Panel 2: Fighting Legal Wars and Fighting Wars Legally: The Future of Jus ad Bellum and its relationship to Jus in Bello

CLE Reading Material:

- A Blurring of Lines: The Jus ad Bellum Past, Present, and Future; Francis Grimal and Michael J. Pollard, Journal on the Use of Force and International Law; Vol 11(1-2) 2024

- Fighting an Illegal War and Fighting a War Illegally: the Link Between Regime Change Operations and International Humanitarian Law Violations; Gabor Rona, Just Security 2026
    - https://www.justsecurity.org/134514/fighting-illegal-war-fighting-war-illegally-regime-change-ihl/

- Might Unmakes Right: The Catastrophic Collapse of Norms Against the Use of Force, Oona A. Hathaway & Scott J. Shapiro, Foreign Aff., July/Aug. 2025, at 10
  https://www.foreignaffairs.com/united-states/might-unmakes-right-hathaway-shapiro

- International Law in Gaza: Belligerent Intent and Provisional Measures, Tom Dannenbaum and Janina Dill, American Journal of International Law , Volume 118 , Issue 4 , October 2024 , pp. 659 - 683



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Journal on the Use of Force and International Law

ISSN: 2053-1702 (Print) 2053-1710 (Online) Journal homepage: www.tandfonline.com/journals/rjuf20

A Blurring of Lines: The *Jus ad Bellum* Past, Present, and Future

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To cite this article: Francis Grimal & Michael J. Pollard (2024) A Blurring of Lines: The *Jus ad Bellum* Past, Present, and Future, Journal on the Use of Force and International Law, 11:1-2, 4-15, DOI: 10.1080/20531702.2024.2416336

To link to this article: https://doi.org/10.1080/20531702.2024.2416336

Published online: 09 Dec 2024.

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JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW
2024, VOL. 11, NOS. 1–2, 4–15
https://doi.org/10.1080/20531702.2024.2416336

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EDITORIAL

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A Blurring of Lines: The *Jus ad Bellum* Past, Present, and Future

1. Introduction

As readers will no doubt be aware, this Journal has always, and will continue to focus, on issues at the very heart of any *ad bellum* discussion. As the JUFIL team notes in both the introduction and specifically in this editorial, discussions on the *ad bellum* (both present and future) are likely to become even more connected (owing to the nature of current and future armed conflicts) between the *ad bellum*, *in bello*, and even *post bellum*. Though of course, the *ad bellum* and the *in bello* are generally considered as two distinct legal regimes,[1] the separation is arguably relatively recent.[2]

Nonetheless, on the one hand, the *ad bellum* provides the conditions which determine the lawfulness,[3] *inter alia*, of a state's response in self-defence against an imminent threat or use of force which amounts to the

[1]For a classis discussion supporting the separation of the *ad bellum* and the *in bello* see, Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 4th edn 2022) <https://www.cambridge.org/core/product/identifier/9781009106191/type/book> accessed 5 September 2024. And for further comment, see e.g., Kubo Mačák, 'In Honor of Yoram Dinstein - The Separation Between the Jus in Bello and the Jus Ad Bellum' (*Lieber Institute West Point*, 10 May 2024) <https://lieber.westpoint.edu/separation-between-jus-in-bello-jus-ad-bellum/> accessed 4 September 2024. It is perhaps somewhat interesting to note the latter authors concluding remarks that 'the separation between these two bodies of international law is less of an impenetrable wall and more of a semi-transparent membrane'.

[2]'Jus Ad Bellum and Jus in Bello | ICRC' (28 July 2014) <https://www.icrc.org/en/law-and-policy/jus-ad-bellum-and-jus-bello> accessed 5 September 2024. See in particular para. 2, which states 'The terms did not become common in debates and writings about the law of war until a decade after World War II. The concepts they cover certainly featured in legal debate before then, but without the clear distinction the adoption of these terms has provided.'

[3]See e.g., Arts. 2(3), 2(4), 42 and 51 Charter of the United Nations 1945 (1 UNTS XVI). Though most readers will of course be immediately mindful of, Art. 2(3) UN Charter provides the following positive duty, 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.' Whereas, Art. 2(4) provides the following negative prohibition, 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. For completeness, Art. 42 provides the following 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations'. And, Art 51, 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

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qualitatively grave threshold as required by *Nicaragua*.[4] While on the other, the *in bello* provides, *inter alia*, a set of rules which govern the behaviour of individuals during an armed conflict.[5] Indeed, one might reasonably posit (in the context of this editorial comment) that the *ad bellum* determines the lawfulness of a state's overall response when resorting to force (e.g. in the lawful exercise of self-defence or collective security authorisation by the United Nations Security Council), while the *in bello* determines the lawfulness of individual acts/attacks within an armed conflict.[6]

However, while this all appears very neat and tidy, it does not represent real world reality. Indeed, the intersect between the *ad bellum* and the *in bello* has been referred to as a murky corner of international law for many years now,[7] and recent conflicts (not least those in Ukraine and Gaza[8]) have done little to clarify exactly how we should understand the relationship.[9] A primary issue here (though the authors do not wish to conflate *ad bellum* or *in bello* considerations) is that long after the *in bello* has been 'activated', states and observers continue to use the language of the *ad bellum*, particularly in relation to the right of 'self-defence'. One might consider, for example, the current language of the newly elected British government —in August (2024), Defence Secretary Luke Pollard referred to Ukraine's *continuing* right to defend itself over two years into Ukraine's armed

[4] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America); Merits* (I.C.J) (1986) para. 191. See also, *Oil Platforms (Islamic Republic of Iran v U.S.) Merits, Judgment* (2003) (I.C.J). Rep 161, para. 51. For commentary see e.g., Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Repr, Hart 2012). Also, Avra Constantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the United Nations Charter /Avra Constantinou* (Sakkoulas [u.a] 2000).More recently see, James A Green, *Collective Self-Defence in International Law* (Cambridge University Press 2024). As Green further notes, It is possible for an aggressor to perpetrate an unlawful use of force against another state that falls short of the required level of gravity to amount to an armed attack, meaning that the attacked party is unable to defend itself (or request that other states do so collectively), pp 104. See also, Chiara Redaelli, *Intervention in Civil Wars: Effectiveness, Legitimacy, and Human Rights* (Hart, Paperback edition 2022).

[5] 'Rules of War: Why They Matter? | ICRC' (11 August 2021) <https://www.icrc.org/en/document/rules-war-why-they-matter> accessed 3 September 2024.

[6] 'Jus Ad Bellum and Jus in Bello | ICRC' (n 2).

[7] K Okimoto, 'The Cumulative Requirements of Jus Ad Bellum and Jus in Bello in the Context of Self-Defense' (2012) 11 *Chinese Journal of International Law* 45. See also, Mačák (n 1). Here, the author cites a further work (Theodor Meron, *Henry's Wars and Shakespeare's Laws Perspectives on the Law of War in the Later Middle Ages* (Oxford University Press 1993) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198258117.001.0001/acprof-9780198258117> accessed 5 September 2024.) which identifies that similar discussions are in fact centuries old, despite the separation being relatively recent (n 2).

[8] Here the authors refer specifically to the continuing military action in Ukraine which has followed Russia's 22 February 2022 invasion, and the ongoing Israeli military action in Gaza in response to the 7 October 2023 'coordinated, complex attack on Israeli civilian communities' carried out by Hamas. See, 'Detailed Findings on Attacks Carried out on and after 7 October 2023 in Israel' (Human Rights Council 2024) Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel A/HRC/56/CRP.3.

[9] See also e.g., Marco Sassòli, 'In Honor of Yoram Dinstein - Will the Separation Between Jus Ad Bellum and Jus in Bello Survive the Conflicts in Ukraine and Gaza?' (*Lieber Institute West Point*, 26 April 2024) <https://lieber.westpoint.edu/will-separation-between-jus-ad-bellum-jus-in-bello-survive-conflicts-ukraine-gaza/> accessed 4 September 2024.

conflict with Russia.[10] Similarly, Prime Minister Keir Starmer made comments during his conference speech in Berlin (28 August 2024) regarding Israel's right of self-defence—nearly a year after the ongoing military operation in Gaza commenced.[11]

It is this continuing uncertainty (as to where the *ad bellum* ends and the *in bello* 'takes over'), that often necessitates the concurrent application of both legal specialities—arguably blurring the fault-lines between both regimes.[12] The purpose of this editorial comment within this broader discussions to centre the attention around the more niche but highly poignant issue of civilians directly participating in hostilities (DPH)—and the implications of this *in bello* discussion for the *ad bellum*. The authors will also consider similar *in bello* to *ad bellum* consequences in regard to *levée en masse*—asking whether there is a sliding scale/threshold ranging from isolated instances of DPH, to more concerted efforts of resistance, and then instances that would qualify as an all-out *levée en masse*.[13] The authors note that the latter (*levée en masse*) has attracted some scholarly scrutiny in relation to the possible interweave with *ad bellum* self-defence.[14] The authors' unique take on the interweave, is the way in which one would factor (within an overall *ad bellum* calculation) the nature and depth of the *levée en masse*—in other words, if the *levée* is so significant, how ought that to be accounted for in necessity and proportionality *ad bellum* calculations? This editorial comment commences its analysis of the interweave by first addressing the *in bello* concept of DPH, and in particular the use of civilian objects in armed conflict (such as unmanned aerial vehicles UAV/drones). Secondly, they expand the analysis to account for civilian uprisings by way of *levée en masse*, in both instances reflecting upon the *ad bellum* implications.

2. Direct Participation in Hostilities

It is well documented that civilians are participating in hostilities either directly (by choosing to fight) or indirectly (in any number of ways

[10]See e.g., George Allison, 'UK Reaffirms Policy on Storm Shadow Missiles for Ukraine' (28 July 2024) <https://ukdefencejournal.org.uk/uk-reaffirms-policy-on-storm-shadow-missiles-for-ukraine/> accessed 3 September 2024.

[11]'Prime Minister's Conference Speech in Berlin: 28 August 2024' (*GOV.UK*, 28 August 2024) <https://www.gov.uk/government/speeches/prime-ministers-conference-speech-in-berlin-28-august-2024> accessed 3 September 2024.

[12]Here see e.g., Raphaël van Steenberghe, 'Proportionality under Jus Ad Bellum and Jus in Bello: Clarifying Their Relationship' (2012) 45 Israel Law Review 107. Here, for example, the author notes, it often 'becomes impossible to distinguish between the military operation as a whole and the individual military attacks undertaken during this operation'.

[13]Noting the concept of direct participation is considered in greater detail in part 2, and *levée en masse* in part 3.

[14]See e.g., Marco Sassòli and Lizaveta Tarasevich, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing, 2nd edn 2024). Also see e.g., Paola Gaeta, Jorge E Viñuales and Salvatore Zappalà, '17. Legal Restraints on Violence in Armed Conflict' in *Cassese's International Law* (OUP 2020).

including, for example, by providing funding to a militant armed group).[15] What is much less well defined in contemporary literature, however, is the status of civilian objects within the context of DPH.[16] The present authors have somewhat controversially questioned whether (under the *in bello*) the concept of civilian participation should be limited solely to human participation.[17] Somewhat less controversially(!), the authors have also questioned the role of civilian objects within the realm of DPH, and it is on this point that the authors wish to direct their attention for present purposes.

This general unease surrounding categorisation is straining upon the *in bello*, not least because in contemporary conflict it can be extremely difficult to determine who or indeed what can (or cannot) be lawfully targeted. Moreover, there is a question within the specific realm of DPH. Do resistance actions by civilians or civilian objects (in an *in bello* sense) get calculated within the overall *ad bellum* calculation of self-defence? And if not, should they?

A further blurring of lines within armed conflict is a more recent occurrence. And here, it is civilian objects that are the primary focus of this editorial comment (rather than civilians themselves). The point here is, that parties to a conflict (whether it be the state or civilians) are now, perhaps more than ever, seeking to adapt civilian technology for military purposes in order to defend themselves (e.g. via DPH or a full-on *levée*). Such technology could currently include Artificial Intelligence (AI), robotic and cyber systems.[18] Indeed, one wonders how many readers (including the authors of this editorial comment …) have previously questioned how long it would take before an assault rifle was bolted to the top of a Boston Dynamics (or similar) quadruped robot-dog.[19] And, this trend of cross-pollinating technology is likely to continue in the future as we see the world's militaries start to adapt technology that was initially developed solely for civilian purposes.

A useful and pertinent example of this polarisation/blurring of lines (between civilian and military technology, and between the *ad bellum* and the *in bello*) can be seen in Ukraine. In the first instance for example, it is

[15]Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (International Committee of the Red Cross 2009).

[16]For further discussion however, see generally, Francis Grimal and Michael Pollard, '"Embodied AI" and the Direct Participation in Hostilities: A Legal Analysis' (2020) 51 *Georgetown Journal of International Law* 513.

[17]*Ibid*.

[18]See e.g., the following report which outlines some of the areas of potential technological cross-over; Claire Mills, 'Emerging and Disruptive Defence Technologies' (House of Commons 2023) Research Briefing <https://researchbriefings.files.parliament.uk/documents/CBP-9184/CBP-9184.pdf>.

[19]'Let Slip the Robot Dogs of War | WIRED' <https://www.wired.com/story/let-slip-the-robot-dogs-of-war/> accessed 5 September 2024.

undeniable that in the initial stages of the conflict at least, Ukrainian citizens were in some way participating in hostilities[20]—noting such discussions were very much limited to individual participation rather than object participation. Nonetheless, before delving into our concerns relating to civilian objects, it may be useful to restate the current test that is generally used to determine whether 'someone' (and potentially 'something') is directly participating in hostilities.

Any discussion regarding civilian participation must of course begin with Article 51(3) API which states, '[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'.[21] In short, this means that while the principle of distinction[22] prohibits direct attacks upon civilians and civilian objects (noting that doing so intentionally may constitute a war crime[23]), this right is forfeited where *they* become (perhaps *it* becomes) directly involved in military action. Having said that, it is still somewhat unclear as to what constitutes 'direct' participation. According to the ICRC,

> In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: 1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on per-sons or objects protected against direct attack (threshold of harm), and; 2. there must be a direct causal link between the act and the harm likely to result either form the act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[24]

[20]There have been numerous documented instances of Ukrainian civilians participating in hostilities during the conflict with Russia, especially since the start of the ongoing military operation in Ukraine. See e.g., Russell Buchan, 'Ukranian "IT Army": A Cyber Levée En Masse or Civilians Directly Participating in Hostilities?' (*EJIL: Talk!*, 9 March 2022) <https://www.ejiltalk.org/ukranian-it-army-a-cyber-levee-en-masse-or-civilians-directly-participating-in-hostilities/> accessed 5 September 2024. Also see, Emily Crawford, 'Armed Ukrainian Citizens: Direct Participation in Hostilities, Levée En Masse, or Something Else?' (*EJIL: Talk!*, 1 March 2022) <https://www.ejiltalk.org/armed-ukrainian-citizens-direct-participation-in-hostilities-levee-en-masse-or-something-else/> accessed 5 September 2024.

[21]Art. 51(3), International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 UNTS 3, 8 June 1977 (hereinafter API).

[22]Art 48 API. The principle of distinction is also widely believed to have a customary nature. See e.g., 'The Principle of Distinction between Civilians and Combatants' <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1#Fn_3E28356C_00008> accessed 5 September 2024.

[23]N.B. 'Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities constitutes a war crime in international armed conflicts'. See n 22 and, Art. 8(2)(b)(i) *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998 (hereinafter Rome Statute). Also note, *Prosecutor v. Galic, Case No. IT-98-29-T, Judgment and Opinion*, (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003). This supports the principle that intentionally targeting civilians could constitute a war crime but noting that not all attacks on civilians will necessarily constitute a war crime given that there is a requirement for intent.

[24]Melzer (n 15).

While the ICRCs test above has been hugely influential, it is not without its critics.[25] Schmitt and Boothby, for example, were instrumental in providing initial clarification on a number of issues, not least in challenging the ICRC's claim that there must be a presumption of civilian status when it is not clear whether 'someone' is directly participating (or not).[26] As previously noted, we wish to use this space to transfer this line of reasoning across to civilian objects, which to date, have generally been neglected within discussions—on the basis that commentators (other than perhaps present company accepted) had not envisaged the possibility that civilian objects might at some stage (owing to future technological developments) be capable of 'participation'.

In case our *ad bellum* readers are suffering with an *in bello* overload at this stage, the authors appreciate the readers continued patience—as soon as we have finalised the *in bello* discussion on DPH we will return to more familiar pastures. With DPH firmly in mind, however, the question regarding object participation is reposited. In their previous investigation the present authors imagined object participation would only be possible with advanced future technology such as an autonomous humanoid robot.[27] However, it is fair to say that this examination is ever more pressing because it is now directly applicable to civilian drones (e.g. those made and marketed by the leading Chinese company, DJI[28]), which have been widely used by both Russian and Ukrainian forces during the present conflict.[29]

By way of a brief recap, combatants (during an armed conflict) are under a strict obligation to positively identify a military target.[30] Where there is doubt as to the status of a target (civilian or military), the targeteer must presume it is civilian and refrain from attack.[31] As noted, the ICRC argues that, where there is doubt as to whether 'someone' is directly participating in hostilities, the presumption of civilian status is transferred. However, Schmitt,[32] Boothby,[33] and the present authors[34] have argued that this cannot be the case (with the law remaining silent)—not least because it places an unfair burden upon the combatant. Indeed, this is supported

[25]See generally, Michael Schmitt, 'Deconstructing Direct Participation in Hostilties: The Constitutive Elements' (2010) 42 *New York University Journal of International Law and Politics* 679. Also see, William Boothby, 'Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance' (2010) 1 *Journal of International Humanitarian Legal Studies* 143.
[26]Melzer (n 15).
[27]Grimal and Pollard (n 16).
[28]For a discussion see e.g., David Hambling, 'DJI's New Drone Could Change War —But It's Not Supposed To Be A Weapon' (*Forbes*) <https://www.forbes.com/sites/davidhambling/2024/01/16/djis-new-drone-could-change-war--but-its-not-supposed-to-be-a-weapon/> accessed 5 September 2024.
[29]See ibid and e.g., Elisabeth Gosselin-Malo, 'Ukraine Continues to Snap up Chinese DJI Drones for Its Defense' (*C4ISRNet*, 23 October 2023) <https://www.c4isrnet.com/global/europe/2023/10/23/ukraine-continues-to-snap-up-chinese-dji-drones-for-its-defense/> accessed 5 September 2024.
[30]Art. 52(2) API (n 21).
[31]*Ibid*.
[32]Schmitt (n 25).
[33]Boothby (n 25).
[34]Grimal and Pollard (n 16).

with a further counter argument that the vast majority of civilians are likely to want to make it abundantly clear that they are not in any way involved in any military action—not least to ensure they maintain their protection against direct attack.[35] To date, this difference of opinion has largely remained moot— given that in reality a combatant is likely (as argued by Schmitt and Boothby) to consider whether someone is directly participating on a case-by-case basis (as opposed to there being an absolute rule).

Current practice in Ukraine, however, appears to provide unwavering support for the case-by-case argument (supporting, *inter alia*, Schmitt and Boothby's position). Here, the present authors go one stage further: contending that not only should there be a case-by-case application and assessment of DPH, but that this now *must* also be extended to civilian objects. This is because it is now patently clear that civilian objects are being utilised for military purposes (i.e. drones), leading to situations where the drone itself should be seen as participating, especially because it may be acutely difficult to positively identify the operator/pilot.[36] And indeed, with current technology at least, it would be problematic for the civilian object to communicate its status. Moreover, the authors also take this opportunity to raise the speculative question as to whether the use of a technologically advanced civilian object under military guise could be considered as perfidious[37] —noting this is currently being explored by the present authors' elsewhere—a question we will address at a later date.

The primary point for present purposes though, is, how could one expect a Ukrainian or Russian combatant to refrain from targeting a DJI civilian marketed drone that they suspect is being used by the opposing side? There authors note the difficulties faced by a combatant in assessing, for example, whether a drone is capable of something more than straightforward surveillance. In such circumstances (applying the ICRC argument in favour of the presumption of civilian status) arguably imposes a wildly inequitable burden upon the combatant. For example, the ICRC would require that one or more human lives must be put at risk to ensure a $100 drone is not mistakenly/unlawfully targeted. If the ICRC are indeed mistaken in regard of the presumption of civilian status for objects, the present authors maintain it stands to reason this should be the case for civilians too.

[35] E.g., Art. 48 API (n 22).
[36] E.g., Art. 52(2) API (n 30).
[37] Art. 37(1) defines Perfidy, which provides, 'It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy: (a) the feigning of an intent to negotiate under a flag of truce or of a surrender; (b) the feigning of an incapacitation by wounds or sickness; (c) the feigning of civilian, non-combatant status; and (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict. See also ICRC customary rule 65 <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule65#Fn_56A2126F_00002> accessed 5 September 2024.

Conscious of the *ad bellum* readership, we now bring the concept of civilian object DPH full circle and question how a state (that has knowledge that its civilians are using drones for the purpose of defending their 'motherland' against an invader), transposes that *in bello* consideration back into the *ad bellum*. In other words, how does one operationalise and calculate *ad bellum* necessity and proportionality when factoring in defensive actions by DPH. Here it is perhaps fair to argue, that an isolated occurrence of DPH (via civilian objects) would be harder to quantify and calculate within an overall a*d bellum* calculation that encompasses necessity of last resort and proportionality of abating or repelling an attack.[38]

That is not to say that individual acts in protection of the state are insignificant (in terms of self-defence), but rather under Article 51 UN Charter it is unclear how one could factor them into the overall calculation (though arguably this will perhaps not be impossible if utilising advanced AI). For example, a future 'all-encompassing' system may be in a better position to account for the overall awareness of isolated instances of DPH and therefore could be better placed to provide a real-time assessment of a state's compliance with *ad bellum* necessity and proportionality.

3. Levée en Masse

In direct contrast to isolated incidents of object DPH however, as the authors positioned at the start, it is arguably at the other end of scale/threshold the *ad bellum* becomes much more relevant. For example, should a large number of civilian objects be weaponized and deployed, does/can this constitute a *levée*? In other words, does it have to be humans/civilians that form a *levée en masse*? Moreover, and if so, this still leaves a question as to how *levée* of non-human civilian objects can be reconciled within the overall *ad bellum* calculation of self-defence? While the relationship between *levée en masse* and the *ad bellum* is perhaps not completely unexplored,[39] the authors' novel addition of object participation does most certainly add a previously unidentified element.

The natural starting point for any discussion pertaining to *levée en masse* is Article 4(A)(6) of the Third Geneva Convention (1949),[40] which builds upon the 1907 revised Hague Convention.[41] GCIII defines a *levée en masse* as:

[38] See e.g., Green (n 4).
[39] Sassòli and Tarasevich (n 14). Gaeta, Viñuales and Zappalà (n 14).
[40] Art. 4(A)(6) International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 75 UNTS 135, 12 August 1949 (hereinafter GCIII).
[41] Note that *levée en masse* is not referred to explicitly. Instead, there a general reference to the protection of civilian infrastructure. See e.g., Arts. 23(g) and 56 of the Hague, *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, International Conferences (The Hague), 18 October 1907.

> Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.'[42]

The authors note at this juncture, that the specific correlation between *levée en masse* and the necessity and proportionality requirements of the *ad bellum* has perhaps overlooked some of the very granular and operational inter-calculation. Notably, how does one equate a *levée* within a state's calculation of *ad bellum* self-defence? Typically, the literature has understandably focused on the broader applications of these principles.[43]

Nonetheless, as Boothby notes '[m]embers of a *levée en masse* are civilians who are regarded as belligerents (combatants in modern parlance)', even if their status by this definition is relatively short-lived. The authors note that at this stage there is no reference to civilian objects. However, those 'individuals' who fall under this classification *are* extended combatant privileges including immunity from prosecution for would be crimes such as murder and destruction of property (committed as part of an armed conflict) 'unless such acts constitute war crimes'.[44]

Furthermore, the concept of combatant status/combatant privilege means that participants in a *levée en masse* are afforded certain levels of protection, such as being treated as prisoners of war (POWs) if captured.[45] In somewhat stark contrast to DPH, there is no need to demonstrate belligerent nexus, causation, and threshold of harm (as per ICRC DPH guidelines).[46] Rather, in order to be afforded the protection, those participating in a *levée en masse* must carry arms openly and actively distinguish themselves from civilians, which is of course reminiscent of the test in Article 4(A)(2) GCIII for determining POW status.[47] Should they fail to do so, they are likely to lose their combatant status. Somewhat crucially, if this happens, the individual

[42] Art 4(A)(6)(n 40)

[43] See e.g., Sassòli and Tarasevich (n 14); Gaeta, Viñuales and Zappalà (n 14).

[44] See, 'Immunities' | ICRC <https://casebook.icrc.org/a_to_z/glossary/immunities> accessed 5 September 2024.

[45] See, Article 13 GCIII which provides, (1) Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. (2) Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. (3) Measures of reprisal against prisoners of war are prohibited.

[46] Melzer (n 15), 47.

[47] Art. 4(A)(2) states, Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.

(and perhaps the object) will become an illegal combatant meaning they/it could then be lawfully targeted as a civilian 'DPHing' (thus losing the protections afforded to lawful combatants, such as those noted above).[48]

Ostensibly, there are two key points the authors wish to underline and underscore as part of a mini summary at this stage. First and foremost, the discussion above has highlighted that a *levée en masse* is centred on a human/civilian uprising of sorts. This is something that the authors understand but wish to challenge in light of emerging and future technology—today drones, tomorrow … Secondly, that owing to the breadth and depth of a *levée* cf. limited instances of DPHing a *levée* must be included as a crucial component within the *ad bellum* calculation of necessity and proportionality. It stands to reason that a *levée* must in some way halt, hinder or even repel an attack, even if only briefly, and therefore is a critical component when assessing the state as a whole and its compliance (or not) with Charter and customary norms under Article 51.[49]

The necessity element of self-defence under the *ad bellum* requires that a response to an armed attack is one of last resort i.e. that it is necessary—a state must demonstrate that it has exhausted all non-forcible measures and that a non-forceful response would be wholly unreasonable.[50] The implication of a *levée en masse* (in relation to *ad bellum* necessity) could be evidence to support that a *levée* is a necessary response *par excellence*—a last ditch attempt by the civilian population to defend themselves. However, it may also further support the notion that any military action taken by the state must presumably have reached the very limits of last resort. The point here, is that the inherently spontaneous nature of *levée en masse* must suggest that a state response in self-defence is failing, or has failed (resulting in occupation), which in turn means that civilian participation may be truly the very last line of defence.

A similar trajectory of analysis could be applied to *ad bellum* proportionality. For example, if the circumstances are such that they have triggered the *levée* as a last resort, a *levée* is arguably more likely to remain within the confines of what is acceptable under *ad bellum* proportionality, namely

[48](n 44).

[49]In relation to the customary nature of Art. 51 UN Charter please see, 'Self-Defence | How Does Law Protect in War? - Online Casebook' <https://casebook.icrc.org/a_to_z/glossary/self-defence> accessed 5 September 2024. Also refer to the sources previously noted regarding self-defence more generally (n 3).

[50]Green (n 4). In notes 138, 139 and 140 Green identifies the following applicable literature on the principle of necessity: James A Green, 'Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defence' (2006) 14 *Cardozo Journal of International and Comparative Law* 429, 450. Also, 'James A. Green, *The International Court of Justice and Self-Defence in International Law* (Hart 2009) 80–85; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 95–98. Myra Williamson, *Terrorism, War and International Law The Legality of the Use of Force Against Afghanistan in 2001* (Routledge 2016), 115. Yoram Dinstein, *War, Aggression and Self-Defence:* (6th edn, Cambridge University Press 2017) 249–51.

that the action taken is not excessive to abating or repelling the attack.[51] By the very nature of this response coming from the civilian population, it is currently difficult to imagine instances where a response would be excessive in relation to *ad bellum* proportionality. However, the authors invite the reader to think in more dystopian terms - a rise of the machines (a veritable coalition of civilian objects) may perhaps be a completely different matter altogether.

4. Conclusion

This editorial has highlighted a multidimensional and multifaceted blurring of lines. This is, of course, ever apparent in the grand architecture between the *ad bellum* and *in bello* which has been the primary underlying theme and focus of this comment. However, as has become increasingly clear in the modern era, further polarisation and blurring of lines can be witnessed in many aspects of the *in bello*: between combatants and civilians, and now (as the authors have argued here and elsewhere) between civilian objects and military objects. The butterfly effect of these further blurring of lines (within the minutiae in the *in bello*), is very likely to have repercussions in the *ad bellum*—not least because, as the authors have demonstrated, it is very difficult to identify an absolute hard border between the two regimes.

Despite the authors' conclusion above, namely that isolated instances of DPH would be difficult to quantify in the *ad bellum* for the most part, there could be instances where the damage is so significant in regards to repelling or abating an attack that the *ad bellum* must be impacted. Far-fetched though it may presently be, one might consider a one-off act, e.g. where a civilian who has built an Unmanned Surface Vehicle (USV) in their garden shed goes on to strike and perhaps even sink a would-be invader's naval vessel.

In terms of overall conclusion, the authors invite the reader to consider one final observation. Returning to the ICRCs belligerent nexus criteria for example, or even the test for *levée en masse,* is this necessitated by immediacy (instant, overwhelming leaving no choice of means and no moment for deliberation)?[52] It stands to reason that a *levée* presupposes that the above

[51] James Green provides a further helpful reference to scholarly works on proportionality, which include, Green (n 4), 123. At footnotes 141 and 142 he also identifies the following "classics", Sina Etezazian, 'The Nature of the Self-Defence Proportionality Requirement' (2016) 3 *Journal on the Use of Force and International Law* 260; TD Gill, 'The Second Gulf Crisis and the Relation between Collective Security and Collective Self-Defense' (1989) 10 *Grotiana* 47, 67. Chris O'Meara, *Necessity and Proportionality and the Right of Self-Defence in International Law* (Oxford University Press, 1st edn 2021) 97–171; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 1st edn 2004) 142 and 161.

[52] Letter dated 27 July 1842, from Daniel Webster to Lord Ashburton (1841–1842) XXX British and Foreign State Papers 193–194 (extract taken from Webster's earlier letter to Henry S. Fox dated 24 April 1841,

requirements of immediacy *ad bellum* would be present in order to generate a civilian call to arms as an action of last resort. Therefore, if an *in bello* act (e.g. *levée*) fails to meet the language of the Caroline incident formulation and self-defence more generally, the authors question whether that *in bello* act could in fact represent a reprisal or act of retribution in the *ad bellum*?[53]

Acknowledgements

The authors would like to extend their sincerest thanks to Chiara Redaelli, Senior Legal Adviser, Diakonia IHL Centre, Visiting Professor, Université Catholique de Lille and Co-Editor in Chief of JUFIL for all her considerable advice and invaluable feedback throughout the preparation of this editorial comment. © 2024, Francis Grimal & Michael J. Pollard.

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(1840–1841) XXIX British and Foreign State Papers 1137–1138) (a state claiming self-defence must: 'show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that . . . [it] did nothing unreasonable or excessive; since the act justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it').

[53]For a helpful discussion on reprisals more generally, see, Yishai Beer, 'Regulating Armed Reprisals: Revisiting the Scope of Lawful Self-Defense' (2021) 59 *Columbia Journal of Transnational Law* 114.

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Fighting an Illegal War and Fighting a War Illegally: the Link Between Regime Change Operations and International Humanitarian Law Violations

By Gabor Rona

Published on March 20, 2026

Editor's Note

This article is part of *Just Security*'s Collection: Iran, Israel and the United States at War (2025-2026 Operations).

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When States go to war to replace an enemy's very system of government, the goals of the military campaign can lead to noncompliance with the rules that regulate belligerents during armed conflict. The end result threatens not only international law prohibiting the resort to war except under very specific circumstances, but also international humanitarian law that protects civilians in wartime.

Experts writing on these pages, and elsewhere, have almost unanimously declared the recent uses of force by the United States in Venezuela and by the United States and Israel in Iran to be violations of international law. Some, such as Oona Hathaway, have noted, correctly, that States increasingly violate the prohibition of the use of force, or excuse such violations by other States. Some scholars condemn these violations and call for accountability. Others, such as Yuval Shany and Amichai Cohen, as well as Ken Watkin, argue for relaxation of the rules to better reflect States' perceived security interests, but they fail to offer a convincing roadmap for doing so without creating a permission structure for exactly what the law is meant to accomplish: the prohibition of naked acts of aggression, such as those committed by Russia in Ukraine (a response to Shany and Cohen from Rebecca Hamilton and Tom Dannenbaum can be found here). Meanwhile, little has been said about the effect of the illegality of the *resort* to force on compliance with the rules for *conduct* of the armed conflicts triggered thereby.

Violations of Jus ad Bellum are Not the End of International Law…

As introduced above, experts are debating whether we have reached the end of international law.

To my view, the declaration of the death of international law is, to paraphrase Mark Twain (and echo Watkin), exaggerated. International law is a broad, deep and complex compilation of elements, too numerous to parse here. Suffice it to say that although many of us (including the undersigned) have observed that the *Jus ad Bellum* (the law on when States can resort to military force) is at the core of the "rules-based international order" (RBIO), it would be hyperbole to suggest that challenges to the prohibition of the use of force herald the end of that norm, let alone the disintegration of the larger RBIO. States have too much skin in the game, developed over too much time, to abandon the entire project, from rules relating to diplomacy, to trade and finance, to health, to environment and natural resource exploitation, to the high seas and outer space, to human rights and cooperation on criminal enforcement, among other realms. That said, increased disrespect for the *Jus ad Bellum* will certainly create pressures on the sustainability of these, and other aspects of international law.

…But They Do Put IHL at Great Risk

If there is one aspect of international law that is most at risk due to degradation of the *Jus ad Bellum*, it is the *Jus in Bello*, or International Humanitarian Law (IHL), referred to by some as the Law of Armed Conflict (LOAC). *Jus ad Bellum* may be understood as the law addressing the "why" of using force, and *Jus in Bello*, or IHL, as the law addressing the "how."

IHL is codified in the Geneva Conventions and various so-called Hague Conventions. The Geneva Conventions concern protections accorded those "hors de combat" (outside of combat) such as injured combatants, prisoners of war, and civilians. Hague Law consists of various conventions governing the conduct of hostilities, or the means and methods of combat.

International law envisions a strict dichotomy between *Jus ad Bellum* and *Jus in Bello.* This separation, often called a "firewall," is designed to ensure that the rules of war apply equally to all parties to armed conflict, regardless of whether their cause is just or their invasion illegal. The reasons for the principle of equality of parties to conflict under IHL are simple. First, there is no real-time referee to authoritatively distinguish aggression from self-defense and to enforce the consequences of that distinction. Second, parties to armed conflict could not be expected to obey IHL rules if they applied asymmetrically on the basis of a *Jus ad Bellum* analysis, and civilians would become the ultimate victims.

…Especially When Regime Change is On the Menu

Regime change is widely considered in general a violation of *Jus ad Bellum* norms because it directly targets a state's political independence and is likely a disproportionate use of force. Outside of specific Security Council mandates, unilateral regime change is "highly disfavored" and carries a "heavy burden of justification." When a war is initiated with an illegal or "total" goal, it sets a dangerous precedent for the conduct that follows, and the theoretical firewall between *Jus ad Bellum* and *Jus in Bello* undergoes severe structural strain. The pursuit of a total political outcome – the dismantling of a sovereign government – often leads to the erosion of the core pillars of IHL: the principles of distinction, proportionality, and precaution.

The Principle of Distinction

The rule of distinction under IHL requires parties to differentiate between combatants and civilians, and between military objectives and civilian objects. In a regime-change conflict, the definition of a "military objective" often expands. Attackers may target "dual-use" infrastructure such as electrical grids, State media, or civilian government ministries, arguing that these are essential to the regime's survival and therefore must be destroyed. But under IHL, targeting dual-use objects is not so clear-cut; they are not recognized as a separate legal class of targetable objects, but rather, a commander should (in theory) establish that any particular target, including one that is used for both military and civilian purposes, does in fact qualify as a military object under the specific circumstances at hand (although approaches to targeting dual-use objects are complicated and somewhat varied, as highlighted in this discussion), and then apply a proportionality test to all civilian aspects of the object if it is properly deemed a legitimate target. In a regime change operation, we can predict that the answers to those sensitive questions would shift in the direction of attacks that come with unacceptable loss of civilian infrastructure and lives.

The slippage of fundamental IHL norms in the context of regime change is also applicable to the targeting of civilians themselves. As seen in recent reports on Operation Epic Fury, strikes have targeted political leaders and members of the security and intelligence services responsible for domestic repression. Some of these, like the IRGC, an official component of Iran's armed forces, may be targetable as combatants. Others, like Senior Intelligence Ministry (MOIS) official Mohammed Baseri, are civilian government officials. Obviously, these elements of the regime's "grip" must be loosened, if not destroyed, to effect regime change, and yet, such individuals are likely not *ipso facto* combatants nor civilians directly participating in hostilities – the only categories of persons subject to targeting under IHL. Accordingly, war for the purpose of regime change necessarily creates a strong incentive to expand targeting beyond the permissible confines of IHL.

The Proportionality Paradox

The rule of proportionality prohibits attacks expected to cause incidental civilian harm that is "excessive in relation to the concrete and direct military advantage anticipated."

The determination of how much civilian harm is proportionate, and therefore, permitted, will vary depending on whether the military objective is tactical ("take that hill") or strategic ("change that regime"). Strategic Proportionality applied to this context would seem to take the position that when the goal is regime change, the "military advantage" of a single strike is at risk of inflation; if a commander believes a strike on a civilian building, let's say with some military objective included, will "destabilize the regime," they may justify high collateral damage as a "necessary cost" for a transformative political outcome, and consequently non-excessive to the high-value military advantage anticipated. Scholars have noted that a reinvigorated analysis of proportionality is necessary because commanders often weigh "long-term" benefits (which could be political, like the formation a new government), against "immediate" civilian deaths. In short, armed conflict undertaken for the purpose of regime change risks facilitating proportionality assessments that stretch the appropriate bounds of the proportionality principle.

The Duty of Precaution

The principle of precaution requires States to "take all feasible precautions" to minimize civilian harm.

In regime-change scenarios, the "speed" of the advance often overrides the "feasibility" of precautions. The desire to "paralyze the chain of command" can lead to rapid-fire targeting that skips the rigorous intelligence vetting required to ensure civilians are not in the blast zone of a high-value target. If the goal is the "total defeat" of a system, there is less incentive to take costly or time-consuming precautions that might allow regime leaders to escape or regroup. Again, a fundamental norm of IHL finds itself potentially bowing and breaking in the context of regime-change operations.

Behavioral Feedback Loop: A Race to the Bottom

The pursuit of regime change also creates a perverse incentive for the **defender**. When a regime faces an existential threat or a demand of "unconditional surrender," as demanded of Iran by U.S. President Donald Trump, it has little incentive to follow IHL.

A cornered regime is, for example, more likely to use human shields, embed military assets in hospitals, or deploy prohibited weapons as a last resort. This, in turn, provokes the attacker into unlawful reprisals and more indiscriminate strikes, creating a downward spiral of respect for IHL. Even the International Court of Justice has not been unsympathetic to extreme measures that are difficult to square with accepted notions of proportionality, when taken in the service of State preservation. A plurality of the Court, for example, could not conclude that even the use of nuclear weapons would be definitively unlawful in the event that the survival of the State (though not the regime) is at stake.

In the context of the U.S.-Israeli Operation Epic Fury, this issue has come to the forefront as we see Iran (the cornered regime) targeting both technology companies and banks in Israel, with Iran claiming that they are in part responding to U.S./Israeli targeting of banks in Tehran. These are violations of IHL's principle of distinction under which mere "war sustaining activities," as distinct from acts constituting "direct participation in hostilities" are not targetable, according to the majority view of experts. Were it otherwise, every taxpayer in a State at war would be a target. Of course, IHL has traditionally recognized a right of reprisal, conduct that would normally be illegal but is considered lawful when committed by one State in response to, and in an effort to discourage, a prior illegal act by an adversary. However, reprisal is never permitted against non-combatants. These circumstances exemplify both the perverse incentives regarding the principle of distinction for the would-be regime changers, and a real-world "race to the bottom."

The "Illegal but Legitimate" Trap: The False Promise of Humanitarian Intervention

Even where the goal is not explicitly regime change, IHL principles come under severe pressure where intervention is justified as humanitarian (a goal often associated with regime change). Recent analysis explores the reawakening of the "illegal but legitimate" doctrine. This framework, resting on a justification of "moral legitimacy," often leads to a breakdown in legal restraint, as the attacker views their cause as so righteous that the specific rules of IHL become secondary to the "larger good" of the regime's removal.

For example, during the 1999 Kosovo War, NATO conducted a 78-day bombing campaign against Serbian forces – not in self-defense and not authorized by the Security Council, and therefore, unlawful. The stated purpose of the campaign was humanitarian, in response to mass atrocities committed against the Kosovar civilian population by Serb forces. The campaign largely utilized high-altitude airstrikes, often around 30,000 feet, to destroy military infrastructure while avoiding anti-aircraft defenses. Strikes targeted strategic installations, power plants, bridges, and command centers in Kosovo and Serbia, including in Belgrade. The high-altitude bombing was deemed responsible for significant civilian damage and casualties, with estimates of around two thousand civilians killed, often due to the inability to distinguish military objectives from civilian objects at that altitude. In a post-conflict analysis by the Prosecutor of the International Tribunal for the Former Yugoslavia, (see the full report here), which raised the question of whether NATO was justified in conducting a "zero casualty war" – an argument arose that the metrics normally applied to the rules of distinction, proportionality, and precaution should be relaxed, as NATO's involvement was purely humanitarian, thus NATO forces should not have to face the same risks as other parties to the conflict. The NATO bombing did force Serbian forces to end their ethnic cleansing campaign. The Serbian regime fell over one year after the bombing campaign and the ICTY declined to further investigate the NATO bombing campaign.

The NATO bombing in Kosovo is not, however, the most significant example of legally unsupported *Jus ad Bellum* rationales resulting in IHL harms. After all, it stopped the Serb atrocities. A greater harm to both civilians and to the integrity of the legal structure is when false humanitarian justification is used to rationalize acts of aggression.

Conclusion

The relationship between regime change and IHL is one of inherent tension. By pursuing a "total" political goal that lacks a clear legal basis under *Jus ad Bellum*, States create a battlefield environment where the standard rules of distinction, proportionality, and precaution are viewed as obstacles to victory rather than essential constraints. To preserve the humanitarian mission of IHL, the international community must resist the "sliding scale" where the perceived justice of a cause is used to excuse injustices of conduct.

FEATURED IMAGE: M142 High Mobility Artillery Rocket Systems (HIMARS) conduct live-fire missions during Operation Epic Fury in the U.S. Central Command area of responsibility. (U.S. Army Photo)

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The Catastrophic Collapse of Norms Against the Use of Force

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July/August 2025

Published on June 24, 2025

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In his first months back in office, U.S. President Donald Trump has threatened to use military force to seize Greenland and the Panama Canal, suggested that the United States could take ownership of Gaza after the expulsion of two million Palestinians, and demanded that Ukraine give up territory to Russia in exchange for a cease-fire. These acts and statements might appear to be just a handful of examples of Trump's typical wide-ranging and hyperbolic bluster. But in fact, they all form part of a cohesive assault on a long-standing principle of international law: that states are prohibited from threatening or using military force against other states to resolve disputes.

should. War was considered legal, the primary way to enforce national rights and resolve disputes between states. That all changed in 1928, when nearly every country in the world at the time joined the Kellogg-Briand Pact, agreeing that wars of aggression should be illegal and territorial conquest prohibited. The 1945 UN Charter reaffirmed and expanded that commitment, putting at its core a prohibition on the "threat or use of force against the territorial integrity or political independence of another state." Having discovered that merely agreeing to prohibit war was not by itself enough, states then went to extraordinary lengths to design frameworks and institutions to cement this essential rule, leading to the establishment of a new legal order that elevated economic tools over military might to ensure peace.

As a result, wars between states became far less common. In the 65 years after the last settlements of World War II, the amount of territory conquered by foreign states each year plummeted to less than six percent of what it had been for just over a century before the world first outlawed war. The number of countries tripled from 1945 to today, as states no longer feared that they would be gobbled up by more powerful neighbors. And countries traded more freely with one another, knowing that the wealth they accumulated was less likely to be plundered by other states. The world became more peaceful and prosperous.

The influence of the prohibition on the use of force had already eroded somewhat before Trump returned to office. In 2003, the United States invaded Iraq, justifying the war by claiming that Iraq had weapons of mass destruction that it did not possess; China has spent the last decade building military bases in contested areas of the South China Sea; and Russia's full-scale invasion of Ukraine in 2022 set off the largest land war in Europe since World War II. But Trump is shredding what is left of the norm against using force. Until now, the United States had played a critical, if imperfect, role in maintaining and defending the postwar legal order. The resilience of that order depended less on total compliance with international law than on a shared set of expectations about how other countries would behave: even if a country was not itself committed to the UN Charter's prohibition on the use of force, it knew that violating

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Now, that expectation is gone. Trump is not merely abandoning the United States' traditional role in defending the prohibition on war and, with it, conquest. He seems to want something more: to restore war or the threat of it as the main way that states resolve their disagreements and seek economic gain. Other countries are already signaling an acceptance that the norms have changed. Israeli Prime Minister Benjamin Netanyahu appeared to endorse Trump's musings about Gaza, and Panama chose to placate the American president by accepting deportation flights of non-Panamanians and signing an agreement allowing the United States to deploy military personnel along the Panama Canal. Amid Trump's threats to permit Russian President Vladimir Putin to annex parts of Ukraine, Kyiv inked a deal with Washington giving the United States access to its rich mineral resources. If left unchecked, the erosion of the prohibition on the use of force will return geopolitics to a raw contest of military power. The consequences will be grave: a global arms race, renewed wars of conquest, shrinking trade, and the collapse of the cooperation needed to confront shared global threats.

ENTRENCHED WARFARE

international order—it was the order. In the absence of a global court to adjudicate international conflicts, sovereign states had the authority to enforce their rights as they saw fit—namely, by going to war. States set out their legal reasoning for attacking other states in "war manifestos." Any legal grievance could serve as a just cause for using military force: property damage, such as harm to ships; unpaid debts; treaty violations; and, of course, self-defense. As the seventeenth-century Dutch philosopher and jurist Hugo Grotius—often called "the father of international law"—wrote in *Commentary on the Law of Prize and Booty*, a "war is said to be 'just' if it consists in the execution of a right."

Because war was conceived as a means of enforcing rights, international law recognized the right of conquest. Land and property could be seized to remedy the wrongs that had triggered the conflict. "In seizing prize or booty," Grotius explained, states attain "through war that which is rightfully [theirs]." To be sure, powers often claimed what was not rightfully theirs. But because no supreme authority existed to judge the legality of wars, the international system effectively presumed that every conquest was just. Might made right. When the United States launched a war against Mexico in 1846, for example, a main legal justification was Mexico's unpaid debts. In return for stopping the military campaign, the United States forced Mexico to sign a treaty ceding 525,000 square miles of territory that became the American Southwest in exchange for $15 million and forgiving the debts.

This outcome was far from unique. States often practiced what became known as "gunboat diplomacy"—the use of military threats to advance political or economic demands—to pressure weaker countries into signing unequal treaties. If it was justified for a state to wage war in defense of its rights, then it was justified to threaten war in defense of those rights. In early 1854, U.S. Commodore Matthew Perry exemplified this logic when he sailed into Edo (now Tokyo) Bay with a fleet of American warships. He claimed that the United States had a legal right to trade with Japan, and he made it clear that if Japan did not agree to open its ports, he would do so using military power. The pressure worked: on March 31, 1854, the two countries signed the Treaty of Kanagawa, which opened two Japanese ports to U.S. ships.

Because war was the way in which states pursued their legal rights, waging war was a means of law enforcement, not a crime. When Napoleon lost the War of the Sixth Coalition, in 1814, the European powers that defeated him did not imprison him as a war criminal. Rather, he was sent to the island of Elba, where he was allowed to retain the title of emperor and rule the island as a sovereign. Even after he returned to mainland Europe and was again defeated at the Battle of Waterloo, his subsequent exile to St. Helena in the South Atlantic was not a criminal punishment. It was a preventive measure—a kind of quarantine—meant to keep him from once again unleashing war on Europe.

Not only did states possess the right to conquer other countries' territory, practice gunboat diplomacy, and enjoy immunity from criminal prosecution for waging war; they were also bound by strict duties of impartiality toward belligerents. Neutral states could not put sanctions on warring parties. If they did, they would be interfering with the belligerents' efforts to assert their legal rights; if a state violated that duty of neutrality, it created a just cause for war against it. Conquest was lawful, but imposing economic sanctions against belligerents was not.

Under this legal order, which lasted until the early twentieth century, powerful states freely resorted to war to enforce their claims, and weaker states were forced to submit or risk annihilation, yielding a near-constant churn of conflict. With no prohibition on conquest, national borders shifted regularly through violence, and empires expanded by force, entrenching global inequalities. Trade routes were opened and then controlled with cannons, and colonial possessions were won and lost like damages in a lawsuit. The world's economy remained stunted by the incessant threat of war.

FROM WAR TO PEACE

World War I, however, brought destructive new technologies to the battlefield, and its devastation far outstripped that of previous wars. More than 20 countries eventually entered the fight, and an estimated 20 million people died, around half of them civilians. Once the killing subsided, a desperate search began to find a way to prevent

wary of being drawn back into European wars, blocked the United States from joining, which hobbled the international organization's enforcement power.

Around the same time, a new and more audacious idea emerged: to outlaw war altogether. In late 1927, U.S. Secretary of State Frank Kellogg proposed a global treaty formalizing the concept to French Prime Minister Aristide Briand. In less than a year, the so-called Kellogg-Briand Pact of 1928—formally titled the General Treaty for Renunciation of War as an Instrument of National Policy—acquired 58 signatories, the vast majority of states in the world at the time. Establishing the principle that aggressive war was illegal, the parties agreed to "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another" and pledged to settle any disputes between them "by pacific means."

Because the pact failed to prevent World War II, it has been widely mocked as naive and ineffective. But in truth, it set in motion a process that gave rise to the modern international legal order. The authors of the pact, for all their ambition, failed to appreciate the scale of what they had done. Once war was outlawed, nearly every aspect of international law had to be reimagined. When Japan invaded Manchuria in 1931, it took U.S. Secretary of State Henry Stimson a year to craft a response consistent with the pact's principles. Stimson decided that the United States would refuse to recognize Japan's right to the land it had illegally seized, and the members of the League of Nations soon followed suit. This new principle of nonrecognition, now known as the Stimson Doctrine, became a turning point. Conquest, once lawful, would no longer be recognized. And even if Japan could force China to sign a treaty to give the Japanese the illegally seized land, the agreement would not be recognized as lawful. Gunboat diplomacy would no longer give rise to valid treaty obligations.

After World War I, an audacious idea emerged: to outlaw war altogether.

territory they had conquered by force, and their leaders stood trial at war crimes tribunals. The first count in the indictment at the Nuremberg trials charged that "the aggressive war prepared by the Nazi conspirators . . . had been specifically planned in advance, in violation of the terms of the Kellogg-Briand Pact of 1928."

The pact's principles also redefined other aspects of international law. U.S. Attorney General Robert Jackson defended the 1941 Lend-Lease Act—which enabled the United States to provide weapons to countries fighting Nazi Germany without a formal declaration of war—by noting that the Kellogg-Briand Pact had altered the laws regulating neutrality. Because the pact's signatories had agreed "to renounce war as an instrument of policy," Jackson explained, it followed that "the state which has gone to war in violation of its obligations acquires no right to equality of treatment from other states." Neutrality no longer demanded that states remain completely impartial in the face of aggression.

Norms, in other words, began shifting in 1928. But the world's leaders came to realize that ideals were not enough. They needed new legal rules and institutions to give those ideals force. After World War II, the victorious states founded the United Nations to codify the revolution that the Kellogg-Briand Pact had set in motion. In the UN Charter, states are prohibited "from the threat or use of force against the territorial integrity or political independence of any state." Treaties signed under coercion became formally void, neutrality no longer required impartiality, and leaders who committed aggressive acts of war could be held criminally responsible.

This shift, led by the United States, marked one of the most profound legal transformations in world history. During the nearly eight decades after the UN Charter entered into force, the kinds of interstate wars and territorial conquests that had shaped and reshaped national borders for centuries became rare. Great powers have not openly fought a war against one another since 1945, and no UN member state has permanently ceased to exist as a result of conquest. Conflict, of course, has not disappeared, but it has become far less prevalent. The century that preceded World War II saw over 150 successful territorial conquests; in the decades afterward, there have been fewer than ten.

account for the importance of the decision to outlaw war. When the Iraqi leader Saddam Hussein invaded Kuwait in August 1990, violating the UN Charter, for instance, the UN Security Council demanded that Iraqi forces withdraw immediately. When they failed to do so, the Security Council authorized other countries to "use all necessary means" to "restore international peace and security." The United States then led an international military coalition that expelled Iraqi forces from Kuwait. States watching learned that violating the prohibition on the use of force would have consequences. The law shaped states' behavior not necessarily because they decided that they ought to follow it. It shaped their behavior because it changed how they expected other states—especially the United States—to respond.

Sanctions replaced war as the primary way to enforce international law.

The prohibition on territorial conquest also altered how countries could acquire wealth. Before this rule was established, states' ability to accumulate wealth often depended on how much territory, resources, and concessions they could capture from other countries. War and conquest were recognized paths to prosperity. By eliminating the right to conquest, the postwar legal order forced states to seek economic growth through peaceful means, primarily trade. The expansion of trade and the prohibition of war went hand in hand, as states could no longer enrich themselves through conquest. Instead, they had to rely on economic cooperation, market competition, and the free flow of goods and capital.

Great powers that had relied on gunboat diplomacy to impose their will, meanwhile, had to substitute checkbook diplomacy. Economic and diplomatic sanctions replaced war as the primary means of enforcing international law. As states became more economically interdependent, they designed increasingly nuanced ways of "outcasting," or excluding states from the benefits of international cooperation. One such tool, trade sanctions, became a key way that states responded to a wide variety of unlawful actions, such as human rights violations, supporting terrorism, or waging wars of

organizations emerged, and more than 250,000 treaties were created to help manage this unprecedented level of interdependence. The threat of being excluded from international cooperation became harder and harder to bear.

Thanks to its large share of global GDP and the U.S. dollar's status as the world's reserve currency, the United States gained extraordinary power to enforce the rules. For most states, staying on good terms with the United States was a financial imperative. Washington's role in maintaining the postwar legal order was far from perfect: the United States' war in Vietnam, its 2003 invasion of Iraq, and its multidecade counterterrorism campaign in the Middle East all relied on overly broad claims of self-defense. But the United States did not violate the essential prohibition on territorial conquest, and it played a critical role in upholding the system, pledging to defend the European states that joined NATO and the American countries in the Rio Treaty, as well as Australia, Japan, New Zealand, the Philippines, South Korea, and Thailand, if any of them faced an illegal attack. Washington's decision to lead the charge against Iraq's invasion of Kuwait made it clear that if a state attempted to conquer another, it could well face American-led resistance—even when the United States did not have a treaty obligation to respond. This imperfect but functional system kept major conflicts at bay and ensured that an interconnected world, for all its tensions, did not descend into unchecked violence. States were able to build more prosperous economies without fearing that a greater military power would conquer them or force them into unequal treaties to fork over the spoils.

LEGAL JEOPARDY

That may all be about to change. Prior U.S. administrations can be condemned for their hypocrisy. But the Trump administration's willingness to give up altogether on the prohibition on war is far more dangerous. The very premise that the United States could acquire Canada, Greenland, or the Panama Canal by force—or that it might claim ownership of Gaza—is not mere realism or a new form of transactional politics based on dealmaking. It is a throwback to an earlier era when might made right. Trump's rhetoric and actions resuscitate the pre-Kellogg-Briand idea that threatening

In addition to threatening conquests of its own, the Trump administration appears poised to give up on defending other states' right not to be conquered. In April, after threatening to pull U.S. military assistance from Ukraine, Trump warned Ukrainian President Volodymyr Zelensky that if he would not consider a U.S.-brokered peace plan that, according to the *Financial Times*, could cede 20 percent of Ukraine's territory to Russia, he would face "losing [his] whole country." Trump has already brought back gunboat diplomacy by using the threat of force to coerce other countries into signing treaties on his terms; military threats helped obtain concessions from Canada and Mexico. Trump's tariff policy also undermines the prohibition on conquest by diminishing the power of economic sanctions as a law enforcement tool. Sanctions are most effective if used rarely and in response to clear violations of international law. Slapping tariffs of 25 percent on other countries on a whim, as Trump did to Canada and Mexico, corrodes the impact economic penalties have to punish real unlawful behavior.

Trump made a direct attack on the power of sanctions as an enforcement mechanism when he signed an executive order threatening to sanction judges and lawyers associated with the International Criminal Court. That move turned a tool for enforcing international law into a weapon to undermine it. More broadly, by unraveling states' interdependence, the isolationist economic policies that Trump is pursuing diminish other states' ability to punish breaches of international law by outcasting, leaving them with little choice but to resort to military force or to allow violations to go unchecked.

Trump's various rhetorical salvos and policy shifts may seem chaotic. But they all form part of a wider attempt to dismantle the postwar legal order. This assault is especially dangerous because it is being carried out by the country that built and, albeit imperfectly, maintained that system. Trump may not follow through on all his threats: some may be blocked by the courts or by domestic political opposition, and other leaders may not immediately mimic him. But his threats alone dangerously erode the set of assumptions about behavior, restraint, and consequences that uphold the prohibition on conquest.

across borders, and governments to respond collectively to violations of law. If the world's most powerful state can flout long-settled expectations with impunity, others are likely to feel they can do the same. And once states no longer expect one another to play by the rules, the system that depended on that expectation will crumble—not all at once, but piece by piece until it collapses altogether.

THE RIGHT FIGHT

If the prohibition on the use of force collapses, Putin, Trump, and Chinese President Xi Jinping may well agree to simply carve the world into spheres of influence. Their countries would then be free to terrorize states within their spheres, extracting concessions from the less powerful in exchange for protection. Although it is possible that such a world would temporarily be relatively quiescent, it would also be far less free. It is more likely that the kinds of incessant conflicts that the prohibition on war banished would return, yielding a world in which, in the famous words of Thucydides, "the strong do what they can and the weak suffer what they must."

There is another potential path, but it would require courage and quick action. In 2022, 142 countries joined the United States in supporting a UN General Assembly resolution condemning Russia's attempted annexation of Ukrainian territory as unlawful. Those other states could join forces to reaffirm the prohibition on territorial conquest without relying on the United States as its chief enforcer. There are some signs that Europe intends to step into the gap the United States has left. After the disastrous March meeting in the White House in which Trump and Vice President JD Vance belittled Zelensky and appeared to threaten to abandon Ukraine, Europe rallied to back Ukraine's right to sovereignty. British Prime Minister Keir Starmer pledged that European countries would increase their military spending and assemble a "coalition of the willing" to defend Ukraine, and the president of the European Commission, Ursula von der Leyen, vowed that the European Union would present a plan to support the country.

could, it would be a mistake for the world to overly rely on another actor. Any serious attempt to safeguard the prohibition on the use of force cannot be made without acknowledging the problems with the system that secured it. When the UN was established, five powerful countries—China, France, the Soviet Union, the United Kingdom, and the United States—gave themselves a privileged position as Security Council permanent members with the power to veto any UN enforcement actions. And the United States' overwhelmingly dominant role in the order meant that when Washington broke the rules—for example, when it invaded Iraq in 2003—nobody was able to hold it to account.



A U.S. soldier guarding the Palestine hotel, Baghdad, Iraq, November 2003
DAMIR SAGOLJ / REUTERS

recognize the value of what they will lose when Trump dismantles that prohibition. Publicly acknowledging the postwar legal order's weaknesses—and its defenders' frequent failure to live up to their own ideals—is a crucial first step toward creating a more robust legal order. Maintaining the prohibition on the use of force will require fresh thinking about international institutions: a renewed system for ensuring international peace and security must empower a wider variety of states to share the responsibility of upholding legal norms, making them more legitimate and resilient to domestic shifts in any one country.

Midsize and small countries need to form broad coalitions to defend the prohibition on the use of force. Many analysts assume that the relative peace that has predominated for 80 years could never have been sustained without a primary, powerful state guarantor. But this view underestimates the real power that states can wield when they work in concert. The European Union is an example: none of its 27 member states has great power on its own, but together they are a force.

The UN General Assembly, in which all 193 member states have an equal vote, should play a leading role. The body does not currently have the Security Council's enforcement powers, but as an organ responsible for maintaining international peace and security, it can assert more power to enforce the charter's prohibition on the use of force. A recent reform known as the "veto initiative" demonstrates how it can do more. Created after Russia invaded Ukraine, this procedure refers any vetoed Security Council resolution to the General Assembly for debate. General Assembly resolutions passed under this provision afforded states legal backing to coordinate sanctions against Russia and provide Ukraine with arms and financial support. They also led to the creation of an international register of damages to pave the way for postwar reparations.

States should also work within regional or issue-specific coalitions to achieve shared goals. Such coalitions have begun to form: the Council of Europe, for instance, has announced that it is establishing a court to gather evidence against Putin and other Russian leaders and eventually try them for the crime of aggression in Ukraine, and members of the so-called Hague Group—Bolivia, Colombia, Cuba, Honduras,

the war in Gaza. In May, foreign ministers from the African Union and the European Union vowed to strengthen their partnership on peace, security, and economic matters, offering a potential starting point for a peace coalition that does not rely on the United States.

Trump is shredding what is left of the norm against using force.

Officially, the UN Security Council is currently the only body that can authorize states to go to war to enforce the law. But nothing is stopping countries from creating an "outcasting council," an organization to authorize joint sanctions against states that violate the prohibition on the use of force or other critical international laws. Sanctions have not always successfully curtailed unlawful behavior, in part because coordinating them on an ad hoc basis is slow and unpredictable. But if states work together consistently to trigger automatic, coordinated responses to certain unlawful acts, they could make this tool far more effective.

Most of all, securing the prohibition on the use of force depends on states recognizing how much good it has enabled, how hard it was to establish, and how much chaos could ensue if it vanishes. If countries respond to the United States' abandonment of its enforcement role by creating new institutions to take its place, that would send a powerful signal. American leaders may claim that might makes right, but they would be in the minority, and that stance would isolate them. If, for example, Washington were to pursue its threat to seize the Panama Canal, states could coordinate to outcast the United States with economic sanctions and diplomatic penalties or even by withdrawing their permission to allow U.S. bases in their territories. Demonstrating that other countries are willing and able to join together to impose costs on the United States when it breaks the law would help counter the deep damage the Trump administration has done—and would affirm that a wider variety of countries can play a more equal role in shaping and enforcing international law.

Trump's rise does not constitute the only threat to the prohibition on the use of force. China and Russia are seeking to reshape international norms to suit their interests. But

whether countries such as France, Germany, and the United Kingdom—which are used to dictating the terms of global engagement—will be prepared to share that power. It is also unclear whether countries long excluded from global decision-making can place their trust going forward in an international legal order grounded in the prohibition on the use of force. But supporting such an order is critically important. Playing China, Russia, and the United States off one another might seem to offer short-term advantages to developing countries, but in the long run, these countries risk becoming the spoils of great-power rivalries, with little capacity to direct or control their own futures.

The system that preserved relative peace and prosperity for nearly eight decades is not self-sustaining. It must be vigorously defended. After World War II broke out, U.S. policymakers realized that the failure to establish a durable postwar order following World War I had sown the seeds of future chaos. History's lesson is that waiting until a moment of crisis has passed to begin planning for what comes next is a recipe for failure. Just as policymakers in the 1940s sought to establish lasting peace out of the disorder of war, today's leaders must design institutions, alliances, and strategies to secure peace rather than sit and watch as Trump rewinds the clock.

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doi:10.1017/ajil.2024.53

International Law in Gaza: Belligerent Intent and Provisional Measures

*By Tom Dannenbaum and Janina Dill**

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

* We are grateful to Helmut Aust, Adil Haque, Kevin Jon Heller, David Kretzmer, Nicolas Lamp, Eliav Lieblich, and Henry Shue, as well as the participants of the colloquium of the Kollegg-Forschungsgruppe "International Law – Rise or Decline?" and the American Society of International Law's International Criminal Law Interest Group Works-in-Progress Conference for comments on early drafts. For excellent research assistance, we thank Gwendolyn Whidden. We acknowledge the financial support of the Economic and Social Research Council (EX/X01097X/1).

[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 66–67 *infra*.

[9] *See* notes 65, 68–74 *infra*.

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campaigns.[10] Both sides have committed violations of International Humanitarian Law (IHL), too many to list individually.[11]

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

[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).

[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).

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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 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

[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).

[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).

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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 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" that 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

[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).

[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.

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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 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]

[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.

[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, 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 AP I]; 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.

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Second, International Criminal Tribunal for the former Yugoslavia (ICTY) case law supports that for the purpose of *violating* distinction, prohibited intent attaches not to the consequences, but to 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 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

[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).

[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 (UNOCHR) 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] AP I, *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.

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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 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

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

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

[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, Art. 7, 2048 UNTS 93 (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, paras. 54 et seq. (Dec. 5, 2003).

[51] AP I, *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 U. PENN. L. REV. 173 (2024).

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

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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 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.

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

[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; AP I, *supra* note 35, Art. 51(7).

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

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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, 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

[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.

[62] AP I, *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 64 *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 (UNRWA), Gaza Supplies and Dispatch Tracking, *at* https://www.unrwa.org/what-we-do/gaza-supplies-and-dispatch-tracking.

[64] COGAT 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); UNRWA, *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).

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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 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

[67] UN Satellite Centre (UNOSAT) 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 65, 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.

[74] UNRWA, *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.).

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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 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

[77] AP I, *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] Watts, *supra* note 79.

[82] AP I, *supra* note 35, Art. 48.

[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 20,000–25,000 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.

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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 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.

[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] AP I, *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., AP I, *supra* note 35, Arts. 69–70).

[90] AP I, *supra* note 35, Arts. 69–70; AKANDE & GILLARD, *supra* note 77.

[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 75–76, 88–90 *supra*.

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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 that 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, 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

[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).

[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.

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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]

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,

[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).

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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, 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

[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).

[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).

[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).

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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 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]

[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 ARSIWA]; 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* 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)).

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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.

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).

[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).

[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.

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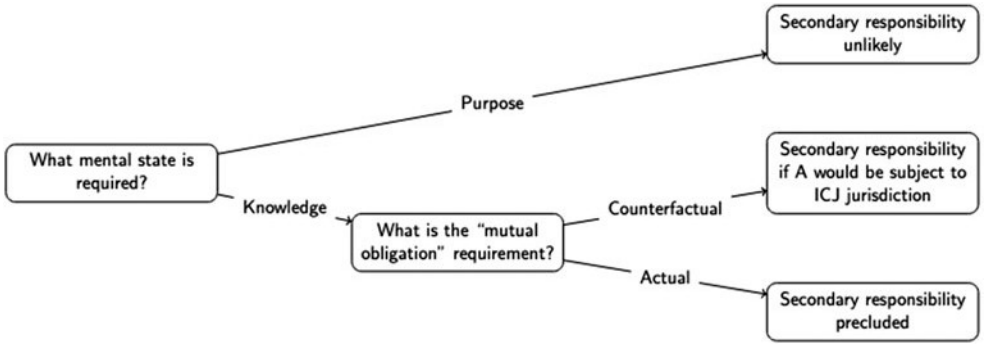


FIGURE 1: ICJ Provisional Measures Orders & Secondary ARSIWA Responsibility
Example: State A assists Israel in breaching an ICJ Provisional Measures Order, for instance, by sending weapons to be used in a Rafah offensive that threatens Palestinians' rights under the Genocide Convention. Does State A incur secondary responsibility for assisting in an internationally wrongful act under Article 16 ARSIWA?

A. Provisional Measures and ARSIWA 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 (ARSIWA), 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

[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] ARSIWA, *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] ARSIWA, *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.

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without ruling out that purpose may also have been necessary.[143] Notably, the Arms Trade Treaty (ATT) absolutely prohibits 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 ARSIWA 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 ARSIWA 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

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

[144] GA Res. 67/234, Arms Trade Treaty, Art. 6(3), *at* https://ihl-databases.icrc.org/en/ihl-treaties/att-2013 [hereinafter ATT]. 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."

[145] ARSIWA, *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. ARSIWA, *supra* note 125, at 67. On human rights territoriality, see MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2011).

[148] ARSIWA, *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).

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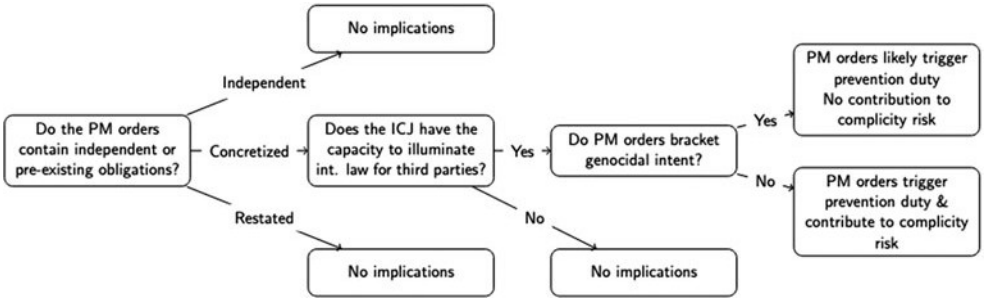


FIGURE 2: ICJ Provisional Measures Orders & Genocide Complicity/Prevention

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?

shared by both states and the PM-breach would, by implication, also breach that underlying obligation.[150] We turn to that possibility next.

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-

[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.

[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.).

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existing obligations, Barak's 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

[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 (ITLOS Jan. 28, 2021).

[157] McIntyre, *supra* note 155.

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

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

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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 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.

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"

[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.

[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).

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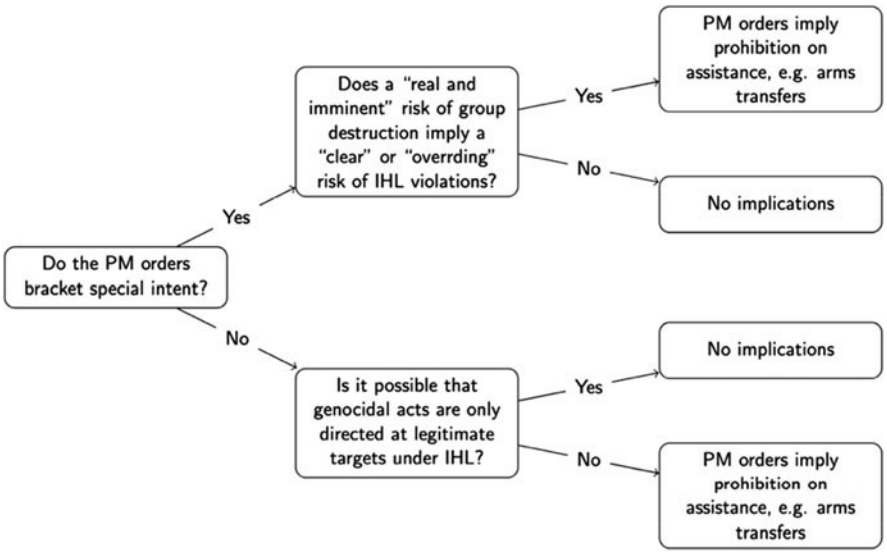


FIGURE 3: ICJ Provisional Measures Orders & Third States' Obligations Under IHL

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?

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 (see Figure 3).[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-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

[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).

[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.

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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 (1) the doctrinal possibility that violations of the Genocide Convention do not also violate the Geneva Conventions or (2) 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.

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 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

[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).

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

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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).

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