New York American Inn of Court and ABA International Law Section

International Humanitarian Law in Contemporary Armed Conflicts - May 14, 2024

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Before:
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Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 octobre 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simic

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

2. Before the Trial Chamber, Appellant had launched a three-pronged attack:

a) illegal foundation of the International Tribunal;
b) wrongful primacy of the International Tribunal over national courts;
c) lack of jurisdiction *ratione materiae*.

The judgement under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

> "THE TRIAL CHAMBER [. . .]HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal
> HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal." (Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, 10 August 1995 (Case No. IT-94-1-T), at 33 (hereinafter *Decision at Trial*).)

Appellant now alleges error of law on the part of the Trial Chamber.

3. As can readily be seen from the operative part of the judgement, the Trial Chamber took a different approach to the first ground of contestation, on which it refused to rule, from the route it followed with respect to the last two grounds, which it dismissed. This distinction ought to be observed and will be referred to below.
From the development of the proceedings, however, it now appears that the question of jurisdiction has acquired, before this Chamber, a two-tier dimension:

> a) the jurisdiction of the Appeals Chamber to hear this appeal;
> b) the jurisdiction of the International Tribunal to hear this case on the merits.

Before anything more is said on the merits, consideration must be given to the preliminary question: whether the Appeals Chamber is endowed with the jurisdiction to hear this appeal at all.

B. Jurisdiction Of The Appeals Chamber

4. Article 25 of the Statute of the International Tribunal (Statute of the International Tribunal (originally published as annex to *the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)* (U.N. Doc. S/25704) and adopted pursuant to Security Council resolution 827 (25 May 1993) (hereinafter *Statute of the International Tribunal*)) adopted by the United Nations Security Council opens up the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal (International Covenant on Civil and Political Rights, 19 December 1966, art. 14, para. 5, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) (hereinafter *ICCPR*)).

As the Prosecutor of the International Tribunal has acknowledged at the hearing of 7 and 8 September 1995, the Statute is general in nature and the Security Council surely expected that it would be supplemented, where advisable, by the rules which the Judges were mandated to adopt, especially for "*Trials and Appeals*" (Art.15). The Judges did indeed adopt such rules: Part Seven of the Rules of Procedure and Evidence (Rules of Procedure and Evidence, 107-08 (adopted on 11 February 1994 pursuant to Article 15 of the Statute of the International Tribunal, as amended (IT/32/Rev. 5))(hereinafter *Rules of Procedure*)).

5. However, Rule 73 had already provided for "*Preliminary Motions by Accused*", including five headings. The first one is: "objections based on lack of jurisdiction." Rule 72 (B) then provides:

> "The Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction." (Rules of Procedure, Rule 72 (B).)

This is easily understandable and the Prosecutor put it clearly in his argument:

> "I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the existence of customary international rules governing internal strife: and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber focuses on these two requirements because before the Trial Chamber the Defence argued that they had not been met in the case at issue. This examination is also appropriate because of the paucity of authoritative judicial pronouncements and legal literature on this matter.

(iii) **Customary Rules of International Humanitarian Law Governing Internal Armed Conflicts**

a. **General**

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled (suffice to think of the Spanish civil war, in 1936-39, of the civil war in the Congo, in 1960-1968, the Biafran conflict in Nigeria, 1967-70, the civil strife in Nicaragua, in 1981-1990 or El Salvador, 1980-1993). Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

98. The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. **Principal Rules**

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

> "The rules of international law as to what constitutes a military objective are undefined and pending the conclusion of the examination of this question [. . .] I am not in a position to make any statement on the subject. The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty's Government's protest was based on information which led them to the conclusion that the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature." (333 House of Commons Debates, col. 1177 (23 March 1938).)

More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:

> "I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed." (337 House of Commons Debates, cols. 937-38 (21 June 1938).)

101. Such views were reaffirmed in a number of contemporaneous resolutions by the Assembly of the League of Nations, and in the declarations and agreements of the warring parties. For example, on 30 September 1938, the Assembly of the League of Nations unanimously adopted a resolution concerning both the Spanish conflict and the Chinese-Japanese war. After stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law", the Assembly expressed the hope that an agreement could be adopted on the matter and went on to state that it

> "[r]ecognize[d] the following principles as a necessary basis for any subsequent regulations:
>
> (1) The intentional bombing of civilian populations is illegal;
> (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
> (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence." (**League of Nations, O.J. Spec. Supp. 183**, at 135-36 (1938).)

102. Subsequent State practice indicates that the Spanish Civil War was not exceptional in bringing about the extension of some general principles of the laws of warfare to internal armed conflict. While the rules that evolved as a result of the Spanish Civil War were intended to protect civilians finding themselves in the theatre of hostilities, rules designed to protect those who do not (or no longer) take part in hostilities emerged after World War II. In 1947, instructions were issued to the Chinese "peoples' liberation army" by Mao Tse-Tung who instructed them not to "kill or humiliate any of Chiang Kai-Shek's army officers and men who lay down their arms." (*Manifesto of the Chinese People's Liberation Army,* in Mao Tse-Tung, 4 Selected Works (1961) 147, at 151.) He also instructed the insurgents, among other things, not to "ill-treat captives", "damage crops" or "take liberties with women." (*On the Reissue of the Three Main Rules of Discipline and the Eight Points for Attention - Instruction of the General Headquarters of the Chinese People's Liberation Army,* in *id*., 155.)

In an important subsequent development, States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The International Court of Justice has confirmed that these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of an internal or international character. (Nicaragua Case, at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.

103. Common Article 3 contains not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts in the former Yugoslavia, parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities. For example, in the 1967 conflict in Yemen, both the Royalists and the President of the Republic agreed to abide by the essential rules of the Geneva Conventions. Such undertakings reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict.

104. Agreements made pursuant to common Article 3 are not the only vehicle through which international humanitarian law has been brought to bear on internal armed conflicts. In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law.

105. As a notable example, we cite the conduct of the Democratic Republic of the Congo in its civil war. In a public statement issued on 21 October 1964, the Prime Minister made the following commitment regarding the conduct of hostilities:

> "For humanitarian reasons, and with a view to reassuring, in so far as necessary, the civilian population which might fear that it is in danger, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives.

> In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [sic]. It also expects the rebels - and makes an urgent appeal to them to that effect - to act in the same manner.
>
> As a practical measure, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Convention [sic] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), *reprinted* in **American Journal of International Law** (1965) 614, at 616.)

This statement indicates acceptance of rules regarding the conduct of internal hostilities, and, in particular, the principle that civilians must not be attacked. Like State practice in the Spanish Civil War, the Congolese Prime Minister's statement confirms the status of this rule as part of the customary law of internal armed conflicts. Indeed, this statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelled out the notion that the Congolese Government would fully comply with them.

106. A further confirmation can be found in the "Operational Code of Conduct for Nigerian Armed Forces", issued in July 1967 by the Head of the Federal Military Government, Major General Y. Gowon, to regulate the conduct of military operations of the Federal Army against the rebels. In this "Operational Code of Conduct", it was stated that, to repress the rebellion in Biafra, the Federal troops were duty-bound to respect the rules of the Geneva Conventions and in addition were to abide by a set of rules protecting civilians and civilian objects in the theatre of military operations. (See A.H.M. Kirk-Greene, **1 Crisis and Conflict in Nigeria, A Documentary Sourcebook 1966-1969**, 455-57 (1971).) This "Operational Code of Conduct" shows that in a large-scale and protracted civil war the central authorities, while refusing to grant recognition of belligerency, deemed it necessary to apply not only the provisions of the Geneva Conventions designed to protect civilians in the hands of the enemy and captured combatants, but also general rules on the conduct of hostilities that are normally applicable in international conflicts. It should be noted that the code was actually applied by the Nigerian authorities. Thus, for instance, it is reported that on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba, (see New Nigerian, 28 June 1968, at 1). In addition, reportedly on 3 September 1968, a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba. (See Daily Times - Nigeria, 3 September 1968, at 1; Daily Times, - Nigeria, 4 September 1968, at 1.)

This attitude of the Nigerian authorities confirms the trend initiated with the Spanish Civil War and referred to above (see paras. 101-102), whereby the central authorities of a State where civil strife has broken out prefer to withhold recognition of belligerency but, at the same time, extend to the conflict the bulk of the body of legal rules concerning conflicts between States.

107. A more recent instance of this tendency can be found in the stand taken in 1988 by the rebels (the FMLN) in El Salvador, when it became clear that the Government was not ready to apply the Additional Protocol II it had previously ratified. The FMLN undertook to respect both common Article 3 and Protocol II:

> "The FMLN shall ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II, take into consideration the needs of the majority of the population, and defend their fundamental freedoms." (FMLN, *La legitimidad de nuestros metodos de lucha,* Secretaria de promocion y proteccion de lo Derechos Humanos del FMLN, El Salvador, 10 Octobre 1988, at 89; unofficial translation.)3

108. In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the formation of the customary rules at issue. The Appeals Chamber will mention in particular the action of the ICRC, two resolutions adopted by the United Nations General Assembly, some declarations made by member States of the European Community (now European Union), as well as Additional Protocol II of 1977 and some military manuals.

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously4 adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts," the General Assembly "affirm[ed]"

> "the following principles for observance by all governmental and other authorities responsible for action in armed conflict: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." (G.A. Res. 2444, U.N. GAOR., 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).)

It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law" (U.N. GAOR, 3rd Comm., 23rd Sess., 1634th Mtg., at 2, U.N. Doc. A/C.3/SR.1634 (1968)). This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was "declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law." (See 67 **American Journal of International Law** (1973), at 122, 124.)

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously5 adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); *see also* U.N. GAOR, 25th Sess., 1922nd Mtg., at 3, U.N. Doc. A/PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of resolution 2675).)The resolution stated the following:

> "Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:
>
> 1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.
>
> 2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.
>
> 3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian

populations.

4. Civilian populations as such should not be the object of military operations.

5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.

6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.

7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.

8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application." (G.A. Res. 2675, U.N. GAOR., 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970).)

112. Together, these resolutions played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.

113. That international humanitarian law includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts has also been stated on a number of occasions by groups of States. For instance, with regard to Liberia, the (then) twelve Member States of the European Community, in a declaration of 2 August 1990, stated:

"In particular, the Community and its Member States call upon the parties in the conflict, in conformity with international law and the most basic humanitarian principles, to safeguard from violence the embassies and places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter." (6 European Political Cooperation Documentation Bulletin, at 295 (1990).)

114. A similar, albeit more general, appeal was made by the Security Council in its resolution 788 (in operative paragraph 5 it called upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law") (S.C. Res. 788 (19 November 1992)), an appeal reiterated in resolution 972 (S.C. Res. 972 (13 January 1995)) and in resolution 1001 (S.C. Res. 1001 (30 June 1995)).

Appeals to the parties to a civil war to respect the principles of international humanitarian law were also made by the Security Council in the case of Somalia and Georgia. As for Somalia, mention can be made of resolution 794 in which the Security Council in particular condemned, as a breach of international humanitarian law, "the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population") (S.C. Res. 794 (3 December 1992)) and resolution 814 (S.C. Res. 814 (26 March 1993)). As for Georgia, see Resolution 993, (in which the Security Council reaffirmed "the need for the parties to comply with international humanitarian law") (S.C. Res. 993 (12 May 1993)).

115. Similarly, the now fifteen Member States of the European Union recently insisted on respect for international humanitarian law in the civil war in Chechnya. On 17 January 1995 the Presidency of the European Union issued a declaration stating:

"The European Union is following the continuing fighting in Chechnya with the greatest concern. The promised cease-fires are not having any effect on the ground. Serious violations of human rights and

international humanitarian law are continuing. The European Union strongly deplores the large number of victims and the suffering being inflicted on the civilian population." (Council of the European Union - General Secretariat, Press Release 4215/95 (Presse II-G), at 1 (17 January 1995).)

The appeal was reiterated on 23 January 1995, when the European Union made the following declaration:

> "It deplores the serious violations of human rights and international humanitarian law which are still occurring [in Chechnya]. It calls for an immediate cessation of the fighting and for the opening of negotiations to allow a political solution to the conflict to be found. It demands that freedom of access to Chechnya and the proper convoying of humanitarian aid to the population be guaranteed." (Council of the European Union-General Secretariat, Press Release 4385/95 (Presse 24), at 1 (23 January 1995).)

116. It must be stressed that, in the statements and resolutions referred to above, the European Union and the United Nations Security Council did not mention common Article 3 of the Geneva Conventions, but adverted to "international humanitarian law", thus clearly articulating the view that there exists a **corpus** of general principles and norms on internal armed conflict embracing common Article 3 but having a much greater scope.

117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.

This proposition is confirmed by the views expressed by a number of States. Thus, for example, mention can be made of the stand taken in 1987 by El Salvador (a State party to Protocol II). After having been repeatedly invited by the General Assembly to comply with humanitarian law in the civil war raging on its territory (*see*, e.g., G.A. Res. 41/157 (1986)), the Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war (although an objective evaluation prompted some Governments to conclude that all the conditions for such applications were met, (see, e.g., 43 **Annuaire Suisse de Droit International**, (1987) at 185-87). Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol, for it considered that such provisions "developed and supplemented" common Article 3, "which in turn constitute[d] the minimum protection due to every human being at any time and place"(6) (*See Informe de la Fuerza Armata de El Salvador sobre el respeto y la vigencia de las normas del Derecho Internacional Humanitario durante el periodo de Septiembre de 1986 a Agosto de 1987*, at 3 (31 August 1987) (forwarded by Ministry of Defence and Security of El Salvador to Special Representative of the United Nations Human Rights Commission (2 October 1987),; (unofficial translation). Similarly, in 1987, Mr. M.J. Matheson, speaking in his capacity as Deputy Legal Adviser of the United States State Department, stated that:

> "[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (Humanitarian Law Conference, Remarks of Michael J. Matheson, (2) **American University Journal of International Law and Policy** (1987) 419, at 430-31).

118. That at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts is also borne out by national military manuals. Thus, for instance, the German Military Manual of 1992 provides that:

> Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." (Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch, August 1992, DSK AV207320065, at para. 211 in fine; unofficial translation.)(7)

119. So far we have pointed to the formation of general rules or principles designed to protect **civilians or civilian objects** from the hostilities or, more generally, to protect **those who do not (or no longer) take active part in hostilities**. We shall now briefly show how the gradual extension to internal armed conflict of rules and

principles concerning international wars has also occurred as regards **means and methods of warfare**. As the Appeals Chamber has pointed out above (see para. 110), a general principle has evolved limiting the right of the parties to conflicts "to adopt means of injuring the enemy." The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby "[w]eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances." (*Declaration of Minimum Humanitarian Standards, reprinted in, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session,* Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).) It should be noted that this Declaration, emanating from a group of distinguished experts in human rights and humanitarian law, has been indirectly endorsed by the Conference on Security and Cooperation in Europe in its Budapest Document of 1994 (Conference on Security and Cooperation in Europe, Budapest Document 1994: Towards Genuine Partnership in a New Era, para. 34 (1994)) and in 1995 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (*Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session*, Commission on Human Rights, 51st Sess., Agenda Item 19, at 1, U.N. Doc. E/CN.4/1995/L.33 (1995)).

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

120. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts. By way of illustration, we will mention chemical weapons. Recently a number of States have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law. On 7 September 1988 the [then] twelve Member States of the European Community made a declaration whereby:

> "The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of these weapons. They call for respect of international humanitarian law, including the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war]." (4 European Political Cooperation Documentation Bulletin, (1988) at 92.)

This statement was reiterated by the Greek representative, on behalf of the Twelve, on many occasions. (See U.N. GAOR, 1st Comm., 43rd Sess., 4th Mtg., at 47, U.N. Doc. A/C.1/43/PV.4 (1988)(statement of 18 October 1988 in the First Committee of the General Assembly); U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtg., at 23, U.N. Doc. A/C.1/43/PV.31 (statement of 9 November 1988 in meeting of First Committee of the General Assembly to the effect inter alia that "The Twelve [. . .] call for respect for the Geneva Protocol of 1925 and other relevant rules of customary international law"); U.N. GAOR, 1st Comm., 43rd Sess., 49th Mtg., at 16, U.N. Doc. A/C.3/43/SR.49 (summary of statement of 22 November 1988 in Third Committee of the General Assembly); *see also Report on European Union [EPC Aspects*], 4 European Political Cooperation Documentation Bulletin (1988), 325, at 330; *Question No 362/88 by Mr. Arbeloa Muru (S-E) Concerning the Poisoning of Opposition Members in Iraq*, 4 European Political Cooperation Documentation Bulletin (1988), 187 (statement of the Presidency in response to a question of a member of the European Parliament).)

121. A firm position to the same effect was taken by the British authorities: in 1988 the Foreign Office stated that the Iraqi use of chemical weapons against the civilian population of the town of Halabja represented "a serious and grave violation of the 1925 Geneva Protocol and international humanitarian law. The U.K. condemns unreservedly this and all other uses of chemical weapons." (59 **British Yearbook of International Law** (1988) at 579; *see also* id. at 579-80.) A similar stand was taken by the German authorities. On 27 October 1988 the German Parliament passed a resolution whereby it "resolutely rejected the view that the use of poison gas was allowed on one's own territory and in clashes akin to civil wars, assertedly because it was not expressly prohibited by the Geneva Protocol of 1925"(8) . (50 **Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht** (1990), at 382-83; unofficial translation.) Subsequently the German representative in the General

Assembly expressed Germany's alarm "about reports of the use of chemical weapons against the Kurdish population" and referred to "breaches of the Geneva Protocol of 1925 and other norms of international law." (U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtng., at 16, U.N. Doc. A/C.1/43/PV.31 (1988).)

122. A clear position on the matter was also taken by the United States Government. In a "press guidance" statement issued by the State Department on 9 September 1988 it was stated that:

> Questions have been raised as to whether the prohibition in the 1925 Geneva Protocol against [chemical weapon] use 'in war' applies to [chemical weapon] use in internal conflicts. However, it is clear that such use against the civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements." (United States, Department of State, Press Guidance (9 September 1988).)

On 13 September 1988, Secretary of State George Schultz, in a hearing before the United States Senate Judiciary Committee strongly condemned as "completely unacceptable" the use of chemical weapons by Iraq. (*Hearing on Refugee Consultation with Witness Secretary of State George Shultz*, 100th Cong., 2d Sess., (13 September 1988) (Statement of Secretary of State Shultz).) On 13 October of the same year, Ambassador R.W. Murphy, Assistant Secretary for Near Eastern and South Asian Affairs, before the Sub-Committee on Europe and the Middle East of the House of Representatives Foreign Affairs Committee did the same, branding that use as "illegal." (See **Department of State Bulletin** (December 1988) 41, at 43-4.)

123. It is interesting to note that, reportedly, the Iraqi Government "flatly denied the poison gas charges." (New York Times, 16 September 1988, at A 11.) Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. In the aforementioned statement, Ambassador Murphy said:

> "On September 17, Iraq reaffirmed its adherence to international law, including the 1925 Geneva Protocol on chemical weapons as well as other international humanitarian law. We welcomed this statement as a positive step and asked for confirmation that Iraq means by this to renounce the use of chemical weapons inside Iraq as well as against foreign enemies. On October 3, the Iraqi Foreign Minister confirmed this directly to Secretary Schultz." (*Id*. at 44.)

This information had already been provided on 20 September 1988 in a press conference by the State Department spokesman Mr Redman. (See State Department Daily Briefing, 20 September 1988, Transcript ID: 390807, p. 8.) It should also be stressed that a number of countries (Turkey, Saudi Arabia, Egypt, Jordan, Bahrain, Kuwait) as well as the Arab League in a meeting of Foreign Ministers at Tunis on 12 September 1988, strongly disagreed with United States' assertions that Iraq had used chemical weapons against its Kurdish nationals. However, this disagreement did not turn on the legality of the use of chemical weapons; rather, those countries accused the United States of "conducting a smear media campaign against Iraq." (See New York Times, 15 September 1988, at A 13; Washington Post, 20 September 1988, at A 21.)

124. It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals - a matter on which this Chamber obviously cannot and does not express any opinion - there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.

125. State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations. (*See* Pius Nwaoga v. The State, 52 **International Law Reports**, 494, at 496-97 (Nig. S. Ct. 1972).)

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply

to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. (On these and other limitations of international humanitarian law governing civil strife, see the important message of the Swiss Federal Council to the Swiss Chambers on the ratification of the two 1977 Additional Protocols (38 **Annuaire Suisse de Droit International** (1982) 137 at 145-49.))

127. Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

(iv) **Individual Criminal Responsibility In Internal Armed Conflict**

128. Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such prohibitions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction. It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. (See The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, at 445, 467 (1950).) The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals (id., at 445-47, 467). Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

> [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (*id*., at 447.)

129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts. As mentioned above, during the Nigerian Civil War, both members of the Federal Army and rebels were brought before Nigerian courts and tried for violations of principles of international humanitarian law (see paras. 106 and 125).

131. Breaches of common Article 3 are clearly, and beyond any doubt, regarded as punishable by the Military Manual of Germany (**Humanitäres Völkerrecht in bewaffneten Konflikten** - Handbuch, August 1992, DSK AV2073200065, at para. 1209)(unofficial translation), which includes among the "grave breaches of international humanitarian law", "criminal offences" against persons protected by common Article 3, such as "wilful killing, mutilation, torture or inhumane treatment including biological experiments, wilfully causing great suffering, serious injury to body or health, taking of hostages", as well as "the fact of impeding a fair and regular trial"(9) . (Interestingly, a previous edition of the German Military Manual did not contain any such provision. See Kriegsvölkerrecht - Allgemeine Bestimmungen des Kriegführungsrechts und Landkriegsrecht, ZDv 15-10, March 1961, para. 12; Kriegsvölkerrecht - Allgemeine Bestimmungen des Humanitätsrechts, ZDv

15/5, August 1959, paras. 15-16, 30-2). Furthermore, the "Interim Law of Armed Conflict Manual" of New Zealand, of 1992, provides that "while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for 'war crimes', trials would be held under national criminal law, since no 'war' would be in existence" (New Zealand Defence Force Directorate of Legal Services, DM (1992) at 112, Interim Law of Armed Conflict Manual, para. 1807, 8). The relevant provisions of the manual of the United States (Department of the Army, The Law of Land Warfare, Department of the Army Field Manual, FM 27-10, (1956), at paras. 11 & 499) may also lend themselves to the interpretation that "war crimes", **i.e.,** "every violation of the law of war", include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 (War Office, The Law of War on Land, Being Part III of the Manual of Military Law (1958), at para. 626).

132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. (Socialist Federal Republic of Yugoslavia, Federal Criminal Code, arts. 142-43 (1990).) (It should be noted that by a decree having force of law, of 11 April 1992, the Republic of Bosnia and Herzegovina has adopted that Criminal Code, subject to some amendments.) (2 Official Gazette of the Republic of Bosnia and Herzegovina 98 (11 April 1992)(translation).) Furthermore, on 26 December 1978 a law was passed by the Yugoslav Parliament to implement the two Additional Protocols of 1977 (Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, Medunarodni Ugovori, at 1083 (26 December 1978).) as a result, by virtue of Article 210 of the Yugoslav Constitution, those two Protocols are "directly applicable" by the courts of Yugoslavia. (Constitution of the Socialist Federal Republic of Yugoslavia, art. 210.) Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (***infractions graves***) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" (***[c]onstituent des crimes de droit international***) within the jurisdiction of Belgian criminal courts (Article 7). (*Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions*, Moniteur Belge, (5 August 1993).)

133. Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them. (See S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).)

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity. As pointed out above (*see* para. 132) such violations were punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of

11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.

136. It is also fitting to point out that the parties to certain of the agreements concerning the conflict in Bosnia-Herzegovina, made under the auspices of the ICRC, clearly undertook to punish those responsible for violations of international humanitarian law. Thus, Article 5, paragraph 2, of the aforementioned Agreement of 22 May 1992 provides that:

> "Each party undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence **and to punish those responsible in accordance with the law in force.**"
> (Agreement No. 1, art. 5, para. 2 (Emphasis added).)

Furthermore, the Agreement of 1st October 1992 provides in Article 3, paragraph 1, that

> "All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention, as well as in Article 85 of Additional Protocol I, will be unilaterally and unconditionally released." (Agreement No. 2, 1 October 1992, art. 3, para. 1.)

This provision, which is supplemented by Article 4, paragraphs 1 and 2 of the Agreement, implies that all those responsible for offences contrary to the Geneva provisions referred to in that Article must be brought to trial. As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict.

(v) **Conclusion**

137. In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied.

(c) Article 5

138. Article 5 of the Statute confers jurisdiction over crimes against humanity. More specifically, the Article provides:

> "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
>
> (b) extermination;
>
> (c) enslavement;
>
> (d) deportation;
>
> (e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts."

As noted by the Secretary-General in his Report on the Statute, crimes against humanity were first recognized in the trials of war criminals following World War II. (Report of the Secretary-General, at para. 47.) The offence was defined in Article 6, paragraph 2(c) of the Nuremberg Charter and subsequently affirmed in the 1948 General Assembly Resolution affirming the Nuremberg principles.

139. Before the Trial Chamber, Counsel for Defence emphasized that both of these formulations of the crime limited it to those acts committed "in the execution of or in connection with any crime against peace or any war crime." He argued that this limitation persists in contemporary international law and constitutes a requirement that crimes against humanity be committed in the context of an international armed conflict (which assertedly was missing in the instant case). According to Counsel for Defence, jurisdiction under Article 5 over crimes against humanity "committed in armed conflict, whether international or internal in character" constitutes an ex post facto law violating the principle of *nullum crimen sine lege*. Although before the Appeals Chamber the Appellant has forgone this argument (*see* Appeal Transcript, 8 September 1995, at 45), in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5.

140. As the Prosecutor observed before the Trial Chamber, the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was carried over to the 1948 General Assembly resolution affirming the Nuremberg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II(1)(c) of Control Council Law No. 10 of 20 December 1945. (Control Council Law No. 10, Control Council for Germany, Official Gazette, 31 January 1946, at p. 50.). The obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict. (Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. 1, 78 U.N.T.S. 277, Article 1 (providing that genocide, "whether committed in time of peace or in time of war, is a crime under international law"); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243, arts. 1-2Article . I(1)).

141. It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege*.

142. We conclude, therefore, that Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts. In addition, for the reasons stated above, in Section IV A, (paras. 66-70), we conclude that in this case there was an armed conflict. Therefore, the Appellant's challenge to the jurisdiction of the International Tribunal under Article 5 must be dismissed.

C. May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?

143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting., at 11, 15, 19, U.N. Doc. S/PV.3217 (25 May 1993).).

144. We conclude that, in general, such agreements fall within our jurisdiction under Article 3 of the Statute. As the defendant in this case has not been charged with any violations of any specific agreement, we find it unnecessary to determine whether any specific agreement gives the International Tribunal jurisdiction over the alleged crimes.

145. For the reasons stated above, the third ground of appeal, based on lack of subject-matter jurisdiction, must be dismissed.

V. DISPOSITION

146. For the reasons hereinabove expressed
and
Acting under Article 25 of the Statute and Rules 72, 116 bis and 117 of the Rules of Procedure and Evidence,

The Appeals Chamber

(1) By 4 votes to 1,

Decides that the International Tribunal is empowered to pronounce upon the plea challenging the legality of the establishment of the International Tribunal.

IN FAVOUR: *President* Cassese, *Judges* Deschênes, Abi-Saab and Sidhwa

AGAINST: *Judge* Li

(2) Unanimously

Decides that the aforementioned plea is dismissed.

(3) Unanimously

Decides that the challenge to the primacy of the International Tribunal over national courts is dismissed.

(4) By 4 votes to 1

Decides that the International Tribunal has subject-matter jurisdiction over the current case.

IN FAVOUR: *President* Cassese, *Judges* Li, Deschênes, Abi-Saab

AGAINST: *Judge* Sidhwa

1. The Public Committee against Torture in Israel
2. Palestinian Society for the Protection of Human Rights and the Environment

v.

1. The Government of Israel
2. The Prime Minister of Israel
3. The Minister of Defense
4. The Israel Defense Forces
5. The Chief of the General Staff of the Israel Defense Forces
6. Shurat HaDin – Israel Law Center and 24 others

The Supreme Court Sitting as the High Court of Justice
[December 11 2005]
Before President (Emeritus) A. Barak, President D. Beinisch, and Vice President E. Rivlin

Petition for an *Order Nisi* and an *Interlocutory Order*
For Petitioners: Avigdor Feldman, Michael Sfarad
For Respondents no. 1-5: Shai Nitzan
For Respondents no. 6: Nitsana Darshan-Leitner, Sharon Lubrani

JUDGMENT

President (Emeritus) A. Barak:

The Government of Israel employs a policy of preventative strikes which cause the death of terrorists in Judea, Samaria, or the Gaza Strip. It fatally strikes these terrorists, who plan, launch, or commit terrorist attacks in Israel and in the area of Judea, Samaria, and the Gaza Strip, against both civilians and soldiers. These strikes at times also harm innocent civilians. Does the State thus act illegally? That is the question posed before us.

1. Factual Background

In February 2000, the second *intifada* began. A massive assault of terrorism was directed against the State of Israel, and against Israelis, merely because they are Israelis. This assault of terrorism differentiates neither between combatants and civilians, nor between women, men, and children. The terrorist attacks take place both in the territory of Judea, Samaria, and the Gaza Strip, and within the borders of the State of Israel. They are directed against civilian centers, shopping centers and markets, coffee houses and restaurants. Over the last five years, thousands of acts of terrorism have been committed against Israel. In the attacks, more than one thousand Israeli citizens have been killed. Thousands of Israeli citizens have been wounded. Thousands of Palestinians have been killed and wounded during this period as well.

2. In its war against terrorism, the State of Israel employs various means. As part of the security activity intended to confront the terrorist attacks, the State employs what it calls "the policy of targeted frustration" of terrorism. Under this policy, the security forces act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel. During the second *intifada*, such preventative strikes have been performed across Judea, Samaria, and the Gaza Strip. According to the data relayed by petitioners, since the commencement of these acts, and up until the end of 2005, close to three hundred members of terrorist organizations have been killed by them. More than thirty targeted killing attempts have failed. Approximately one hundred and fifty civilians who were proximate to the location of the targeted persons have been killed during those acts. Hundreds of others have been wounded. The policy of targeted killings is the focus of this petition.

2. The Petitioners' Arguments

3. Petitioners' position is that the targeted killings policy is totally illegal, and contradictory to international law, Israeli law, and basic principles of human morality. It violates the human rights recognized in Israeli and international law, both the rights of those targeted, and the rights of innocent passersby caught in the targeted killing zone.

4. Petitioners' position is that the legal system applicable to the armed conflict between Israel and the terrorist organizations is not the laws of war, rather the legal system dealing with law enforcement in occupied territory. Changes were made in petitioners' stance during the hearing of the petition, some as a result of changes in respondents' position. At first it was claimed that the laws of war deal primarily with international conflicts, whereas the armed conflict between Israel and the Palestinians does not fit the definition of an international conflict. Thus, the laws which apply to this conflict are not the laws of war, rather the laws of policing and law enforcement. In the summary of their arguments (of September 9 2004), petitioners conceded that the conflict under discussion is an international conflict, however they claim that within its framework, military acts to which the laws of war apply are not allowed. That is since Israel's right to self defensive military action, pursuant to article 51 of the Charter of the United Nations of 1945, does not apply to the conflict under discussion. The right to self defense is granted to a state in response to an armed attack by another state. The territories of the area of Judea, Samaria, and Gaza are under belligerent occupation by the State of Israel, and thus article 51 does not apply to the issue. Since the State cannot claim self defense against its own population, nor can it claim self defense against persons under the occupation of its army. Against a civilian population under occupation there is no right to self defense; there is only the right to enforce the law in accordance with the laws of belligerent occupation. In any case, the laws applicable to the issue at hand are the laws of policing and law enforcement within the framework of the law of belligerent occupation, and not the laws of war. Within that framework, suspects are not to be killed without due process, or without arrest or trial. The targeted killings violate the basic right to life, and no defense or justification is to be found for that violation. The prohibition of arbitrary killing which is not necessary for self defense is entrenched in the customary norms of international law. Such a prohibition stems also from the duties of the force controlling occupied territory toward the members of the occupied population, who are protected persons according to IV Geneva Convention Relative to the Protection

supplementary briefs on behalf of the parties. According to the decision of *Beinisch P.* (of November 22 2006), *Rivlin V.P.* replaced *Cheshin V.P.*, who had retired.

15. After the petition was submitted, two additional motions for enjoinder were submitted. First (on July 22 2003), petitioners' counsel submitted a motion, on behalf of the National Lawyers Guild and the International Association of Democratic Lawyers, for enjoinder to the petition and to submit briefs as *amici curie*. Respondents opposed the motion. Later (on February 23 2004) a motion was submitted by "Shurat ha-Din – Israel Law Center" and 24 additional applicants, for enjoinders as respondents to the petition. Petitioners opposed the motion. We decide to allow both motions and to enjoinder the applicants as parties to the petition. The arguments of *amici curie* support most of petitioners' arguments. They further argue that the killing of religious and political leaders contradicts international law and is illegitimate, both in times of war and in times of peace. In addition, the policy of targeted killing is not to be implemented against those involved in terrorist activity except in cases in which there is immediate danger to human life, and even then it is to be implemented only if there is no other means that can be used to remove the danger. The arguments on behalf of "Shurat haDin" support most of respondents' arguments. It further claims that targeted killings are permissible, and even required, pursuant to the Jewish law principle of "if one rises to kill you, rise and kill him first" (BABYLONIAN TALMUD, SANHEDRIN 8, 72a), and pursuant to the Jewish law rule regarding "he who pursues his fellow man to kill him…" (MAIMONIDES, MISHNE TORAH, NEZIKIM, *Halachot Rotzeach v'Shmirat Nefesh*, chapter 1, halacha 6).

5. The General Normative Framework

A. International Armed Conflict

16. The general, principled starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip (hereinafter "the area") a continuous situation of armed conflict has existed since the first *intifada*. The Supreme Court has discussed the existence of that conflict in a series of judgments (*see* HCJ 9255/00 *El Saka v. The State of Israel* (unpublished); HCJ 2461/01 *Kna'an v. The Commander of IDF Forces in the Judea and Samaria Area* (unpublished); HCJ 9293/01 *Barake v. The Minister of Defense*, 56(2) PD 509; HCJ 3114/02 *Barake v. The Minister of Defense*, 56(3) PD 11; HCJ 3451/02 *Almandi v. The Minster of Defense*, 56(3) PD 30 (hereinafter *"Almandi"*); HCJ 8172/02 *Ibrahim v. The Commander of IDF Forces in the West Bank* (unpublished); HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel* (unpublished, hereinafter – *Mara'abe*). In one case I wrote:

> "Since late September 2000, severe combat has been taking place in the areas of Judea and Samaria. It is not police activity. It is an armed conflict" (HCJ 7015/02 *Ajuri v. The Military Commander of the Judea and Samaria Area*, 56(6) PD 352, 358; hereinafter *"Ajuri"*).

This approach is in line with the definition of armed conflict in the international literature (*see* O. BEN-NAFTALI & Y. SHANI, INTERNATIONAL LAW BETWEEN WAR AND PEACE, 142 (2006) [HAMISHPAT HABEINLEUMI BEIN MILCHAMA

LE'SHALOM], hereinafter "BEN-NAFTALI & SHANI"; Y. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 201 (4th ed. 2005); H. DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 219 (2005), hereinafter DUFFY). It accurately reflects what is taking place, to this very day, in the *area*. Thus the situation was described in the supplement to the summary on behalf of the State Attorney (on January 26 2004):

> "For more than three years now, the State of Israel is under a constant, continual, and murderous wave of terrorist attacks, directed at Israelis – because they are Israelis – without any discrimination between combatants and civilians or between men, women, and children. In the framework of the current campaign of terrorism, more than 900 Israelis have been killed, and thousands of other Israelis have been wounded to date, since late September 2000. In addition, thousands of Palestinians have been killed and wounded during that period. For the sake of comparison we note that the number of Israeli casualties in proportion to the population of the State of Israel, is a number of times greater than the percentage of casualties in the US in the events of September 11 in proportion to the US population. As is well known, and as we have already noted, the events of 9/11 were defined by the states of the world and by international organizations, with no hesitation whatsoever, as an 'armed conflict' justifying the use of counterforce.
>
> The terrorist attacks take place both within the territories of Judea, Samaria, and the Gaza Strip (hereinafter 'the territories') and in the State of Israel proper. They are directed against civilians, in civilian population concentrations, in shopping centers and in markets, and against IDF soldiers, in bases and compounds of the security forces. In these terrorist attacks, the terrorist organizations use military means *par excellence*, whereas the common denominator of them all is their lethalness and cruelty. Among those means are shooting attacks, suicide bombings, mortar fire, rocket fire, car bombs, *et cetera*" (p. 30).

17. This armed conflict does not take place in a normative void. It is subject to the normative systems regarding the permissible and the prohibited. I discussed that in one case, stating:

> "'Israel is not an isolated island. It is a member of an international system'…. The combat activities of the IDF are not conducted in a legal void. There are legal norms – some from customary international law, some from international law entrenched in conventions to which Israel is party, and some in the fundamental principles of Israeli law – which determine rules about how combat activities should be conducted" (HCJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza,* 58(5) PD 385, 391, hereinafter *Physicians for Human Rights*).

What is the normative system that applies in the case of an armed conflict between Israel and the terrorist organizations acting in the *area*?

18. The normative system which applies to the armed conflict between Israel and the terrorist organizations in the *area* is complex. In its center stands the international law regarding international armed conflict. Professor Cassese discussed the international character of an armed conflict between the occupying state in an area subject to belligerent occupation and the terrorists who come from the same area, including the armed conflict between Israel and the terrorist organizations in the *area*, stating:

> "An armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict" (A. CASSESE, INTERNATIONAL LAW 420 (2nd ed. 2005), hereinafter CASSESE).

This law includes the laws of belligerent occupation. However, it is not restricted only to them. This law applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation. This law constitutes a part of *iue in bello*. From the humanitarian perspective, it is part of international humanitarian law. That humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law (*see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226, 240, hereinafter *The Legality of Nuclear Weapons*; Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136, hereinafter *The Fence*; Bankovic v. Belgium, 41 ILM 517 (ECHR, 12 December 2001); *see also* Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239 (2000)). Alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier "carries in his pack" and which go along with him wherever he may turn, may apply (see HCJ 393/82 *Jami'at Ascan el-Malmun el-Mahdudeh el-Masauliyeh, Communal Society Registered at the Judea and Samaria Area Headquarters v. The Commander of IDF Forces in the Judea and Samaria Area ,* 37(4) P.D. 785, 810, hereinafter *Jami'at Ascan*; *Ajuri*, at p. 365; *Mara'abe*, at paragraph 14 of the judgment).

19. Substantial parts of international law dealing with armed conflicts are of customary character. That customary law is part of Israeli law, "by force of the State of Israel's existence as a sovereign and independent state" (*S.Z. Cheshin, J.*, CrimApp 174/54 *Shtempfeffer v. The Attorney General*, 10 PD 5, 15; *see also* CrimApp 336/61 *Eichmann v. The Attorney General*, 17 PD 2033; CApp 7092/94 *Her Majesty the Queen in Right of Canada v. Edelson*, 51(1) PD 625, 639 *and the caselaw referred to within, and* Ruth Lapidoth, *The Status of Public International Law in Israeli Law*, 19 MISHPATIM 809 (5750) [*Mikumo shel haMishpat haBeinleumi haPombi beMishpat haYisraeli*]; R. SABLE, INTERNATIONAL LAW 29 (2003) [MISHPAT BEINLEUMI]). *Shamgar P.* expressed that well, stating:

> "According to the consistent caselaw of this Court, customary international law is a part of the law of the country, subject to Israeli

statute determining a contrary provision" (HCJ 785/87 *Afu v. The Commander of IDF Forces in the West Bank*, 42(2) PD 4, 35).

The international law entrenched in international conventions which is not part of customary international law (whether Israel is party to them or not), is not enacted in domestic law of the State of Israel (*see* HCJ 69/81 *Abu A'ita v. The Commander of the Judea and Samaria Area*, 37(2) PD 197, 234, *and* Zilbershatz, *Integration of International Law into Israeli Law – The Current Law is the Desirable Law*, 24 MISHPATIM 317 (5754) [*Klitat haMishpat haBeinleumi leMishpat haYisraeli – haDin haMatzui, Ratzui*]). In the petition before us, there is no question regarding contradictory Israeli law. Public Israeli law recognizes the Israel Defense Forces as "The People's Army" (article 1 of Basic Law: the Army). The army is authorized "to do all acts necessary and legal, in order to defend the State and in order to attain its security-national goals" (article 18 of the Administration of Rule and Justice Ordinance, 5708-1948). Basic Law: the Government recognizes the legality of "any military acts needed in order to defend the State and public security (article 40(b)). These acts also include, of course, armed conflict against terrorist organizations outside of the boundaries of the State. Also to be noted is the exception to criminal liability determined in article 34m(1) of The Penal Code, 5737-1977, according to which a person shall not be criminally liable for an act which he "has a duty, or is authorized, by law, to do." When soldiers of the Israel Defense Forces act pursuant to the laws of armed conflict, they are acting "by law", and they have a good justification defense. However, if they act contrary to the laws of armed conflict they may be, *inter alia*, criminally liable for their actions. Indeed, the "geometric location" of our issue is in customary international law dealing with armed conflict. It is from that law that additional law which may be relevant will be derived according to our domestic law. International treaty law which has no customary force is not part of our internal law.

20. International law dealing with the armed conflict between Israel and the terrorist organizations is entrenched in a number of sources (*see* DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (2004), hereinafter DINSTEIN). The primary sources are as follows: the fourth Hague convention (Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907), hereinafter *The Hague Convention*). The provisions of that convention, to which Israel is not a party, are of customary international law status (*see Jami'at Ascan*, at p. 793; HCJ 2056/04 *The Beit Sourik Village Council v. The Government of Israel*, 58(5) PD 817, 827, hereinafter *Beit Sourik*; *Ajuri*, at p. 364). Alongside it stands *The Fourth Geneva Convention* (IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)). Israel is party to that convention. It has not been enacted through domestic Israeli legislation. However, its customary provisions constitute part of the law of the State of Israel (*see* the judgment of *Cohen, J.* in HCJ 698/80 *Kawasme v. The Minister of Defense*, 35(1) PD 617, 638, hereinafter *Kawasme*). As is well known, the position of the Government of Israel is that, in principle, the laws of belligerent occupation in *The Fourth Geneva Convention* do not apply regarding the *area*. However, Israel honors the humanitarian provisions of that convention (*see Kawasme*; *Jami'at Ascan*, at p. 194; *Ajuri*, at p. 364; HCJ 3278/02 *Hamoked: Center for Defense of the Individual founded by Dr. Lotte Salzberger v. The Commander of IDF Forces in the West Bank Area*, 57(1) PD 385, 396, hereinafter *Hamoked: Center for Defense of the Individual*; *Beit Sourik*, at

p. 827; *Mara'abe*, at paragraph 14 of the judgment). That is sufficient for the purposes of the petition before us. In addition, the laws of armed conflict are entrenched in 1977 Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, hereinafter *The First Protocol*). Israel is not party to that protocol, and it was not enacted in domestic Israeli legislation. Of course, the customary provisions of *The First Protocol* are part of Israeli law.

21. Our starting point is that the law that applies to the armed conflict between Israel and the terrorist organizations in the *area* is the international law dealing with armed conflicts. So this Court has viewed the character of the conflict in the past, and so we continue to view it in the petition before us. According to that view, the fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict (*see* CASSESE, at p. 420). Indeed, in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character. A number of other possibilities have been raised in the legal literature (*see* DUFFY, at p. 218; EMANUEL GROSS, DEMOCRACY'S STRUGGLE AGAINST TERRORISM; LEGAL AND MORAL ASPECTS 585 (2004) [MA'AVAKA SHEL DEMOCRATIA BETEROR: HEIBETIM MISHPATI'IM VE'MUSARI'IM] hereinafter GROSS; Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': a Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INTERNATIONAL LAW JOURNAL 233 (2003), hereinafter "Ben-Naftali & Michaeli"; Derek Jinks, *September 11 and the Law of War* 28 YALE JOURNAL OF INTERNATIONAL LAW 1 (2003), hereinafter "Jinks"). According to the approach of Professor Kretzmer, that armed conflict should be categorized as a conflict which is not of purely internal national character, but also not of international character, rather is of a mixed character, to which both international human rights law and international humanitarian law apply (*see* David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171 (2000), hereinafter "Kretzmer"); Respondents' counsel presented those possibilities to us, and pointed out their problems, without taking any stance on the issue. As stated, for years the starting point of the Supreme Court – and also of the State's counsel before the Supreme Court – is that the armed conflict is of an international character. In this judgment we continue to rule on the basis of that view. It should be noted that even those who are of the opinion that the armed conflict between Israel and the terrorist organizations is not of international character, think that international humanitarian or international human rights law applies to it (*see* Kretzmer, at p. 194; BEN-NAFTALI & SHANI, at p. 142), as well as Hamdan v. Rumsfeld, 165 L. Ed. 2d 729 (2006); *and* Prosecutor v. Tadic, ICTY, case no. IT-94-1, para. 127, hereinafter *Tadic;* regarding armed conflict which is not international, *see* YORAM DINSTEIN, CHARLES H. B. GARRAWAY & MICHAEL N. SCHMITT, THE MANUAL ON NON-INTERNATIONAL ARMED CONFLICT: WITH COMMENTARY (2006).

22. The international law dealing with armed conflicts is based upon a delicate balance between two contradictory considerations (*see Jami'at Ascan*, at p. 794;

Moked: Center for Defense of the Individual, at p. 396; *Beit Sourik*, at p. 833). One consists of the humanitarian considerations regarding those harmed as a result of an armed conflict. These considerations are based upon the rights of the individual, and his dignity. The other consists of military need and success (*see* DINSTEIN, at p. 16). The balance between these considerations is the basis of international law of armed conflict. Professor Greenwood discussed that, stating:

> "International humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity" (DIETER FLECK (ed.) THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 32 (1995), hereinafter FLECK).

In *Jami'at Ascan*, I wrote:

> "*The Hague Regulations* revolve around two central axes: one, the ensuring of the legitimate security interests of the occupier in the territory under belligerent occupation; the other, the ensuring of the needs of the civilian population in the territory under belligerent occupation" (p. 794).

In another case *Procaccia J.* noted that *The Hague Convention* authorizes the military commander to look after two needs:

> "The one need is a military, and the other is civilian-humanitarian. The first focuses on concern for the security of the military force occupying the area, and the second on the responsibility for maintaining the welfare of the inhabitants. Within the latter sphere, the commander of the *area* is responsible not only for maintaining order and the security of the inhabitants, but also for protecting their rights, especially their constitutional human rights. The concern for human rights lies at the heart of the humanitarian considerations that the commander must consider" (HCJ 10356/02 *Hass v. The Commander of IDF Forces in the West Bank*, 58(3) PD 443, 455, hereinafter – *Hass*).

In *Beit Sourik* I added that –

> "The law of belligerent occupation recognizes the authority of the military commander to maintain security in the *area* and to thus protect the security of his country and its citizens. However, it imposes upon the use of this authority the condition of a proper balance between that security and the rights, needs, and interests of the local population" (p. 833).

Indeed,

> "like in many other areas of law, the solution is not found in 'all' or 'nothing'; the solution is in location of the proper balance between the clashing considerations. The solution is not in assignment of absolute weight to one of the considerations; the solution is in assignment of

> relative weights to the various considerations, while balancing between them at the point of decision" (*Mara'abe*, paragraph 29 of the judgment).

The result of that balancing is that human rights are protected by the law of armed conflict, but not to their full scope. The same is so regarding the military needs. They are given an opportunity to be fulfilled, but not to their full scope. This balancing reflects the relativity of human rights, and the limits of military needs. The balancing point is not constant. "In certain issues the accent is upon the military need, and in others the accent is upon the needs of the civilian population" (*Jami'at Ascan*, at p. 794). What are the factors affecting the balancing point?

23. A central consideration affecting the balancing point is the identity of the person harmed, or the objective compromised in armed conflict. That is the central principle of the distinction (*see* DINSTEIN, at p. 82; BEN-NAFTALI & SHANI, at p. 151). Customary international law regarding armed conflicts distinguishes between combatants and military targets, and non-combatants, in other words, civilians and civilian objectives (*see The Legality of Nuclear Weapons*, at p. 257; *The First Protocol*, art. 48). According to the basic principle of the distinction, the balancing point between the State's military need and the other side's combatants and military objectives is not the same as the balancing point between the state's military need and the other side's civilians and civilian objectives. In general, combatants and military objectives are legitimate targets for military attack. Their lives and bodies are endangered by the combat. They can be killed and wounded. However, not every act of combat against them is permissible, and not every military means is permissible. Thus, for example, they can be shot and killed. However, "treacherous killing" and "perfidy" are forbidden (*see* DINSTEIN, at p. 198). Use of certain weapons is also forbidden. The discussion of all these does not arise in the petition before us. Moreover, comprehensive legal rules deal with the status of prisoners of war. Thus, for example, prisoners of war are not to be put on criminal trial for their very participation in combat, and they are to be "humanely treated" (*The Third Geneva Convention*, art. 13). They can of course be tried for war crimes which they committed during the hostilities. Opposite the combatants and military objectives stand the civilians and civilian objectives. Military attack directed at them is forbidden. Their lives and bodies are protected from the dangers of combat, provided that they themselves do not take a direct part in the combat. That customary principle is worded as follows:

> "Rule 1: The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.
>
> Rule 6: Civilians are protected against attack unless and for such time as they take a direct part in hostilities.
>
> Rule 7: The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects" (J. I. HENCKAERTS & L. DOSWALD-BECK, CUSTOMARY INTERNATIONAL LAW pp. 3, 19, 25 (Vol. 1, 2005), hereinafter HENCKAERTS & DOSWALD-BECK).

This approach – which protects the lives, bodies, and property of civilians who are not taking a direct part in the armed conflict – passes like a thread throughout the caselaw of the Supreme Court (*see Jami'at Ascan*, at p. 794; HCJ 72/86 *Zalub v. The Military Commander of the Judea and Samaria Area*, 41(1) PD 528, 532; *Almandi*, at p. 35; *Ajuri*, at p. 365; *Moked: Center for the Defense of the Individual*, at p. 396; HCJ 5591/02 *Yasin v. The Commander of the Ktzi'ot Military Camp*, 57(1) PD 403, 412, hereinafter *Yasin*; HCJ 3239/02 *Marab v. The Commander of IDF Forces in the Judea and Samaria Area*, 57(2) PD 349, 364; *Hass*, at p. 465; *Mara'abe*, at paragraphs 24-29 of the judgment; HCJ 1890/03 *The Municipality of Bethlehem v. The State of Israel*, 59(4) PD 736, paragraph 15 of the judgment, hereinafter *The Municipality of Bethlehem*); HCJ 3799/02 *Adalah – The Legal Center for Arab Minority Rights in Israel v. GCO Central Command, IDF*, paragraph 23 of my judgment, hereinafter *The "Early Warning" Procedure*). I discussed that in *Physicians for Human Rights*, which dealt with the combat activity during the armed conflict in Rafiah:

> "…the central provision of international humanitarian law applicable in times of combat is that civilian persons are '…entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof' (*Fourth Geneva Convention*, § 27. *See also Hague Regulations,* regulation 46.) At the foundation of that provision is the recognition of the value of man, the sanctity of his life, and his freedom. . . . His life, and dignity as a person may not be harmed, and his dignity must be protected. This basic duty is not absolute. It is subject to '. . . such measures of control and security. . . as may be necessary as a result of the war" (*See Fourth Geneva Convention*, § 27, final clause). These measures may not affect the fundamental rights of the persons concerned. . . . They must be proportionate" (p. 393).

Later in the same case I stated:

> "The duty of the military commander according to the basic rule is twofold. First, he must refrain from acts that harm the local civilians. That is his 'negative' duty. Second, he must take action necessary to ensure that the local civilians are not harmed. That is his 'positive' duty. . . . Both these duties – the boundary between which is fine – should be fulfilled reasonably and proportionately, according to the requirements of time and place" (p. 394).

Are terrorist organizations and their members combatants, in regards to their rights in the armed conflict? Are they civilians taking an active part in the armed conflict? Are they possibly neither combatants nor civilians? What, then, is the status of those terrorists?

B. Combatants

24. What makes a person a combatant? This category includes, of course, the armed forces. It also includes people who fulfill the following conditions (*The Hague Regulations*, §1):

> "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
>
> 2. To have a fixed distinctive emblem recognizable at a distance;
>
> 3. To carry arms openly; and
>
> 4. To conduct their operations in accordance with the laws and customs of war.
>
> . . ."

Article 13 of *The First and Second Geneva Conventions* and article 4 of *The Third Geneva Conventions* repeat that wording (*compare also* article 43 of *The First Protocol*). Those conditions are examined in the legal literature, as well as additional conditions which are deduced from the relevant conventions (*see* DINSTEIN, at p. 39). We need not discuss all of them, as the terrorist organizations from the *area*, and their members, do not fulfill the conditions for combatants (*see* GROSS, at p. 75). It will suffice to say that they have no fixed emblem recognizable at a distance, and they do not conduct their operations in accordance with the laws and customs of war. In one case, I wrote:

> "The Lebanese detainees are not to be seen as prisoners of war. It is sufficient, in order to reach that conclusion, that they do not fulfill the provisions of article 4a(2)(d) of *The Third Geneva Convention*, which provides that one of the conditions which must be fulfilled in order to fit the definition of 'a prisoner of war' is 'that of conducting their operations in accordance with the laws and customs of war.' The organizations to which the Lebanese detainees belonged are terrorist organizations acting contrary to the laws and customs of war. Thus, for example, these organizations intentionally harm civilians, and shoot from within the civilian population, which serves them as a shield. Each of these is an act contrary to international law. Indeed, Israel's constant stance throughout the years has been to view the various organizations, like the *Hizbollah*, as organizations to which *The Third Geneva Convention* does not apply. We found no cause to intervene in that stance" (HCJ 2967/00 *Arad v. The Knesset*, 54 PD(2) 188, 191; *see also* Severe CrimC 1158/02 (TA) *The State of Israel v. Barguti* (unpublished, paragraph 35 of the verdict); Tav Mem/69/4 *The Military Prosecutor v. Kassem*, 1 SELECTED JUDGMENTS OF THE MILITARY TRIBUNALS IN THE ADMINISTERED TERRITORIES 403 [PISKEI DIN NIVCHARIM SHEL BATEI HADIN HATSVAYIM BASHTACHIM HAMUCHZAKIM]).

25. The terrorists and their organizations, with which the State of Israel has an armed conflict of international character, do not fall into the category of combatants. They do not belong to the armed forces, and they do not belong to units to which international law grants status similar to that of combatants. Indeed, the terrorists and the organizations which send them to carry out attacks are unlawful combatants. They do not enjoy the status of prisoners of war. They can be tried for their participation in hostilities, judged, and punished. The Chief Justice of the Supreme Court of the United States, *Stone C.J.* discussed that, writing:

> "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful population of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatant are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful" (Ex Parte Quirin 317 U.S. 1, 30 (1942); *see also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004)).

The Imprisonment of Unlawful combatants Law, 5762-2002 authorizes the chief of the general staff of the IDF to issue an order for the administrative detention of an "unlawful combatant". That term is defined in the statute as "a person who took part in hostilities against the State of Israel, whether directly or indirectly, or is part of a force which commits hostilities against the state of Israel, who does not fulfill the conditions granting prisoner of war status in international humanitarian law, as determined in article 4 of III Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949." Needless to say, unlawful combatants are not beyond the law. They are not "outlaws". God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law (Neuman, *Humanitarian Law and Counterterrorist Force,* 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 283 (2003); Georg Nolte, *Preventative Use of Force and Preventative Killings: Moves into a Different Legal Order*, 5 THEORETICAL INQUIRIES IN LAW 111, 119 (2004), hereinafter "Nolte"). That is certainly the case when they are in detention or brought to justice (*see* §75 of *The First Protocol*, which reflects customary international law, *as well as* Knut Dormann, *The Legal Situation of 'Unlawful/Unprivileged' Combatants,* 849 INTERNATIONAL REVIEW OF THE RED CROSS 45, 70 (2003), hereinafter "Dormann"). Does it follow that in Israel's conduct of combat against the terrorist organizations, Israel is not entitled to harm them, and Israel is not entitled to kill them even if they are planning, launching, or committing terrorist attacks? If they were seen as (legal) combatants, the answer would of course be that Israel is entitled to harm them. Just as it is permissible to harm a soldier of an enemy country, so can terrorists be harmed. Accordingly, they would also enjoy the status of prisoners of war, and the rest of the protections granted to legal combatants. However, as we have seen, the terrorists acting against Israel are not combatants according to the definition of that term in international law; they are not entitled to the status of prisoners of war; they can be put on trial for their membership in terrorist organizations and for their operations against the army. Are they seen as civilians under the law? It is to the examination of that question which we now turn.

C. Civilians

26. Customary international law regarding armed conflicts protects "civilians" from harm as a result of the hostilities. The International Court of Justice discussed that in *The Legality of Nuclear Weapons*, stating:

> "states must never make civilians the object of attack" (p. 257).

That customary principle is expressed in article 51(2) of *The First Protocol*, according to which:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack".

From that follows also the duty to do everything possible to minimize collateral damage to the civilian population during the attacks on "combatants" (*see* Eyal Benvenisti, *Human Dignity in Combat: the Duty to Spare Enemy Civilians*, 39 ISRAEL LAW REVIEW 81 (2006). Against the background of that protection granted to "civilians", the question what constitutes a "civilian" for the purposes of that law arises. The approach of customary international law is that "civilians" are those who are not "combatants" (*see* §50(1) of *The First Protocol*, *and* SABLE, at p. 432). In the *Blaskic* case, the International Criminal Tribunal for the former Yugoslavia ruled that civilians are –

> "Persons who are not, or no longer, members of the armed forces" (Prosecutor v. Blaskic (2000) Case IT-95-14-T, para 180).

That definition is "negative" in nature. It defines the concept of "civilian" as the opposite of "combatant". It thus views unlawful combatants – who, as we have seen, are not "combatants" – as civilians. Does that mean that the unlawful combatants are entitled to the same protection to which civilians who are not unlawful combatants are entitled? The answer is, no. Customary international law regarding armed conflicts determines that a civilian taking a direct part in the hostilities does not, at such time, enjoy the protection granted to a civilian who is not taking a direct part in the hostilities (*see* §51(3) of *The First Protocol*). The result is that an unlawful combatant is not a combatant, rather a "civilian". However, he is a civilian who is not protected from attack as long as he is taking a direct part in the hostilities. Indeed, a person's status as unlawful combatant is not merely an issue of the internal state penal law. It is an issue for international law dealing with armed conflicts (*see* Jinks). It is manifest in the fact that civilians who are unlawful combatants are legitimate targets for attack, and thus surely do not enjoy the rights of civilians who are not unlawful combatants, provided that they are taking a direct part in the hostilities at such time. Nor, as we have seen, do they enjoy the rights granted to combatants. Thus, for example, the law of prisoners of war does not apply to them.

D. A Third Category: Unlawful combatants?

27. In the oral and written arguments before us, the State asked us to recognize a third category of persons, that of unlawful combatants. These are people who take active and continuous part in an armed conflict, and therefore should be treated as combatants, in the sense that they are legitimate targets of attack, and they do not enjoy the protections granted to civilians. However, they are not entitled to the rights and privileges of combatants, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war. Thus, for example, they are not entitled to the status of prisoners of war. The State's position is that the terrorists who participate in the armed conflict between Israel and the terrorist organizations fall under this category of unlawful combatants.

28. The literature on this subject is comprehensive (Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs,* 28 BRITISH YEARBOOK OF INTERNATIONAL LAW 323 (1951); Kenneth Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and Struggle over Legitimacy*, 11 HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (2005), hereinafter "Watkin"; Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1025 (2004); Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction With Implications for the Future of International Humanitarian Law*, 34 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 227 (2002); Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?* 38 ISRAEL LW REVIEW 378 (2005); Nolte; Dormann). We shall take no stance regarding the question whether it is desirable to recognize this third category. The question before us is not one of desirable law, rather one of existing law. In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category. That is the case according to the current state of international law, both international treaty law and customary international law (*see* CASSESE, at pp. 408, 470). It is difficult for us to see how a third category can be recognized in the framework of the *Hague* and *Geneva Conventions*. It does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law. However, new reality at times requires new interpretation. Rules developed against the background of a reality which has changed must take on a dynamic interpretation which adapts them, in the framework of accepted interpretational rules, to the new reality (*see Jami'at Ascan*, at p. 800; *Ajuri*, at p. 381). In the spirit of such interpretation, we shall now proceed to the customary international law dealing with the status of civilians who constitute unlawful combatants.

6. Civilians who are Unlawful combatants

A. The Basic Principle: Civilians Taking a Direct Part in Hostilities are not Protected at Such Time they are Doing So

29. Civilians enjoy comprehensive protection of their lives, liberty, and property. "The protection of the lives of the civilian population is a central value in humanitarian law" (*The "Early Warning" Procedure*, at paragraph 23 of my judgment). "The right to life and bodily integrity is the basic right standing at the center of the humanitarian law intended to protect the local population" (HCJ 9593/04 *Yanun Village Council Head v. The Commander of IDF Forces in Judea and Samaria* (yet unpublished)). As opposed to combatants, whom one can harm due to their status as combatants, civilians are not to be harmed, due to their status as civilians. A provision in this spirit is determined in article 51(2) of *The First Protocol*, which constitutes customary international law:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack. . ."

Article 8(2)(b)(i)-(ii) of the Rome Statute of the International Criminal Court determines, in the same spirit, in defining a war crime, that if an order to attack civilians is given intentionally, that is a crime. That crime applies to those civilians who are "not taking direct part in hostilities". In addition, civilians are not to be harmed in an indiscriminate attack; in other words, in an attack which, *inter alia*, is not directed against a particular military objective (*see* §51(4) of *The First Protocol*, which constitutes customary international law: *see* HENCKAERTS & DOSWALD-BECK, at p. 37). That protection is granted to all civilians, excepting those civilians taking a direct part in hostilities. Indeed, the protection from attack is not granted to unlawful combatants who are taking a direct part in the hostilities. I discussed that in one case, stating:

> "The fighting is against the terrorists. The fighting is not against the local population" (*Physicians for Human Rights*, at p. 394).

What is the source and the scope of that basic principle, according to which the protection of international humanitarian law is removed from those who take an active part in hostilities at such time that they are doing so?

B. The Source of the Basic Principle and its Customary Character

30. The basic principle is that the civilians taking a direct part in hostilities are not protected from attack upon them at such time as they are doing so. This principle is manifest in §51(3) of *The First Protocol*, which determines:

> "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

As is well known, Israel is not party to *The First Protocol*. Thus, it clearly was not enacted in domestic Israeli legislation. Does the basic principle express customary international law? The position of The Red Cross is that it is a principle of customary international law (HENCKAERTS & DOSWALD-BECK, at p. 20). That position is acceptable to us. It fits the provision Common Article 3 of *The Geneva Conventions*, to which Israel is party and which, according to all, reflects customary international law, pursuant to which protection is granted to persons "[T]aking no active part in the

hostilities." The International Criminal Tribunal for the former Yugoslavia determined that article 51 of *The First Protocol* constitutes customary international law (*see* Struger ICTY IT-OT-42-T-22 (2005)). In military manuals of many states, including England, France, Holland, Australia, Italy, Canada, Germany, the United States (Air Force), and New Zealand, the provision has been copied verbatim, or by adopting its essence, according to which civilians are not to be attacked, unless they are taking a (direct) part in the hostilities. The legal literature sees that provision as an expression of customary international law (*see* DINSTEIN, at p. 11; Kretzmer, at p. 192; Ben-Naftali & Michaeli, at p. 269; CASSESE, at p. 416; *and* Marco Roscini, *Targeting and Contemporary Aerial Bombardment*, 54 INTERNATIONAL AND COMPARATIVE LAW QUATERLY 411, 418 (2005), hereinafter "Roscini"; Vincent-Jöel Proulx, *If the Hat Fits Wear It, If the Turban Fits Run for Your Life: Reflection on the Indefinite Detention and Targeted Killings of Suspected Terrorists*, 56 HASTINGS LAW JOURNAL 801, 879 (2005); George Aldrich, *Laws of War on Land*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 42, 53 (2000)). Respondents' counsel stated before us that in Israel's opinion, not all of the provisions of article 51(3) of *The First Protocol* reflect customary international law. According to the State's position, "all that is determined in customary international law is that it is forbidden to harm civilians in general, and it expressly determines that it is permissible to harm a civilian who 'takes a direct part in hostilities.' Regarding the period of time during which such harm is permitted, there is no restriction" (supplement to summary on behalf of the State Attorney (of January 26 2004), p. 79). Therefore, according to the position of the State, the non-customary part of article 51(3) of *The First Protocol* is the part which determines that civilians do not enjoy protection from attack *"for such time"* as they are taking a direct part in hostilities. As mentioned, our position is that all of the parts of article 51(3) of *The First Protocol* express customary international law. What is the scope of that provision? It is to that question that we now turn.

C. The Essence of the Basic Principle

31. The basic approach is thus as follows: a civilian – that is, a person who does not fall into the category of combatant – must refrain from directly participating in hostilities (*see* FLECK, at p. 210). A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy – during that time – the protection granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant, *e.g.* those granted to a prisoner of war. True, his status is that of a civilian, and he does not lose that status while he is directly participating in hostilities. However, he is a civilian performing the function of a combatant. As long as he performs that function, he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack (*see* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (2004), hereinafter "Watkin"). Gasser discussed that, stating:

> "What are the consequences if civilians do engage in combat? . . . Such persons do not lose their legal status as civilians. . . . However, for factual reasons they may not be able to claim the protection guaranteed to civilians, since anyone performing hostile

> acts may also be opposed, but in the case of civilians, only for so long as they take part directly in hostilities" (FLECK, at p. 211, paragraph 501).

The Red Cross Manual similarly states:

> "Civilians are not permitted to take direct part in hostilities and are immune from attack. If they take a direct part in hostilities they forfeit this immunity" (MODEL MANUAL ON THE LAW OF ARMED CONFLICT FOR ARMED FORCES, at paragraph 610, p. 34 (1999)).

That is the law regarding unlawful combatants. As long as he preserves his status as a civilian – that is, as long as he does not become part of the army – but takes part in combat, he ceases to enjoy the protection granted to the civilian, and is subject to the risks of attack just like a combatant, without enjoying the rights of a combatant as a prisoner of war. Indeed, terrorists who take part in hostilities are not entitled to the protection granted to civilians. True, terrorists participating in hostilities do not cease to be civilians, but by their acts they deny themselves the aspect of their civilian status which grants them protection from military attack. Nor do they enjoy the rights of combatants, *e.g.* the status of prisoners of war.

32. We have seen that the basic principle is that the civilian population, and single civilians, are protected from the dangers of military activity and are not targets for attack. That protection is granted to civilians "unless and for such time as they take a direct part in hostilities" (§51(3) of *The First Protocol*). That provision is composed of three main parts. The first part is the requirement that civilians take part in "hostilities"; the second part is the requirement that civilians take a "direct" part in hostilities; the third part is the provision by which civilians are not protected from attack "for such time" as they take a direct part in hostilities. We shall discuss each of those parts separately.

D. The First Part: "Taking . . . part in hostilities"

33. Civilians lose the protection of customary international law dealing with hostilities of international character if they "take . . . part in hostilities." What is the meaning of that provision? The accepted view is that "hostilities" are acts which by nature and objective are intended to cause damage to the army. Thus determines COMMENTARY ON THE ADDITIONAL PROTOCOLS, published by the Red Cross in 1987:

> "Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces" (Y. SANDOZ et al. COMMENTARY ON THE ADDITIONAL PROTOCOLS 618 (1987)).

A similar approach was accepted by the Inter-American Commission on Human Rights, and is positively referred to in HENCKAERTS & DOSWALD-BECK (p. 22). It seems that acts which by nature and objective are intended to cause damage to civilians should be added to that definition. According to the accepted definition, a civilian is taking part in hostilities when using weapons in an armed conflict, while

gathering intelligence, or while preparing himself for the hostilities. Regarding taking part in hostilities, there is no condition that the civilian use his weapon, nor is their a condition that he bear arms (openly or concealed). It is possible to take part in hostilities without using weapons at all. COMMENTARY ON THE ADDITIONAL PROTOCOLS discussed that issue:

> "It seems that the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon" (p. 618-619).

As we have seen, that approach is not limited merely to the issue of "hostilities" toward the army or the state. It applies also to hostilities against the civilian population of the state (*see* Kretzmer, at p. 192).

E. Second Part: "Takes a Direct Part"

34. Civilians lose the protection against military attack, granted to them by customary international law dealing with international armed conflict (as adopted in *The First Protocol*, §51(3)), if "they take a direct part in hostilities". That provision differentiates between civilians taking a direct part in hostilities (from whom the protection from attack is removed) and civilians taking an indirect part in hostilities (who continue to enjoy protection from attack). What is that differentiation? A similar provision appears in Common Article 3 of *The Geneva Conventions*, which uses the wording "active part in hostilities". The judgment of the International Criminal Tribunal for Rwanda determined that these two terms are of identical content (*see* The Prosecutor v. Akayesu, case no. ICTR-96-4-T (1998)). What is that content? It seems accepted in the international literature that an agreed upon definition of the term "direct" in the context under discussion does not exist (*see* DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, REPORT PREPARED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS (2003); DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2004)). HENCKAERTS & DOSWALD-BECK rightly stated that–

> "It is fair to conclude . . . that a clear and uniform definition of direct participation in hostilities has not been developed in state practice" (p. 23).

In that state of affairs, and without a comprehensive and agreed upon customary standard, there is no escaping going case by case, while narrowing the area of disagreement (*compare Tadic*). On this issue, the following passage from COMMENTARY ON THE ADDITIONAL PROTOCOLS is worth quoting:

> "Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly" (p. 516).

Indeed, a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it, is a civilian taking "an active part" in the hostilities (*see* Watkin, at p. 17). However, a civilian who generally supports the hostilities against the army is not taking a direct part in the hostilities (*see* DUFFY, at p. 230). Similarly, a civilian who sells food or medicine to unlawful combatants is also taking an indirect part in the hostilities. The third report of the Inter-American Commission on Human Rights states:

> "Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party" (IACHR THIRD REPORT ON HUMAN RIGHTS IN COLOMBIA, par. 53, 56 (1999)).

And what is the law in the space between these two extremes? On the one hand, the desire to protect innocent civilians leads, in the hard cases, to a narrow interpretation of the term "direct" part in hostilities. Professor CASSESE writes:

> "The rationale behind the prohibition against targeting a civilian who does not take a direct part in hostilities, despite his possible (previous or future) involvement in fighting, is linked to the *need to avoid killing innocent civilians*" (p. 421, emphasis original).

On the other hand, it can be said that the desire to protect combatants and the desire to protect innocent civilians leads, in the hard cases, to a wide interpretation of the "direct" character of the hostilities, as thus civilians are encouraged to stay away from the hostilities to the extent possible. Schmitt writes:

> "Gray areas should be interpreted liberally, i.e., in favor of finding direct participation. One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities. Moreover, a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible – in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted" (Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, in H. FISCHERR (ed.), CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSHRIFT FUR DIETER FLECK 505-509 (2004), hereinafter "Schmitt").

35. Against the background of these considerations, the following cases should also be included in the definition of taking a "direct part" in hostilities: a person who collects intelligence on the army, whether on issues regarding the hostilities (*see* Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVEW 1, 116 (1990), hereinafter "Parks"), or beyond those issues (*see* Schmitt, at p. 511); a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. All those persons are performing the function of combatants. The function determines the directness of the part taken in the hostilities (*see* Watkin, at p. 17; Roscini). However, a person who sells food or medicine to an unlawful combatant is not taking a direct part, rather an indirect part in the hostilities. The same is the case regarding a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid. The same is the case regarding a person who distributes propaganda supporting those unlawful combatants. If such persons are injured, the State is likely not to be liable for it, if it falls into the framework of collateral or incidental damage. This was discussed by Gasser:

> "Civilians who directly carry out a hostile act against the adversary may be resisted by force. A civilian who kills or takes prisoners, destroys military equipment, or gathers information in the area of operations may be made the object of attack. The same applies to civilians who operate a weapons system, supervise such operation, or service such equipment. The transmission of information concerning targets directly intended for the use of a weapon is also considered as taking part in hostilities. Furthermore, the logistics of military operations are among the activities prohibited to civilians . . . [N]ot only direct and personal involvement but also preparation for a military operation and intention to take part therein may suspend the immunity of a civilian. All these activities, however, must be proved to be directly related to hostilities or, in other words to represent a direct threat to the enemy . . . However, the term should not be understood too broadly. Not every activity carried out within a state at war is a hostile act. Employment in the armaments industry for example, does not mean, that civilian workers are necessarily participating in hostilities… Since, on the other hand, factories of this industry usually constitute lawful military objectives that may be attacked, the normal rules governing the assessment of possible collateral damage to civilians must be observed" (FLECK, at p. 232, paragraphs 517, 518).

In the international literature there is a debate surrounding the following case: a person driving a truck carrying ammunition (*see* Parks, at p. 134; Schmitt, at p. 507; ANTHONY P. V. ROGERS, LAW ON THE BATTLEFIELD 8 (1996), hereinafter ROGERS; *and* Lisa L. Turner &. Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 AIR FORCE LAW REVEW 1, 31 (2001); John R. Heaton, *Civilians At War: Re-examining the Status of Civilians*

Accompanying the Armed Forces, 57 AIR FORCE LAW REVEW 155, 171 (2005)). Some are of the opinion that such a person is taking a direct part in the hostilities (and thus he can be attacked), and some are of the opinion that he is not taking a direct part (and thus he cannot be attacked). Both opinions are in agreement that the ammunition in the truck can be attacked. The disagreement regards the attack upon the civilian driver. Those who think that he is taking a direct part in the hostilities are of the opinion that he can be attacked. Those who think that he is not taking a direct part in the hostilities believe that he cannot be attacked, but that if he is wounded, that is collateral damage caused to civilians proximate to the attackable military objective. In our opinion, if the civilian is driving the ammunition to the place from which it will be used for the purposes of hostilities, he should be seen as taking a direct part in the hostilities (*see* DINSTEIN, at p. 27; Schmitt at p. 508; ROGERS, at p. 7; ANTHONY .P .V. ROGERS & P. MALHERBE, MODEL MANUAL OF THE LAW OF ARMED CONFLICT 29 (ICRC, (1999)).

36. What is the law regarding civilians serving as a "human shield" for terrorists taking a direct part in the hostilities? Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities (*see* Schmitt, at p. 521 *and* Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 511, 541 (2004))

37. We have seen that a civilian causing harm to the army is taking "a direct part" in hostilities. What says the law about those who enlist him to take a direct part in the hostilities, and those who send him to commit hostilities? Is there a difference between his direct commanders and those responsible for them? Is the "direct" part taken only by the last terrorist in the chain of command, or by the entire chain? In our opinion, the "direct" character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take "a direct part". The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct (and active) (*see* Schmitt, at p. 529).

F. The Third Part: "For Such Time"

38. Article 51(3) of *The First Protocol* states that civilians enjoy protection from the dangers stemming from military acts, and that they are not targets for attack, unless "and for such time" as they are taking a direct part in hostilities. The provisions of article 51(3) of *The First Protocol* present a time requirement. A civilian taking a part in hostilities loses the protection from attack "for such time" as he is taking part in those hostilities. If "such time" has passed – the protection granted to the civilian returns. In respondents' opinion, that part of article 51(3) of *The First Protocol* is not of

customary character, and the State of Israel is not obligated to act according to it. We cannot accept that approach. As we have seen, all of the parts of article 51(3) of *The First Protocol* reflect customary international law, including the time requirement. The key question is: how is that provision to be interpreted, and what is its scope?

39. As regarding the scope of the wording "takes a direct part" in hostilities, so too regarding the scope of the wording "and for such time" there is no consensus in the international literature. Indeed, both these concepts are close to each other. However, they are not identical. With no consensus regarding the interpretation of the wording "for such time", there is no choice but to proceed from case to case. Again, it is helpful to examine the extreme cases. On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility (*see* Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES IN LAW 179, 195 (2004)).

40. These examples point out the dilemma which the "for such time" requirement presents before us. On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed. On the other hand, the "revolving door" phenomenon, by which each terrorist has "horns of the alter" (1 Kings 1:50) to grasp or a "city of refuge" (Numbers 35:11) to flee to, to which he turns in order to rest and prepare while they grant him immunity from attack, is to be avoided (*see* Schmitt, at p. 536; Watkin, at p. 12; Kretzmer, at p. 193; DINSTEIN, at p. 29; *and* Parks, at p. 118). In the wide area between those two possibilities, one finds the "gray" cases, about which customary international law has not yet crystallized. There is thus no escaping examination of each and every case. In that context, the following four things should be said: first, well based information is needed before categorizing a civilian as falling into one of the discussed categories. Innocent civilians are not to be harmed (*see* CASSESE, at p. 421). Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities (*see* Ergi v. Turkey, 32 EHRR 388 (2001). CASSESE rightly stated that –

> "[I]f a belligerent were allowed to fire at enemy civilians simply suspected of somehow planning or conspiring to plan military attacks, or of having planned or directed hostile actions, the basic foundations of international humanitarian law would be seriously undermined. The basic distinction between civilians and combatants would be called into

> question and the whole body of law relating to armed conflict would eventually be eroded" (p. 421).

The burden of proof on the attacking army is heavy (*see* Kretzmer, at p. 203; GROSS at p. 606). In the case of doubt, careful verification is needed before an attack is made. HENCKAERTS & DOSWALD-BECK made this point:

> "[W]hen there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious" (p. 24).

Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed (*see* Mohamed Ali v. Public Prosecutor [1969] 1 A.C. 430). Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force. That question arose in McCann v. United Kingdom, 21 E.H.R.R. 97 (1995), hereinafter *McCann*. In that case, three terrorists from Northern Ireland who belonged to the IRA were shot to death. They were shot in the streets of Gibraltar, by English agents. The European Court of Human Rights determined that England had illegally impinged upon their right to life (§2 of the European Convention on Human Rights). So wrote the court:

> "[T]he use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk" (p. 148, at paragraph 235).

Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required (*see* ALAN DERSHOWITZ, PREEMTION: A KNIFE THAT CUTS BOTH WAYS 230 (2005)). However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities (*see* §5 of *The Fourth Geneva Convention*). Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used. Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent (*see* Watkin, at p. 23; DUFFY, at p. 310; CASSESE, at p. 419; *see also* Colin Warbrick, *The Principle of the European Convention on Human Rights and the Responses of State to Terrorism*, EUROPEAN HUMAN RIGHTS LAW REVIEW 287, 292

(2002); *McCann*, at pp. 161, 163; *as well as* McKerr v. United Kingdom, 34 E.H.R.R. 553, 559 (2001)). In appropriate cases it is appropriate to pay compensation as a result of harm caused to an innocent civilian (*see* CASSESE, at pp. 419, 423, *and* §3 of *The Hague Regulations*; §91 of *The First Protocol*). Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test. We shall now proceed to the examination of that question.

7. Proportionality

A. The Principle of Proportionality and its Application in Customary International Law

41. The principle of proportionality is a general principle in law. It is part of our legal conceptualization of human rights (*see* §8 of Basic Law: Human Dignity and Freedom; *see also* AHARON BARAK, A JUDGE IN A DEMOCRATIC SOCIETY 346 (2004) [SHOFET BECHEVRA DEMOKRATIT], hereinafter BARAK). It is an important component of customary international law (*see* ROSALYN HIGGINS, PROBLEMS AND PROCESS – INTERNATIONAL LAW AND HOW WE USE IT 219 (1994); Delbruck, *Proportionality,* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1144 (1997). It is an integral part of the law of self defense. It is a substantive component in protection of civilians in situations of armed conflict (*see* DINSTEIN, at p. 119; Gasser, at p. 220; CASSESE, at p. 418; BEN-NAFTALI & SHANI, at p. 154; *and* HENCKAERTS & DOSWALD-BECK, at p. 60; Judith Gardam, *Proportionality and Force in International Law*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 391 (1993), hereinafter "Gardam"; J.S. PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 62 (1985); William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MILITARY LAW REVIEW 91 (1982); T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY INTERNATIONAL LAW 73 (1989)). It is a central part of the law of belligerent occupation (*see Hass,* at p. 461; *The Municipality of Bethlehem*; *Beit Sourik*, at p. 836; HCJ 1661/05 *Gaza Coast Regional Council v. The Knesset*, 59(2) PD 481, paragraph 102 of the judgment of The Court; *Mara'abe*, paragraph 30 of my judgment; *see also* DINSTEIN, at p. 119; HENCKAERTS & DOSWALD-BECK, at p. 60). In a long list of judgments, the Supreme Court has examined the authority of the military commander in the *area* according to the standards of proportionality. It has done so, *inter alia*, regarding restriction of place of residence (*Ajuri*); regarding encirclement of villages and positioning checkpoints on the access roads to and from them in order to frustrate terrorism (HCJ 2847/03 *Alauna v. The Commander of IDF Forces in Judea and Samaria* (unpublished)); regarding harm to property of protected persons due to army operations (*see* HCJ 9525/00 *Ali Skai v. The State of Israel* (unpublished)); regarding the safeguarding of freedom of worship and the right to access to holy places (*Hass*); regarding demolition of houses due to operational needs (*see* HCJ 4219/02 *Gusin v. The Commander of IDF Forces in the Gaza Strip*, 56(4) PD 608); regarding the laying of siege (*Almandi*); regarding the erection of the security fence (*Beit Sourik; Mara'abe*).

B. Proportionality in an International Armed Conflict

42. The principle of proportionality is a substantial part of international law regarding armed conflict (*compare* §51(5)(b) *and* 57 of *The First Protocol* (*see* HENCKEARTS & DOSWALD-BECK, at p. 46; BEN-NAFTALI & SHANI, at p. 154)). That law is of customary character (*see* HENCKEARTS & DOSWALD-BECK, at p. 53; DUFFY, at p. 235; *and* Prosecutor v. Kupreskic, ICTY Case no. IT-95-16 (2000)). The principle of proportionality arises when the military operation is directed toward combatants and military objectives, or against civilians at such time as they are taking a direct part in hostilities, yet civilians are also harmed. The rule is that the harm to innocent civilians caused by collateral damage during combat operations must be proportionate (*see* DINSTEIN, at p. 119). Civilians might be harmed due to their presence inside of a military target, such as civilians working in an army base; civilians might be harmed when they live or work in, or pass by, military targets; at times, due to a mistake, civilians are harmed even if they are far from military targets; at times civilians are forced to serve as "human shields" from attack upon a military target, and they are harmed as a result. In all those situations, and in other similar ones, the rule is that the harm to the innocent civilians must fulfill, *inter alia*, the requirements of the principle of proportionality.

43. The principle of proportionality applies in every case in which civilians are harmed at such time as they are not taking a direct part in hostilities. Judge Higgins pointed that out in the *Legality of Nuclear Weapons* case:

> "The principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack" (p. 587).

A manifestation of this customary principle can be found in *The First Protocol*, pursuant to which indiscriminate attacks are forbidden § 51(4)). *The First Protocol* further determines (§51(5)):

> Among others, the following types of attacks are to be considered as indiscriminate:
>
> (a) …
>
> (b) An attack 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.

44. The requirement of proportionality in the laws of armed conflict focuses primarily upon what our constitutional law calls proportionality *"stricto senso"*, that is, the requirement that there be a proper proportionate relationship between the military objective and the civilian damage. However, the laws of armed conflict include additional components, which are also an integral part of the theoretical principle of proportionality in the

wider sense. The possibility of concentrating that law into the legal category to which it belongs, while formulating a comprehensive doctrine of proportionality, as is common in the internal law of many states, should be considered. That cannot be examined in the framework of the petition before us. We shall concentrate upon the aspect of proportionality which is accepted, without exception, as relevant to the subject under discussion.

Proper Proportion between Benefit and Damage

45. The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage (in protecting combatants and civilians). In other words, attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it. That is a values based test. It is based upon a balancing between conflicting values and interests (*see Beit Sourik*, at p. 850; HCJ 7052/03 *Adalah – The Legal Center Arab Minority Rights in Israel* (unpublished, paragraph 74 of my judgment, hereinafter *Adalah*). It is accepted in the national law of various countries. It constitutes a central normative test for examining the activity of the government in general, and of the military specifically, in Israel. In one case I stated:

> "Basically, this subtest carries on its shoulders the constitutional view that the ends do not justify the means. It is a manifestation of the idea that there is a barrier of values which democracy cannot surpass, even if the purpose whose attainment is being attempted is worthy" (HCJ 8276/05 *Adalah - The Legal Center for Arab Minority Rights in Israel v. The Minister of Defense* (unpublished, paragraph 30 of my judgment; *see also* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 66 (2002)).

As we have seen, this requirement of proportionality is employed in customary international law regarding protection of civilians (*see* CASSESE, at p. 418; Kretzmer, at p. 200; Ben-Naftali & Michaeli, at p. 278; *see also* Gardam; *as well as* §51(2)(III) of *The First Protocol*, which constitutes customary law). When the damage to innocent civilians is not proportionate to the benefit of the attacking army, the attack is disproportionate and forbidden.

46. That aspect of proportionality is not required regarding harm to a combatant, or to a civilian taking a direct part in the hostilities at such time as the harm is caused. Indeed, a civilian taking part in hostilities is endangering his life, and he might – like a combatant – be the objective of a fatal attack. That killing is permitted. However, that proportionality is required in any case in which an innocent civilian is harmed. Thus, the requirements of proportionality *stricto senso* must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage caused to nearby innocent civilians. The proportionality rule applies in regards to harm to those innocent civilians (*see* § 51(5)(b) of *The First Protocol*). The rule is that combatants and terrorists are not to be harmed if the damage expected to

be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists (*see* HENCKAERTS & DOSWALD-BECK, at p. 49). Performing that balance is difficult. Here as well, one must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed (*compare* DINSTEIN, at p. 123; GROSS, at p. 621). The hard cases are those which are in the space between the extreme examples. There, a meticulous examination of every case is required; it is required that the military advantage be direct and anticipated (*see* §57(2)(iii) of *The First Protocol*). Indeed, in international law, as in internal law, the ends do not justify the means. The state's power is not unlimited. Not all of the means are permitted. The Inter-American Court of Human Rights pointed that out, stating:

> "[R]egardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the state is not unlimited, nor may the state resort to any means to attain its ends" (Velasquez Rodriguez v. Honduras, I/A Court H.R. (Ser. C.), No 4, 1, para. 154 (1988)).

However, when hostilities occur, losses are caused. The state's duty to protect the lives of its soldiers and civilians must be balanced against its duty to protect the lives of innocent civilians harmed during attacks on terrorists. That balancing is difficult when it regards human life. It raises moral and ethical problems (*see* Asa Kasher & Amos Yadlin, *Assassination and Preventative Killing*, 25 SAIS REVIEW 41 (2005). Despite the difficulty of that balancing, there's no choice but to perform it.

8. Jusiticiability

47. A considerable part of the State Attorney's Office's response (of March 20, 2002) was dedicated to preliminary arguments. According to that response, "the IDF combat activity in the framework of the combat events occurring in the *area*, which are of operational character *par excellence*, are not justiciable – and at very least are not institutionally justiciable – and this honorable Court will not judge them" (paragraph 26, p. 7; emphasis original). In explaining this approach, respondents' counsel emphasized that in his opinion "the dominant character of the issue is not legal, and the attribute of judicial restraint requires that the Court refrain from stepping down into the combat zone and from judging the operational acts *par excellence* which are occurring in that zone" (*ibid,* paragraph 36, p. 11; emphasis original). Respondents' counsel emphasized that "clearly, the subject's status as 'non-justiciable' does not mean that means of supervision and control on the part of the executive branch itself are not employed on this issue . . . the units of the army have been instructed by the Attorney General and the Military Advocate General to act on this issue, as in others, strictly according to the provisions of international law regarding laws of conflict, and they comply with that instruction" (*ibid*, paragraph 40, p. 13).

INTERNATIONAL COURT OF JUSTICE

2005
19 December
General List
No. 116

YEAR 2005

19 December 2005

CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* UGANDA)

Situation in the Great Lakes region — Task of the Court.

* * *

Issue of consent.

The DRC consented to presence of Ugandan troops in eastern border area in period preceding August 1998 — Protocol on Security along the Common Border of 27 April 1998 between the DRC and Uganda — No particular formalities required for withdrawal of consent by the DRC to presence of Ugandan troops — Ambiguity of statement by President Kabila published on 28 July 1998 — Any prior consent withdrawn at latest by close of Victoria Falls Summit on 8 August 1998.

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Findings of fact concerning Uganda's use of force in respect of Kitona.

Denial by Uganda that it was involved in military action at Kitona on 4 August 1998 Assessment of evidentiary materials in relation to events at Kitona — Deficiencies in evidence adduced by the DRC — Not established to the Court's satisfaction that Uganda participated in attack on Kitona.

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Findings of fact concerning military action in the east of the DRC and in other areas of that country.

Determination by the Court of facts as to Ugandan presence at, and taking

of, certain locations in the DRC — Assessment of evidentiary materials — Sketch-map evidence — Testimony before Porter Commission — Statements against interest — Establishment of locations taken by Uganda and corresponding "dates of capture".

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Did the Lusaka, Kampala and Harare Agreements constitute any consent of the DRC to the presence of Ugandan troops?

Contention of Uganda that the Lusaka, Kampala and Harare Agreements constituted consent to presence of Ugandan forces on Congolese territory — Nothing in provisions of Lusaka Agreement can be interpreted as affirmation that security interests of Uganda had already required the presence of Ugandan forces on territory of the DRC as from September 1998 — Lusaka Agreement represented an agreed modus operandi *for the parties, providing framework for orderly withdrawal of all foreign forces from the DRC — The DRC did not thereby recognize situation on ground as legal — Kampala and Harare Disengagement Plans did not change legal status of presence of Ugandan troops — Luanda Agreement authorized limited presence of Ugandan troops in border area — None of the aforementioned Agreements (save for limited exception in the Luanda Agreement) constituted consent by the DRC to presence of Ugandan troops on Congolese territory for period after July 1999.*

*

Self-defence in light of proven facts.

Question of whether Ugandan military action in the DRC from early August 1998 to July 1999 could be justified as action in self-defence — Ugandan High Command document of 11 September 1998 — Testimony before Porter Commission of Ugandan Minister of Defence and of commander of Ugandan forces in the DRC — Uganda regarded military events of August 1998 as part of operation "Safe Haven" — Objectives of operation "Safe Haven", as stated in Ugandan High Command document, not consonant with concept of self-defence — Examination of claim by Uganda of existence of tripartite anti-Ugandan conspiracy between the DRC, the ADF and the Sudan — Evidence adduced by Uganda lacking in relevance and probative value Article 51 of the United Nations Charter — No report made by Uganda to Security Council of events requiring it to act in self-defence — No claim by Uganda that it had been subjected to armed attack by armed forces of the DRC — No satisfactory proof of involvement of Government of the DRC in alleged ADF attacks on Uganda — Legal and factual circumstances for exercise of right of self-defence by Uganda not present.

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Findings of law on the prohibition against the use of force.

Article 2, paragraph 4, of United Nations Charter — Security Council resolutions 1234 (1999) and 1304 (2000) — No credible evidence to support allegation by DRC that MLC was created and controlled by Uganda — Obligations arising under principles of non-use of force and non-intervention violated by Uganda — Unlawful military intervention by Uganda in the DRC constitutes grave violation of prohibition on use of force expressed in Article 2, paragraph 4, of Charter.

* *

The issue of belligerent occupation.

Definition of occupation — Examination of evidence relating to the status of Uganda as occupying Power — Creation of new province of "Kibali-Ituri" by commander of Ugandan forces in the DRC — No specific evidence provided by the DRC to show that authority exercised by Ugandan armed forces in any areas other than in Ituri — Contention of the DRC that Uganda indirectly controlled areas outside Ituri administered by Congolese rebel groups not upheld by the Court — Uganda was the occupying Power in Ituri — Obligations of Uganda.

* *

Violations of international human rights law and international humanitarian law: contentions of the Parties.

Contention of the DRC that Ugandan armed forces committed wide-scale human rights violations on Congolese territory, particularly in Ituri — Contention of Uganda that the DRC has failed to provide any credible evidentiary basis to support its allegations.

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Admissibility of claims in relation to events in Kisangani.

Contention of Uganda that the Court lacks competence to deal with events in Kisangani in June 2000 in the absence of Rwanda — Jurisprudence contained in Certain Phosphate Lands in Nauru *case applicable in current proceedings — Interests of Rwanda do not constitute "the very subject-matter" of decision to be rendered by the Court — The Court is not precluded from adjudicating on whether Uganda's conduct in Kisangani is a violation of international law.*

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Violations of international human rights law and international humanitarian law: findings of the Court.

Examination of evidence relating to violations of international human rights law and international humanitarian law — Findings of fact — Conduct of UPDF and of officers and soldiers of UPDF attributable to Uganda — Irrelevant whether UPDF personnel acted contrary to instructions given or

exceeded their authority — Applicable law — Violations of specific obligations under Hague Regulations of 1907 binding as customary international law — Violations of specific provisions of international humanitarian law and international human rights law instruments — Uganda is internationally responsible for violations of international human rights law and international humanitarian law.

* *

Illegal exploitation of natural resources.

Contention of the DRC that Ugandan troops systematically looted and exploited the assets and natural resources of the DRC — Contention of Uganda that the DRC has failed to provide reliable evidence to corroborate its allegations.

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Findings of the Court concerning acts of illegal exploitation of natural resources.

Examination of evidence relating to illegal exploitation of Congolese natural resources by Uganda — Findings of fact — Conduct of UPDF and of officers and soldiers of UPDF attributable to Uganda — Irrelevant whether UPDF personnel acted contrary to instructions given or exceeded their authority — Applicable law — Principle of permanent sovereignty over natural resources not applicable to this situation — Illegal acts by UPDF in violation of the jus in bello *— Violation of duty of vigilance by Uganda with regard to illegal acts of UPDF — No violation of duty of vigilance by Uganda with regard to illegal acts of rebel groups outside Ituri — International responsibility of Uganda for acts of its armed forces — International responsibility of Uganda as an occupying Power.*

* *

Legal consequences of violations of international obligations by Uganda.

The DRC's request that Uganda cease continuing internationally wrongful acts — No evidence to support allegations with regard to period after 2 June 2003 — Not established that Uganda continues to commit internationally wrongful acts specified by the DRC — The DRC's request cannot be upheld.

The DRC's request for specific guarantees and assurances of non-repetition of the wrongful acts — Tripartite Agreement on Regional Security in the Great Lakes of 26 October 2004 — Commitments assumed by Uganda under the Tripartite Agreement meet the DRC's request for specific guarantees and assurances of non-repetition — Demand by the Court that the Parties respect their obligations under that Agreement and under general international law.

The DRC's request for reparation — Obligation to make full reparation for the injury caused by an international wrongful act — Internationally wrongful acts committed by Uganda resulted in injury to the DRC and persons on its territory — Uganda's obligation to make reparation accordingly — Question of reparation to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings.

* *

Compliance with the Court's Order on provisional measures.

Binding effect of the Court's orders on provisional measures — No specific evidence demonstrating violations of the Order of 1 July 2000 — The Court's previous findings of violations by Uganda of its obligations under international human rights law and international humanitarian law until final withdrawal of Ugandan troops on 2 June 2003 — Uganda did not comply with the Court's Order on provisional measures of 1 July 2000 — This finding is without prejudice to the question as to whether the DRC complied with the Order.

* * *

Counter-claims: admissibility of objections.

Question of whether the DRC is entitled to raise objections to admissibility of counter-claims at current stage of proceedings — The Court's Order of 29 November 2001 only settled question of a "direct connection" within the meaning of Article 80 — Question of whether objections raised by the DRC are inadmissible because they fail to conform to Article 79 of the Rules of Court — Article 79 inapplicable to the case of an objection to counter-claims joined to the original proceedings — The DRC is entitled to challenge admissibility of Uganda's counter-claims.

* *

First counter-claim.

Contention of Uganda that the DRC supported anti-Ugandan irregular forces — Division of Uganda's first counter-claim into three periods by the DRC: prior to May 1997, from May 1997 to 2 August 1998 and subsequent to 2 August 1998 — No obstacle to examining the first counter-claim following the three periods of time and for practical purposes useful to do so — Admissibility of part of first counter-claim relating to period prior to May 1997 — Waiver of right must be express or unequivocal — Nothing in conduct of Uganda can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu régime — The long period of time between events during the Mobutu régime and filing of Uganda's counter-claim has not rendered inadmissible Uganda's first counter-claim for the period prior to May 1997 — No proof that Zaire provided political and military support to anti-Ugandan rebel groups — No breach of duty of vigilance by Zaire — No evidence of support for anti-Ugandan rebel groups by the DRC in the second period — Any military action taken by the DRC against Uganda in the third period could not be deemed wrongful since it would be justified as

action in self-defence — No evidence of support for anti-Ugandan rebel groups by the DRC in the third period.

* *

Second counter-claim.

Contention of Uganda that Congolese armed forces attacked the premises of the Ugandan Embassy, maltreated diplomats and other Ugandan nationals present on the premises and at Ndjili International Airport — Objections by the DRC to the admissibility of the second counter-claim — Contention of the DRC that the second counter-claim is not founded — Admissibility of the second counter-claim — Uganda is not precluded from invoking the Vienna Convention on Diplomatic Relations — With regard to diplomats Uganda claims its own rights under the Vienna Convention on Diplomatic Relations — Substance of the part of the counter-claim relating to acts of maltreatment against other persons on the premises of the Embassy falls within the ambit of Article 22 of the Vienna Convention on Diplomatic Relations — The part of the counter-claim relating to maltreatment of persons not enjoying diplomatic status at Ndjili International Airport is based on diplomatic protection — No evidence of Ugandan nationality of persons in question — Sufficient evidence to prove attacks against the Embassy and maltreatment of Ugandan diplomats — Property and archives removed from Ugandan Embassy — Breaches of the Vienna Convention on Diplomatic Relations.

The DRC bears responsibility for violation of international law on diplomatic relations — Question of reparation to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings.

JUDGMENT

Present: *President* Shi; *Vice-President* Ranjeva; *Judges* Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; *Judges* ad hoc Verhoeven, Kateka; *Registrar* Couvreur.

In the case concerning armed activities on the territory of the Congo,

between

as Agent, Counsel and Advocate;

Mr. Lucian Tibaruha, Solicitor General of the Republic of Uganda,

as Co-Agent, Counsel and Advocate;

Mr. Ian Brownlie, C.B.E, Q.C., F.B.A., member of the English Bar, member of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, Member of the Institute of International Law,

Mr. Paul S. Reichler, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Bar of the District of Columbia,

Mr. Eric Suy, Emeritus Professor, Catholic University of Leuven, former Under-Secretary-General and Legal Counsel of the United Nations, Member of the Institute of International Law,

The Honourable Amama Mbabazi, Minister of Defence of the Republic of Uganda,

Major General Katumba Wamala, Inspector General of Police of the Republic of Uganda,

as Counsel and Advocates;

Mr. Theodore Christakis, Professor of International Law, University of Grenoble II (Pierre Mendès France),

Mr. Lawrence H. Martin, Foley Hoag LLP, Washington D.C., member of the Bar of the District of Columbia,

as Counsel;

Captain Timothy Kanyogonya, Uganda People's Defence Forces,

as Adviser,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 23 June 1999, the Democratic Republic of the Congo (hereinafter "the DRC") filed in the Registry of the Court an Application instituting proceedings against the Republic of Uganda (hereinafter "Uganda") in respect of a dispute concerning "acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity" (emphasis in the original).

In order to found the jurisdiction of the Court, the Application relied on the declarations made by the two Parties accepting the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of Uganda by the Registrar; and, pursuant to paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. By an Order of 21 October 1999, the Court fixed 21 July 2000 as the time-limit for the filing of the Memorial of the DRC and 21 April 2001 as the time-

VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW: FINDINGS OF THE COURT

205. The Court will now examine the allegations by the DRC concerning violations by Uganda of its obligations under international human rights law and international humanitarian law during its military intervention in the DRC. For these purposes, the Court will take into consideration evidence contained in certain United Nations documents to the extent that they are of probative value and are corroborated, if necessary, by other credible sources.

In order to rule on the DRC's claim, it is not necessary for the Court to make findings of fact with regard to each individual incident alleged.

206. The Court first turns to the DRC's claims that the Ugandan armed forces caused loss of life to the civilian population, committed acts of torture and other forms of inhumane treatment, and destroyed villages and dwellings of civilians. The Court observes that the report of the Special Rapporteur of the Commission on Human Rights of 18 January 2000 (E/CN/4/2000/42, para. 112) refers to massacres carried out by Ugandan troops in Beni on 14 November 1999. The Secretary-General in his Third Report on MONUC concluded that Rwandan and Ugandan armed forces "should be held accountable for the loss of life and the property damage they inflicted on the civilian population of Kisangani" (doc. S/2000/566 of 12 June 2000, para. 79). Security Council resolution 1304 (2000) of 16 June 2000 deplored "the loss of civilian lives, the threat to the civilian population and the damage to property inflicted by the forces of Uganda and Rwanda on the Congolese population". Several incidents of atrocities committed by Ugandan troops against the civilian population, including torture and killings, are referred to in the report of the Special Rapporteur of the Commission on Human Rights of 1 February 2001 (E/CN/4/2001/40, paras. 112, 148-151). MONUC's special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, paras. 19, 42-43, 62) contains much evidence of direct involvement by UPDF troops, in the context of the Hema-Lendu ethnic conflict in Ituri, in the killings of civilians and the destruction of their houses. In addition to particular incidents, it is stated that "[h]undreds of localities were destroyed by UPDF and the Hema South militias" (para. 21); "UPDF also carried out widespread bombing and destruction of hundreds of villages from 2000 to 2002" (para. 27).

207. The Court therefore finds the coincidence of reports from credible sources sufficient to convince it that massive human rights violations and grave breaches of international humanitarian law were committed by the UPDF on the territory of the DRC.

208. The Court further finds that there is sufficient evidence of a reliable quality to support the DRC's allegation that the UPDF failed to protect the civilian population and to distinguish between combatants and non-combatants in the course of fighting against other troops, especially the FAR. According to the report of the inter-agency assessment mission to Kisangani (established pursuant to paragraph 14 of Security Council resolution 1304 (2000) (doc. S/2000/1153 of 4 December 2000, paras. 15-16)), the armed conflict between Ugandan and Rwandan forces in Kisangani led to

> "fighting spreading into residential areas and indiscriminate shelling occurring for 6 days . . .
>
> Over 760 civilians were killed, and an estimated 1,700 wounded. More than 4,000 houses were partially damaged, destroyed or made uninhabitable. Sixty-nine schools were shelled, and other public buildings were badly damaged. Medical facilities and the cathedral were also damaged during the shelling, and 65,000 residents were forced to flee the fighting and seek refuge in nearby forests."

MONUC's special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, para. 73) states that on 6 and 7 March 2003,

> "during and after fighting between UPC [Union des patriotes congolais] and UPDF in Bunia, several civilians were killed, houses and shops were looted and civilians were wounded by gunshots . . . Stray bullets reportedly killed several civilians; others had their houses shelled." (Para. 73.)

In this context, the Court notes that indiscriminate shelling is in itself a grave violation of humanitarian law.

209. The Court considers that there is also persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district. The reports of the Special Rapporteur of the Commission on Human Rights (doc. A/55/403 of 20 September 2000, para. 26 and E/CN/4/2001/40 of 1 February 2001, para. 31) state that the Ugandan presence in Ituri caused a conflict between the Hema (of Ugandan origin) and the Lendu. According to these reports, land was seized from the Lendu by the Hema with the encouragement and military support of Ugandan soldiers. The reports also state that the confrontations in August 2000 resulted in some 10,000 deaths and the displacement of some 50,000 people, and that since the beginning of the conflict the UPDF had failed to take action to put an end to the violence. The Sixth Report of the Secretary-General on MONUC (doc. S/2001/128 of 12 February 2001, para. 56) stated that "UPDF troops stood by during the killings and failed to protect the civilians". It is also indicated in MONUC's special

report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, para. 6), that

> "Ugandan army commanders already present in Ituri, instead of trying to calm the situation, preferred to benefit from the situation and support alternately one side or the other according to their political and financial interests".

The above reports are consistent in the presentation of facts, support each other and are corroborated by other credible sources, such as the HRW Report "Ituri: Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo", July 2003 (available at http://hrw.org/reports/2003/ituri0703/).

210. The Court finds that there is convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control. The Fifth Report of the Secretary-General on MONUC (doc. S/2000/1156 of 6 December 2000, para. 75) refers to the confirmed "cross-border deportation of recruited Congolese children from the Bunia, Beni and Butembo region to Uganda". The Eleventh Report of the Secretary-General on MONUC (doc. S/2002/621 of 5 June 2002, para. 47) points out that the local UPDF authorities in and around Bunia in Ituri district "have failed to prevent the fresh recruitment or re-recruitment of children" as child soldiers. MONUC's special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, para. 148) refers to several incidents where Congolese children were transferred to UPDF training camps for military training.

211. Having examined the case file, the Court considers that it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.

212. With regard to the claim by the DRC that Uganda carried out a

deliberate policy of terror, confirmed in its view by the almost total impunity of the soldiers and officers responsible for the alleged atrocities committed on the territory of the DRC, the Court, in the absence of specific evidence supporting this claim, does not consider that this allegation has been proven. The Court, however, wishes to stress that the civil war and foreign military intervention in the DRC created a general atmosphere of terror pervading the lives of the Congolese people.

*

213. The Court turns now to the question as to whether acts and omissions of the UPDF and its officers and soldiers are attributable to Uganda. The conduct of the UPDF as a whole is clearly attributable to Uganda, being the conduct of a State organ. According to a well-established rule of international law, which is of customary character, "the conduct of any organ of a State must be regarded as an act of that State" (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, p. 87, para. 62). The conduct of individual soldiers and officers of the UPDF is to be considered as the conduct of a State organ. In the Court's view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda. The contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit.

214. It is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority. According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.

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215. The Court, having established that the conduct of the UPDF and of the officers and soldiers of the UPDF is attributable to Uganda, must now examine whether this conduct constitutes a breach of Uganda's international obligations. In this regard, the Court needs to determine the rules and principles of international human rights law and international humanitarian law which are relevant for this purpose.

216. The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and interna-

tional human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In this Advisory Opinion the Court found that

> "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law." (*I.C.J. Reports 2004*, p. 178, para. 106.)

It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", particularly in occupied territories (*ibid.*, pp. 178-181, paras. 107-113).

217. The Court considers that the following instruments in the fields of international humanitarian law and international human rights law are applicable, as relevant, in the present case:

— Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907. Neither the DRC nor Uganda are parties to the Convention. However, the Court reiterates that "the provisions of the Hague Regulations have become part of customary law" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 172, para. 89) and as such are binding on both Parties;
— Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949. The DRC's (at the time Republic of the Congo (Léopoldville)) notification of succession dated 20 February 1961 was deposited on 24 February 1961, with retroactive effect as from 30 June 1960, the date on which the DRC became independent; Uganda acceded on 18 May 1964;
— International Covenant on Civil and Political Rights of 19 December 1966. The DRC (at the time Republic of Zaire) acceded to the Covenant on 1 November 1976; Uganda acceded on 21 June 1995;
— Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. The DRC (at the time Republic of

Zaire) acceded to the Protocol on 3 June 1982; Uganda acceded on 13 March 1991;
— African Charter on Human and Peoples' Rights of 27 June 1981. The DRC (at the time Republic of Zaire) acceded to the Charter on 20 July 1987; Uganda acceded on 10 May 1986;
— Convention on the Rights of the Child of 20 November 1989. The DRC (at the time Republic of Zaire) ratified the Convention on 27 September 1990 and Uganda on 17 August 1990;
— Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 25 May 2000. The Protocol entered into force on 12 February 2002. The DRC ratified the Protocol on 11 November 2001; Uganda acceded on 6 May 2002.

218. The Court moreover emphasizes that, under common Article 2 of the four Geneva Conventions of 12 August 1949,

> "[i]n addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

219. In view of the foregoing, the Court finds that the acts committed by the UPDF and officers and soldiers of the UPDF (see paragraphs 206-211 above) are in clear violation of the obligations under the Hague Regulations of 1907, Articles 25, 27 and 28, as well as Articles 43, 46 and 47 with regard to obligations of an occupying Power. These obligations are binding on the Parties as customary international law. Uganda also violated the following provisions of the international humanitarian law and international human rights law instruments, to which both Uganda and the DRC are parties:

— Fourth Geneva Convention, Articles 27 and 32 as well as Article 53 with regard to obligations of an occupying Power;

— International Covenant on Civil and Political Rights, Articles 6, paragraph 1, and 7;
— First Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2;
— African Charter on Human and Peoples' Rights, Articles 4 and 5;

— Convention on the Rights of the Child, Article 38, paragraphs 2 and 3;
— Optional Protocol to the Convention on the Rights of the Child, Articles 1, 2, 3, paragraph 3, 4, 5 and 6.

220. The Court thus concludes that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.

221. The Court finally would point out that, while it has pronounced on the violations of international human rights law and international humanitarian law committed by Ugandan military forces on the territory of the DRC, it nonetheless observes that the actions of the various parties in the complex conflict in the DRC have contributed to the immense suffering faced by the Congolese population. The Court is painfully aware that many atrocities have been committed in the course of the conflict. It is incumbent on all those involved in the conflict to support the peace process in the DRC and other peace processes in the Great Lakes area, in order to ensure respect for human rights in the region.

* * *

ILLEGAL EXPLOITATION OF NATURAL RESOURCES

222. In its third submission the DRC requests the Court to adjudge and declare:

> "3. That the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources, by pillaging its assets and wealth, by failing to take adequate measures to prevent the illegal exploitation of the resources of the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:
>
> — the applicable rules of international humanitarian law;
> — respect for the sovereignty of States, including over their natural resources;
> — the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;
> — the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters."

223. The DRC alleges that, following the invasion of the DRC by

Reflections on the Law of Occupation: Afghanistan and Iraq

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by David Wallace | Feb 7, 2022

A recent *New York Times* article discussed, in part, the occupations of Iraq and Afghanistan, raising important, yet underexplored, questions about occupations under the law of armed conflict (LOAC). The article focuses primarily on the U.S. armed forces' transition from a combat mission in Iraq to one meant to "advise, assist and enable" Iraqi forces fighting the remnants of ISIS.

However, the article's characterization of the occupations in Iraq and Afghanistan stood out. Specifically, the article stated, "Thursday's announcement comes just months after the withdrawal from Afghanistan following a 20-year occupation that Mr. Biden said the United States could no longer justify." Concerning Iraq, the article quoted a representative from an Iranian-backed militia group in Iraq stating, "[i]f U.S. forces do not withdraw at the end of the year, it can be defined only as an occupation."

As the conflicts in Afghanistan and Iraq are either ending or transforming, it is important and timely to reflect upon the application of the LOAC in those conflicts. The article mentioned above raises issues about "occupations" in Afghanistan and Iraq. This post provides a brief

orientation to occupations under the LOAC and then discusses the contexts of Afghanistan and Iraq while addressing specific comments in the *New York Times* article.

The Law of Occupation: A Brief Orientation

The law of belligerent occupation is a discrete subset of the LOAC. It is embodied in select provisions of the 1899 and 1907 Hague Regulations and the 1949 Fourth Geneva Convention. It is also reflected in customary international law. Other treaties address aspects of the law of occupation including the 1977 Additional Protocol I and the 1954 Hague Cultural Property Convention as well as others. For the United States, as well as other States, occupation law is fleshed out further in military regulations and policy. Finally, international human rights law is applicable and relevant to occupations; however, it will not be addressed in this post in any meaningful way.

The portions of the Hague Regulations and the Fourth Geneva Convention addressing occupations emphasize different underlying purposes. Formulated before two world wars, the Hague Regulations focus on property rights and interests of States. As noted by Professor Yoram Dinstein, "[a]lthough the life and liberty of inhabitants are also safeguarded in the Hague Regulations, this is done in a more abstract manner." (at 10) The Fourth Geneva Convention supplements the Hague Regulations. Not surprisingly, the Fourth Geneva Convention, adopted in the aftermath of the atrocities committed in occupied territories in World War II, rewrote, expanded, and transformed the law of occupation emphasizing humanitarian aims.

Articles 42 and 43 of the Hague Regulations provide the organizing principles of the law of occupation. Article 42 provides the trigger and scope of occupation law. Specifically, it provides that territory is occupied when "it is actually placed under the authority of the hostile army." Longstanding U.S. military doctrine restated that standard, observing that occupation "is invasion plus taking firm possession of enemy territory for the purpose of holding it." (para. 352)

The existence of an occupation is a matter of fact. Characterizations by the occupying or occupied powers are not controlling. The scope of an occupation is limited to the territory where authority has been established and can be exercised. Article 43 provides as follows: "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Put differently, the law of occupation rests on the fundamental premise that an occupation is a temporary arrangement and any alteration of the existing order should be minimal.

The Fourth Geneva Convention was the first multilateral treaty devoted to the protection of the civilian population. If the law of occupation is conceived as a trusteeship (which some respected commentators reject because it is not a relationship built on trust), the Fourth Geneva Convention makes civilians and the civilian population the primary beneficiaries of the trust. Article 27 of the Fourth Geneva Convention specifies some of the safeguards for protected persons in occupied territories. They are, in part, as follows: “[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.”

Given the above, what is the best way to characterize the occupations in Afghanistan and Iraq?

Afghanistan

As a threshold matter, the occupation *did not* last twenty years as asserted in the *New York Times* article. The United States, with the support of the British, began a bombing campaign against Taliban-controlled Afghanistan on or about October 7, 2001. In the early phase of this international armed conflict, U.S. Special Forces partnered with the Northern Alliance and ethnic Pashtun anti-Taliban forces in their fight against the Taliban. The first wave of conventional forces arrived later in October. The United Nations invited major Afghan actors, not including the Taliban, to a conference in Bonn, Germany. On 5 December 2001, the parties signed the Bonn Agreement establishing an interim government led by Hamid Karzai and endorsed by United Nations Security Council Resolution 1383. On 20 December 2001, the United Nations Security Council authorized an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas.

For the limited period of November and December, the United States and its coalition partners may have exercised effective control over some portions of Afghanistan triggering occupation law in those areas. However, to the degree this happened at all, it was limited. Very few U.S. and coalition forces featured in the invasion of Afghanistan. And, those involved either fought the Taliban and al Qaeda or supported others like the Northern Alliance that were doing the same. Additionally, once a new Afghan government took control and the armed conflict transformed from an international to a non-international one, any occupation ended.

The bottom line is that the occupation of Afghanistan did not last anywhere near 20 years. For the overwhelming majority of that time, the United States and other States were there only with the consent of the Afghan authorities or an Afghan government. Accordingly, occupation law did not apply for most of that time.

From the perspective of legal policy, the approach taken by the United States and its coalition partners was arguably prudent. That is, they expeditiously turned control of the government over to the Afghans. In doing so, they did not become occupying powers for any lengthy period or in any significant way. Having said that, there has been and will continue to be sharp criticism over what went wrong in Afghanistan for the past twenty years. With the rapid collapse of the Afghan government and military and the chaotic withdrawal of U.S. and fortunate Afghans, there is a lingering bitter taste over this conflict. But, it is important to highlight the myriad of shortcomings in Afghanistan were not related to occupation law. Iraq, on the other hand, was very different.

Iraq

By way of background, on or about March 19, 2003, coalition forces launched cruise missiles and stealth aircraft sorties to decapitate the leadership of the Iraqi Baathist regime. At approximately the same time, coalition ground forces began to move into Iraq. These forces, supported by a robust air campaign and special operations forces, were able to overwhelm and defeat Iraqi forces and capture major cities in just a few weeks. U.S. President Bush declared the end of major combat operations on May 1, 2003 from the deck of the aircraft carrier USS Abraham Lincoln.

Unlike Afghanistan, there was no question that an occupation was triggered in Iraq. Although there was a time lapse between the invasion and occupation, it did not last long. Ambassador Paul “Jerry” Bremer, administrator for the occupation government—the Coalition Provisional Authority (CPA)—arrived in Baghdad on May 12, 2003 with a broad mandate and plenary authority. The occupation was scheduled to end on June 30, 2004, with the assumption of full responsibility by an interim government of Iraq. The CPA transferred authority to that interim government on June 28, 2004. After that point, the continued presence of coalition forces in Iraq and the scope of their activities was based upon an invitation of the new Iraqi Government. As a practical matter though, little changed in the immediate aftermath of the termination of the occupation in terms of security and violence.

The causes and consequences of the Iraq occupation’s shortcomings are well documented. They include, but are not limited to, poor planning and execution, inadequate occupation forces, and ill-conceived policies and practices. Two early decisions were exceptionally noteworthy and controversial. In May 2003, Coalitional Provisional Authority Order Number 1: De-Ba’athification of Iraqi Society purged some 30,000 senior Ba’ath party members from public employment. That same month, Coalition Provisional Order Number 2: Dissolution of Entities dissolved government entities including the military, intelligence, and national security organizations.

Bremer’s approach to de-Ba’athification excluded Iraqi civil servants who had valuable skills, historical knowledge, and experience. Overnight, the CPA dismissed 120,000 Iraqis from their positions. Arguably, even more detrimental to the success of the Iraq occupation was an

edict targeting the military and intelligence services. Bremer gave approximately 400,000 pink slips to military personnel. Beyond antagonizing the targets of the orders, a large pool of well-trained fighters and security personnel were motivated and incentivized to fight against the occupying powers or support those that did. It is important to note that occupying powers have authority to issue orders, regulations, and legislation as part of their mandate to administer the occupied territory. This authority includes expunging certain laws. But, having the authority to make or change laws does not equate to making good decisions.

The *New York Times* article comment that, "[i]f U.S. forces do not withdraw at the end of the year, it can be defined only as an occupation" is incorrect. The United States is not an occupying power and has not been an occupying power since 2004 when the CPA returned authority to the Iraqi government. United States forces have been and continue to be in Iraq only with the consent of Iraq. The term and concept "occupation" has specific legal meaning, and consequences. Used colloquially and imprecisely, the term and concept of an "occupation" lose its normative significance under the law of armed conflict leading to confusion.

It is impossible to overstate the importance of planning and, relatedly, appreciating the magnitude of the obligations undertaken as an occupying power. Candidly, to the degree that authority can be returned to the sovereign power as soon as possible or never assumed at all, it is usually better for the occupying power. To undertake the obligations to restore order, governance, economic activity, and basic services quickly and with limited resources is a recipe for failure. This is particularly true when the occupied State is significantly degraded as with Iraq.

Regarding Iraq, the U.S. Department of State undertook exhaustive planning through its "The Future of Iraq Project." Inspired by a conference at Columbia University in the fall of 2001, the effort was broad, voluntary, and melded the talents, experiences, and expertise of Iraqis in the service of a new Iraq. The Future of Iraq Project was an interagency effort that included seventeen federal agencies. When completed, it had assembled 240 Iraqis representing every ethnic group and major political party to address tough issues relating to education, health care, sanitation, agriculture, infrastructure, energy, security, governance, rule of law, and public finance among others. Regrettably, for a variety of reasons, the findings of The Future of Iraq Project did not contribute in a meaningful way to the occupation and reconstruction efforts.

There are certainly other hard lessons to learn from the occupation of Iraq including: the relationship and lack of coordination between the U.S. military and the civilian leaders of the occupation; financial mismanagement and corruption; Abu Ghraib and its aftermath; security lapses; and failure to provide basic services like electricity, health care, and education among many others. These and other issues need to be adequately planned and resourced if an occupying power is to meet its obligations under LOAC.

There are also underexplored, thought-provoking questions raised by Iraq and other occupations. For example, the question of transformative occupation remains one of the enduring fault lines of the law of occupation. As eloquently framed by Sir Adam Roberts, “[w]ithin the existing framework of international law, is it legitimate for an occupying power, in the name of creating the conditions for a more democratic and peaceful state, to introduce fundamental changes in the constitutional, social, economic, and legal order within an occupied territory?” Put in a slightly different manner, how does one justify fundamentally changing an occupied State considering the clear conservationist principles and rules embodied in the Hague Regulations? Relatedly, what, if any limitations, are there on the United Nations Security Council taking actions that derogate from the law of occupation in a given case or issue? These, among many other, challenging issues were raised in the occupation of Iraq.

Conclusion

The term and concept of “occupation” has a well-defined meaning and understanding under LOAC. Once triggered, usually in the aftermath of an invasion, an array of obligations are required by LOAC. Accordingly, care should be taken to avoid terminological imprecision. Afghanistan, and to a much greater extent Iraq, provided a plethora of lessons to be learned by future occupying powers. Difficult questions about the application of occupation law remain unresolved. But, given a future where more international conflict is likely, it is an area of LOAC that needs more attention and exploration.

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Israel – Hamas 2023 Symposium – Siege Law and Military Necessity

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by Geoff Corn, Sean Watts | Oct 13, 2023

It is no surprise that the debate over the legality of Israeli measures directed against Hamas is already gaining momentum. Public discussion has focused, at least for now, on Israeli Defense Minister Gallant's declaration that, "no electricity, no food, no water, no fuel …" would enter Gaza. Equally unsurprising is that the legality of siege tactics and cutting of resources for the civilian population have become the basis for assertions that Israel is committing a war crime.

From a strategic perspective, Israel's proclaimed siege of Gaza is undoubtedly intended to demonstrate resolve to respond to the Hamas attacks of 7 October. From a legal, moral, and operational perspective, this action resurrects the enduring—albeit sporadically dormant—relevance of siege operations to warfare. While there will be debates related to the legality of this tactic, one thing is clear: no matter how compelling the interest in signaling responsive resolve, the use of siege tactics must comply with the law of armed conflict. Or, to put it differently, there is no strategic necessity "override" to the legal limits on the execution of military operations.

But this also raises what we believe is another important aspect of a legality debate that will almost certainly gain substantial momentum as this operation continues: is the focus on legal complexities related to siege operations a recipe for missing the proverbial forest for the trees? These complexities are certainly important and worthy of analysis. Indeed, we will offer some of our own perspectives below.

However, we also believe that no matter where one comes out on the complicated issues associated with such analysis—issues such as the type of conflict and the applicability of specific treaty provisions, the anticipated military advantage motivating the use of siege tactics, the underlying intent for siege measures, and the impact of other measures implemented to facilitate humanitarian relief on the legality of a siege—a supplemental and productive question may be to ask whether the Israeli Defense Forces are complying with universally agreed upon aspects of the law of armed conflict including that of military necessity.

Is Siege Necessary?

Siege—or encirclement as it is often known in modern military doctrine—remains a valuable tool in the conduct of hostilities regardless of the time, place, or character of conflict. Despite their ancient origins, archaic imagery, and often notorious effects, siege operations remain highly relevant to the conduct of warfare. Modern war is replete with resorts to siege. Recent conflicts in the Balkans, Iraq, Syria, and Ukraine, to name only a few, have featured intense and prolonged efforts to surround, isolate, and force into submission enemy forces.

Although there are many reasons to employ siege, the most common may be to avoid costly direct assaults into densely populated or built-up areas. No operation is more complicated, dangerous, and challenging than conducting combined arms maneuver in urban areas. Attack operations usually call for friendly-to-enemy force ratios of three or even five-to-one. In contrast, in the right circumstances, siege operations can be conducted on a one-to-one force ratio. In addition to requiring a commitment of fewer forces, sieges often spare friendly forces from the almost inevitable and hellish small-unit urban clearing operations that are so costly in terms of personnel, material, and time. And, ideally, siege may spare the civilian population from some of the inevitable consequences of close combat operations in the urban battle-space.

To achieve its intended effect, the military *sine qua non* of successful siege is isolation. To force an enemy into submission by resort to deprival rather than by destruction or capture requires cutting them off from all forms of support: reinforcement, supply, sustenance, and ideally communications. Accordingly, for a siege to succeed, isolation of the enemy must be as complete as possible. In addition to the physical and moral isolation that successful siege has required, modern military doctrine calls for electronic isolation. Both ancient and modern experiences have shown that almost any compromise of these prescribed forms of isolation

compromises the tactical effect of siege operations. One need look no further than the complicated, well-resourced, and horrific Hamas attacks of 7 October to witness the results of incomplete isolation efforts.

Despite its tactical and operational advantages, siege is not always preferred. It has often signaled a failure of offensive operations or stalemate. Still, that Israel would resort to tactics aligned with the general concept of siege so soon after the Hamas attack is unsurprising. Encircling Gaza to isolate Hamas and deprive its armed operatives of all forms of external military and other support, for now, seems preferable to destroying that capability by way of combined arms maneuver operations in some of the world's most complex urban terrain. And at present, the Israel Defense Forces appear well structured and equipped to inflict military costs on Hamas during its isolation by remote means such as air attacks and indirect fires rather than by ground assault.

Notwithstanding its unequivocal political rhetoric, it is unclear whether Israel will be able to fully and effectively siege Gaza. Israel can no doubt greatly restrict the flow of support into Gaza. But it is doubtful it can impose the near absolute isolation so crucial for an effective siege. A significant portion of Gaza does not border Israel, most notably the southern border Gaza shares with Egypt. Cutting off or interdicting supplies of weapons, commerce, food, and water from territory or waters Israel controls will greatly reduce support to Gaza. But it is doubtful they can do so to the extent required to compel Hamas into submission. The undeniable reality that Hamas will prioritize provision of support to its personnel and operations from whatever limited resources do make their way into Gaza exacerbates the difficulty of a successful siege. Moreover, other States, including through regional arrangements, appear poised to continue to provide aid to Gaza notwithstanding the current security situation.

Siege Law

One of us has previously outlined law of armed conflict considerations applicable to siege during international armed conflict. Does this law apply to the ongoing armed conflict between Israel and Hamas? This is a complex question. Obviously, Gaza is not a sovereign State and Hamas is not an organ of a State. However, some continue to assert the law of international armed conflict applies to this situation because Gaza is functionally occupied. We disagree with this position and find it perplexing how an area putatively subject to occupation is now on the verge of being "re-occupied."

But setting aside this debate, while the character of an armed conflict will have a controlling impact on specific treaty obligations applicable to operations, including siege operations, the *fundamental* assessment of siege legality is similar in both international and non-international armed conflicts. Does military necessity justify it? Is the intent of cutting off access to resources intended to weaken the enemy armed forces? Has the party imposing the siege

considered and implemented all operationally feasible measures to mitigate the adverse consequences on the civilian population? Does the anticipated military degradation of enemy capability outweigh the foreseeable adverse effects on the civilian population?

In this regard, the context of a siege does little to alter the operation of the general and relevant law of armed conflict. That body of law regulates targeting operations carried out during siege similarly to other contexts. For example, the obligation to distinguish combatants from civilians and military objectives from civilian objects, the requirement to implement all feasible precautions to mitigate civilian risk, and the duty to evaluate foreseeable civilian harm against anticipated military advantage apply in either their conventional or customary forms to all types of armed conflicts. And methods of war and weapons prohibited *per se* in other contexts of international armed conflict remain so during siege.

Yet the law applicable to international armed conflicts also includes select rules specific to siege or similar situations involving isolation and control. The 1907 Hague Regulations specifically mention siege when they require a besieging force to spare "as far as possible" certain buildings not used for military purposes. Notably, the same provision also requires a besieged belligerent "to indicate the presence of such buildings or places by distinctive visible signs."

Though not exclusive to siege, law of armed conflict rules prohibiting starvation of the civilian population as a method of warfare assume special significance—and comparable interpretive difficulty—during siege. A widely ratified treaty provision codifies this rule and there appears to be broad agreement that measures implemented *for the purpose* of starving civilians are prohibited as a matter of universal custom as well. However, debate swirls whether and at what point incidental starvation—starvation designed and carried out to force enemy armed forces into submission but also inevitably and foreseeably starves civilians—is prohibited.

The operational effect of admitting such a prohibition is potentially enormous. While each view is legally defensible, siege, as understood and prescribed by military doctrine, would prove nearly impossible were the prohibition interpreted to include *all* incidental starvation or deprivation of other resources used by the civilian population. Furthermore, prohibiting siege *whenever* it would have such a foreseeable incidental impact on civilians would create a powerful incentive for a defending force to comingle its personnel and assets in the most densely populated civilian areas, a tactic that undermines the efficacy of implementing distinction and proportionality obligations by the attacking force and inevitably exacerbates civilian risk irrespective of whether there is a siege.

Ultimately, no matter the nature of the armed conflict, a military commander contemplating "laying siege" to the enemy must ensure any such measures account for the charge to take "constant care" to mitigate, as much as feasible, the suffering of the civilian population.

Operationally, this translates to a requirement to implement all operationally feasible measures to facilitate humanitarian relief without compromising the anticipated military advantage, and to loosen or terminate any siege when the harm to civilians is assessed as excessive in relation to the anticipated military advantage.

As a result, siege clearly implicates the issue of civilian access to humanitarian assistance. The Fourth Geneva Convention of 1949, applicable to international armed conflicts, includes obligations to "endeavor to" permit specified relief and humanitarian assistance to certain categories of civilians. In the context of belligerent occupation, in which a party enjoys effective control and exercises authority over territory and a population the Fourth Convention expands the obligation to provide or admit relief significantly. However, in situations of active hostilities when the area in need of humanitarian assistance is under the control of the enemy, the extent to which a party, especially as besieging commander, must allow relief to pass to the besieged area is fraught with legal and operational complexities. In some cases, deprivation of such access may be inconsistent with both military necessity and the notion of constant care. At the same time, allowing such access when it will impede combat operations or inevitably lend advantage to enemy forces is not required. But the line between these two extremes remains blurry and subject to debate; or, phrased differently, what amounts to unlawful denial of access is uncertain. By one view, a besieging force must not arbitrarily deny relief and must offer reasoned explanations for denials. By another view, the prerogative to admit or deny relief remains, at its heart, a matter of choice and a good faith determination for the besieging party. Still, there is common ground between these views; at minimum, there must be military necessity to deny such access in any situation.

Others have already outlined the case for a law of siege applicable to both international and non-international armed conflicts, although the legal methodology of some conclusions, particularly concerning emerging interpretive and customary international law claims are debatable. As noted above, we agree with the general view that many rules applicable to siege in international armed conflict also find life in international law applicable to non-international armed conflict. However, for now, we suggest that more fundamental and productive legal considerations can be undertaken with respect to the role of military necessity in regulating siege.

Military Necessity

Whether in offensive, defensive, or siege operations, belligerents must assess whether *every* tactic employed is justified by military necessity. Although at times misused and even abused as a rationale for clearly unlawful conduct in war, correctly understood, military necessity remains the most fundamental legal restraint on military operations. Only those acts intended to bring about the enemy's submission are justified in war. Acts that exceed what is anticipated to achieve enemy submission or bear no connection to achieving military

advantage are always illegitimate. Military necessity is, in this sense, a free-standing check on all operations. It is also an essential prism through which legal restraints on military operations, such as those we discussed above, can best be understood.

It is an article of faith that measures justified by military necessity must also be balanced against the principle of humanity. But we suggest that this inquiry is often of limited operational utility. First, the notion of humanity is arguably integrated into the notion of military necessity and the law of armed conflict rules that flow from it. Military necessity as a justification, and like all other justifications (self-defense, defense of others, general necessity) is based on a simple premise that any harm produced by a measure serves a "greater good." In the military context, this "greater good" is bringing about the enemy's submission. As a justification, military necessity renders legal what in other circumstances would be illegal: intentional killing and infliction of injury, the infliction of incidental civilian death or injury or destruction of civilian property, capture and deprivation of liberty, requisition of private property, etc. But infliction of such harm *without* the justification provided by military necessity is unjustified, and as a result inhumane.

Balancing military necessity against humanity also suffers from the fact that humanity is a concept that is both broad and vague at the same time. This is especially true in relation to the conduct of hostilities, at the heart of which is the use of combat power and other tactics, like siege, to weaken and defeat the enemy. It is often unclear what humanity, as a free-standing consideration, means and demands in this context. Translating it into operational and tactical measures is exceedingly complex and loaded with operational peril.

This is why we believe that a more helpful companion to military necessity, including with respect to evaluating siege operations, may be the notion of "constant care," also adopted in the first paragraph of Article 57 of Additional Protocol I. That article appears alongside law of armed conflict targeting precautions and has been increasingly (and distressingly) loaded with far greater doctrinal demands than likely intended by States. But it is noteworthy that its mandate is broad in scope, and it remains useful as a guiding concept. "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." This mandate covers every aspect of military operational planning and mission execution, not just conducting attacks. Furthermore, it is readily translatable into operational and tactical action. And finally, it genuinely complements military necessity.

How? First, it is premised on the expectation that whatever measures are being employed have been *prima facie* justified by military necessity. It then counsels identifying and implementing all feasible measures to mitigate civilian risk and suffering *that do not* compromise the need to take those measures. This approach to assessing operational and tactical measures, including during siege, should be demanded of all combat leaders, no matter how senior or junior in rank. They must do what is necessary to defeat the enemy and must also mitigate civilian risk and suffering.

Returning to the prospect of an Israeli siege of Gaza and its military necessity, evaluating the intent to “signal resolve” can be misleading. Although a show of resolve is no doubt useful to bolster domestic or even international support for a siege, military necessity is usually understood to require a more concrete operational justification than merely confirming a belligerent’s level of determination to win. When assessing legitimacy, military necessity inquiries require more precise assessments of the actual measures imposed, not just “siege” as a general concept. Isolating an enemy in order to facilitate attack or to compel capitulation is certainly justified by military necessity, as is depriving the enemy of essential resources like food, water, and electricity.

However, imposing such deprivations to inflict suffering or retribution on the civilian population is not. Nor would the justification of military necessity extend to inflicting that suffering as a foreseeable consequence of weakening the enemy when the impact on the enemy is anticipated as only minimal or nominal while the suffering inflicted on civilians is expected to be substantial.

In the current debate related to siege tactics, the value of such an approach seems obvious. No matter where one comes down on debates whether siege, as a general proposition or with respect to individual doctrinally prescribed measures, is legal, we should start by asking, what is the military necessity for the measures imposed? If there is no credible justification, the measure is invalid. If there is, the next question is whether there is anything feasible that can be implemented to mitigate the suffering of civilians that will result.

Consider two specific measures that have caught the international community’s attention: cutting of power to Gaza; and cutting off water. When an enemy relies on power for a wide array of capabilities, cutting it off, whether by attack or by a non-violent measure, is clearly justified by military necessity. Indeed, if Hamas relied on a power generation station in Gaza instead of in Israel, that station would almost certainly be a high value military objective. Nor would the justification of military necessity in most cases be negated by the incidental impact on civilians. Meanwhile, devoting constant care to the effects of cutting power on the civilian population may go a long way toward reducing harm.

Deprivation of water seems to us to be quite different. First, it is unclear how cutting off access to all water in Gaza is justified by military necessity. Assuming for argument’s sake that it is intended to deprive sustainment to Hamas fighters—an effect justified by military necessity—that impact seems highly speculative. Cutting off water into Gaza will not result in no water being available. There are certainly some existing resources. But those resources will almost certainly be prioritized for Hamas personnel, leaving the civilians to suffer. Furthermore, any hypothetical necessity is negated by the balance between the negligible and speculative military advantage the measure will produce and the widespread suffering to civilians it will inflict. As a result, even if military necessity is assessed as justifying this

measure, the certainty of the civilian suffering it will produce necessitates implementing measures to alleviate that suffering, to include working in good faith to facilitate provision of humanitarian assistance to the population.

Thus, no matter how this armed conflict is characterized, or no matter where one comes down on extension of rules adopted to regulate international armed conflict to the context of non-international armed conflict, a foundational approach to all aspects of military operations serves both humanitarian and operational interests. No measure is operationally justified absent military necessity, and when such measures produce a foreseeable adverse impact on civilians, the commander bears an obligation to consider and implement feasible measures to mitigate that risk. These core considerations are not suspended as the result of the "just cause" being prosecuted, or as the result of confronting an enemy whose forces systemically engage in blatant violations of the law. Instead, framing all operational decisions and interpreting applicable rules consistently with this equation remains the *sine qua non* of a truly professional force led by genuinely responsible commanders.

Concluding Thoughts

Sieges are harsh and have produced some of warfare's most dire and distressing military and humanitarian consequences. Correctly understood, siege law is perhaps comparably harsh and may even be out of touch with modern sensitivities and sensibilities. Although difficult to reconcile with the clear military imperative of siege operations, emerging views on the legality of incidental civilian starvation and other methods of isolating and weakening the enemy armed forces that seek to soften siege operations are entirely understandable from a humanitarian perspective. They may yet find traction in the slow, but still reactive process of law of armed conflict formation and development.

But without intending to displace or to marginalize clearly applicable rules of the law of armed conflict during siege, we have suggested that a productive approach to scrutinizing siege operations lies in considering the imperatives of military necessity and the constant care notion both as free-standing considerations and as a lens through which to interpret applicable rules. Applying these principles may lead to outcomes that are difficult to reconcile with the general appeals to prevent civilian suffering, appeals that may often lead to the strategic decision to forego what is legally permissible. And while aversion to civilian suffering must constantly influence decisions at every level of military operations, it is equally important not to lose sight of the fundamental goal of such operations: to bring the enemy armed forces into submission in the most efficient way possible. Whether and for how long Israeli commanders subject Gaza to siege tactics is yet to be seen, but the forces massing along the border will have a clear mission if they are ordered to enter Gaza, one that any veteran of combined arms operations will understand: close with and destroy your enemy by fire and maneuver. Weakening that enemy through isolation and deprivation unquestionably

contributes to accomplishing that mission, and we should be cautious about the law's balance so far to the side of civilian protection that it significantly undermines the ability to fight and win.

***

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What is the rule of proportionality, and is it being observed in the Israeli siege of Gaza?

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More than a month after Hamas fighters killed 1,400 Israelis in a shock assault, bombs continue to fall on the Gaza Strip in reprisal Israeli attacks.

The aerial campaign has left a heavy death toll – the health authority in the Hamas-run enclave has put the total number of Palestinians killed in excess of 10,000 – leading to questions over whether the response by Israel has been proportionate.

"Proportionality" has a place in what is described as the "laws of war." The Conversation turned to Robert Goldman, an expert on international humanitarian law at American University Washington College of Law, for guidance on some of the issues.

What are the 'laws of war'?

The laws of war, also known as international humanitarian law (IHL), consist of the four 1949 Geneva Conventions, their two Additional Protocols of 1977, the Hague Conventions of 1899 and 1907, as well as certain weapons conventions. It also includes what is known as "customary law" – rules that are accepted by states are legally binding, but are not necessarily part of any formal treaty.

Simply put, these instruments seek to spare civilians and others who are no longer active combatants from the effects of hostilities by placing restrictions and prohibitions on the conduct of warfare.

It is important to understand that modern IHL is not concerned with the reasons for, or the legality of, going to war. Rather, that is governed by the United Nations Charter and member states' own practice.

It is also important to note that violations of the laws of war are notoriously hard to prosecute and can be frustrated by lack of cooperation by the parties involved.

Can civilian structures ever be lawfully attacked?

Under IHL, civilian objects – such as homes, apartment blocks, hospitals and schools – cannot be directly attacked. This is because they, unlike munitions factories and command and control centers, do not effectively contribute to military action.

There is a caveat, however. If enemy forces take up positions in these civilian structures, then they become military objectives and can be lawfully bombed if the raid would yield the attacking party a definite military advantage.

That said, the stipulation does not allow unlimited license to attack such structures. The civilians located in those buildings are not lawful targets. As such, they retain the benefits of what is known as "the rule of proportionality" as it relates to collateral civilian casualties – that is, deaths that are not intended by the attacking party but nonetheless result from their actions.

What exactly is the rule of proportionality?

The rule of proportionality applies to all armed conflicts as part of customary IHL.

The proportionality rule operates as a general restraint on the conduct of parties engaged in hostilities and applies to attacks against lawful military targets located in the vicinity of civilians and civilian structures. It prohibits an attack that may be expected to cause incidental death or injury to civilians or the destruction of civilian objects that would be excessive – or disproportionate – in relation to the concrete and direct military advantage anticipated.

As such, the rule does not apply to enemy combatants or civilians who are directly participating in hostilities.

The Hamas attack of Oct. 7 left Israelis mourning 1,400 dead. Alexi J. Rosenfeld/Getty Images.

The proportionality rule requires those who plan a military operation to undertake in good faith a pre-attack analysis to determine the effects of the attack on civilians and civilian objects.

Such a determination requires a balancing of probabilities that take in foreseeable collateral civilian casualties and the relative importance of a particular military target. This is a relational concept – in other words, it can't be quantified by stating any fixed number of civilians dead or injured for any one attack.

Given the uncertainties of warfare, the actual number of civilian casualties may be greater or less than what the pre-attack analysis predicted. So too might the military advantage gained.

As such, the lawfulness of such an attack must be based on an honest appreciation of the facts and circumstances known to military planners at the time, and not in hindsight.

In addition, planners of a particular attack must choose a weapon that ideally will avoid or minimize likely civilian collateral damage.

Importantly, planners of any attack must suspend or cancel the operation if it becomes apparent that the target selected is not a military objective, or if the attack will result in disproportionate collateral damage.

As such, the rule or proportionality requires the attacking party to place high priority on the timely collection and evaluation of target intelligence.

Is the rule of proportionality being observed in Gaza?

In concrete terms, the rule of proportionality – and its associated precautionary measures – require that the Israeli military undertake, in good faith, a pre-attack analysis of likely civilian casualties ensuing from each and every aerial attack in Gaza. That analysis should be based on timely, reliable and constantly updated target intelligence.

Israeli military spokesmen have stated repeatedly that they are taking all feasible measures to avoid excessive collateral damage in their bombing campaign.

But given the alarming civilian death toll in Gaza, I would submit that the burden has now shifted to the Israeli military to be more forthcoming in explaining to the public its target selection criteria. This is especially needed in those attacks that have caused extensive civilian deaths.

For the same reason, I believe the onus is now on the Israeli military to explain what precautionary measures it has taken to avoid or minimize collateral damage, particularly given recent reports that it has used so-called “dumb bombs” instead of precision-guided munitions in its campaign.

Part of this article appeared in an earlier article published by The Conversation on Oct. 15, 2023.

Israel – Hamas 2023 Symposium – Attacking Hamas – Part I, The Context

lieber.westpoint.edu/attacking-hamas-part-i-context

December 6, 2023

by Michael N. Schmitt | Dec 6, 2023

Editor's Note: This post is the first in a two-part series that explores law of armed conflict targeting considerations. This first post examines operational and contextual considerations. The second post will review the legal requirements applicable to the context identified in the first post.

On December 1, hostilities between Israel and Hamas resumed. They follow a series of cease-fires (also labeled truces) that allowed for the exchange of over 100 hostages seized by Hamas and other organized armed groups on October 7 for nearly three times as many Palestinians detained by Israel (roughly 140 hostages remain). Both sides blame the other for breaking the cease-fire, which was about to expire.

In anticipation of the resumption of the fighting and in light of widespread criticism (see, e.g., here) of the Israeli operations in Gaza (see, e.g., here), the United States has placed significant pressure on Israel to limit harm to civilians. As Secretary of State Blinken explained,

the way Israel defends itself matters. It's imperative that Israel act in accordance with international humanitarian law and the laws of war, even when confronting a terrorist group that respects neither.

In my meetings today with the prime minister and senior Israeli officials, I made clear that before Israel resumes major military operations, it must put in place humanitarian civilian protection plans that minimize further casualties of innocent Palestinians.

According to Blinken, the Israeli government agreed to take such measures, some of which are mentioned below (see also Secretary of Defense and Vice President comments).

Unfortunately, discussion of the application of international humanitarian law (IHL) in this conflict has sometimes been imprecise and often emotive. In this post, I try to clear a bit of the fog of law by providing a primer on targeting law. I begin by noting that targeting law is contextual. Accordingly, I first highlight key factors that underpin that contextuality. I then turn to the fundamental IHL rules of targeting law – lawful targets, precautions in attack, and proportionality. The piece concludes with my thoughts on assessing the IDF's attacks on Hamas.

Three points are necessary before beginning the discussion. First, for ease of reading, I use the term "Hamas" to denote both the fighting wing of the organization (al Qassam Brigades) and other organized armed groups like Islamic Jihad. Second, consensus is lacking regarding whether the conflict is international or non-international. Complicating matters, Israel is not a party to the key instrument addressing "conduct of hostilities" issues during the former, the 1977 Additional Protocol I (AP I) to the Geneva Conventions. Nevertheless, broad agreement exists that the bulk (not all) of IHL treaty rules regarding targeting reflect customary international law, and most apply in both forms of armed conflict. Therefore, I will treat them as generally doing so in the following discussion.

Finally, the discussion focuses on Israel Defense Forces (IDF) attacks during Operation Swords of Iron because it is around them that most controversy is swirling. Analysis of how IHL applies to Hamas's operations is less fraught; therefore, I do not address them head-on. After all, whatever one's perspective on the conflict, it is impossible to deny that Hamas's October 7 attacks violated IHL, as have the continuing rocket attacks into civilian population centers. Indeed, there is no indication that Hamas tries to comply with the IHL rules regarding distinction, precautions in attack, and proportionality that are examined below.

Targeting law is fundamentally contextual in application. What is lawful in one battlefield engagement may not be in another. Therefore, allow me to highlight several particularly important factors when assessing the lawfulness of the IDF's operations against Hamas and the criticism they have drawn. I begin with context before turning to the targeting rules themselves because only by grasping the context in which they operate can one render a fair assessment of compliance with them.

One Size Does Not Fit All

Operational environments can bear upon whether a party to the conflict has violated IHL rules. The reason is simple. Targeting law is based on the "reasonableness" of battlefield legal determinations, for it is generally not a law of absolutes (except in the case of direct attacks against protected persons and objects). Instead, IHL requires commanders and others involved in an attack to act as a reasonable person performing their role would in similar circumstances. This allows for a wide margin of appreciation.

For instance, different *domains* of warfare present different opportunities and challenges concerning IHL's application. Consider the process of identifying lawful targets during air and ground attacks. Air targeting is often based on intelligence, which usually permits greater opportunity to confirm targets as military objectives and assess possible collateral damage than ground targeting, which is more heavily reliant on situational awareness. Those evaluating IDF operations must understand that sound legal conclusions regarding reasonableness in one domain may not hold water in another.

Similarly, the *physical and human terrain* in which an attack occurs affects IHL's application. The density of the physical infrastructure and the presence of civilians in Gaza's urban terrain, which Hamas very effectively exploits, complicates the IDF's ability to identify targets and assess and avoid likely civilian collateral damage. It also limits the IDF's options for minimizing collateral damage to civilians and civilian objects. And it must be remembered that Hamas has spent 16 years preparing to fight in an urban environment by building hundreds of tunnels and embedding its operations in civilian infrastructure, including residential buildings, schools, hospitals, and mosques (as in the 2014 operations into Gaza).

The *temporal factor* also looms large. Given the small size of Gaza, Hamas's "shoot and scoot" tactics that leverage dense groupings of buildings and an extensive tunnel network, and Hamas's continuing rocket attacks against Israel's civilian population, the timing of IDF attacks is highly compressed. It must often act very quickly, which hinders both target verification and accurate estimates of civilian collateral damage. And the longer this conflict lasts, the more reliant the IDF will be on "dynamic" (unplanned) targeting, as with "troops in contact" situations, instead of "deliberate" targeting (preplanned). The latter almost always allows for greater opportunity to avoid civilian harm.

The Fog of War Is Thick

Uncertainty is ubiquitous in warfare; it can permeate every decision of legal consequence made on the battlefield. In a previous post, and an article with Lieutenant Colonel Mike Schauss, I examined the issue of the requisite degree of certainty for lawful identification of military objectives, assessment of likely collateral damage and military advantage *vis-à-vis* the rule of proportionality, and the determination of whether alternatives to a planned attack are feasible and likely to result in fewer civilian casualties or less civilian damage

("precautions in attack"). As we observed, "Targets sometimes may be attacked despite the existence of some doubt. To hold otherwise would fly in the face of state practice stretching back to the crystallization of the principle of distinction" (p. 156). Of course, this raises the question of how much uncertainty is too much.

Consider a case in which the IDF is uncertain as to exactly how many civilians are in a building in which Hamas fighters are present. Whether it may strike the structure depends on an array of factors. They include, *inter alia*, the degree of uncertainty as to the number of civilians in the building, the likelihood of them being harmed, the degree of risk to any other civilians who might be in the area or to nearby civilian structures, the extent to which the IDF is sure Hamas fighters are present, the likelihood of successfully killing them, the impact of killing them on Hamas's operations, and so forth. To take a simple example, the possibility of killing a senior Al Qassam leader when there is a likelihood of civilian collateral damage would justify accepting greater uncertainty as to his presence than would be the case with simple Hamas fighters. The point is that applying the targeting rules in the face of uncertainty is a highly circumstantial endeavor.

Foresight, Not Hindsight

Assessments of whether an attacker has complied with an IHL targeting rule must be based on the information reasonably available at the time to those who planned, approved, and executed the attack, not on that which became available later or on the attack's unexpected consequences. This truism applies across all targeting rules. For instance, the first step in targeting is determining if the place or person to be attacked is a lawful military objective or person subject to lawful attack. The adequacy of the attacker's determination depends on what they knew or should have known *at the time*. To illustrate, if intelligence that a building contains Hamas fighters turns out to be wrong, but the IDF attack on the building would have been lawful had the intelligence been correct, there is no violation, at least so long as the IDF's initial assessment was reasonable.

This before-the-fact point is especially significant for proportionality determinations (see below), which require an attacker to refrain from attack if collateral damage is expected to be excessive relative to the military effect the attacker anticipates achieving. Thus, resulting civilian casualties or damage to civilian objects cannot, standing alone, establish that an IDF attack was unlawful on the basis that the collateral damage proved excessive; what matters is the collateral damage the attacker expected, or should have expected. Similarly, the fact that an IDF attack was wholly unsuccessful does not mean it was unlawful to mount because it caused civilian casualties or damage. The question is whether those involved reasonably assessed the likely military advantage before planning, approving, or executing the attack.

Along the same lines, one cannot conclude that the IDF failed to take sufficient precautions to minimize civilian harm (see below) based solely on the fact that an attack caused civilian incidental casualties or damage. Instead, the assessment can only be made by considering

the information at the attacker's disposal and the feasible options for achieving the desired effect on Hamas that the attacker knew were available.

The point is that except in obvious cases like Hamas's October 7 direct attacks against civilians, it is difficult to offer reliable evaluations of individual attacks without a grasp of the situation as understood by the IDF at the time. Results alone are seldom sufficient to conclude that an IHL violation has occurred.

The Enemy Gets a Vote

Israel is fighting an enemy that intentionally embeds itself among the civilian population as a form of asymmetrical warfare (see my discussion), uses human shields (see my analysis), and actively prevents the civilian population from seeking shelter (see here and here). Moreover, it fails to take feasible precautions to protect the civilian population from the effects of IDF attacks ("passive precautions"). All these actions and omissions violate IHL.

While Hamas's systematic and frequent IHL violations do not excuse the IDF from compliance with targeting rules, they affect the IDF's legal obligations, for they can increase uncertainty (see earlier discussion) and exacerbate the risk of collateral damage. Indeed, if Hamas can get enough civilians into a target area, it may even render an IDF attack legally prohibited as disproportionate. From a practical perspective, these tactics also may cause the IDF to hesitate to attack even if doing so is legal, lest it hand Hamas an opportunity to engage in "lawfare." Hamas nefariously realizes that Palestinian casualties, in several senses, benefit its cause. Simply put, Hamas can influence the IDF's legal obligations through violations of its own.

It also merits emphasis that harm suffered by the civilian population because of *Hamas's* operations does not factor into the legal assessment of *IDF* attacks, thereby necessitating caution when pointing the legal finger. This appears self-evident, but recall the purported October 17 Israel Defense Forces (IDF) attack on Al Ahli Hospital in Gaza that sparked immediate condemnation. Yet, it turned out that, as acknowledged by Human Rights Watch, the explosion "resulted from an apparent rocket-propelled munition, such as those commonly used by Palestinian armed groups, that hit the hospital grounds," not from ongoing IDF operations. As this example illustrates, when observing civilian harm in Gaza from the perspective of IHL, one must be cautious about jumping to the conclusion that the IDF necessarily caused it.

War is Tragically Disruptive

That the war has had devastating consequences for the civilian population of Gaza is undeniable. However, in the law of targeting, only those consequences that result in death or injury to civilians or damage to civilian objects factor into the two critical obligations that

serve to protect civilians and civilian objects, namely, the rule of proportionality and the requirement to take feasible precautions in attack to minimize civilian harm (see discussion below).

In particular, the notion of collateral damage in both rules does not include inconvenience, stress, or other intangible consequences. For instance, the fact that civilians had to flee from their homes in Gaza City is not, as a matter of law, considered to be collateral damage. Nor is the fear and distress they understandably suffer. That said, collateral damage can include indirect, foreseeable effects of an attack that result in the requisite consequences, so long as they are not too "remote" (on remote harm, see DoD, *Law of War Manual*, § 5.12.1.3). For example, the loss of civilian communications access in Gaza is not, as such, civilian collateral damage. Still, if the knock-on effect is to disable emergency response capabilities, the IDF would need to consider any foreseeable resultant physical harm to civilians in its proportionality and precautions in attack assessments.

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Israel – Hamas 2023 Symposium – Attacking Hamas – Part II, The Rules

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by Michael N. Schmitt | Dec 7, 2023

Editor's Note: This post is the second in a two-part series that explores law of armed conflict targeting considerations inspired by the Israeli-Hamas conflict. The first post examined operational and contextual considerations. This second post reviews the legal requirements applicable to the context identified in the first post.

Although the conduct of hostility rules that govern targeting are the subject of voluminous scholarship of great complexity, their framework is relatively straightforward. Reduced to basics, the IDF may only shoot at certain objects and persons and must consider the impact of the attack on civilians and civilian objects.

Targetable Persons and Military Objectives

Attacks (AP I, art. 49) may only be directed at targetable persons or objects that qualify as military objectives. Attacking anyone or anything else is strictly forbidden (in the discussion that follows, see generally AP I, arts. 51 and 52; International Committee of the Red Cross

(ICRC), *Customary IHL* study, rules 1-10; DoD, *Law of War Manual*, §§ 5.5 – 5.8; *NIAC Manual*, §§ 1.2.2. and 2.1.1.1).

As to the persons, a party to the conflict may attack members of the armed forces and other combatants, members of organized armed groups, and those directly participating in the hostilities. During an international armed conflict, the category of combatants includes members of the regular armed forces, militias or volunteer corps forming part of the armed forces, and members of other militias and volunteer corps, including resistance movements, that are under responsible command, distinguish themselves from the civilian population, bear arms openly, and conduct operations in accordance with IHL (Geneva Convention III, art. 4A). Thus, even if the armed conflict between Hamas and Israel is international, Hamas's systematic IHL violations alone preclude it from enjoying combatant status, which applies only in such conflicts.

Instead, and whether the conflict is international or non-international, individuals of Hamas's fighting wing (al Qassam Brigades) and any other Hamas officials in the operational chain of command are members of an organized armed group targetable based on that status alone (so-called "status-based" targeting).

It must be cautioned that the ICRC, some States, and numerous international law experts believe that only members of an organized armed group with a "continuous combat function" may be attacked based on that status alone (ICRC, *Interpretive Guidance*, p. 32-36). The United States and Israel reject this view, as do many international law specialists, including myself. In my estimation, it is legally and logically insupportable to argue that members of an organized armed group like Hamas's fighting wing who do not have a function involving regular involvement in the hostilities (e.g., those responsible for logistics) enjoy greater legal protection from attack than members of the IDF who perform comparable duties and who may be attacked solely based on their membership in the regular armed forces.

Other individuals lose their protection from direct attack for so long as they "directly participate in hostilities" ("conduct-based" targeting), a rule applicable in international and non-international armed conflict. Attacking the IDF in any way is unambiguously direct participation, as was the involvement of non-Hamas Palestinian civilians in the murders and hostage-taking of October 7.

However, direct participation does not necessitate involvement in combat. Instead, individuals who perform any activities that contribute in a relatively direct way to Hamas's military capability or hinder IDF operations are direct participants in hostilities who may be attacked while so participating. For instance, civilians who warn Hamas of the advance of IDF soldiers or who otherwise provide valuable military information qualify as direct participants. Similarly, civilians who interfere with ongoing IDF military operations, as well as those who transport weapons and ammunition to Hamas fighters, are direct participants. But

civilians who sympathize with Hamas, or even with conducting attacks on Israeli civilians, are not directly participating in the hostilities; they retain full protection as civilians. This is a complicated matter with many nuances (see the collection of articles here).

One controversial issue is the characterization of civilians who voluntarily shield Hamas fighters and operations, a topic I have examined in an earlier post (and here). I believe they are directly participating in the hostilities, a view shared by Israel, the United States, and many experts. The ICRC and other experts disagree.

Great attention has been paid to the widespread physical destruction in Gaza. Buildings and other objects are subject to attack when they: 1) "by their nature, location, purpose or use make an effective contribution to military action;" and 2) their "total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage" (AP I, art. 52(2)). In the Gaza context, tunnels devoted exclusively to use by Hamas's armed wing (as distinct from use for other purposes like smuggling) qualify as military objectives by "nature." The buildings and other objects the IDF targets can also amount to military objectives on the basis that Hamas is using them for military purposes (e.g., for command and control, billeting, and weapons storage) at the time of attack ("use" criterion) or because they will be so used in the future ("purpose" criterion). Objects may also qualify by "location," as in the case of needing to prevent Hamas's use of a building to ambush IDF soldiers who will maneuver down a road in front of it.

Importantly, *any* use for military purposes renders an otherwise civilian object, like a school, a military objective. The only significant debate in this regard deals with entities composed of distinguishable parts. If they are clearly separate, as in two adjacent buildings joined by a walkway, only that building being used is a military objective. But consider an apartment building with many apartments, one of which Hamas uses for military purposes. The prevailing view, shared by the United States and Israel, is that the entire building is a military objective, such that harm to the apartments not being used does not factor into the proportionality and precautions assessments (see below). A minority view, which I support, indicates that if the apartment can be targeted individually (which depends on an array of factors such as weapons system capability and availability and risk to the attacking forces), damage to the remainder of the building is collateral damage in the proportionality and precautions assessment. In an intense fight, this is hard to do.

Some persons, objects, and activities enjoy "special protection" under IHL. Of note in this conflict are medical facilities, a topic I will address in a forthcoming post. A hospital that is being used by Hamas for military purposes, like shielding tunnels, hiding hostages, or storing weapons, becomes a military objective (AP I, art. 12; ICRC, *Customary IHL* study, rule 28; DoD, *Law of War Manual*, § 7.10; *NIAC Manual*, § 4.2.1). However, except when the situation does not allow, as when immediately needing to defend against fire from the facility, a warning to cease its misuse and an opportunity to do so must be provided before the IDF

may mount an attack against it. Of course, medical personnel, patients, and other civilians present retain their civilian protections and factor into proportionality and precautions determinations.

Certain cultural objects and places of worship, such as mosques, are also subject to special protection (AP I, art. 53; ICRC, *Customary IHL* study, rules 11-13; DoD, *Law of War Manual*, § 5.18; *NIAC Manual*, § 4.2.2). Like medical facilities, they lose their protection from attack and damage to them does not count as civilian collateral damage in the IDF's proportionality and precautions assessments if Hamas uses them in support of its military effort, which is sadly frequent in Gaza.

Indiscriminate Attack Tactics

IHL prohibits certain types of attacks, such as those that are perfidious because they involve feigning protected status under the law to attack the enemy (ICRC, *Customary IHL* study, rule 65). There is no evidence that Israel has engaged in such conduct, a sharp contrast with Hamas. Much more relevant to IDF operations is the prohibition on indiscriminate attacks, of which there are multiple forms (AP I, art. 51(4) and (5); ICRC, *Customary IHL* study, rules 11-13; *NIAC Manual*, § 2.1.1.3)). Two are of particular significance.

The first occurs when an attack is not directed at a military objective. In these "shot in the dark" attacks, the attacker makes little effort to "aim" at a military objective or targetable persons. It is distinguishable from cases in which the attacker fires "at" protected persons or objects, as in the case of Hamas rocket attacks into Israeli villages where there are few military objectives. In the case of Gaza, which is full of military objectives and targetable persons on the one hand and civilians and civilian objects on the other, an unaimed IDF attack fired into Gaza, even in the hope of maybe hitting a Hamas target, would be indiscriminate.

The second form of indiscriminate attack of relevance in the current conflict is one that "treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects" (AP I, art. 51(5)(a)). To amount to this form of indiscriminate attack, the attacker must have been able to identify individual military objectives in the area and strike them discretely in the circumstances. Absent either capability, area targeting is permissible subject to the rules of proportionality and the requirement to take precautions in attack. For instance, if the IDF knows Hamas fighters are in three buildings and can surgically strike all three, it may not simply destroy the general area in which they are located, even if doing so would satisfy the proportionality rule. Such an attack would be both indiscriminate and violate the requirement to take precautions in attack.

Despite claims that Israel has engaged in indiscriminate targeting, establishing either form of violation would require knowing, or at least being able to draw reasonable and granular conclusions as to, the intelligence that was reasonably available to the IDF, the military objectives in the target area, the capabilities of the IDF at the time (in other words, situationally, not in general), operational alternatives, and what was in the minds of those involved at the time the attack was planned, approved, and executed. Without such context, any characterizations of an attack(s) as indiscriminate is speculative.

Precautions in Attack

Even when conducting an attack against a military objective or targetable persons in a lawful manner, "constant care" must be taken by those who plan, approve, or execute attacks to "spare" the civilian population and civilian objects (AP I, art. 57(1)). This duty includes taking "precautions in attack" to minimize damage or destruction of civilian objects or injury or death of civilians (AP I, art. 57; ICRC, *Customary IHL* study, ch. 5; DoD, *Law of War Manual*, § 5.11; *NIAC Manual*, § 2.1.2). In legal terms, taking precautions is an obligation of conduct, not result.

These "active precautions" require doing everything feasible to verify that the target is a military objective or a lawfully targetable person. The attacker must also consider attack options, especially regarding the weapon system (e.g., precision capability, blast effect), target selected, and tactic used (e.g., timing of attack, angle of attack). If it appears during the attack that the target has been misidentified or may result in excessive collateral damage (see below), the attacker must terminate the strike. Finally, civilians likely to be affected must be warned of the attack "unless circumstances do not permit" (see below).

The verification requirement obliges the IDF to employ reasonably available means to identify the target as a military objective or targetable person. This obligation is not absolute. For instance, getting "eyes on the target" by ground forces may be too risky, or airborne verification assets such as drones may be needed elsewhere. The point is that the information on which the target is verified is that which is reasonably available in the circumstances. And verification does not mean achieving absolute certainty about the target's identity. In that regard, the discussion in Part I of this post on uncertainty applies.

Similarly, the alternatives an attacker considers need only include those "feasible" in the situation. A feasible option is one that "is practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations" (DoD, *Law of War Manual*, § 5.2.3.2; *AMW Manual*, p. 26; Declarations by States upon Ratification of AP I; 1996 Amended Protocol II to the CCW, art. 3(10)).

In other words, feasible options are operationally viable, make good operational sense, and are likely to avoid harm to civilians and civilian objects. For instance, an alternative is not feasible if it places the attacker at greater risk or involves using a weapon system that might

be better employed elsewhere or later in the conflict. Moreover, if an alternative lessens the likelihood of achieving the desired effect of the attack, it need not be taken. Consider IDF attacks against the Hamas tunnel system. There has been criticism that large weapons, such as 2,000-pound bombs, have been dropped. However, unless less destructive bombs could achieve the same effect (collapse of the tunnel) with less risk of civilian injury or death, the active precautions requirement would not require their use. This being so, the issue concerning the tunnel attacks would not be precautions in attack but instead proportionality.

A further active precautions requirement is to provide "effective advance warning" of attacks "which may affect the civilian population, unless circumstances do not permit." I have previously discussed this requirement at length, as well as Hamas's requirement to do what it can to protect the civilian population from the effects of IDF attacks (as in evacuating them or at least not actively discouraging their departure). The key takeaways were that effectiveness means the warning is conveyed by a means that will reach the civilian population, even if the warning is not heeded, and that a specific warning need not be given if it would sacrifice mission accomplishment (as in causing a targetable person to flee).

The IDF has provided unprecedented warnings throughout the conflict. They include text messages, social media posts, radio and TV announcements, leaflets warning residents to relocate through safe corridors, warnings passed through international organizations, and individual phone calls. For instance, soon after the commencement of the fighting, the IDF urged the civilian population to flee south, where they would be safer from the Israeli attacks. It also established evacuation corridors and periodically paused operations to facilitate evacuation of the north. Many misinterpreted this as forced displacement; it was not (see my analysis here).

Warnings need not direct individuals to a specific location but only warn them of attack. Thus, the IDF warnings exceeded what the law required. Moreover, criticism that IDF attacks were occurring in southern Gaza misses the point that it was safer in the south. Only if the warnings had directed the population to a more dangerous location would they have run afoul of IHL.

As its operations move south, the IDF has established a "red alert" system (see also here) involving an interactive map allowing for precise attack warnings and instructions for evacuation. Criticism exists that the warnings are hindered, for instance, by the impact of IDF operations on Internet availability in Gaza. However, in this regard, an attacker is not required to sacrifice military advantage to warn. Moreover, the IDF has created a redundant system of notifications to account for such obstacles.

The bottom line is that the precautions in attack rule cannot be violated in the absence of a feasible alternative means of verifying the target, attacking it, or effectively warning the civilian population. Accordingly, those accusing the IDF of precautions violations should be prepared to cite the feasible option they believe the IDF wrongfully failed to select.

Finally, note that Secretary Blinken outlined several measures Israel could take to protect civilians. These include “clearly and precisely designating areas and places in southern and central Gaza where they can be safe and out of the line of fire,” “avoiding further significant displacement of civilians inside of Gaza,” “avoiding damage to life-critical infrastructure, like hospitals, like power stations, like water facilities,” and “giving civilians who’ve been displaced to southern Gaza the choice to return to the north as soon as conditions permit.” Although each of these makes sense morally and perhaps even operationally, they are not, strictly speaking, IHL requirements, at least not in their entirety (except for attempting to avoid damage to civilian objects).

Proportionality

Lastly, even when an attack is against a military objective or targetable person, it does not employ an indiscriminate tactic, and all that is feasible to minimize civilian harm without sacrificing military advantage has been done, the attack may not “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” (AP I, arts. 51 and 57; *Customary IHL* study, rule 14; DoD *Law of War Manual*, § 5.12; *NIAC Manual*, § 2.1.1.4). It is a rule that acknowledges that sometimes civilian casualties are unavoidable but justified by the need to fight effectively, while accepting that at other times, militarily necessary gains may not be pursued because the civilian cost is too high.

There have been repeated claims that the IDF attacks are disproportionate. In this regard, several points must be made. As noted earlier, determining whether an attack is disproportionate depends on the facts understood by those who plan, approve, or execute an attack, not on its results. This caveat applies to both expected collateral damage and anticipated military advantage.

To take a simple example, a strike against a Hamas facility that is storing ammunition may result in secondary explosions that kill civilians. If the IDF knew the ammunition was there, it was obliged to factor the risk to civilians into the proportionality assessment. But if Hamas used the facility for other military purposes, and the IDF was unaware of (and had no reason to suspect) the presence of the ammunition, harm caused by the secondary explosions would not bear on the lawfulness of the strike. Similarly, consider a case where the IDF possessed seemingly reliable intelligence that a Hamas leader was in a particular building. Suppose, in fact, that leader had moved without the IDF having any reason to know of his departure. The appropriate military advantage to consider in evaluating the strike after the fact would still be the effect of killing the leader.

The military advantage factored into the proportionality determination must be “concrete and direct.” In other words, it cannot be hopeful or speculative. A close cause-and-effect relationship between the attack and the military effect sought must exist. It must also be

military in nature. Undercutting the morale of the civilian population of Gaza or its support for Hamas would not qualify on this basis. Instead, concrete and direct advantage means a realistic impact on Hamas at the tactical or operational levels of war, that is, the ongoing fighting and the overall campaign, respectively.

Moreover, the standard for breach of the rule is "excessiveness." Excessiveness does not admit of mathematical calculation. As the Harvard *Manual on International Law Applicable to Air and Missile Warfare* notes, an attack is excessive "when there is a significant imbalance between the military advantage anticipated on the one hand and the expected collateral damage to civilians and civilian objects, on the other." It explains,

The fact that collateral damage is extensive does not necessarily render it excessive. The concept of excessiveness is not an absolute one. Excessiveness is always measured in light of the military advantage that the attacker anticipates to attain through the attack. If the military advantage anticipated is marginal, the collateral damage expected need not be substantial in order to be excessive. Conversely, extensive collateral damage may be legally justified by the military value of the target struck because of the high military advantage anticipated by the attack (p. 98).

Finally, the proportionality assessment is made attack-by-attack. In other words, as a matter of law, a *campaign* is not "excessive," although *individual* attacks comprising the campaign may be. Thus, with respect to the IHL rule of proportionality, it is inappropriate to consider the *total* number of civilians killed or wounded in light of the *total* number of IDF airstrikes (now over 20,000). Instead, a case-by-case assessment of individual strikes (or closely related ones) must be made.

Concluding Thoughts

It was not my intention in this series to offer a judgment as to whether the IDF's Operation Swords of Iron has complied, in whole or in part, with the IHL rules governing targeting. Instead, my goal is to illustrate the complexity and contextuality of those rules. In my estimation, insufficient facts are currently available to render definitive conclusions. This is because we cannot yet know what information and options were available to the IDF soldiers, sailors, or airmen who planned, approved, and executed individual strikes. Condemnation of Israeli targeting based on international humanitarian law, therefore, strikes me as premature.

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Legal Sidebar

The First Prosecution Under the War Crimes Act: Overview and International Legal Context

December 22, 2023

On December 6, 2023, the U.S. Department of Justice (DOJ) brought an indictment in the U.S. District Court for the Eastern District of Virginia against four members of the Russian armed forces or allied military units (Defendants) for violations of the War Crimes Act of 1996—the first in the almost three decades of the Act's existence. DOJ brought the indictment just under a year after Congress enacted the Justice for Victims of War Crimes Act, which amended the War Crimes Act to extend DOJ's jurisdictional reach, in part in response to Russia's invasion of Ukraine and allegations of war crimes being committed by its armed forces.

More indictments under the Act might be coming. When he announced the indictment, Attorney General Merrick Garland stated that the prosecution is "our first, and you should expect more." He also suggested that DOJ's work may not be limited to Ukraine, stating that "Hamas murdered 30 Americans and kidnapped more" and DOJ is "investigating those heinous crimes and will hold those people accountable." As U.S. prosecutions for war crimes proceed, it will provide Congress with the opportunity to evaluate and potentially respond to DOJ's implementation of the Act.

A previous Legal Sidebar provides a summary of the various war crimes recognized under international law, with a focus on those punishable under U.S. law through the War Crimes Act. This Sidebar focuses on DOJ's first indictment to enforce the War Crimes Act. More specifically, this Sidebar (1) explains the application of the relevant provisions of the War Crimes Act to the facts alleged in the four-count indictment; (2) examines the jurisdictional basis of the case as well as the expansion of jurisdiction under the 2023 amendment; (3) discusses the roles of the Act and prosecutions under it in enforcing international laws prohibiting war crimes; and (4) provides a discussion regarding considerations for Congress in light of DOJ's first enforcement action under the Act.

The Charges

The War Crimes Act, codified at 18 U.S.C. § 2441, makes certain war crimes under the body of international law known as international humanitarian law (IHL) federal criminal offenses. The Act

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derives its definition of "war crime" by reference to certain war crimes that are prohibited in various treaties to which the United States is a party: the four 1949 Geneva Conventions, the Hague Convention IV, Respecting the Laws and Customs of War on Land of 1907, and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.

The counts against the Defendants in the indictment brought by the United States are based on alleged violations of Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention or Convention). That article provides that grave breaches of the Fourth Geneva Convention include the following acts, when "not justified by military necessity and carried out unlawfully and wantonly," committed against civilians:

- willful killing,
- torture or inhuman treatment,
- willfully causing great suffering or serious injury to body or health,
- unlawful deportation or transfer or unlawful confinement of a protected person,
- compelling a protected person to serve in the forces of a hostile power,
- willfully depriving a protected person of the rights of fair and regular trial,
- taking of hostages, and
- extensive destruction and appropriation of property.

As made clear by the Fourth Geneva Convention's title, Article 147 and the other Convention provisions provide special protections to civilians during armed conflict. The indictment alleges that the victim of the grave breaches is a U.S. national, who at the time was living in a village located in a southern Ukrainian oblast (or province). As a civilian who the indictment alleges was not participating in the armed conflict between Russia and Ukraine, this victim (referred to as "V-1") was a protected person during an international armed conflict for purposes of the Convention.

According to the indictment, the Defendants abducted V-1 from his home, severely beat him, and brought him to another location where they detained and interrogated him for 10 days. During the interrogation sessions, the indictment alleges that, among other things, the Defendants tortured V-1, degraded him by photographing him while he was naked, threatened him with sexual assault, and subjected him to a mock execution.

Based on these alleged facts, the indictment charges the Defendants with having committed offenses under the War Crimes Act, each based on a separate Article 147 grave breach: unlawful confinement, torture, and inhuman treatment. (The fourth count charges the Defendants with conspiracy to commit these War Crimes Act offenses in violation of 18 U.S.C. § 371.)

Jurisdiction

As originally enacted in 1996, the War Crimes Act's punishments applied regardless of where the crimes took place, but only if either the perpetrator of the grave breach or the victim was a U.S. national or member of the U.S. Armed Forces. In January 2023, President Biden signed into law the Justice for Victims of War Crimes Act, which expanded the War Crimes Act's jurisdiction to include offenses committed by *anyone* found on U.S. territory—regardless of their or the victim's nationality.

Before moving forward with a prosecution in a case in which the perpetrator or victim is a U.S. national or service member, the Act requires the Attorney General, the Deputy Attorney General, or an Assistant Attorney General to certify that the prosecution "is in the public interest and necessary to secure substantial justice." For cases in which jurisdiction is based only on the presence of the alleged perpetrator on U.S. territory, the Act requires not only that the Attorney General or Deputy Attorney

General make this certification, but also that they consider "whether the alleged offender can be removed from the United States for purposes of prosecution in another jurisdiction" and the "potential adverse consequences for [U.S.] nationals, servicemembers, or employees of the United States." Because V-1 is a U.S. national, DOJ did not utilize the War Crimes Act's expanded jurisdiction based only on the offender's presence in the United States for the current indictment.

Based on the facts alleged in the indictment, the federal district court has *authority* to exercise jurisdiction in the case; it remains uncertain, however, whether the court will be able to *in fact exercise* its jurisdiction or obtain physical custody over the Defendants because they are not currently present in the United States. For the court to do so, either Russia would have to agree to extradite its nationals to the United States to stand trial or the Defendants would have to travel to the United States or to a country with which the United States has an extradition treaty. At this point and for the foreseeable future, neither seems a likely prospect.

Even if the United States is unable to try these Defendants, however, the War Crimes Act as amended and this first indictment still have legal significance. Initially, if the Defendants ever travel to a country with which the United States has an extradition treaty—which, at a current total of 116 countries, span a considerable portion of the globe—they would be doing so at their legal peril.

Furthermore, as explained in the following section, the War Crimes Act both (1) serves as means by which the United States meets its obligations under the Geneva Conventions and other IHL treaties and (2) is, along with extradition treaties and other collaborative international legal mechanisms such as INTERPOL that allow for transnational cooperation in criminal enforcement, part of the broader international legal structure for enforcing prohibitions on war crimes.

The Role of Domestic Legislation in Enforcing War Crimes Prohibitions Globally

The Geneva Conventions obligate parties to enforce war crimes prohibitions through their domestic law. In the Fourth Geneva Convention, this obligation is stated in Article 146, which directs each Convention party to either prosecute persons who have committed "grave breaches" of the Convention, "regardless of their nationality," or transfer those persons to another Convention party to stand trial.

In its report accompanying the 1996 legislation, the House Judiciary Committee stated that at the time of the Conventions' ratification in 1955, the United States believed its existing laws "provided adequate means of [war crimes] prosecution" and satisfied its Convention obligations. The Committee report declared, however, that it had become clear in the following decades that those laws were inadequate, and legislation specifically enacted to authorize the prosecution of war crimes was necessary. To fill what the Committee identified as "major gaps" in existing U.S. laws, the War Crimes Act both defined "war crimes" as they are defined in certain IHL treaties and provided for U.S. jurisdiction regardless of where those crimes were committed, so long as the alleged offenders or victims were U.S. nationals.

At the time that Congress was considering the bill, the State Department and Department of Defense recommended that the legislation provide for jurisdiction regardless of where the war crime was committed or the nationality of the offender or victim, "as long as the perpetrator is present in the United States." Then-President Clinton expressed the same view in signing the bill into law in 1996. Three decades later, Congress amended the War Crimes Act to provide for this jurisdictional expansion.

The 2022 amendment to the War Crimes Act provides the DOJ with the authority to prosecute a significantly broader category of persons than the original version of the statute that required either the offender or the victim to be a U.S. national. In doing so, the amendment establishes domestic legal

mechanisms for the United States to more robustly enforce the war crimes prohibitions of the Fourth Geneva Convention and other IHL treaties.

Considerations for Congress

This indictment under the War Crimes Act provides Congress with its first opportunity to observe the Act's implementation and consider what, if any, measures it might want to take in the future in light of recent developments. The prosecution was brought by the DOJ's War Crimes Accountability Team, which Attorney General Garland established four months after Russia's invasion of Ukraine to "strengthen and centralize the Department's ongoing work to hold accountable those who have committed war crimes and other atrocities in Ukraine." At the press conference announcing the indictment, Garland characterized the prosecution as "an important step toward accountability for the Russian regime's illegal war in Ukraine" and stated that "[o]ur work is far from done."

It thus seems possible that Congress will soon have the opportunity to observe the implementation of the recent amendments to the Act in future indictments. In light of its assessment of the efficacy of the current statutory tools available to the DOJ to respond to atrocities committed during ongoing armed conflicts, Congress may, for example, consider enacting legislation that would further amend the War Crimes Act to include offenses beyond grave breaches that are also recognized under international law as war crimes, such as those set forth in the Rome Statute of the International Criminal Court.

Additionally, Congress could consider criminalizing "crimes against humanity," which, along with war crimes and genocide, have been deemed "atrocity crimes" by the United Nations. Like many war crimes under the recently amended War Crimes Act, genocide is codified as a federal offense with a broad jurisdictional reach extending to offenders and victims of all nationalities. Although Congress has provided supplemental international security assistance to the State Department to assist Ukraine in "document[ing] and collect[ing] evidence of" crimes against humanity as well as war crimes, crimes against humanity are not currently codified as a federal offense under U.S. law.

Domestic prosecutions of war crimes face challenges that cannot entirely be avoided with new legislation—including not only the obstacles to bringing defendants to the United States to stand trial, but also the collection of evidence from a battlefield, the use of classified information, and the constitutional protections owed to all persons, regardless of nationality, who are prosecuted in U.S. civilian courts. In light of such difficulties, Congress may also want to view and assess the implementation of the War Crimes Act through a wider lens and consider it as part of a larger suite of accountability tools that Congress has established or could establish, which includes not only numerous criminal laws with extraterritorial reach but also nonjudicial mechanisms such as sanctions. Over the years, the executive branch has sometimes invoked the International Emergency Economic Powers Act to sanction persons or entities involved in human rights abuses or IHL violations. Congress has also provided the Executive with additional authorities to sanction individuals whom it determines are responsible for gross human rights violations. Although each tool within this suite differs in scope and effect, reviewing the suite holistically may provide insights for Congress as it considers ways the United States may seek to punish or deter war crimes.

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Disclaimer

Israel Implemented More Measures to Prevent Civilian Casualties Than Any Other Nation in History | Opinion

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By **John Spencer**
chair of urban warfare studies at the Modern War Institute (MWI) at West Point; served for 25 years as an infantry soldier and two tours in Iraq

No military fighting an entrenched enemy in dense urban terrain in an area barely twice the size of Washington D.C. can avoid all civilian casualties. Reports of over 25,000 Palestinians killed, be they civilians or Hamas, have made headlines. But Israel has taken more measures to avoid needless civilian harm than virtually any other nation that's fought an urban war.

In fact, as someone who has served two tours in Iraq and studied urban warfare for over a decade, Israel has taken precautionary measures even the United States did not do during its recent wars in Iraq and Afghanistan.

I say this not to put Israel on a pedestal or to diminish the human suffering of Gazans but rather to correct a number of misperceptions when it comes to urban warfare.

First is the use of precision guided munitions (PGMs). This term was introduced to nonmilitary audiences during the Gulf War, when the U.S. fired 250,000 individual bombs and missiles in just 43 days. Only a very small fraction of those would fit the definition of PGMs, even though common perceptions of that war, and its comparatively low civilian casualty rate, was that it was a war of precision.

Let's compare that war, which did not ignite anywhere near the same level of outrage internationally, to Israel's current war in Gaza. The Israeli Defense Force has used many types of PGMs to avoid civilian harm, including the use of munitions like small diameter bombs (SDBs), as well as technologies and tactics that increase the accuracy of non-PGMs. Israel has also employed a tactic when a military has air supremacy called dive bombing, as well as gathering pre-strike intelligence on the presence of civilians from satellite imagery, scans of cell phone presence, and other target observation techniques. All of this is to do more pinpoint targeted to avoid civilian deaths. In other words, the simplistic notion that a military must use more PGMs versus non-PGMs in a war is false.

A second misperception is a military's choice of munitions and how they apply the proportionality principle required by the laws of armed conflict. Here there is an assessment of the value of the military target to be gained from an act that is weighted against the expected collateral damage estimate caused by said act. An external viewer with no access to all information cannot say such things as a 500-pound bomb would achieve the military mission of a 2,000-pound bomb with no mention of the context of the value of the military target or the context of the strike—like the target being in a deep tunnel that would require great penetration.

A Israeli Defence Force Merkava tank drives close to Kibbutz Be'eri on the Gaza border. **OLIVER MARSDEN/MIDDLE EAST IMAGES/AFP VIA GETTY IMAGES**

combined air and ground attack commences. This tactic is unpopular for obvious reasons. It alerts the enemy defender and provides them the military advantage to prepare for the attack. The United States did not do this ahead of its initial invasion of Iraq in 2003, which involved major urban battles to include in Baghdad. It did not do this before its April 2004 Battle of Fallujah (though it did send civilian warnings before the Second Battle of Fallujah six months later).

By contrast, Israel provided days and then weeks of warnings, as well as time for civilians to evacuate multiple cities in northern Gaza before starting the main air-ground attack of urban areas. The Israel Defense Forces (IDF) employed their practice of calling and texting ahead of an air strike as well as roof-knocking, where they drop small munitions on the roof of a building notifying everyone to evacuate the building before a strike.

No military has ever implemented *any* of these practices in war before.

The IDF has also air-dropped flyers to give civilians instructions on when and how to evacuate, including with safe corridors. (The U.S. implemented these tactics in its second battle of Fallujah and 2016-2017 operation against ISIS in Mosul.) Israel has dropped over 520,000 pamphlets, and broadcast over radio and through social media messages to provide instruction for civilians to leave combat areas.

Israel's use of real phone calls to civilians in combat areas (19,734), SMS texts (64,399) and pre-recorded calls (almost 6 million) to provide instructions on evacuations is also unprecedented.

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The IDF also conducted daily four-hour pauses over multiple consecutive days of the war to allow civilians to leave active combat areas. While pauses for civilian evacuations after a war or battle has started is not completely new, the frequency and predictability of these in Gaza have been historic.

Another historical first in war measures to prevent civilian causalities was Israel's distribution of IDF military maps and urban warfare graphics to assist civilians with day to day evacuations and alerting them to where the IDF will be operating. No military in history has ever done this.

NORTHERN GAZA, GAZA - JANUARY 07: Israeli soldiers secure a tunnel that Hamas reportedly used on October 7th to attack Israel through the Erez border crossing on January 07, 2024 in Northern Gaza. As the... More **NOAM GALAI/GETTY IMAGES**

In the 2016-2017 Battle of Mosul, the Iraqi government initially told civilians not to evacuate and to shelter in place during the battle of both the city's eastern and western districts, but later directed civilians to leave using "safe" corridors. But the Islamic State (ISIS) mined the corridors and shot at anyone using them to escape. Hundreds of thousands of civilians were trapped inside the combat areas for months as the battle progressed.

The reality is that when it comes to avoiding civilian harm, there is no modern comparison to Israel's war against Hamas. Israel is not fighting a battle like Fallujah, Mosul, or Raqqa; it is fighting a war involving synchronous major urban battles. No military in modern history has faced over 30,000 urban defenders in more than seven cities using human shields and hiding in hundreds of miles of underground networks purposely built under civilian sites, while holding hundreds of hostages.

Despite the unique challenges Israel faces in its war against Hamas, it has implemented more measures to prevent civilian casualties than any other military in history.

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have conducted the war at all. These calls are understandable, but they fail to acknowledge the context of Israel's war against Hamas, from the hundreds of Israeli hostages to the daily rocket attacks on Israeli civilians from Gaza to the tunnels, and the real existential threat of Hamas poses Israel and its citizens, who live within walking distance of the warzone.

To be clear, I am outraged by the civilian casualties in Gaza. But it's crucial to direct that outrage at the right target. And that target is Hamas.

It is outrageous that Hamas spent decades and billions of dollars building tunnels under civilian homes and protected areas for the sole purpose of using Palestinian civilians as human shields. It is outrageous that Hamas does not allow civilians in their tunnels, that Hamas says and takes actions to create as many civilian deaths as possible—both its own and Israeli. The atrocities committed on Oct. 7 are outrageous. That Hamas fights in civilian clothes, intermixed within civilians, and launches rockets at Israeli civilians from Palestinian civilian areas is outrageous.

The sole reason for civilian deaths in Gaza is Hamas. For Israel's part, it's taken more care to prevent them than any other army in human history.

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The views expressed in this article are the writer's own.

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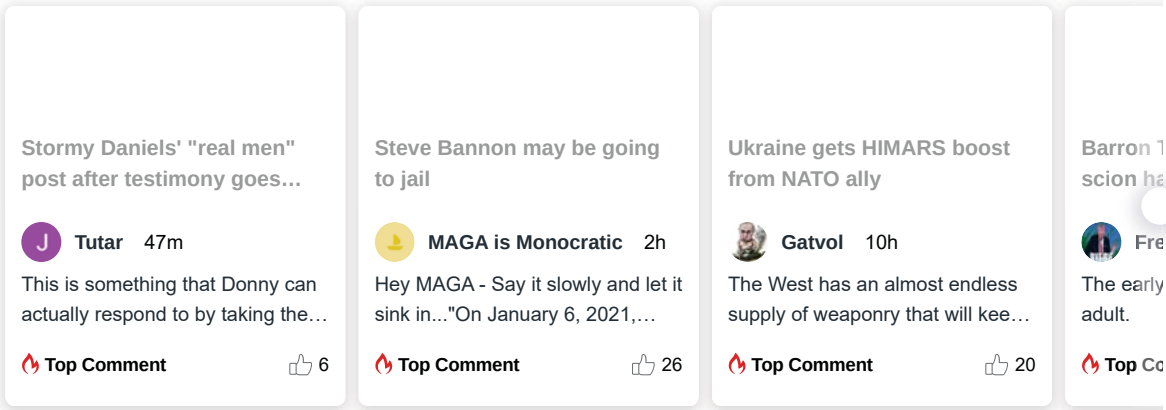

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ANALYSIS

International Humanitarian Law and the Israel-Palestinian Conflict

In this article, Solomon B. Shinerock and Alex Bedrosyan analyze international humanitarian law through the context of the crisis in Gaza.

April 22, 2024 at 10:25 AM

International Law

By Solomon B. Shinerock and Alex Bedrosyan | April 22, 2024 at 10:25 AM

Commentary on the current conflict between Israel and Hamas has brought into popular use a number of terms such as genocide and war crimes that emerge from distinct and specific legal traditions. Using powerful terms like these in political and human rights advocacy can conflate the moral, political, and legal implications of the conflict—or rhetorically, advance certain moral beliefs, cultural allegiances or political agendas. Throwing around legal terms for emotive impact can obscure the important legal framework governing armed conflict that must be applied in addressing this conflict as a matter of international law.

The international community, including the United States, has chastised the Israeli Defense Forces (IDF) for purportedly insufficient protection of civilians and decried the harm to civilian life and infrastructure in absolute terms—some at the fringes even going so far as to say this constitutes evidence of genocide. Others, drawing on extensive experience in urban warfare, assert that Israel's measures to protect civilians during combat are unparalleled, and note that in comparison to the U.S. military's actions in conflicts such as Iraq and Afghanistan, Israel's precautions far exceed what international law mandates.

The required legal analysis, however, is not fulfilled solely by reference to the number of civilian casualties, the kind of precautions taken, or the justifications for starting the war in the first place. Rather, the rules require the warring parties to balance objectively and in good faith the competing imperatives of military necessity and the protection of civilian life. And this exercise is mandatory—even if the adversary refuses to respect the rules of engagement—as Hamas has and will continue to refuse to do—the IDF's international legal obligations are not excused.

Sources of Law Governing Use of Force and Armed Conflict

The laws governing armed conflict are set out in treaties, international charters and a body of principles known as customary international law—similar in many ways to common law—that have developed based on identifiable state practices, viewed as obligatory, that are practiced and accepted by a sufficient number of states over a sufficient range of time so as to reflect an international consensus that they are law. These laws are part of the larger universe of international law set forth in Article 38 of the Statute of the International Court of Justice (ICJ).

The prevalence of armed conflict throughout history has resulted in a robust body of multilateral treaties (most notably the Geneva Conventions), customs and principles. These rules offer critical principles to assess the legality of actions taken by belligerent parties, particularly as it applies to the protection of civilian lives and civilian infrastructure, which is the greatest driving purpose behind the centuries-old effort to regulate conduct in war.

Jus ad Bellum: Whether a State May Resort to Military Force

To begin at the beginning, a discrete set of principles governs the legality of a state going to war. Associated with the "just war" philosophy that traces its roots to the Greek philosophers, jus ad bellum defines the scope of accepted reasons for engaging in armed conflict. Once a broad and liberal mix that included among other things retribution, deterrence, the acquisition of land, slaves and other resources, and even religious dominance (see, e.g. the Crusades), now the only broadly accepted bases for resorting to the use of force are (1) self-defense and (2) when the use of force is authorized by the U.N. Security Council.

Since the Treaties of Westphalia in 1648, the international community has placed increasing importance on a state's sovereignty and territorial integrity—the notions that states should be defined by clear borders, within which their governments have a sovereign right and obligation to protect and administer their population as they choose, without intrusion or meddling from neighboring powers.

These principles of sovereignty and territorial integrity are often honored in the breach, but they have gained strength over the past century, principally as reflected in core aspects of the U.N. Charter and related decisions of the ICJ. Article 2(3)-(4) of the U.N. Charter requires member states to "settle their international disputes by peaceful means" and prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

However, Article 51 confirms that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." Furthermore, Articles 38-42 of the U.N. Charter provide that the U.N. Security Council may authorize member states to use force in response to any "threat to the peace, breach of the peace, or act of aggression" if the council determines that non-forceful measures "would be inadequate or have proved to be inadequate…to maintain or restore international peace and security."

When force is used in self-defense or as authorized by the U.N. Security Council, the amount of force used must be no more than necessary to repel the armed attack or accomplish the goal authorized by the Security Council. Some human rights advocates have argued for expanding the scope of lawful justifications for military force to include "unilateral humanitarian intervention". This refers to situations where such force is necessary to protect civilian populations in states where the government is unwilling or unable to fulfill that basic remit (or indeed poses the primary threat to civilians), and the Security Council has not provided the requisite authorization (because of a politically-motivated veto by one of its permanent members).

Advocates of unilateral humanitarian intervention posit that the international community has a "responsibility to protect" civilians facing internal warfare and its attendant atrocities, famine, and internal displacement. The concept played a role in foreign policy decisions in the 1990s, most prominently in the use of force by the United States and NATO to try and protect ethnic minorities from genocide and other atrocities in the Balkans.

Following several decades of American and allied entanglement in the Middle East, however, there seems to be a reduced appetite for such interventions. In the past decade, civil wars, internal unrest or secessionist conflicts in Syria, Iran, Sudan, Myanmar, Azerbaijan and elsewhere have generated massive civilian casualties and atrocities and other human rights violations, but sparked limited interest elsewhere and little or no military response by other countries on behalf of unprotected civilians.

Jus in Bello: How a State May Use Military Force

Once engaged in the use of military force, the parties to the conflict must comply with jus in bello, regardless of their justification under principles of jus ad bellum. .These rules governing the conduct of hostilities are independent of the rules that govern whether the use of armed force is justified in the first place.

In other words, a party who has suffered an armed attack from a hostile neighbor is justified in responding with military force, but that justification does not excuse the commission of war crimes in the conduct of the war. Similarly, a party pursuing an illegal war of aggression to expand their territory is not excused merely because they conduct that illegal war in a manner that does not violate the principles of international humanitarian law.

Thus, whether or not a party is justified in resorting to military force, *how* it uses force is to be judged independently and on the basis of a stable set of rules articulated and enforced in whole or in part through a number of instruments. These include among others the Geneva Conventions, the charters and decisions of international tribunals, and military field manuals that are relied upon daily by field commanders and military lawyers accompanying the armed forces.

Prominent among the principles of jus in bello, and particularly relevant to the conflict in Gaza, are the principles of proportionality, distinction and precaution. These principles work together to further the overarching goal of limiting harm to civilians and preventing unnecessary suffering during armed conflict.

Proportionality dictates that the anticipated military advantage of an attack must outweigh the expected harm to civilians and civilian objects. While parties to a conflict have the right to engage in military operations, they must ensure that the means employed are not disproportionate to the intended military objective. This principle aims to prevent excessive collateral damage and ensure that the use of force is proportionate to the threat posed. It is applied on an attack-by-attack basis, however. This means that a state using force in response to an attack and existential threat from a terrorist group does not have carte blanche to inflict civilian casualties. Rather, the civilian harm from each defensive attack is to be measured against the specific military advantage that attack is likely to confer within the overall defense strategy. Disproportionate strikes are prohibited.

Distinction requires parties to distinguish between combatants and non-combatants, as well as between military objectives and purely civilian objects. Combatants are legitimate targets, whereas civilians and non-combatants enjoy protection from direct attack unless they directly participate in hostilities. Civilian objects, such as homes, schools and hospitals, are protected from intentional attacks, unless they are being used for military purposes at the time of the attack. Combatants are supposed to distinguish themselves through appropriate dress, such that opposing forces are able to distinguish legitimate military targets from civilians and non-combatants.

Precaution requires parties to take all feasible precautions to minimize harm to civilians and civilian objects during military operations. This includes avoiding or minimizing the use of weapons with indiscriminate effects, such as cluster munitions or landmines, and providing warnings to civilians before launching attacks, when circumstances permit. Furthermore, it is absolutely prohibited to use civilians as human shields, or to deliberately place military installations or objectives in or near civilians and civilian objects—particularly with the goal of inviting civilian deaths to use for propagandistic purposes.

All three fundamental rules become more complicated—and more necessary—in the context of warfare in a densely populated urban area like Gaza, where combatants exist amidst civilian populations and infrastructure, and where combatants sometimes intentionally incorporate civilians and civilian infrastructure directly into hostilities.

In the case of Gaza, while Israel may target Hamas where Hamas is hiding, it *must* take into account the higher expected collateral damage in determining whether a strike will be proportional, and it *must* call off any strike that will be disproportionate. Israel may target a civilian object that Hamas is currently using for military purposes, but not an object that Hamas is no longer using; and it must never target civilians in any circumstance—except for such time as civilians are directly participating in hostilities. And Israel must take or continue to take extensive precautions to minimize civilian casualties, including issuing warnings before airstrikes, employing only precision-guided munitions, and allowing evacuations. An evacuation plan that is dangerous or impossible on its face (because of an unmanageable number of evacuees, or lack of routes or truly safe destination areas) is not a legitimate precautionary measure.

At the same time, Hamas is absolutely prohibited from using civilians and civilian infrastructure as human shields, hiding among civilian areas (including hospitals, schools and residential areas), disguising its combatants as civilians, and all other conduct whose effect—or intent—is to increase the number of actual or perceived civilian casualties that the terrorist group may then hope to exploit in generating political support from the international community.

Against this backdrop, the question whether the principles of jus in bello have been violated, and by whom, requires a factual analysis informed by experienced and knowledgeable military perspectives concerning the tactical and strategic context for given attacks, which is essential to weigh the anticipated military advantage of such attacks against the known civilian casualties that will result. It can often take years to generate the political conditions to institute legal proceedings, gather and analyze the relevant facts, and analyze them in accordance with appropriate due process, all of which is a predicate to a considered and credible judgment concerning compliance with international humanitarian law.

It must be emphasized that mere retaliation, without a military objective, for a previous attack that was in breach of these principles is prohibited. It can also not be assumed that people in civilian dress who are in the same area with Hamas are combatants or even sympathizers.

Given that Hamas does not distinguish its fighters from civilians, however, it can also not be assumed that people in civilian dress are civilians—in each instance a deeper factual analysis must determine the legality of targeting decisions and the proportionality of a proposed attack. Does this inhibit the Israeli war effort and prevent or delay IDF attacks on legitimate targets? The IDF from hitting legitimate targets?

To be sure, it does, but the laws of armed conflict apply independently of prior breaches, and one side's violations do not excuse violations by the other. Savagery in the face of equal savagery is an impulse, not an acceptable principle of war and not a strategy that balances military necessity with the protection of civilian lives.

Genocide

South Africa has filed proceedings against Israel alleging Israeli violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). As only states can be parties to proceedings before the ICJ, Hamas is not and cannot be a party to the case—although the ICJ has called for the unconditional and immediate release of the Israeli hostages Hamas is holding.

Article 2 of the Genocide Convention defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

This definition has been interpreted and applied by the ICJ (in cases against states) and by several international criminal tribunals (in criminal prosecutions of individuals).

The jurisprudence establishes that it is very difficult to prove genocide. The key question has been the *intent* of an individual or state when engaging in the acts enumerated in Article 2. To be genocide, the intent must have been the physical (rather than merely cultural) *destruction of a substantial part of the protected group*.

In many instances the ICJ and international criminal tribunals found that an individual or state did not commit genocide because it was pursuing aims other than the physical destruction of the group. These other aims have included ethnic cleansing (the displacement of a population as distinct from its physical destruction), striking fear in the population, punishing the population for having done a supposedly hostile act, coercing a population to surrender, acquiring territory or pursuing a lawful military objective.

However, once it is established that there is genocidal intent, the existence of an otherwise lawful military objective does not negate a finding of genocide. In other words, it is not a defense that the intended physical destruction of a group was a means to another end; this is still genocide, and genocide is always prohibited. Therefore, the physical destruction of a group cannot be rationalized as necessary to win a war or protect a country.

Similarly, the establishment of a military objective that is inextricably intertwined with physical destruction of the group, or cannot be reasonably attained without the physical destruction of the group, can lead to a finding of genocide. For example, the ICJ and International Criminal Tribunal for Yugoslavia found that the Bosnian Serb forces committed genocide during a military operation in Srebrenica because one objective of their military operation was "to eliminate the enclave and, therefore, the Bosnian Muslim community living there" (*Prosecutor v. Blagojević*, IT-02-60-T (Jan. 17, 2005), para. 674).

A state's genocidal intent can be proven directly, through expressions of state policy, or by inference from a pattern of conduct involving the Article 2 acts enumerated in the Genocide Convention. In the latter case, the genocidal intent must be the only reasonable inference from the conduct.

The international humanitarian law principles discussed above are relevant to determining whether genocide has been committed. An Article 2 act is unlikely to support an inference of genocidal intent if it was otherwise lawful as a matter of international humanitarian law. For example, the phrase "killing members of a group" in Article 2(a) of the Genocide Convention could on its face include the lawful killing of combatants, as well as civilian deaths that occur as collateral but proportional damage in a lawful strike on a military target. Neither scenario would be persuasive evidence of genocidal intent.

On the other hand, a pattern of jus in bello violations can support the inference of genocidal intent. Since, as described above, jus in bello permits only acts that are militarily necessary, the repetition of acts that are not justified by military necessity can suggest that the perpetrator's true aim is not merely to win the war but to physically destroy the protected group.

The question is whether the actions of the IDF in Gaza support an inference that, taken together, they are intended to destroy the Palestinian population of Gaza. This consideration likely played a role in the ICJ's March 28 provisional measures order requiring Israel to take all necessary measures to ensure the unhindered provision of sufficient humanitarian assistance to the civilian population in Gaza ("Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*)", Provisional Measures (March 18, 2024), para. 51). The obstruction of humanitarian assistance to a vulnerable civilian population would be difficult to justify as a matter of military necessity.

Similarly, a state's seeming denial of the applicability of relevant *jus in bello* protections may also contribute to an inference of genocidal intent. For example, in its January 26 order indicating provisional measures, the ICJ cited the statement of Isaac Herzog, President of Israel, on Oct. 12, 2023, that "it is an entire nation out there that is responsible.

It is not true this rhetoric about civilians not aware, not involved. It is absolutely not true" ("Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*)", Provisional Measures (Jan. 26, 2024), para. 52).

If this statement was intended to convey that civilians are all fair game in Gaza, that is an incorrect statement of law and one for which Israel must answer, given that it comes from Israel's president. To the extent that it was intended as a defense to a charge of genocidal intent, it reveals a callous misunderstanding of the complex humanitarian crisis unfolding in Gaza.

The ICJ has not made a finding that Israel is committing genocide or other violations of jus in bello, and it has avoided phrasing its provisional measures orders in a way that implies that Israel is doing so. For example, the ICJ did not call on Israel to "desist" from the commission of genocide, or to cease its military operations, both of which South Africa had requested. Rather, the ICJ has only restated Israel's existing obligations under the Genocide Convention and called on it to ensure the unimpeded supply of humanitarian aid.

If the proceedings continue to the merits, the ICJ will analyze whether Israel is committing the acts enumerated in Article 2 of the Convention and whether it is doing so with the requisite genocidal intent. In this analysis, the ICJ will undoubtedly evaluate the scale of devastation in Gaza, statements by Israeli officials, the nature of Israel's war aims, and its compliance with jus in bello.

Conclusion

The tragic situation in Gaza provides fertile ground to observe the interplay between the different principles governing initiation of military force, the conduct of hostilities, genocide and their application in contemporary armed conflicts. Understanding these principles and appreciating the complexity of their application in urban conflicts will allow fair minded thinkers to make appropriate legal conclusions based on the proven evidence, consistent with the moral imperative to prevent and reduce the suffering of innocent Palestinians and Israelis alike.

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Report to Congress under Section 2 of the National Security Memorandum on Safeguards and Accountability with Respect to Transferred Defense Articles and Defense Services (NSM-20)

Background and Introduction

On February 8, 2024, the President issued NSM-20 on Safeguards and Accountability with Respect to Transferred Defense Articles and Defense Services, which outlines standards to which partner governments or authorities must commit before receiving certain U.S.-funded defense articles from the United States. NSM-20 requires the Secretary of State to obtain credible and reliable written assurances from certain foreign governments that they will:

1) use certain U.S. government (USG)-funded defense articles in accordance with international humanitarian law (IHL) and, as applicable, other international law, and

2) consistent with applicable international law, facilitate and not arbitrarily deny, restrict, or otherwise impede, directly or indirectly, the transport of U.S. humanitarian assistance and USG-supported international efforts to provide humanitarian assistance in any area of armed conflict where the partner uses such defense articles.

NSM-20 requires assurances to be provided, in writing, by a senior official or officials in the partner government with authority to make commitments on behalf of their government related to the required assurances. The State Department determined that Minister-level officials from the relevant ministry or above would be appropriate in most circumstances.

Assurance Status and Considerations

NSM-20 requires that the Secretary of State obtain credible and reliable assurances within 45 days from any country engaged in an active armed conflict in which covered defense articles are used. Based on this requirement, the State Department instructed Posts to seek credible and reliable assurances within 45 days from the following partner governments: Colombia, Iraq, Israel, Kenya,

Nigeria, Somalia, and Ukraine after determining that those countries are currently engaged in active armed conflict.

Embassies Bogota, Baghdad, Jerusalem, Nairobi, Abuja, Mogadishu, and Kyiv obtained the required assurances signed by the designated representatives of their respective countries, which were in turn reviewed by the State Department in order to determine credibility and reliability by March 24, 2024. Assessment of the credibility and reliability of these assurances is based on consideration of the following factors, among others:

- The position, responsibilities, and authority of the official providing assurances on behalf of the foreign government in relation to the subject matter of the assurances;
- Whether the individual providing the assurances is understood to be credible in doing so; and
- The likelihood that the partner government will comply with both assurances based on past practice.

The USG assesses on an ongoing basis the credibility or reliability of assurances received to date. While in some countries there have been circumstances over the reporting period that raise serious concerns, the USG currently assesses the assurances provided by each recipient country to be credible and reliable so as to allow the provision of defense articles covered under NSM-20 to continue.

Concurrently, the State Department, together with the Department of Defense, has reviewed all partners potentially receiving defense articles covered under NSM-20 that are not considered to be in an active armed conflict in which covered defense articles are used, and identified those recipients that must provide written assurances within 180 days of the issuance of the NSM, which is August 6, 2024. The State Department will be reviewing assurances on a rolling basis, and notifying Congress of the receipt of such assurances, as required by NSM-20.

(U) Recipients by region include:

- **AF**: Benin, Djibouti, Ghana, Mauritania, Senegal
- **EAP**: Fiji, Indonesia, Malaysia, Marshall Islands, Micronesia, Mongolia, Palau, the Philippines, Taiwan, Thailand, Timor-Leste, Tonga, Vietnam

- **EUR**: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Greece, Hungary, Kosovo, Latvia, Lithuania, Moldova, Montenegro, North Macedonia, Poland, Romania, Slovakia, Slovenia
- **NEA**: Bahrain, Egypt, Jordan, Lebanon, Morocco, Oman, Tunisia
- **SCA**: Bangladesh, Kazakhstan, Maldives, Sri Lanka, Tajikistan, Turkmenistan, Uzbekistan
- **WHA**: Antigua and Barbuda, Argentina, Bahamas, Belize, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru

In addition to covered defense articles, NSM-20 may also apply to the provision to foreign governments by the Departments of State or Defense of any defense services the Secretary of State or the Secretary of Defense determines to be appropriate to advance the stated policy aims. To date, no services have been determined to be covered. As the USG continues to move forward with implementation of NSM-20, we will extend application to covered services where appropriate.

NSM-20 Reporting Requirement

NSM-20 also requires that, not later than 90 days after the date of the memorandum and once every fiscal year thereafter, the Secretaries of State and Defense submit a written report to the specified Congressional committees of jurisdiction for State and Defense; and, upon request, other congressional national security committees as appropriate. Generally, with limited exceptions, this first report includes available information and reporting collected for the period between January 1, 2023, and late April 2024, for partners that have or are receiving covered defense articles from the USG and were assessed to be engaged in an active armed conflict in which covered defense articles and, as appropriate, defense services, are used.

Consistent with NSM-20, the following sections provide country-specific assessments for the seven countries covered by this initial report. In making these assessments, the USG gathered information through engagement with partner governments, reviewed internal assessments and analysis, including the State Department's annual Human Rights Report and relevant products from the intelligence community, and gathered information from publicly available sources,

including reports from civil society and the media. While the USG is not necessarily in a position independently to verify all information received from sources that are viewed as credible based on their history of reporting and their level of access to relevant facts, and the State and Defense Departments have not both been able to validate every item, such information is included in this report where relevant to reported incidents. Within the State and Defense Departments, relevant bureaus with regional, subject matter, technical, and legal expertise provided their input and contributed to the drafting of this report.

While certain events and information in individual country reports below may fall outside of the scope of the NSM-20 reporting requirements – either by happening beyond the period in question or not involving the use of covered defense articles – they are included to provide important context that could be relevant to credibility and reliability assessments for partner government assurances.

NSM-20 Challenges

This first report under NSM-20 highlights the robust and significant security relationships with seven partners who are in active conflict. Nevertheless, this section discusses the various challenges that the USG faced when developing this report. In the context of active conflict, it is challenging to collect accurate and reliable information. USG personnel are often constrained from accessing a conflict zone. This means much of the information for reports like this one are collected from the partner nation, USG contractors, or other third parties, including from other international partners. Collecting this information firsthand is exceedingly difficult. We appreciate deeply the work of journalists, NGOs, humanitarian workers, and other entities and organizations, especially those operating on the ground, who have provided information relevant to this report and that we have considered in preparing it. While reports received from civil society or published in the media often do not, on their own, contain sufficient information to reach firm conclusions about compliance or lack thereof with particular standards, the Departments of State and of Defense also have sought, as part of our analysis, to consider all available and relevant information, including tools and information that are not available to outside organizations, such as operational planning data, intelligence data, and sensitive diplomatic data.

Reliably assessing a partner's conduct can depend on information that is only available to the partner. External actors generally do not have the ability to question relevant, oftentimes junior military personnel at the unit level or access classified military information. External actors also generally do not have the ability to question the military commanders or decisionmakers in the process for particular military operations. A similar point can be made with regard to reports of civilian harm. Reliably assessing what specific practices were applied in a particular incident can require information that was available only to the force that conducted the operation.

In assessing partner government assurances regarding humanitarian assistance, it is important to note that NSM-20 specifies that partner governments must provide an assurance that, consistent with international law, they will not arbitrarily deny, restrict, or otherwise impede U.S. humanitarian assistance efforts. Instances where aid may, in certain circumstances and consistent with international law, be denied, restricted or otherwise impeded, but not necessarily in an arbitrary manner, could include appropriate requirements for dual-use products that can be diverted to military purposes, requirements for humanitarian movements in active combat zones, or other legitimate measures.

Our assessments remain ongoing. We will continually monitor new and relevant information received from parts of the USG, NGOs, and other entities and organizations. We will review existing assessments if they are called into question by new, relevant, credible information that becomes available.

Finally, the short timeline to collect and review data from more than a year created challenges for drafters, particularly given competing demands on a limited number of personnel. No additional resources were available to offices required to implement NSM-20. We will work with Congress to address these resource constraints.

U.S. Conventional Arms Transfer (CAT) Policy

The President's February 2023 CAT policy takes a holistic approach to arms transfer decisions that considers a number of U.S. national security interests, including human rights, security sector governance, and strategic competition. There is a prohibition under the CAT Policy on any arms transfer

where the USG assesses "it is more likely than not" that the arms to be transferred would be used in, facilitate, or aggravate the risk of commission of certain serious violations of human rights law or IHL. This policy applies to decisions on whether to authorize the transfer of United States arms to a foreign user, including certain items on the Commerce Control List, the transfer of defense articles, related technical data, and defense services, regardless of the authority or USG department or agency under which the transfer would occur or be authorized.

Civilian Harm Mitigation and Response (CHMR)

The Secretary of Defense has stated that protecting civilians is not only a moral imperative but a strategic priority to achieve mission success. In August 2022, the Secretary of Defense approved the Civilian Harm Mitigation and Response Action Plan (CHMR-AP), which sets forth a series of actions that DoD is taking to improve its approach to CHMR. DoD Instruction (DoDI) 3000.17 dated December 21, 2023, "Civilian Harm Mitigation and Response," sets in place standards to incorporate CHMR into U.S. military operations. Ultimately, CHMR efforts reflect U.S. and professional military values, in particular the importance of protecting and respecting human life and treating civilians with dignity and respect.

DoD is actively developing procedures for integrating CHMR considerations into DoD security cooperation programs and activities, including, among other things, responding to reports of civilian harm by ally or partner forces receiving security cooperation assistance under authorities in chapter 16 of Title 10, U.S. Code. Implementation of CHMR-AP and the DoDI across DoD is ongoing. DoD continues efforts to hire dozens of CHMR subject matter experts, and the referenced development of procedures coordination before final approval.

State Department Civilian Harm Incident Response Guidance (CHIRG)

The protection of civilians in the context of military operations by foreign governments has long been viewed by the State Department as a priority fundamental to advancing both U.S. interests and values. It is also critical to strengthening our relationships with allies and partners. The State Department initiated development of the CHIRG in response to Government Accountability Office recommendations regarding the U.S. response to reports of civilian harm in

Yemen. The State Department recognized the potential use of U.S. munitions in incidents involving civilian harm should be addressed through a globally focused process. The CHIRG, launched in September 2023, establishes a bottom up, institutional process to assess and respond to new incidents of civilian harm in which U.S.-provided defense articles may have been used, take steps to help prevent them from recurring, and to drive partners to ensure military operations are conducted in accordance with international law.

Leahy Laws

The Leahy laws refer to statutory provisions that restrict certain assistance to units of foreign security forces if the Secretary of State or Defense has credible information that the unit committed a gross violations of human rights (GVHR). In this context, GVHRs include torture, extrajudicial killing, enforced disappearance, and rape under the color of law. Allegations of GVHRs by foreign security forces are examined on a fact-specific basis. Where U.S. assistance to a foreign security force is provided in a manner in which the recipient unit or units cannot be identified prior to the transfer of assistance, the law requires the State Department to complete an agreement with the recipient government that it will not provide such assistance to any unit the Department identifies as ineligible under the Leahy law. In addition, the State Department has a process to proactively review allegations of GVHRs.

Human Rights and Rule of Law Training

All equipment transfers under DoD authorities such as 10 U.S.C. 333 (Train and Equip) require human rights and rule of law training for partner nations. The training is specific to the lethality of weapons or systems the partner is receiving, and in general, the more lethal the system or capability, the longer and more in-depth the training required.

The Defense Institute of International Legal Studies (DIILS) is the lead DoD security cooperation resource for rule of law capacity-building with international defense sector officials. DIILS conducts resident courses and mobile programs in support of security cooperation programs under authorities in Title 10, U.S. Code, such as Institutional Capacity Building.

During the period of January 1, 2023 to March 24, 2024, forces from Colombia, Iraq, Kenya, Nigeria, Somalia, and Ukraine received a range of DIILS training.

Through professional and technical courses and specialized instruction, the International Military Education and Training (IMET) program provides students from allied and partner nations valuable training and education on U.S. military practices and standards, including exposure to democratic values and respect for internationally recognized standards of human rights.

End Use Monitoring (EUM)

The objective of the EUM program is to provide a factual basis for the USG to conclude reasonably that a foreign partner is meeting its end use requirements. DoD implements EUM for Foreign Military Sales while the State Department implements EUM for Direct Commercial Sales. DoD's EUM program, Golden Sentry, has the objective to ensure compliance with technology control requirements in order to minimize security risks to the United States, partner nations, and allies. The State Department's EUM program, Blue Lantern, promotes understanding of U.S. defense trade controls by foreign partners, builds mutual confidence with partner governments and industry in the defense trade relationship and supply chains; and mitigates the risk of unauthorized diversion and use of U.S. defense articles. EUM includes follow-on actions to prevent misuse or unauthorized transfer of defense articles or services from title transfer until disposal. The type of defense article or service generally determines the level of monitoring required. USG EUM can include scheduled inspections, physical inventories, and reviews of accountability records.

State Department Human Rights Report

The Country Reports on Human Rights Practices, commonly known as the Human Rights Report (HRR), is an annual report mandated by Congress beginning in 1977. Public servants in U.S. missions abroad and in Washington examine, track, and document the state of human rights in nearly 200 countries and territories around the world. In compiling the annual reports, the State Department draws from a variety of credible, fact-based sources, including reporting from government agencies, NGOs, and media. The HRR helps connect U.S. diplomatic and foreign assistance efforts to the fundamental American value of protecting and promoting

respect for universal human rights, while helping to inform the work of civil society, human rights defenders, scholars, multilateral institutions, and others. DoD has not independently reviewed or assessed the information drawn from the 2023 HRR included in this report.

COUNTRY REPORTS

Colombia

Assessment of credible reports or allegations that certain defense articles and, as appropriate, defense services, have been used in a manner not consistent with international law, including international humanitarian law; such assessment shall include any determinations, if they can reasonably be made, as to whether use has occurred in a manner not consistent with international law, and if so, whether the recipient country has pursued appropriate accountability; and a description of the procedures used to make the assessments:

The Colombian government has made significant strides to professionalize its military and ensure it upholds IHL and human rights. The Ministry of Defense issued its first human rights policy in 2008, which mandated that the Ministry, General Staff, and all military services have human rights offices in each unit down to the battalion level. Furthermore, human rights training is universal and adapted according to the level of responsibility, and units are assigned operational lawyers trained on human rights. The Colombian military leadership consistently voice their commitment to respect human rights and the rule of law with an emphasis on zero tolerance for violations of human rights and on human rights as the center of gravity for their institution. Colombian officers have supported human rights-related engagements throughout Latin America and the Caribbean and imparted their training to partner nation's militaries in the Dominican Republic, El Salvador Guatemala, Honduras, Paraguay, and Peru.

The Colombian military has used the U.S.-Colombia Action Plan to provide training to partner nations across Latin America and the Caribbean. The Colombian Ministry of Defense and military have also hosted events to share best practices and lessons learned from their human rights program. Minister of Defense Velasquez has significant legal experience as a judge in combatting corruption and investigating human rights violations and abuses, and, he has committed to prioritizing respect for human rights within the Colombian armed forces.

Assessment and analysis of (1) any credible reports indicating that the use of such defense articles has been found to be inconsistent with established best practices for mitigating civilian harm, and (2) the extent to which efforts to induce effective implementation of such civilian harm mitigation best practices have been incorporated into the relevant United States security assistance program; and a description of the procedures used to make the assessments:

The United States incorporates human rights and respect for law training across a broad spectrum of training and engagements with Colombian partners. Human rights training is conducted at the tactical, operational, and strategic levels, for both State Department and DoD-funded programs with Colombia. Any individual or unit that has been credibly alleged to have been involved in a gross violation of human rights is prevented from receiving USG-funded assistance. Additionally, other kinds of derogatory information can prevent individuals or units from receiving assistance, including information related to the misuse of U.S.-supplied materials. For the vetting process to commence, USG personnel provide detailed information about the unit and its members. For material assistance, this includes providing information on both the individual and unit signing the contracting or procurement documents for the equipment, as well as all units that will be the end-users of the equipment. Vetting must be completed prior to the commencement of the proposed assistance.

In addition, Colombia has undertaken a variety of efforts to implement its obligations under IHL. Colombia has implemented regulations on the use of force by the military and issued a manual on operational law in 2009. Colombia has also taken other steps to disseminate information regarding IHL, including in military training. Further, since 2002, Colombia has employed military lawyers as legal advisers during operations and is considered a regional leader in integration of legal advisers into military operations. Colombia's military justice system is used to ensure accountability for violations committed by members of its armed forces, although this system is in the process of transitioning from an investigatory system to an accusatory system.

Colombia also has an Office of Inspector General (OIG) that routinely inspects and oversees military units and their activity, including efforts that support compliance with IHL. In addition, the Colombian military has taken steps to mitigate harm to non-combatants and is working closely with the U.S. Agency for International

Development (USAID) and other USG entities to reestablish state control in various conflict areas through a phased approach that combines security, counter-narcotics, and socioeconomic development. The Colombian military's presence and operations in these areas have aided in the provision of U.S. and other humanitarian assistance.

Description of any known occurrences of such defense articles not being received by the recipient foreign government that is the intended recipient, or being misused for purposes inconsistent with the intended purposes, and a description of any remedies undertaken:

The USG is not aware of defense articles covered under NSM-20 not being received by the intended foreign government recipient and/or being misused for purposes inconsistent with the intended purposes.

Assessment and analysis of whether each foreign government recipient has abided by the assurances received pursuant to section 1(a)(ii) of the NSM; is in compliance with section 620I of the Foreign Assistance Act of 1961, and whether such recipient has fully cooperated with United States Government efforts and United States Government-supported international efforts to provide humanitarian assistance in an area of armed conflict where the recipient country is using such defense articles and, as appropriate, defense services:

Colombia has fully cooperated with United States Government efforts and United States Government-supported international efforts to provide humanitarian assistance in an area of armed conflict where the recipient country is using covered defense articles.

Iraq

Assessment of credible reports or allegations that certain defense articles and, as appropriate, defense services, have been used in a manner not consistent with international law, including international humanitarian law; such assessment shall include any determinations, if they can reasonably be made, as to whether use has occurred in a manner not consistent with international law, and if so, whether the recipient country has pursued appropriate accountability; and a description of the procedures used to make the assessments:

Although there is ongoing concern over human rights abuses, potential IHL violations, and periodic obstructions of humanitarian access by some elements of the Iraqi security forces (ISF), particularly the Iran-aligned Popular Mobilization Forces (PMF), the United States does not provide covered defense articles or defense services to those entities.

During the reporting period, there were credible reports of potential IHRL violations by government security forces and government-supported armed groups. The State Department's 2023 Country Reports on Human Rights Practices document credible reports of arbitrary or unlawful killings, including extrajudicial killings, as well as torture or other cruel, inhuman, or degrading treatment by government security forces or government-affiliated armed groups.

Nongovernmental organizations also reported disappearances, with the International Committee of the Red Cross receiving nearly 1,000 tracing requests for missing persons from January to July 2023. Additionally, there were credible reports that Iraqi officials employed torture and other cruel, inhuman, or degrading treatment or punishment in jails, detention facilities, and prisons during the reporting period. NGOs indicated that government security forces and government-affiliated forces, including the federal police, the PMF, and units within the internal security services operated with impunity and Iraq maintained very limited accountability for reported violations.

All identified recipients of U.S. foreign assistance undergo vetting to ensure they are not members of foreign terrorist organizations (FTO), sanctioned individuals, nor human rights violators. Material provided to Iraqi security forces undergoes regular end use monitoring and verification.

Through U.S.-led trainings, Iraqi security forces currently receiving covered U.S. defense articles and services have demonstrated an understanding of how professional security forces should operate in active conflict environments, including in compliance with IHL and other international law. U.S.-funded courses for Iraq's security forces over two decades have included and continue to include training on human rights and reducing civilian harm. Since 2003, the United States has provided International Military Education and Training (IMET) funds to support training of Iraqi forces, including through components that train on human rights, respect for the rule of law, and humanitarian assistance response. Additionally, recipients of training provided from the Department of Defense's authority to build capacity (10 U.S.C. 333) are required to take courses on IHL consistent with parameters outlined in NSM-20.

Furthermore, ongoing U.S. Mission Iraq (USMI) visits to Iraq's Counterterrorism Service (CTS) and other Ministry of Interior (MoI) security organizations, including as recently as March 2024, highlighted each organization's ongoing emphasis on human rights training, including through human rights coursework in CTS and MoI training modules. These entities prominently displayed human rights procedures in public spaces, and CTS incorporated them into intake and interview procedures at its facilities. U.S. advisors provide input into coursework on the laws of armed conflict (LOAC) and international human rights law (IHRL) conducted by CTS and attended by MoD participants. Given the close security partnership between Iraq and the United States, U.S. Mission Iraq personnel conduct stringent end use monitoring of defense articles.

Assessment and analysis of (1) any credible reports indicating that the use of such defense articles has been found to be inconsistent with established best practices for mitigating civilian harm, and (2) the extent to which efforts to induce effective implementation of such civilian harm mitigation best practices have been incorporated into the relevant United States security assistance program; and a description of the procedures used to make the assessments:

Iraq and the United States have a highly interconnected defense relationship. Combined Joint Task Force – Operation INHERENT RESOLVE (CJTF-OIR) currently maintains approximately 2,000 Coalition personnel in Iraq, who work daily in an "advise, assist, and enable" capacity with the ISF. U.S. Central Command

(USCENTCOM) hosts biweekly meetings with the ISF. Since February 2024, USCENTCOM has also engaged senior ISF leadership as part of the ongoing Higher Military Commission (HMC) dialogue. These frequent touchpoints provide opportunities for the United States to engage with the ISF regarding the ISF's application of IHL.

Additionally, the Office of Security Cooperation—Iraq (OSC-I) and Defense Attaché teams engage near-daily with the ISF. In all defense transfers, OSC-I works closely with the Government of Iraq. Additionally, the OSC-I Northern Affairs element works consistently with the Iraqi Kurdistan Regional Government (KRG) to continue reform and modernization efforts with the Peshmerga forces, as stated in the DoD-KRG 2022 Memorandum of Understanding.

The Government of Iraq understands that noncompliance with said requirements would jeopardize the significant levels of existing and future USG-funded defense articles afforded to the ISF. At this moment, Iraq is working closely with the United States to normalize and strengthen the bilateral defense relationship.

DoD assesses that the Government of Iraq has been a transparent and cooperative partner in OIR, providing timely reportable information for annual and quarterly accountability as well as congressional reports. The ISF, the primary recipients and users of lethal aid, have been trained by and worked with U.S. and Coalition military forces for more than a decade and have demonstrated an understanding of IHL.

The bilateral U.S.-Iraq security relationship entails continued efforts to work with the ISF, including the Peshmerga, to ensure the enduring defeat of ISIS, while also serving as a key logistical hub for repatriations of displaced persons and foreign terrorist fighters from camps in Syria.

As recently as March 2024, USMI personnel regularly visit Iraqi recipients of covered defense articles, including the CTS, and MoI. These visits serve as opportunities to evaluate each organization's ongoing use of human rights training, including through human rights coursework. USMI has observed that these organizations prominently display information on human rights procedures in public spaces, and CTS incorporates such materials into intake and interview

procedures at its facilities. U.S. advisors also provide input into coursework on LOAC and IHRL.

Description of any known occurrences of such defense articles not being received by the recipient foreign government that is the intended recipient, or being misused for purposes inconsistent with the intended purposes, and a description of any remedies undertaken:

The USG is not aware of defense articles covered under NSM-20 not being received by the intended foreign government recipient and/or being misused for purposes inconsistent with the intended purposes.

Assessment and analysis of whether each foreign government recipient is in compliance with section 620I of the Foreign Assistance Act of 1961, and whether such recipient has fully cooperated with United States Government efforts and United States Government-supported international efforts to provide humanitarian assistance in an area of armed conflict where the recipient country is using such defense articles and, as appropriate, defense services:

The Government of Iraq relies significantly on assistance from the United States and other donor partners and has not arbitrarily impeded or restricted U.S. humanitarian assistance in areas of current active armed conflict. The Government of Iraq remains highly cognizant of the close scrutiny of usage of defense articles it receives from the United States and recognizes the challenges it will face if reporting implicates the Government of Iraq's usage in potential violations of IHL or if the Government of Iraq impedes the delivery of humanitarian assistance. ISF that are recipients of U.S. security assistance have not impeded humanitarian assistance and have been compliant with international law. Although some units of the ISF, including the PMF, have occasionally obstructed humanitarian access or committed human rights violations, we do not provide support to those entities. Moreover, in June 2023, the UN Secretary-General stated in a public report that the UN recognized and welcomed the Government of Iraq's concerted effort toward the decrease in verified humanitarian access restrictions, in particular by the ISF.

While USG humanitarian partners do occasionally experience obstacles in the delivery of humanitarian assistance, we assess that impediments are neither

systemic nor widespread. By and large, the Government of Iraq remains willing to engage with the USG, other donors, and humanitarian actors on humanitarian concerns, even if its capacity and will to change course when needed are inconsistent. The general population's access to humanitarian assistance is highly constrained across Iraq for a variety of reasons, but access by humanitarian organizations has improved since January 2023 given increased security and reduced movement restrictions for people and goods.

Israel

On October 7, 2023, Hamas, Palestinian Islamic Jihad, and other Palestinian terrorists launched an unprovoked, large-scale attack on Israel from the Gaza Strip, killing an estimated 1,200 individuals, injuring more than 5,400, intentionally targeting civilians without any military justification, and abducting 253 hostages, including American citizens. There are also credible reports that individuals associated with these organizations raped or committed other acts of sexual violence against women and girls killed and abducted on October 7. Hamas had previously launched attacks against Israel from Gaza, including in 2008, 2012, 2014, and 2021. Further, Hamas does not follow any portion of and consistently violates IHL.

Israel has conducted a sustained military operation in Gaza in response to the October 7 attacks and hostage-taking, with the stated objectives of destroying Hamas's military capabilities and dismantling its infrastructure. The conflict has resulted in the deaths of an estimated 34,700 Palestinians and injured more than 78,200 in this reporting period, a significant percentage of whom are reported to be women and children. The Hamas-controlled Gaza Ministry of Health is the primary source for these numbers, which international organizations generally deem credible, but do not differentiate between Hamas fighters and civilians. The Government of Israel has asserted that approximately half of the 34,700 killed in Gaza have been Hamas fighters, though we do not have the ability to verify this estimate. The conflict has displaced the vast majority of Palestinians in Gaza and resulted in a severe humanitarian crisis.

Israel has had to confront an extraordinary military challenge: Hamas has embedded itself deliberately within and underneath the civilian population to use civilians as human shields. Hamas intentionally uses schools, hospitals, residential buildings, and international organization facilities for military purposes. It has constructed a vast tunnel network beneath this civilian infrastructure not to protect civilians, but to hide its leaders and fighters and from which it stages and launches attacks. Hamas has not expressed regret for the intentional targeting of Israeli civilians, and its charter and statements by its leadership continue to call for the destruction of Israel. Hamas continues to hold more than 100 hostages, continues to fire rockets into Israel indiscriminately, and has pledged to conduct

attacks on the scale of October 7th again. Military experts describe Gaza as being as difficult a battlespace as any military has faced in modern warfare.

The United States has supported Israel's right to defend itself in the wake of October 7, both from the continuing threat it faces from Hamas and in the broader region, and the United States is committed by law and policy to Israel maintaining its Qualitative Military Edge. The covered defense articles we have provided during this period have helped Israel maintain deterrence against Iran, Hezbollah, and other Iranian-backed proxies in the region, advancing our objective of preventing the conflict from spreading. We have also made clear the imperatives as Israel defends itself of adhering to IHL, protecting humanitarian workers, facilitating the flow of humanitarian assistance, and minimizing civilian casualties.

Throughout this period, the USG has engaged at all levels with the Government of Israel to understand Israel's view of the applicable legal frameworks relevant to the ongoing Israel-Hamas conflict, as well as to further our understanding of the procedures and mechanisms upon which Israel relies to integrate IHL compliance into their approach to combat operations, civilian protection, and humanitarian assistance. In the course of those discussions, Government of Israel officials confirmed their commitment to ongoing dialogue on IHL issues, including as related to the NSM-20 assurances and any incidents of concern.

Israel has institutions and processes charged with upholding the implementation of IHL. Israeli military lawyers can and do give binding legal advice during military operations, and the Israeli Supreme Court may provide judicial review of past targeting and/or operational decisions made during armed conflict. Prior to the conflict in Gaza, the IDF sent an average of approximately 500 personnel to the United States annually for relevant DoD-sponsored training. In many of these courses, IDF personnel are trained to U.S. standards on civilian harm mitigation.

In the course of U.S. engagements during this period, the Government of Israel has identified a number of processes for ensuring compliance with IHL that are embedded at all levels of their military decision-making. The Government of Israel has provided written analysis of its legal positions related to its military operations and described in detail its procedures for integrating legal review into targeting decisions and other aspects of military operations. It has also identified

several domestic accountability mechanisms aimed at investigating and remediating violations of its rules of engagement and IHL. The current Military Advocate General has stated publicly that she is investigating incidents in which Israel Defense Forces (IDF) soldiers are alleged to have acted in contravention to IDF protocols and IHL. Israel also appointed a retired Major General and former head of the IDF J3 to lead investigations into incidents in Gaza involving the IDF under the IDF's independent, fact-finding assessment mechanism (FFAM). To date, Israel has confirmed that it has opened a number of criminal investigations, which are ongoing, including into allegations related to deaths and treatment of detainees and allegations of violations of IHL. The FFAM also continues to examine hundreds of incidents to consider possible misconduct in the context of ongoing military operations. Recognizing such investigations and legal processes take time, to date the USG is unaware of any Israeli prosecutions for violations of IHL or civilian harm since October 7.

Israel has, upon request, shared some information on specific incidents implicating IHL, some details of its targeting choices, and some battle damage assessments. Although we have gained insight into Israel's procedures and rules, we do not have complete information on how these processes are implemented. Israel has not shared complete information to verify whether U.S. defense articles covered under NSM-20 were specifically used in actions that have been alleged as violations of IHL or IHRL in Gaza, or in the West Bank and East Jerusalem during the period of the report. Limited information has been shared to date in response to USG inquiries regarding incidents under review to determine whether U.S. munitions were used in incidents involving civilian harm. However, certain Israeli-operated systems are entirely U.S.-origin (e.g., crewed attack aircraft) and are likely to have been involved in incidents that raise concerns about Israel's IHL compliance.

Assessment of credible reports or allegations that certain defense articles and, as appropriate, defense services, have been used in a manner not consistent with international law, including international humanitarian law; such assessment shall include any determinations, if they can reasonably be made, as to whether use has occurred in a manner not consistent with international law, and if so, whether the recipient country has pursued appropriate accountability; and a description of the procedures used to make the assessments:

As reflected in the 2016 Memorandum of Understanding with Israel and pursuant to annual U.S. appropriations acts, the United States provides significant security assistance, including defense articles and services, to Israel on an annual basis. This support will be augmented by supplemental appropriations since October 7. In any conflict involving foreign partners, it is often difficult to make swift, definitive assessments or determinations on whether specific U.S. defense articles or services have been used in a manner not consistent with international law. The nature of the conflict in Gaza and the compressed review period in this initial report amplify those challenges.

However, there have been sufficient reported incidents to raise serious concerns. As described more fully below, the State Department has received reporting from multiple credible UN and non-governmental sources on alleged human rights violations by Israeli forces during the reporting period. The State Department's 2023 Country Reports on Human Rights Practices document credible reports of alleged human rights abuses by Israeli security forces, including arbitrary or unlawful killings, enforced disappearance, torture, and serious abuses in conflict. Credible UN, NGO, and media sources have reported that since October 7, Israeli security forces have arrested large numbers of Palestinians suspected of being Hamas militants and transported them from Gaza to Israel, where some were allegedly abused during their detentions. NGOs have disputed claims that all of these detainees are Hamas militants. There are also allegations of Israeli security forces using excessive force against Palestinians in the West Bank and East Jerusalem in the course of counterterrorism operations. The UN reported that 2023 was the deadliest year on record in the West Bank prior to October 7, and there was a significant intensification of killings and other incidents of violence in the West Bank in the following months. Palestinians killed in operations by Israeli security forces included both militants and civilians while Israeli civilians were also killed by Palestinian terrorists during this period. Extremist settlers have been responsible for acts of violence and intimidation against Palestinians in the West Bank, including incidents where Israeli security forces may have played an abetting role or failed to effectively intervene.

Israeli officials have stated that Israel complies with IHL and continues to strengthen efforts to minimize civilian harm. Given the nature of the conflict in Gaza, with Hamas seeking to hide behind civilian populations and infrastructure and expose them to Israeli military action, as well as the lack of USG personnel on

the ground in Gaza, it is difficult to assess or reach conclusive findings on individual incidents. Nevertheless, given Israel's significant reliance on U.S.-made defense articles, it is reasonable to assess that defense articles covered under NSM-20 have been used by Israeli security forces since October 7 in instances inconsistent with its IHL obligations or with established best practices for mitigating civilian harm. Israel's own concern about such incidents is reflected in the fact it has a number of internal investigations underway. At the same time, it is also important to emphasize that a country's overall commitment to IHL is not necessarily disproven by individual IHL violations, so long as that country is taking appropriate steps to investigate and where appropriate determine accountability for IHL violations. As this report notes, Israel does have a number of ongoing, active criminal investigations pending and there are hundreds of cases under administrative review.

The U.S. Intelligence Community (IC) notes that security forces in Israel, which is involved in an active war against Hamas, have inflicted harm on civilians in military or security operations, potentially using U.S.-provided equipment. The IC has no direct indication of Israel intentionally targeting civilians. The IC assesses that Israel could do more to avoid civilian harm, however.

One specific area of concern is the impact of Israel's military operations on humanitarian actors. Despite regular engagement from humanitarian actors and repeated USG interventions with Israeli officials on deconfliction/coordination procedures, the IDF has struck humanitarian workers and facilities. While Israel repeatedly committed to improve deconfliction and implemented some additional measures, those changes did not fully prevent subsequent strikes involving humanitarian workers and facilities during the reporting period. The USG will continue to press the Government of Israel on the need to do more to create a permissive and safe environment for delivery and distribution of aid.

The UN reports that more than 250 humanitarian workers have been killed in the course of their work or in other circumstances. Multiple military operations have taken place in protected or de-conflicted sites or in areas designated for evacuees. Some of these incidents during the reporting period that have received widespread attention in media or are cited by humanitarian organizations as illustrative of the operating environment in Gaza are noted below. As noted

above, we are not able to reach definitive conclusions on whether defense articles covered by NSM-20 were used in these or other individual strikes.

- 4/9/2024: Small arms fire reportedly struck a UN International Children's Emergency Fund vehicle and World Food Program fuel truck in a convoy south of the Salahedin checkpoint. UN staff reported IDF patrols were the source of fire. Israeli authorities denied responsibility. The [UN] submitted a formal complaint to the Coordinator of Government Activities in the Territories (COGAT).

- 4/1/2024: Seven World Central Kitchen (WCK) workers, including an American citizen, were killed by three successive IDF strikes on their aid convoy despite WCK having coordinated with the IDF; Israel accepted responsibility and conducted an immediate investigation, called the incident a "grave mistake," said the IDF misidentified the vehicles, dismissed four officers responsible, formally reprimanded relevant commanders, and said prosecutions are being considered.

- 2/29/2024: At least 118 people reportedly were killed and approximately 760 people were injured along the coastal road southwest of Gaza City when crowds gathered around trucks carrying humanitarian aid. An IDF command review of the incident reported that IDF troops fired at individuals who approached their forces at the IDF checkpoint adjacent to the end of the lengthy convoy. The IDF initially fired warning shots, but subsequently fired at individuals' lower extremities when the group continued to approach. While the GOI acknowledged IDF shooting-related fatalities might have ensued, it asserted that most civilian deaths occurred due to stampeding and trucks driving over people. Accounts from NGO and media reporting dispute this assertion. The IDF General Staff's FFAM continues to investigate the incident.

- 2/20/2024: IDF tank fire reportedly killed two people and injured six others – five of whom were women or children – in a Medecins Sans Frontieres (MSF) guesthouse in Khan Younis Governorate's Al Mawasi area, according to MSF. MSF reports Israeli forces had been clearly informed of the precise location of the guesthouse, and the site clearly displayed humanitarian identification.

- 1/18/2024: An Israeli airstrike reportedly hit a residential site used by humanitarian staff from the International Rescue Committee (IRC) and Medical Aid for Palestinians UK (MAP), injuring two staff members and damaging the building beyond repair. IRC and MAP indicated that the site had been deconflicted with the IDF, and that Israel provided varied responses to IRC and MAP inquiries about the strike. As a result, IRC and MAP surgeons suspended medical work at Nasser Hospital.

Additionally, there are numerous credible UN, NGO, and media reports of Israeli airstrikes impacting civilians and civilian objects unrelated to humanitarian operations that have raised questions about Israel's compliance with its legal obligations under IHL and with best practices for mitigating civilian harm. These include reported incidents involving strikes on civilian infrastructure and other sites protected from being made the object of attack absent use for a military purpose; certain strikes in densely populated areas; strikes taken under circumstances that call into question whether expected civilian harm may have been excessive relative to the reported military objective; or failure to provide effective warning or take appropriate precautions to protect civilians. Strikes on protected sites do not necessarily constitute violations of IHL, as such sites can be legitimate targets if used for military purposes. However, all military operations must always comply with IHL rules, including distinction, proportionality, and precautions. Because Hamas uses civilian infrastructure for military purposes and civilians as human shields, it is often difficult to determine facts on the ground in an active war zone of this nature and the presence of legitimate military targets across Gaza. As noted above, the reported death tolls in Gaza generally do not differentiate between Hamas and civilian deaths, further complicating efforts to precisely assess the civilian impact. Several examples of these strikes during the reporting period include:

- 3/8/2024: An Israeli airstrike reportedly killed dozens sheltering in Deir al-Balah, including an Anera humanitarian worker. Anera reported it had shared the coordinates of the site with COGAT. Anera has raised concerns about the lack of effective deconfliction in Gaza and called for an independent investigation.

- 12/24/2023: Israeli airstrikes on a home in the Maghazi refugee camp, reportedly killing 90 with an unknown number additionally injured. Israel indicated that it was investigating the incident.

- 10/31/2023 and 11/1/2023: Israeli airstrikes on the Jabailia refugee camp, reportedly killing dozens of civilians, including several dozen children, injuring hundreds more, and significantly damaging civilian infrastructure. The IDF reported these airstrikes successfully targeted a senior Hamas commander and underground Hamas facilities. Israel said the munitions used in the strike led to the collapse of tunnels and the buildings and infrastructure above them as well as significant reported civilian harm in a densely populated area.

- 10/22/2023: An Israeli airstrike on a civilian home in Deir al-Balah, reportedly killing 18 civilians including 12 children. Amnesty International identified U.S.-origin munition fragments at the site but this has not been confirmed.

  10/9/2023: Israeli airstrikes on a marketplace in Jabaliya refugee camp, reportedly killing dozens, including many Hamas fighters according to the IDF. Israel reported these strikes sought to destroy a significant Hamas tunnel complex.

Assessment and analysis of (1) any credible reports indicating that the use of such defense articles has been found to be inconsistent with established best practices for mitigating civilian harm, and (2) the extent to which efforts to induce effective implementation of such civilian harm mitigation best practices have been incorporated into the relevant United States security assistance program; and a description of the procedures used to make the assessments:

The USG reviewed numerous reports of civilian harm resulting from IDF operations during the reporting period, which raised serious questions with respect to whether Israel was upholding established best practices for mitigating civilian harm.

Israel has provided hundreds of tactical pauses to allow civilians to leave combat zones. These range from an evacuation order at the beginning of the war for

civilians in northern Gaza to move to the south two weeks before ground operations began; to establishing daily four-hour humanitarian pauses, with three hours notice, and evacuation corridors to allow for north-south movements; to hundreds of smaller-scale pauses in specific neighborhoods to allow civilians to procure supplies and/or seek medical care. The IDF used numerous methods to inform citizens of these pauses, including dropping leaflets, making automated phone calls, and sending SMS text messages. Israel has a sophisticated system for identifying where civilians are located in order to try to minimize civilian harm. However, UN and humanitarian organizations have reported Israeli civilian harm mitigation efforts as inconsistent, ineffective, and inadequate, failing to provide protection to vulnerable civilians who cannot or chose not to relocate, including persons with disabilities, persons receiving medical treatment, children, and the infirm. Humanitarian organizations reported further that phone/SMS messages were ineffective during IDF-generated telecommunications blackouts, and civilians received insufficient notice, inaccurate or vague information on where people should go, and on safe evacuation routes. Many of the IDF-designated areas to which civilians were directed to seek safety lacked adequate shelter, water, sanitation, food, medical care, security or other support. The reported rate of civilian harm in the conflict also raises serious questions about the efficacy of Israeli precautionary measures, notwithstanding Hamas' deliberate embedding within and use of civilian and humanitarian infrastructure as shelter.

The IDF coordinated with foreign governments and NGOs to create no-strike lists of facilities operated by foreign governments, NGOs, and international organizations. However, since the beginning of the conflict in Gaza, the UN has reported 169 of its facilities in Gaza have been destroyed or damaged. These make up just a fraction of the sites characterized by the USG as Category I protected sites that are given heightened protection under targeting procedures, including diplomatic, medical, education, religious/cultural, and other facilities. Numerous incidents have been reported in which civilians have been hit at these sites. Many of these incidents reportedly have been the result of Hamas launching attacks on Israeli troops from these protected facilities or safe zones, or firing rockets into Israel from them, followed by the IDF returning fire to eliminate the threat. IDF leadership has also cited other occasions where they chose not to engage given the presence of civilians. During this period, 85 alleged incidents of civilian harm involving Israeli military operations in Gaza have been submitted to

the CHIRG for evaluation, and approximately 40 percent of those cases have been closed.

Following the WCK incident on April 1, 2024, Israel took initial steps to set up a new Humanitarian Coordination and De-confliction Cell to better ensure the safety of humanitarian providers. Humanitarian organizations have consistently underscored that real-time communication between IDF units and humanitarian workers on the ground, particularly at checkpoints, is imperative to realizing concrete improvement in deconfliction and coordination. Humanitarian organizations repeatedly requested approval from COGAT to bring in equipment necessary to enable this communication, with COGAT raising concerns about potential diversion to Hamas for military purposes. COGAT recently approved this equipment, with deployment in initial stages. We continue to engage with the Government of Israel to encourage it to take necessary steps to improve its deconfliction mechanisms.

The IDF coordinates closely with USCENTCOM, Security Cooperation Office, and Defense Attaché teams in Israel on IHL in addition to frequent engagements on issues related to the conflict at the Secretary or Under Secretary levels. On numerous occasions and at various levels, IDF and Israel Ministry of Defense personnel have shared with U.S. counterparts descriptions of Israel's efforts to implement IHL in their operations in Gaza. IDF officials have shared details about their targeting processes, including an extensive sensitive site list, legal advisors embedded in the target approval process, and investigation protocol for incidents of unanticipated collateral damage. The IDF has also shared images and videos demonstrating real-time capabilities to depict civilian population movement and has shared evidence of certain strikes that were aborted when civilians were observed in the target area. DoD does not observe real-time targeting, however.

The IDF has also created a map dividing Gaza into more than 300 sectors, which has been shared with civilians and humanitarian organizations in Gaza. The IDF develops assessments of the level of civilian presence in each sector of the map, using cell phone data among other sources, while also working to update these assessments as the situation evolves. However, humanitarian organizations have raised serious concerns regarding the efficacy of this system, and the USG continues to engage Israel to improve these methods.

The IDF has undertaken steps to implement IHL obligations for the protection of civilians in the current conflict, including the requirements related to distinction, proportionality, and precautions in offensive operations. As reflected above, however, the USG lacks full visibility into Israel's application of these principles and procedures. In addition, the Government of Israel has asserted it takes steps to mitigate the risk of civilian harm when conducting military operations, such as providing advance warnings, employing specific procedures for determining targets and carrying out attacks, including choice of weapons and munitions, and implementing restrictive measures to protect sites such as hospitals, schools, places of worship and UN facilities. Israel has also asserted that its processes provide opportunities for the IDF to validate the presence or absences of civilians, including through the collection of intelligence that would support real-time assessment of civilian harm, and have led to aborted airstrikes when unexpected civilians have appeared. While Israel has the knowledge, experience, and tools to implement best practices for mitigating civilian harm in its military operations, the results on the ground, including high levels of civilian casualties, raise substantial questions as to whether the IDF is using them effectively in all cases. This includes the WCK strike, in which Israel has acknowledged that IDF operators did not follow applicable rules of engagement, and which led the Israelis to take steps to discipline IDF personnel.

The State Department will continue to engage with the Government of Israel to establish a dedicated channel focused on supporting more timely and fully-informed work by the CHIRG to review incidents of concern and to make recommendations to reduce the risk of civilian harm.

Description of any known occurrences of such defense articles not being received by the recipient foreign government that is the intended recipient, or being misused for purposes inconsistent with the intended purposes, and a description of any remedies undertaken:

The USG is not aware of defense articles covered under NSM-20 not being received by the intended foreign government recipient and/or being misused for purposes inconsistent with the intended purposes.

Assessment and analysis of whether each foreign government recipient is in compliance with section 620I of the Foreign Assistance Act of 1961, and whether

such recipient has fully cooperated with United States Government efforts and United States Government-supported international efforts to provide humanitarian assistance in an area of armed conflict where the recipient country is using such defense articles and, as appropriate, defense services:

Since October 7, the United States has led international efforts to address the humanitarian crisis in Gaza, including providing significant contributions for food, water, medical, and other essential supplies and coordinating delivery mechanisms with Israel, Egypt, Jordan, UN agencies and humanitarian partners. If not for sustained engagement by the United States with the Israeli government at the highest levels, the humanitarian crisis that has persisted for the past several months would have been even more dire.

During the period since October 7, and particularly in the initial months, Israel did not fully cooperate with USG efforts and USG-supported international efforts to maximize humanitarian assistance flow to and distribution within Gaza. There were numerous instances during the period of Israeli actions that delayed or had a negative effect on the delivery of aid to Gaza. Specific examples include:

- Some senior Israeli government officials have been actively involved in encouraging protests against and attacks on aid convoys that delayed their entry into Gaza. Israeli civilian protestors periodically blocked entry points into Gaza during a multi-week period in January and February, resulting in reduced aid flows.

- As noted above, there have been strikes on coordinated humanitarian movements and deconflicted humanitarian sites that created an exceptionally difficult environment for distributing and delivering aid.

- There have been denials or delays of specific movements of humanitarian actors.

- Extensive bureaucratic delays with regard to implementation of political commitments made by Israeli leaders have further slowed the delivery of assistance to civilians in Gaza.

- Inconsistent rejections of humanitarian relief supplies and a lack of standardized processes significantly reduced aid workers' ability to transport humanitarian items into Gaza. In particular, Israel has failed to provide a clear, definitive list of items allowed into or prohibited from entering Gaza because of dual-use concerns. It also has, on occasion, stretched dual-use issues to a concerning degree.

- Humanitarian organizations continue to report a lack of clarity around how cargo is validated at checkpoints along supply routes and there is no standardized practice dictated by COGAT to prevent approved commodities from being rejected at various inspection points.

- Delays in visa issuance for humanitarian staff by Israel's Ministry of Welfare and Social Affairs have exacerbated the shortage of relief personnel and made the delivery of aid into Gaza more difficult. In late April, as a result of transfer of the authority over visa issuance to the Ministry of Foreign Affairs and U.S. intervention, all but a small number of pending visa requests were approved for periods of at least six months.

As noted above, assessments under NSM-20 must also factor in whether requirements applied to efforts to provide humanitarian assistance are arbitrary. Getting aid to Palestinians in Gaza is a complex undertaking in an active war zone. The destruction of civilian infrastructure, the embedding of Hamas in the civilian population, and ongoing military operations by the IDF have complicated aid delivery and exacerbated the humanitarian crisis, as have Israeli concerns about Hamas appropriating dual-use items for military purposes. Hamas has at times sought to direct the distribution of humanitarian assistance not to maximize the benefits to civilians in Gaza but rather to try to maintain its effective control of governance functions.

The USG worked with Government of Israel, international partners, and humanitarian organizations to resolve these and other challenges. Senior members of the Israeli government have also worked to overcome the objections of individual government ministers opposed to Israel having a role in addressing the humanitarian needs of the civilian population in Gaza. After the Hamas attacks on October 7, humanitarian aid began to enter Gaza as of October 21. At USG urging, Israel established the initial humanitarian crossing mechanism at

Rafah, opened Kerem Shalom and Gate 96, allowed flour to move via Ashdod port, enabled fuel deliveries, and cooperated with international efforts to open air and maritime aid corridors. To prevent protestors from disrupting aid movements into Gaza, the Minister of Defense instructed the IDF to declare the crossing points closed military zones and acted more effectively to remove and arrest the protesters, which facilitated an increase in aid to previous levels. However, aid levels remain below what is necessary to meet the nutritional, medical, and sanitary needs of the population. UN agencies and NGOs have assessed that aid deliveries remain below levels necessary to fully mitigate the potential risk of famine, while Israel has consistently disputed famine warnings.

More recently, Israel has substantially increased humanitarian access and aid flow into Gaza, reaching significantly higher levels that require continued upward trajectory to meet immense needs. On April 4, President Biden secured commitment from Prime Minister Netanyahu on a series of concrete steps that – if fully implemented and sustained – would substantially improve the delivery and distribution of assistance and materially improve humanitarian conditions for civilians in Gaza.

In recent weeks, Israel acted on many of these steps, including significantly increasing the number of trucks entering Gaza, opening the Erez crossing, facilitating humanitarian shipments through Ashdod port, expanding the use of the Jordan corridor, and repairing and opening routes to northern Gaza. The volume of aid entering Gaza measurably increased – April showed the highest volume of humanitarian and commercial supplies since the conflict began. The Israeli government reopened and/or repaired the three major water pipelines into Gaza, but there remains damage to the distribution network within Gaza that limits water flow and the overall supply of water remains inadequate to meet the basic human needs of 2.1 million Palestinians. Israel increased the supply of fuel to humanitarian actors, including to newly established bakeries in northern Gaza. Israel must sustain these actions and implement a number of commitments not yet acted upon in order to stabilize humanitarian conditions in Gaza.

While the USG has had deep concerns during the period since October 7 about action and inaction by Israel that contributed significantly to a lack of sustained and predictable delivery of needed assistance at scale, and the overall level reaching Palestinian civilians – while improved – remains insufficient, we do not

currently assess that the Israeli government is prohibiting or otherwise restricting the transport or delivery of U.S. humanitarian assistance within the meaning of section 620I of the Foreign Assistance Act. This is an ongoing assessment and we will continue to monitor and respond to any challenges to the delivery of aid to Palestinian civilians in Gaza moving forward.

Kenya

Assessment of credible reports or allegations that certain defense articles and, as appropriate, defense services, have been used in a manner not consistent with international law, including international humanitarian law; such assessment shall include any determinations, if they can reasonably be made, as to whether use has occurred in a manner not consistent with international law, and if so, whether the recipient country has pursued appropriate accountability; and a description of the procedures used to make the assessments:

During the reporting period, there were credible reports of potential IHRL violations by government security forces and government-supported armed groups. The State Department's 2023 Country Reports on Human Rights Practices document credible reports of arbitrary or unlawful killings, including extrajudicial killings as well as the use of torture and violence during interrogations.

Nongovernmental organizations reported Kenyan security forces used excessive force against demonstrators during protests that took place between March and July 2023, including through the use of crowd control items such as teargas as well as firearms with live ammunition. The Kenya National Commission on Human Rights recorded 24 deaths during protests from suffocation and shootings. Additionally, NGOs reported more than 100 extrajudicial killings and over 400 cases of torture between January and September 2023. NGOs indicated Kenyan police forces operated with impunity, as the government neither acknowledged alleged human rights violations nor held individual police officers accountable for their actions and the resulting harm during the protests from March to July 2023.

The Government of Kenya has reaffirmed its commitment to accountability based on the Kenya Defence Forces (KDF) Act of 2012. According to the Act, the KDF shall "train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity."

In addition, the government has publicly stated that the Ministry of Defense has opened its doors for complaints both internally and externally under the existing chain of command in accordance with the 2012 act. In September 2023, Cabinet Secretary of Defense Aden Duale hosted the chair of Kenya's Commission for Administrative Justice (CAJ), commonly known as the Office of the Ombudsman,

and said that the MoD is open to having a CAJ liaison officer within the Ministry to enable access to information.

In addition, Kenya has undertaken a variety of efforts to implement its obligations under IHL. For example, Kenya has established a national committee on implementation of IHL, convened by the International Law Division of the Kenyan Ministry of Justice.

Kenya also has taken steps to disseminate information regarding IHL, including issuing a military manual on the law of armed conflict, which emphasizes the importance of training. Kenya's national council for law reporting also publishes online a number of IHL treaties, including the 1949 Geneva Convention. Similarly, Kenya employs military lawyers, and Kenya has a system of military justice that can be used to ensure accountability for violations committed by members of its armed forces. There is also information indicating that Kenyan leaders have set a command climate emphasizing the important of compliance with IHL.

Assessment and analysis of (1) any credible reports indicating that the use of such defense articles has been found to be inconsistent with established best practices for mitigating civilian harm, and (2) the extent to which efforts to induce effective implementation of such civilian harm mitigation best practices have been incorporated into the relevant United States security assistance program; and a description of the procedures used to make the assessments:

From International Military Education Training courses in the United States for large annual cadres of KDF to large, joint, multinational exercises hosted in Kenya, Civilian Harm Mitigation and Response is a deliberate narrative and core theme of U.S.-Kenyan military-to-military engagements. The United States has significant security cooperation programs with Kenya, which span multiple lines of effort across numerous military capabilities, including instruction on IHL.

DoD provides specific training to the KDF on Air-to-Ground Integration (AGI), which establishes doctrine, tactics, techniques, and procedures to build capability to plan and execute operations in a manner consistent with IHL and best practices for mitigating civilian harm.

Description of any known occurrences of such defense articles not being received by the recipient foreign government that is the intended recipient, or being misused for purposes inconsistent with the intended purposes, and a description of any remedies undertaken:

The USG is not aware of defense articles covered under NSM-20 not being received by the intended foreign government recipient and/or being misused for purposes inconsistent with the intended purposes.

Assessment and analysis of whether each foreign government recipient is in compliance with section 620I of the Foreign Assistance Act of 1961, and whether such recipient has fully cooperated with United States Government efforts and United States Government-supported international efforts to provide humanitarian assistance in an area of armed conflict where the recipient country is using such defense articles and, as appropriate, defense services:

In the past, allegations have been made of food aid being diverted in Kenya, but these allegations implicate individual politicians rather than the KDF. While USAID and its humanitarian partners can experience occasional obstacles in the delivery of humanitarian assistance, impediments are neither systematic nor widespread. The KDF has been accused of participating in illicit trade of goods, but it has not been reported for restricting humanitarian assistance in international peacekeeping operations.

Nigeria

Assessment of credible reports or allegations that certain defense articles and, as appropriate, defense services, have been used in a manner not consistent with international law, including international humanitarian law; such assessment shall include any determinations, if they can reasonably be made, as to whether use has occurred in a manner not consistent with international law, and if so, whether the recipient country has pursued appropriate accountability; and a description of the procedures used to make the assessments:

Nigeria has undertaken a variety of efforts to implement its obligations under IHL, including related to dissemination of and training on IHL. Although efforts to incorporate Nigerian military lawyers into advice during military operations are nascent, Nigeria has military lawyers and a military justice system, which it has rapidly expanded over the past two years.

At all levels of the USG, officials discuss with Nigerian counterparts ways to reduce incidents of civilian harm and encourage transparency and accountability when such incidents do occur. DoD is working with Nigeria to strengthen and professionalize the Nigerian Armed Forces through development of and adherence to rules-based structures. Through multi-year efforts, DoD is working to strengthen Nigeria's Advanced Infantry and Special Operations Forces and capabilities for intelligence, surveillance, and reconnaissance.

Furthermore, the United States has an ongoing Air-to-Ground Integration initiative with Nigeria, which addresses key capabilities that significantly contribute to civilian harm mitigation. In addition, Nigeria recently purchased a training package through the foreign military sales program to support additional training and capacity-building for civilian harm mitigation over five years. The Defense Security Cooperation University (DSCU)'s Institute for Security Governance will provide this training, which includes education and training supporting increased awareness and compliance with human rights and IHL, throughout the Nigerian Armed Forces.

During the reporting period, there were no credible reports of U.S. defense articles or services used in a manner not consistent with international law. There were credible reports of potential IHL and IHRL violations by military forces not

involving U.S.-funded defense articles and services, though investigations and/or court martial proceedings were reportedly conducted. Nigeria classifies most investigations and court martial outcomes making the outcome of its investigations of credible reports unclear.

NGOs reported Nigerian security forces routinely used excessive force in the course of their duties, as well as using physical violence and torture in jails and prisons. Impunity for torture remained a significant problem for Nigerian security forces, including in the police, military, and Department of State Services – Nigeria's primary internal security agency. Nigerian operations against ISIS-West Africa, Boko Haram, and criminal groups also resulted in concerning incidents of civilian harm during the reporting period that raise concerns about potential IHL violations. An illustrative list follows:

- 1/3/2023: The Nigerian Army conducted a drone strike against a religious gathering in Kaduna State that killed at least 85 individuals and possibly as many as 120 persons in what it characterized as a mistaken strike as it targeted terrorists moving in the area. The Nigerian government covered all medical costs for victims and provided other assistance to the victims and community. The USG has raised this incident with Nigerian representatives.

- 1/24/2023: An airstrike reportedly against criminal bandits in the rural community of Kwatiri killed an estimated 39 civilians, predominately herders gathered to retrieve their confiscated cattle. On January 28, 2024, the Nigerian government admitted innocent civilians were killed in the strike and reported that it was working to provide compensation to victims.

- 4/2024: An airstrike in Zamfara state reportedly killed at least 33 persons. The Nigerian Air Force claimed the strike targeted and killed terrorists in the area, but residents reported those killed were civilians, including children.

As detailed further below, the Nigerian military is working to improve and follow civilian harm mitigation best practices with U.S. assistance, and the current government has recently shown a willingness to address these incidents quickly and transparently.

Assessment and analysis of (1) any credible reports indicating that the use of such defense articles has been found to be inconsistent with established best practices for mitigating civilian harm, and (2) the extent to which efforts to induce effective implementation of such civilian harm mitigation best practices have been incorporated into the relevant United States security assistance program; and a description of the procedures used to make the assessments:

There have been no credible reports that covered defense articles have been used by Nigeria's military in a manner inconsistent with established best practices for mitigating civilian harm, including practices that have been adopted by the United States military, and including measures implemented in response to the CHMR-AP or incidents reviewed pursuant to the Department of State's CHIRG during the reporting period.

U.S.-Nigeria security cooperation includes an intensive focus on reducing civilian harm. The Nigerian military is working to improve training and legal advice, and to follow such best practices. State Department and DoD-funded U.S. security assistance programs integrate human rights and civilian harm mitigation training and concepts as key components of the programs. Additionally, in a first of its kind case of a foreign military sale of attack helicopters, Nigeria paid $25 million for an air-to-ground integration program that will help mitigate civilian harm across its three military services. They also have requested to purchase precision weapons specifically to reduce collateral harm. Current and proposed U.S. security assistance programs are designed to complement this program in facilitating the development and implementation of civilian harm mitigation doctrine, policies, and procedures across the armed forces of Nigeria.

Description of any known occurrences of such defense articles not being received by the recipient foreign government that is the intended recipient, or being misused for purposes inconsistent with the intended purposes, and a description of any remedies undertaken:

The USG is not aware of defense articles covered under NSM-20 not being received by the intended foreign government recipient and/or being misused for purposes inconsistent with the intended purposes.

Assessment and analysis of whether each foreign government recipient is in compliance with section 620I of the Foreign Assistance Act of 1961, and whether such recipient has fully cooperated with United States Government efforts and United States Government-supported international efforts to provide humanitarian assistance in an area of armed conflict where the recipient country is using such defense articles and, as appropriate, defense services:

The Government of Nigeria (GON) permits humanitarian aid and access in garrison towns that are secure. The military mandates the use of escorts for humanitarian convoys travelling to unsafe areas when GON resources have been available. Humanitarian actors lacked access outside these areas due to insecurity and resource constraints. Negotiating humanitarian access with organized armed groups is criminalized under Nigerian law. The government in Borno State is keen to relocate internally displaced persons (IDPs). Some of the relocations led to IDPs living in areas that are insecure and/or inaccessible to humanitarian actors. USG-supported humanitarian partners are unable to implement certain programs outside of government-controlled areas in Borno State.

The USG assesses that the Nigerian government's posture on humanitarian access is not arbitrary but is a result of complex security threats and dangers posed to implementing partners and a lack of capacity to improve security. Any implementing partner that tries to go beyond the safe zones runs a high risk of kidnapping or death.

Somalia

Assessment of credible reports or allegations that certain defense articles and, as appropriate, defense services, have been used in a manner not consistent with international law, including international humanitarian law; such assessment shall include any determinations, if they can reasonably be made, as to whether use has occurred in a manner not consistent with international law, and if so, whether the recipient country has pursued appropriate accountability; and a description of the procedures used to make the assessments:

During the reporting period, there were credible reports of potential IHL and IHRL violations by government security forces in Somalia. The State Department's 2023 Country Reports on Human Rights Practices document credible reports of arbitrary or unlawful killings, including extrajudicial killings as well as the use of torture and other cruel, inhuman, or degrading treatment or punishment, and sexual violence.

The United Nations Assistance Mission in Somalia (UNSOM) reported state security personnel killed 61 civilians between February and October 2023. According to media reports, federal government soldiers killed 14 civilians during daily security-related activities between August and October. Nine perpetrators were arrested, prosecuted, and sentenced. NGOs also documented credible reports of government officials detaining terrorism suspects for prolonged periods and torturing them while in custody. Government security forces, including the National Intelligence and Security Agency and the Puntland Intelligence Agency, reportedly threatened, beat, and forced detainees to confess to crimes. There were reports of rape and sexual abuse by government agents. State security forces and affiliated militias reportedly operated with impunity, due to clan protection of perpetrators and weak government capacity and will to hold the guilty to account. While some military and police personnel accused of abuses were arrested and prosecuted, not all faced charges or were punished.

The sole recipient of NSM-20 covered defense articles in Somalia is the Somali National Army (SNA) Danab Brigade. The U.S. Government provides lethal assistance to this U.S.-funded, trained, and mentored brigade. The purpose of this U.S. assistance is to make the brigade capable of sustaining professional infantry forces proficient in counterterrorism operations. The brigade operates at the

direction of the Chief of Defense Force and in coordination with the Federal Member States' security chief to counter al-Shabaab and ISIS-Somalia efforts to destabilize Somalia. The U.S. Government has direct insight into the Danab Brigade's use of covered defense articles and there is no information to indicate covered defense articles have been used by the partner in a manner inconsistent with international law.

Since 2021, and projected to continue through 2026, the Department of Defense has worked with the Somali Ministry of Defense and SNA leadership on development of an operational law training program for SNA legal advisors, integration of trained legal advisors into key aspects of military planning, and development of operational control mechanisms (Rules of Engagement/Rules for Use of Force/Civilian Harm Mitigation procedures) that reinforce adherence to the law of armed conflict and IHRL. DoD plans to assist with implementation of a table-top exercise to facilitate integration of identified SNA legal advisors with Danab commanders.

Assessment and analysis of (1) any credible reports indicating that the use of such defense articles has been found to be inconsistent with established best practices for mitigating civilian harm, and (2) the extent to which efforts to induce effective implementation of such civilian harm mitigation best practices have been incorporated into the relevant United States security assistance program; and a description of the procedures used to make the assessments:

Danab intake and basic training is conducted by State Department-funded mentors and includes extensive training on human rights and international humanitarian law. Following Danab basic training, soldiers are mentored by State Department-funded contractors and advised by U.S. military personnel who reinforce best practices for mitigating civilian harm, including measures implemented in response to the Department of Defense's CHMR-AP. Within the DoD-funded Danab support, mandatory training on civilian harm mitigation is annually conducted with the DIILS. Higher levels of DoD-funded training are also required when specific lethal items are provided to the partner nation.

Description of any known occurrences of such defense articles not being received by the recipient foreign government that is the intended recipient, or

being misused for purposes inconsistent with the intended purposes, and a description of any remedies undertaken:

The USG is not aware of defense articles covered under NSM-20 not being received by the intended foreign government recipient and/or being misused for purposes inconsistent with the intended purposes.

Assessment and analysis of whether each foreign government recipient is in compliance with section 620I of the Foreign Assistance Act of 1961, and whether such recipient has fully cooperated with United States Government efforts and United States Government-supported international efforts to provide humanitarian assistance in an area of armed conflict where the recipient country is using such defense articles and, as appropriate, defense services:

The Danab Brigade has facilitated USG-supported international efforts to provide humanitarian assistance in Somalia by working to eliminate the threat posed by al-Shabaab, a terrorist organization that has in the past worked to stymie the provision of U.S. humanitarian assistance to the Somali people.

Ukraine

Assessment of credible reports or allegations that certain defense articles and, as appropriate, defense services, have been used in a manner not consistent with international law, including international humanitarian law; such assessment shall include any determinations, if they can reasonably be made, as to whether use has occurred in a manner not consistent with international law, and if so, whether the recipient country has pursued appropriate accountability; and a description of the procedures used to make the assessments:

Since the beginning of Russia's full-scale invasion, the United States has committed more than $50.2 billion in security assistance to Ukraine. The Government of Ukraine is aware of the challenges they would face for any derogatory information implicating Ukraine's misuse of U.S.-provided defense articles.

The State Department's 2023 Country Reports on Human Rights Practices document credible reports of arbitrary detention and enforced disappearance of civilians, as well as torture or cruel, inhuman, or degrading treatment or punishment by government security forces and government-supported armed groups. The United Nations Human Rights Council Commission of Inquiry, media reporting, and nongovernmental organizations documented numerous incidents of alleged IHL and IHRL violations by state armed groups in 2023 and 2024.

According to the State Department's 2023 Country Reports on Human Rights Practices, the UN Office of the High Commissioner for Human Rights (OHCHR) documented 75 cases of arbitrary detention of civilians by law enforcement or armed forces, some of which the report stated amounted to enforced disappearance. There were also reports that law enforcement and military officials abused and, at times, tortured persons in custody to obtain confessions, usually related to alleged collaboration with Russia. Though the accused officials were sometimes charged with exceeding authority under martial law and/or sentenced to imprisonment, the government often did not take adequate steps to identify and punish officials who may have committed abuses during the reporting period.

Credible reports, including from the United Nations Human Rights Council Commission of Inquiry, also document potential IHRL violations by members of the Security Service of Ukraine (SBU). For example, SBU officers arrested and beat a man suspected of being a spy for Russia in March 2023 in Odesa Province. They kicked him and beat him with a rifle butt while asking him to confess that he was a spy. The victim reported he was requested to sign documents indicating he was a spy and threatened with further beatings in case of refusal. The Commission found, in that case, that the perpetrators had committed torture and arrested the victim arbitrarily, in violation of IHRL. Additionally, members of the SBU reportedly engaged in targeted killings of Ukrainian citizens believed to be supporting Russia. In March 2024, Lt General Vasili Malyuk, the director of the SBU, remarked during a broadcast on Ukraine's national television that the SBU engaged in an assassination campaign directed at "very many" individuals accused of war crimes and orchestrating attacks against Ukrainian citizens. Malyuk spoke of the killing of Ukraine-born Vladlen Tatarsky, a Kremlin propagandist and Ilya Kyva, a former Ukrainian parliament member. Kyva spoke out against Ukrainian independence and was considered a traitor by Kyiv before he was shot dead near Moscow in December of 2023. Sources within the SBU had previously told several outlets that the service was responsible for the killing.

Ukraine has undertaken a variety of efforts to implement its obligations under IHL. Ukraine has implemented a domestic requirement for members of the Armed Forces of Ukraine to understand and comply with IHL, as well as procedures for implementation. Ukraine has also taken steps to disseminate information regarding IHL, including IHL in military training and developing reference publications, memos, and videos on IHL compliance.

The Government of Ukraine has demonstrated a commitment to respect its obligations under IHL, to fully investigate any allegations of violations or abuses committed by its forces, and has been engaged in an effort to improve its program of training on IHL. Ukraine employs military lawyers, and Ukraine has domestic law that can be used to ensure accountability for violations committed by members of its armed forces. Ukrainian leaders have also fostered a command climate emphasizing the importance of complying with IHL.

A critical element of Ukraine's National Anti-Corruption Strategy is "ensuring effective state control over the observance by public servants of the rules of

ethical conduct," including adherence to IHL. Minister of Defense Umerov has conveyed in multilateral forums like the Ukraine Defense Contact Group (UDCG) and bilateral engagements with U.S. and international counterparts his focus on the ethical use of partner provisioned security assistance and defense articles.

Assessment and analysis of (1) any credible reports indicating that the use of such defense articles has been found to be inconsistent with established best practices for mitigating civilian harm, and (2) the extent to which efforts to induce effective implementation of such civilian harm mitigation best practices have been incorporated into the relevant United States security assistance program; and a description of the procedures used to make the assessments:

The Ukrainian military is working (with U.S. assistance) to improve and follow best practices in use of force and civilian protection.

Description of any known occurrences of such defense articles not being received by the recipient foreign government that is the intended recipient, or being misused for purposes inconsistent with the intended purposes, and a description of any remedies undertaken:

The USG is not aware of defense articles covered under NSM-20 not being received by the intended foreign government recipient and/or being misused for purposes inconsistent with the intended purposes.

Assessment and analysis of whether each foreign government recipient is in compliance with section 620I of the Foreign Assistance Act of 1961, and whether such recipient has fully cooperated with United States Government efforts and United States Government-supported international efforts to provide humanitarian assistance in an area of armed conflict where the recipient country is using such defense articles and, as appropriate, defense services:

The Government of Ukraine has facilitated the delivery of U.S. humanitarian assistance, and humanitarians have not experienced systemic delays or obstructions. While there are access constraints to the delivery of humanitarian assistance in Ukraine, these instances are driven by the Government of Russia's active hostilities near frontline areas. Humanitarian organizations are operating

in extremely difficult environments facing security concerns due to Russia's refusal to participate in the humanitarian de-confliction system.

The UN Office for the Coordination of Humanitarian Affairs reported as recently as December 2023 that visa delays, visa denials, bureaucratic, and administrative challenges with the Government of Ukraine delayed or otherwise negatively impacted aid delivery. However, appropriate ministries within the Government of Ukraine are actively engaged with the UN Resident and Humanitarian Coordinator in Ukraine on reducing or eliminating these limited issues.

When Terror Strikes: International Humanitarian Law and Operation Iron Swords[α]

By: Harry Baumgarten,[*] Robert E. Lutz,[†] Bruce Rashkow,[‡]
Shira Scheindlin,[**] and David Schwartz[††]

On October 7, 2023 thousands of Hamas terrorists forcibly entered sovereign Israeli territory where they killed, tortured, raped, or took hostage over 1,000 Israeli civilians and several hundred Israeli soldiers.[1] The Israeli Defense Forces responded with a campaign of aerial strikes, followed by a ground incursion, eventually titled Operation Swords of Iron, targeting Hamas operatives and infrastructure deeply embedded in the Gazan civilian population.[2] According to both Western estimates and Hamas casualty figures, the operation has killed tens of thousands of Gazans, a substantial majority of whom are

 The bulk of this article was drafted in November 2023. The authors thank Ronald J. Bettauer, former Deputy Legal Adviser, U.S. Department of State, for his significant assistance with this article. We recognize that the debate has begun to shift to other areas of discussion, such as whether Israel is doing enough to prevent famine and starvation, in compliance with the March 28, 2024, International Court of Justice provisional measures order, and whether Israel should be showing greater improvement in the avoidance of civilian deaths by learning in an iterative manner from its experience. Nonetheless, we share this article in the hope that it will contribute to the legal discourse. Even as we do so, we note the tragedy of every innocent death in Israel and Gaza. Nothing in this article takes away from this heartbreaking reality.

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[1] Jim Zanotti and Jeremy M. Sharp, Cong. Rsch. Serv., R47828, Israel and Hamas Conflict In Brief: Overview, U.S. Policy, and Options for Congress (2024), https://crsreports.congress.gov/product/pdf/download/R/R47828/R47828.pdf/.

[2] The Knesset, Swords of Iron War, https://main.knesset.gov.il/en/about/lexicon/pages/swordsiron.aspx (last visited Apr. 2, 2024).

believed to be civilians.[3] The following is an explanation of relevant international legal principles as they relate to the October 7 terrorist attack and Israel's response.

International Law Relevant to the Conflict

International Humanitarian Law (IHL) is the body of international law that governs the conduct of armed conflict. It is found in treaties such as the four Geneva Conventions of 1949 and in customary international law, i.e., general and consistent state practice observed due to a sense of legal obligation. Among other objectives, IHL seeks to limit unnecessary suffering during armed conflict, preserve the professionalism and humanity of combatants, and facilitate the restoration of peace.[4]

Because Hamas is a non-state actor,[5] the legal status of Gaza is contested,[6] and Israel is a party only to certain IHL treaties,[7] there is substantial debate about whether several IHL principles apply to the present Israel-Hamas conflict in Gaza. Nonetheless, there is widespread consensus that certain rules of IHL apply universally, regardless of whether a participant in a conflict is a state or a non-state actor, or whether the participant is a party to any particular treaty.[8] Those rules include the requirements of Common Article 3 of the 1949 Geneva Conventions, which has been ratified by every state in the world, and

[3] OCHA, OCCUPIED PALESTINIAN TERRITORY, https://www.ochaopt.org/ (last visited Apr. 2, 2024).

[4] *See generally,* ICRC, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004) https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf; § 1.3.1 at 8, OFFICE OF GENERAL COUNSEL, DEPT. OF DEFENSE LAW OF WAR MANUAL (2023), https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/DOD-LAW-OF-WAR-MANUAL-JUNE-2015-UPDATED-JULY%202023.PDF (utilizing terms "international humanitarian law", "law of war", and "law of armed conflict" often, but not always, interchangeably).

[5] U.S. DEPT. OF STATE BUREAU OF COUNTERTERRORISM, FOREIGN TERRORIST ORGS, https://www.state.gov/foreign-terrorist-organizations/ (last visited Mar. 14, 2024) (listing Hamas as a US-designated terrorist organization), *see also* HOME OFFICE, PROSCRIBED TERRORIST GROUPS OR ORGANISATIONS, https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version (last visited Mar. 14, 2024) (listing Hamas as a UK-designated terrorist organization).

[6] ISRAEL MINISTRY OF FOREIGN AFFAIRS, HAMAS-ISRAEL CONFLICT 2023: KEY LEGAL ASPECTS, https://www.gov.il/en/Departments/news/hamas-israel-conflict2023-key-legal-aspects (last visited Apr. 2, 2024).

[7] Israel, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/en/ihl-treaties/treaties-and-states-parties?title=&topic=&state=IL&from=&to=&sort=state&order=ASC (last visited Mar. 19, 2024) (listing treaties to which Israel is a party); *cf*. Palestine, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/en/ihl-treaties/treaties-and-states-parties?title=&topic=&state=PS&from=&to=&sort=state&order=ASC (last visited Mar. 19, 2024) (listing treaties to which the UN-recognized Palestine is a party).

[8] ISRAEL MINISTRY OF FOREIGN AFFAIRS, *supra* note 6.

other principles of customary IHL overwhelmingly acknowledged by states across the world.[9]

The Relevant Principles of International Law

Common Article 3 of the 1949 Geneva Conventions, which indisputably applies both to Israel and to Hamas, requires all parties engaged in the current conflict to treat humanely all people who take no active part in the hostilities.[10] With respect to these non-combatants, the provisions of Common Article 3 expressly prohibit "violence to life and person," "[o]utrages upon personal dignity, in particular humiliating and degrading treatment," and "cruel treatment and torture."[11] Murder, rape, and the taking of hostages are all prohibited.[12]

Customary IHL likewise prohibits using human shields and intentionally locating military operations in close proximity to civilian facilities.[13] While states have the right to engage militarily in acts of self-defense, states must conform to the rules established by international law regarding armed conflict, including the principles of distinction and proportionality.[14] The principle of distinction means that belligerents have an obligation to direct attacks only against combatants and military objectives and not to intentionally target civilians or civilian objects, such as schools, houses of worship, or medical facilities, so long as these objects are not used for military purposes.[15] Similarly, belligerents are prohibited from using starvation of the civilian population as a method of warfare, or from deliberately targeting "objects indispensable to the survival of the civilian population" as such.[16]

[9] *See*, *e.g.*, States Party to the Following International Humanitarian Law and Other Related Treaties as of 19-January-2024, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/public/refdocs/IHL_and_other_related_Treaties.pdf (last visited Mar. 19, 2024) (detailing treaties to which UN members are party).

[10] *See* ART. 3, GENEVA CONV. RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF 12 AUG. 1949, *available at* https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949?activeTab=1949GCs-APs-and-commentaries (last visited Mar. 19, 2024).

[11] *Id*. at ART. 3(1).

[12] *Id.*; *see also* Rules, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/en/customary-ihl/v1 (last visited Mar. 15, 2024) (rules 1 and 2).

[13] Rule 97. Human Shields, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule97 (last visited Mar. 19, 2024).

[14] *Fundamental Principles of IHL,* ICRC, https://casebook.icrc.org/a_to_z/glossary/fundamental-principles-ihl (last visited Mar. 15, 2024); Rule 14. Proportionality of Attack, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14.

[15] Rules 23 and 24, ICRC, *Int'l Humanitarian Law Databases*, ICRC.

[16] Rule 54, *International Humanitarian Law Databases*.

Consistent with the principle of distinction, civilian facilities can lose protected status under IHL if it is clear that they are being used for military purposes.[17] For example, a hospital or school may become a legitimate military target if it contributes to a party's military operations, such as serving as a weapons depot or housing fighters who do not require medical attention.[18] To prevent this from happening, parties are not permitted to locate military facilities in close proximity to hospitals.[19] If a hospital becomes a legitimate target, the opposing party must still attempt to protect any civilians present by conforming to the requirements of proportionality.[20]

The principle of proportionality provides that combatants must refrain from a specific military attack if the expected loss of civilian life or injury to civilians, incidental to the attack, would be excessive in relation to the concrete military advantage expected to be gained.[21] This analysis focuses on the combatant's understanding based on the information reasonably available before the military operation has been effected; the proportionality of a strike thus turns on assessing both the extent of the anticipated civilian harm and the concrete military advantage the combatant expected to achieve before undertaking the specific military operation.[22] There is no formula for determining whether the expected value of a military target justifies the expected harm to civilians.[23] But the required analysis confirms that, under international law, collateral civilian harm is understood to be a tragic but often inevitable consequence of warfare. Whether such harm to civilians violates international law depends on conformity with the principle of proportionality.

The international legal principles of distinction and proportionality apply to all participants in warfare irrespective of whether one or both sides has violated them.[24] Whether specific military operations accord with these principles is a fact-driven inquiry.[25] A proper analysis of whether operations comply with IHL necessarily involves knowledge of the direct military objective that was expected to be achieved by a specific action and the extent of

[17] Rules 23 and 24, ICRC, *Int'l Humanitarian Law Databases.*

[18] *See id*.

[19] *See id*.

[20] *See id*.

[21] Rule 14, ICRC, *Int'l Humanitarian Law Databases, supra* note 12.

[22] Rule 14, ICRC*, supra* note 12.

[23] *See id*.

[24] ICRC, *Fundamental Principles of IHL*, *supra* note 14.

[25] *See* Rule 14, ICRC*, Int'l Humanitarian Law Databases, supra* note 12.

harm to civilian life and property that was anticipated based on the information available before the action was undertaken.[26]

Application of the Relevant Principles of International Law

Applying these and other relevant international legal principles to the current conflict leads to the following findings:

- Hamas's deliberate killing of civilians, hostage-taking, rape, torture, and other inhumane treatment of Israeli and other civilians on October 7 constitute war crimes.[27]
- Consistent with Article 51 of the UN Charter, Israel has the inherent right to conduct military actions in self-defense, and in doing so it is obligated to observe international humanitarian law, including the principles of distinction and proportionality.[28]
- Hamas's use of hospitals, schools, mosques, ambulances, and other civilian facilities for military purposes, and its construction of military facilities in tunnels underneath or otherwise in proximity to such facilities is prohibited,[29] and may result in those facilities becoming legitimate targets provided Israel complies with the principle of proportionality.[30]
- In light of Hamas's established use of civilian and protected facilities for military purposes, the question of whether Israeli strikes may have violated the principles of distinction and proportionality requires evidence of what Israeli commanders believed about their targets, what they intended to achieve by striking those targets, as well as the measures the Israeli commanders took to minimize civilian casualties in making the strikes in question.[31] Absent such evidence, any assessment of proportionality would be flawed and incomplete.[32]
- Although some have asserted that the high number of reported Palestinian civilians killed indicates that the Israeli military has violated the principle of proportionality, violations of IHL cannot be determined based on partial information, such as reported casualty counts. Instead, any such assessment must depend on reliable information concerning anticipated or actual civilian

[26] *See id*.

[27] *See* ART. 3, GENEVA CONV., *supra* note 10; Rules 1 and 2, ICRC, *Int'l Humanitarian Law Databases*, https://ihl-databases.icrc.org/en/customary-ihl/v1 (last visited Mar. 15, 2024).

[28] *See* ART. 51, U.N. CHARTER, *available at* https://www.un.org/en/about-us/un-charter/full-text (last visited Mar. 17, 2024); *see also* ICRC, *Fundamental Principles of IHL*, *supra* note 14.

[29] Rules 23 and 24, ICRC, *Int'l Humanitarian Law Databases*.

[30] *See id*. at Rule 10.

[31] *See Fundamental Principles of IHL,* ICRC; § 5.3, p. 196 *et seq*., DOD MANUAL, *supra* note 4.

[32] *See id*.

casualties, the anticipated military value of particular targets, and the availability of less harmful alternatives.[33]

- International aid organizations have warned of imminent famine in Gaza and placed much of the blame on Israel for slowing or limiting the flow of humanitarian aid in Gaza.[34] Israel insists that it permits substantial aid to enter Gaza and that the primary obstacle is distribution within Gaza, namely that Hamas and armed gangs are diverting aid or deliberately causing starvation to achieve propaganda aims.[35] Insofar as any party is engaged in a deliberate policy of starving civilians, that constitutes a violation of the IHL.[36]
- No principle of international law requires comparable casualty counts, civilian or military, of the sides to an armed conflict.[37]

Recommendations

Based on the foregoing analysis of fundamental norms of international law and related findings, we believe the following recommendations should be adopted by all parties to this conflict:

- All parties to the conflict must comply rigorously with international humanitarian law, particularly with regard to the protection of civilians.
- Hamas should immediately and unconditionally release all hostages and cease all incursions and rocket-fire into the sovereign territory of Israel.[38]
- The legal community should reject the fallacy of IHL equivalence between civilians forcibly kidnapped by Hamas and held without justification or legal process, and Palestinian prisoners in Israeli jails convicted of terrorist acts or held pursuant to legal process, security justification, and with access to humanitarian services.
- Hamas should immediately cease using Gazan civilians as human shields, preventing residents of Gaza from leaving the areas in which Hamas has placed its soldiers and weapons, and locating and operating military equipment,

[33] *See Id*.

[34] *See*, *e.g*., Steve Inskeep and Daniel Estrin, *Experts Say Gaza Faces Imminent Famine. Israel Says That Is A Myth*, NPR MORNING EDITION (Mar. 22, 2024), https://www.npr.org/2024/03/22/1240108446/experts-say-gaza-faces-imminent-famine-israel-says-that-is-a-myth.

[35] *Id*.

[36] Rule 54, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/en/customary-ihl/v1.

[37] *See Fundamental Principles of IHL,* ICRC.

[38] *See* ART. 3, GENEVA CONV., *supra* note 10; Rules 1 and 2, ICRC, *Int'l Humanitarian Law Databases*, https://ihl-databases.icrc.org/en/customary-ihl/v1 (last visited Mar. 15, 2024).

camps, and headquarters in, near, or underneath civilian locations such as mosques, schools, and hospitals.[39]

- Consistent with the appropriate exercise of military force otherwise authorized under IHL, Israel should do everything possible to protect civilians and civilian objects from the effects of the conflict. Israel should make additional efforts to allow supplies of humanitarian aid to Gazan civilians, including food, water, medical supplies, and fuel, provided it can be reasonably assured that such aid will not interfere with its immediate ongoing military operations and will not be diverted by Hamas or others for military purposes.[40] Efforts by credible parties to airdrop humanitarian supplies or deliver them to Gaza's civilian population by sea in coordination with Israel are also justified.[41]
- Based on the current, publicly available record, the legal community should not assert that Israel is engaged in war crimes in Gaza without fairly and objectively examining whether and to what extent credible and reliable bases exist for such a conclusion.[42]

Both Israelis and Palestinians have already suffered tragically due to the horrific and unjustifiable attack of October 7th. However, one matter remains clear. The rigorous application of international humanitarian law is essential to prevent rewarding brutal aggressors and to help ensure a future peace.

[39] *See* Rules 23, 24, and 97, ICRC, *Int'l Humanitarian Law Databases*.

[40] *See* ART. 23, GENEVA CONV. IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF 12 AUG. 1949, *available at* https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949?activeTab=1949GCs-APs-and-commentaries (last visited Mar. 22, 2024); *see also* DOD MANUAL, *supra* note 4, at 294 (The Manual states that the U.S. government supports the concept in Article 54 of the Additional Protocol I, but suggests that it would be difficult to argue that such concept is customary international law. This may not be an international armed conflict to which Article 23 of the Fourth Geneva Convention would apply, and Israel argues that Article 55 does not apply because it no longer occupies Gaza. Without taking a position on these questions, Israel should act as if these articles apply).

[41] *See id*.

[42] *See*, *e.g.*, REUTERS, *US 'Not Seeing Acts of Genocide' in Gaza, State Dept Says* (Jan. 3, 2024), https://www.usnews.com/news/world/articles/2024-01-03/us-not-seeing-acts-of-genocide-in-gaza-state-dept-says.

Participants

John Bellinger, former Legal Adviser, U.S. Department of State - John Bellinger is the co-chair of the firm's Global Law and Public Policy group. A globally recognized expert on international law, he joined the firm in 2009, after serving as the Senate-confirmed Legal Adviser for the Department of State and Senior Associate Counsel to the President and Legal Adviser to the National Security Council (NSC) at the White House in the George W. Bush Administration.

John assists a broad range of U.S. and non-U.S. clients to resolve complex and politically sensitive issues and international legal disputes in the United States and around the world. His clients include corporations, sovereign governments, international organizations, universities, government officials, and private individuals.

Colonel Joshua Berry, Managing Director Lieber Institute, deputy head of the Law Department at the U.S. Military Academy (West Point), and Constitutional & Military Law Course Director - Colonel Josh Berry is the Deputy Head of the Department of Law, United States Military Academy at West Point, New York. Prior to his selection to serve at West Point, Colonel Berry served in the Office of The Judge Advocate General, Headquarters, Department of the Army, as the Chief of Strategic Plans and then as the Deputy Chief of the National Security Law Division.

Originally commissioned as a Field Artillery officer, after serving as a lieutenant in a field artillery battalion, he was selected for the Funded Legal Education Program, and after graduation from law school, transitioned to the Judge Advocate General's Corps. Colonel Berry has extensive experience serving as a legal advisor in conventional and special operations forces, from the tactical to the strategic level, with several deployments to Kuwait, Iraq and Afghanistan. He has also served as a professor in the International and Operational Law Department, The Judge Advocate General's School, in Charlottesville, Virginia.

Colonel Berry holds a LL.M from the U.S. Army Judge Advocate General's School, a M.S. in National Security Strategy from the National War College, a J.D. from The Ohio State University Moritz College of Law, and a B.S. in Environmental Engineering from the United States Military Academy. He served as an Associate Editor on The Ohio State Journal of Dispute Resolution, won the 2012 Richard R. Baxter Military from the American Society of International Law's Lieber Society, and won the 2022 Military Officer Association of American award for excellence in writing at the National War College.

Judge Mary McGowan Davis, former NYS judge, and former Chair, UN Committee of Independent Experts (2008/9) and UN Independent Commission of Inquiry (2014) Gaza Conflict - Judge Mary McGowan Davis, formerly an Acting Justice of the Supreme Court of the State of New York from 1986-1998, has been involved in a variety of matters relating to transitional justice and human rights law since her retirement from the bench. These activities have included: serving first as a member, then as Chair, of the UN Committee of Independent Experts monitoring and assessing investigations into allegations of serious violations of International Humanitarian and International Human Rights Law during the 2008/9 Gaza Conflict (2010-1);

Chairing the UN Independent Commission of Inquiry for the 2014 Gaza Conflict; conducting an assessment of the gender justice mobile courts in S. Kivu, Eastern DRC, for OSISA and OSJI (2011); consulting on trainings for Mongolian judges and prosecutors in conjunction with The Asia Foundation's Trafficking in Persons Initiative (2008-10); and mentoring lawyers at Afghanistan's first full-service public defender office (2004-5). Judge Davis participated in trainings for judges of the Iraq High Tribunal on gender justice and international law organized by the Global Justice Center in Jordan in 2006, then traveled to Iraq in December, 2007 for follow up sessions with local judges and women's rights activists.

She has been a frequent visitor to the International Criminal Tribunal for Rwanda (2000-10) and the International Criminal Court (2008-9), as a consultant and as a participant in trial advocacy training programs for prosecutors and judges. More recently, she has participated in various workshops for judges promoting the Rule of Law in Tunisia, Egypt, Madagascar, and Myanmar.

Professor Robert Goldman is the President of the International Commission of Jurists and Professor of Law and Louis C. James Scholar at American University Washington College of Law. He is also Faculty Director of the War Crimes Research Office and Co-Director of WCL's Center For Human Rights and Humanitarian Law. A member of WCL's faculty since 1971, Professor Goldman was the law school's Acting Dean from 1979-1980. He was instrumental in founding and was the first Faculty Director of WCL's International Legal Studies Program. He practiced international trade law at Arnold & Porter from 1974-1976.

Professor Goldman teaches, practices and writes in the areas of International Law, Human Rights Law, Terrorism, and International Humanitarian Law. In 1993, he chaired the Commission of International Jurists on the Administration of Justice in Peru, jointly tasked by the US and Peruvian governments to evaluate Peru's anti-terrorist legislation. He helped from 1994-1996 develop the normative framework for internally displaced persons and was a principal author of The Guiding Principles on Internal Displacement. He was a member of the Inter-American Commission on Human Rights from 1995 to 2004 and was that body's president in 1999-2000. From July 2004 to August 2005, Professor Goldman was the former UN Human Rights Commission's Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism. In 2008, he was elected a Commissioner and member of the Executive Committee of the International Commission of Jurists (ICJ) and since 2014 was its Vice President.

In July 2018, Professor Goldman was elected President of ICJ. Prior to his election to the Inter-American Commission, he was a member of the Policy Committee of Human Rights Watch and the Advisory Boards of Americas Watch, Helsinki Watch and Middle East Watch. Professor Goldman is currently a member of the Diplomatic Reception Room's Fine Arts Committee of the State Department

Michel Paradis, adjunct professor at Columbia Law School, and former U.S. Department of Defense, Military Commission Defense Organization - Dr. Paradis has led dozens of high-profile, high-impact matters. He has led final and interlocutory appeals, in civil and criminal cases, in state, federal, and foreign courts, before three-judge panels, *en banc* panels, and the Supreme Court, in almost every appellate posture, including petitions for review, *habeas corpus* actions, extraordinary writs, and petitions for *certiorari*. He has exceptional insight into the standards of review, rules of appellate procedure, and nuances of jurisdiction and is accustomed to managing the unique challenges presented by multi-district/multi-fora litigation. Starting in 2007, Dr. Paradis worked for the U.S. Department of Defense, focusing on human rights litigation and policy work arising out of Guantanamo Bay. He represented both the U.S. Department of Defense's Military Commission Defense Organization and the detainees themselves, including the first post-trial appeal to arise out of the military tribunals in 2009. In recognition of his work, he received the *U.S. Department of Defense, Secretary of Defense Global War on Terrorism Medal* in 2021
Before joining Curtis, Dr. Paradis ran his own litigation practice, focusing on technology and national security law for clients ranging from start-ups to members of the Dow 30, alongside his career as an author and academic.

Bruce Rashkow, former Office of the Legal Adviser, US Department of State; former UN Office of Legal Affairs; and former U.S. Mission to the UN - Mr. Rashkow worked in the government as a career civil servant since 1970, except for the period between 1995 and 2005 during which he was with the United Nations. He retired at the end of 2011. Following his retirement Mr. Rashkow became an expert consultant on international law and UN law and practice.

After spending some 12 years with the Department of Justice, in 1982, he transferred to the Office of the Legal Adviser of the Department of State. In 1995, Mr. Rashkow joined the UN, as the highest ranking American in the UN Office of Le-gal Affairs. He served with the UN for ten years before reaching mandatory UN retirement. He returned to the Department of State in 2005, first as a Senior Policy Adviser in the US Mission to the United Nations and later as head of the Mission's Management and Reform Section, before retiring. Following his retirement, Mr. Rashkow was a Lecturer at Columbia Law School teaching a course on United Nations Law and Practice.

At the Department of Justice, Mr. Rashkow headed a special office responsible for a wide range of issues relating to the adjacent seas and seabed. Those responsibilities included litigation with the US coastal states, including in the Supreme Court, and legislation relating to the use and regulation of the coastal zone and the adjacent seas and seabed, including exploitation of offshore fisheries and petroleum resources. Mr. Rashkow participated on behalf of the Department of Justice in the development of the 1982 UN Law of the Sea Convention.

In 1982, he was brought over to the Office of the Legal Adviser in the Department of State to head an office preparing the case of the United States in the World Court with Canada over rights in the adjacent seas and seabed, and stayed on afterwards to deal with other matters. Mr. Rashkow became the principal lawyer in the office responsible for issues relating to the

diplomatic privileges and immunities of foreign missions and diplomats in the United States, including in regard to the United Nations and other international organizations headquartered in the United States, as well as US missions and diplomats abroad. Subsequently, Mr. Rashkow became the principal lawyer in the office responsible for the full range of issues relating to the UN, including the Security Council and the General Assembly, as well as issues relating generally to other international organizations.

At the United Nations, Mr. Rashkow served as the Director of the General Legal Division providing the full range of in-house legal counsel advice to the Secretary General and other officials throughout the Organization in respect to financial, personnel, procurement, and other management, administrative and operational issues.

Major John Spencer, Ret., Chair of Urban Warfare Studies at the Modern War Institute, U.S. Military Academy (West Point) - **John Spencer** is an award-winning scholar, professor, author, combat veteran, and internationally recognized expert and advisor on urban warfare and other military related topics. Considered the world's leading expert on urban warfare, he served as an advisor to the top four-star general and other senior leaders in the U.S. Army as part of strategic research groups from the Pentagon to the United States Military Academy.

Spencer currently serves as the Chair of Urban Warfare Studies with the **Madison Policy Forum**. He recently served as the Chair of Urban Warfare Studies at the **Modern War Institute at West Point**, Co-Director of the **Urban WarfaUrban Warfare Project podcastre Project**, and host of the . He also served as a Colonel in the California State Guard with assignment to the 40th Infantry Division, California Army National Guard as the Director of Urban Warfare Training.

Serving over twenty-five years in the active Army as an infantry soldier, Spencer has held ranks from Private to Sergeant First Class and Second Lieutenant to Major. His assignments as an Army officer included two combat deployments to Iraq as both an Infantry Platoon Leader and Company Commander, a Ranger Instructor with the Army's Ranger School, a Joint Chief of Staff and Army Staff intern, fellow with the Chief of Staff of the Army's Strategic Studies Group, and Co-Founder, Strategic Planner, and Deputy Director of the Modern War Institute at West Point.

Spencer holds a Master of Policy Management from Georgetown University. His writing has appeared in the *New York Times*, *USA Today*, *Wall Street Journal*, *Washington Post*, *LA Times*, *NY Daily News*, *Wired Magazine*, *Politico*, *The Hill*, *Foreign Policy Magazine*, *Defense One*, *Army Magazine*, and many other publications. Spencer is also a regular **military analyst and commentator** for CNN, MSNBC, BBC, and numerous news and media organizations.

Diana Haladey is thrilled to be co-leading the Inn's inaugural international law program. A longtime judge of the Jessup International Law Moot Court Competition, she was previously at White & Case LLP, and interned at the U.S. Attorney's Office EDNY Civil Division. She went to Fordham University School of Law where she won best oralist in the first-year moot court

competition and competed on the Jessup International Law and National Moot Court teams. She received an A.B. in English from Dartmouth College where she co-captained the women's rugby club. She is also Co-Chair of the Inn's White Collar Team, which received national Inn awards for their programs on insider trading and the college admissions scandal (aka Varsity Blues).

Mary McInnis Boies is Counsel to Boies Schiller Flexner LLP where she specializes in antitrust and corporate commercial litigation. She served for ten years on the Council of Foreign Relations Board of Directors where she chaired its Committee on Nominations and Governance. She is on the Board of Directors of the Stimson Center, the Dean's Council of the Harvard Kennedy School, and Business Executives for National Security.
She has served on the Board of MIT's Center for International Studies and the Board of Visitors that oversees the U.S. Air Force School of Advanced Air and Space Studies, the Air Force Research Institute, the Air War College, the National Security Space Institute and the Air Force Institute of Technology. She was a member of the Board of Directors of MBNA Bank, a public Fortune 200 Company before its merger with Bank of America. She was a member of the Congressional Commission to Study the Potential Creation of a National Women's History Museum, and is currently on the Smithsonian's American Women's History Museum Advisory Council.

She served a term on the Committee established by President Eisenhower to conduct nonpartisan peer review of federal judicial nominees including to the U.S. Supreme Court. Previously she has been on the Board of the International Rescue Committee; the International Center for Journalists; and the Central European and Eurasian Law Committee that trains judges in states previously controlled by the former Soviet Union.

She worked for over 30 years at the law firm she founded, Boies & McInnis LLP. She was Vice President CBS Inc; General Counsel of the U.S. Civil Aeronautics Board; Assistant Director of the Domestic Policy Staff at the White House; and Counsel to the U.S. Senate Committee on Commerce.

In the 1990s she founded and later sold MaryBoies Software Inc., a publisher of children's educational software titles including Top of the Key and Slam Dunk Typing. Her titles were among PC Data's Top 10 titles and Newsweek Magazine's Top Picks. Titles were translated and distributed into Spanish, Italian, French, Korean, Japanese and Chinese markets.

Solomon Shinerock is a partner at Lewis Baach Kaufmann Middlemiss, where he focuses on white-collar crime, regulatory matters, and cases arising from civil frauds. He also serves as civilian counsel with the Military Commissions Defense Organization. Mr. Shinerock spent over seven years in public service, as both a federal prosecutor in the Northern District of New York and an Assistant District Attorney at the Manhattan District Attorney's Major Economic Crimes Bureau. In those roles, he investigated and prosecuted complex fraud, tax evasion, and money laundering cases arising from domestic and cross-border transactions. He played a lead role in several high-profile matters, including the tax fraud case against the Trump Organization and its Chief Financial Officer. In recognition of his work prosecuting a $35 million international money laundering case involving the parent company of Newsweek, he was awarded the 2021 FinCEN Director's Law Enforcement Award in the Significant Fraud Investigation category.

Mr. Shinerock served as a law clerk in the U.S. District Court for the Southern District of New York and spent four years as an associate at an international law firm in New York.

MarcAnthony Bonanno is an associate at Seiden Law who focuses on cross-border commercial litigation and arbitration where he represents public and private companies in international arbitration, securities, and high-stake complex corporate litigation. Mr. Bonanno has substantial experience litigating a variety business and corporate disputes including matters involving shareholder disputes, derivative claims, distressed debt, breach of contract, fraud, RICO, and unfair and deceptive trade practices.

Outside of practicing law, Mr. Bonanno is actively involved in Africa in the Moot as the Chair of the Education and Training Committee, which is a nonprofit dedicated to increasing African university participation in the Willem C. Vis International Commercial Arbitration Moot competition held in Vienna each year. In this role, he leads a committee of volunteers to develop a series of open-access virtual educational programs. He additionally coaches the University of Cape Town's Vis Moot team, where he helps his students assess the legal issues in the Vis Moot problem, prepare and revise a claimant's and respondent's memoranda of law, coordinate practice oral arguments, and generally aids the students refine their advocacy skills.

Mr. Bonanno received his Juris Doctor from Quinnipiac University School of Law, cum laude.

Manvinder Singh is a young driven lawyer, with an expertise in Intellectual Property. A graduate of St. John's University School of Law and Cardozo School of Law with an LL.M in I.P. He honed his skills clerking for Justice Lance P. Evans, gaining invaluable experience in the judicial system. While clerking Manny spent his nights studying and completing his LL.M. In addition to his legal accomplishments, Manny has a passion for education. He completed his undergraduate studies at St. John's University, where he developed a strong foundation for his academic pursuits. Currently, Manny serves as the US Ambassador to Academia Cerebrea, a prestigious Milan-based fashion business school, where they bridge the worlds of law, academia, and fashion with dedication. Outside of his professional endeavors Manny has a passion for automotive racing and will still occasionally compete when time allows.