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The 21st-Century Belligerent's Trilemma

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Abstract

This article introduces three ways in which a state at war can attempt to accommodate the often contradictory demands of military necessity and humanitarianism – three 'logics' of waging war. The logics of sufficiency, efficiency and moral liability differently distribute the harm and destruction that waging war inevitably causes. International law demands belligerents follow the logic of sufficiency. Contemporary strategic imperatives, to the contrary, put a premium on waging war efficiently. Cross-culturally shared expectations of proper state conduct, however, mean killing in war ought to fit the logic of moral liability. The latter proves entirely impracticable. Hence, a belligerent faces a choice: (i) renounce the right and capacity to use large-scale collective force in order to meet public expectations of morally appropriate state conduct (logic of liability); (ii) defy those expectations as well as international law and follow strategic imperatives (logic of efficiency) and (iii) follow international law (logic of sufficiency), which is inefficient and will be perceived as illegitimate. This is the 21st-century belligerent's trilemma.

1 Introduction

A state in war faces at every turn the overwhelming demands of military necessity. Not following them might give the adversary the decisive edge in the struggle for military victory. At the same time, very few states that end up waging war against another state will altogether fail to also perceive an imperative to protect human life.[1] After all,

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[1] This assumption does not apply to non-international armed conflict or regionalized civil wars, which often feature widespread atrocities. For a compelling explanation of this difference between international and non-international armed conflict, see Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law', 16 *Journal of Conflict and Security Law* (2011) 2, at 225. Studies that stress the crucial role played by lawyers in recent international armed conflicts include Blum, 'JAG Goes to War', *Legal Times* (15 November 2011); Coe and Schmitt, 'Fighter Ops for Shoe Clerks', 42 *Air Force Law Review (AFLR)* (1997) 49; Dunlap, 'The Revolution in Military Legal Affairs: Air Force Legal Professionals in the 21st Century', 46 *AFLR* (2001) 293; Kahl, 'How We Fight', 85 *Foreign Affairs* (2006) 8; Kramer and Schmitt, 'Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations', 55 *University of California Los Angeles Law Review* (2008) 1407.

they are members of an international society in which the violation of human rights provides grounds for criticism and often entails reputational costs. Of course, there is no reason to assume that acting on military imperatives always involves sacrificing humanitarian goals. Yet, it is a non-contingent reality of war that it regularly does. How can a belligerent square the circle between the desire to win a war, on the one hand, and the interest in meeting widely shared normative expectations of legitimate state conduct, on the other hand?

This article introduces three ways in which a belligerent can attempt to accommodate these opposing imperatives – three logics of waging war. What shall be called the logics of sufficiency, efficiency and moral liability differently distribute the harm and destruction all wars inevitably inflict on a belligerent society. The article demonstrates that a contextual interpretation of international humanitarian law (IHL) demands belligerents follow the logic of sufficiency. The 21st-century battlefield, to the contrary, appears to put a premium on waging war in accordance with the logic of efficiency. Yet, neither combat operations that follow efficiency considerations nor hostilities conducted in accordance with the strictures of sufficiency meet with public expectations of legitimate state conduct. Cross-culturally shared beliefs about the value of human life require destruction and killing in war to fit the logic of moral liability. However, it proves impossible to wage war while accounting for the moral liability of individuals on the opposing side. Rather than accommodating both humanitarian and military imperatives, the logic of moral liability amounts to a de facto prohibition on the use of force. The article discusses the implications of the observation that law (logic of sufficiency), strategy (logic of efficiency) and legitimacy (logic of moral liability) make diverging demands on states in war. The article focuses in particular on what it means that obedience to international law neither allows a belligerent to pursue military victory in an efficient way nor does it ensure the legitimacy of conduct in war.

2 International Law and Sufficiency

'War is about killing people and breaking things.'[2] Distinguishing people that belligerents are allowed to kill from those who are immune from attack and things that belligerents may break from those that are to be left intact is at the heart of the subjection of warfare to legal regulation.[3] This section will establish the logic behind the distribution of harm in war that international law envisages. The First Additional Protocol to the Geneva Conventions contains the most recent promulgation of what and who is a

[2] Quoted in J.C. Roat, *The Making of US Navy Seals: Class-29* (2000), at xi.

[3] The principle of distinction is as old as the laws of war. The Lieber Code in Article 22 required 'the distinction between the private individual belonging to a hostile country and the hostile country itself with its men in arms'. Instructions for the Government of Armies of the United States in the Field, General Order No. 100 of 1863. The International Court of Justice (ICJ) declared distinction to be an 'intransgressible principle' of customary law. *Legality of the Threat or Use of Nuclear Weapons (1996)*, ICJ Reports (1996) 226, at ss 78ff; similar G. Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (1983), at 265.

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legitimate target of attack.[4] Article 48 enjoins belligerents to 'direct … operations only against military objectives'. Persons that are combatants in the meaning of Article 43 are military objectives. According to Article 52(2), as far as objects are concerned, military objectives are those 'which by their nature, location, purpose or use make an effective contribution to the military action and whose partial or total destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage'. Two criteria – an 'effective contribution to military action' and a 'definite military advantage' – hence determine whether an object can be reckoned a military objective.

In other words, it is the connection of an object to the conduct of combat operations – those of the enemy belligerent (effective contribution) and one's own (military advantage) – that puts an object into the category of military objectives.[5] But how close must this connection be? What is the minimum degree of nexus between an object and the enemy's hostile actions for the object to count as a military objective? We could interpret Article 52(2) to allow the engagement of only those objects that contribute to the enemy's *military* effort, meaning the direct, mostly kinetic engagement of enemy forces. Alternatively, a connection to the *war* effort more broadly could be deemed sufficient.[6] The latter interpretation creates a wider pool of 'things to break' on the opposing side.

Not surprisingly, the degree of nexus between an object and the adversary's military action often determines the degree of nexus between the attack and the military advantage arising from the engagement of this object.[7] Can we solve the interpretive question raised earlier by establishing the required degree of nexus between an attack and the military advantage? The text says that the advantage has to be 'definite'. The ordinary meaning of definite could be tangible, visible or palpable, terms that allude to the existence of an advantage, possibly the likelihood of its emergence. Alternatively, definite could denote precise, determinate, distinct or unequivocal. These words refer to, as it were, the sharpness of the contours of the advantage. None of the synonyms

4 Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (First Additional Protocol) 1977, 1125 UNTS 3.

5 See also Dill, 'International Law and the American Way of Bombing: Two Logics of Warfare in Tension', in M. Evangelista and H. Shue (eds), *Changing Ethical and Legal Norms: From Flying Fortresses to Drones* (2014).

6 For instance, A.P.V. Rogers, *Law on the Battlefield* (2004); see also Schmitt, '21st Century Conflict: Can the Law Survive?', 8 *Melbourne Journal of International Law* (2007) 443.

7 It is logically impossible that the engagement of an object that makes an effective contribution to the adversary's military action would not yield a military advantage. In turn, the most likely, though not the only, reason why an attack on an object should be militarily advantageous is that it contributes to enemy military action. Many commentators simply assume that the two criteria logically presuppose each other. For instance, Dinstein, 'Legitimate Military Objectives under the Current Jus in Bello', in A.E. Wall (ed), *Legal and Ethical Lessons of NATO's Kosovo Campaign* (2002), at 4; M. Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht mit besonderer Betrachtung der Regeln zum Schutz der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten* (1990), at 363; for an opposing view, see McCormack and Durham, 'Aerial Bombardment of Civilians: The Current International Legal Framework', in Y. Tanaka and M.B. Young (eds), *Bombing Civilians: A Twentieth-Century History* (2009), at 222; C. Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at s. 2018.

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of 'definite' describe the advantage's connection to the attack as designations such as direct, immediate, prompt or instant would.

Claude Pilloud and his colleagues in their commentary on the Protocol require the advantage to be 'substantial and relatively close'.[8] This requirement suggests there is a limit to the permissible distance between the advantage and the attack, but 'relatively close' leaves room for interpretation. Michael Bothe, Karl Partsch and Waldemar Solf consider 'definite' to mean that the military advantage must be 'concrete and perceptible … rather than … hypothetical'.[9] Perceptible is another way of describing the quality of the required advantage. 'Concrete' and 'not hypothetical' could refer either to the latter or to the connection between the attack and the advantage. If concrete and not hypothetical are attributes of the connection between the attack and the advantage, they likewise rule out that any remote connection can bring an object under the definition of military objectives. However, like Pilloud and his colleagues, Bothe, Partsch and Solf do not positively specify a required degree of nexus. Scholars disagree on whether an indirect advantage arising from an attack renders the object in question fair game.[10] The interpretation of both criteria that define a military objective is hence beset by the same interpretive controversy.

For the application of the law, does it matter that different interpretations prevail regarding the minimum connection between objects and military operations? It does. As indicated, the lower the minimum required degree of nexus, the broader the category of military objective. An example of an object, whose contribution to the military effort is vital, yet indirect, is the food supplier of an enemy belligerent.[11] As soldiers need to eat, food suppliers quite literally sustain the adversary's war effort. By the same token, their engagement ultimately generates a military advantage because hungry forces are less militarily effective. However, this military advantage is not a direct result of the attack. It is two, rather than one, causal steps away from the destruction of the object in question. The result of the attack is that the business is in ruins and food availability decreases: first causal step – soldiers get hungry; second causal step – military effectiveness declines. In turn, the food supplying industry is doubtlessly part of a society's war effort. Yet, it is two causal steps removed from the enemy's *military* effort, meaning the engagement of the enemy belligerent in hostilities. Compare this to an attack on an object more directly related to combat operations, for instance, a power plant producing the energy supply for, *inter alia,* the opposing armed forces. Contrary to the food industry, power plants generate an output that provides something soldiers

[8] Pilloud *et al.*, *supra* note 7, at s 2209.

[9] M. Bothe, K.J. Partsch and W.A. Solf (eds), *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982), at 326; similarly I. Primoratz, *Civilian Immunity in War* (2007).

[10] For discussions of this issue, see Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2010); M.N. Schmitt, *Ethics and Military Force: The Jus in Bello* (2002), at 4.

[11] I assume that the food supplier in question does not fall under the protection of Article 54(2) of the First Additional Protocol, *supra* note 4. I further bracket here the dual-use status of many food suppliers that service not merely the military but also the civilian population.

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need to fight rather than 'merely' to live.[12] As a result, the decrease in military effectiveness directly follows from their destruction. It is widely accepted that power plants used by the armed forces are military objectives. Whether food suppliers that service the military can be reckoned *prima facie* legitimate targets is controversial.[13]

Modern industrialized societies heavily rely on objects the engagement of which potentially yields a significant military advantage, but only in more than one causal step. Two causal steps separate a decrease in military effectiveness from attacks on non-military industry, businesses or other objects used for a taxable economic activity. In Step 1, such an attack decreases the financial resources of the state and, in Step 2, its capacity to, for instance, procure weapons. Three or more causal steps separate a decrease in military effectiveness from attacks on symbolically important sites, the political apparatus of a state at war, infrastructure only used by civilians, and communication links between the government and the civilian population. In Step 1, attacks on such 'message targets'[14] may 'inconvenience'[15] civilians. In Step 2, civilians might rethink their contribution to the war effort, communicate disaffection or worry to their relatives 'at the front', or withdraw their support from their warmongering political leaders. Only in Step 3 or even further down the line might a decrease in military effectiveness ensue.

Closely related to the interpretive controversy about the minimally required connection between an object and combat operations is the question of how belligerents should define progress during hostilities. The point of reference used to determine a military advantage could be the destruction of one object – a larger, but discrete, step in the process of overcoming the adversary's military forces – or victory as such. Examples of a point of reference that is more than one attack, but not overall victory, are the capture of a strategically important area of enemy territory or the destruction of the adversary's air defence system. The interpretive statement for Article 52(2) introduced by the United Kingdom on the occasion of negotiations to the First Additional Protocol avers that the definite military advantage 'is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack'.[16] The British position has been often reproduced and is widely endorsed.[17] Most commentators thus agree that it does not have to be a single air strike or artillery barrage that provides the advantage.

[12] Some just war theorists make an analogous distinction to define individuals who contribute to the war in a manner that warrants their loss of immunity. See B. Orend, *Michael Walzer on War and Justice* (2000), at 117; see also M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977), at 146.

[13] In a slight variation on the example described, the US *Joint Fires and Targeting Handbook* lists 'basic processing and equipment production', industry as well as its 'end products', even though they are described as 'chiefly civilian', as part of a target set for legitimate attack. US Department of Defense (DOD), Joint Forces Command, *Joint Fires and Targeting Handbook* (2007), at III-49; Dinstein likewise considers the food production industry a legitimate target, however, only when the engagement is necessary to prevent the advancement of enemy forces. Y. Dinstein, *War Aggression and Self-Defence* (2005), at 132.

[14] Dunlap, 'The End of Innocence; Rethinking Noncombatancy in the Post-Kosovo Era', 14 *Strategic Review* (2001) 9, at 20.

[15] *Ibid.*, at 10.

[16] Reprinted in UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2005), at 56.

[17] For instance, Dinstein, *supra* note 7; Hampson, 'Means and Methods of Warfare in the Conflict in the Gulf', in Peter Rowe (ed), *The Gulf War 1990–1991 in International and English Law* (1993), at 94.

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Yet, whether it has to be a discrete step in the pursuit of victory or overall victory that is the most general allowable point of reference for the determination of progress in war is contested. The interpretation that '"[m]ilitary advantage" is not restricted to tactical gains, but is linked to the full context of one's war strategy'[18] conflicts with one commentary's understanding that 'an attack as a whole is a finite event, not to be confused with an entire war'.[19] What if the point of reference for the definition of progress in combat was the 'full context of one's war strategy' – that is, overall victory? It is commonplace that states wage war for political reasons rather than as an end in itself. The question would hence arise whether Article 52(2) should be interpreted in light of the desired political end-state a belligerent seeks in war. Advantage is a relational concept, and in order to attribute meaning to the notion of a relative gain over another actor, we need to know what it is we ultimately seek to gain: victory informed by the specific political goals of a war or victory on the battlefield that then needs to be translated into political outcomes?[20]

That the textual interpretation of positive IHL remains inconclusive on this point has important implications.[21] If political goals of a war serve as the point of reference for defining progress, different categories of objects count as military objectives in different wars. For instance, in 2003, during *Operation Iraqi Freedom*, 1,799 desired mean points of impact (targets) served the strategy-to-task mission referred to as 'the suppression of the regime's ability to command Iraqi forces and *govern the State*'.[22] The interpretation of military advantage with a view to the goal of undermining the regime's ability, not only to command its forces but also to govern the state, may have brought Baath party headquarters and information links between the government and the public, such as media facilities, into the remit of legitimate targets.[23] Roughly 9 per cent of all air strikes, the

[18] DOD, Army Judge Advocate General's Legal Center and School, International and Operational Law Department (DOD IOLD), *Operational Law Handbook* (2013), at 13.

[19] Pilloud *et al.*, *supra* note 7, at s. 2209.

[20] I define political goals as those that even after a hypothetical complete destruction of the enemy's military capabilities would still require negotiations or an occupation of the defeated state in order to be secured – for instance, regime change for the purpose democratization. Political goals are also those that depend on a specific reaction of the enemy party (other than withdrawal of forces) – for instance, concessions in ongoing negotiations.

[21] For a historical interpretation and investigation of the negotiation records of the First Additional Protocol, see J. Dill, *Legitimate Targets? International Law, Social Construction and US Bombing* (2015), at 96ff.

[22] DOD, Assessment and Analysis Division, *Operation Iraqi Freedom: By the Numbers* (2003), at 4f; also G. Fontenot, *On Point: The United States Army in Operation Iraqi Freedom* (2005) (emphasis added).

[23] Human Rights Watch (HRW) investigated attacks on the Ministry of Information, the Baghdad Television Studio and Broadcast Facility, the Abu Ghraib Television Antennae Broadcast Facility, other telecommunications infrastructure, leadership buildings, government buildings, and security buildings. HRW, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (2003), at 46, 49f. Commentators criticized similar targeting choices during *Operation Enduring Freedom*. The coalition attacked 'power stations, radio stations, the Kabul telephone exchange, the Al Jazeera Kabul office'. M.W. Herold, *Civilian Victims of United States Aerial Bombing of Afghanistan: A Comprehensive Accounting* (2002); see also Arkin, 'Civilian Casualties and the Air War', *Washington Post* (21 October 2001); Campbell, 'Bombing of Farming Village Undermines US Credibility', *Globe and Mail* (3 November 2001); Huggler, 'Carpet Bombing Kills 150 Civilians in Frontline Town', *The Independent* (19 November 2001); Norton-Taylor, 'The Return of the B-52s', *The Guardian* (2 November 2001).

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second largest category, were thus chosen in light of the political goal of regime change. Alternatively, during *Operation Allied Force*, in 1999, NATO practised so called 'boutique bombing'.[24] Attacking civilian industrial and infrastructural targets to interfere with the lives of regime cronies and the larger population was meant to provide an advantage in light of the political goal of pressuring Slobodan Milošević to return to the negotiation table. The connection of these air strikes to the military goal of overcoming Serbian military forces was remote. As an instance of message targeting, boutique bombing also provides examples of attacks that only hypothetically and in three or more causal steps impact military effectiveness.[25]

Could an interpretation of the text animated by the purpose of the First Additional Protocol not shed light on the required point of reference for the definition of progress in war? The Hague Conventions and the Geneva Conventions have attempted to further military pragmatism and humanitarian goals in combat operations respectively.[26] The object and purpose of the First Additional Protocol, in contrast, is split between these two imperatives. It is to prescribe rules for the conduct of hostilities that render warfare as humane as possible given military pragmatism and as militarily

[24] HRW alleges that NATO bombed, among other targets, two hotels (s. 50), numerous factories including one for tobacco and one for asphalt (s. 5, s. 24, s. 42), trade targets, the Nis city centre, the New Belgrade Heating Plant (s. 7), and the Tornik ski resort (s. 12). HRW, *Civilian Deaths in the NATO Air Campaign* (2000). For investigations of individual targets, see also *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia* (2001), at s. 9; B.S. Lambeth, *NATO's Air War for Kosovo: A Strategic and Operational Assessment* (2001), at 31.

[25] Air strikes to sever communication links between the government and the civilian population are becoming a *leitmotiv* in US and NATO air campaigns. During *Operation Allied Force*, NATO famously attacked Radio Television Serbia, a central Belgrade broadcasting facility. HRW, *supra* note 24, at s. 26. The prosecutor for the International Criminal Tribunal for the Former Yugoslavia reached the vague conclusion that the goal to disrupt propaganda meant an attack's 'legal basis was more debatable. Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the "effective contribution to military action" and "definite military advantage" criteria required by the Additional Protocols'. *Final Report to the Prosecutor, supra* note 24, at s. 76.

[26] This is visible in the different parameters of applicability of the two sets of conventions. The Hague Conventions impose constraints on belligerents' freedom of action only to the extent that those are reciprocal. The so-called *si omnes* clause stipulates that the Convention only applies during an armed conflict, if all belligerent states involved are also parties to it (for instance, Article 2 of Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) 187 CTS 227). To the contrary, the Geneva Conventions apply between those parties to an armed conflict that have ratified them, regardless of whether that includes all belligerents involved (Common Article 2 of the Geneva Conventions 1949, 1125 UNTS 3). Geneva law displays what Meron refers to as a 'homocentric' impetus. Its ultimate beneficiary is the individual that requires protection from the harmful effects of war. T. Meron, *The Humanization of International Law* (2006), at 6, 9. The Geneva Conventions hence impose obligations on belligerents 'out of respect for the human person as such'. J. Pictet, *Commentary I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field* (1952), at 28f. See also Guirola, 'The Importance of Criteria-Based Reasoning in Targeted Killing Decisions', in C. Finkelstein, J.D. Ohlin and A. Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (2012), at 324; O.M. Uhler and H. Coursier, *Commentary on Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (1958), at 2; US Department of Defense, *Field Manual 27-10* (1956), at 2.

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expeditious as possible given humanitarian goals.[27] Military pragmatism means law cannot make warfare impossible.[28] Humanitarianism means law cannot allow more death and destruction than necessary for war to be possible. It follows that IHL must allow no more and no less violence than is sufficient; but sufficient for what exactly? While a purposive interpretation of the First Additional Protocol thus means returning to the question of the right point of reference for defining progress in war, it is the split object and purpose of the Protocol that provides an important insight into the logic that the Protocol envisages combat operations follow. In order to do justice to both humanitarianism and military pragmatism, contemporary IHL permits no more and no less violence than is sufficient. The only question is, sufficient for what?

It is a systematic or contextual interpretation of Article 52(2) that establishes with regard to what sufficiency has to obtain. The First Additional Protocol, as the first international treaty to regulate the conduct of hostilities in light of the prohibition on the use of force, does not allow appeal to the notion of a *causa justa.* IHL (*jus in bello*) is independent from the reasons for resort to force and their legality (*jus ad bellum*). The Protocol's preamble unequivocally spells out that its provisions must be applied 'without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'. Law that does not allow any appeal to the causes for which a war is fought in guiding the conduct of hostilities must work from the assumption that there is a stable (if very abstract) concept of military victory that is valid across most wars, notwithstanding their different moral and political contexts. Belligerents then have to achieve their political goals via the advantages that appeal only to such a 'generic' military victory, rather than directly to the political or moral reasons for which they are ultimately fighting – for instance, regime change. It follows that it is generic military victory that represents the most general permissible point of reference for the determination of a military advantage according to a contextual interpretation.

In other words, the First Additional Protocol commands belligerents to sharply distinguish between ultimate goals (political or other) and intermediate goals (military). While hostilities are ongoing, belligerents have to bracket their larger political, moral or other aspirations when devising how to act, namely what to attack. I call this action

[27] Different opinions prevail regarding the regulative purpose of the First Additional Protocol. Some scholars argue that all international humanitarian law (IHL) is humanitarian in nature. See Fenrick, 'Applying the Targeting Rules to Practical Situations: Proportionality and Military Objectives', 27 *Windsor Year Book of Access to Justice* (2009) 271. For the rejection of this understanding of IHL and the argument that even the Protocol regularly prioritizes considerations of military necessity, see Dinstein, *supra* note 7, at 19; see also Canestaro, 'Legal and Policy Constraints on the Conduct of Aerial Precision Warfare', 37 *Vanderbilt Journal of Transnational Law* (2004), at 431; Garraway, 'The Law Applies but What Law?', in Evangelista and Shue, *supra* note 5; Kahl, 'In the Crossfire or the Crosshairs? Norms, Civilian Casualties and US Conduct in Iraq', 32 *International Security* (2007) 7; Meyer, 'Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine', *Air Force Law Review* (2001), at 143; Schmitt, *supra* note 6, at 443.

[28] IHL that is prohibitively stringent would be redundant of the prohibition on the use of force under Art. 2(4) of the UN Charter and would in fact demand that states relinquish their inherent right to exercise self-defence under Art. 51 of the UN Charter.

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the 'command of sequencing' – sequencing the use of force and the pursuit of politics. Underlying this command is the assertion that military victory is sufficient to allow states to subsequently achieve their legitimate political or other goals. But is this true? The legal prescription to use force only with a view to attaining generic military victory rules out war as an effective instrument for the achievement of all those political goals for which a generic military victory is not actually a sufficient condition. It is crucial here to note that the current international legal order rests on a presumption against the use of force as a continuation of politics by other means. For this interpretation to be coherent, if states had a right to use force as a regular expression of sovereign statecraft, we would have to test whether generic military victory is in fact sufficient for the achievement of what are considered just causes. There are no so-called just causes.[29] The assertion that generic military victory is sufficient is thus not an empirical observation or assumption. It is an expression of the fact that *jus in bello*, its self-contained nature notwithstanding, shares in the mission of general international law to limit the usefulness of force in international relations.

The injunction that generic military victory is all that belligerents are allowed to strive for elucidates what kind of violence can be considered sufficient and thus legal. Only one side can win every war. So law does not simply allow all violence that is sufficient for the achievement of even just military victory. It permits violence that is necessary and sufficient for a competition between enemy militaries to proceed. Crucially, this competition has to be geared towards generic military victory only. As a result, it is sufficient to attack objects directly connected to such a competition. After all, a competition between enemy militaries in which one side will ultimately prevail militarily does not have to involve more than the objects and persons directly involved in it. In turn, being allowed to attack those objects and persons whose engagement immediately provides a genuinely military advantage is necessary for the competition between two militaries to proceed and a chance of generic military victory for one side to exist. The First Additional Protocol hence commands belligerents to sharply distinguish objects and persons closely connected to the competition between enemy militaries from everyone and everything else.[30] A systematic interpretation of Article 52(2) then requires that no more than one causal step separates an object from military action

[29] Self-defence is the exception that gives states a right to unilaterally use force under international law. For a discussion of the disastrous implications of relaxing IHL for cases of self-defence, see Dill and Shue, 'Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption', 26 *Ethics and International Affairs* (2012) 3, at 311.

[30] This section focuses on distinction as far as objects are concerned. It is noteworthy that a strikingly similar debate as the one discussed concerns the interpretation of 'direct participation in hostilities'. In internal armed conflicts, irregular wars and counter-insurgency operations direct participation is the crucial criterion for distinction among persons as at least one side tends not to fight with regular incorporated armed forces that have combatant status. The International Committee of the Red Cross (ICRC) takes a firm stance, demanding that for the individual to become a legitimate target 'the harm in question must be brought about in one causal step'. N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in the Conduct of Hostilities under International Humanitarian Law* (2009), at 53. Combatant status is assigned and assumed to correlate with an individual's direct contribution to the war. The last section of this article examines whether this holds true.

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and an attack from the resulting advantage in the quest for generic military victory. I call this action the 'command of containment' – the containment of hostilities.

What does a war fought in accordance with the logic of sufficiency look like? The commands of sequencing and containment mean hostilities will have to focus on objects instrumental in the actual competition between enemy militaries, such as weapons, barracks, military transport and military industry. These are all military objectives by nature and have no, or only marginal, civilian functions. Combat operations may be directed against objects that have both a civilian and a military function in virtue of their purpose, location or use. However, according to the logic of sufficiency, the intent of attacks on what is generally referred to as dual-use objects must be to neutralize only their military function. The foreseeable disruption of objects' civilian function must count as expected collateral damage, not as military advantage. Finally, combat operations following the logic of sufficiency will not involve objects that do not have a direct (one causal step) connection to the fight. Examples include political infrastructure, symbolic sights, non-military industrial production and communication infrastructure not used for command and control but merely for propaganda. Regardless of the specific political goals of a war, the logic of sufficiency translates into attrition warfare – the attempt to win a war by overcoming an enemy military.[31]

Waging war in this way is highly inefficient. First, the logic of sufficiency precludes the efficient (direct, quick and cheap) pursuit of the belligerents' ultimate political goals. The goal over which other factors can be minimized is military progress narrowly defined. To be specific, in a war with limited goals, such as *Operation Allied Force*, sequencing the conduct of war and the pursuit of those goals by focusing on all-out attrition warfare might seem wasteful in terms of time, blood and treasure. Moreover, even generic military victory may only be achieved with the engagement of objects that in one causal step contribute to the competition among opposing militaries. This conclusion remains true even if the attack on other objects promises to contribute to ending the war sooner by generating a political or psychological advantage but only an indirect military advantage (ending the war). Message targeting and attacks on the political fabric of a state and on non-military industry are prohibited by the command of containment. The First Additional Protocol regulates warfare through sequencing and containment, both of which defy the efficient achievement of political goals with force.

3 Strategic Imperatives and Efficiency

Implicit in the above outline of the logic of sufficiency is an alternative way in which to accommodate both military and humanitarian imperatives in the conduct of war as well as an alternative way in which to distribute harm. A logic of efficiency would eschew sequencing the pursuit of military and political victory and demand

[31] Attrition, according to the DOD, is '[t]he reduction of the effectiveness of a force caused by loss of personnel and materiel'. DOD, *Dictionary of Military and Associated Terms* (2010).

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belligerents choose targets with a view to gaining an advantage in the pursuit of their ultimate overall – often political – goals. In its most radical form, a logic of efficiency would also reject the containment of hostilities and recommend belligerents target exactly those objects and persons – be they civilian or military – whose attack promises the quickest political victory. A moderate version of the logic of efficiency might not abandon the legal obligation to distinguish altogether. Rather, it could broaden the category of military objectives, and, thus, of *prima facie* legitimate targets, by allowing for a lower degree of nexus to connect objects to military operations.

Over the last two decades, military doctrine, specifically among NATO countries, has evolved to ever more closely reflect such a moderate version of the logic of efficiency, which rejects sequencing and relaxes containment.[32] The introduction and rise to prominence of effects-based operations (EBO) in Western militaries is a clear indicator of this trend. The doctrine of EBO explicitly demands efficiency in war. The prescription is that mission accomplishment should be 'sought while minimizing cost in lives, treasure, time, and/or opportunities',[33] seeking 'to achieve objectives most effectively, then most efficiently'.[34] The following paragraphs show that EBO challenges both the sequencing and the containment command of the logic of sufficiency and the First Additional Protocol.

In defiance of sequencing, EBO is most successfully executed if belligerents achieve their ultimate political goal while not having to destroy the enemy's military forces.[35] The doctrine recommends that those targets are to be selected that 'contribute *directly* to the achievement of strategic objectives'.[36] 'Strategic' is defined as 'the highest level of an enemy system that, if affected, will contribute most directly to the achievement of our national security objectives'.[37] Hence, the doctrine advocates choosing objects as targets that are linked not to generic military victory but, rather, to the specific strategic [read political] goals of a war. Accordingly, 'offensive action [is allowed and welcomed] against a target – whether [it is] military, political, economic, or other'.[38] Manuals contrast effects-based targeting with attrition warfare, which is shunned for its lack of effectiveness.[39] Rather than limiting combat operations as much as possible to the competition between opposing militaries, as the logic of sufficiency does, effects-based targeting avoids this competition as much as possible.

In defiance of containment, the doctrine urges commanders to 'consider *all* possible types of effects' when selecting targets.[40] It advocates producing 'political effects

[32] The logics and the associated terminology are contributions of this research and do not feature in any of the military manuals and doctrinal texts cited.

[33] DOD, Department of the Air Force, *Targeting, Doctrine Document* (November 2006), at 14.

[34] *Ibid.*

[35] DOD IOLD, *Operational Law Handbook* (2004), at 464.

[36] DOD, Department of the Air Force, *Strategic Attack, Doctrine Document 2-1.2* (2007), at 2 (emphasis in original).

[37] *Ibid.*, at 3

[38] DOD, Joint Forces Command, *Joint Fires and Targeting Handbook* (2007), at III-20.

[39] DOD, Department of the Air Force, *Basic Doctrine, Doctrine Document 1* (2003), at 18.

[40] *Ibid.*, *Targeting, Doctrine Document 3–60* (2006/11), at 14 (emphasis added).

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beyond the mere destruction of those targets'[41] because those indirect effects are considered to be often more important than the immediate kinetic results of an attack.[42] In other words, an effects-based approach does not follow the sharp distinction between military objectives narrowly defined and the rest of a belligerent society as prescribed by the logic of sufficiency. Military manuals explicitly credit effects-based thinking for inspiring the engagement of objects other than '"traditional" wartime targets'.[43] The prescriptions to avoid the engagement of enemy military forces and to strive for other than kinetic effects is taken even further by the doctrine of 'achieving rapid dominance', colloquially known as 'shock and awe'. The latter identifies the civilian population as the most promising object of psychological warfare.[44]

The rise to prominence of military doctrine that challenges the logic that warfare ought to follow as envisaged by the First Additional Protocol has not left the interpretation of international law unaffected. In many countries, IHL exegesis and the conception of military doctrine are in different hands. In the USA, however, so-called operational law and military doctrine are devised by the same bureaucracy, the Department of Defense.[45] In addition, shock and awe and EBO both originated in the USA, and it is the US military, specifically the air force, that has most explicitly turned its back on what I refer to as the logic of sufficiency. Not surprisingly then, in the development of US operational law, we find a neat imprint of the shift from sufficiency to efficiency.

Although it did not ratify the First Additional Protocol, the USA adopted the language of Article 52(2) into operational law manuals.[46] This move signalled the USA's acceptance of the Protocol's addition of a definition of military objectives to the customary obligation to distinguish binding general international law. Yet, two

[41] *Ibid.*, at 11

[42] *Ibid.*, at 19

[43] *Ibid.*, *Basic Doctrine, Organisation, and Command, Doctrine Document 1* (2011), at 27. In 2007, the US army distanced itself from effects-based operations (EBO). Since 2008, the Joint Forces Command likewise avoids the doctrine's terminology. Yet the reason for this is not that EBO ignores the boundary between genuinely military objectives and the rest of civilian society (containment) and between conduct of, and resort to, war (sequencing). Criticism centres on the allegation that the doctrine '[a]ssumes a level of unachievable predictability'. Indeed, Joint Forces Commander Mattis emphasizes that while he rejected 'the more mechanistic aspects of EBO', he 'recognizes the value of operational variables, such as the political, military, economic, social … characteristics of the operating environment', which the doctrine brings to a commander's attention. Mattis, 'USJFCOM Commander's Guidance for Effects-based Operations', 18 *Parameters* (2008) 20, at 23. Moreover, the US air force continues to embrace EBO and has even extended the doctrine's application since 2007. DOD, Air Force, *Basic Doctrine, Organisation, and Command, Doctrine Document 1* (2011), at 19.

[44] H. Ullman and J. Wade, *Shock and Awe: Achieving Rapid Dominance* (1996).

[45] Dickinson, 'Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance', 104 *American Journal of International Law* (*AJIL*) (2010) 1.

[46] The following recent *Operational Law Handbooks* issued by the DOD IOLD contain the formulation of Article 52(2): DOD IOLD, *Operational Law Handbook* (2012), at 22; DOD IOLD, *Operational Law Handbook* (2011), at 20; DOD IOLD, *Operational Law Handbook* (2010), at 12; *The Military Commander and the Law* (2008), at 19f; DOD IOLD, *Operational Law Handbook* (2008), at 19, 614; DOD IOLD, *Operational Law Handbook* (2007), at 21, 446; DOD IOLD, *Operational Law Handbook* (2004), at 12, 20; DOD IOLD, *Operational Law Handbook* (2003), at 8; DOD IOLD, *Operational Law Handbook* (2002), at 16.

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decades later, military manuals started to feature a change in the wording of the definition of military objectives. In the 1997 field manual on the joint targeting process, the attribute 'war-sustaining'[47] emerged as a criterion for mission assessment.[48] The *Joint Doctrine for Targeting* of 2002 used the term to explain the definition of a military objective.[49] The term entered this definition in *Military Commission Instruction No. 2* of 2003. The document defines military objectives as those objects that 'effectively contribute to the opposing force's war-fighting or war-sustaining capability', as opposed to the original criterion of 'an effective contribution to military action'.[50] According to the new formulation, a link to military action properly so-called is no longer the only way an object can become a military objective. Another way is to contribute to an enemy's 'war-sustaining capability'. The military advantage that may ultimately arise from attacks on objects that can conceivably be construed as sustaining a belligerent's capabilities to wage war can have a very low degree of nexus to the attack itself.[51] The discussion in the previous section showed that anything from the civilian political apparatus to business activities and morale sustains the war in some way.

The shift towards a lower degree of nexus is also visible in the yearly *Operational Law Handbooks* issued by the Judge Advocate General School. Since 2004, the handbooks have started the definition of military objectives with a verbatim repetition of Article 52(2) and have then elaborated: 'The connection of some objects to an enemy's war fighting or *war-sustaining effort* may be direct, indirect, or even discrete. A decision as to classification of an object as a military objective … is dependent upon its value to an enemy nation's war fighting or *war-sustaining effort* (including its ability to be converted to a more direct connection), and not solely to its overt or present connection or use.'[52] The criterion of having value to an enemy's war-sustaining effort is thereby framed as a faithful interpretation of the uncontroversial formulation defining a military objective according to Article 52(2).

[47] The position that objects that are 'war-sustaining' are legitimate targets of attack originated with naval warfare. The US navy traditionally considers legitimate '[e]conomic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability'. For instance, DOD, Army Judge Advocate General's Legal Center and School, *The Commander's Handbook on the Law of Naval Operations* (1995), at 403. The term appeared for the first time in the *Annotated Supplement of The Commander's Handbook* (1989). It was there accompanied by the explicit qualification that it was not intended to alter the meaning of Article 52(2) of the First Additional Protocol. See also Robertson, 'The Principle of the Military Objective in the Law of Armed Conflict', 8 *USAF Academy Journal of Legal Studies* (1997–1998) 35, at 46. For the original meaning and purpose of the term in naval warfare, see Melson, 'Targeting War-Sustaining Capability at Sea: Compatibility with Additional Protocol I', 434 *Army Lawyer* (2009) 44.

[48] DOD, Air Land Sea Application Centre, *The Joint Targeting Process and Procedures for Targeting Time-Critical Targets*, Field Manual 90-36, I-10 (25 July 1997).

[49] DOD, Joint Chiefs of Staff, *Joint Doctrine for Targeting, Joint Publication 3–60*, A-2 (17 January 2002).

[50] DOD, *Military Commission Instruction No. 2* (30 April 2003), Art. 5(d)

[51] The Joint Doctrine for Targeting of 2007 brings back the link between sustaining and war fighting. DOD, Joint Chiefs of Staff, *Joint Targeting, Joint Publication 3–60* (13 April 2007, last changed 28 July 2011), at 91

[52] Among others, DOD IOLD, *Operational Law Handbook* (2013), at 23 (emphasis added); DOD IOLD, *Operational Law Handbook* (2012), at 23; DOD IOLD, *Operational Law Handbook*, 21 (2011); DOD IOLD, *Operational Law Handbook* (2010), at 19f; DOD IOLD, *Operational Law Handbook* (2007), at 22.

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Whether or not this is the case is controversial. Prominent military expert, Hays Parks, in a public lecture at Chatham House, referred to the issue as 'more of an intellectual argument between various semantic alternatives which does not make a real practical difference'.[53] Michael Schmitt likewise maintains that the use of the attribute war-sustaining as a feature defining military objectives has not led to problematic targeting choices.[54] The International Humanitarian Law Research Initiative abstained from using the term in its 2009 *Manual on Air and Missile Warfare*. The commentary describes it as 'a matter of dispute' whether 'the definition includes objects which indirectly yet effectively support military operations'. The Initiative goes on to reject the argument that objects that merely sustain the war should fall under the definition contained in Article 52(2).[55] Yoram Dinstein considers 'war-fighting' capability largely synonymous with military action, but, like Frits Kalshoven, he rejects 'war-sustaining' as being too broad.[56]

Admiral Horace Robertson is a lone voice in arguing that the change in language presents a deliberate challenge to the customary *status quo*: '[T]he inference that one may draw from this change in wording is that the United States … has rejected the presumptively narrower definition contained in Article 52 of Protocol Additional I in favour of one that, at least arguably, encompasses a broader range of objects and products.'[57] Corroborating the view that the criterion 'sustaining a war effort' creates a more inclusive category of military objectives than the Protocol's condition that the object 'makes an effective contribution to military action', the *Operational Law Handbooks* of 2006–2008 list, without qualification, '(1) Power (2), Industry (war supporting manufacturing/export/import), (3) Transportation'[58] as military objectives. None of the objects that fall into these three categories are military objectives by nature. The First Additional Protocol therefore requires that a link to military action via their location, purpose or use be established before they can legally be attacked.

The broadest conception of military objectives in US doctrine, however, is implied by the permission to intentionally attack 'objects that contribute to an opposing state's ability to wage war', which has been featured in the *Operational Law Handbooks* since

[53] Chatham House, *Summary of the International Law Discussion Group* (21 February 2011), at 21, available at www.chathamhouse.org.uk/files/18899_il210211summary.pdf (last visited 18 January 2015).

[54] Schmitt, 'Effects-Based Operations and the Law of Aerial Warfare', 5 *Washington University Global Studies Law Review* (2006) 265, at 281; M.N. Schmitt, *Ethics and Military Force: The Jus in Bello* (2002), at 70.

[55] International Humanitarian Law Research Initiative, *Manual on Air and Missile Warfare* (2011).

[56] Kalshoven, 'Noncombatant Persons', in H.B. Robertson (ed), *The Law of Naval Operations* (1991), at 300; Dinstein, *supra* note 7, at 146; see also Fenrick, 'Applying the Targeting Rules to Practical Situations: Proportionality and Military Objectives', 27 *Windsor Year Book of Access to Justice* (2009) 271, at 275; Fenrick, 'The Prosecution of Unlawful Attack Cases before the ICTY', 7 *Yearbook of International Humanitarian Law* (2004) 153, at 172; Roscini, 'Targeting and Contemporary Aerial Bombardment', 54 *International and Comparative Law Quarterly* (2005) 411, at 422; Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', 98 *AJIL* (2004) 1.

[57] Robertson, 'The Principle of the Military Objective in the Law of Armed Conflict', 8 *US Air Force Academy Journal of Legal Studies* (1997–1998) 35.

[58] DOD IOLD, *Operational Law Handbook* (2008), at 19; DOD IOLD, *Operational Law Handbook* (2007), at 21; DOD IOLD, *Operational Law Handbook* (2006), at 20.

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2010.[59] Ultimately, the entire civilian infrastructure can be considered to contribute to a state's ability to wage war. The statement includes no specification of the required nexus between an object and the actual military effort. The same operational law manuals acknowledge that the USA defines '"definite military advantage" very broadly'.[60] A preventive argument against critics is implicit in the statement that '[s]tates may come to different conclusions regarding whether certain objects are military objectives in accordance' with Article 52(2).[61] It is certainly safe to conclude that US operational law allows for a lower degree of nexus between an object and the enemy's military action – and, hence, between an attack and the resulting military advantage – than the First Additional Protocol, which demands containment of hostilities within one causal step.

This brief overview of a recent trend in military doctrine and of the development specifically of US operational law suggests that what seems like an outright rejection of distinction in military strategy corresponds instead to a lowering of the required degree of nexus between objects and military operations in operational law. The USA has not turned its back on distinction, but it does no longer recognize the requirement of a direct causal connection between an object and the competition among enemy militaries.[62] It follows that the ultimate point of reference for the definition of the first order effects of an attack as progress in war is not necessarily generic military victory. Military strategy openly defies the command of sequencing when it prescribes that belligerents endeavour to attain their desired political end state as directly as possible. Operational law has abandoned it by implication.

In order to shed light on why this alternative logic of efficiency has emerged and risen to prominence in military and operational legal doctrine over the last two decades, an enquiry into the factors that may have altered warfare at the turn of the 20th to the 21st century is necessary.[63] The most obvious impulses for changes to the character of war come from progress in technology. A large body of scholarship explores the effects of increasingly precise weapons and improved capabilities for reconnaissance, surveillance and intelligence gathering (RSI) on combat operations.[64] Often overlooked

[59] DOD IOLD, *Operational Law Handbook* (2013), at 22; DOD IOLD, *Operational Law Handbook* (2012), at 22; DOD IOLD, *Operational Law Handbook* (2011), at 20; DOD IOLD, *Operational Law Handbook* (2010), at 20. Previous handbooks bore the slightly more specific formulation 'military objectives that enable an opposing state and its military forces to wage war'. Among others, see DOD IOLD, *Operational Law Handbook* (2006), at 20.

[60] DOD IOLD, *Operational Law Handbook* (2013), at 134; DOD IOLD, *Operational Law Handbook* (2012), at 134; DOD IOLD, *Operational Law Handbook* (2011), at 132; DOD IOLD, *Operational Law Handbook* (2010), at 146.

[61] DOD IOLD, *Operational Law Handbook* (2012), at 526f; DOD IOLD, *Operational Law Handbook* (2011), at 132; DOD IOLD, *Operational Law Handbook* (2010), at 552.

[62] To investigate whether the USA fully embraced the implications of the logic of efficiency before the described changes in military doctrine and operational law is beyond the scope of this article.

[63] The logic of efficiency has older precursors, for instance, in strategic bombing doctrine. For an investigation of similarities and differences, see Dill, *supra* note 21.

[64] See, among others, Backstrom and Henderson, 'New Capabilities in Warfare: An Overview of Contemporary Technological Developments and the Associated Legal and Engineering Issues in Article 36 Weapons Reviews', 94 *International Review of the Red Cross* (*IRRC*) (2012) 483; Boothby, 'Some Legal Challenges Posed by Remote Attack', 94 *IRRC* (2012) 579; Asaro, 'On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanization of Lethal Decision-Making', 94 *IRRC* (2012) 687; Kreps and Kaag, 'The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis', 44 *Polity* (2012) 2; Casey-Maslen, 'Pandora's Box? Drone Strikes under *Jus ad bellum*, *Jus in Bello*, and International Human Rights Law', 94 *IRRC* (2012) 597.

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is the question of how these alterations to the material means of waging war interact with moral and legal imperatives. It is the progress in technology that enhances RSI that has also improved telecommunication and that affords the international public an ever better view onto the battlefield. It is not immediately obvious why an international public opinion[65] should prefer that wars be waged according to the logic of efficiency though. What it means for the conduct of war that the public is watching requires an exploration of shared ideas about violence in international relations.

In order to explain the shift in logics, the considered judgments on war of the international society would have to have changed. The first tangible result of such a change in the shared beliefs about violence in international relations in the 20th century was arguably the formal legal prohibition on the use of force in 1945. While outlawing war had been a project in pacifist and feminist circles as well as among liberal politicians and scholars for a while, it was only after the two World Wars that circumstances aligned to make it a reality. Spurred by the human suffering just witnessed, a majority of actors in the international community, including the major powers of the moment, were able to reach consensus on the establishment of a legal obstacle to the resort to force in international relations.[66] Over the following decades, this ideational change entailed the creation, elaboration and increased justiciability of a global human rights regime under international law. The end of the Cold War, moreover, inspired a flurry of United Nations (UN) peacekeeping missions to ease the consequences of conflict and rebuild war-torn societies. The post-Cold War order also saw the revival of international criminal law. Martha Finnemore and Kathryn Sikkink have diagnosed international relations with 'a long-term trend toward humanizing the "other," or "moral progress"'.[67] What is alternatively called the 'individualisation'[68] of international relations or the

[65] The argument in international relations literature that a world public opinion exists – one that is moreover wedded to liberal values and human rights – is extremely vulnerable to the criticism of being Western centric. Western centrism is less of a damning indictment for an argument based at least in part on the spread of legal rights and concepts that are *de jure* universally binding. However, this discussion by no means aims to veil the Western origin and liberal tendentiousness of the concept of a liberal global public opinion or deny the contestation of individual rights in some parts of the world. For the argument that a global public opinion endorsing liberal human rights exists, see B. Buzan, *From International to World Society* (2004); A. Slaughter, *A New World Order* (2004). For arguments that support the notion that a liberal community of values underlies international law, see among others, von Bogdandy, 'Constitutionalism in International Law, Comment on a Proposal from Germany', 47 *Harvard International Law Journal* (*HILJ*) (2006) 223; Simma and Paulus, 'The International Community: Facing the Challenge of Globalization, 9 *European Journal of International Law* (*EJIL*) (1998) 266, Simma, 'From Bilateralism to Community Interest in International Law', 250 *Collected Courses of The Hague Academy of International Law* (1994) 217, at 233; Slaughter and Burke-White, 'An International Constitutional Moment', 43 *HILJ* (2002) 1.

[66] Previous attempts at outlawing war were spectacularly eclipsed by the outbreak of the Second World War. See Kritsiotis, 'When States Use Armed Force', in Christian Reus-Smit (ed), *The Politics of International Law* (2004), at 50.

[67] Finnemore and Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organization* (1998) 887, at 267; see also Crawford, 'Decolonization as an International Norm: The Evolution of Practices Norms and Beliefs', in L.W. Reed and C. Kaysen *(eds), Emerging Norms of Justified Intervention* (1993).

[68] Harding, 'The Significance of Westphalia: An Archaeology of the International Legal Order', in C. Harding (ed), *Renegotiating Westphalia* (1999); Slaughter and Burke-White, *supra* note 65.

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'humanisation'[69] of general international law arguably reached a peak with the tentative qualification of state sovereignty for the sake of an emerging right to humanitarian intervention towards the end of the 20th century.[70] At the heart of this ideational change lies what Theodor Meron calls the 'advent of a general distaste for the waste of human life.'[71] International relations at the turn of the century were characterized by the increasingly cross-cultural scope of physical integrity right.[72]

This ideational change, namely the rise of an individual rights-based moral standard in international relations, explains the rising and now notorious casualty aversion specifically among Western societies. There seems almost universal agreement among scholars of international relations that 'Western societies can now only fight wars which minimise human suffering.'[73] The 'zeitgeist that requires the reduction of human risk'[74] has been most thoroughly documented to prevail in US society.[75] A project analysing various opinion polls discovered that the American public, as we might expect, displays a double standard in that losses among American troops are felt more keenly than fatalities among civilians in the country under attack or enemy combatants.[76] Crucially, however, the plight of civilians in the theatres of US military operations abroad receives some media attention in the USA these days and by no means is met with complete indifference.[77]

That deaths of enemy combatants can even entail reputational costs for the belligerent causing them became evident when on 2 March 1991, shortly before the end of *Operation Desert Storm*, the USA killed scores of Iraqi troops on Highway 80 between Kuwait and Basra. The legality of the attacks depended on whether the Iraqi troops were withdrawing (illegal) or merely retreating (legal) and on whether they had violated a prior cease fire agreement as the commanding general had alleged.[78] These

69 T. Meron, *The Humanization of International Law* (2006), at 6.

70 See, for instance, Morris, 'Humanitarian Intervention in the Balkans, in Humanitarian Intervention and International Society', in J.M. Welsh (ed), *Humanitarian Intervention and International Society* (2006); J. Pattinson, *Humanitarian Intervention and the Responsibility to Protect* (2012); Roberts, 'The United Nations and Humanitarian Intervention', in J.M. Welsh (ed), *Humanitarian Intervention and International Society* (2006); Shue, 'Limiting Sovereignty', in *ibid.*

71 Meron, *supra* note 26, at 6.

72 M. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998).

73 C. Coker, *Humane Warfare* (2001), at 2; likewise Beier, 'Discriminating Tastes: Smart Bombs, Non Combatants and Notions of Legitimacy in Warfare', 34 *Security Dialogue* (2003) 413, at 420; T. Farrell, *The Norms of War: Cultural Beliefs and Modern Conflict* (2005), at 179; C. McInnes, *Spectator-Sport War: The West and Contemporary Conflict* (2002), at 90; Owens, 'Accidents Don't Just Happen: The Liberal Politics of High-Technology "Humanitarian" War', 32 *Millennium: Journal of International Studies* (2003) 595, at 606; Rogers, 'Zero Casualty Warfare', 837 *IRRC* (2000), at 165; Zehfuss, 'Targeting: Precision and the Production of Ethics', 17 *European Journal of International Relations* (2011) 543, at 552.

74 Zehfuss, *supra* note 73, at 546

75 For instance, C. Gelpi, P.D. Feaver and J. Reifler, *Casualty Sensitivity and the War in Iraq* (2005).

76 Bacevich, 'Morality and High Technology', 45 *The National Interest* (1996) 37; also J. Butler, *Precarious Life: The Powers of Mourning and Violence* (2004); Gregory, '"In Another Time-Zone, the Bombs Fall Unsafely…": Targets, Civilians and Late-Modern War', 9 *Arab World Geographer* (2006) 88; D. Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq* (2004).

77 Larson and Savych, *Misfortunes of War: Press and Public Reactions to Civilian Deaths in Wartime* (2007).

78 Hersh, 'Annals of War: Overwhelming Force', *The New Yorker* (22 May 2000).

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subtleties were of little importance to the media, which broadcast gruelling images of smoking tanks and charred bodies. While the resulting indignation about the waste of human life was an international phenomenon, critical voices were heard also in the USA. If we took the USA to be representative of a Western belligerent with the strategic offensive, we could unequivocally state that in such a society at war loss of life in none of the three groups – friendly combatants, civilians and opposing combatants – is simply considered unproblematic nowadays.

In third countries not involved in a war, civilian casualties tend to generate the most abhorrence, more so than combatant deaths on either side. After all, troop fatalities are rarely individually reported outside the dead combatants' countries of origin. The so-called 'Highway of Death' incident in Iraq was an exception in this respect. It evidenced, however, that even combatants' lives are no longer considered dispensable and their large-scale killing does not go unnoticed or uncriticized.

Coming back to the two logics, the normative imperative of saving lives provides an explanation for the perceived strategic imperative of efficiency. In both logics, civilians are protected from direct attack but open to being incidentally harmed. The logic of sufficiency makes no claim at all to protecting combatants' lives. In fact, it endows killing combatants with the legitimacy of a legally privileged course of action, an acceptable way to attain a military advantage. The logic of efficiency does, of course, likewise involve deliberate attacks on combatants. However, it lays a claim to the protection of human life that the logic of sufficiency does not make: minimizing combatant and possibly even civilian losses by getting a war over with as quickly as possible. At first sight, waging war according to the logic of efficiency then enjoys an advantage over the logic of sufficiency in the eyes of a belligerent concerned with being perceived as legitimate.[79] The fewer air strikes it takes to end a war, the less likely it is to receive criticism from a global public that is scandalized by the loss of life (if it is reported) and from the public at home, which is anxious to protect the troops.

It is plausible that casualty aversion means contemporary military operations are kept as brief as possible and other than 'traditional' military objectives are targeted to that end (defiance of containment). It is less clear why efficiency should be sought with regard to the achievement of the overall political goals of a war (defiance of sequencing). Human suffering, at least the kind directly inflicted by combat operations, presumably ends with one side achieving generic military victory.[80] Why then focus on the desired political end state, as EBO and shock and awe prescribe? For an explanation, we have to return to the prohibition on the use of force. This legal watershed rendered war a state of exception in need of a legal and political apology.

[79] It is beyond the scope of this article to discuss the origins of this concern and whether non-Western belligerents share it.

[80] Of course, civilians and combatants in countries at war do not stop suffering once one side achieves generic military victory. However, that is unfortunately not necessarily the case when one side achieves the desired political end state either. Generic military victory nonetheless marks the point at which the deliberate, legally sanctioned infliction of human suffering through direct physical violence ends. The repercussions of this violence tend to linger even past the point where one side also achieves their ultimate political aims.

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If something is *prima facie* prohibited, unless it pursues one of a very small number of specific legitimizing goals, those goals are naturally crucial – the more so, the keener a belligerent is on upholding an aura of legitimacy.

The only legal apology available to a state unilaterally resorting to force is self-defence. However, over the last seventy-odd years, the exercise of self-defence very rarely has meant the straightforward defeat of an invading army. It is often a specific political end state that affords the neutralization of the threat that has triggered the perceived need to resort to force from the point of view of the 'defender'.[81] Achieving this political end state, which grounds a state's inherent right to self-defence, exceptionally removes the stigma of aggression from the use of force.[82] It is only natural that this source of legitimacy is kept at the forefront of combat operations. Every air strike that inflicts civilian casualties and/or puts troops at risk ought to also contribute to the achievement of the exceptional goals for which a state claims to rightfully deviate from the *Grundnorm* of peaceful international relations.

In this reading, the removal of war from the spectrum of regular international politics has paradoxically encouraged appeal in the conduct of combat operations to political aims. This explains why a belligerent who has an interest in avoiding the reputational costs of being branded an aggressor is tempted to lend expression to the importance of its overall goals with every attack. To sum up, it is an ideational change – the emergence of an individual rights-based morality and therefore an evolution of shared normative beliefs about violence in international relations – that drives those perceived strategic imperatives to which developments in military doctrine attempt to do justice and that a change in the interpretation of IHL accommodates.

4 Morality and Moral Liability

If ideational changes (casualty aversion and the internalization of the prohibition on the use of force) drive perceived strategic imperatives (quick, direct achievement of overall political goals), the question arises whether the logic of efficiency actually addresses the normative concerns that, I argue, have inspired its emergence in military doctrine and operational law.[83] In order to find out whether the logic of efficiency lessens the tension between 21st-century liberal moral values concerned with the individual and large-scale, collective state on state violence in war, we need to investigate what it looks like to conduct combat operations following the logic of efficiency.[84]

[81] Blum argues that self-defence is rarely conceived as a return to a *status quo ante*. More often than not, it includes a larger mission to change the world for the better. Blum, 'The Fog of Victory', 24 *EJIL* (2013) 1, at 401.

[82] Though humanitarian intervention is arguably not an available legal apology, 'other-defence' has recently come to provide a moral or political, though contentious, apology.

[83] For a detailed demonstration that US air warfare has in fact developed from mostly relying on the logic of sufficiency to more often following the logic of efficiency, see Dill, *supra* note 5.

[84] For accounts of how the 'rise and spread of liberal norms, especially after the end of the Cold War' have affected warfare, see also Blum, *supra* note 81, at 404

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The logic of sufficiency and efficiency can be respectively translated into the credos 'contained wars are the least destructive' and 'sharp wars are brief'. Whereas the logic of sufficiency manifests on the battlefield as attrition warfare, belligerents following the logic of efficiency will avoid it. Instead, they will focus on dual-use targets, message targets, the adversary's political infrastructure and other objects connected to the specific political end that the state has sought. It is analytically plausible that a war fought according to the logic of efficiency might be shorter, but that the air strikes that efficiency considerations demand – less attrition and more targeting of dual-use and civilian infrastructure – create a higher risk of collateral damage than 'a similar' war fought according to sufficiency considerations.[85] Yet, we do not know whether either of the logics pans out – that is, whether sharp wars are in fact brief enough to warrant their increased sharpness or whether wars fought under the strictures of sufficiency are contained enough to warrant their increased length. In efficient wars, does enough of a society remain intact once one side has achieved their political goals to make up for the fact that fewer objects are immune and that civilians are less protected from the start? In a contained war, does enough of a society remain immune from attack once sufficient objects and persons have been declared fair game to make up for the fact that this competition is likely to take longer?

It is not possible to establish whether a shift from sufficiency to efficiency saves lives or increases the casualty count. As a result, in order to gauge whether the logic of efficiency meets the expectation of legitimate state conduct, we have to focus on public reactions to instances of combat operations following efficiency considerations. Even more so than air strikes in accordance with EBO or shock and awe, targeted killings, often with unmanned aerial vehicles, reflect the strategic pressures of the 21st-century battlefield induced by changed shared ideas about violence in international relations. Targeted killings afford friendly forces absolute protection[86] and circumvent killing large numbers of enemy troops. In addition, that they directly channel violence towards an enemy framed as culpable, probably even deserving of lethal attack, makes what we colloquially refer to as 'drone strikes' the epitome of warfare, according to the logic of efficiency.[87] There is no more obvious way to keep the goal of self-defence at the forefront of violent action than to direct that violence against the individual who is the source of the supposed threat. Drone strikes heed the liberal demand that 'criminals, not an impoverished nation, should be on the receiving end of punishment'.[88] At first sight, the logic of efficiency has therefore considerable appeal.

[85] This argument cannot be empirically tested and rests purely on analytical plausibility. I make it in more detail and also demonstrate that empirical verification is futile in Dill, *supra* note 21.

[86] The USA uses unmanned aerial vehicles to carry out targeted killing. Israel tends to rely on missiles fired from helicopters. While the latter does not reduce the risk to friendly forces to zero, the Israeli defence forces rarely lose troops in these missions. In the following discussion, I will focus on US practices because they present the purest example of risk-free warfare. Guirola, *supra* note 26.

[87] I use the term as short hand for targeted killings with remotely piloted aerial vehicles.

[88] Quoted in Herold, *supra* note 23.

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Yet, the identification of targeted killings as the purest implementation of the logic of efficiency should give us reason to pause. Protests against drone strikes in Pakistan match, if not exceed, those against 'regular' air strikes in Afghanistan.[89] In other parts of the world, targeted killings have galvanized political observers, non-governmental organizations and political activists.[90] The secrecy around who is attacked and the complete lack of international institutional oversight likely has played a role in explaining these reactions. Moreover, public outrage may be spurred on by the remote nature of the infliction of violence and by the challenge that drone strikes cause to the spatial limitation of wars. Yet the sheer intensity of the rejection of what is essentially an attempt to make individuals 'rather than distinct collectives' … the "target" in conflict',[91] warrants further exploration.

At the heart of many critical statements about the practice of targeted killing is concern about collateral damage. Specifically, the current US administration has gone to great lengths to foster the narrative of the surgical precision of drone strikes. Yet, there has been a steady trickle of information revealing that these attacks do cause incidental harm to civilians.[92] However, do targeted killings cause more collateral damage than all-out attrition warfare against Pakistan, Yemen and Somalia would? If the latter is what we compare drone strikes to, the answer is likely no. In such a comparison, targeted killings save combatants' as well as civilians' lives. However, in the counterfactual scenario in which the option of remotely executed targeted killings is unavailable, these wars are extremely unlikely to take place, due to their material but also their reputational costs. Drone strikes lower the threshold for the use of force, precisely because they circumvent the hard-won normative obstacle to war in international relations that is a shared normative belief that combatants' lives are not simply dispensable.

This threshold effect certainly preoccupies academics and possibly political and military commentators.[93] However, it is unlikely to be at the heart of wider public criticism. Marc Herold expresses a more visceral reaction to targeted killings when he

[89] Bergen and Tiedemann argue that the perception that air strikes kill innocent civilians accounts for the fact that 'nearly two-thirds of those polled in Pakistan's tribal areas said that suicide attacks against US military targets are justified'. Bergen and Tiedemann, 'Washington's Phantom War', 90 *Foreign Affairs* (2011) 4.

[90] See, among others, N. Crawford, *Accountability for Killing* (2013), at 32; similar McClatchy, *Pakistanis Protest Civilian Deaths in US Drone Attacks* (2010), available at http://www.mcclatchydc.com/2010/12/10/105104/pakistanis-protest-civilian-deaths.html (last visited 18 January 2015); Rohde, 'The Obama Doctrine; Obama's Secret Wars', *Foreign Policy* (March/April 2012); Salopek, 'Collateral Damage: Obama's Secret Wars', *Foreign Policy* (March/April 2012). For media reports about public protests against civilian suffering inflicted by coalition forces in Afghanistan and Iraq, see, among others, Rahim, 'NATO Airstrikes Killed 8 Civilians', *Huffington Post* (27 May 2012); M. Raski and D. West, *Collateral Damage; A US Strategy in War?* (2008); Tavernise and Lehren, 'A Grim Portrait of Civilian Deaths in Iraq', *New York Times* (23 October 2010), at A1.

[91] Dunlap, 'Some Observations on Gabriella Blum's "Fog of Victory"', 24 *EJIL* (2013) 423.

[92] See recently International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU Law School), *Living under Drones: Death, Injury, and Trauma to Civilians for US Drone Practices in Pakistan* (2012); HRW, *Between a Drone and Al Qaida; The Civilian Cost of US Targeted Killings in Yemen* (2013).

[93] Casey-Maslen, *supra* note 64.

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writes that '[i]t is simply unacceptable for civilians to be slaughtered as a side-effect of an intentional strike against a specified target. … Slaughter is slaughter. Killing civilians even if unintentional is criminal.'[94] Behind this abhorrence is not a comparison of the collateral damage that drones cause with the incidental harm associated with all-out war or with other reactions to a perceived threat of terrorism. It is simply a rejection of any and all collateral damage as immoral and as criminal. If we recall that it is ideas centred on the value of the individual and his or her right to life and bodily integrity that grounds the perceived utility of efficient warfare, this rejection should not be a surprise. There is nothing more obviously at odds with the deontological premise of individual rights than killing human beings as a means to a military end.[95]

This elementary rejection of collateral damage should be visible then in regular war as well. It is, but to a slightly lesser extent. Gabriella Blum writes that in recent years criticism of collateral damage 'has been so fierce as to bring some commentators in the US to advocate the abrogation of the principle [of proportionality] altogether'.[96] The impact of the reputational costs of collateral damage on the conduct of hostilities is best documented with regard to *Operation Enduring Freedom*. In July 2009, General Stanley McChrystal, upon taking command in Afghanistan, issued a directive that significantly restricted military action from the air in order to reduce civilian casualties. His predecessor General David McKiernan had already repeatedly curtailed preplanned air strikes to avoid collateral damage. However, McChrystal also questioned the paradigm that troops in contact ought to receive all available air support, notwithstanding the considerable risk to civilians that called-in air strikes pose. He stipulated that '[t]he use of air-to-ground munitions and indirect fires against residential compounds is [sic] only authorized under very limited and prescribed conditions'.[97] From then on, as a matter of course, pre-planned targets were only approved if the expectation was that no civilians would get hurt. Time sensitive air-to-ground support for troops under fire was subjected to stricter oversight.

How do we explain that air power has not been ruled too costly in modern theatres but that it continues to be 'the distinctively American form of military intimidation'?[98] It is the strength of the countervailing imperative to protect friendly forces. The McChrystal directive achieved its objective to limit civilian casualties.[99] However, it also coincided with a significant increase in fatalities among American troops: from 18 per month before the directive to an average of 33 per month thereafter. [100] Criticism of McChrystal's policy evoked not only the imperative of force protection

[94] Herold, *supra* note 23.

[95] I use the term human rights interchangeably with the term individual rights, notwithstanding their slightly different evocations.

[96] Blum, *supra* note 81.

[97] NATO Tactical Directive (2 July 2009).

[98] Cohen, 'The Mystique of US Air Power', 73 *Foreign Affairs* (1994) 109, at 3; also Clodfelter, 'A Strategy Based on Faith: The Enduring Appeal of Progressive American Airpower', 49 *Joint Force Quarterly* (2008) 24.

[99] Crawford, *supra* note 90.

[100] *Ibid.*, at 56ff.

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in general but also a right of troops to defend their own lives.[101] Combatants do not have a legal right of self-defence against other combatants under IHL, which would be altogether absurd. Yet, against the backdrop of an individual rights-based morality, self-defence is the only legal justification for killing a person.[102] The norm enjoys considerable momentum. The notion that force protection during troops-in-contact situations maps onto this more fundamental norm that a person ought to be able to defend his or her life explains the pressures not to curtail air support.[103] By the same token, it explains why some collateral damage in all-out war may continue to be acceptable even to an increasingly human rights-conscious international public. The aspiration of zero-casualty warfare has shaped US combat operations across 21st century combat theatres,[104] but it has remained that: an aspiration.

Targeted killings with remotely piloted aerial vehicles do not raise a force-protection concern. Neither do they evoke the right of combatants, whose lives are no longer presumed to be at the disposition of the state, to effectively preserve their own lives. Against the backdrop of the norm that it is immoral to deprive individuals of their right to life as a means to an end, other than in self-defence, the specific moral rejection of targeted killings is plausible. Remotely piloted attacks on individuals respond to the pressures of saving the lives of combatants (on both sides). Yet, as a reaction to shared ideas about violence in international relations that are informed by an individual rights-based morality drone strikes present a fallacy. Perfect force protection takes away the last apology for collateral damage in a liberal order. Drone strikes therefore do not solve the 21st-century belligerent's legitimacy problems.

From the point of view of an individual rights-based morality, how should a belligerent wage war then? A condition of legitimate state conduct would certainly be a complete avoidance of collateral damage, unless possibly in situations where troops are directly at risk. Those situations themselves need to be minimized according to the same moral standard, which upholds a combatant's right to life. The avoidance of collateral damage drastically reduces the pool of objects a belligerent would be able to attack. As there are few 'things to break,' a belligerent will have to focus on 'killing people'. Yet because combatants retain their right to life, whom is it that a belligerent may attack? According to an individual rights-based morality, where should belligerents direct the deliberate death and destruction that all wars inevitably involve?

As mentioned, in liberal individual rights-affirming societies, without prior due process, individuals may only be justifiably killed in self- (or other) defence. It is from this analogy that we can develop a list of the conditions under which an individual is morally liable to potentially lethal attack by another in war. An individual is generally considered liable to be killed in self-defence only if she is (i) responsible for (ii) contributing

[101] *Ibid.*

[102] That is, without due process.

[103] For the argument that norms spread more quickly and are internalized more deeply if they cohere with existing norms, see K. Sikkink, *The Justice Cascade* (2011); Franck, 'The Power of Legitimacy and the Legitimacy of Power; International Law in an Age of Power Disequilibrium', 100 *AJIL* (2006) 88.

[104] Wheeler, 'Protecting Afghan Civilians from the Hell of War', *Social Science Research Council Paper*, available at http://essays.ssrc.org/sept11/essays/wheeler.htm (last visited 18 January 2015).

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to (iii) an unjustified threat and (iv) a lethal attack is a proportionate and necessary response to the contribution.[105] I will focus on the first three conditions. Crucially, they concern the conduct of the individual and her resulting moral status, not her membership, in a group – for instance, the armed forces. In the words of Jeff McMahan: 'To say that a person is morally liable to being harmed in a certain way is to say that his own action has made it the case that to harm him in that way would not wrong him, or contravene his rights.'[106]

If it were rigorously implemented, a logic of moral liability would ensure that warfare, as far as deliberate attacks are concerned, does not involve violations of individual rights. Given that the legitimacy of combat operations seems to hinge on the moral imperative to protect individual rights, combat operations in accordance with the logic of moral liability have a much better chance at meeting expectations of legitimate state conduct than hostilities that follow either the logic of sufficiency or efficiency. The next logical step is then to change IHL with the aim of imposing on combat operations the logic of moral liability. Yet, bringing IHL in line with the logic of moral liability proves impossible. The following paragraphs elaborate why.[107]

In order to distribute harm in war in accordance with individuals' moral liability, we would have to determine which side is actually justified in their resort to force. Hence, we would have to look at the morality of resort to determine the morality of conduct. Combatants who fight without a just cause or who resist a just attack contribute to an unjustified threat to the combatants on the other side and are hence liable to defensive harm (including deliberate attack).[108] By implication, if combatants use force in defence of a just cause, they do not forfeit their right to life and should remain immune.[109] The only legal justification for resort to force without a mandate from the UN Security Council is self-defence. On the assumption that only one side, if any, in every war acts in self-defence, IHL that is no longer independent from questions of resort would have to relinquish symmetry.[110] It would have to allow one belligerent actions that are prohibited to the other.

Belligerents often enter into wars because they mistakenly believe they are legally permitted to do so. Even if one side was aware that they were in want of a legal

[105] Lazar identifies as the common denominator of revisionist just war theorists that these four cumulative elements trigger liability to attack. Lazar, 'The Morality and Law of War', in A. Marmor (ed), *Routledge Companion to Philosophy of Law* (2012).

[106] J. McMahan, *Killing in War* (2009), at 11

[107] This section is kept brief as a number of accounts of the practical impossibility to only kill liable individuals in war already exist.

[108] McMahan, *supra* note 106, at 234; Rodin, 'The Moral Inequality of Soldiers: Why *Jus in Bello* Assymetry Is Half Right', in D. Rodin and H. Shue (eds), *Just and Unjust Warrior; The Moral and Legal Status of Soldiers* (2008), at 46.

[109] '[U]nless they lose rights for some reason other than acquiring combatant status, just combatants are innocent in the relevant sense.' McMahan, 'The Moral Equality of Combatants', *Journal of Political Philosophy* (2006) 14, at 377, 379; Rodin, 'War Proportionality and Double Effect', in Y. Benbji and N. Sussman (eds), *Reading Walzer* (2012), at 1; Rodin, *supra* note 108, at 167.

[110] For an overview, see D. Rodin and H. Shue (eds), *Just and Unjust Warriors; The Moral and Legal Status of Soldiers* (2008), at 7.

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justification, the decision to nevertheless go to war suggests that the stakes are high.[111] Moreover, such a deliberate aggressor would likely lack scruples that could prevent him from using the law applicable to just belligerents. The law that is less permissive for one side would then never be applied. The asymmetry that the logic of moral liability requires – law is consistently differentially permissive for opposing belligerents – undermines compliance with international law.

The second obstacle to changing law so that it would be able to impose the logic of moral liability is that the logic challenges the principle of non-combatant immunity without offering a viable alternative category of persons that are legitimate targets. Contribution can be defined based on the significance of an action for the military effort, the magnitude of a contribution or the proximity of an action to the engagement of enemy forces. In whichever way it is conceived, it is not immediately obvious that civilians on the whole contribute less to a war than combatants. The argument made in the first section of this article about objects is true also for persons. With the possible exception of children, the elderly, ill people and outright dissidents or saboteurs, all members of a society somehow contribute to a war. The significance and magnitude of the contribution of many civilians will outweigh that of many combatants. Compare the nuclear scientist to the ill-motivated 18-year-old conscript. If we focus on proximity to military action in the definition of contribution, we come closer to tracking the distinction between combatants and civilians. Yet some combatants contribute only indirectly to military action – for instance, military chefs. In turn, munitions workers directly contribute to hostilities but are not considered combatants purely in virtue of their profession.

There is arguably a rough correlation between combatant status and a one causal step contribution to military action – a correlation that might justify keeping the principle of non-combatant immunity as the basis of distinction. However, I have so far neglected that the contribution has to be made 'responsibly'. The fundamental obstacle to meeting the condition of responsibility is epistemic. It is difficult in the heat of battle to determine who exactly contributes to the fighting; it is impossible to determine who does so responsibly. Responsibility refers to a state of mind. We simply do not know the extent to which any combatant, or, for that matter, a civilian who contributes to a threat, has the requisite information to be aware that it is an unjustified or illegal threat. Even if we knew that combatants have the means to judge the legality and/or the moral justification of a war, outright or indirect coercion might excuse individuals and at least cast doubt over their moral liability to lethal attack.

In order to be practicable and complied with, IHL has to remain symmetrical, and it has to retain the principle of non-combatant immunity as the basis of distinction. This means it is incapable of meeting the standard of moral liability according to an individual rights-based morality.[112] Targeted killings decollectivize killing in war, but

[111] For the argument that it is often genuinely difficult to determine which side in a war is in the wrong, see Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure', 90 *IRRC* (2008) 931.

[112] Similar Lazar, 'The Responsibility Dilemma for Killing in War: A Review Essay', 38 *Philosophy and Public Affairs* (2010) 180.

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this brief discussion of the complexity of individual liability to lethal attack brings into sharp relief that we would need to know much more about the individuals under attack to be able to affirm their individual moral liability and perceive the attacks as justified. Yet, the fact that targeted killings come so much closer to implementing a logic of moral liability, yet meet with so much criticism, corroborates the earlier point that it is the infliction of collateral damage without the countervailing imperative of force protection and its association with self-defence that accounts for the vehement condemnation of drone strikes.

5 Conclusion

War inevitably jeopardizes human rights on a large scale and often marks the breakdown of order. As the current international system lacks an overarching authority with a monopoly on violence, the use of force by states against states is also sometimes the only available means of maintaining order or protecting human life. Regulating the conduct of war through law seems to offer a way to reconcile non-pacifist foreign policies with a society's liberal identity. Yet, the paper demonstrates that IHL does not alter the Janus-faced role of war in international relations.

Complying with IHL, as we might expect, not only militates against the efficient pursuit of military victory, but it also fails to ward off moral reproof. This article demonstrates that strategic imperatives in war are chiefly determined by shared normative beliefs. Yet it is impossible to fully accommodate those normative beliefs, and a strategy of war needs to be practicable. Attempting to actually meet shared normative expectations about legitimate state conduct does not merely interfere with a state's quest for military victory. For a state that does not want to fall foul of 21st-century human rights standards, attaining political goals with military force is an altogether unavailable tool of statecraft. To sum up, a state is left with a threefold choice: (i) acting legally by following the logic of sufficiency, which will be perceived as inefficient and immoral; (ii) following the strategic yet ultimately fallacious imperative to wage war efficiently and break the law in the process or (iii) renouncing the legal right and the capacity of self- (or other) defence by committing to pacifism in order to meet widespread expectations of legitimate state conduct. This is the trilemma of the 21st-century belligerent.

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INTERNATIONAL LAW IN GAZA: BELLIGERENT INTENT AND PROVISIONAL MEASURES

By Tom Dannenbaum and Janina Dill[*]

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On October 7, 2023, Palestinian armed groups, chiefly Hamas's armed wing, breached the fence around the Gaza strip and launched attacks on Israeli territory. Over several hours, Palestinian fighters killed 1,269 people, mostly civilians,[1] engaged in sexual violence and torture,[2] and took 253 hostages.[3] The same day, Israel's Prime Minister Benjamin Netanyahu declared, "Israel is at war," and the Israel Defense Forces (IDF) launched air strikes and later a ground invasion of Gaza.[4] In the eleven months since, Palestinian groups have continued to hold, mistreat, and kill hostages and launched rockets into Israel's population centers.[5] Meanwhile, the IDF has killed an estimated forty-one thousand people in Gaza, mostly civilians,[6] engaged in sexual violence and torture of Palestinian detainees,[7] damaged or destroyed most of the food, water, and medical infrastructure,[8] and restricted humanitarian access, with dire consequences.[9] Civilian casualty experts argue the death toll (which excludes the likely greater number killed "indirectly" through disease and deprivation) far exceeds what we have come to expect from contemporary military campaigns.[10] Both sides have committed violations of International Humanitarian Law (IHL), too many to list individually.[11]

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[1] Tamsin Westlake, *An Analysis of the 7th of October 2023 Casualties in Israel*, ACTION ON ARMED VIOLENCE (Dec. 20, 2023).

[2] UN Press Release, Reasonable Grounds to Believe Conflict-Related Sexual Violence Occurred in Israel During 7 October Attacks, Senior UN Official Tells Security Council (Mar. 11, 2024), *at* https://press.un.org/en/2024/sc15621.doc.htm.

[3] House of Commons, 2023/24 Israel-Hamas Conflict: US, UN, EU and Regional Response (July 25, 2024), *at* https://researchbriefings.files.parliament.uk/documents/CBP-10007/CBP-10007.pdf.

[4] Ibrahim Dahman et al., *Netanyahu Says Israel Is "At War" After Hamas Launches Surprise Air and Ground Attack from Gaza*, CNN (Oct. 7, 2023), *at* https://edition.cnn.com/2023/10/07/middleeast/sirens-israel-rocket-attack-gaza-intl-hnk/index.html.

[5] Albeit with decreasing frequency, see https://rocketalert.live (last accessed Sept. 3, 2024).

[6] UN Office for the Coordination of Humanitarian Affairs (OCHA), Occupied Palestinian Territories: News and Updates, *at* https://www.ochaopt.org (last accessed Oct. 2, 2024). The number may include some deaths attributable to actors other than the IDF and is also likely a significant undercount.

[7] Diakonia, *Unlawful Incarceration: An International Law Based Assessment of the Legality of the Military Detention Regime That Israel Applies to Palestinians* (Aug. 30, 2024).

[8] *See* notes 65–66 *infra*.

[9] *See* notes 68–74 *infra*.

[10] Mark Lattimer, *Assessing Israel's Approach to Proportionality in the Conduct of Hostilities in Gaza*, LAWFARE (Nov. 16, 2023); Larry Lewis, *Israeli Civilian Harm Mitigation in Gaza: Gold Standard or Fool's Gold,* JUST SECURITY (Mar. 12, 2024).

[11] Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel, Detailed findings on the military operations and attacks carried out in the [OPT] from 7 October to 31 December 2023, UN Doc A/HRC/56/CRP.4 (June 10, 2024); Diakonia, *Legal Brief: 2023 Hostilities in Israel and Gaza* (Dec. 5, 2023).

The prevalence of violations is not unique to this conflict. What is unusual in Gaza is that catastrophic civilian harm coincides with more than a perfunctory claim of legal compliance: Israeli officials consistently and often proactively argue that their military operations adhere to international law,[12] with support from some legal experts.[13] This has put the spotlight on international law. Three proceedings before the International Court of Justice (ICJ)—South Africa's allegation that Israel is engaged in genocide, Nicaragua's allegation that Germany is complicit in Israel's alleged violations of international law, and an Advisory Opinion affirming the illegality of Israel's continued occupation—as well as the International Criminal Court (ICC) prosecutor's request for arrest warrants against Hamas and Israeli leaders garner unprecedented public interest. These discursive and judicial processes could repair and solidify international law's role as the yardstick for normative evaluation of war, including vis-à-vis powerful Western states. Or they could reveal IHL's incapacity to meaningfully restrain war, catalyzing legal deterioration.

We may not know the net effect of the war on international law's trajectory for some time. However, from the beginning, the devastating human toll of this conflict has underscored the urgent need for international law to fulfill three distinct functions: *ex ante* action-guidance; concurrent third-party evaluation; and *ex post* accountability. Much commentary on Gaza has prioritized concepts and institutional frames developed for accountability. For critics of a party's military operations, charging war crimes may express stronger disapproval than "mere" IHL violations. For those defending that conduct, calling attention to law's accountability function often grounds a demand to suspend legal judgement until after adjudication.[14] Accountability is important. However, IHL is also meant to constrain belligerents' actions *ex ante* and to help third states evaluate these actions so they can concurrently meet their own obligations. Law must discharge these functions while hostilities are ongoing or not at all.

To be sure, IHL faces challenges in fulfilling its action-guiding and evaluative functions in real time.[15] In war, information is partial, cognitive biases are primed, and propaganda machines operate at full tilt.[16] The resulting epistemic fissures can lead to disagreement on basic facts, while out-group bias fuels extreme views of what ought to be permitted in pursuit of a military aim.[17] Still, it would be a mistake to invoke this epistemic environment to defer legal analysis. Instead, international law must provide the doctrinal resources to navigate the uncertainty and contestation that characterizes armed conflict.

The war in Gaza has spotlighted two doctrinal questions that partly underpin polarized evaluations and that go to the heart of law's capacity to discharge its action-guiding and evaluative functions in real time: first, how to conceptualize intent in war, and second, how to evaluate

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[12] Israeli Prime Minister's Office Press Release, Statement by PM Netanyahu (Oct. 29, 2023), *at* https://www.gov.il/en/pages/event-statement281023; Israeli Ministry of Foreign Affairs Press Release, Hamas-Israel Conflict 2023: Frequently Asked Questions (Dec. 8, 2023), at https://www.gov.il/en/pages/swords-of-iron-faq-6-dec-2023.

[13] We cite them as we engage with their arguments.

[14] *See, e.g.*, Benjamin Wittes & Jen Patja, *Lawfare Daily: Benjamin Wittes on Israel, Gaza, and Implications for U.S. Foreign and Domestic Policy*, LAWFARE (May 6, 2024); Andreea Manea, *Too Early to Tell? The (Un)lawfulness of Israeli Attacks: The Case of the Jabalia Refugee Camp*, EJIL:*TALK!* (Nov. 4, 2023).

[15] Stephen Townley, *Indiscriminate Attacks and the Past, Present, and Future of the Rules/Standards and Objective/Subjective Debates in IHL*, 50 VAND. J. TRANSNAT'L L. 1223, 1252–55 (2017).

[16] *See, e.g.,* Shiri Krebs, *The Legalization of Truth in International Fact-Finding*, 18 CHI. J. INT'L L. 83, 102–09 (2017).

[17] Sophia Hatz, *Israeli Demolition Orders and Palestinian Preferences for Dissent*, 81 J. POL. 1069 (2019); Anna Getmansky & Thomas Zeitzoff, *Terrorism and Voting: The Effect of Rocket Threat on Voting in Israeli Elections*, 3 AM. POL. SCI. REV. 588 (2014).

international courts' early-stage engagement with ongoing conflict. We submit that the functional differentiation of law's tasks, in turn, is critical to answering these questions. In Part I, we clarify intent requirements and argue that their meaning and inference may differ across international law's three functions. In Part II, we clarify the doctrinal significance of international courts' provisional engagement with ongoing armed conflict particularly for guiding third states' evaluations in real time.

I. Belligerent Intent in Gaza

In criminal law, "a guilty mind" is generally a precondition for accountability. However, in war, intent also determines action guidance and third-party evaluation. Some strikingly divergent evaluations of Israel's conduct in Gaza hinge on what intent is attributed to Israel or its officials. Are mass civilian casualties unavoidable[18] and potentially proportionate[19] in this operational context? Or do they evince intentional attacks against civilians or civilian objects in violation of distinction?[20] When it comes to hunger in Gaza, some portray the crisis as a "tragic" consequence of civilians being "caught in the midst of intense hostilities,"[21] while others identify intentional starvation of civilians as a method of warfare.[22] And of course, whether we need "to sound the alarm"[23] about genocide or whether the allegation is "morally repugnant"[24] depends on whether the observer entertains the possibility that Israel has the special intent to "destroy in whole or in part" Palestinians as a group.

Some of these divergent judgments relate to contested facts. Others, however, stem from doctrinal confusion about how to conceptualize intent. We identify five dimensions of this confusion. First, intent in law has multiple meanings, including acting with purpose (direct intent), but also acting with knowledge (indirect or oblique intent).[25] Which is required for some prohibitions is debated. Second, the object of intent may be contested. Whereas some violations are triggered merely through prohibited conduct (regardless of consequences), the difference between purpose and knowledge matters for prohibitions that include a consequence element or define intent in relation to consequences. Third, when prohibited intent is not limited to purposive acts, the question arises whether it extends to acting with less than perfect foresight—e.g., taking a substantial and unjustified risk. Fourth, when purpose is central to a prohibition, an actor's

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[18] John Spencer, *Israel Implemented More Measures to Prevent Civilian Casualties Than Any Other Nation in History*, Newsweek (Jan. 31, 2024).

[19] Benjamin Wittes, *On Strategy, Law, and Morality in Israel's Gaza Operation*, Lawfare (Oct. 17, 2023).

[20] Amnesty International, *Damning Evidence of War Crimes as Israeli Attacks Wipe out Entire Families in Gaza* (Oct. 20, 2023), *at* https://www.amnesty.org/en/latest/news/2023/10/damning-evidence-of-war-crimes-as-israeli-attacks-wipe-out-entire-families-in-gaza.

[21] Geoff Corn & Emanuela-Chiara Gillard, *The War Crime of Starvation - The Irony of Grasping at Low Hanging Fruit*, Articles of War (May 15, 2024); Amichai Cohen & Yuval Shany, *The Prosecutor's Uphill Legal Battle?: The Netanyahu and Gallant ICC Arrest Warrant Requests*, Just Security (May 25, 2024).

[22] Tom Dannenbaum, *The Siege of Gaza and the Starvation War Crime*, Just Security (Oct. 11, 2023); Yousuf Syed Khan, *Gaza Arrest Warrants: Assessing Starvation as a Method of Warfare and Associated Starvation Crimes*, Just Security (May 31, 2024).

[23] *Public Statement: Scholars Warn of Potential Genocide in Gaza*, Third World Approaches Int'l L. Rev. (Oct. 17, 2023), *at* https://twailr.com/public-statement-scholars-warn-of-potential-genocide-in-gaza.

[24] *NSC and Foreign Ministry: Charges of Genocide are False, Outrageous, Morally Repugnant*, Isr. Nat'l News (May 24, 2024).

[25] Sarah Finnin, *Mental Elements Under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, 61 Int'l & Comp. L. Q. 325 (2012).

motives and attitudes (including regret) may cloud legal analysis. Finally, what does *state* intent mean when officials involved in state policy operate with divergent intentions?

The threshold for criminal accountability is often higher than for "mere" legal violation. And yet, most jurisprudence on intent emanates from international criminal law. Intent defined for law's accountability function therefore shapes our understanding of intent for constraining belligerents' actions and evaluating their conduct in real time, producing a "forensic fallacy" which confuses "[the] narrowness and precision in criminal statutes with defining features" of the prohibited act.[26] Due process demands that law discharge its accountability function with a high inferential standard. Moreover, "criminal intent" must track blameworthiness, not only wrongfulness of conduct. However, third-party efforts to ensure compliance through exercising appropriate leverage cannot plausibly be conditioned on operating like a criminal court. Suspending judgment until adjudication subverts IHL's capacity to protect civilians. Rather, prohibited intent must be conceptualized and inferred differently depending on the legal function at stake.

In the following, we clarify the meaning of intent as applied to the conduct of hostilities (I.A), starvation (I.B), and the genocide allegation before the ICJ (I.C). We show where law already differentiates intent for the purpose of law's accountability function from intent appropriate for law's action-guiding and evaluative functions, but also highlight open doctrinal questions. We focus primarily on intent in relation to Israel's conduct since, with two noted exceptions, there is little contestation about intent in evaluating Hamas's actions.

A. Conduct of Hostilities in Gaza

In May 2024, the U.S. State Department reported to Congress that it had found "no direct indication of Israel intentionally targeting civilians," even though it described several strikes, specifically on humanitarian assistance missions, without a military target and flatly stated that "Israel could do more to avoid civilian harm."[27] The United States concluded that it did not have to suspend arms transfers to Israel. But does the report really rule out that Israel is violating IHL's "cardinal principle" of distinction? The principle is cast in terms of prohibitions on making civilians or the civilian population "the object of attack," or "directing attacks against" protected civilian(s)/objects—terms commonly understood to implicate intent. Israel argues that "a commander's *intent* is critical in reviewing the principle of distinction during armed conflict."[28] But what does intent mean here?

Jens David Ohlin has argued that violations of distinction require direct intent, i.e., acting with purpose, vis-à-vis the attack's impact on civilians. This, he argues, is because IHL does not prohibit knowingly killing civilians or destroying civilian objects, if compliant with precautions and proportionality.[29] On attaching intent to impact, Michael Bothe seems to agree that "not only

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[26] David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823, 850 (2011).

[27] 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), at 22, *at* https://www.justsecurity.org/wp-content/uploads/2024/05/Report-to-Congress-under-Section-2-of-the-National-Security-Memorandum-on-Safeguards-and-Accountability-with-Respect-to-Transferred-Defense.pdf.

[28] State of Israel, The Operation in Gaza, 27 December 2008–18 January 2009: Factual and Legal Aspects, para. 10 (July 2009).

[29] Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 79 (2013); *see also* Townley, *supra* note 15, at 1233.

the actual conduct (e.g., the dropping of the bomb), but also the consequences (e.g., hitting a civilian object) must be covered by the intent."[30] The State Department may rely on something like this approach in arguing that a pattern of attacks without identifiable military objectives does not imply violations of distinction without evidence that what the report considers avoidable civilian deaths were brought about with purpose. We proffer three reasons against this interpretation of prohibited intent.

First, Ohlin's correct observation that "distinction and proportionality must be understood as two normatively distinct prohibitions"[31] does not require that the attacking commander violates distinction only if she seeks to harm civilian(s)/objects. Rather we must disaggregate two questions often merged—"who the attacker wishes to affect [and] who he is aiming his attack at."[32] Even in relation to war crimes, the ICC's Elements of Crimes document raises only the latter question: it requires meaning to engage in an attack (purposive intent attached to conduct) that is directed (aimed) against what is known to be a civilian object/person.[33] This knowledge characterizes the prohibited conduct and its circumstances, not its consequences. The key is that the perpetrator "intended" civilian objects/persons "to be the object of the attack," [34] not that she wished to kill or injure them. Intentionally launching an attack known to be directed against a civilian person/object violates distinction (including criminally). This is clearly distinct from the separate ban on intentionally directing an attack against a military objective that may be foreseen (known) to cause (clearly) excessive incidental civilian harm, thus (criminally) violating proportionality.[35]

Second, International Criminal Tribunal for the former Yugoslavia (ICTY) case law supports that for the purpose of *violating* distinction, prohibited intent does not attach to the consequences but the direction of the attack. Unlike the Rome Statute, ICTY jurisprudence considers harmful consequences—"deaths and/or serious bodily injury within the civilian population or damage to civilian property"[36]—a constituent element of the crime. However, these consequences primarily demarcate whether an attack was "grave enough to bring the offence into the scope of the Tribunal's jurisdiction."[37] Moreover, the Appeals Chamber states categorically that in "none of [the] declarations of customary international law . . . is the prohibition of attacks on civilians or civilian objects explicitly combined with statements regarding a finding of actual injury to civilians or damage to civilian objects."[38] Nodding to functional differentiation, the

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[30] Michael Bothe, *War Crimes*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, Vol. 1, at 370, 389 (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds., 2002).

[31] Jens David Ohlin, *Targeting and the Concept of "Intent,"* OPINIO JURIS (Feb. 8, 2012).

[32] Dapo Akande, *US Drone Strikes in Pakistan: Can It Be Legal to Target Rescuers & Funeralgoers*, EJIL:*TALK!* (Feb. 12, 2012).

[33] Knut Dörmann, *Article 8. War Crimes*, *in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE-BY-ARTICLE COMMENTARY 317, 402 (Kai Ambos ed., 4th ed. 2022); *see also* Prosecutor v. Blaškić, IT-95-14-T, Judgment, para. 180 (Mar. 3, 2000).

[34] ICC, Elements of Crimes 12 (2013). Similarly: Dörmann, *supra* note 33; *Prosecutor v. Blaškić*, *supra* note 33, para. 180; Johan D. Van der Vyver, *The International Criminal Court and the Concept of* Mens Rea *in International Criminal Law*, 12 U. MIAMI INT'L & COMP. L. REV. 57, 112 (2004); ADIL AHMAD HAQUE, LAW AND MORALITY AT WAR, DISTINCTION, Ch. 5 (2017).

[35] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), Art. 51(5)(b), June 8, 1977, 1125 UNTS 3 [hereinafter API]; Rome Statute of the ICC, Art. 8(2)(b)(iv), July 17, 1998, 2187 UNTS 90 [hereinafter ICC Statute]; Elements of Crimes, *supra* note 34, at 13.

[36] *Prosecutor v. Blaškić*, *supra* note 33, at 180. See also AP I, *supra* note 35, art. 85(3)(a).

[37] Prosecutor v. Strugar, IT-01-42-T, Judgment, para. 225 (Jan. 31, 2005).

[38] Prosecutor v. Kordić & Čerkez, IT-95-14/2-A, Judgment, paras. 59, 65 (Dec. 17, 2004).

judges highlight that *ex ante* "the purpose of this prohibition is not only to save lives of civilians, but also to spare them from the risk of being subjected to war atrocities."[39]

That a violation of distinction hinges at most on knowledge of the target's status and not the consequences of an attack (sought, foreseen, or realized) explains why an attack that is directed against civilian(s)/objects violates distinction even if the attacker seeks military effects, i.e., has an ultimate military purpose.[40] In Gaza the reported target category "operatives' homes" illustrates this.[41] Homes are presumptively civilian until it is established that they are used to make an effective contribution to military action.[42] Facts are contested, but attacking homes while the operatives are out would straightforwardly violate distinction. What about the alleged approach "to destroy private residences in order to assassinate a single resident suspected of being a Hamas or Islamic Jihad operative?"[43] Even assuming the operatives are plausibly legitimate targets (for example, on the basis of their continuous combat function), their mere presence would not transform their personal homes into military objectives.[44] If these attacks were directed against the home rather than the person, they would violate the principle of distinction even if the intended *consequence* was the death of the latter.

Differentiating between a person and the surrounding home being the object of attack may seem technical, but it clarifies legal assessments. Using munitions that destroy the home, rather than available alternatives that would target the individual while preserving the home, in addition to violating precautionary requirements, would entail directing the attack at the home, regardless of how one might construe the attack's purpose. Similarly, attacking a home without certainty that the combatant is there, again in addition to violating precautions, could only be construed as directing the attack at the home, regardless of whether it would be plausible to construe the (wished for) purpose as killing the person. The difference matters. The widespread destruction of family homes in Gaza has devastating humanitarian consequences.[45]

That "military purpose" of an attack alone cannot render a civilian object a legitimate target of direct attack is relevant also in other contexts. It would for instance rule out directing an attack against a civilian structure wishing to collapse it over, and thereby neutralize, a distinct military objective. On October 25, 2023, a twelve-story residential tower in the Al-Yarmouk neighborhood "was directly hit" by an airstrike which the IDF labeled a "strike on a Hamas terror tunnel."[46] The attack collapsed the tower and killed eighty-one women and children. Distinction would have precluded directing the attack at the building (presumptively a civilian object) as the means to

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[39] *Prosecutor v. Strugar*, *supra* note 37, at 221.

[40] Prosecutor v. Katanga & Ngudjolo, ICC-01/04-01/07 OA 8, Admissibility Appeal, para. 800 (Sept. 25, 2009); Prosecutor v. Galić, IT-98-29-A, Judgment, para. 130 (Nov. 30, 2006).

[41] Office of the UN High Commissioner for Human Rights (<8>UNOCHR<8>) Press Release, Gaza: UN Experts Deplore Use of Purported AI to Commit "Domicide" in Gaza, Call for Reparative Approach to Rebuilding (Apr. 15, 2024), *at* https://www.ohchr.org/en/press-releases/2024/04/gaza-un-experts-deplore-use-purported-ai-commit-domicide-gaza-call.

[42] API, *supra* note 35, Art. 52(3).

[43] Yuval Abraham, *"A Mass Assassination Factory": Inside Israel's Calculated Bombing of Gaza*, +972 (Nov. 30, 2023).

[44] Homes are different in this respect from the kinds of accommodation that are often thought to qualify as military objectives, namely: barracks which are of a "nature" to make an effective contribution to military action or armed group safe houses which may be "use[d]" to make such a contribution by hiding fighters or facilitating clandestine military activity. *See* AP I, *supra* note 35, Art. 52(2). Operatives' personal homes are neither military by nature nor military by use.

[45] <8>UNOCHR<8> Press Release, *supra* note 41.

[46] Commission of Inquiry, *supra* note 11, at 43.

destroying the tunnel.[47] If, on the contrary, the tunnel was targeted, and the residential tower was destroyed incidentally, the legality of the attack would turn on the preventability and the very likely excessiveness of expected civilian harm.

Third, knowledge of the target's civilian status is not necessary to violate distinction. The customary war crimes regime,[48] the International Committee of the Red Cross (ICRC) Commentary to Article 85(3) of the First Additional Protocol,[49] and ICTY jurisprudence envisage criminal accountability for reckless targeting of civilians/objects.[50] Recklessness lies beneath knowledge on an epistemic continuum. The threshold for "mere" illegality is still lower. Target misidentification violates IHL if the attacking party fails to "do everything feasible to verify" the target's status and to take "constant care" to spare civilians.[51] In cases characterized by doubt regarding target status, civilian status must be presumed and attack eschewed (although how much doubt is disputed).[52] Concretely, even if those who directed the Israeli airstrike that killed seven World Central Kitchen aid workers did not *know* the persons targeted to be civilians, information in the public domain indicates that the latter were likely targeted despite a substantial and unjustifiable risk that they were civilians (i.e., recklessly) and almost certainly in context defined by doubt.[53]

Ultimately, even if the war crimes status of certain strikes cannot be determined in real time, the United States' findings of a pattern of attacks without a plausible military target and the diagnosis that the IDF did not do everything feasible to avoid civilian casualties, possibly including target verification, entail clear IHL violations. For the United States to withhold evaluative judgment here is: (1) to hide behind a (highly deferential) application of the narrowest interpretation of intent developed for war crimes (IHL's strictest accountability function); and (2) to fail to consider IHL as a whole, including its rules on precautions and doubt.

A legal assessment of Hamas's conduct, though significantly less polarized, likewise benefits from differentiating intent by law's functions. We argued above that seeking lawful consequences cannot legitimate the use of unlawful means. Yet, seeking unlawful consequences (for example, killing or destroying civilian(s)/objects) *can* taint what might otherwise be lawful means (such as directing attacks against lawful military objectives). Concretely, even assuming

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[47] This may seem to be in tension with the common view that certain civilian objects may be booby-trapped without violating Amended Protocol II to the Convention on Certain Conventional Weapons. *See, e.g.*, Michael N. Schmitt, Russian Booby Traps and the Ukraine Conflict, Articles of War (Apr. 5, 2022). However, this issue differs in two respects from that of attacking a civilian object to destroy a distinct military objective. First, the relevant provision of Amended Protocol II regulates the weaponization of objects; it does not bear on the distinction between objects against which attacks may be lawfully directed and those against which they may not. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, 2048 U.N.T.S. 93, Art. 7 (1996). Second, the fact that a practice does not violate the weaponization provisions of Amended Protocol II does not entail that it is not prohibited by other rules of IHL, including the principle of distinction. Indeed, the Protocol itself clarifies the applicability of the latter "in all circumstances." *Id.*Art. 3(7).

[48] International Committee of the Red Cross (ICRC), Vol 1: Rules, Customary International Humanitarian Law Study 574 (2005).

[49] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, para. 4795 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

[50] Prosecutor v. Galić, IT-98-29-T, Judgment, para. 54ff (Dec. 5, 2003).

[51] API, *supra* note 35, Arts. 57(2)(a)(i), 57(1); Janina Dill, *Do Attackers Have a Legal Duty of Care? Limits to the "Individualization of War*," 11 Int'l Theory 1 (2019); Oona A. Hathaway & Azmat Khan, *"Mistakes" in War*, 1 Univ. Penn. L. Rev. 173 (2024).

[52] API, *supra* note 35, Arts. 50(1), 52(3); Haque, *supra* note 34, at 154 et seq.

[53] Douglas Guilfoyle, *The Strike on the World Central Kitchen Convoy as a War Crime*, Opinio Juris (Apr. 6, 2024).

some Hamas rocket fire into Israel has been directed (loosely) against military objectives,[54] if those firing sought also to harm civilians, they violated distinction.[55] Such an attack would be directed at *both* the military objective (as the target) and the civilians (whose harming is one of the attack's animating purposes);[56] neither would be harmed "incidentally." Even in the criminal domain, the ICC has identified combined attacks on both civilian and military targets as attacks directed against both.[57] Purpose is inculpating but not exculpating because an unlawful purpose changes the nature of conduct, but a lawful purpose cannot rehabilitate unlawful conduct.

The use of human shields, a charge often laid against Hamas, further illustrates the need to consider IHL as a whole, across legal functions. Here, both war crime and underlying IHL prohibition attach only to intermingling undertaken with the purposive intent to "shield from attack" or "favor or impede military operations."[58] Particularly in densely populated areas, this cannot easily be inferred from context, making violations hard to diagnose in real time.[59] However, where it could be feasibly avoided, Hamas's practice of "locating military objectives within or near densely populated areas" would straightforwardly violate Article 58 of the First Additional Protocol, regardless of intent. This precautionary requirement, even if it does not give rise to criminal accountability, is critical for real-time evaluation of Hamas's conduct.

The use of human shields also highlights a further doctrinal confusion that can be clarified by differentiating among law's functions. Hamas's alleged criminal conduct is often invoked to rebut the alleged disproportionality of Israeli attacks that kill many civilians, based on the argument that the defender's "ultimate responsibility" for civilian casualties modifies the permissibility of an otherwise disproportionate attack.[60] The U.S. *Law of War Manual* also argues that "the responsibility of the defending force is a factor that may be considered in determining whether such harm is excessive."[61] Space does not permit a full discussion of the legal debates about shielding. However, this invocation of the shielding party's responsibility is clearly erroneous in two ways. First, at the accountability stage, Hamas's responsibility for human shielding would not preclude either the state responsibility of Israel or the criminal responsibility of its officials for engaging in attacks with clearly excessive civilian harm. Responsibility is not zero sum. Second, even assuming Israel's *ex post* responsibility for excessive civilian casualties were diminished or excused by Hamas's use of those civilians as shields, this would not affect *ex ante* impermissibility. Excuses are not justifications, and civilians do not forfeit their protection because they have suffered a violation by the adversary. The First Additional Protocol reflects this,

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[54] Critically reviewing this claim, Arthur van Coller, Israel-Hamas 2024 Symposium - *Qassam Rockets, Weapon Reviews, and Collective Terror as a Targeting Strategy*, ARTICLES OF WAR (Jan. 17, 2024).

[55] Alternatively, these attacks may not be directed against any objective, i.e., indiscriminate. Diakonia, *supra* note 11, at 28.

[56] Relatedly: Luigi Daniele, *A Lethal Misconception, in Gaza and Beyond: Disguising Indiscriminate Attacks as Potentially Proportionate in Discourses on the Laws of War*, EJIL:*TALK!* (Nov. 7, 2023).

[57] Compare: Prosecutor v. Ntaganda, ICC-01/04-02/06-2666-Red, Judgment, paras. 418, 424, 491 (Mar. 30, 2021); Prosecutor v. Katanga, ICC-01/04-01/07-3436-tENG, Judgment, para. 802 (Mar. 7, 2014).

[58] ICC Elements of Crimes, *supra* note 34, at 20; API, *supra* note 35, Art. 51(7).

[59] Michael N. Schmitt, *Ukraine Symposium - Weaponizing Civilians: Human Shields in Ukraine*, ARTICLES OF WAR (Apr. 11, 2022).

[60] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, para. 626 (4th ed. 2022).

[61] U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL, para. 5.12.1.4 (June 2015, updated July 2023). The Manual refers here to *voluntary* human shields. However, given the argued difficulty of establishing purposive intent to shield in belligerents, relaxing protection based on inferring this intent in civilians would undermine the functionality of law.

specifying that even purposive human shielding by one party does not "release" the other from its legal obligations relating to civilians.[62]

B. Starvation and the Siege of Gaza

Two days after the October 7 atrocities, Israel's defense minister ordered "a complete siege" on Gaza, specifying "There will be no electricity, no food, no fuel, everything is closed."[63] Charging that "the citizens of Gaza" were celebrating Hamas's crimes, the head of Israel's agency for the Coordination of Government Activities in the Territories promised the encirclement would bring "hell."[64] Credible reports indicate that in the ensuing months, Israel: significantly restricted humanitarian access to Gaza (especially the North);[65] attacked "deconflicted" humanitarian actors, distribution centers, and convoys; [66] destroyed agricultural areas and water systems; [67] and restricted fuel, electricity, and the entry of mobile desalination units.[68] In December, an Integrated Food Security Phase Classification report estimated that 25 percent of civilians in northern Gaza were suffering catastrophic levels of acute food insecurity.[69] By March 2024, that estimate was 55 percent, with 69 percent of all Gazans suffering emergency (39 percent) or catastrophe (30 percent) levels of food insecurity.[70] In March and April, access was expanded, particularly to northern Gaza,[71] improving the numbers.[72] However, even then, the Famine Review Committee warned of an enduring "high and sustained risk of Famine across the whole Gaza Strip."[73] The Rafah

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[62] API, *supra* note 35, Art. 51(8).

[63] Although most translations relay a siege on "the Gaza Strip" (e.g., Emanuel Fabian, *Defense Minister Announces "Complete Siege" of Gaza: No Power, Food or Fuel*, TIMES OF ISRAEL (Oct. 9, 2023)), Gallant spoke of a siege on "Gaza City": B'Tselem, *Manufacturing Famine: Israel is Committing the War Crime of Starvation in the Gaza Strip* 9 (Apr. 2024). Others, however, described a siege on "Gaza" (*id.*; note 65 *infra*), consistent with the closure of all Israeli crossings for over seventy days. UN Relief and Works Agency for Palestine Refugees in the Near East (<8>UNRWA<8>), Gaza Supplies and Dispatch Tracking, *at* https://www.unrwa.org/what-we-do/gaza-supplies-and-dispatch-tracking.

[64] <8>COGAT<8> head, Maj Gen Ghassan Alian, @COGAT-MOD, YOUTUBE (Oct. 10, 2023), *at* https://www.youtube.com/shorts/5a0EWv-o7mE.

[65] Oxfam, *Inflicting Unprecedented Suffering and Destruction* (Mar. 15, 2024); Refugees International, *Siege and Starvation: How Israel Obstructs Aid to Gaza* (Mar. 2024); <8>UNRWA<8>, *supra* note 63.

[66] Human Rights Watch, *Gaza: Israelis Attacking Known Aid Worker Locations* (May 14, 2024); Léopold Salzenstein, *Behind the Numbers: Gaza's Unprecedented Air Worker Death Toll*, NEW HUMANITARIAN (Mar. 21, 2024).

[67] UN Satellite Centre (<8>UNOSAT<8>) Gaza Strip Agricultural Damage Assessment (Jan. 2024), *at* https://unosat.org/products/3792; Insecurity Insight, *Flash Analysis Report: Over Five Months of Attacks on Food Security in Gaza* (Mar. 2024); B'Tselem, *supra* note 63, at 5; Oxfam, *Water War Crimes: How Israel Has Weaponized Water in Its Military Campaign in Gaza*, 13-28 (July 18, 2024), *at* https://www.oxfamamerica.org/explore/research-publications/water-war-crimes-how-israel-has-weaponized-water-in-its-military-campaign-in-gaza.

[68] Oxfam, *supra* note 5, at 19–20, 28–29; Natasha Hall, Anita Kirschenbaum & David Michel, *The Siege of Gaza's Water*, CTR. STRATEGIC & INT'L STUD. (Jan. 12, 2024).

[69] IPC Global Initiative, *Special Brief – Gaza Strip* (Dec. 21, 2023); *see also* Alex de Waal, *Starvation as a Method of Warfare*, LONDON REV. BOOKS (Jan. 11, 2024).

[70] IPC Global Initiative, *Special Brief – Gaza Strip* (Mar. 18, 2024); IPC Global Initiative, *Special Snapshot – Gaza Strip* (Mar. 18, 2024); *see also* Bar Peleg, *Citing "Extreme" Hunger in Gaza, Israel's Top Food Security Official Calls for Cease Fire*, HAARETZ (Mar. 3, 2024).

[71] Famine Early Warning Systems Network, *Gaza Strip Food Supply Report* (Apr. 2024); IPC Famine Review Committee, *Gaza Strip, June 2024: Conclusions and Recommendations*, at 9 (June 25, 2024) [hereinafter IPC FRC June].

[72] IPC Global Initiative, *Gaza Strip: IPC Acute Food Insecurity Special Snapshot* (June 25, 2024).

[73] IPC FRC June, *supra* note 71, at 3.

offensive and expanded Israeli operations around purported humanitarian zones brought further significant declines in humanitarian access and resurgent malnutrition.[74]

The ICJ recently affirmed that notwithstanding its military withdrawal in 2005, Israel retained law of occupation obligations in Gaza "commensurate" with its enduring control—"even more so" since October 7, 2023.[75] One of the clearest "commensurate" obligations, given Israel's relevant control is to "ensur[e] the food and medical suppl[y]" (including water) of the civilian population in Gaza to "the fullest extent of the means available to it," including by "bring[ing] in" those supplies "if the resources of the occupied territory are inadequate."[76] It is hard to see how Israel's aforementioned practices could be reconciled with these duties. Given the siege, however, most commentary has focused instead on the starvation war crime, often revealing confusion about proscribed intent.

IHL does not prohibit sieges per se. A belligerent may besiege to fix, hold, and deny military supply, and may inspect humanitarian consignments, while controlling their times and routes.[77] Furthermore, genuinely incidental deprivation, such as when food is the collateral damage of a strike on a military objective, implicates proportionality, not the starvation ban. But when is starvation intentional and therefore prohibited?

Some observers argue that the war crime obtains only when "the individual acted with the *conscious objective* of producing the prohibited *result*, in this context starvation of civilians," a purpose they decline to attribute to Israeli officials.[78] On this view, prohibiting belligerents from knowingly causing civilian starvation "without an actuating illicit purpose would impose an unrealistic demand on war fighters."[79] Sean Watts has warned that limiting "intentional" starvation to acting with the purpose of causing civilians to suffer fatal or near-fatal malnutrition, "reduces the rule's humanitarian effect, perhaps to the vanishing point."[80] He nevertheless argues that military necessity precludes an interpretation that would ban siege starvation in contexts of civilian-populated encirclements.[81] We disagree.

To insist that military necessity demands permitting siege deprivation, even if it implies knowingly starving the civilian population, is to turn three foundational principles on their heads. First, per IHL's "basic rule," belligerents must distinguish "in all military operations" between combatants and the civilian population, directing military operations solely at the former.[82] A

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[74] <8>UNRWA<8>, *supra* note 63; OCHA, Humanitarian Situation Update #196 (July 26, 2024); OCHA, Humanitarian Situation Update #203 (Aug. 12, 2024); OCHA, Humanitarian Situation Update #208 (Aug. 23, 2024); OCHA, Humanitarian Situation Update #211 (Aug. 30, 2024); Jeremy Konyndyk & Jesse Marks, *Untangling the Reality of Famine in Gaza*, Refugees Int'l, at 19–23 (Sept. 2024). Rebutting arguments that seek to deny this reality or absolve Israel of responsibility for it, see *id.* at 24–28.

[75] Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Judgment, paras. 93–94 (ICJ July 19, 2024); *see also id.*, para. 78; Orna Ben-Naftali et al., *Israel's Status in the North of the Gaza Strip* (Apr. 1, 2024), at https://static.gisha.org/uploads/2024/04/Legal-Opinion-on-the-status-of-Israel-in-the-north-of-Gaza-EN.pdf.

[76] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, , Art. 55, 75 UNTS 287. On water: *Policies and Practices of Israel in the OPT*, *supra* note 75, paras. 124, 133. Citing this as a likely "commensurate" obligation, *id.*, para. 24 (sep. op., Cleveland, J.).

[77] API, *supra* note 35, Art. 70(3); Dapo Akande & Emanuela-Chiara Gillard, Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict 28–29 (2016).

[78] Corn & Gillard, *supra* note 21 [emphasis added].

[79] *Id.*; Similarly: Cohen & Shany, *supra* note 21; Sean Watts, *Humanitarian Logic and The Law of Siege: A Study of the* Oxford Guidance *on Relief Actions*, 95 Int'l L. Stud. 1, 19 (2019).

[80] Sean Watts, *Siege War*, Articles of War (Mar. 4, 2022).

[81] *Id*.

[82] API, *supra* note 35, Art. 48.

starvation siege is plainly a "military operation." Second, a predominantly civilian population does not lose its civilian character due to the presence of combatants within it.[83] Third, a besieging party cannot recharacterize an operation directed against such a population as lawful simply by warning or allowing civilians to leave (e.g., from northern to southern Gaza). Those who eschew, or cannot take, that chance do not thereby "participate directly in hostilities"—the only threshold for losing IHL's civilian protection.

Over 98 percent civilian, Gaza's population is a civilian population by any measure.[84] So is the population of northern Gaza, site of the most severe deprivation.[85] Denying sustenance to either of these areas entails directing sustenance denial against a civilian population, even if the goal is to squeeze militants within that population. When the (only) means to starve militants is deliberately starving the civilian population, the lawful ultimate goal cannot authorize the unlawful means any more than a kinetic attack against a civilian population can be justified with reference to the ultimate goal of eliminating combatants embedded within that population.[86] The latter bombardment would constitute a clear war crime and likely crime against humanity.[87] Mass deprivation is no more permissible.

Moreover, the starvation prohibition is underpinned by a specialized IHL framework on objects indispensable to survival (OIS). Unlike dual-use objects generally, which are widely thought to be military objectives, OIS are protected against being the object of attack, destruction, removal, or rendering useless: (1) for their sustenance value, including their sustenance value to combatants, unless *only* combatants draw sustenance from them; and (2) for any other military reason, if such deprivation "may be expected" to leave civilians starving or forced to move.[88] As explained elsewhere, these safeguards are best understood as constitutive of the IHL starvation ban, which applies to all modalities of deprivation, including deprivation by impeding humanitarian relief.[89] Complementary rules preclude arbitrarily denying humanitarian access to populations in need.[90] Thus understood, the IHL starvation ban covers the intentional ("methodical") deprivation of OIS either: (1) with the purpose of denying their sustenance value to a population that qualifies as a civilian population in aggregate (including denying sustenance to the civilian population as the predicate purpose to squeezing embedded enemy forces); or (2) for any other military reason when that deprivation may be expected to leave civilians starving.

Building on this IHL foundation and the ICC Statute's inclusion of both direct and oblique intent, the war crime of intentionally starving civilians as a method of warfare is best understood

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[83] *Id.* Art. 50(3); *Prosecutor v. Kordić & Čerkez*, *supra* note 38, paras. 95–97; Prosecutor v. Karadžić, IT-95-5/18-T, Judgment, paras. 474, 4610 n. 5510 (Mar. 24, 2016).

[84] U.S. estimates suggest that of over two million people, approximately 20,00025,000 are combatants with Hamas, *Hamas Overview*, COUNTER TERRORISM GUIDE (Sept. 2022), *at* https://www.dni.gov/nctc/ftos/hamas_fto.html, and 1,000 with Palestinian Islamic Jihad, *Palestine Islamic Jihad (PIJ) Overview*, COUNTER TERRORISM GUIDE (Feb. 2023), *at* https://www.dni.gov/nctc/ftos/pij_fto.html.

[85] After mass displacement, 300,000 people remained there. *At Least 300,000 at Risk from Lack of Food in North, Central Gaza: UN*, FRANCE 24 (Feb. 8, 2024), *at* https://www.france24.com/en/live-news/20240208-at-least-300-000-at-risk-from-lack-of-food-in-north-central-gaza-un.

[86] *Prosecutor v. Ntaganda*, *supra* note 57, para. 424.

[87] *Prosecutor v. Karadžić*, *supra* note 83, paras. 474, 4610 n. 5510; *Prosecutor v. Ntaganda*, *supra* note 57, paras. 418, 424, 491.

[88] API, *supra* note 35, Arts. 54(2), 54(3) (a–b); Tom Dannenbaum, *Criminalizing Starvation in an Age of Mass Deprivation in War: Intent, Method, Form, and Consequence*, 55 VAND. J. TRANSNAT'L L. 681, 729–32 (2022).

[89] *Id.* at 732–38, 741–54. Also discussing the relationship to rules on humanitarian access, e.g., API, *supra* note 35, Arts. 69–70.

[90] API, *supra* note 35, Arts. 69–70; Akande and Gillard, *supra* note 77.

to entail the deliberate deprivation of OIS, either with the direct intent of denying sustenance to a civilian population, or with the oblique intent of knowing that civilians will starve.[91] At writing, the ICC chief prosecutor is seeking arrest warrants for Defense Minister Gallant and Prime Minister Netanyahu for starvation and related war crimes and crimes against humanity.[92] In this case, the Court has the opportunity to set a precedent in which the criminal intent threshold is communicated definitively. Critically, the ICC threshold should not be inaptly transposed to *ex ante* and concurrent legal assessments, which must incorporate prohibitions on acts of deprivation that *may be expected* to cause starvation or forced movement, *arbitrary denials* of humanitarian access, and the law-of-occupation duty to *ensure* food and medical supply.[93] As elaborated below, ICJ provisional measures offer essential resources for third states evaluating compliance with these rules.

C. The Genocide Allegation and Three Questions of Intent

It is uncontested that genocide, both as an individual criminal act and as a state act, hinges on the special intent to destroy in whole or in part a protected group. Yet, three doctrinal questions about intent underpin polarized reactions to South Africa's allegation that Israel is violating the Genocide Convention in Gaza.

First, what is the legal significance of committing acts enumerated in the Convention in the knowledge that they substantially risk (partial) group destruction? The special intent which characterizes genocide is generally understood as direct.[94] International Criminal Tribunal for Rwanda (ICTR)[95] and ICTY[96] jurisprudence, as well as the drafting history of the Genocide Convention, confirm that prohibited acts must be carried out "with the aim, purpose or desire to destroy a group" in whole or in part.[97] Knowledge of the genocidal intent and actions of others may suffice for secondary liability, but the underlying genocide must be perpetrated with special purposive intent.[98] The notion that knowing or reckless group destruction could ground *principal* individual criminal responsibility for genocide remains a minority scholarly position.[99] But does the prevailing consensus regarding intent as defined for accountability entail that the Genocide Convention neither bears on conduct that poses a substantial risk of (partial) group destruction,

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[91] Dannenbaum, *supra* note 88, at 716–26; 734–38; *see also* Wayne Jordash, Catriona Murdoch & Joe Holmes, *Strategies for Prosecuting Mass Starvation*, 17 J. INT'L CRIM. JUST. 849, 854–60 (2019).

[92] ICC, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine (May 20, 2024).

[93] See notes 76–77, 88–90 *supra*.

[94] Van der Vyver, *supra* note 34, at 85; William A. Schabas, Mens Rea *and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1033 (2002).

[95] Prosecutor v. Akayesu, ICTR-96–4-T, Judgment, paras. 497, 544–47 (Sept. 2, 1998); Prosecutor v. Kayishema & Ruzindana, ICTR-95–1-T, Judgment, para. 91 (May 21, 1999); Prosecutor v. Rutaganda, ICTR-96–3-T, Judgment, para. 59 (Dec. 6, 1999); Prosecutor v. Musema, ICTR-96–13-T, Judgment, para. 164 (Jan. 27, 2000); Prosecutor v. Kambanda, ICTR 97–23-S, Judgment, para. 16 (Sept. 4, 1998).

[96] Prosecutor v. Krstić, IT-98-33-A, Judgment, para. 134 (Apr. 19, 2004); Prosecutor v. Goran Jelisić, IT-95-10-A, Judgment, paras. 46, 50 et seq. (July 5, 2001); Rutaganda v. Prosecutor, ICTR-96-3-A, Judgment, para. 524 (May 26, 2003).

[97] Florian Jessberger, *The Definition and the Elements of the Crime of Genocide*, in THE UN GENOCIDE CONVENTION - A COMMENTARY (Paola Gaeta ed., 2009).

[98] *Prosecutor v. Krstić*, *supra* note 96, paras, 134, 144.

[99] Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2288 (1999).

nor informs third-party evaluation of such conduct, unless (partial) group destruction is also evidently its purpose?

In Gaza, the question looms large. Responding to South Africa's application under the Genocide Convention, the ICJ has, to date, thrice indicated provisional measures. In January 2024, the Court determined that "there [was] a real and imminent risk that irreparable prejudice [would] be caused to the rights [of the Palestinians in Gaza]."[100] What rights? "[T]he right[s] . . . to be protected from acts of genocide and related prohibited acts mentioned in Article III [of the Genocide Convention]."[101] The Court then ordered Israel to prevent violations of the Convention, punish incitement, and "enable the provision of urgently needed basic services and humanitarian assistance."[102] It did not, as South Africa requested, order Israel to halt hostilities. In March, the Court ordered Israel to "*ensure*, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance."[103] Two months later, the Court demanded that Israel "[i]mmediately halt its military offensive, and any other action in the Rafah governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part."[104]

Although the first order recalled statements by Israeli officials that may be probative of intent,[105] the Court has not explicitly grappled with whether Israel's conduct can plausibly be seen as *purposively* bringing about the destruction of Palestinians in Gaza. This has led some to demand "not to read any substantive conclusions"[106] regarding genocide into its orders.[107] Others, including one of us,[108] have pointed out that ordering provisional measures means finding that Israel's actions in Gaza pose "a real and imminent risk"[109] of whole or partial group destruction. For instance, in the third order, the "Court finds that the current situation arising from Israel's military offensive in Rafah entails a further risk of irreparable prejudice to the plausible rights claimed by South Africa," namely the Palestinians' rights under the Genocide Convention.[110] As the orders have become more demanding, the Court appears to have tightened the link between its demands and Israel's primary obligations relating to genocide.[111]

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[100] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Provisional Measures Order, para. 74 (ICJ Jan. 26, 2024) [hereinafter ICJ, Gaza PM I].

[101] *Id.*, para. 59.

[102] *Id.*, para. 4.

[103] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr), Provisional Measures Order, para. 51(2)(a) (ICJ Mar. 28, 2024) (emphasis added) [hereinafter ICJ Gaza PM II].

[104] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr), Provisional Measures Order, paras. 50, 57(2)(a) (ICJ May 24, 2024) [hereinafter ICJ, Gaza PM III].

[105] ICJ, Gaza PM I, *supra* note 100, paras. 51–52.

[106] Roy Schondorf, *Implausible Confusion: The Meaning of "Plausibility" in the ICJ's Provisional Measures*, EJIL:*Talk!* (May 6, 2024).

[107] Brian L. Cox, *Evaluating Security Assistance to Israel Following ICJ Provisional Measures Order*, EJIL:*Talk!* (Mar. 7, 2024).

[108] Janina Dill in *Top Experts' Views of International Court of Justice Ruling on Israel Gaza Operations*, Just Security (Jan. 26, 2024).

[109] ICJ, Gaza PM I, *supra* note 100, para. 27.

[110] ICJ, Gaza PM III, *supra* note 104, para. 47.

[111] *Compare* ICJ, Gaza PM I, *supra* note100, paras. 27, 78, 86(1) *with* ICJ, Gaza PM II, *supra* note 103, paras. 45, 51(2); and ICJ, Gaza PM III, *supra* note 104, paras. 50, 57(2).

One way to read the orders assumes that the Convention rights that the Court seeks to safeguard are rights to be protected from prohibited acts carried out with special intent. On this reading, the Court deemed, for instance, Israel's offensive operations in Rafah to pose a real and imminent risk of genocide (with purposive intent). An alternative reading is that the Court put Israeli officials on notice that continuing with the identified conduct amounts to recklessly, and potentially knowingly, destroying a protected group in whole or in part because a "real and imminent risk" is an objective and substantial risk. On this view, although accountability under the Genocide Convention turns on purposive intent, the Convention (and the framework for provisional measures) should be understood *ex ante* as guiding states not to engage in enumerated acts that pose a substantial risk to the survival of a protected group because doing so carries a risk of genocide. Supporting the second interpretation, in *The Gambia v. Myanmar*, the ICJ did "not consider that the exceptional gravity of the allegations is a decisive factor warranting . . . the determination, at the present stage of the proceedings [provisional measures], of the existence of a genocidal intent."[112]

To be clear, this interpretation implies that the Court bracketed intent in inferring a risk that genocide is or will be occurring, not in the substantive definition of genocide. This approach arguably secures international law's functionality *ex ante* and in real time. Purposive intent is held in the first instance by individuals, is exceedingly difficult to detect, and can often only be established, if at all, *ex post*. Meanwhile, states generally have a duty to prevent genocide when there is a "serious risk" it will be committed.[113] When individual officials adopt a plan or carry out acts that pose a substantial risk of whole or partial group destruction, an *ex ante* functional law might therefore guide the state in whose name these officials act to put a stop to their conduct even while their intent remains obscure (thus requiring a form of auto-prevention). At the accountability stage, the ICJ will only find Israel responsible for violations of the Genocide Convention (preventive or direct) if it establishes that relevant acts were committed with special purposive intent.

For concurrent third-party evaluation, such a functionally differentiated interpretation is more established: any state conduct that poses a risk of group-destruction (regardless of intent) logically poses "a serious risk that genocide will be committed," which incontestably triggers third states' prevention duties. [114] And yet, a state that has violated this prevention duty *ex ante* will not incur responsibility if the genocide risk does not materialize.[115] This opens a response to the concern that South Africa used the Convention's compromissory clause to litigate IHL violations in a court without IHL jurisdiction in this conflict.[116] If IHL violations are so widespread as to pose a risk of group destruction, then even if South Africa were unsure of the attributability of genocidal intent to Israel, its request that the Court consider a genocide allegation would be appropriate to genocide prevention.

A second doctrinal question underlying polarized assessments of the genocide allegation is how to distinguish direct (purposive) intent from desire, ultimate goal, and motive.[117] Judge Nolte,

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[112] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.) Provisional Measures Order 2020 ICJ Rep. 3, paras. 53–56 (Jan. 23, 2020) .

[113] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 ICJ Rep. 43, para. 341 (Feb. 26) [hereinafter ICJ, Bosnian Genocide]

[114] *Id.*, para. 431.

[115] *Id.*

[116] *See, e.g.*, Rebecca Ingber in *Top Experts' Views*, *supra* note 108.

[117] *See, e.g.*, Marko Milanović, *State Responsibility for Genocide*, 17 EUR. J. INT'L L. 553, 558–59 (2006).

on occasion of the first order, declared himself "not persuaded"[118] that South Africa had established genocidal intent, pointing instead to "the stated purpose of [Israel's] operation, namely to 'destroy Hamas' and to liberate the hostages."[119] Yet, those aims are not dispositive. If the destruction of Palestinians in Gaza as a protected group in whole or in part were the means by which Israel sought to achieve its ultimate goal of security, group destruction would be the predicate purpose, pursued with direct intent.[120] This construction also exemplifies the possibility that one can act purposively in relation to conduct or an outcome despite lamenting it. Whether in relation to targeting, starvation, or genocide, neither the fact of a permissible ultimate goal nor the lamentation of what was deemed necessary to achieve it would warrant recharacterizing that predicate action as anything other than directly intended.[121] Ultimately, the ICJ will need to evaluate whether total or partial group destruction was a purpose of an enumerated act, not whether it was pursued enthusiastically or as an end in itself.

A third question is what it means for a *state* to act with genocidal intent, as distinct from failing to prevent or punish individuals who perpetrate genocide.[122] The least contestable basis for "genocidal" state intent would be a "concerted plan" among government leaders.[123] In the current context, this would have to be a policy developed by Israel's Security Cabinet or some other leadership group. However, even if such a plan existed, proving it would be very difficult. Often, intent must instead be inferred from a consistent pattern of state conduct, either as evidence of the plan, or as the manifestation of a form of collective intent, whether or not defined centrally.[124] Absent a concerted plan or a pattern of state conduct leaving no reasonable inference other than the presence of genocidal intent, is it possible to speak of "the intent of a state?"

Uncontroversially, when a state official acts (even *ultra vires*) in their official capacity, that act is attributable to the state.[125] The individual's conduct is, legally speaking, state conduct. But when a composite act involves the conduct of multiple state officials, each acting in their official capacity, but with different intentions, which of those intentions is properly understood to be the state's? Can the state be said to hold each official's intent simultaneously, such that the unlawful intent of any entails the unlawful intent of the state vis-à-vis the collective act? In extremis, that could mean attributing genocidal intent to Israel based on the group-destructive intent of an IDF soldier engaged in criminal killings (an enumerated genocidal act).[126] That strikes us as implausible.[127] Alternatively, does the individual's control over the collective action determine the

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[118] ICJ, Gaza PM I, *supra* note 100, para. 13 (dec., Nolte, J.).

[119] *Id.*, para. 14.

[120] A. Dirk Moses, The Problems of Genocide: Permanent Security and the Language of Transgression (2021).

[121] *See* Sections II.A, II.B *infra.*

[122] William A. Schabas, Genocide in International Law 444 (1st ed. 2000).

[123] ICJ, Bosnian Genocide, *supra* note 113, paras. 373, 376; *see also* Robin M. Smith, *State Responsibility and Genocidal Intent: A Three Test Approach*, 34 Aust. Y.B. Int'l L. 87, 97–112 (2017).

[124] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serb.) 2015 ICJ Rep. 3, para. 145 (Feb. 3). Comparing the plan and pattern of conduct tests, see Smith, *supra* note 123, at 112.

[125] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Art. 4, UN Doc. A/56/10 (2001) [hereinafter <8>ARSIWA<8>]; ICJ, Bosnian Genocide, *supra* note 113, para. 379.

[126] Milanović argues that the commission of genocide can be attributed to the state in this context, without entailing state genocidal *intent*. Milanović, *supra* note 117, at 568.

[127] The ICC's requirement of either a pattern of collective conduct or individual destructive capability would anyway preclude criminal liability for genocide in this context. ICC, Elements, *supra* note 34, at 2. Whether that is generally required is contested. Antonio Cassese, *Is Genocidal Policy a Requirement for the Crime of Genocide*, *in*

attributability of *their* intent to the state as it relates to that action, such that leaders' statements are uniquely important?[128] It warrants mention that state responsibility generally does not require establishing state intent, which may explain why these issues have yet to be fully resolved.[129]

II. Courts' Provisional Products and Real-Time Evaluation

In Gaza, international courts' profile as focal points for public engagement with international law is striking. What does this mean for law's capacity to discharge its three functions? Courts operate primarily as institutions of accountability.[130] Applying law to established facts, they are meant to determine with finality whether a subject violated its obligations in a particular case. In addition to resolving disputes and endeavoring to dispense justice,[131] their decisions contribute to international law's development, as "subsidiary means" for its ascertainment,[132] including in ways that ultimately guide action and third-party evaluation. However, the latter process occurs ordinarily through the jurisprudential impact of courts' final judgments. Whether those entail declaratory, reparative, or punitive accountability, the procedural ideal of the rule of law demands a process that is measured in years. The two previous genocide cases to reach full merits judgments at the ICJ took well over a decade from initiation to judgment. Plainly, courts' capacity to contribute directly through these judgements to *ex ante* action-guidance (e.g., via specific deterrence) or to concurrent third-party evaluation is limited.

Issued on a shorter time horizon, courts' provisional products may offer a more direct mechanism through which to discharge law's functions during armed conflict. Although the ICJ's "real-time" involvement is not unique to this conflict,[133] its provisional products relating to Gaza have received more attention than most of its *final* judgments elsewhere, adding urgency to clarifying their significance for action-guidance and third-party evaluation.

The UN Genocide Convention - A Commentary, *supra* note 97, 128 at 134–36. Our focus here is instead on state intent.

[128] *See, e.g.*, ICJ, Gaza PM I, *supra* note 100, South Africa, Application Instituting Proceedings, para. 101.

[129] James Crawford argues that state responsibility does not hinge on intent (State Responsibility: The General Part 61–62 (2013)), but genocide is the exception (James Crawford & Simon Olleson, *State Responsibility*, *in* Encyclopedia of Genocide and Crimes Against Humanity 904, 909 (Dinah L. Shelton, ed., 2005)).

[130] Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 Chi J. Int'l L. 537 (2009); David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 Berk. J. Int'l L. 401, 402 (2006).

[131] Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 Brit. Y.B. Int'l L. 195 (2006).

[132] *Id*.; Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 Temp. L. Rev. 61 (2013); Decisions of the ICJ as Sources of International Law? (Enzo Cannizzaro, Emanuele Cimiotta, Nicola Napoletano & Paola Palcetti eds., 2018).

[133] The Court has granted requested provisional measures in roughly 50% of cases. *See* Gentian Zyberi, *Provisional Measures of the International Court of Justice in Armed Conflict Situations*, 23 Leiden J. Int'l L. 571 (2010).

Uncontroversially, the ICJ's provisional measures orders bind the litigating parties,[134] though compliance is generally "unsatisfactory,"[135] including, observers argue, in the case at hand.[136] However, a potentially consequential (yet untested) question in a system of decentralized enforcement, is what courts' provisional products mean for third states. Below, we discuss both the possibility of third states' complicity in provisional measures violations (II.A), and provisional measures' potential significance for third states' discharging their pre-existing obligations regarding genocide (II.B) and IHL (II.C).

A. Provisional Measures and <10>ARSIWA<10> Complicity

When the addressee of a provisional measures order does not comply [hereinafter PM-breach], it incurs state responsibility for an internationally wrongful act.[137] There is reason to believe that Israel has failed that obligation.[138] If it has, per Article 16 of the International Law Commission's (ILC's) Articles on the Responsibility of States for Internationally Wrongful Acts (<10>ARSIWA<10>), it would seem to follow that third states could be complicit if they contribute significantly to that breach, "with knowledge of the circumstances of the internationally wrongful act."[139] However, before drawing that conclusion, two doctrinal questions must be addressed (see Figure 1).

First, must a state assist purposively in a PM-breach or does knowledge suffice for complicity? Confusing the otherwise straightforward use of "knowledge" in Article 16, the ILC Commentary indicates that the contribution must have been made "with a view to facilitating the commission" of the wrongful act.[140] The latter implies a purpose element that would be difficult to establish, and would exceed the parallel criminal intent standard for complicity.[141] Meanwhile, the Commentary's separate discussion of *jus cogens* violations is framed in terms of the Article 16 threshold with reference only to knowledge, not purpose.[142] In assessing complicity in the Bosnian genocide case, the ICJ focused exclusively on knowledge, albeit without ruling out that purpose may also have been necessary.[143] Notably, the Arms Trade Treaty (ATT) absolutely prohibits

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[134] LaGrand (Ger. v. U.S.), Judgment, 2001 ICJ Rep. 466, 498–508, para. (June 27, 2001); Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgment, 2005 ICJ Rep 168, 258, 263 (Dec. 19, 2005); Maurice Mendelson, *State Responsibility for Breach of Interim Protection Orders of the International Court of Justice*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 35 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004).

[135] Erlend M. Leonhardsen, *Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures When Non-compliance Is to Be Expected*, 5 J. INT'L DISPUTE SETTLEMENT 306, 309 (2014).

[136] International Commission of Jurists, *Gaza: One month on, Israel fails to comply with the Order of the International Court of Justice* (Feb. 26, 2024), *at* https://www.icj.org/gaza-one-month-on-israel-fails-to-comply-with-the-order-of-the-international-court-of-justice.

[137] Karin Oellers-Frahm & Andreas Zimmerman, *Article 41*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1026, 1068 (Andreas Zimmermann et al. eds., 3rd ed. 2012); Robert Kolb, *Note on New International Case-Law Concerning the Binding Character of Provisional Measures*, 74 NORDIC J. INT'L L. 117 (2005).

[138] *See* ICJ, Gaza PM II, *supra* note 103, para. 4 (sep. op., Nolte, J.) ("This terrible situation would most probably not exist if the Order of 26 January 2024 had been fully implemented.")

[139] <8>ARSIWA<8>, *supra* note 125, Art. 16(a), p. 66.

[140] Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, CHATHAM HOUSE, at 30–31, 60–64 (2016).

[141] On the complexity of purposive state intent, see Section I.C *supra*.

[142] <8>ARSIWA<8>, *supra* note 125, at 115; HELMUT PHILIPP AUST, COMPLICITY AND THE LAW OF STATE RESPONSIBILITY 236 (2011); Moynihan, *supra* note 140, paras. 65–76, 79–83.

[143] ICJ, Bosnian Genocide, *supra* note 113, paras. 420–21.

authorizing arms transfers in the "knowledge" that they would be used to commit genocide, crimes against humanity, or war crimes.[144]

Second, is a PM-breach the kind of wrongful act that can underpin <10>ARSIWA<10> complicity? Article 16 responsibility attaches only to acts that "would be internationally wrongful if committed by [the assisting] State"—hereinafter the "mutual obligation" requirement. There are two ways of reading this qualification, one contingent on the primary rule's actual reach and one counterfactual.

On the more restrictive interpretation of Article 16, complicity would depend on the actual reach of the underlying primary obligation. In support, the Commentary describes third-party responsibility as turning on whether the assisted act breaches "obligations by which the aiding or assisting State *is itself bound*."[145] That would not include assisting a PM-breach *as such*, as ICJ decisions bind only the litigating parties.[146] As a general matter, this interpretation could create potentially dangerous gaps. For instance, the territoriality of many human rights obligations risks implausibly precluding complicity in their violation, even across parties to the same treaty, as only the principal (territorial) state would bear the relevant obligations to those whose rights are violated.[147]

The counterfactual approach meanwhile asks whether the assisting state would bear those obligations if it were engaged in the conduct of the principal state, in the latter's circumstances, but given its own legal commitments. In support, the Commentary states that third party responsibility obtains if "the conduct in question, *if attributable to the assisting State*, would have constituted a breach of its own international obligations."[148] In addition to grounding third-party complicity in human rights violations, this approach arguably entails that complicity in a PM-breach—for instance through weapons transfers supporting offensive operations in Rafah that threaten Palestinians' rights under the Genocide Convention—would hinge on whether the assisting state, if it were in Israel's position in terms of conduct and circumstances, would be bound by the relevant orders. For states that have accepted the ICJ's Genocide Convention jurisdiction, this counterfactual approach could imply that materially and knowingly assisting a PM-breach would implicate Article 16.[149]

If the counterfactual approach prevails, states may incur secondary <10>ARSIWA<10> responsibility for assisting a PM-breach as such. Even if the more restrictive interpretation prevails, an assisting third state could still incur responsibility if the order relayed an underlying obligation shared by both states and the PM-breach would, by implication, also breach that underlying obligation.[150] We turn to that possibility next.

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[144] GA Res. 67/234, Arms Trade Treaty, Art. 6(3), *at* https://ihl-databases.icrc.org/en/ihl-treaties/att-2013. As discussed below, the ATT includes further responsibilities to mitigate the risk of violations when they "could" occur and to avoid contributing when the remaining risk is "overriding" [hereinafter ATT].

[145] <8>ARSIWA<8>, *supra* note 125.

[146] ICJ Statute, Art. 59.

[147] The ILC, Articles on State Responsibility Commentary includes "material aid to a State that uses the aid to commit human rights violations" under Article 16. <8>ARSIWA<8>, *supra* note 125, at 67. On human rights territoriality, see MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2011).

[148] <8>ARSIWA<8>, *supra* note 125, at 66, para. 6 (emphasis added).

[149] The analogy to human rights complicity and the issue of territoriality warrants caution since the commitment to comply with provisional measures might be argued to be contingent on having the opportunity to participate as a litigating party in the obligation-generating process (the PM hearing).

[150] Analogously, state A would ordinarily not be complicit for aiding state B breach a bilateral treaty to which A is not party. However, complicity might obtain if that bilateral treaty codified pre-existing *erga omnes* obligations.

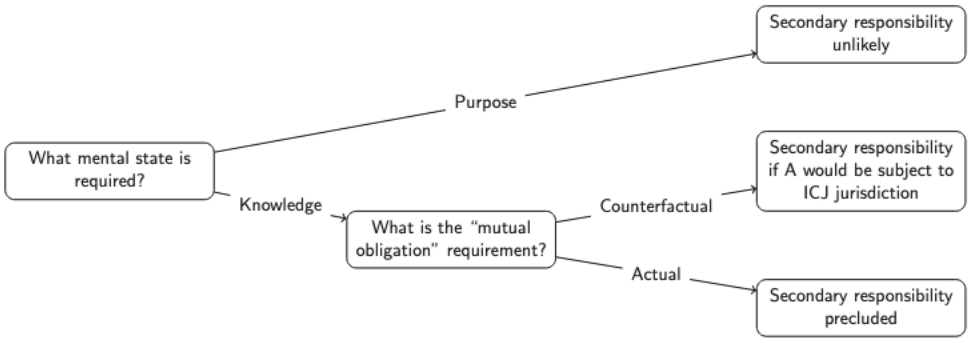

Figure 1: ICJ Provisional Measures Orders & Secondary ARSIWA Responsibility

Example: State A assists Israel in breaching an ICJ Provisional Measures Order, for instance, by sending weapons to be used in a Rafah offensive that threatens Palestinians' rights under the Genocide Convention. Does state A incur secondary responsibility for assisting in an internationally wrongful act under Article 16 ARSIWA?

B. Provisional Measures and Genocide Complicity and Prevention

Ordering provisional measures, the ICJ can either create new independent obligations, or relate pre-existing obligations (see Figure 2). [151] In the latter case, PM orders could inform how states that share these pre-existing obligations must discharge them. Do the Gaza PM orders for instance bear on third states' risk of complicity in genocide (rather than complicity in any PM-breach)? The ICJ's third order demanded, among other things, that Israel: "Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part."[152] As an independent obligation to halt a specific military operation in a specific context, this demand would not bear on how third states discharge their obligations under the Genocide Convention. But that the order created an independent obligation is debatable.

Judge ad hoc Barak in his Dissenting Opinion interpreted the "halt" order as merely "reaffirming" Israel's prior obligation not to violate the Genocide Convention. The order indeed demands several times that Israel must act "in conformity with its obligations under the Convention."[153] Barak states that "even without an order issued by the Court, a military offensive that may result in a violation of a State's obligations under the Genocide Convention would have to stop."[154] By attaching the order's "halt" requirement to pre-existing obligations, Barak's

[151] The ICJ has affirmed that provisional measures orders "bind the parties *independently* of the factual or legal situation which the provisional measure in question aims to preserve." Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Judgment, 391 (ICJ Jan. 31, 2024); *see also* Dai Tamada, *Still Valid: Provisional Measures in* Ukraine v. Russia (Allegations of Genocide), EJIL:*Talk!* (Mar. 15, 2024); Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 ICJ Rep. 159, para. 8 (Apr. 20).

[152] ICJ, Gaza PM III, *supra* note 104, para. 50.

[153] *Id.*

[154] *Id.*, para. 1 (diss. op., Barak, J.).

interpretation supports the notion that the order could in principle have implications for third states assisting Israel in offensive operations in Rafah. However, for him, the Court's order amounted to a redundant restatement of the law—the "halt" requirement conditional on whether the offensive in fact would violate the Genocide Convention, which third states would have to determine for themselves when assessing their complicity risk.

A third interpretation of the order is that the Court concretized a pre-existing obligation not to engage in military operations "which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part," and identified the Rafah offensive as such an operation.[155] If this is correct, then, actualizing law's *ex ante* function, the ICJ's order arguably specified Israel's pre-existing obligations into an action-guiding demand to halt offensive operations in Rafah. That demand would not *itself bind* third states. However, might the concretization of Israel's duties *inform* third states that share the obligation under the Genocide Convention?

Here the question arises whether the ICJ has the capacity to illuminate how states not directly bound by its pronouncements must discharge their existing international obligations in a specific context. We believe so. Although not a specialized factfinder, the ICJ has distinct epistemic advantages that warrant presumptive deference, most obviously because it is presented with available evidence by competing litigants, including the evidence most favorable to the party against which a decision is issued. Moreover, as manifest in its advisory opinions, the ICJ has a general competence to apply and concretize international law in an authoritative, if non-binding, way.[156]

Of course, to the extent that an order's relevance for third-party evaluation and response hinges on its role in concretizing pre-existing obligations, its usefulness depends on its determinacy. Ambiguity, while "constructive" in building consensus, weakens action-guidance and epistemic value for third-party evaluation.[157] Recall here the contestability of whether the Court identified a risk to Palestinians' rights not to be harmed by Israel with genocidal intent or whether it diagnosed a risk of group destruction, while bracketing intent. At the *accountability* stage, where Article 16 operates, the Court has identified knowledge of genocidal intent as a condition of complicity.[158] If the ICJ's provisional measures orders have bracketed intent, their epistemic value to third states to assess their complicity-risk is limited. Conversely, if the Court has identified a real risk of genocidal intent through its orders, this would be an important, though not sufficient, contribution to third states' *knowledge* of that intent.

A state's duty to *prevent* genocide, meanwhile, is implicated when it "was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed."[159] If the Court's orders implied a risk that Israel is acting with special intent (because Palestinians' rights under the Genocide Convention are rights not to be harmed with special intent), the orders incontestably implicate third states' prevention duties. The latter "arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be

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[155] Surveying interpretations of this clause, see Juliette McIntyre, *Consensus, at What Cost?*, VERFASSUNGSBLOG (May 25, 2024).

[156] Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean, Case No. 28, paras. 202–06 (<8>ITLOS<8> Jan. 28, 2021).

[157] McIntyre, *supra* note 155.

[158] ICJ, Bosnian Genocide, *supra* note 113, paras. 419, 421, 432.

[159] *Id.*, para. 432.

committed,"[160] so by January 26, 2024.[161] On the alternative interpretation, the Court bracketed special intent and declared that Israel's actions, specifically continued deprivation (second and third order) and the military offensive in Rafah (third order), risk group destruction. Here, although the implications for third states' duties are, in principle, more contestable, we suggest they remain significant. Why?

The intent-bracketing reading of the orders indicates that the Court deemed it appropriate to cast an objective risk of group destruction (possibly without genocidal intent) as a risk of irreparable prejudice to the Palestinians' rights under the Genocide Convention. As argued above, this could itself be framed in terms of functional differentiation, with the Court—at the provisional measures stage—acting in the paradigm of action guidance, not accountability. Third states' obligation to prevent genocide arguably operates in a similar paradigm, geared toward the same purpose of preventing irreparable prejudice to the right not to be subjected to group destruction through violations of the Genocide Convention. A teleological interpretation might therefore indicate that facts that trigger provisional measures also trigger third states' preventive obligations. Just as provisional measures orders do not prejudge the merits, a third state may fail to act preventively as required by the Genocide Convention, and yet, by chance, avoid a violation at the accountability stage, where state responsibility even for a preventive failure would materialize only if the principal "actually committed" genocide, with the requisite intent.[162]

Of course, genocide lends itself to "bracketing" intent in real-time evaluation. As the underlying conduct would ordinarily be illegal (likely criminal) absent genocidal intent, the risk that low-threshold third-state prevention duties (or PM orders) would undermine *lawful* action is minimal. Whether a similar bracketing of intent in service of functional differentiation could work in shaping third-state duties vis-à-vis principal-state conduct that is closer to the line of legality may be contested. And yet third-state duties to avoid the risk of contributing to violations *are* more broadly applicable in war. We next turn to another set of obligations for which the ICJ's provisional measures could modify third states' epistemic environment.

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[160] *Id.*, para. 431.

[161] Yussef Al Tamimi, *Implications of the ICJ Order* (South Africa v. Israel) *for Third States*, EJIL:*Talk!* (Feb. 6, 2024); Jinan Bastaki, *The ICJ's Provisional Orders Measures and the Responsibility of Third States*, Opinio Juris (Feb. 5, 2024).

[162] ICJ, Bosnian Genocide, *supra* note 113, para. 431.

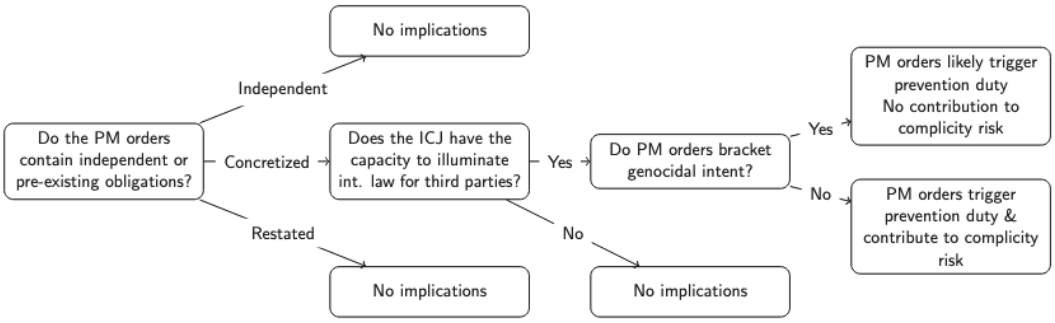

Figure 2: ICJ Provisional Measures Orders & Genocide Complicity/Prevention

Note: Do the ICJ orders in *South Africa v. Israel* affect the epistemic environment in which third states discharge their obligations under the Genocide Convention?

C. Provisional Measures and Third States' Obligations Under IHL

States have an obligation "to ensure respect" for IHL under Common Article 1 of the Geneva Conventions and customary law. Per the updated ICRC Commentary, this requires states "to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions."[163] In a similar vein, parties to the Arms Trade Treaty may not transfer weapons that "could facilitate" a serious IHL or human rights violation if, following mitigating measures (or the consideration thereof), an "overriding risk" of such violation remains.[164] The question in relation to the ICJ's orders is whether "a real and imminent risk" to rights protected under the Genocide Convention (the provisional measures threshold) implies a "clear" or "overriding" risk of IHL violations.[165] The rules are primarily action-guiding and have been invoked in multiple tranches of ongoing litigation across several states not for the purpose of accountability, but to stop arms transfers.[166]

Is it possible that IHL-compliant acts may pose a real and imminent risk of genocide or group destruction? This claim may be likely to be invoked in conjunction with a charge that the adversary inflates that risk through the systematic use of human shields. Although it is conceivable in theory that perpetrators act with the purpose to destroy a group but (1) direct their efforts only against group members who are targetable under IHL, or (2) pursue that end through IHL-

[163] ICRC, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK ARMED IN FORCES IN THE FIELD, para. 162 (Jean-Marie Henckaerts et al. eds., 2016).

[164] ATT, *supra* note 144, Art. 7(1–3).

[165] ICRC, ARMS TRANSFER DECISIONS: APPLYING INTERNATIONAL HUMANITARIAN LAW CRITERIA 3, at 8–9 (2007).

[166] Vladyslav Lanovoy, *Arms Transfers to Israel: Knowledge and Risk of Violations of International Law*, JUST SECURITY (Apr. 17, 2024).

compliant conduct in densely populated areas,[167] an IHL-compliant genocide, including the genocidal intent implied in the first interpretation of the orders, is difficult to credit as a practical possibility. In Gaza, ICJ orders related not anomalous scenarios of genocidal purpose with little impact on the protected group. Instead, the Court diagnosed a risk to Palestinians' rights under the Genocide Convention due to "famine and starvation,"[168] "the forcible displacement of the vast majority of the population, and extensive damage to civilian infrastructure."[169]

Even on the second interpretation, according to which the ICJ bracketed intent and "merely" diagnosed a real and imminent risk of partial or whole group destruction, the orders have clear implications for third states' duties under Common Article 1 and the Arms Trade Treaty: grave IHL violations, such as starvation, indiscriminate attacks, and forcible displacement, are the non-contingent reality of threats to the survival of protected groups in war.[170] As states grapple with how to evaluate an armed conflict in real time it would violate their due diligence duties to ignore the systematic connections between group destruction, genocide, and violations of IHL for the sake of honoring either (i) the doctrinal possibility that violations of the Genocide Convention do not also violate the Geneva Conventions or (ii) the empirical possibility that Israel poses "a real and imminent risk" of (partial) destruction to the Palestinians in Gaza without violating IHL. In this overtly action-guiding aspect of international law, the ICJ's orders provide a key focal point for third-state evaluation and response.

[167] Linking genocide, torture, and mass killing to the same individual level variables, see Ervin Staub, *Moral Exclusion, Personal Goal Theory, And Extreme Destructiveness*, 46 J. SOC. ISSUES 47 (1990).

[168] ICJ, Gaza PM II, *supra* note 103, para. 11.

[169] ICJ, Gaza PM I, *supra* note 100, para. 46.

[170] Martin Shaw has shown that "a very fine line" separates mass destruction of civilian populations and genocide, see MARTIN SHAW, WAR AND GENOCIDE: ORGANISED KILLING IN MODERN SOCIETY (2003).

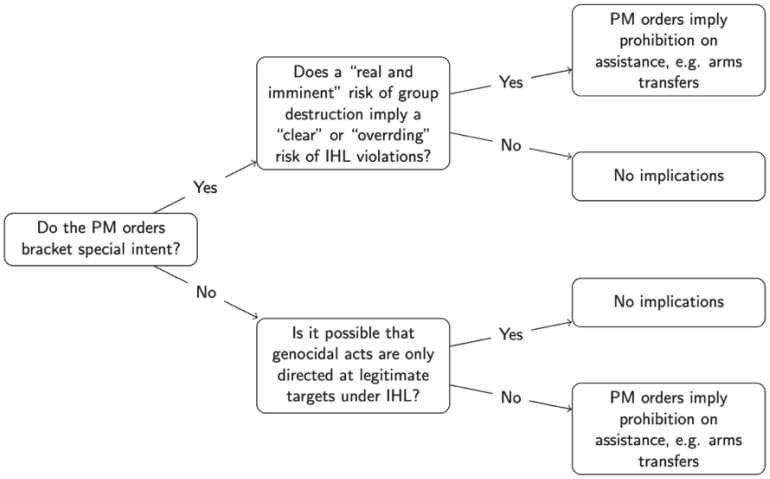

Figure 3: ICJ Provisional Measures Orders & Third States' Obligations under IHL

Note: Provided the ICJ has the capacity to illuminate international law for third parties, do the ICJ orders in *South Africa v. Israel* affect the epistemic environment in which third states discharge their primary obligation to ensure respect for IHL and obligations under the Arms Trade Treaty?

Conclusion

Current developments in Gaza, where Israel's systematic compliance claim collides with catastrophic civilian harm, create doctrinal pressure on concepts and frameworks that permit international law to discharge its *ex ante* action-guiding and concurrent evaluative functions. Establishing belligerent intent is a critical, but misunderstood, challenge. Where available, courts' provisional products can provide a key epistemic resource in real-time legal assessments of war.

Concretely, we argued that doctrinal confusion obscures prohibited intent in Israel's conduct of hostilities and siege. The relevant violations do not require purposively bringing about prohibited consequences such as dead or starved civilians. When not unduly shaped by standards developed for law's accountability function, an application of *lex lata* in real time demands that Israel change course and third states suspend material assistance. Notably, UK Foreign Secretary David Lammy recently distinguished his government's decision to suspend the licensing of certain arms exports to Israel from the future accountability work of international courts.[171] Meanwhile, the ICJ's provisional orders contribute critically to third states' awareness of risks sufficient to trigger their IHL obligation to act now rather than defer to law's accountability function.

Regarding the allegation of genocide, developments in Gaza spotlight doctrinal questions that should be resolved with due regard to differentiating accountability from action-guidance and concurrent evaluation. Specifically, we argued that before and during a risk of (partial) group destruction, bracketing genocidal intent in the inference of a genocide risk may be appropriate

[171] UK policy on arms export licenses to Israel: Foreign Secretary's Statement, House of Commons (Sept. 2, 2024).

when the ICJ issues provisional measures, the primary state evaluates its own officials' conduct, and third states discharge their prevention duty. Direct intent is exceedingly difficult to infer in real time. Law's functionality in inhibiting wrongful conduct must not be sacrificed for standards developed to safeguard due process and track blameworthiness in law's accountability function. In some legal contexts, lowering inferential (or substantive) intent standards *ex ante* may carry the risk that an agent is inhibited or unsupported in what would be legally permissible (morally desirable) conduct. This is not the case when conduct poses a real and imminent risk of group destruction.

Finally, we argued that ICJ provisional measures can in principle clarify the *ex ante* and concurrent obligations of parties not directly bound by them. However, several open doctrinal and interpretive questions condition the third-party implications of the *South Africa v. Israel* orders. One pervasive danger is that third parties—rather than drawing on provisional court orders as epistemic resources or seeking to undertake rigorous IHL risk assessments themselves—will rely instead on the perceived or imputed character of the belligerent. Current developments in Gaza show that this guarantees contradictory inferences and the functional infirmity of international law as a restraining force in real time. To presume that a party complies with international law, for instance because it is a democracy,[172] is not only to ignore the empirical record. It is also inimical to the idea of law and thus an existential threat to the primary mechanism available to limit the horrors of war and mass violence.

[172] Chancellor Olaf Scholz quoted in Stefan Talmond, *Germany Takes Ostrich Approach to Israel's IHL Violations in the Gaza War*, GER. PRAC. INT'L L. (Apr. 7, 2024).