LAW, ETHICS, AND ARMED CONFLICT

An International Law Reader

Edited by Frank G. Lumpkin IV

INTERNATIONAL BAR ASSOCIATION

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Edited by: Frank G. Lumpkin IV

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Dedication

to

Benjamin B. Ferencz
(1920–2023)

By Federica D'Alessandra

Benjamin B. Ferencz was known to the world as the last surviving prosecutor of the Nuremberg trials, a key figure in the establishment of the International Criminal Court, and one of the most enduring advocates for international justice of the modern era.

Over more than eight decades, his lifelong commitment to the prevention of atrocity crimes and the advancement of legal accountability made him one of the defining legal voices of the postwar international order. His extraordinary life and work demand renewed reflection at a moment marked by geopolitical instability, institutional strain, and renewed challenges to the international rule of law.

Born in 1920 to a Hungarian-Jewish family that fled rising antisemitism in Europe to seek refuge in the United States, Ferencz came to embody the resilience, moral clarity, and public spirit of what became known as the Greatest Generation. Raised in poverty in New York City, he graduated from Harvard Law School before enlisting in the United States Army following Japan's attack on Pearl Harbor.

He served as an infantryman in the European Theater, landing in Normandy and participating in some of the fiercest campaigns of the Western Front. In April 1945, while attached to advancing Allied forces, he was among the first Americans to enter Nazi concentration camps including Buchenwald concentration camp and Mauthausen concentration camp. These experiences would shape the course of his life.

Later that year, he was transferred from the 115th Anti-Aircraft Artillery Gun Battalion to the War Crimes Branch of the Judge Advocate General's Department, where he began collecting evidence of Nazi atrocities. In 1946, he was recruited by Brigadier General Telford Taylor to join the prosecution team for the subsequent Nuremberg proceedings.

In 1947, at just twenty-seven years old, Ferencz was appointed Chief Prosecutor in *The United States of America v. Otto Ohlendorf et al.*, better known as the Einsatzgruppen Trial. There, he prosecuted twenty-two senior members of the SS mobile killing units responsible for the murder of more than one million civilians.

Having witnessed the systematic dehumanization of the concentration camps firsthand, Ferencz brought one of history's earliest comprehensive prosecutions of genocidal violence. His work at Nuremberg helped establish enduring principles of accountability for crimes against humanity and demonstrated that law could answer even the gravest abuses of state power.

After the trials, he remained in Germany to administer one of the first victim-centered restitution and compensation programs for survivors of Nazi persecution. He successfully pursued compensation claims against German state entities and industrial firms that had profited from forced labor and helped negotiate reparative measures that contributed to postwar justice efforts.

His greatest contribution may have been the decades he devoted thereafter to building legal institutions capable of preventing future atrocities. Throughout the remainder of his life, Ferencz advanced a simple but profound proposition: international law must regulate state conduct and serve as a practical instrument for preserving peace. Having witnessed the catastrophic consequences of unrestrained power, he believed that legal accountability was not merely an aspirational ideal but an operational necessity for international stability.

For Ferencz, international law existed not only to facilitate relations among states, but also to protect human dignity against the arbitrary

exercise of power. This conviction animated his decades-long advocacy for the criminalization of aggression and the peaceful resolution of disputes through law rather than force.

In recognition of these efforts, he received numerous honors, including the posthumous award of the Congressional Gold Medal, one of the highest civilian distinctions bestowed by the United States.[1]

At the time of this publication, the international legal order again faces profound tests. Armed conflict, institutional paralysis, and growing challenges to legal norms have placed renewed pressure on the framework Ferencz spent his life defending. It is precisely moments like these that make his message most urgent.

Ferencz reminded generations of lawyers, policymakers, and citizens that the alternative to law is not order, but force; not justice, but domination. His enduring challenge to us is the same one he articulated throughout his life: to insist that humanity's collective future be governed not by power alone, but by principle.

Today, more than ever, it is time to recommit to the values and principles that have secured the longest period of global peace and prosperity known to humanity, and to insist on "Law, Not War."

[1] S. 4587, 117th Cong. (2022).

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Foreword

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It is my pleasure to offer these introductory reflections in connection with this volume on law, ethics, and armed conflict. The questions explored in this collection echo long-standing efforts within international law to restrain violence, to preserve the principle of humanity in armed conflict, and to promote justice and accountability during and in the aftermath of armed conflict.

What is the promise and premise of the peaceful settlement of disputes through international law? The most pertinent regime for this preventive purpose of the law is the *jus ad bellum*—a set of international legal norms regulating the conditions under which States may lawfully resort to force. These challenges—both enduring and contemporary—form an essential backdrop to the themes examined in this volume. There are also two other prisms through which international law has a relationship with war. The *jus in bello*, or international humanitarian law (IHL), addresses how warfare is to be conducted. This body of norms regulates the conduct of hostilities within war, with the humanitarian aim of limiting the suffering caused. Another prism is the *jus post bellum*, which is less well-established as a matter of positive law, but denotes a body of norms applicable during the transition to sustainable peace after the end of conflict.

It would be almost hackneyed to highlight that conflict, unfortunately, remains a reality of our times, whether in Iran, Donbas, Gaza, Sudan, or elsewhere in the world. However, it is still useful to step back and acknowledge the recency of the legal prohibition on wars. The concept of a "just war" serves to illustrate this point. Before the

twentieth century, many classical thinkers emphasized how war, though lamentable, could serve a variety of causes in the name of justice. This translated into discourse centered around permissive doctrines which sought not to outlaw war, but to define just wars. It was only in 1928, just about a century ago with the Kellogg-Briand Pact, that a significant number of States agreed to renounce war as an instrument of national policy. Of course, the Second World War, which followed not long after, showed the fragility of this nascent change in legal thought. In 1945, the United Nations Charter was adopted, which concretely stated in its Preamble the intention of Member States to "save succeeding generations from the scourge of war." Article 2, paragraph 4 of the Charter became the cornerstone of the *jus ad bellum*, recognizing the obligation to "refrain" from the "threat or use of force" against other States. The Charter recognized only two exceptional circumstances in which a State may resort to force—in self-defense, as per Article 51, or under authorization from the Security Council. Indeed, Article 24, paragraph 1 of the Charter conferred upon the Security Council the "primary responsibility" for maintaining international peace and security.

The universal adoption of the Charter, and this system of collective security established by it, marked a revolution in international relations. Conquest and the resort to war would no longer be the norm. Rather, as per Article 2, paragraph 3, every Member State "shall settle their international disputes by peaceful means." Moreover, the Statute of the International Court of Justice was annexed to the Charter, forming an "integral part" of it, as per Article 92 of the Charter. An example of the success of the Court is its resolution of a number of sovereignty disputes between States from many regions of the world, disputes that could otherwise have become a tense cause for conflict. This year historically marks the eightieth anniversary of the United Nations. In a way, the fact that the organization managed to endure for this long is an achievement in itself, signaling that States continue to believe in an order of international relations that prefers multilateralism, not unilateralism.

But underneath the surface of this optimism and the success stories lie many complexities. The *jus ad bellum*, the body of norms regulating the resort to armed force, and the collective security system with the Security Council at the center, have been, and continue to remain under controversy.

One of these challenges is the recurring debate about the scope and limits of the prohibition on the use of force and its exceptions. Perhaps divergent meanings of a norm are only natural to expect in an order with so many diverse States. Or perhaps, this debate can be attributed to the creativity of lawyers like the contributors to this volume! Some illustrations would help serve the point.

As an example, consider the right of self-defense, recognized under Article 51 of the Charter. While self-defense may indeed be exercised in response to an ongoing armed attack, can force in the exercise of self-defense be used in a pre-emptive or anticipatory fashion? Or, for that matter, can self-defense be invoked in response to "armed attacks" launched not by States, but by non-State actors? In specific terms, can force be used in the territory of a State, if that State is "unable or unwilling" to act against a non-State actor launching attacks on the State claiming self-defense? Those who answer such questions in the negative believe that interpreting the exceptions to the prohibition too widely and liberally could flip the regime on its head. As recognized in Article 2, paragraph 1 of the Charter, the international order is premised on "sovereign equality," meaning that the prohibition on force should be understood in such a way that does not incentivize unilateral armed force by powerful States. By contrast, for those who answer in the affirmative, it is necessary to insist on rigidity to ensure the continuing relevance of the *jus ad bellum* against contemporary security threats and developments not foreseen by the drafters of the Charter. For them, to deny States the fullest remit of their "inherent" right to self-defense would affect the legitimacy of the *jus ad bellum* regime.

Here we are, then, eighty years since the adoption of the Charter, yet unable to agree still on certain fundamental assumptions and positions about the conditions under which States may lawfully resort

to war. The challenge for us as lawyers is not merely to describe these disagreements, but to bring clarity and coherence to the meaning of the *jus ad bellum*, perhaps in such a way that meaningfully balances the priority of keeping the *jus ad bellum* representative and respectful of sovereign equality, whilst also being responsive to contemporary developments. Setting the law clearly, and unambiguously, is essential to its credibility and authority in practice as well as situating the law as an alternative to war

But suppose that we secure clarity on whether the use of armed force in a given situation is, or is not, prohibited. What then? What about the effectiveness of the norms, once a breach is determined? If, in practice, some States have preferred war over the law, can we seriously maintain the view that the *jus ad bellum* remains effective? The debate about the effectiveness of the *jus ad bellum* is far from recent. As early as the 1970s, scholars lamented the frequent uses of force during the Cold War, going to the extent of announcing the death of Article 2(4). Others replied that the announcement of the death of Article 2(4) was premature; this norm was indeed not in the best condition, but there was still time to recover. I believe that holds true today. In its judgments, the International Court of Justice has observed that for every resort to armed force, we would see tenfold reactions from States condemning the aggressor State for breaching the prohibition on the use of force. States that indeed breached the prohibition, no matter how flagrantly, would never admit to that breach. Rather, they would find a way to appeal to one or more exceptions to the prohibition, with varying degrees of legal validity. In this sense, the Court reasoned that the normative status of the prohibition on the use of force can survive some breaches. The question is: how many? And we may well ask whether it is still always the case that truly legal justifications always accompany uses of force today.

The real issue is how we can build resilient institutions and processes to actualize the peaceful settlement of disputes and to provide lawful avenues for addressing the use of force. Under the schema of the Charter, the "primary" responsibility for maintaining peace and

security is entrusted to the Security Council and concretized via Chapter VII. The problem, as is widely known, however, is that Article 27, paragraph 3 of the Charter, requires the "affirmative vote" of all five Permanent Members on all decisions of the Council, other than merely procedural matters. In other words, as you will know, the Permanent Members exclusively possess the veto power within the Council. What happens, then, when the Security Council is paralyzed by a veto, unable to fulfil its responsibility to maintain international peace and security in the face of atrocities or breaches of jus cogens norms, which should protect the fundamental values of the international community?

In that scenario, we must remember that the Security Council has the primary, but not exclusive responsibility for maintaining international peace and security. In 1950, the General Assembly of the United Nations, which consists of all Member States, adopted resolution 377 A (V) titled "Uniting for Peace", following a deadlock within the Security Council on the armed force used by North Korea against South Korea. Through the resolution, the General Assembly assumed a subsidiary role in the maintenance of international peace and security, affirming its competence to make "recommendations" for collective action, in case the Council fails to reach decisions on the matter. Indeed, the Uniting for Peace resolution was invoked most recently following Israel's military escalations in Palestine and in the wake of Russia's invasion of Ukraine in the Donbas. Yet, the General Assembly is not a substitute for the Council, considering that its recommendations do not have binding force. Therefore, Member States are not obligated to follow these recommendations, unlike the "decisions" of the Council, which have binding effect as per Article 25 of the Charter.

Where else could an aggrieved State go, then, for relief from armed force? One possibility would be to institute proceedings at the International Court of Justice. Any decision of the Court would be binding as between the Parties, as per Article 59 of the Statute of the Court. The Court itself also has a subsidiary responsibility towards the maintenance of international peace and security, achieved through its

role in the peaceful settlement of disputes between States. There are, however, some challenges in anticipating the peaceful resolution of such a dispute through the Court. Firstly, there has to be a basis of jurisdiction, that is, a way to show that the other party consented in some form to the Court's adjudication of the case, since international dispute settlement is based on the principle of consent. This, however, is difficult to demonstrate in most cases. Secondly, assuming an aggrieved State obtains a favorable judgment from the Court, what if the opposing party refuses to comply? In case of non-compliance, the aggrieved State may have recourse to the Security Council, as per Article 94, paragraph 2 of the Charter. However, this brings us back to square one!

This is not to say that the findings of the Court and the recommendations of the General Assembly are without value. Indeed, they provide a clear message and legal impetus to the aggrieved States and the international community. The point I am seeking to make, and it is far from being a novel one, is that the collective security system envisaged under the Charter, including in particular the role of the Security Council, needs reform. International law, unlike national legal systems, is a decentralized order. It is a system of mutually co-existing sovereigns, lacking a central enforcement authority. Perhaps, this is for good reason; after all, there could be concerns about democratic deficits or threats to sovereignty if such a central power existed. Yet, if we are to defend the legitimacy of this system, we need to find a way to ensure our legal institutions provide clear and effective alternatives to and recourse against the resort to force. This is no easy task. It is one that has challenged those who came before us and will continue to challenge future generations. There are, indeed, some examples of movements towards reforms to this end. For instance, it has been argued that Permanent Members of the Security Council are obligated not to exercise their veto powers, when the Council is seized of a situation implicating mass atrocities of the kind witnessed in the former Yugoslavia and Rwanda. If successful, such initiatives would incrementally strengthen the authority and credibility of the collective security system.

When prevention fails and conflict erupts, does law fall silent? The *jus in bello*, or IHL, ensures that it does not. The 1949 Geneva Conventions and their Protocols codify the principle that even in war, humanity must not perish. They limit the means and methods of warfare, protect civilians, and guarantee humane treatment of those who have laid down their arms. Compliance with these rules is not optional. A State acting in self-defense under the *jus ad bellum* is still bound by the *jus in bello*. Military necessity does not erase human dignity. Violations of humanitarian law—targeting civilians, mistreating prisoners, employing indiscriminate weapons—are war crimes that engage individual criminal responsibility.

The creation of international criminal tribunals for the former Yugoslavia and Rwanda, and the establishment of the International Criminal Court, along with other ad hoc hybrid judicial bodies, demonstrate that accountability is possible even in the aftermath of atrocity. They also remind us that law in wartime is not only about restraint but about preserving the possibility of peace. Persistent violations of IHL feed cycles of vengeance that undermine the very order the *jus ad bellum* seeks to protect. We have also noticed an unwillingness in current times to establish adjudicatory bodies to deal with issues arising from the conduct of hostilities; what we see instead is a deferral, without specificity, of legal scrutiny – deferral to an unknown time and unspecified mechanisms – exemplified by the commendable work of the International, Impartial and Independent Mechanism established by the U.N. General Assembly.

When the guns fall silent, the work of law continues. The *jus post bellum*—literally "law after war"—addresses the transition from conflict to sustainable peace. Though less codified, it encompasses principles of accountability, reconstruction, reparations, and reconciliation. It embodies the conviction that peace is not simply the absence of fighting but the presence of justice. Post-conflict tribunals and truth commissions—from Nuremberg to Sierra Leone to South Africa—have shown that justice, however delayed, restores moral order. The ICC's

recognition of aggression as a crime reaffirms that waging an unlawful war itself violates the law.

At the heart of the *jus post bellum* lies inclusion. Durable peace requires that those who suffered most are part of rebuilding. Processes that exclude victims or marginalized groups may end the violence but not the conflict. The law after war must therefore be both juridical and humane, combining accountability with restoration.

We must ask whether the legal regimes and institutions remain fit for purpose. The U.N. Charter system, built for 1945, now operates in a world of multipolar power and digital interdependence. The failures we witness are real: paralysis in the Security Council, selective compliance with ICJ judgments in certain high-profile instances, growing skepticism toward global governance. These failings may be viewed as indicating the irrelevance of international law; but they may also be viewed as underscoring its necessity. To reflect seriously on law, ethics, and armed conflict is not to indulge in utopia. It is to affirm a disciplined hope: that reason, not violence, can guide international relations; that humanity can choose law as the first, not the last, resort. Every treaty respected, every judgment complied with, every war crime prosecuted is an act of faith in that vision.

I am honored to present this distinguished collection of essays authored by leading experts in the law of armed conflict, human rights law, international criminal law, military operational law, and public international law. This volume assembles an exceptional group of contributors to examine the enduring principle that even in times of war, the law does not fall silent. At a moment when armed conflicts across the globe challenge and destabilize the international order, these contributions reaffirm the resilience and adaptability of international law. They offer rigorous analysis and critical insights into how legal norms constrain violence, strengthen institutions of peace, uphold the principle of humanity, and lay the foundations for a just and sustainable post-war order.

The chapters in this volume do more than describe the law; they interrogate its capacity to respond to contemporary threats and its role

in shaping a just post-conflict order. In doing so, they illuminate pathways for strengthening institutions of peace and reinforcing the normative foundations of international relations. I have no doubt that this work will constitute a significant contribution to scholarly discourse and to the continuing project of reinforcing law, rather than war, as the primary framework for the governance of international relations. May this work contribute meaningfully to that endeavor.

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I am deeply grateful to my exceptional editorial board: Major Grant Jenson, Captain Joshua Carmel, Lieutenant Junior Grade Madison Graham, Justus Armstrong, Lucy Wylie, and Keely Brock. Their diligence, keen editorial judgment, and unwavering attention to detail greatly strengthened this volume. Their efforts spared readers from countless errors, awkward turns of phrase, and editorial oversights, and helped ensure that any imperfections that remain are mine alone.

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Finally, I am indebted to the Lord God, who granted me the strength, endurance, and perseverance necessary to complete this undertaking. I am likewise profoundly grateful to my parents, Tamie and Frank, whose unwavering love, encouragement, and steadfast support have sustained me throughout my life and enabled me to pursue opportunities such as this.

Introduction

The study of war, law, and ethics calls to mind places such as The Hague, Geneva, London, and New York. Perhaps Nuremberg and Tokyo also come to mind. At first glance, Columbus, Georgia, seems an unlikely place from which to edit a scholarly volume on international humanitarian law and armed conflict. I would suggest otherwise.

I was born and raised in Columbus, home to Fort Benning, one of the world's most significant military installations. For generations, Soldiers from across the United States—and from many of our closest allies—have passed through its gates, as I did during my own military training. Countless military officers received their commissions at Fort Benning, the "Home of the Infantry," and Soldiers from over one hundred nations travel to Benning, which houses the Western Hemisphere Institute for Security Cooperation (WHINSEC), to train alongside their American counterparts.

Fort Benning is more than a military installation. It is a place where young men and women begin careers of service, where leaders are formed, and where decisions made in classrooms and on training fields shape conduct on battlefields across the globe. It is where many Soldiers first encounter the principles of international humanitarian law—distinction, proportionality, military necessity, humanity, and honor—and the enduring tension between military necessity and humanitarian imperative that the law of armed conflict seeks to balance.

The questions this volume explores are therefore not distant—not geographically, from a place like Columbus, and not intellectually, as academic abstractions. They affect soldiers, commanders, policymakers, diplomats, lawyers, and civilians alike. They concern the difficult choices that arise when nations employ force, the legal frameworks that seek to regulate armed conflict, and the ethical principles that preserve our humanity amid violence.

My interest in these subjects springs from both professional and personal experience. As an attorney and Judge Advocate in the United States Army Reserve, I have taken part in military decision-making processes where the law of armed conflict serves not as a topic of scholarly discussion but as a practical guide to action. Legal advisors help commanders navigate uncertainty, assess risk, and apply legal principles in environments where information is incomplete and the consequences are profound.

Yet the duty to uphold the law of armed conflict rests not with lawyers or senior leaders alone. It belongs to every soldier, down to the lowest levels. Military professionals are often reminded that whatever their branch, specialty, or rank, they remain "Soldiers first," entrusted with the responsibilities that military service entails. Distinction, proportionality, necessity, humanity, and honor are not concepts confined to conference rooms or legal memoranda; they take form through the actions of individual warfighters. The character and judgment of those individuals remain among the strongest safeguards against unnecessary suffering in war.

The importance of this responsibility is only increasing. For much of its history, the United States has enjoyed the advantages of geography: peaceful neighbors to the north and south, vast oceans to the east and west. Advances in military technology, cyber capabilities, space operations, autonomous systems, and information warfare now steadily erode the significance of distance. We cannot take the future security of our communities for granted. If coming generations are to enjoy the freedoms and peace that so many Americans have sacrificed to preserve, then each of us must contribute, however modestly, to a stable international order, credible deterrence, and collective self-defense.

At its core, the law of armed conflict reflects a simple but timeless truth: even in war, there must be limits. The Geneva Conventions and their related frameworks embody the principle that military necessity and human dignity are not mutually exclusive. As one introduction to the Geneva Conventions explains, "we obey [the Law of Armed

Conflict] because we cannot allow ourselves to become what we are fighting and because we cannot be heard to say that we fight for the right while we are seen to commit wrongs."[1] The law does not end war, but it preserves a measure of humanity within it.

This commitment to human dignity is no modern invention. Across cultures, religions, and philosophical traditions, societies have recognized some version of the principle often called the Golden Rule: "do to others what you would have them do to you."[2] The contemporary law of armed conflict rests on treaties, custom, and state practice, yet its enduring appeal springs from a broader recognition that human beings possess inherent worth—a conviction Christianity expresses through the doctrine of the *Imago Dei*, the belief that human beings are created in the image of God—even amid conflict.

The chapters that follow do not speak with a single voice, nor should they. The contributors form a diverse group of practitioners, scholars, military officers, professionals in humanitarian assistance and protection, and advocates who approach hard questions from different vantage points. Readers will agree with some arguments and reject others. I do myself. Meaningful progress demands serious engagement with competing ideas. This volume does not aim to answer every challenge confronting modern warfare; it aims to foster thoughtful examination of the most pressing legal and ethical questions of our time.

The subjects explored in this volume range from accountability for aggression and atrocities to gray-zone conflict; the protection of civilians in armed conflict; information operations and an emerging customary law of cyber warfare; due diligence obligations of corporate actors operating in combat zones; state obligations to prevent genocide; the special legal protections afforded to children in armed conflict; the evolving application of international humanitarian law to emerging challenges; and many others. Together, these chapters reflect the complexity of contemporary armed conflict and

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[1] GARY SOLIS, THE LAW OF ARMED CONFLICT 7 (2010).
[2] *Matthew* 7:12.

the continuing effort of scholars and practitioners to understand, refine, and strengthen the rules that govern it.

Every contributor devoted substantial time and effort to these questions because they matter. The stakes are measured not in legal doctrine or academic debate but in human lives, national security, and the preservation of peace. Each contributor writes from a shared desire to leave the world safer, more stable, and more just than they found it.

Calvin Smyre, a Coumbus friend of mine, former Dean of the Georgia House of Representatives, and former United States Delegate to the United Nations, often quotes an ancient Greek proverb: "Society grows great when old men plant trees whose shade they know they may never sit in." In many respects, scholarship on armed conflict is an exercise in planting such trees. The benefits may not be immediate, and the authors may never witness the full impact of their efforts. Yet the pursuit remains worthwhile if it helps future generations navigate conflict with greater wisdom, restraint, and humanity.

It is in that spirit that this volume is offered.

Frank G. Lumpkin IV
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Chapter 1. The Continuum of Prevention: Germany's Obligations Under the Genocide Convention and the Ethics of Yazidi Deportation

Naomi Prodeau and Marissa Kardon Weber[1]

I. Introduction

On November 30, 2021, a German court became the first worldwide to convict a member of the Islamic State of Iraq and the Levant (ISIL)[2] for committing genocide against members of the Yazidi community.[3] In January 2023, the German Bundestag[4] institutionalized the recognition of crimes perpetrated by ISIL against the Yazidis, passing a

[1] The authors are international criminal and human rights lawyers and members of the Persecution Prevention Project (PPP), a pro bono initiative supported by Yale University's Genocide Studies Program and the International Bar Association's Human Rights Law Committee. They are deeply grateful for significant contributions from Project members, as well as Sophie Foster for her research assistance. Additional experts significantly contributed to this chapter on condition of anonymity in order to safely and securely continue working directly with the Yazidi community in Iraq and Europe. Some of the information relied on in this chapter is derived from firsthand experience or on-the-ground interviews and testimonies carried out by Project members, and referenced throughout as PPP Reporting). Project members can be contacted for bilateral requests for information. The authors would like to thank Frank G. Lumpkin IV, attorney at Hall Booth Smith, P.C. and U.S. Army Judge Advocate, and Justus Armstrong, criminal defense attorney at the Armstrong Justice League, P.C. in Phenix City, Alabama, for their review.

[2] This chapter uses ISIL instead of ISIS to maintain consistency with official U.N. documentation.

[3] Oberlandesgericht [OLG] Frankfurt am Main [Higher Regional Court] Nov. 30, 2021, 5-3 StE 1/20-4-1/20 (Ger.).

[4] This is the German title of the German lower body of parliament.

parliamentary resolution expressly classifying the 2014 atrocities as genocide under the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (hereafter "Genocide Convention").[5] Then-Foreign Minister Annalena Baerbock stated that "Germany, as a society, recognizes the genocide against the Yazidis."[6] The same resolution called upon the Federal Government to "continue

[5] Antrag der Fraktionen SPD, CDU/CSU, BÜNDNIS 90/DIE GRÜNEN und FDP, Anerkennung und Gedenken an den Völkermord an den Êzîdinnen und Êzîden 2014 [Motion of the Parliamentary Groups SPD, CDU/CSU, Alliance 90/The Greens, and FDP, Recognition and Remembrance of the Genocide against the Êzidî Women and Men in 2014], Deutscher Bundestag: Drucksache [BT] 20/5228, Jan. 18, 2023, 1, https://dserver.bundestag.de/btd/20/052/2005228.pdf (Ger.).

[6] Deutscher Bundestag, *Bundestag Erkennt IS-Verbrechen an Jesiden als Völkermord an* [*Bundestag Recognizes IS Crimes against Yazidis as Genocide*] (Jan. 19, 2023), https://www.bundestag.de/dokumente/textarchiv/2023/kw03-de-jesiden-927032 (Ger.).

granting protection to Yazidis, taking into account their ongoing persecution[7] and discrimination within the asylum procedure."[8]

[7] Under European law,

> [an] act shall be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention where it is: (a) sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the ECHR; or (b) an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner to an act referred to in point (a).

See Regulation 2024/1347, of the European Parliament and of the Council of 14 May 2024 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection and for the Content of the Protection Granted, art. 9(1), 2024 O.J. (L 1347) 1 (EU). Under international law, there is no universally accepted definition of "persecution." As per the U.N. High Commissioner for Refugees, a threat to life or freedom, or other serious violations of human rights on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other prejudicial actions or threats can amount to persecution depending on case-specific circumstances, including the subjective fear of persecution. The High Commissioner also supports a finding of persecution based on cumulative factors:

> [a]n applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds.

See U.N. High Comm'r for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 2, ¶¶ 51-53, (Feb. 2019), https://www.unhcr.org/sites/default/files/legacy-pdf/5ddfcdc47.pdf.

[8] Antrag der Fraktionen SPD, *supra* note 5.

The same year that it recognized the genocide, reports emerged of Germany deporting members of the Yazidi community back to Iraq.[9] In September 2023, the German Bundestag[10] raised concerns regarding the "above-average number of revocations of protected status . . . for Yazidi refugees from Iraq, many of whom are survivors of the genocide perpetrated by the Islamic State (IS) in 2014."[11] According to the Bundestag, the Federal Office for Migration had ceased to consider Yazidis from northern Iraq subject to group persecution from the then-ongoing genocide as early as the end of 2017,[12] at least two years before what is considered the defeat of ISIL in 2019 in Baghouz, Syria. The adjusted protection rate of the Federal Office for Yazidi refugees from Iraq fell from nearly 100 percent in 2015 to just 48.6 percent in 2022.[13]

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[9] Press Release, PRO ASYL, Innenministerkonferenz: PRO ASYL Fordert Sofortigen Abschiebestopp für Jesidinnen und Jesiden [Conference of Interior Ministers: PRO ASYL Demands an Immediate Moratorium on Deportations of Yazidis] (Dec. 2, 2023), https://www.proasyl.de/pressemitteilung/innenministerkonferenz-pro-asyl-fordert-sofortigen-abschiebestopp-fuer-jesidinnen-und-jesiden; Press Release, PRO ASYL, Bundesregierung Forciert Heimlich Abschiebungen in den Irak [The German Government is Secretly Pushing Ahead with Deportations to Iraq] (Oct. 9, 2023), https://www.proasyl.de/news/bundesregierung-forciert-heimlich-abschiebungen-in-den-irak/; Press Release, PRO ASYL & WADI, The Yazidis: There Is No Going Back to the Time Before the Genocide (Apr. 2024), https://wadi-online.org/2024/04/24/report-ten-years-after-the-genocide-on-the-situation-of-the-yazidis-and-yazidis-in-iraq-pro-asyl-and-wadi.

[10] The Bundestag is the lower house of the German legislature or parliament.

[11] Antwort der Bundesregierung [Answer of the Federal Government], Deutscher Bundestag: Drucksache [BT] 20/8592, Sept. 29, 2023, 2, https://dserver.bundestag.de/btd/20/085/2008592.pdf (Ger.). Under German asylum law, protected status may be revoked if the conditions for prohibiting deportation are considered to no longer apply. *See* Asylgesetz [Asylum Act], § 73b(1) (Ger.), https://www.gesetze-im-internet.de/asylvfg_1992/BJNR111260992.html.

[12] According to the Bundestag, the Federal Office for Migration and Refugees (BAMF) ceased to assume Yazidis from northern Iraq were subject to group persecution by virtue of the ongoing genocide as early as the end of 2017. From then on, decisions regarding Yazidi refugees were made on a case-by-case basis, taking into account the prevailing situation in Iraq and the available information about the individual. *See* Bundesregierung, *supra* note 11, at 14.

[13] Kleine Anfrage: Jesidische Geflüchtete in Deutschland [Minor Interpellation: Yazidi Refugees in Germany], Deutscher Bundestag: Drucksache 21/3188, ¶ 2 (Dec. 10, 2025), https://dserver.bundestag.de/btd/21/031/2103188.pdf. Schriftliche

Within that timeframe, the Federal Office revoked the protected status of 1475 Yazidi refugees.[14] Media reports from April 2026 estimate that the overall protection rate for Iraqi Yazidis had fallen from eighty-three percent in 2014 to around twenty-three percent in 2025.[15]

In parallel, publicly available figures show that removals from Germany to Iraq increased markedly in the immediate years following the recognition of the genocide: 300 people were deported to Iraq in 2023,[16] 699 in 2024,[17] 793 in 2025,[18] and 135 by the end of March 2026.[19] While the Federal Government does not systematically record the religious affiliation of persons removed to Iraq, members of the Bundestag have expressly stated that these deportations frequently affect survivors of the genocide.[20] Civil society organizations, media reports, and Bundestag committee testimony indicate that Yazidis have been among those removed or threatened with removal, with specific deportations confirmed in 2024 and 2025.[21] In February 2026,

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Fragen mit den in der Woche vom 23, Jan. 2023 eingegangenen Antworten der Bundesregierung [Written Questions with the Federal Government's Answers Received During the Week of January 23, 2023], Deutscher Bundestag: Drucksache 20/5426, Antwort auf Frage 44, Jan. 27, 2023, https://dserver.bundestag.de/btd/20/054/2005426.pdf.

[14] Bundesregierung, *supra* note 11, at 2.

[15] Sulaiman Tadmory et al., *Migration Turnaround: Resistance from Within the CDU/CSU*, NDR (Apr. 16, 2026), https://www.ndr.de/fernsehen/sendungen/panorama/archiv/2026/migrationswende-widerstand-aus-der-union%2Cmigrationswende-widerstand-union-100.html.

[16] Antwort: Abschiebungen in den Irak [Answer: Deportations to Iraq], Deutscher Bundestag, Drucksache 21/1416, 2 (Aug. 29, 2025), https://dserver.bundestag.de/btd/21/014/2101416.pdf.

[17] *Id*.

[18] *Id*.

[19] *Germany Deports 135 Iraqi Migrants in First Three Months of 2026: Ministry*, RUDAW (May 7, 2026), https://www.rudaw.net/english/categories/world/956759.

[20] Antwort: Abschiebungen und Ausreisen im Jahr 2025 [Answer: Deportations and Departures in 2025], Deutscher Bundestag, Drucksache 21/4103, 1 (Feb. 11, 2026), https://dserver.bundestag.de/btd/21/014/2101416.pdf.

[21] Wortprotokoll: Tagesordnung - Öffentliche Anhörung [Verbatim Transcript: Agenda – Public Hearing], Deutscher Bundestag: Drucksache 21/3601, 6 (Feb. 23, 2026), https://www.bundestag.de/resource/blob/1162094/25-Sitzung-23-02-2026.pdf. *See* OLIVER M. PIECHA, ZEHN JAHRE NACH DEM VOLKERMORD: ZUR LAGE DER

experts testifying before the Bundestag estimated that between 5000 and 10,000 Yazidis in Germany remained at risk of deportation.[22]

German courts also ceased to presume protected status as early as 2019.[23] Higher administrative courts came to reject claims that Yazidis remained exposed to group persecution in Iraq following the defeat of ISIL as a territorial actor.[24] The latest iteration of this restrictive

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JESIDINNEN UND JESIDEN IM IRAK [TEN YEARS AFTER THE GENOCIDE: ON THE SITUATION OF THE YAZIDIS IN IRAQ] (Apr. 2024), https://www.proasyl.de/wp-content/uploads/2024_04_23_Zur-Lage-der-Jesidinnen-und-Jesiden-im-Irak.pdf (not all administrative decisions are made available to the public). *See, e.g.*, Verwaltungsgericht Potsdam [Potsdam Administrative Court], *Antrag der am 22. Juli 2025 in den Irak Abgeschobenen Jesidischen Familie auf Rückabwicklung der Abschiebung Erfolglos* [*Application of the Yazidi Family Deported to Iraq on July 22, 2025, for the Reversal of the Unsuccessful Deportation*], VG 16 L 866/25.A (Aug. 7, 2025), https://verwaltungsgerichtsbarkeit.brandenburg.de/sixcms/media.php/9/PE-07-08-2025-1.pdf (Ger.); Thüringer Ministerium für Justiz, Migration und Verbraucherschutz [Thuringian Ministry of Justice, Migration and Consumer Protection], *Abschiebung von Vollziehbar Ausreisepflichtigen Personen in den Irak* [*Deportation of persons subject to enforceable deportation orders to Iraq*] (July 22, 2025), https://justiz.thueringen.de/aktuelles/medieninformationen/detailseite/31-2025 (Ger.); ZDFHeute, *Flug von Hannover nach Bagdad: 47 Personen in den Irak Abgeschoben* [*Flight from Hanover to Baghdad: 47 People Deported to Iraq*] (Feb. 17, 2025) https://www.zdfheute.de/politik/deutschland/hannover-abschiebeflug-migration-irak-proteste-100.html (Ger.); Die Ziet, *47 Menschen in den Irak abgeschoben* [*47 People Deported to Iraq*] (Feb. 17, 2025), https://www.zeit.de/gesellschaft/2025-02/abschiebung-irak-hannover-flug-jeside-demonstration (Ger.). 50 Personen nach Bagdad Abgeschoben – Auch Jesiden an Bord [50 People Deported to Baghdad — Yazidis Also on Board], WELT (Sept. 30, 2025), https://www.welt.de/regionales/nrw/article68dba6c69207ead1797a320a/50-Personen-nach-Bagdad-abgeschoben-Auch-Jesiden-an-Bord.html.

[22] Wortprotokoll: Tagesordnung - Öffentliche Anhörung [Verbatim Transcript: Agenda – Public Hearing], Deutscher Bundestag: Drucksache 21/3601, 7 (Feb. 23, 2026), https://www.bundestag.de/resource/blob/1162094/25-Sitzung-23-02-2026.pdf.

[23] Niedersächsisches Oberverwaltungsgericht [OVG Lüneburg] [Higher Administrative Court of Lower Saxony] July 30, 2019, 9 LB 133/19; Niedersächsisches Oberverwaltungsgericht [OVG Lüneburg] [Higher Administrative Court of Lower Saxony] Sept. 24, 2019, 9 LB 136/19; Niedersächsisches Oberverwaltungsgericht [OVG Lüneburg] [Higher Administrative Court of Lower Saxony] Oct. 22, 2019, 9 LB 130/19.

[24] Oberverwaltungsgericht für das Land Nordrhein-Westfalen [OVG NRW] [Higher Administrative Court of North Rhine-Westphalia], July 31, 2024, 9 A 1591/20.A (Ger.).

practice, and an example of the reasoning now used to deny group-based protection to Yazidi applicants, is the March 2025 decision of the Higher Administrative Court of Saxony-Anhalt.[25] Affirming judicial precedent and the German government's position, the Court determined that members of the Yazidi community are no longer at "significant" risk of persecution as a group based on their religious affiliation, either by the so-called Islamic State or by other non-state third parties.[26] This judicial reasoning rests on a narrow premise: that with the territorial defeat of the Islamic State as the principal perpetrator of the 2014 genocide, the "current danger of being personally affected"[27] required to constitute group persecution under German Law has been eliminated. This narrow interpretation of risk was subsequently adopted by lower courts adjudicating claims of asylum or subsidiary protection of Yazidi plaintiffs.[28]

The dissonance between Germany's recognition of and pioneering accountability efforts for the 2014 genocide and its deportations of Yazidis back to Iraq, where the genocide occurred and they face ongoing risks, requires an evaluation of Germany's obligations to the Yazidi community as the subject of a recent genocidal campaign and ongoing acts of persecution. This contradiction raises questions about

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Verwaltungsgerichtshof Baden-Württemberg [VGH Baden-Württemberg] [Higher Administrative Court of Baden-Württemberg], July 12, 2023, A 10 S 400/23 (Ger.).

[25] Oberverwaltungsgericht des Landes Sachsen-Anhalt [Higher Administrative Court of Saxony-Anhalt, 2d Senate] Mar. 13, 2025, 2 L 2/25.Z. A decision from the Bavarian Administrative Court of Appeal later adopted the same position, citing to this March 13, 2025, decision for its detailed reasoning. VGH Bayern, Aug. 27, 2025, 5 ZB 23.30936 ("The plaintiffs have failed to provide the required analysis of the higher court rulings issued in the interim regarding the situation of the Yazidis in Iraq").

[26] *Id*. (The Court considers that the living conditions and humanitarian circumstances in the province of Nineveh do not constitute, with the required substantial probability, a serious risk of a violation of Article 3 of the ECHR (prohibition of torture and CIDT) for every Yazidi returning there.).

[27] *Id*.

[28] *See, e.g.*, VG Hannover, Apr. 10, 2025, 3 A 140/25, Keine Beachtliche Wahrscheinlichkeit der Gruppenverfolgung der Yeziden im Irak [No Substantial Probability of Group Persecution of Yazidis in Iraq]; VG Potsdam, Apr. 10, 2025, 16 K 616/23.A (Ger.); VG Hannover, Aug. 14, 2025, 3 A 4909/22.

Germany's legal compliance and challenges its credibility as a global advocate of accountability for mass atrocities.

Germany is bound under several international legal frameworks and principles to protect populations at risk of genocide, both individually and collectively. This includes the foundational obligations under the Genocide Convention to prevent and punish genocide, incumbent upon both territorial and third States,[29] and the attendant principle of *non-refoulement* of persons having sought refuge in the latter.[30]

International law does not exhaustively detail the content of the Genocide Convention's obligations. However, U.N. protection frameworks provide guidance to support their operationalization. In 2014, the year ISIL invaded Sinjar district and began its genocidal campaign against the Yazidis, the United Nations released the "Framework of Analysis for Atrocity Crimes: A Tool for Prevention" (hereafter "the U.N. Framework"),[31] designed to assist States in fulfilling their obligations to prevent atrocity crimes by assessing fourteen risk factors considered predictors of occurrence or recurrence. Founded on the moral obligation to protect populations at risk, this Framework illustrates the need to associate legal and ethical considerations when assessing risks faced by a community.

Contrary to German courts' determinations, this chapter contends that Yazidis remain at a real risk of group persecution by civil, non-State, and State groups in Iraq. In reaching this conclusion, this chapter analyzes both the continued presence of the same risks to the Yazidi community that led to the 2014 genocide and ongoing risks of recurrence through the prism of the aforementioned U.N. Framework. Several of its risk factors can still be characterized as present for the Yazidi in Iraq.

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[29] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[30] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

[31] U.N. OFF. ON GENOCIDE PREVENTION & THE RESPONSIBILITY TO PROTECT, FRAMEWORK OF ANALYSIS FOR ATROCITY CRIMES: A TOOL FOR PREVENTION (2014).

Where a narrow interpretation of international legal obligations places those they are meant to protect at risk, European States like Germany should reexamine their approach and act in the spirit of protection frameworks to proactively protect populations at risk of mass atrocities. This chapter will seek to demonstrate that the present risk factors for Yazidis in Iraq legally and ethically support Germany's reassessment of risks of group persecution of Yazidis in Iraq. Section II of this chapter summarizes the historical and factual context of the Yazidi genocide. Section III details specific elements of States' ongoing legal obligations to prevent genocide. Section IV analyzes the present situation of Yazidis in Iraq under the U.N. Framework's Risk Factors relevant to genocide. In conclusion, this chapter supports Germany's integration of the U.N. Framework as a complementary ethics-based instrument to operationalize its legal duty to prevent genocide and apply this Framework to the Yazidi situation.

II. Contextual Background

Yazidism is considered both an ethnicity and a religion. Its present configuration dates to the turn of the eleventh and twelfth centuries.[32] As an endogamous community, children can only be Yazidi by having two Yazidi parents. With conversion into the faith impossible, the survival of the community has historically relied on marriages within the Yazidi religious group.

The central tenet of the Yazidi religion is the belief in one God as the creator of the world, who upon creation entrusted its care to seven Holy Angels, the head of whom is Taus Malek, the Peacock Angel.[33] Honoring these figures, along with the figure of God, is the motivation of the Islamic State and other ethno-religious communities for

[32] Christine Allison, *The Yazidis*, OXFORD RESEARCH ENCYCLOPEDIA OF RELIGION (2017).
[33] *Id*.

perceiving Yazidis as *mushrikin*,[34] going against the command of monotheism in Islam.[35] An additional narrative around Taus Malek is his refusal to worship humans despite their divine creation. While Yazidis view this as an expression of fidelity to God, other communities mistakenly identify Taus Malek as an evil or fallen being, thus viewing the Yazidis as "devil-worshippers" (Abd-al-Shaytan).[36]

This wholly unjust yet pervasive view of the Yazidi has resulted in cycles of religiously motivated persecutions dating as far back as the Ottoman Empire.[37] The Islamic State weaponized this ideology and used it as the foundation of its 2014 campaign of extermination of the community. On August 3, 2014, ISIL fighters attacked and encircled Sinjar, Yazidis' homeland in Iraq. The fighters faced little to no resistance; the Kurdish Peshmerga, principally made up of Kurdistan Democratic Party (KDP)-affiliated forces,[38] in control of Sinjar district before the advance, withdrew without effectively communicating this

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[34] *The Revival of Slavery Before the Hour*, DABIQ (2014), at 14-16 (Notably, "[p]rior to the taking of Sinjar, Shari'ah students in the Islamic State were tasked to research the Yazidi group to see if they should be treated as an originally mushrik group or one that originated as Muslims and then apostatized . . .". The term "*mushrikūn*" is translated as "polytheists," referring to individuals committing "*shirk*," defined in Islam as "idolatry, polytheism, and the association of God with other deities."). *See Shirk*, ENCYCLOPEDIA BRITANNICA (2026), https://www.britannica.com/topic/shirk.

[35] QUR'AN 4:48 ("Allah does not forgive associating others with Him 'in worship' . . . . And whoever associates others with Allah has indeed committed a grave sin"; QUR'AN 4:76 ("Believers fight for the cause of Allah, whereas disbelievers fight for the cause of the Devil. So fight against Satan's evil forces.") The literal interpretation of this Surah represents a highly conservative and minority branch of Sunni Islam, but does not represent the view of a majority of the Sunni Muslim community.

[36] U.N. Hum. Rts. Council, *"They came to destroy": ISIS Crimes Against the Yazidis*, ¶ 19, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016).

[37] A/HRC/32/CRP.2, *supra* note 36, ¶ 19.

[38] Formally, the Peshmerga are under the command of the Ministry of Peshmerga Affairs (MoPA) of the KRG. In practice, however, the Peshmerga's structure is largely divided and controlled separately by the two Iraqi Kurdish political parties: the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK); *see, e.g.*, Wladimir van Wilgenburg & Mario Fumerton, *Kurdistan's Political Armies: The Challenge of Unifying the Peshmerga Forces*, CARNEGIE MIDDLE EAST CTR. (Dec. 16, 2015), https://carnegieendowment.org/files/ACMR_WilgenburgFumerton_Kurdistan_English_final.pdf. In this report, we refer to the Peshmerga under KDP control, who were present in Sinjar in summer 2014.

decision to the local civilian population.[39] No official evacuation orders were issued, leaving most unaware of ISIL's encirclement and lack of defenses.[40]

The withdrawal occurred against a broader security context. After the collapse of the Iraqi army in Nineveh in June 2014, the Peshmerga moved to take fuller control of Sinjar district.[41] Thousands of Yazidis serving in the Iraqi army then returned to Sinjar with weapons, but KDP Peshmerga forces and secret police systematically disarmed them and collected their weapons across the district's villages.[42] This significantly weakened Yazidis' ability to defend themselves when ISIL attacked.

Yet, the August 3 attack had been preceded by clear, observable warning signs. By late June 2014, Sinjar was nearly surrounded by ISIL-held territory. In the weeks before August 3, ISIL fighters already conducted medium-range missile attacks on Yazidi villages; attacked and took over Yazidi farmland where they flew their own flags; and carried out shootings and kidnappings near Yazidi towns.[43] On August 2, reliable information of an impending ISIL attack circulated, of which KDP intelligence could not have been unaware.[44] Local Yazidi town and village leaders contacted KDP security officials to inquire about an evacuation plan, but Peshmerga commanders and high-level party and security officials provided assurances that the

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[39] A/HRC/32/CRP.2, *supra* note 36, ¶ 24. The KDP and affiliated Peshmerga forces had exercised de facto control over Sinjar's security architecture since 2003. The KDP had established a party-security structure in Sinjar through which local administration, intelligence, and armed security were closely integrated; *see* Matthew Barber, *A Survey Political History of the First Year of the Yezidi Genocide*, *in* YEZIDISM: BETWEEN CONTINUITY AND NATION-BUILDING 7-8 (Carina Jahani & Dashni Morad eds., 2022).

[40] A/HRC/32/CRP.2, *supra* note 36, ¶¶ 24-25.

[41] Matthew Barber, *A Survey Political History of the First Year of the Yezidi Genocide*, in Yezidism: Between Continuity and Nation-Building 8-9 (Carina Jahani & Dashni Morad eds., 2022).

[42] *Id*. at 9.

[43] *Id*. at 11-12.

[44] *Id*. at 12.

population would be protected and instructed civilians to remain in their villages.[45]

Yazidi movement before the attack was also restricted. As early as July 2014, Yazidi families attempting to relocate temporarily to the Kurdistan Region (KRI) were refused passage at the checkpoint controlling all movement between Sinjar and Dohuk Governorate in the KRI and for the KDP, save for individuals working in the KRI.[46] This policy reportedly intensified on August 2, 2014, when families attempting to evacuate were prevented from leaving. Intelligence officers stationed at town entrances stopped vehicles carrying children and possessions and instructed them to return home.[47]

The failure of the formal security structure was an enabling factor in the subsequent atrocities. ISIL fighters proceeded to capture all Yazidis who had been unable to escape their villages and intercept others on escape routes leading to neighboring Mount Sinjar. Upon capture, fighters methodically sorted Yazidis into three separate groups.[48] Yazidi men and boys above the age of puberty within the first group were immediately isolated and forced to convert or be summarily executed, often within eyesight or earshot of their families.[49] ISIL fighters subsequently transferred women, girls, and non-pubescent boys to holding sites, where they were registered and sold into sexual slavery and forced labor.[50] Upon reaching the age of seven, boys were separated from their mothers and forcibly transferred to training centers or military camps to be subjected to an intense program of indoctrination and military training and serve as recruits in ISIL's war against 'un-believers.'[51] ISIL fighters utilized the practice of forced marriage outside the faith and rape as tools to

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[45] *Id*.
[46] *Id*.
[47] Matthew Barber, *supra* note 47, ¶ 12.
[48] A/HRC/32/CRP.2, *supra* note 36, ¶ 31.
[49] *Id*. ¶ 33.
[50] *Id*. ¶¶ 42, 44, 55.
[51] *Id*. ¶¶ 92, 95-96.

destroy the endogamous Yazidi community.[52] As a result, an unknown but likely significant number of children were born as a result of wartime rape.[53] Both religiously and legally, the children born as a result of wartime rape are still considered Muslim.[54] Ultimately, ISIL killed approximately 5000 Yazidis, enslaved 6000 women and girls,[55] displaced 400,000,[56] and destroyed Sinjar.[57] As of February 2026, approximately 190,000 Yazidis remained displaced, with more than half living in camps, principally located in Duhok and Nineveh Governorates.[58]

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[52] *Id*. ¶ 19.

[53] SEED FOUND., CHILDREN BORN OF THE ISIS WAR 4, 12-13 (2000), https://www.seedkurdistan.org/Downloads/Reports/201223-Children_Born_of_the_ISIS_War.pdf. U.N. Secretary-General, *Women and Girls Who Become Pregnant as a Result of Sexual Violence in Conflict and Children Born of Sexual Violence in Conflict*, U.N. Doc. S/2022/77, ¶ 8 (Jan. 31, 2022), https://digitallibrary.un.org/record/3957087?ln=en&v=pdf ("Hawl camp in the Syrian Arab Republic, where security and humanitarian conditions remain deplorable, hosts close to 57,600 people, 94 per cent of them women and children (S/2021/1029), a number of whom arrived pregnant, in 2019, as a result of systemic sexual violence perpetrated by Da'esh and other parties to the conflict.").

[54] SEED FOUND., *supra* note 59.

[55] In August 2016, the United Nations estimated that between 2000 and 5500 Yezidi had been killed and approximately 6386 abducted by ISIL members on or after August 3, 2014. *See* U.N. High Comm'r for Human Rights & U.N. Assistance Mission for Iraq, *A Call for Accountability and Protection: Yezidi Survivors of Atrocities Committed by ISIL* (Aug. 2016), https://www.ohchr.org/sites/default/files/Documents/Countries/IQ/UNAMIReport12Aug2016_en.pdf. This was consistent with independent demographic analysis of mortality and kidnapping estimates. *See* Valeria Cetorelli et al., *Mortality and Kidnapping Estimates for the Yazidi Population in the Area of Mount Sinjar, Iraq, in August 2014: A Retrospective Household Survey*, PLOS MED. (May 2017), https://pmc.ncbi.nlm.nih.gov/articles/PMC5423550/.

[56] *See* INT'L ORG. FOR MIGRATION, YAZIDI DISPLACEMENT AND MIGRATION FROM IRAQ: TRENDS, DRIVERS, AND VULNERABILITIES, 3 (2024), https://iraqdtm.iom.int/files/BorderMonitoring/20244304316478_iom_iraq_protection_yazidipaper_digital.pdf.

[57] *See* YALE UNIV. GENOCIDE STUD. PROGRAM & THE INT'L BAR ASS'N HUM. RTS. L. COMM., PATHWAYS TO PROTECTION: A REPORT CALLING FOR IMMEDIATE SOLUTIONS TO THE ONGOING DESTRUCTION OF THE YAZIDI COMMUNITY OF SINJAR 2, 6 (November 2024), https://macmillan.yale.edu/sites/default/files/2024-11/Pathways%20to%20Protection.pdf.

[58] *See* Section IV.D. (Humanitarian and Security Crisis) below.

The genocide has received worldwide recognition. U.N. mechanisms, including the Security-Council-created Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant ("UNITAD"),[59] have repeatedly recognized and detailed the genocidal character of ISIL's crimes against the Yazidi.[60] Regional institutions, including the European Parliament and the Parliamentary Assembly of the Council of Europe, have likewise recognized ISIL's crimes against Yazidis and other targeted minorities as genocide.[61] Individual States and national parliaments independently began to recognize the genocide as early

[59] The U.N. Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant was created to support Iraq-based efforts to hold ISIL accountable by collecting, preserving, and storing evidence of acts that may have amounted to war crimes, crimes against humanity, and genocide. Its mandate ceased in September 2024. *See* S.C. Res. 2379 (Sept. 21, 2017), https://docs.un.org/en/S/RES/2379(2017).

[60] U.N. Security Council, Letter dated May 12, 2021, from President addressed to the Secretary-General and Permanent Representatives of the members of the Security Council, U.N. Doc. S/2021/460, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2021_460.pdf. The Independent International Commission of Inquiry on the Syrian Arab Republic released its first official report in 2016, in which it concluded to the U.N. Human Rights Council that ISIL was committing genocide against Yazidis. *See* A/HRC/32/CRP.2, *supra* note 36.

[61] EUR. PARL. DOC. (SEC 14402) (2017). European Parliament Resolution of 4 February 2016 on the Systematic Mass Murder of Religious Minorities by the So-Called 'ISIS/Daesh', 2018 O.J. (C 35) 77, https://www.europarl.europa.eu/doceo/document/TA-8-2016-0051_EN.html?redirect.

as 2016, including Iraq,[62] the United States,[63] the United Kingdom,[64] Canada,[65] and, critically, Germany.[66]

Even so, twelve years later, neither the structural causes that led to the creation of ISIL nor the combination of factors that enabled ISIL to carry out the Yazidi genocide have been adequately addressed. The continuing violence,[67] persistent discrimination, and credible threats

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[62] Iraq Law No. 8 of 2021 - Yazidi Female Survivors Law, Art. 2, https://www.refworld.org/legal/legislation/natlegbod/2021/124274?__cf_chl_f_tk=f7ieCfVEnEuZ1Vyu28FGgJGwh0uXX9V7W5xI5W6M0wo-1782833222-1.0.1.1-bsuutdde9UZ2knjfNz6rXklsj60.CNiNN_wBHGmM5lg.

[63] S. Res. 340, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/senate-resolution/340.

[64] Philip Loft, *UK Acknowledges Yazidi Genocide by Daesh/Islamic State* (Aug. 9, 2023), https://commonslibrary.parliament.uk/uk-acknowledges-yazidi-genocide-by-daesh-islamic-state/.

[65] Standing Comm. on Citizenship and Immigr., House of Commons, *Road to Recovery: Resettlement Issues of Yazidi Women and Children in Canada*, 42d Parl., 1st Sess., 18th Rep. 7 (Mar. 2018) (Can.).

[66] Antrag der Fraktionen SPD, CDU/CSU, BÜNDNIS 90/DIE GRÜNEN und FDP, *Anerkennung und Gedenken an den Völkermord an den Êzîdinnen und Êzîden 2014* [Motion of the Parliamentary Groups SPD, CDU/CSU, Alliance 90/The Greens, and FDP, Recognition and Remembrance of the Genocide Against the Êzidî Women and Men in 2014], BT-Drucksache 20/5228, at 1 (Jan. 18, 2023), https://dserver.bundestag.de/btd/20/052/2005228.pdf (Ger.) Other States include Armenia, the Netherlands, Belgium, and Luxembourg. *See Armenia Recognizes Genocide Against Iraq's Yazidis*, Azatutyun (Jan. 16, 2018), https://www.azatutyun.am/a/28978565.html; Tweede Kamer Der Staten-General, *Motion by member Kuik et al. regarding declaring that IS has committed genocide against the Yazidi population*, 29754-610 (July 1, 2021), https://www.tweedekamer.nl/kamerstukken/kamervragen/detail?id=2021D26770&did=2021D26770; Chamber of Representatives of Belgium, *Resolution aimed at recognizing and prosecuting crime of genocide against the Yazidis as well as providing them with assistance*, Doc. 55 1766/008 (July 15, 2021), https://www.lachambre.be/FLWB/PDF/55/1766/55K1766008.pdf; Chambre des Députés Grand-Duché de Luxembourg, *Regarding the case: Massacres and persecutions suffered by the Yazidis in Iraq and Syria at the hands of the terrorist group "Islamic State in Iraq and in the Levant" (ISIL)*, 4009 (Nov. 9, 2022), https://www.chd.lu/fr/motion_resolution/4009.

[67] *See* YALE UNIV. GENOCIDE STUD. PROGRAM, *supra* note 57, at 6, 26, (citing U.S. Comm'n on Int'l Religious Freedom, *Country Update: Iraq* (Mar. 2022), https://www.uscirf.gov/sites/default/files/2022-03/2022%20Iraq%20Country%20Update.pdf. *See also Fire Burns Five Caravans in*

against the Yazidi by various groups together instill a reasonable fear in many Yazidis that their lives are at risk in Iraq, notably in their homeland of Sinjar district. A severe lack of basic infrastructure and security[68] and lack of prospects for Sinjar's reconstruction severely restrict Yazidis' ability to sustainably and safely return to their homeland. Displacement in the Kurdistan Region of Iraq presents separate and additional risks. The continued, harmful impact of these systemic issues, including the failure to bring criminals, some of whom are known, to justice enable this ongoing insecurity. The failure to investigate allegations against parties not directly associated with ISIL also leaves the Yazidi vulnerable.

Governmental and non-governmental reports confirm the Yazidi's sustained need for refuge amidst continuing threats in Iraq. Despite Germany's diplomatic mission in Iraq acknowledging that it is too dangerous for their representatives to go to Sinjar to assess the situation for themselves,[69] Germany's protection policies do not reflect this reality. Rather, Germany has pursued its deportations of Yazidis to Iraq, where they continue to face a founded risk of future harm (*see* Section IV).[70]

Yazidi IDP Camp in Duhok Province, RUDAW (Jan. 9, 2024), https://www.rudaw.net/english/kurdistan/090120242.

[68] *See* Zeynep Kaya, *Iraq's Yazidis and ISIS: The Causes and Consequences of Sexual Violence in Conflict* (Nov. 2019), https://eprints.lse.ac.uk/102617/1/Kaya_yazidis_and_isis_published.pdf.

[69] OVG Sachsen-Anhalt [Higher Administrative Court of Saxony-Anhalt, Second Senate], Mar. 13, 2025, 2 L 2/25.Z, ¶ 44 (Ger.) ("The Federal Foreign Office also explicitly points out that the situation report must remain general and cursory due to the lack of an empirical basis . . . from media reports or statements by human rights organizations cannot be verified in many areas due to the precarious security situation in Iraq."). Auswartigen Amt vom [Federal Foreign Office], Lagebericht: Bericht über die asyl- und abschiebungsrelevante Lage in der Republik Irak [Situation Report on the asylum and deportation-relevant situation in the Republic of Iraq] (Apr. 2024), https://fragdenstaat.de/dokumente/248197-lagebericht-irak-04-2024/.

[70] Deutscher Bundestag, *Kritik an Abschiebungen von Jesiden in den Irak* [Criticism of Deportations of Yazidis to Iraq], hib 871/2023 (Nov. 16, 2023), https://www.bundestag.de/presse/hib/kurzmeldungen-978206.

This harsh reality has led many Yazidis to seek refuge in Europe. The largest number resides in Germany, with an estimated 250,000.[71] Other Western European countries like the Netherlands, Belgium, and France have also become temporary safe havens for Yazidis as their governments have publicly recognized the genocide and promised justice.[72] Members of the European Union are thus uniquely positioned to provide the Yazidi survivor community justice in the form of security and protection. The establishment of a community-led truth commission, hosted by Europe, has been announced for late 2026 and aims to be a forum for genocide survivors to "present evidence, share their experiences, and shape what accountability means on their own terms."[73] This will be a renewed opportunity for European countries to demonstrate their commitment to their international obligations and the rights of Yazidi genocide survivors.

III. The Duty to Prevent Genocide: Germany's Continuing Obligation to the Yazidi Community

This section explores Germany's continuing obligations to the Yazidi community. It first examines Germany's foundational duties under the Genocide Convention, and the specific scope and

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[71] German parliamentary reporting has described Germany as home to the largest Yazidi diaspora, numbering approximately 250,000 people in 2024. *See* Deutscher Bundestag, *Sorge über Weiterhin Gefährliche Lage für Jesiden* [*Concern Over the Continuing Dangerous Situation for Yazidis*], hib 319/2024 (May 15, 2024), https://www.bundestag.de/presse/hib/kurzmeldungen-1002892.

[72] *See* YALE UNIV. GENOCIDE STUD. PROGRAM, *supra* note 57, at 6, 45 (citing Int'l Org. for Migration, *France Welcomes Final Yazidi Families From Iraq Through Humanitarian Admissions Programme* (Nov. 22, 2019), https://www.iom.int/news/france-welcomes-final-yazidi-families-iraq-through-humanitarian-admissions-programme.); Council of the Eur. Union, *Yazidi: Statement by the High Representative on Behalf of the EU on the Situation of the Yazidi Community in Iraq* (Aug. 3, 2023), https://www.consilium.europa.eu/en/press/press-releases/2023/08/03/yazidi-statement-by-the-high-representative-on-behalf-of-the-eu-on-the-situation-of-the-yazidi-community-in-iraq/.

[73] Truth Comm., *City St George's University of London Res. Centres: Genocide, Accountability, Participation & Sols. (GAPS)*, https://researchcentres.citystgeorges.ac.uk/genocide-accountability-participation-solutions/truth-commission.

requirements of the duty to prevent. Against that framework, it then analyzes the "current danger" standard used by German courts in their protection determinations, and how this standard might undervalue longer-term recurrence risks, notably when approaching genocide as a process rather than a single event.

A. Germany's Foundational Obligations under the Genocide Convention

As a party to the Genocide Convention, Germany is bound by the dual obligation to prevent and punish genocide.[74] The Convention requires States to prevent, criminalize, and punish genocide and related acts, and ensure that persons accused of genocide are tried before a competent tribunal.[75] Germany has played a pioneering role in prosecuting ISIL fighters under the principle of universal

[74] Under the Genocide Convention, States must prevent genocide, investigate and punish perpetrators, and secure remedies for victims. States parties commit that "genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to **prevent and to punish**." Convention on the Prevention and Punishment of the Crime of Genocide art. I, Dec. 9, 1948, 78 U.N.T.S. 277 (emphasis added). This is also a *jus cogens* norm under customary international law, and a peremptory norm of international law. *See also* International Court of Justice, Case Concerning Armed Activities On the Territory of the Congo (2002), Jurisdiction of the Court and Admissibility of the Application, Judgment, 2006 I.C.J. 6, ¶ 64 (Feb. 3); *See also Commentary on Art. 40 of the Articles on State Responsibility of the International Law Commission, in* Report of the International Law Commission to the General Assembly on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 112 (2001); Restatement (Third) of the Foreign Relations Law of the United States (1987), ii ¶ 702(d) (at 163 and 167, respectively); Guénaël Mettraux, *Genocide under General International Law, in* INTERNATIONAL CRIMES: LAW AND PRACTICE 16 (2019), https://academic.oup.com/oxford-law-pro/book/57761/chapter-abstract/470818516?redirectedFrom=fulltext&login=true.

[75] Convention on the Prevention and Punishment of the Crime of Genocide, arts. I, III, & IV, Dec. 9, 1948, 78 U.N.T.S. 277; Mettraux, *supra* note 74; G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005).

jurisdiction,[76] culminating in the first worldwide genocide conviction for crimes against the Yazidi.[77]

Those accountability efforts, however, address only one dimension of State obligations under the Convention. The obligation to prevent genocide is distinct from the obligation to punish, and scholars consider it to be the Convention's overarching goal.[78] The aftermath of a genocidal campaign presents a profound level of destruction at the human, community, and societal levels. Repercussions can last for decades, and damage to the social fabric can be irreparable. The duty to prevent renders it incumbent on States to take measures to prevent the destruction of a group.[79] It follows that States should analyze risks of genocidal acts in the long-, medium-, and short-terms.

This preventive obligation does not exist in a legal vacuum; it is reinforced by the principle of *non-refoulement* under international refugee and human rights law.[80] The absolute prohibition against

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[76] In Germany's first prosecution for genocide, defendant Taha al. J. was arrested in October 2019 pursuant to an arrest warrant issued by the investigative judge of the Federal Court of Justice on April 18, 2019. *See* International Nuremberg Principles Academy and International Criminal Law Research Unit of the Friedrich-Alexander-Universität Erlangen-Nürnberg (FAU), Case Information Sheet: Taha Al-J., (2023), https://vstgb-datenbank.de/media/pdfs/CIS_Mustervorlage_TahaAlJ_englisch_KB.pdf.

[77] The aforementioned prosecution of Taha al. J. culminated in a November 30, 2021 ruling of culpability. *See* Oberlandesgericht Frankfurt am Main [OLG Frankfurt] [Higher Regional Court of Frankfurt am Main], Nov. 30, 2021, 5-3 StE 1/20–4–1/20, https://www.rv.hessenrecht.hessen.de/bshe/document/LARE220002903 (Ger.).

[78] Mettraux, *supra* note 74, at 86 n. 70 ("The overarching goal of prevention built into the Convention is apparent not just from this obligation, but also from the criminalization of a number of predatory acts that fall short of genocide."). *See also* Convention on the Prevention and Punishment of the Crime of Genocide art. III, Dec. 9, 1948, 78 U.N.T.S. 277.

[79] The ICJ held that the duty to prevent is one of conduct, *see* Genocide Judgment ¶ 430.

[80] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), Dec. 10, 1984. 1465 U.N.T.S. 85; Hum. Rts. Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) ("[T]he article 2 obligation requiring that States Parties respect and ensure the

returning individuals to territories where they face a risk of irreparable harm serves as a necessary operational component of genocide prevention. Where a deportation would expose Yazidis to a real risk of persecution, serious harm, or renewed genocidal violence, Germany's obligations to prevent genocide and uphold the principle of *non-refoulement* converge.

B. The Scope and Requirements of the Duty to Prevent

The practical application of the duty to prevent extends beyond the borders of a State where atrocities are taking place. As articulated by the International Court of Justice (ICJ), this duty not only binds the territorial State but "any State which, in a given situation, has it in its power to contribute to restraining *in any degree* (emphasis added) the commission of genocide."[81]

The duty to prevent is interpreted as one of due diligence and conduct. The ICJ has articulated that this requires States to "employ all means reasonably available to them, so as to prevent genocide as far as possible"[82] within the limits permitted by international law. The measures required in any given case are not exhaustive but context-specific: they depend on the nature of the risk, the means reasonably

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Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant."); *see also* Hum. Rts. Comm., General Comment No. 36: Article 6 Right to Life, ¶ 30, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

[81] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 461 (Feb. 26, 2007) [hereinafter Genocide Judgment], https://www.icj-cij.org/node/103164; *see also* Mettraux, *supra* note 74, at 87.

[82] The ICJ articulates a "due diligence" standard, whereby States must "employ the means reasonably available to them, so as to prevent genocide as far as possible." Genocide Judgment ¶ 430. *See also* Mettraux, *supra* note 74, at 85 n. 69: "The duty to prevent genocide . . . requires states to take all necessary steps to try to avoid or stop the commission of such crimes."

available to the State, and the State's capacity to contribute to prevention.[83]

Whether a State has discharged its obligation to prevent genocide requires an assessment of its capacity to "influence effectively the action of persons likely to commit, or already committing, genocide."[84] This capacity is not limited to territorial access or direct influence over local actors. It also varies according to a State's "particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide."[85] In this case, Germany's legal position is not limited to diplomatic or prosecutorial influence over Iraq or ISIL perpetrators respectively. It also exercises jurisdiction over Yazidis present on its territory.[86] Where a State has physical control over members of a protected group, the 'means reasonably available' include, at minimum, refraining from exposing them to prohibited risks through removal. In this context, non-removal does not reach beyond the scope of due diligence articulated by the ICJ; it is one of its most direct applications.

Temporally, the ICJ regards prevention as a continuing duty, which arises "at the instant that [a] State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."[87] The duty continues to exist as long as the risk is real.[88]

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[83] Genocide Judgment ¶ 430; *see also* Mettraux, *supra* note 74, at 90-5.
[84] Genocide Judgment ¶ 430.
[85] *Id*.
[86] *See also* YALE UNIV. GENOCIDE STUD. PROGRAM, *supra* note 57, at 24.
[87] Genocide Judgment ¶ 431

> ([A] State's obligation to prevent, and the corresponding duty to act, 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. *From that moment onwards*, if the State has available to it means likely to have a deterrent effect . . . it is under a duty to make such use of these means as the circumstances permit.

(emphasis added)).
[88] Mettraux, *supra* note 74, at 86.

While responsibility for a failure to prevent could not arise unless genocide is ultimately committed,[89] this does not mean that a State may wait until genocidal acts occur before acting.[90] The duty to prevent is triggered once a State knows or should know of a serious risk, before the prohibited acts occur. This is of particular importance in the aftermath of a recent genocide, such as the 2014 genocide against the Yazidis, where the immediate genocidal campaign may have ceased but structural drivers, insecurity, impunity, displacement, and discriminatory ideology persist.

C. German Courts' Requirement of "Current Danger"

As highlighted above, the duty to prevent involves identifying anticipatory risks of genocide. In March 2025, the Higher Administrative Court of Saxony-Anhalt determined that there was no longer a risk of group persecution against the Yazidis on account of ISIL's defeat as the principal architect and perpetrator of the 2014 genocide.[91] The Court further determined that there is "no significant probability of renewed group persecution of Yazidis"[92] in Nineveh province, where Sinjar district is located.

While Section IV below expands on the factual nature of the risks, the basis for the Court's determination resides in part on the temporal element of German group persecution doctrine. Under German administrative law, group persecution requires a density of persecution to such an extent that each group member not only faces the possibility, but the "current danger," of being personally

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[89] A state breaches the obligation to prevent if it fails to act once the perpetration of the crime has commenced, or once "the State learn[ed] of, or should normally have learned of, the existence of a serious risk that genocide will [have been] committed." Genocide Judgment ¶ 431. If genocide is not committed, a state cannot be held responsible for not having acted to prevent something which in fact did not occur.

[90] Genocide Judgment ¶ 431.

[91] Oberverwaltungsgerichet Sachsen-Anhalt [OVG Sachsen-Anhalt] [Higher Administrative Court of Saxony-Anhalt], 2d Senate, Mar. 13, 2025, Case No. 2 L 2/25.Z, ¶ 10-22.

[92] *Id*. ¶ 7.

affected.[93] The only exception to this evidentiary requirement is where reliable indications show that a persecution program has already been initiated or is imminent.[94] In practice, this approach conditions group-based protection on a present or immediately operative risk, thereby narrowing the legal significance of longer-term risks of recurrence, continuing structural vulnerability, and the unaddressed consequences of prior genocidal persecution.

Such temporal narrowing sits uneasily with international law. As outlined above, the Genocide Convention does not limit the obligation to prevent to threats that are immediate in time.[95] Further, the ICJ's "serious risk" standard does not specifically require danger to be current, nor does ICJ jurisprudence suggest that it intended to defer States' obligations of intervention until genocidal harm is imminent.

Refugee and human rights law on *non-refoulement* are similarly forward-looking: the relevant standards of assessment are well-founded fear[96] or real risk[97] of persecution or other serious harm upon return,[98] rather than a temporally imminent threat. This assessment must be conducted in light of the applicant's individual circumstances, including past persecution or threats, accepted

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[93] *Id*. ¶ 8.

[94] *Id*. ¶ 8.

[95] The prohibition of genocide as a norm of jus cogens goes against temporal limitation. The crime of genocide is also not subject to any statutory limitation. *See* Doctors Without Borders, *The Practical Guide to Humanitarian Law: Non-Applicability of Statutory Limitations* (2013), https://guide-humanitarian-law.org/content/article/3/non-applicability-of-statutory-limitations/.

[96] Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

[97] Eur. Union Agency for Asylum, *EASO Practical Guide: Qualification for International Protection: Real risk* (Apr. 2018), https://www.euaa.europa.eu/fr/node/17272#:~:text=%27Real%20risk%27%20refers%20to%20the,Practical%20Guide%3A%20Evidence%20assessment.

[98] Michelle Foster et al., *The Time Trap in International Protection: The Misplaced Notion of "Imminence,"* 56 GEO. J. INT'L L. 273, 274 (2025) ("The 'well-founded fear' test in refugee law and the parallel 'real risk' test in human rights law recognize that the appropriate standard is a 'real chance' of persecution or other serious harm," citing JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 115 (2d ed. 2014)).

material facts, country-of-origin information, and whether effective State protection is available there.[99] Timing may affect the evidentiary assessment—a more temporally distant harm may require stronger evidence to establish that the risk is real rather than speculative—but should not have to satisfy a threshold of temporal imminence.[100]

Even in criminal law, where duress, necessity, and self-defense operate under strict interpretation, courts have distinguished imminence from immediacy: a continuing threat may be sufficiently present even where its execution is not "immediately in prospect."[101] This comparative authority reinforces that a "current danger" or risk should not be interpreted more narrowly than criminal law's imminence standard, particularly where the purpose of the assessment is preventive protection from persecution, serious harm, or renewed atrocity violence.[102]

D. Genocide as a Process: Enduring Crimes and Enduring Risks

The Higher Administrative Court's aforementioned focus on current danger also appears to overlook the legal and factual reality that genocide often presents not as a singular, completed event but as

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[99] Eur. Union Agency for Asylum, *EASO Practical Guide: Qualification for International Protection* (Apr. 2018), https://www.euaa.europa.eu/sites/default/files/publications/easo-practical-guide-qualification-for-international-protection-2018.pdf.

[100] Michelle Foster et al., *supra* note 274, at 111 ("The risk of harm must not be too remote, in the sense that it is 'real' and not far-fetched or fanciful, in light of the applicant's individual circumstances. Remoteness thus relates to plausibility rather than temporal considerations, even though they may, too, be implicated," citing U.N. High Comm'r for Refugees, *UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by indiscriminate Violence*, at 6-7 (Jan. 2008), https://www.unhcr.org/us/media/unhcr-statement-subsidiary-protection-under-ec-qualification-directive-people-threatened.).

[101] *R v. Abdul-Hussain*, [1998] EWCA (Crim) 3528, pp. 11-12 (Eng.). *See also United States v. Flick*, 6 Trials of War Criminals Before the Nuernberg Military Tribunals 1189, 1201 (1952); *R v. McConnell*, [1996] 1 S.C.R.1075, ¶ 71 (Can.) (approving Conrad, J.A., dissenting).

[102] Michelle Foster, *supra* note 111; *see also* Adrienne Anderson et al., *Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection*, 68 INT'L & COMP. L.Q. 111 (2019).

a process.[103] The U.N. Framework (*see* Section IV below) is premised on this understanding: atrocity crimes are usually not single or isolated events, but develop through a dynamic process. Genocide scholarship cautions against treating genocide as a discrete episode that necessarily ends with the military defeat of the principal perpetrator.[104] This requires States' ongoing attention and assessment under the obligation to prevent.

With respect to the Yazidi genocide, the difficulty lies in resisting the assumption that ISIL's territorial defeat clearly ended the genocide-related risks relevant to protection. There is no single rule in international law under which the territorial defeat of a perpetrating organization automatically establishes that the genocide, or the risk of its recurrence, has ended. Indeed, certain wrongful acts may be composite in character, consisting of an accumulation of conduct over time. The International Law Committee has articulated that genocide is not committed until there has been an accumulation of acts committed with the relevant intent, but "[o]nce that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed."[105] This supports a more cautious temporal analysis than battlefield defeat as a legal endpoint.

This caution is particularly important for the Yazidi. ISIL's loss of territorial control ended the phase of large-scale battlefield killings, but it did not resolve consequences through which group destruction continued to be experienced. Many genocide-related harms remain

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[103] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 4.

[104] *See, e.g.*, Mettraux, *supra* note 74, at 259-62 (outlining that the harm of genocide and the group-targeting may endure); Martina Caslini, *How Does the State's Obligation to Prevent Genocide Overlap with and Differ from that of Offering Guarantees of Its Non-Recurrence?*, 25 INT'L CRIM. L. REV. 869 (2025) (explicitly addressing post-genocide obligations (guarantees of non-recurrence) and showing that obligations continue beyond cessation of hostilities). *See also* Sheri P. Rosenberg, *Genocide Is a Process, Not an Event*, 7 GENOCIDE STUD. & PREV. 16 (2012), https://digitalcommons.usf.edu/gsp/vol7/iss1/4/.

[105] Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, art. 15, cmt. ¶ 3, at 62, U.N. Doc. A/56/10 (2001) (emphasis added).

ongoing to this day, including mass displacement,[106] disappearance,[107] sexual enslavement, and the continuing consequences of sexual slavery and child indoctrination.[108]

In light of the temporal complexity of genocide, courts should not treat ISIL's territorial defeat as dispositive. Rather, a more appropriate and impactful inquiry would be whether the conditions that made group destruction possible have been sufficiently dismantled to make return compatible with Germany's obligations pursuant to the duty to prevent and the principle of *non-refoulement*.

IV. Assessing the Risks of Recurrence: An Ethics-Based Framework to Operationalize the Legal Duty to Prevent Genocide

The duty to prevent applies to serious risks of genocide that the State has learned of or should have normally learned of.[109] It follows that determining whether there is a serious risk of genocide requires the proactive assessment of risk factors.[110]

One tool to this end is the U.N. Framework of Analysis for Atrocity Crimes: A Tool for Prevention, which offers a concrete risk-assessment methodology. The Framework is premised on the fact that atrocity crimes are typically not single events, but instead develop in a dynamic process,[111] which provides opportunities to identify early warning signs and take action to prevent further development or

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[106] *See* Section IV.C. (Historical and Continued Discrimination); IV.D. (Humanitarian and Security Crisis) below.
[107] *See* Section IV.A. (Lack of Accountability for the 2014 Genocide and Ongoing Crimes) below.
[108] *Id*.
[109] Genocide Judgment ¶ 431.
[110] Federica D'Alessandra & Shannon Raj Singh, *Operationalizing Obligations to Prevent Mass Atrocities: Proposing Atrocity Impact Assessments as Due Diligence Best Practice*, 14 J. HUM. RTS. PRAC. 769 (2022), https://academic.oup.com/jhrp/article/14/3/769/6646799.
[111] *See* Section III.D. above.

commission.[112] Although States are encouraged to use the Framework to help fulfill their duty to prevent genocide, they are not legally obligated to do so. Instead, it can be understood as an ethics-based tool for operationalizing legal obligations whose practical enforcement may otherwise seem abstract.[113] As the Framework recognizes, there exists a "moral and ethical responsibility that we all have to protect populations at risk of atrocity crimes, both individually and collectively."[114] Utilizing the Framework can help guide States toward "consistent, evidence-based policy and law, rather than ad-hoc responses."[115]

The U.N. Framework's methodology consists of indicators to assess the risks and early indications of genocide and other atrocity crimes. It was developed to provide an integrated analysis based on case law from international courts and tribunals and empirical analyses.[116] The Framework enumerates fourteen risk factors—or behavioral, environmental, and structural triggers—that might "indicate the potential, probability or risk" of the occurrence of an atrocity crime.[117] Each risk factor has correlating indicators to guide the collection of accurate information[118] and help analysts determine which risks are present. Not all risk factors need to be identified to find a significant risk of occurrence. While the presence of more risk factors indicates an increased likelihood that an atrocity crime will be

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[112] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 3-4.

[113] D'Alessandra & Singh, *supra* note 101; *see also* Jennifer M. Welsh, *Norm Robustness and the Responsibility to Protect*, 4 J. GLOB. SEC. STUD. 53, 57-58, 64 (2019), (referencing the "duty of conduct," a pillar of the principle of the Responsibility to Protect that requiring "members of the international community: to identify when atrocity crimes are being committed or are imminent, and to deliberate, through applicatory discourses, on how different actors (national, regional and international) can and should respond.").

[114] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 2.

[115] Exec. Order No. 13729, A Comprehensive Approach to Atrocity Prevention and Response, 81 Fed. Reg. 32611 (May 23, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/05/18/executive-order-comprehensive-approach-atrocity-prevention-and-response.

[116] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 5.

[117] *Id*. at 5-6.

[118] *Id*. at 5-6 (" . . . the systematic collection of accurate and reliable information.").

committed, this analysis is also qualitative. States should weigh present risk factors and indicators within broader relevant political, historical, and cultural contexts.[119]

The following analysis sets out the Framework's risk factors that are most relevant to the Yazidi in Iraq and identifies factual findings that might indicate the "potential, probability or risk" of genocide. In light of their legal obligations and ethical responsibility to protect populations at risk, German policymakers, lawmakers, and courts should consider this analysis when determining whether to deport Yazidis back to Iraq.

The risk factors most relevant to the situation of the Yazidi in Iraq include:

- Risk Factor 1 – Situations of armed conflict or other forms of instability
- Risk Factor 2 – Record of serious violations of international human rights and humanitarian law
- Risk Factor 3 – Weakness of State structures
- Risk Factor 4 – Motives or incentives
- Risk Factor 6 – Absence of mitigating factors
- Risk Factor 9 – Intergroup tensions or patterns of discrimination against protected groups

This section will assess the presence of these risk factors in the context of: (1) the lack of accountability for the 2014 genocide and ongoing crimes; (2) the lack of address of root causes of the 2014 genocide and continued capacity of armed actors; (3) the historical and continued discrimination against the Yazidis; and (4) the humanitarian and security crisis in Sinjar.

[119] *Id*. at 5-7.

A. Lack of Accountability for the 2014 Genocide and Ongoing Crimes

Accountability for past and ongoing atrocities is of central importance in preventing the recurrence of genocide. In 2005, the United Nations General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation, which set out States' obligations to prevent, prosecute, and provide effective remedies for victims of gross violations of international human rights law and serious violations of international humanitarian law.[120] These principles align with the U.N.'s broader understanding of transitional justice as aimed at ensur[ing] accountability, serv[ing] justice, and achiev[ing] reconciliation."[121] This finds echo in the U.N. Framework's Risk Factor 2, which identifies a record of serious violations of international human rights and humanitarian law that have not been prevented, punished, or adequately addressed as creating a permissive environment for repetition, particularly where protected groups were targeted.[122]

Such accountability remains elusive in Iraq, both in federal Iraq and the KRI. While the long-term record of human rights violations against the Yazidi is addressed in Subsections 2 and 3 below, this Subsection will focus specifically on the 2014 genocide as a serious violation of international law that remains inadequately punished or addressed.

The first component of transitional justice put forth by the U.N. is prosecution initiatives.[123] As noted in 2019 by the President of the International Committee of the Red Cross, accountability in Iraq is a

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[120] G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005).

[121] U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* 3 (Mar. 2010), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/TJ_Guidance_Note_March_2010FINAL.pdf [hereinafter *Guidance Note*].

[122] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 11.

[123] *Guidance Note*, at 7.

necessary precondition for security and reconciliation.[124] The Iraqi government has repeatedly affirmed its position that accountability for ISIL crimes committed in Iraq should proceed through national judicial proceedings.[125] Following UNITAD's closure in September 2024,[126] Iraq's National Centre for International Judicial Cooperation became the principal repository of evidence relating to ISIL crimes, further increasing the importance of a domestic accountability framework.[127] Yet, as of mid-2026, Iraq still had not enacted comprehensive domestic legislation criminalizing genocide, crimes against humanity, and war crimes in line with international law.[128] The absence of a domestic legal framework enabling the prosecution of these crimes as such reflects a risk of recurrence under Risk Factor

[124] Int'l Comm. Red Cross, *Iraq: Massive Challenges Prevent Iraqis from Returning Home, ICRC President Says* (Feb. 4, 2019), https://www.icrcnewsroom.org/story/en/550/iraq-massive-challenges-prevent-iraqis-from-returning-home-icrc-president-says.

[125] *See* Permanent Rep. of Iraq to the U.N., Letter dated Dec. 28, 2023 from the Charge d'affaires a.i. of the Permanent Mission of Iraq to the United Nations addressed to the Secretary-General, at 2, U.N. Doc. S/2024/53 (Jan. 12, 2024), (whereby the Iraqi government officially states its "firm and final position" that the mission must end and that all evidence must be handed over for use in "national judicial proceedings," explicitly rejecting other jurisdictions); U.N. SCOR, 79th Sess., 9645th mtg. at 17, U.N. Doc. S/PV.9645 (June 5, 2024) ("Iraq's firm position of upholding accountability at the national level.").

[126] Press Release, UNITAD, Statement from the Acting Special Adviser and Head of UNITAD on the Conclusion of the UNITAD Mandate (Sept. 16, 2024), https://reliefweb.int/report/iraq/statement-acting-special-adviser-and-head-unitad-conclusion-unitad-mandate-enar.

[127] Press Release, Eurojust, Eurojust and Iraq Sign Working Arrangement to Combat Terrorism and Serious Organised Crime (June 30, 2026), https://www.eurojust.europa.eu/news/eurojust-and-iraq-sign-working-arrangement-combat-terrorism-and-serious-organised-crime.

[128] *See*, *e.g.*, *Joint Statement on the Occasion of 5 Years Since the Enactment of the Yazidi Survivors Law in Iraq,* GLOB. CTR. FOR THE RESP. TO PROTECT (Mar. 1, 2026), https://www.globalr2p.org/publications/joint-statement-on-the-occasion-of-5-years-since-the-enactment-of-the-yazidi-survivors-law-in-iraq/.

3.1 concerning the lack of effective protection from national legal frameworks.[129]

The Iraqi Anti-Terrorism Law[130] has consequently remained the primary instrument for prosecuting ISIL-affiliated individuals, despite being ill-suited to address the relevant crimes. Substantively, the Act criminalizes only the act of "terrorism"[131]—an offense against the State—framing ISIL-related conduct as an offense against State security rather than as crimes committed against protected groups and individual victims. It also limits survivors' ability to participate in the process.[132] This exclusive prosecution keeps the perpetrators' specific genocidal intent legally invisible and accountability for genocide absent from proceedings. For prevention purposes, this distinction matters: prosecutions that do not legally identify the group-destructive character of the crimes do not adequately repudiate the ideology behind intent.

The Anti-Terrorism Law also continues to raise significant human rights concerns in its application, implicating Risk Factor 3, or the weakness or inadequacy of State structures that negatively affect its capacity to prevent or halt atrocity crimes.[133] Both its substance and procedural use raise serious rule-of-law concerns through overly

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[129] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 12 ¶ 3.1 ("National legal framework that does not offer ample and effective protection, including through ratification and domestication of relevant international human rights and humanitarian law treaties.").

[130] Anti-Terrorism Law No. 13 of 2005, Iraqi Official Gazette, No. 4009 (Nov. 9, 2005) (Iraq), https://www.unodc.org/uploads/icsant/documents/Legislation/Iraq/Iraq/English/Act_No._13_2005_ENG.pdf.

[131] *Id*.

[132] Int'l Bar Ass'n Human Rts. Inst., *Universal Periodic Review – Fourth Cycle: Joint Submission to the 48th Session of the Human Rights Council's Universal Periodic Review Working Group: Iraq* ¶¶ 15, 17 (Jan. 2025), https://www.ibanet.org/document?id=IBAHRI-UPR-joint-submission-Iraq-ten-years-yazidi-genocide-July-2024; Coalition for Just Reparations, *Position Paper on an ISIL Accountability Mechanism in Iraq* 8-9 (Aug. 2022), https://c4jr.org/wp-content/uploads/2022/08/Final-position-paper-ISIL-mechanism-ENG_FINAL_Hyperlinks.pdf.

[133] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 12 ¶ 3.6 ("Absence or inadequate external or internal mechanisms of oversight and accountability, including those where victims can seek recourse for their claims.").

broad and vague terrorism charges,[134] minimal evidence of association,[135] and documented reliance on confessions obtained under torture.[136] The death penalty has also been widely imposed in terrorism-related cases: Amnesty International confirmed at least sixty-three executions in Iraq in 2025, all of which involved terrorism-related convictions, but estimates that there are likely more.[137] This represented a four-fold increase from 2023, and was the highest recorded since 2019.[138]

Children have also been charged under this counterterrorism framework and detained for actual or alleged association with armed groups, primarily ISIL.[139] This raises particular concerns where abducted and indoctrinated children, including Yazidi boys forcibly

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[134] U.S. DEP'T OF STATE, 2024 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAQ 18-19 ¶ 3.a. (2024), https://www.state.gov/reports/2024-country-reports-on-human-rights-practices/iraq; U.K. VISAS & IMMIGR., COUNTRY POL'Y & INFO. NOTE ¶ 2.1.9 (Sept. 2025), https://www.gov.uk/government/publications/iraq-country-policy-and-information-notes/country-policy-and-information-note-actors-of-protection-iraq-september-2025-accessible#:~:text=Constitution%20and%20laws).-,2.1.,including%20family%20members%20of%20suspects.

[135] This gives authorities "extensive powers to pursue people deemed to have assisted terrorist activities," U.K. VISAS & IMMIGR., *supra* note 134, ¶ 2.1.3.

[136] U.K. VISAS & IMMIGR., *supra* note 134, ¶ 2.1.3.

[137] Amnesty Int'l, *Death Sentences and Executions 2024*, at 6, 10 (2025), https://www.amnesty.de/sites/default/files/2025-04/Amnesty-Bericht-Todesstrafe-weltweit-2024-auf-Englisch-April-2025.pdf. *See, e.g.*, Amnesty Int'l, *Iraq: At least 13 people executed amid alarming lack of transparency* (Apr. 25, 2024), https://reliefweb.int/report/iraq/iraq-least-13-people-executed-amid-alarming-lack-transparency-enar#:~:text=Amnesty%20International%20is%20concerned%20that,in%20Iraq%20in%20recent%20months.

[138] AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2024 10 (2025).

[139] U.N. Secretary-General, *Promotion and Protection of the Rights of Children: Children and Armed Conflict*, U.N. Doc. A/79/878–S/2025/247, ¶ 85 (June 17, 2025), https://docs.un.org/en/S/2025/247 ("As at 31 December 2024, 531 children (524 boys, seven girls) remained in detention on national security-related charges, including for their actual or alleged association with armed groups, primarily Da'esh.").

recruited by ISIL,[140] are treated through a security lens absent a child-rights and victim-sensitive framework.[141]

These procedural flaws further create a standalone risk under Risk Factor 9, concerning intergroup tensions or patterns of discrimination against protected groups. To be considered credible and legitimate, prosecutions as a measure of transitional justice must be conducted in a non-discriminatory and objective manner, regardless of who the alleged perpetrators are.[142] According to the U.S. State Department, more than ninety percent of prisoners arrested under the Anti-Terrorism Law were Sunni.[143] The European Union Agency for Asylum has likewise described the Law as being used as a "pretext" to unlawfully detain Sunni Arabs, particularly in Sunni-majority governorates.[144] This reported disproportionate use of the Law contributes to a perception of sectarian targeting rather than objective justice (Risk Factors 9.1 and 9.4).[145]

Risk of recurrence stemming from inadequate State structures also derives from the Second Amendment to the General Amnesty Law (No. 27 of 2016), initially adopted by the Iraqi parliament in January 2025. While designed to address concerns regarding the arbitrary

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[140] A/HRC/32/CRP.2, *supra* note 36, ¶¶ 92, 95-96.

[141] U.N. Office on Drugs and Crime, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System* 2–3, 68–70 (2017) (emphasizing that children recruited and exploited by terrorist and violent extremist groups should be treated in accordance with child-rights and justice-for-children principles).

[142] *Guidance Note*, at 7.

[143] U.S. DEP'T OF STATE, 2023 INTERNATIONAL RELIGIOUS FREEDOM REPORT: IRAQ 1 (June 26, 2024).

[144] Eur. Union Agency for Asylum, *Country Guidance: Iraq*, § 3.2 (Nov. 2024), https://euaa.europa.eu/country-guidance-iraq-2024/32-sunni-arabs#:~:text=The%20government%20continued%20to%20use,of%20all%20prisoners%20in%20Iraq.

[145] *See* Indicator 9.1 ("Past or present serious discriminatory . . . practices, policies or legislation against protected groups"); Indicator 9.4 ("Past or present serious tensions or conflicts between protected groups or with the State, with regards to access to rights . . . security, . . . or perceptions about the targeted group."); U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 18.

detention of Sunnis,[146] the Law extends amnesty to individuals convicted of terrorism offenses, including ISIL members.[147] While release is reportedly conditioned on judicial review, the Supreme Judicial Council reported that, by February 2026, 41,364 persons had been released from prisons and detention centers under the amended law, and that 166,283 persons subject to arrest warrants, summons orders, bail guarantees, or in absentia convictions were eligible under the law.[148]

The scale and speed of releases raise questions about the depth and consistency of individualized judicial review for each release, particularly as the Supreme Judicial Council did not provide details about the charges faced by those released.[149] While individuals convicted of terrorism-related killing[150] and of the abduction and

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[146] U.N. Secretary-General, *Implementation of Resolution* 2732, ¶ 50, U.N. Doc. S/2025/323 (May 30, 2025), https://docs.un.org/en/S/2025/323.

[147] Eur. Union Agency for Asylum, *Country of Origin Information: Iraq, Country Focus*, at 90 (Oct. 2025) https://euaa.europa.eu/sites/default/files/publications/2025-10/2025_10_EUAA_COI_Report_Iraq_Country_Focus.pdf; *Iraq Frees over 19,000 Prisoners Under New Amnesty, Including Some Ex-ISIL*, ALJAZEERA (May 13, 2025), https://www.aljazeera.com/news/2025/5/13/iraq-frees-over-19000-prisoners-under-new-amnesty-including-some-ex-isil.

[148] Majlis al-Qaḍāʾ al-Aʿlā [Supreme Judicial Council of Iraq], *Majlis al-Qaḍāʾ al-Aʿlā yakshif ʿan iḥṣāʾiyya jadīda li-taṭbīq Qānūn Taʿdīl Qānūn al-ʿAfw raqm 27 li-sana 2016 al-muʿaddal* [The Supreme Judicial Council Reveals New Statistics on the Application of the Amended Law No. 27 of 2016 Amending the General Amnesty Law] (Feb. 3, 2026).

[149] Majlis al-Qaḍāʾ al-Aʿlā [Supreme Judicial Council], *Majlis al-Qaḍāʾ al-Aʿlā yakshif ʿan iḥṣāʾiyya jadīda li-taṭbīq Qānūn Taʿdīl Qānūn al-ʿAfw raqm 27 li-sana 2016 al-muʿaddal* [The Supreme Judicial Council Reveals New Statistics on the Application of the Amended Law No. 27 of 2016 Amending the General Amnesty Law] (Feb. 3, 2026). Eur. Union Agency for Asylum, *Country of Origin Information: Iraq, Country Focus*, at 90 (Oct. 2025) https://euaa.europa.eu/sites/default/files/publications/2025-10/2025_10_EUAA_COI_Report_Iraq_Country_Focus.pdf; *Iraq Frees over 19,000 Prisoners Under New Amnesty, Including Some Ex-ISIL*, ALJAZEERA (May 13, 2025), https://www.aljazeera.com/news/2025/5/13/iraq-frees-over-19000-prisoners-under-new-amnesty-including-some-ex-isil.

[150] Majlis al-Qaḍāʾ al-Aʿlā [Supreme Judicial Council], *Majlis al-Qaḍāʾ al-Aʿlā yakshif ʿan iḥṣāʾiyya jadīda li-taṭbīq Qānūn Taʿdīl Qānūn al-ʿAfw raqm 27 li-sana 2016 al-muʿaddal* [The Supreme Judicial Council Reveals New Statistics on the Application of the

enslavement of Yazidi women[151] are not eligible for amnesty, there has been very little public transparency regarding the evidence that determines ineligibility. Without this, the law risks the reintegration of ISIL supporters or perpetrators into society with impunity (Risk Factor 2.3),[152] along with their ideological motives for the erasure of the Yazidi community (Risk Factor 4).

In parallel to criminal legislation, the civil reparations framework presents important but incomplete forms of accountability.[153] The Iraqi government, with the support of the international community, enacted the Yazidi Survivors' Law (YSL) establishing this framework. The Law commendably qualifies ISIL crimes committed against the Yazidi and other communities as crimes of genocide and crimes against humanity[154] but establishes no criminal accountability framework. In addition, the structural omissions and implementation gaps undermine its efficacy. For instance, Yazidi boys are eligible for reparations, yet those who apply often face suspicion due to their prior

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Amended Law No. 27 of 2016 Amending the General Amnesty Law] (Feb. 3, 2026). Eur. Union Agency for Asylum, *Country of Origin Information: Iraq, Country Focus*, at 90 (Oct. 2025) https://euaa.europa.eu/sites/default/files/publications/2025-10/2025_10_EUAA_COI_Report_Iraq_Country_Focus.pdf; *Iraq Frees over 19,000 Prisoners Under New Amnesty, Including Some Ex-ISIL*, *supra* note *167*.

[151] Iraq Supreme Jud. Council, *Head of the National Center for International Judicial Cooperation: The General Amnesty Law Does Not Include Perpetrators of Kidnapping and Enslavement of Yazidi Women and Other Groups*, Facebook (Feb. 12, 2025), https://www.facebook.com/judiciary.sjc.iq/posts/pfbid023ghQ1HRgsxzDcLcVCLuJnFYvEM9J31xGVNkgigZeAMGZkVF7q1mg7m71gvHNLYwHl?_rdc=1&_rdr.

[152] Indicator 2.3: "Policy or practice of impunity for or tolerance of serious violations of international human rights and humanitarian law, of atrocity crimes, or of their incitement." U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 11.

[153] *Joint Statement on the Occasion of 5 Years Since the Enactment of the Yazidi Survivors Law in Iraq*, *supra* note 143.

[154] *See* Yazidi [Female] Survivors' Law No. 8 of 2021, art. 7.1 (Iraq) ("Crimes committed by Daesh against the Yazidis and other components, (Turkmen, Christians and Shabaks) shall be considered crimes of genocide and crimes against humanity"), https://c4jr.org/wp-content/uploads/2022/01/Yazidi-Female-Survivors-Law-March-24-2021.pdf.

capture and indoctrination by ISIL.[155] Importantly, the Law omits the Kaka'i community, which holds beliefs similar to the Yazidi,[156] as well as Shia and Sunni Arabs.[157] Sunni victims of ISIL,[158] rather than being enabled to bring a claim, may face suspicion or prosecution under the Anti-Terrorism Law.[159] The selective availability of recognition and reparations fosters communities' mistrust among each other and in State institutions (Risk Factor 2.8),[160] sustaining fissures that may enable atrocity crimes (Risk Factor 9).[161] The YSL's implementation also remains limited. The Coalition for Just Reparations reported that, as of May 2026, 2496 survivors had been approved under the YSL,

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[155] *See* Yazidi [Female] Survivors' Law No. 8 of 2021, art. 2 (Iraq). *See also* Luke Moffett, *Ten Years on from the Yazidi Genocide: Searching for Redress for the War Against ISIS*, INT'L CTR. FOR COUNTER-TERRORISM (July 31, 2024), https://icct.nl/publication/ten-years-yazidi-genocide-searching-redress-war-against-isis.

[156] Minority Rts. Grp., *Kaka'I in Iraq* (Nov. 2017), https://minorityrights.org/communities/kakai/.

[157] Bojan Gavrilovic, *Survivors of ISIL crimes in Iraq one step closer to reparations*, Jiyan Foundation for Human Rights (Mar. 2021), https://jiyan.org/survivors-of-isil-crimes-in-iraq-one-step-closer-to-reparations/.

[158] *See, e.g.*, Liz Sly, *ISIS Has Been a Catastrophe for Sunnis in Iraq and Syria*, WASH. POST (Nov. 23, 2016), https://www.washingtonpost.com/sf/world/2016/11/23/isis-a-catastrophe-for-sunnis/; *Iraq: Sunni Women Tell of ISIS Detention, Torture*, HUM. RTS. WATCH (Feb. 20, 2017), https://www.hrw.org/news/2017/02/20/iraq-sunni-women-tell-isis-detention-torture; *Islamic State 'Kills 322' from Single Sunni Tribe*, BBC NEWS (Nov. 2, 2014), https://www.bbc.com/news/world-middle-east-29871068; U.S. Dep't of State, *10th Anniversary of ISIS's Genocide Against Yezidis, Christians, and Shia Muslims* (Aug. 3, 2024), https://2021-2025.state.gov/10th-anniversary-of-isiss-genocide-against-yezidis-christians-and-shia-muslims/.

[159] *See* Anti-Terrorism Law No. 13 of 2005, art. 4.1, Iraqi Official Gazette, No. 4009, Nov. 9, 2005 (Iraq) ("[E]very one [who] helps the terrorists committing crimes mentioned in this law shall be punished with the actual actor's penalty." The Law does not provide a definition of what constitutes "help," thus allowing all types of acts to fall under its purview.).

[160] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 11 ¶ 2.8; Press Release, Nadia's Initiative, Press Release Issued by the Yazidi Community on Rejecting and Condemning the Passage of a Controversial General Amnesty Law by the Iraqi Parliament (Jan. 25, 2025), https://www.nadiasinitiative.org/news/press-release-issued-by-the-yazidi-community-on-rejecting-and-condemning-the-passage-of-a-controversial-general-amnesty-law-by-the-iraqi-parliament.

[161] *See* Risk Factor 9, Intergroup Tensions or Patterns of Discrimination. U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 18.

while 2216 received reparations.[162] Based on an estimate of 10,000 Yazidis abducted or killed in 2014,[163] including over 6000 women and children,[164] this at best represents a third of Yazidi victims.

The accountability deficit is not limited to ISIL perpetrators. It also extends to the alleged enabling conduct of non-ISIL actors whose decisions affected the Yazidi community's exposure to the August 2014 attack. In Sinjar, the KDP-affiliated security structures exercised *de facto* control before the genocide; yet serious allegations concerning prior warning of ISIL's advance, the disarmament of local Yazidis and Iraqi army units, restrictions on Yazidi movement toward the KRI, and the unannounced Peshmerga withdrawal have not been subject to a transparent, independent inquiry.[165] The omission reinforces Risk Factors 2 and 3 by leaving serious violations and institutional failures unaddressed. It further engages Risk Factor 9, as many Yazidis from Sinjar consider the withdrawal not merely a security failure but co-perpetration by the authority in charge of protecting the district.

Lastly, the assessment of risk cannot be divorced from the reality that some crimes committed against Yazidis during the 2014 genocide are ongoing. As of 2025, at least 2500 Yazidis remained missing,[166]

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[162] *C4JR YSL Newsletter – Issue #15 (June 2026)*, Coalition for Just Reparations (June 30, 2026), https://c4jr.org/3006202631044. The total number is not disaggregated by community eligible for reparations under the YSL and may include non-Yazidi survivors.

[163] Demographic analysis estimates that approximately 10,000 Yazidis were either killed or kidnapped during ISIL's assault on Sinjar; *see* Valeria Cetorelli & Sareta Ashraph, *A Demographic Documentation of ISIS's Attack on the Yazidi Village of Kocho*, LSE Middle East Centre (June 2019), https://researchonline.lse.ac.uk/id/eprint/101098/1/Cetorelli_Demographic_documentation_ISIS_attack.pdf.

[164] Civil society estimates that more than 6000 were women and children. *See* Nadia's Initiative, The Genocide, https://www.nadiasinitiative.org/the-genocide.

[165] *See* above, Section II, Contextual Background.

[166] Nadia's Initiative, *Remains of 32 Victims Arrive at Yazidi Genocide Memorial Ahead of Return to Families* (Feb. 21, 2025), https://www.nadiasinitiative.org/news/remains-of-32-victims-arrive-at-yazidi-genocide-memorial-ahead-of-return-to-families; Sarah Al Jameel, *Through the Survivors' Voices: Eleven Years After the Yazidi Genocide*, IOM IRAQ (July 31, 2025), https://iraq.iom.int/stories/through-survivors-voices-

approximately half of whom were children at the time of capture.[167] The whereabouts of over forty percent of individuals captured remain unknown, which may constitute a continuing violations under international law or, at minimum, prevent full accountability while prolonging harm to families and the wider community.[168]

In the aggregate, the current accountability landscape in Iraq does not feature adequate genocide-specific criminal accountability of ISIL and non-ISIL actors' conduct against Yazidis or other communities. While reparations are indispensable, they do not address the component of transitional justice specifically aimed at sanctioning the range of genocidal acts, nor can they substitute for proceedings that legally name and punish the group-destructive character of those crimes. By contrast, criminal measures taken by the Iraqi government, through their arbitrariness and selective impact, aggravate the risk of hostility within and between groups. Ultimately, the absence of a genocide-specific accountability process reinforces the difficulty of treating the genocide as a completed legal event (*see* above Section III.D).

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eleven-years-after-yazidi-genocide; *More Than a Decade on, 2,500 Yazidis Still Missing after ISIS Attack*, RUDAW (May 11, 2025), https://www.rudaw.net/english/categories/iraq/869800. *See also On International Day of the Disappeared, KRG Renews Appeal for Recognition and Reparation* (Aug. 30, 2025), https://gov.krd/ocia-en/activities/news-and-press-releases/2025/august/on-international-day-of-the-disappeared-krg-renews-appeal-for-recognition-and-reparation/.

[167] Save the Children, *About 1,300 Yazidi Children Still Missing 10 Years After Genocide* (Aug. 1, 2024), https://www.savethechildren.net/news/about-1300-yazidi-children-still-missing-10-years-after-genocide.

[168] Where Yazidis remain missing after abduction by ISIL, and their fate or whereabouts continue to be concealed or unclarified, their disappearance may amount to a continuing crime under international criminal law, including enforced disappearance where the relevant elements are met. *See* Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgment, ¶ 721 (Nov. 28, 2007) (citing BLACK'S LAW DICTIONARY 399 (8th ed. 2004)) ("A continuing crime implies an ongoing criminal activity. According to Black's Law Dictionary, a continuing crime is: '1. A crime that continues after an initial illegal act has been consummated; a crime that involves ongoing elements . . . 2. A crime (such as driving a stolen vehicle) that continues over an extended period.'").

B. Failure to Address Root Causes and Continued Capacity

Assessing the Yazidi community's present vulnerability in Iraq requires an examination that extends beyond ISIL's 2014 atrocities. It also needs to be considered through the continued failure to address the ideological and structural conditions that enabled the genocide, many of which long predate ISIL's formation.[169] An analysis of the current landscape under the U.N. Framework indicates that several structural precursors to violence remain operative.

Some of the clearest indicators are under Risk Factor 9, which concerns intergroup tensions or patterns of discrimination against protected groups. This Factor considers past or present conduct that reveals serious prejudice against protected groups, creating an environment where the threshold for violence is lowered. As regards the Yazidi community, the facts engage multiple indicators.

Central among these are past and present discriminatory,[170] segregational, and exclusionary practices against the Yazidi (Risk Factor 9.1), and the absence of sustained State- or regional-level efforts to confront the specific historical beliefs that cast Yazidis as "devil-worshippers" (Risk Factor 9.6).[171] Targeted hate speech has been circulating since the community's earliest history, consistently utilizing the theological slur of "devil worshippers" to frame the

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[169] *See, e.g.*, Majid Hassan Ali, *Genocidal Campaigns During the Ottoman Era*, 13 GENOCIDE STUD. INT'L 77 (2019), https://www.jstor.org/stable/26986111; Jan Ilhan Kizilhan, *The Yazidi – Religion, Culture and Trauma*, 7 ADV. ANTHROPOL. 333 (2017), https://www.scirp.org/journal/paperinformation?paperid=80317.

[170] Eur. Union Agency for Asylum, COI-Report — Iraq: Country Focus, § 2.3.2 (Sep. 2025), https://www.euaa.europa.eu/country-origin-information-report/232-treatment-ethnic-and-religious-minorities.

[171] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 18 ¶ 9.6. Yazda, *Under Constant Threat: Yazda Launches Report on Hate Speech Targeting the Yazidi Community in Iraq and the Kurdistan Region, Urging Action from Both Governments and the International Community* (Dec. 9, 2024), https://www.yazda.org/under-constant-threat-yazda-launches-report-on-hate-speech-targeting-the-yazidi-community-in-iraq-and-the-kurdistan-region-urging-action-from-both-governments-and-the-international-community.

group as legitimate targets for violence.[172] These beliefs, which persist across social and religious segments of Iraqi society, provided ISIL with its most potent ideological tool: the portrayal of Yazidis as a group whose destruction was not only permissible but religiously mandated. This ideology as the root of ISIL's genocidal intent and driver of the genocide remains largely unaddressed: while the higher levels of State organs officially support the community, perception of the Yazidi at the individual and community level has not fundamentally changed.

Without a sustained citizen-level effort to dismantle this narrative, the core justification for violence remains intact and socially transmissible. This reality also engages Risk Factor 2, which considers how societies with a history of human rights violations or atrocity crimes can be prone to further atrocity crimes. Such violations can include severe restrictions to economic, social, and cultural rights, with patterns of discrimination or exclusion of protected groups, which mirrors the Yazidi experience in Iraqi society.[173] An important element of reparation and prevention of future genocide is the dissemination of information about the targeted group and public repudiation of the ideology that justified its persecution. The YSL contains some provisions with concrete symbolic reparations.[174]

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[172] The burning of the Temple of Lalish in 1415 by a Muslim religious cleric; Allison, *supra* note 34; DAVE VAN ZOONEN & KHOGIR WIRYA, THE YAZIDIS: PERCEPTIONS OF RECONCILIATION AND CONFLICT (2017), https://www.usip.org/sites/default/files/Yazidis-Perceptions-of-Reconciliation-and-Conflict-Report.pdf; BIRGÜL AÇIKYILDIZ, THE YEZIDIS: THE HISTORY OF A COMMUNITY, CULTURE AND RELIGION 52 (2014); *Gunmen Kill 23 Members of Yazidi Minority in Iraq*, N.Y. TIMES (Apr. 22, 2007); *Qaeda Militant Behind Deadliest Iraq Attack Killed: US*, AFP NEWS (Sept. 9, 2007); *U.N. Assistance Mission for Iraq*, HUM. RTS. REP. 17 (2007).

[173] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 2, 11. Eur. Union Agency for Asylum, COI Query, at 11-13 (Nov. 18, 2024), https://www.ecoi.net/en/file/local/2117691/2024_11_EUAA_COI_Query_Response_Q77_Iraq_Yazidis.pdf.

[174] Symbolic reparations include the recognition of ISIL crimes against Yazidis and other covered communities as genocide and crimes against humanity (art. 7); requiring the Ministry of Foreign Affairs to expose those crimes in international fora

However, recent survivor-led reviews of the Law's implementation indicate that these measures have not yet developed into a comprehensive national strategy of education, memorialization, anti-discrimination, and guarantees of non-recurrence.[175]

This gap is visible in public education. The events of the 2014 genocide were not integrated in national educational curricula[176] despite this being a widespread tool to ensure access to information. Information about the Yazidi and other Iraqi minorities and their history, including of persecution, has also not been incorporated.[177] The need for such reform is not merely symbolic: reconciliation research has identified the absence of Yazidi history and culture from

(art. 7); designating August 3 as a national day to reveal the crimes (art. 8); and calling for media programming and memorial measures (art.8). Yazidi Survivors' Law, Coalition for Just Reparations, https://c4jr.org/ysl.

[175] Yazda, *Implementing The Yazidi Survivors Law: A Review by and for Yazidi Survivors* (July 2025), https://irp.cdn-website.com/16670504/files/uploaded/Yazda_YSL_Report_July2025_R3.pdf; FREE YEZIDI FOUND. & LEITNER CTR., STRENGTHENING IMPLEMENTATION OF THE YAZIDI [FEMALE] SURVIVORS LAW: RECOMMENDATIONS BASED ON INTERNATIONAL AND COMPARATIVE BEST PRACTICES (May 2024), https://freeyezidi.org/wp-content/uploads/2024/06/FYF_Leitner_YSL_Report.pdf.

[176] Recent civil-society reporting recommends that Iraq embed the histories and lived experiences of persecuted groups into school curricula and promote awareness of Iraq's ethnic and religious communities and of the genocide and other ISIL crimes committed against minority groups. YAZDA, IMPLEMENTING THE YAZIDI SURVIVORS LAW: A REVIEW BY AND FOR YAZIDI SURVIVORS 40 (July 2025), https://irp.cdn-website.com/16670504/files/uploaded/Yazda_YSL_Report_July2025_R3.pdf.

[177] *See, e.g.*, *Yazda, Goal 16, Religious Freedom and The Yazidi Genocide* 2 (2020) https://www.ohchr.org/sites/default/files/Documents/Issues/Religion/Submissions/CSOs/75.yazda.pdf; Joshua Levkowitz & Salah Abdulrahman, *In Iraq, Advocates Aim to Reform Education to Build Collective Identity*, U.S. INST. PEACE (Feb. 16, 2021), https://www.usip.org/blog/2021/02/iraq-advocates-aim-reform-education-build-collective-identity#:~:text=More%20recently%2C%20Nadia%20Murad%2C%20a,to%20have%20our%20religion%20protected.%E2%80%9D; Karzan Aziz Mahmood, *Resolving the Ongoing Suppression of the Yazidis,* E-INT'L RELS. (Oct. 20, 2024), https://reliefweb.int/report/iraq/resolving-ongoing-suppression-yazidis#:~:text=Global%20advocacy%20should%20push%20for,centuries%20of%20oppression%20and%20violence.

Iraqi public-school curricula as a source of widespread ignorance about Yazidi beliefs.[178]

Within the larger public sector, institutions have not articulated a sustained counter-narrative against discriminatory perceptions of Yazidi identity. The YSL, as the existing reparations framework, does not include a strategy for deconstructing the prejudicial mythologies that fueled the genocide.

As a result, Iraqi communities remain without proactive access to objective knowledge about the Yazidi. This perpetuates intergenerational transmission of stereotypes that remain uncorrected, sustaining a social context where the community is viewed through a lens of suspicion or religious hostility rather than equal citizenship. Under Risk Factor 4, motives and incentives for targeting a group can arise from entrenched social narratives, religious dogma, or political opportunism. The portrayal of Yazidis as heretical,[179] demonic,[180] and "unclean"[181] or "haram"[182] constitutes such a narrative and provides the ideological rationale for discrimination, exclusion, and, in extreme forms, annihilation.

This narrative continues to be expressed in modern-day hate speech. The Framework treats intergroup tensions, serious prejudice, and hate speech or propaganda against protected groups as relevant indicators of genocide risk (Risk Factor 7.14). In 2004, flyers circulated in Mosul offering "divine rewards" for killing Yazidis.[183] In the KRI,

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[178] DAVE VAN ZOONEN & KHOGIR WIRYA, THE YAZIDIS: PERCEPTIONS OF RECONCILIATION AND CONFLICT 8 (Middle East Res. Inst. 2017), https://www.usip.org/sites/default/files/Yazidis-Perceptions-of-Reconciliation-and-Conflict-Report.pdf.

[179] *The Revival of Slavery Before the Hour*, *supra* note 34, at 15.

[180] Yazda, *Under Constant Threat: Hate Speech Against the Yazidi Community in Iraq and the Kurdistan Region of Iraq* (Dec. 8, 2024) (documenting anti-Yazidi hate speech referring to Yazidis as "devil worshippers," "supporters of Satan," "infidels," "Satanists," "Satan's people," "devilish people," "filth," and "dirty people").

[181] A/HRC/32/CRP.2, *supra* note 36, ¶ 87.

[182] *How Did Yezidis Become Muslim?*, RUDAW (Oct. 7, 2016), https://www.rudaw.net/english/categories/culture/997234.

[183] Sebastian Maisel, *Social Change Amidst Terror and Discrimination: Yezidis in the New Iraq*, 18 The Middle East Inst. Policy Brief 4 (2008).

an imam threatened Yazidis with punishment if they refused to convert to Islam.[184] In 2007, public posters in Mosul declared it "*halal*" to kill Yazidis,[185] contributing to targeted attacks against Yazidi leader Mir Tahsin Beg and the execution of twenty-three Yazidi workers.[186] That same year, a terrorist attack in Yazidi towns of South Sinjar killed approximately 700 people and injured 1500.[187] Then-Iraq-based U.S. military forces reportedly assigned responsibility for the attack to ISIL's precursor Al-Qaeda.[188] It remains to this day one of the deadliest terrorist attacks worldwide.

Another critical rise in hate speech coincided with the August 3, 2024, commemoration of the 2014 genocide.[189] Following a speech by a Yazidi Peshmerga commander, a widespread social media campaign of hate speech, including incitement, erupted across social media platforms in Iraq after his remarks were perceived as offensive to Islam.[190] Despite the commander's clarification that his remarks were directed at extremist ideologies,[191] verified public messages explicitly

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[184] *Id*.

[185] The term "halal" translates to "permissible." Derived from the Quran and the Sunnah, it is a central concept to Islamic practices. *See* The American Halal Foundation, *What is Halal? What Halal Exactly Means* (Jan. 20, 2025), https://halalfoundation.org/what-is-halal/; U.N. High Comm'r for Refugees, *UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, at 80 (Aug. 2007), https://www.refworld.org/policy/countrypos/unhcr/2007/en/91922.

[186] Maisel, *supra* note 207, at 4.

[187] *U.N. Assistance Mission for Iraq*, HUM. RTS. REP. 17 (2007) (documenting the casualty numbers and the specific targeting of the minority group by Al-Qaeda in Iraq).

[188] *Up to 500 Dead in War's Deadliest Attack*, CBS NEWS, (Aug. 15, 2007), https://www.cbsnews.com/news/up-to-500-killed-in-wars-deadliest-attack/; Damien Cave & James Glanz, *Toll in Iraq Truck Bombings Is Raised to More Than 500*, N.Y. TIMES (Aug. 21 2007), https://www.nytimes.com/2007/08/22/world/middleeast/22iraq-top.html?_r=1&.

[189] Yazda, *Under Constant Threat: Hate Speech Against the Yazidi Community in Iraq and the Kurdistan Region of Iraq* 12 (Dec. 8, 2024).

[190] *Id*.

[191] *Id*.

called for "another genocide"[192] or total annihilation, while others contained actionable threats of physical violence, including incitement of ISIL-like sexual violence against Yazidi women.[193] According to the Sinjar Office of the Ministry of Migration and Displacement, this triggered the displacement of 25,000 people from the KRI back to Sinjar.[194] The government response demonstrated a structural bias: while authorities issued an arrest warrant against the Yazidi commander for "insulting Prophet Muhammad and inciting religious conflict,"[195] no simultaneous legal action was taken against the individuals publicly inciting genocide and mass rape against the Yazidi.

Such speech is not incidental; it reflects the persistence of social narratives that mark Yazidis as outsiders, which, in moments of tension, can convert prejudice into intimidation. This climate plays a crucial role in reproducing the psychological environment that made mass violence possible. As per Risk Factor 9, continued social marginalization and public hostility against a protected group lowers the threshold for violence against that group.

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[192] *Id*. (Examples of messages include: "ISIS did not wrong them, they should have burned them"; "ISIS made a mistake by leaving any of them alive; they should have eradicated them along with Lalish, from the face of the earth"; "I wish from God that all their days will be filled with genocide"; "God willing, your genocides will not end"; "There is another genocide on the way"; "Shasho, genocide 75 is coming.").

[193] *Id*. (Examples of messages include: "Let us rise together and f*** their women and girl[s]"; "ISIS has raped your sisters and wives. Wait for us, we will do to your sisters and mothers worse than what ISIS did to them. May God have mercy on Abu Bakr al-Baghdadi because he raped your wives and daughters"; "Listen to this from me, If I see Qasim Shasho, I won't kill him, but I will take his daughter, just as ISIL did with their women.").

[194] *Yezidis Flee Iraqi Kurdistan Camps Following Hate Speech Campaign by Kurdish Extremists*, THE CRADLE (Aug. 9, 2024), https://thecradle.co/articles-id/26350. *See also Joint Open Letter by Human Rights Watch and Yazda to the Iraqi Government and the Kurdistan Regional Government on the Hate Speech Targeting the Yazidi Community of Iraq*, YAZDA (Dec. 10, 2024), https://www.yazda.org/joint-open-letter-by-human-rights-watch-and-yazda-to-the-iraqi-government-and-the-kurdistan-regional-government-on-the-hate-speech-targeting-the-yazidi-community-of-iraq.

[195] *Id*.

Although ISIL no longer wields the territorial power it once possessed, remnants of the group continue to operate, and its doctrines circulate through informal networks, online propaganda, and radicalized individuals.[196] As of December 2025, more than 25,740 individuals remained in the Al-Hol and Al-Roj camps in north-east Syria for their alleged ties to ISIL. The U.N. Secretary-General described these camps as fertile ground for terrorist groups, including ISIL, to exploit and radicalize individuals to terrorism.[197]

The continued capacity—not only of ISIL but of any actor able to mobilize violence against Yazidis—aligns with Risk Factor 5, which emphasizes the danger in the continued availability of means, structures, or actors capable of committing atrocity crimes. In Iraq, the unresolved reintegration of ISIL-affiliated individuals further complicates the security environment. Camps of Nineveh Governorate, where ISIL-affiliated individuals resided, were closed without planned relocation,[198] and some reportedly sought to return

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[196] *See, e.g.*, U.N. Secretary-General, Twenty-second Report of the Secretary-General on the Threat Posed by ISIL (Da'esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat, U.N. Doc. S/2026/57, (Feb. 2, 2026), https://docs.un.org/en/S/2026/57; U.N. Secretary-General, *Twentieth Report of the Secretary-General on the Threat Posed by ISIL (Da'esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat*, ¶¶ 3-4, 7, 13-14, U.N. Doc S/2025/72 (Jan. 31, 2025), https://docs.un.org/en/s/2025/72.

[197] *Id*.

[198] For example, the April 2023 closure of Jeddah 5 camp in Nineveh Governorate forced 342 families, comprising 1566 former residents, to depart without adequate preparation for IDPs or receiving communities; *see* UNAMI, Statement by the Office of the Humanitarian Coordinator for Iraq on the closure of Jeddah 5 camp (Apr. 19 2023), https://iraq.un.org/en/228270-statement-office-humanitarian-coordinator-iraq-closure-jeddah-5-camp. The camps housed wives and children of Islamic State fighters but also supporters of the militant group. The European Union Asylum Agency identified the closure as a source of concern regarding the return of families with ISIL ties. *See* Eur. Union Agency for Asylum, *Country of Origin Information: Iraq, Country Focus*, at 27-28 (May 2024), https://www.euaa.europa.eu/sites/default/files/publications/2024-06/2024_05_COI_Report_Iraq_Country_Focus_EN_0.pdf.

to Sinjar.[199] Notwithstanding the lack of reintegration solutions, 5700 individuals detained for alleged ISIL affiliation were transferred from northeast Syria to Iraq in February 2026.[200]

The risks stemming from the failure to address root causes of the genocide and continued actor capacity also fall within the preventive logic of the Genocide Convention. Article III of the Convention makes direct and public incitement to commit genocide a punishable act.[201] The duty to prevent therefore cannot be confined to preventing physical acts;[202] it also requires attention to warning signs. Persistent hate speech, propaganda, and the absence of protective counter-speech indicate the serious structural risks the Yazidi community continues to face if returned to Iraq.

C. Historical and Continued Discrimination

As mentioned above, Yazidis in Iraq have been the subject of both historical and contemporary discrimination. In the twentieth century, this discrimination not only took the form of social stigma and religious prejudice, but was also territorial, political, and socio-economic. Under Ba'athist rule,[203] Yazidis were subjected to "Arabization" policies that forcibly relocated them from their villages on Mount Sinjar into collective towns ('mujammaʿāt') in the plains, far

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[199] *See, e.g.*, *French Embassy to Iraq Condemns Hate Speech Against Yazidis*, Rudaw (Mar. 5, 2023), https://www.rudaw.net/english/middleeast/iraq/03052023).

[200] *Iraq: Alleged ISIS Detainees Transferred from Syria at Risk of Abuse*, HUM. RTS. WATCH (Feb. 17, 2026), https://www.hrw.org/news/2026/02/17/iraq-alleged-isis-detainees-transferred-from-syria-at-risk-of-abuse.

[201] Convention on the Prevention and Punishment of the Crime of Genocide art. III, Dec. 9, 1948, 78 U.N.T.S. 277.

[202] *See, e.g.*, Irwin Cotler, *State-Sanctioned Incitement to Genocide: Responsibility to Prevent,* in *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Michael Herz & Peter Molnar eds., June 2012).

[203] The Baʿath Party was a Pan-Arabist political party advocating for the formation of a single Arab socialist nation. It was the ruling party in Iraq from 1968 to 2003. *See Ba'ath Party*, ENCYCLOPAEDIA BRITANNICA (2026), https://www.britannica.com/topic/Baath-Party.

from their agricultural land on which they depended to survive.[204] Community representatives estimated that approximately 100,000 Yazidis were coercively relocated.[205] The policies aimed to make the population more controllable and to disconnect it from the mountain refuge that had historically provided physical protection.[206] They also served to consolidate State control over a contested territory, weaken Yazidi communal autonomy, and reshape the demographic character of Sinjar, elements of Risk Factors 4.1, 4.2, 4.3, and 4.4.[207] Forcibly-relocated households were denied the right to register the assigned allotments in their names and obtain an official property document ('tapu').[208] This meant that Yazidi families were not able to sell their plots or apply for government construction loans.[209] Land tenure became an instrument of exclusion, preventing Yazidis from converting their residences into secure property rights and restricting their access to long-term economic stability, engaging Risk Factors 9.1

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[204] Matthew Barber, *supra* note 47, ¶ 6; *Genocide in Iraq: The Anfal Campaign Against the Kurds*, HUM. RTS. WATCH, 313 (July 1993), https://www.hrw.org/reports/pdfs/i/iraq/iraq.937/anfalfull.pdf.

[205] Community representatives estimated that approximately 100,000 Yazidis were coercively relocated to eleven collective townships to the south and north of Mount Sinjar; *see* U.N. Habitat, *Emerging Land Tenure Issues Among Displaced Yazidis From Sinjar, Iraq: How Chances of Return May Be Further Undermined by a Discrimination Policy Dating Back 40 Years* 6 (Nov. 2015), https://unhabitat.org/sites/default/files/documents/2019-04/emerging_land_tenure_issues_among_displaced_yazidis_from_sinjar_iraq.pdf.

[206] Matthew Barber, *supra* note 47, ¶ 6.

[207] U.N. Framework Risk Factors: 4.1 Political motives, particularly those aimed at the attainment or consolidation of power; 4.2 Economic interests, including those based on the safeguard and well-being of elites or identity groups, or control over the distribution of resources; 4.3 Strategic or military interests, including those based on protection or seizure of territory and resources; and 4.4 Other interests, including those aimed at rendering an area homogeneous in its identity.

[208] U.N. HABITAT, EMERGING LAND TENURE ISSUES AMONG DISPLACED YAZIDIS FROM SINJAR, IRAQ: HOW CHANCES OF RETURN MAY BE FURTHER UNDERMINED BY A DISCRIMINATION POLICY DATING BACK 40 YEARS 11 (Nov. 2015), https://unhabitat.org/sites/default/files/documents/2019-04/emerging_land_tenure_issues_among_displaced_yazidis_from_sinjar_iraq.pdf.

[209] *Id*.

and 9.4.[210] These policies contributed to most of the community living in a State of poverty and illiteracy.[211] By contrast, Arab families were either granted parcels of lands or allowed to buy and register property.[212] The unequal allocation of land entrenched disparities between communities and marginalized Yazidi access to rights, resources, and local governance (Risk Factors 4.2, 9.1, and 9.4). These policies continued following the fall of the Ba'athist regime in 2003. As such, until the first recognition of some Yazidi land ownership in Sinjar in 2025,[213] it was estimated that approximately 250,000 Yazidis lacked land tenure documents.[214]

Discriminatory policies extended beyond relocation. Most of the Yazidi community speaks the Kurmanji dialect of Kurdish. In 1974, while a framework granting semi-autonomous status to the Kurdish provinces permitted Kurdish-language education in Kurdish-majority areas, the use of minority languages remained prohibited in Sinjar.[215] This restricted public expression of minority identity and reinforced the exclusion of Yazidis from equal cultural and civic recognition (Risk Factor 9.2).[216] State control over identity also extended to naming and ethnic registration. Authorities refused to register newborns with Kurdish and other non-Arabic names on the ground that these names

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[210] U.N. Framework Risk Factors: 9.1 Past or present serious discriminatory, segregational, restrictive or exclusionary practices, policies or legislation against protected groups; and 9.4 Past or present serious tensions or conflicts between protected groups or with the State, with regards to access to rights and resources, socioeconomic disparities, participation in decision making processes, security, expressions of group identity or to perceptions about the targeted group.

[211] Maisel, *supra* note 207, at 3.

[212] U.N. Habitat, *supra* note 237, ¶ 12.

[213] Press Release, U.N. Habitat, Recognition of Yazidi Land Ownership in Sinjar A Historic Achievement underscoring UN and Iraqi Joint Efforts (Apr. 14, 2025), https://iraq.un.org/en/292797-recognition-yazidi-land-ownership-sinjar-historic-achievement-underscoring-un-and-iraqi.

[214] U.N. Habitat, *supra* note 237, ¶ 12.

[215] *Id*. ¶ 11.

[216] U.N. Framework Risk Factor: 9.2 Denial of the existence of protected groups or of recognition of elements of their identity.

were incompatible with Iraqi and Islamic heritage.[217] During the 1977 census, this policy of Arabization was formalized through pressure on Yazidis to re-register their ethnicity as Arab.[218] At the time, the government also sought to manipulate Yazidi identity by classifying Yazidis as Arab descendants of the Arab Umayyad dynasty.[219] Today, similar pressures operate in the opposite direction, with Yazidis pushed to identify as ethnic Kurds despite their longstanding demands for recognition as a distinct ethnic community.[220]

Across these periods, the community's identity has been treated as an object of State or regional management rather than as a right of Yazidi self-definition (Risk Factors 9.2 and 9.6).[221] This imposed identity, combined with displacement and dispossession, weakened Yazidis' ability to participate in decisions affecting their land and collective future (Risk Factors 4.9, 9.4, 9.5, and 9.6).[222]

This structural exclusion finds contemporary form in minimal political representation and contested local governance. In the Iraqi Council of Representatives,[223] the Yazidi community is formally

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[217] Hum. Rts. Watch, *Iraq: Forcible Expulsion of Ethnic Minorities* 16-17 (2003), https://www.refworld.org/reference/countryrep/hrw/2003/en/30380?__cf_chl_f_tk=jKL1SKFxejPUipbm3hFIkf4Yzb94AEflhD99qonRGNM-1783356807-1.0.1.1-EafljkKBXEMYuuoEZ.KzWQNl2noCgmPJA_IP92cBNqk.

[218] U.N. Habitat, *supra* note 237, ¶ 11.

[219] Maisel, *supra* note 207, at 3.

[220] U.N. Habitat, *supra* note 237, ¶ 11.

[221] U.N. Framework Risk Factors: 9.2 Denial of the existence of protected groups or of recognition of elements of their identity; and 9.6 Lack of national mechanisms or initiatives to deal with identity-based tensions or conflict.

[222] U.N. Framework Risk Factors: 4.9 Social trauma caused by past incidents of violence not adequately addressed and that produced feelings of loss, displacement, injustice and a possible desire for revenge; 9.4 Past or present serious tensions or conflicts between protected groups or with the State, with regards to access to rights and resources, socioeconomic disparities, participation in decision making processes, security, expressions of group identity or to perceptions about the targeted group; 9.5 Past or present serious tensions or conflicts involving other types of groups (political, social, cultural, geographical, etc.) that could develop along national, ethnical, racial or religious lines; and 9.6 Lack of national mechanisms or initiatives to deal with identity-based tensions or conflict.

[223] As per Article 48 of the Constitution of Iraq (2005), the Council of Representatives is one of two bodies of the legislative branch.

allocated only one reserved quota seat out of 329.[224] In the November 2025 parliamentary elections, Yazidis gained a single additional parliamentary seat outside the quota.[225] This demographic allocation precludes substantive influence over legislative processes that directly affect them. Their position in the Kurdistan Regional Parliament is similarly obscured: unlike other minority communities,[226] Yazidis have historically lacked reserved representation, notably due to Kurdistan Regional Government (KRG)-linked narratives ethnically defining them as Kurds despite widespread Yazidi rejection of that categorization.[227] The result is the community's structural marginalization and underrepresentation in institutions that shape the conditions of return to Sinjar and the protection of their rights. As per Risk Factor 3,[228] the absence or inadequacy of oversight and accountability mechanisms within State structures, including

[224] Council of Representatives Elections and Provincial Council Elections Law No. 12 of 2018, art. 9(2), Official Gazette of the Republic of Iraq, No. 4494, June 4, 2018 (Iraq), https://moj.gov.iq/upload/pdf/4494.pdf; *see also* U.K. VISAS & IMMIGR., *supra* note 134, ¶ 9.1.2.

[225] Murad Ismael (@murad_ismael), X (June 21, 2026, 12:00 PM), https://x.com/murad_ismael/status/1988860827768639720.

[226] Before 2024, out of the 100 seats of the Kurdish Parliament, five seats were reserved for Christians and Turkmen respectively, and one for Armenians. No seats were reserved for Yazidis, Faili Kurds, Shabak, and Mandeans. After 2024, the number of seats reserved for Christians and Turkmen lowered to two each, with no change in the representation of other minorities; *see* Noor Omer, *The Status of Yezidis' Political Representation in the Kurdistan Region of Iraq*, Innov8 (Aug. 3, 2024), https://innov8.krd/1885.

[227] Yazda Statement on the Identity of Yazidis (Dec. 5, 2016), https://www.yazda.org/publications/yazda-statement-on-the-identity-of-yazidis; Dina Hatif Maki, *The Political Role of Yezidis in Iraq*, 52 DIRASAT: HUM. & SOC. SCIS. 267, 275 (2025), https://dsr.ju.edu.jo/djournals/index.php/Hum/article/view/2957/2086. Dave van Zoonen & Khogir Wirya, THE YAZIDIS: PERCEPTIONS OF RECONCILIATION AND CONFLICT 11-12 (2017), https://www.usip.org/sites/default/files/Yazidis-Perceptions-of-Reconciliation-and-Conflict-Report.pdf. U.S. DEP'T OF STATE, 2023 INTERNATIONAL RELIGIOUS FREEDOM REPORT: IRAQ 12 (June 26, 2024), https://www.state.gov/wp-content/uploads/2024/04/547499-IRAQ-2023-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf. Freedom House, *Iraq: Freedom in the World 2024* § B4 (2024), https://freedomhouse.org/country/iraq/freedom-world/2024.

[228] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 12.

mechanisms ensuring fair representation, plays a central role in continued discrimination. It also directly implicates Risk Factor 9.4, which warns of intergroup tensions and patterns of discrimination regarding access to rights and resources, socioeconomic disparities, participation in decision-making processes, security, and expressions of group identity.

Poor representation obstructs Yazidis' efforts towards desired self-governance and autonomy, particularly in Sinjar, where political control, security authority, and reconstruction remain disputed between the Iraqi Federal Government and the KRG. The Iraqi government has repeatedly failed to give effect to Yazidi calls for local self-governance in Sinjar.[229] The Sinjar Agreement,[230] signed in 2020 by the Federal Government and the KRG and intended to normalize governance, was negotiated between the Federal Government and the KRG without Yazidi participation. Five years after its signing, none of its administrative, security, or reconstruction provisions have been fully implemented.[231]

In parallel, Yazidis face significant barriers to accessing traditional public accountability mechanisms, engaging Risk Factor 3.6, which concerns the absence or inadequacy of independent oversight and accountability mechanisms within State Structures. Within the KRG,

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[229] *See generally* Houman Oliaei, *Navigating Dispute and Displacement: The Yazidi Experience in Post-ISIS Iraq* 151 (Mar. 2023), https://www.brandeis.edu/crown/publications/middle-east-briefs/pdfs/101-200/meb151.pdf.

[230] The Sinjar Agreement was developed by the governments of Iraq and the Kurdistan Region to rebuild Sinjar. The Agreement committed the equivalent of $18 million USD annually toward new governance, security, and reconstruction. *See* Hum. Rts. Watch, *Iraq: Political Infighting Blocking Reconstruction of Sinjar* (June 6, 2023), https://www.hrw.org/news/2023/06/06/iraq-political-infighting-blocking-reconstruction-sinjar.

[231] The KRG Ministry of Interior itself acknowledged this reality in an October 2025 statement. *See Obstruction of Sinjar Agreement Implementation Undermines Rule of Law and Stability*, Kurdistan Regional Gov't (Oct. 10, 2025), https://gov.krd/moi-en/activities/news-and-press-releases/2025/october/obstruction-of-sinjar-agreement-implementation-undermines-rule-of-law-and-stability/. YAZDA, THERE IS NO FUTURE IN SINJAR WITHOUT SAFETY AND AGENCY 10-11 (July 30, 2024), https://irp.cdn-website.com/16670504/files/uploaded/Yazda_IOM-USAID-ZP_S1P2_SinjarSecurity_12072024_v28_EN.pdf.

institutions theoretically designed to receive complaints—such as parliamentary committees, ministry offices, or human rights bodies—are often inaccessible due to a prevailing climate of intimidation.[232] Yazidis who have sought to use these mechanisms have reported blocked complaints,[233] censorship, arbitrary detentions,[234] and threats in response to criticism of authorities or exposure of discriminatory practices. Activists and journalists have faced legal retaliation, harassment, and physical assault for expressing dissent.[235] In this instance, State structures not only fail to provide oversight, but also suppress freedom of speech and press as accountability systems of their own.

The above-described tensions highlight how discrimination and intergroup tension can contribute to an environment conducive to atrocity crimes under Risk Factor 9. In the case of the Yazidi, the long-term denial or prevention of meaningful political participation and access to justice can leave a community vulnerable for generations. Their dependence on State and regional mechanisms that have historically failed them reinforces the precarity of their position and heightens the risk of future abuses. In this context, historical discrimination is not a static backdrop but persists in current governance structures and their impact.

D. Humanitarian and Security Crisis

Sinjar is arguably one of Iraq's most disputed territories, with authority over the district long contested between the Federal

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[232] PPP Reporting.

[233] *See, e.g.*, Gulf Centre for Human Rights, *GCHR's periodic report on human rights violations in the Iraqi Kurdistan Region* (June 19, 2026), https://www.gc4hr.org/gchrs-periodic-report-on-human-rights-violations-in-the-iraqi-kurdistan-region-3/ (regarding the April 28, 2026, arrest of civil society activist Divan Ahmed due to the contents of a video he posted on his Facebook page).

[234] *See, e.g.*, Kurdistan Watch (@KurdistanWatch), X (Sep. 17, 2021), https://x.com/KurdistanWatch/status/1438842238214234120 (regarding the detention of Yazidi journalist Dilman Khanki was detained following a live Facebook video in which he criticized Yazidi figures close to the KDP).

[235] Eur. Union Agency for Asylum, *Country of Origin Information: Iraq, Country Focus*, at 85-89 (Oct. 2025). PPP Reporting.

Government and the KRG. Today, Sinjar remains a high-risk and vulnerable environment, with a persisting humanitarian and security crisis that prevents safe and dignified return. An estimated 400,000 Yazidis were forcibly displaced from Sinjar district in August 2014,[236] and approximately 190,000 remain displaced.[237] Protracted displacement, insecurity, and disparities in access to rights and resources remain central features of the post-genocide environment (Risk Factors 1 and 9.4). As of March 2026, displaced persons considering returning to Sinjar encountered significant barriers, including lack of safety and security in their areas of origin, lack of housing, basic services, and availability of return support programs.[238] The Iraqi government has withheld financial return packages for now several years.[239] In January 2025, most of the Yazidis who returned to Sinjar from Duhok Governorate had not received the return grant or household items that the government pledged to provide. While the Federal Government has initiated the issuance of land titles to Yazidi residents of Sinjar (*see* Section IV.C. above), its reported delays have prevented many returns.[240]

Risk Factor 3 becomes particularly relevant upon examining the causes of this displacement: the stalled implementation of the Sinjar Agreement and consequent failure to implement effective governance

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[236] *See* INT'L ORG. FOR MIGRATION, YAZIDI DISPLACEMENT AND MIGRATION FROM IRAQ: TRENDS, DRIVERS, AND VULNERABILITIES, 3 (2024), https://iraqdtm.iom.int/files/BorderMonitoring/20244304316478_iom_iraq_protection_yazidipaper_digital.pdf.

[237] *See* above, p. 8.

[238] INT'L ORG. FOR MIGRATION & U.N. HIGH COMM'R FOR REFUGEES, UPDATE ON INTERNAL DISPLACEMENT IN IRAQ (AS OF MARCH 2026) 2 (Apr. 26, 2026), https://reliefweb.int/report/iraq/update-internal-displacement-iraq-march-2026.

[239] *See Iraq: Political Infighting Blocking Reconstruction of Sinjar*, *supra* note 230.

[240] U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 2026 – IRAQ 65 (2026), https://www.ecoi.net/en/file/local/2137791/USCIRF%202026%20Annual%20Report%20Iraq.pdf. In order to return, IDPs must fill a return form from the Ministry of Migration and Displaced to their area of displacement (AoD) or the Mayor's office (located in the KRI) and are required to obtain security clearance to finalize their return. *See* IRAQ RETURNS WORKING GROUP, RETURNS TO SINJAR, IRAQ DURABLE SOLUTIONS (June 2020), https://iraqdurablesolutions.net/Uploads/PublicationFiles/20231225_256_RWG%20meeting%2030th%20June.pdf.

in the district; the lack of civilian control over competing security actors; and the State's inability to provide the infrastructure and protection necessary for return.

The Sinjar Agreement was designed to restore stability through administrative reform, security control, and reconstruction. It provides that security in the district should be maintained exclusively by local police, national security, and intelligence services, and that all other armed formations should be removed.[241] Further, it tasks a joint Baghdad-Erbil committee with rebuilding the district.[242] Yet, in October 2025, the KRG Ministry of Interior stated that, five years after the Agreement was signed, none of its administrative, security, or reconstruction provisions had been fully implemented.[243] The 2026 conflict with the Islamic Republic of Iran and resulting instability is expected to generate further obstacles.[244]

Reconstruction is not simply an issue of infrastructure but also of reparations. Despite consequential pledges to support ISIL-affected communities,[245] Sinjar remains largely destroyed: roads, wells, and

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[241] Agreement for Restoring Stability and Normalising Conditions in the Sinjar District art. 2.1 (Oct. 9, 2020), https://www.peaceagreements.org/media/documents/IQ_201009_Agreement_for_Restoring_Stability_and_Normalising_Conditions_in_the__QZr4mRZ.pdf.

[242] *Id*.

[243] Press Release, Kurdistan Regional Gov't, Obstruction of Sinjar Agreement Implementation Undermines Rule of Law and Stability, (Oct. 10, 2025), https://gov.krd/moi-en/activities/news-and-press-releases/2025/october/obstruction-of-sinjar-agreement-implementation-undermines-rule-of-law-and-stability/.

[244] Winthrop M. Rodgers, *Political deadlock has left Iraq's Kurdistan Region dangerously exposed amid Iran war*, CHATHAM HOUSE (Apr. 29, 2026), https://www.chathamhouse.org/2026/04/political-deadlock-has-left-iraqs-kurdistan-region-dangerously-exposed-amid-iran-war.

[245] *US Embassy reaffirms commitment to Yazidi recovery on 10th genocide anniversary*, SHAFAQ NEWS (Aug. 3, 2024), https://shafaq.com/en/World/US-Embassy-reaffirms-commitment-to-Yazidi-recovery-on-10th-genocide-anniversary; FED. FOREIGN OFF., GERMANY AND IRAQ: BILATERAL RELATIONS (Oct. 22, 2024), https://www.auswaertiges-amt.de/en/aussenpolitik/laenderinformationen/irak-node/iraq/228454; *Iraq: Stabilizing the Contested District of Sinjar*, INT'L CRISIS GRP., 6-7 (May 31, 2022), https://www.crisisgroup.org/sites/default/files/235-iraq-

homes lie in rubble, and hospitals and schools operate with a fraction of the staff and equipment required.[246] In its 2023 three-year budget, the Iraqi government allocated 38 million USD to Sinjar and the Nineveh Plains, when experts estimate reconstruction costs to approximate 1.5 billion USD.[247] As to foreign aid, reports of corruption practices have explained an identified gap between extensive foreign funding and minimal reconstruction.[248] By contrast, many

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sinjar.pdf; *Yazidis Denounce Iraqi Government's Funding Allocations, Demand Fair Share to Rebuild Sinjar*, MEDYA NEWS (July 30, 2023), https://medyanews.net/yazidis-denounce-iraqi-governments-funding-allocations-demand-fair-share-to-rebuild-sinjar/.

[246] *More Support Needed for Survivors of the Sinjar Massacre*, INT'L ORG. FOR MIGRATION (Aug. 4, 2022), https://www.iom.int/news/more-support-needed-survivors-sinjar-massacre; Izat Noah, *Sinjar: Challenges and Resilience Nine Years after Genocide*, WASH. INST. (July 25, 2023), https://www.washingtoninstitute.org/policy-analysis/sinjar-challenges-and-resilience-nine-years-after-genocide; *Progress Toward Durable Solutions in Iraq: Sinjar District*, INT'L ORG. FOR MIGRATION (June 2024), https://reliefweb.int/report/iraq/progress-toward-durable-solutions-iraq-sinjar-district-june-2024; Ammar Aziz, *Shingal (Sinjar) in Need of Doctors*, KIRKUKNOW (Apr. 30, 2022), https://kirkuknow.com/en/news/68014 (The number of doctors has changed slightly since this article was written in 2022, but it describes the problem accurately. This is also based on the personal experience of members of the PPP team and the testimony of six Yazidis living in southern Sinjar.). *Students in Shingal Forced to Walk Long Distances to Attend Classes*, RUDAW (Feb. 14, 2024), https://manage.rudaw.net/english/middleeast/iraq/14022024; EUR. COMM'N, HUMANITARIAN IMPLEMENTATION PLAN (HIP): IRAQ 5, (Dec 13, 2024), https://ec.europa.eu/echo/files/funding/hip2025/echo_irq_bud_2025_91000_v1.pdf#:~:text=Some%20of%20the%20main%20barriers%20for%20IDPs,public%20services%2C%20social%20protection%20and%20compensation%20schemes.

[247] *Demand for $1.5 Billion Sinjar Reconstruction Fund by 3 August 2024*, FREE YEZIDI FOUND. (July 27, 2023), https://freeyezidi.org/news-updates/fyf-statements/demand-for-1-5-billion-sinjar-reconstruction-fund-by-3-august-2024/.

[248] *See UN to Investigate Claims of Corruption in Iraq Aid Project*, GUARDIAN (Feb. 5, 2024), https://www.theguardian.com/global-development/2024/feb/05/un-to-investigate-claims-of-corruption-in-iraq-aid-project (The Guardian investigation into corruption practices within the United Nations Development Programme (UNDP), followed by an internal investigation and auditing.); U.N. DEV. PROGRAMME, STATEMENT ON IRAQ (Jan. 23, 2024), https://www.undp.org/iraq/speeches/statement-iraq; U.N. Development Programme, Audit & Evaluation Advisory Committee, *2024 Annual Report*, U.N. Doc DP/2025/11, app., ¶ 14 (2025) (The Special Adviser to the Administrator for the Management Assessment and Review Mission to Iraq briefed the AEAC about pending allegations of corruption in

neighboring Muslim- and Christian-majority areas have been rebuilt.[249] The absence of effective reconstruction, return support, and protective services as mitigating factors under Risk Factor 6[250] only increase vulnerability.

An additional element indicative of insufficient protection from national legal frameworks (Indicator 3.1), and lack of international support and presence (Risk Factor 6, Indicators 6.3 and 6.9),[251] is the severely restricted humanitarian and press access to Sinjar. Both Yazidis and international humanitarian actors continue to meet challenges. Heavily militarized checkpoints, operated by competing militia groups, severely restrict civilian travel, humanitarian access, and oversight.[252] INGOs and U.N. agencies report unpredictable or

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the UNDP Iraq Funding Facility for Stabilization); U.N. DEVELOPMENT PROGRAMME, ANNUAL REPORT OF THE OFFICE OF AUDIT AND INVESTIGATIONS ON INTERNAL AUDIT AND INVESTIGATION ACTIVITIES IN 2024 ¶ 66 (Mar. 24, 2025)

> (The section deployed investigation missions to 10 countries, including a proactive mission to Iraq. The latter involved detailed field visits; engagement with local and national stakeholders; dozens of interviews of current and former UNDP personnel and vendors; and voluminous document reviews. The investigation resulted in recommendations aimed at strengthening controls and risk management in project design and implementation. It also resulted in the registration of eight new investigative cases.)

See also U.N. DEVELOPMENT PROGRAMME, UNODC HELP IRAQ COMBAT CORRUPTION (Mar. 24, 2025), https://mptf.undp.org/news/undp-unodc-help-iraq-combat-corruption, (concerning Iraq's first anti-corruption strategy, launched in March 2025).

[249] Eileen Travers, *Iraq: How the World Helped Mosul Rise from the Rubble of War*, U.N. NEWS (Feb. 6, 2025), https://news.un.org/en/story/2025/02/1159891; Hudhaifa Ebrahim, *Prosperity Comes to Sunni Provinces of Iraq*, MEDIALINE (Jan. 20, 2023), https://themedialine.org/top-stories/prosperity-comes-to-sunni-provinces-of-iraq/#:~:text=Prosperity%20Comes%20to%20Sunni%20Provinces,a%20third%20of%20Iraq's%20area; *Iraq: Political Infighting Blocking Reconstruction of Sinjar*, *supra* note 243.

[250] U.N. Framework Risk Factor: 6 Absence of mitigating factors.

[251] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 15.

[252] PPP Reporting; *see also* Zmkan Saleem & Renad Mansour, *Responding to Instability in Iraq's Sinjar District*, CHATHAM HOUSE, 22-23 (Mar. 2024), https://www.chathamhouse.org/2024/03/responding-instability-iraqs-sinjar-district/03-sinjar-transnational-conflict-hub.

blocked access.[253] When present, international presence in Sinjar is minimal, sporadic, and tightly controlled, with documented instances of detentions of foreign journalists.[254] Without sustained monitoring, the risk environment remains unmitigated. The absence of external witnesses impedes the international community's ability to independently assess or prevent atrocity risks.

Another relevant indicator of continued risk is Risk Factor 1, which in part examines forms of instability and security crises caused by threats of external interventions (Indicator 1.2).[255] Relevant here is the ongoing insecurity posed by the presence of militias in Sinjar, also implicating Risk Factor 3.4 in the lack of effective civilian control of security forces. The fragmented security landscape remains one of the principal risks to return. At least eight militia forces—including the Syrian People's Defense Units (YPG)[256] affiliated with the Kurdistan Workers' Party (PKK),[257] Popular Mobilization Forces-affiliated

[253] PPP Reporting. As of July 2025, the IOM FVM program has been suspended as it waits for necessary approvals to access the camps and informal sites by the regional authorities. *See* INT'L ORG. FOR MIGRATION & U.N. HIGH COMM'R FOR REFUGEES, *supra* note 271.

[254] *Two European Journalists Researching Yazidis Held for a Month in Iraq*, REPS. WITHOUT BORDERS (May 26, 2022), https://rsf.org/en/two-european-journalists-researching-yazidis-held-month-iraq.

[255] U.N. OFF. ON GENOCIDE PREVENTION, *supra* note 31, at 10.

[256] The People's Defense Units (YPG) are the armed branch of the Kurdish Democratic Union Party (PYD), the Syrian branch of the Kurdistan Workers' Party (PKK) (*see* following note). Between August 9-11, 2014, they created a safety corridor into Syria for Yazidis who had successfully escaped ISIL to Mount Sinjar. More than 100,000 Yazidis were able to reach the KRI this way. *See* Can Acun & Bünyamin Keskin, *The PKK's Branch in Northern Syria: PYD-YPG*, SETA (2017), https://media.setav.org/en/file/2017/05/the-pkks-branch-in-northern-syria-pyd-ypg.pdf.

[257] The Kurdistan Workers' Party (PKK) is a Turkish armed group founded in 1978 with the objective of creating a Kurdish State. It is considered a terrorist organisation by Türkiye and has been on the U.S. State Department's list of Foreign Terrorist Organizations since 1997. *See Qu'est-ce que le mouvement kurde du PKK, qui vient d'annoncer sa dissolution?*, INST. FR. DES RELATIONS INT'L (May 12, 2025) https://www.ifri.org/fr/presse-contenus-repris-sur-le-site/quest-ce-que-le-mouvement-kurde-du-pkk-qui-vient-dannoncer-sa.

groups,[258] Yazidi militias, and KRG-linked actors—exercise overlapping or competing control, along with the Iraqi army.[259] Their combined presence has turned Sinjar into a militarized zone where civilians navigate daily uncertainty.[260] Yazidi residents have described intrusive searches and surveillance.[261] Some groups occupy schools and civilian buildings, while others impose taxes or control access to services.[262] For some Yazidi survivors already traumatized by the genocide, the omnipresence of armed actors replicates the atmosphere of threat that preceded the 2014 attacks.[263]

The presence of militias resulted in repeated military clashes with the Iraqi army in 2025, requiring the army's deployment of heavy weapons to Sinjar.[264] Independent monitoring recorded 265 security incidents in Nineveh Governorate, 219 of which were attacks by the Turkish army against the PKK.[265] Of particular concern, a February 2026 statement attributed to the Turkish Foreign Minister indicated that Türkiye may coordinate a military operation with Sinjar-based militias against PKK armed elements, with a ground advance

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[258] The Popular Mobilization Forces (PMF) is an umbrella organization consisting of many different militias. They originated as part of the effort to stop and reverse the ISIL advance from Syria into Iraq but have largely become a front for militias responsive to Iran. Most of the militias are Shia, however, there are also smaller militias made up of Sunnis or other minority groups *See, e.g.*, *The Leadership and Purpose of Iraq's Mobilization Forces*, INST. FOR THE STUDY OF WAR (Mar. 19, 2024), https://understandingwar.org/research/middle-east/the-leadership-and-purpose-of-iraqs-popular-mobilization-forces/.

[259] PPP Reporting. *See also* Saleem & Mansour, *supra* note 300, at 22-23.

[260] U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, IRAQ: USCIRF-RECOMMENDED FOR SPECIAL WATCH LIST (May 2024), https://www.uscirf.gov/sites/default/files/2024-05/Iraq.pdf; *Iraq: Political Infighting Blocking Reconstruction of Sinjar*, *supra* note 230.

[261] PPP Reporting; *see also* Saleem & Mansour, *supra* note 300, at 22-23.

[262] *Id*.

[263] *Id*.

[264] *Iraqi Army Deploys Heavy Weapons to Sinjar Following Clashes with YBS*, KURDISTAN 24 (Mar. 21, 2025), https://www.kurdistan24.net/en/story/831000/iraqi-army-deploys-heavy-weapons-to-sinjar-following-clashes-with-ybs.

[265] Eur. Union Agency for Asylum, COI-Report — Iraq: Country Focus, § 1.4.5 (Aug. 2025), https://www.euaa.europa.eu/country-origin-information-report/145-ninewa.

supported by Turkish air operations.[266] Sinjar lacks functioning governance, effective law enforcement, humanitarian oversight, and the basic infrastructure necessary to ensure civilian safety. A triggering event, including a political crisis, militia conflict, regional conflict, or further Turkish operations, could rapidly escalate.

Compounded, these conditions prolong Yazidis' displacement. The camp system for internally displaced persons (IDPs) itself demonstrates that displacement remains unresolved rather than transitional, the reflection of a continuing humanitarian crisis more than a decade after the genocide (Risk Factor 1). As of March 2026, 101,231 individuals were living in the eighteen IDP camps of the Kurdistan Region of Iraq,[267] of which approximately 90% were Yazidis.[268] Others live in critical shelters and informal sites under precarious conditions, often without access to basic services, thereby increasing tensions in areas struggling with limited water supply, sanitation, and electricity.[269]

The government's procedure for registering IDPs departing from camps has remained suspended since July 2024. As of April 2026, the U.N.'s International Organization for Migration (IOM) was the only formal channel facilitating IDPs' departures.[270] Between January and April 2026, only 112 households had departed from Dohuk camps, while 234 individuals were newly admitted. The IOM attributed these admissions to continuing socio-economic hardship among IDPs living in rented accommodation and informal settlements.[271] Acceptance

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[266] Saeed Abdulrazek, *Türkiye Signals May Launch 'Simple' Military Operation Against PKK in Iraq*, ASHARQ AL-AWSAT (Feb. 11, 2026), https://english.aawsat.com/arab-world/5239578-t%C3%BCrkiye-signals-may-launch-%E2%80%98simple%E2%80%99-military-operation-against-pkk-iraq?utm_source=chatgpt.com.

[267] Int'l Org. for Migration & U.N. High Comm'r for Refugees, *supra* note 271.

[268] Eur. Union Agency for Asylum, *COI-Report – Iraq: Country Focus*, § 3.3 (Sep. 2025), https://www.euaa.europa.eu/country-origin-information-report/33-situation-idps; U.N. Secretary-General, Implementation of Resolution 2732, ¶ 34, U.N. Doc. S/2025/323 (May 30, 2025), https://docs.un.org/en/S/2025/323.

[269] *Id*.

[270] Int'l Org. for Migration & U.N. High Comm'r for Refugees, *supra* note 271.

[271] *Id*.

into camps is only agreed to by the KRG, as the Federal Government continues to refuse new admissions.[272]

Camp conditions and access to services remains critical. IDP camps, designed as temporary shelters, are not equipped to satisfy basic rights. Government authorities are responsible for delivering services and can be subject to political inclinations.[273] Harsh weather conditions have highlighted the inadequacy of camp shelters, which are fragile, poorly maintained, and leave IDPs vulnerable to the elements.[274] In the first few months of 2026, many IDPs reported significant leaks due to heavy rainfall[275] and damage from fires, often ignited by an electrical fault when attempting to use heating or cook due to poor infrastructure.[276] Multiple fires have been reported every year for at least the past five years[277] and constitute a persistent risk as camp residents cannot survive without seasonal heating or cooling.

As of April, no food assistance has been received yet for 2026.[278] Access to healthcare clinics is available but with significant limitations, including shortages of essential medication and staffing, notably of female healthcare professionals.[279] Some camps lack

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[272] *Id*.
[273] *Id*.
[274] *Id*. at 2.
[275] *Id*.
[276] *Seven Tents Burn Down in Electrical Fire at Yezidi IDP Camp in Zakho*, RUDAW (July 17, 2020), https://www.rudaw.net/english/categories/lifestyle/1048495.
[277] *See, e.g.*, INT'L ORG. FOR MIGRATION & U.N. HIGH COMM'R FOR *REFUGEES* supra note 271 (In 2025, around forty-seven empty caravans were destroyed by a fire accident in Baharka camp.); Sarah Al Jameel, *A Mother's Pursuit of Legal Identity and Stability for Her Children in Iraq,* IOM IRAQ (Mar. 8, 2026), https://storyteller.iom.int/stories/mothers-pursuit-legal-identity-and-stability-her-children-iraq (In July 2024, a fire in Shariya camp of Dohuk Governorate, primarily housing Yazidis, destroyed sixteen tents.); Houman Oliaei, *The High Cost of Short-Term Solutions: The Inadequate Response to Yazidis' Displacement*, 1001 IRAQI THOUGHTS (Aug. 3, 2023), https://1001iraqithoughts.com/2023/08/03/the-high-cost-of-short-term-solutions-the-inadequate-response-to-yazidis-displacement/ (In 2023, a February fire killed two children in Chamishko camp, and a July fire destroyed twenty tents in Dawudia camp.).
[278] Int'l Org. for Migration & U.N. High Comm'r for Refugees, *supra* note 271.
[279] *Id*.

healthcare centers entirely, and hygiene kits have not been distributed since 2024.[280] Camps notably lack mental health support services, despite residents, which include genocide survivors, reporting increasing psychological distress.[281]

IDPs residing in Erbil and Dohuk Governorates have also been particularly impacted by current regional instability, and have reported hearing drone activity.[282] With regards to education, the government's response to the security situation has been to transfer school to an online format, including in the camps. [283] Consequences of poor electrical infrastructure in turn restrict displaced children's reliable access to education.[284]

The humanitarian and security crisis in Sinjar keeps active several risk factors concerning atrocity recurrence. The continued displacement of approximately 190,000 Yazidis reflects the enduring consequences of the genocide and resulting crises (Risk Factor 1), and the failure to restore the minimum conditions for return, such as protective mechanisms and effective reconstruction (Risk Factor 6). Prolonged inability to access housing, services, livelihoods, and safe return on equal terms reflects serious disparities in access to rights and

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[280] *Id*.

[281] Interactions between members of the Persecution Prevention Project and hundreds of Yazidis in Europe and Iraq, and a conversation in 2024 with the director of a mobile medical team that serves the population on Mount Sinjar, reveals the level of PTSD in the community. *See generally* Samih Abed Odhaib et al., *Impact of Humanitarian Crises on Diabetes Care in Iraq and Syria–IDF-MENA Region*, 13 J. DIABETOLOGY S38 (Dec. 2022), https://doi.org/10.4103/jod.jod_105_22; Jan Ilhan Kizilhan & Anna Weigelt, *Healing after Genocide: A Cross-Sectional Study on Emotion-Focused Coping and Psychosocial Recovery Among Yazidi Survivors*, 13 MED. RES. ARCHIVES 1 (2025), https://esmed.org/coping-and-recovery-in-yazidi-genocide-survivors/; Jan Ilhan Kizilhan et al., *The Psychological Impact of Genocide on the Yazidis*, 14 FRONTIERS PSYCH. 1 (Mar. 2023), https://www.frontiersin.org/journals/psychology/articles/10.3389/fpsyg.2023.1074283/full; Roberto Benoni et al., *Assessing the Mental Health Needs of Yazidi Adolescents and Young Adults in an Iraqi Kurdi IDP Camp: A Focus Group Study*, 23 INT'L J. EQUITY HEALTH 88 (May 2024), https://equityhealthj.biomedcentral.com/articles/10.1186/s12939-024-02182-8.

[282] Int'l Org. for Migration & U.N. High Comm'r for Refugees, *supra* note 271.

[283] *Id*.

[284] *Id*.

resources (Risk Factor 9.4), including rights to reparations and non-repetition. In this context, vulnerability is not simply the result of past atrocity, but a present structural condition that increases the risk of renewed mass violence should a triggering event occur.

V. Conclusion – From Impunity to Accountability and Dignity

The dissonance between Germany's recognition of and pioneering efforts toward justice for the 2014 genocide and its deportation of Yazidis to Iraq illustrates a broader difficulty in translating genocide prevention into protection practice. While recognition of a past genocide does not determine the outcome of every protection claim, Germany's obligation to prevent under the Genocide Convention requires a broader analysis than one focused primarily on the defeat of the perpetrator group.

As analyzed above, the U.N. Framework provides one means of operationalizing this preventive duty. Applied to the Yazidi situation in Iraq, it indicates the continued presence of multiple risk factors relevant to atrocity recurrence, including lack of accountability, persistent anti-Yazidi discrimination, protracted displacement, contested governance in Sinjar, fragmented security authority, limited reconstruction, and the absence of effective guarantees of non-repetition. These factors do not need to be characterized as proof that genocide is imminent. Rather, their significance lies in the aggregate, whereby conditions enabling serious harm to the Yazidi community have not been sufficiently dismantled to remove real risk. For a community that has survived a recent genocide, the relevant inquiry should not end with the territorial defeat of the principal perpetrator. Instead, it should ask whether the conditions that enabled group destruction have been sufficiently addressed to make return compatible with obligations under the duty to prevent.

This approach does not require German courts to abandon the legal standards governing asylum, subsidiary protection, or *non-*

refoulement, but rather to apply them consistently with Germany's separate and continuing obligation to prevent genocide. Where the available evidence indicates that multiple Framework risk factors remain engaged, German authorities should treat non-removal as one of the means reasonably available to reduce exposure to renewed atrocity risks.

Chapter 2. Trials in Absentia: Understanding the Procedure for Ukraine and Beyond

Mark Ellis

I. Abstract

This chapter explores the history, development, growth and use of trials *in absentia* as a mechanism to bring a degree of justice to victims when alleged perpetrators are beyond the reach of courts. It reviews the standards established in international law and practice through European and international courts. This framework offers guidance to Ukraine in its efforts to bring to justice those who have committed atrocity crimes against the country and its citizens. Ukraine's experience in utilizing trials *in absentia*—both domestically and through the newly created Special Tribunal for the Crime of Aggression against Ukraine—will define new legal boundaries.

II. Introduction

This Since the start of Russia's full-scale war against Ukraine on February 24, 2022, I have visited Kyiv and other regions of the country on ten occasions. On each visit, I witnessed firsthand the overwhelming evidence of Russia's systematic and targeted attacks against civilians and civilian infrastructure. Apartment buildings, schools and health centers lie in ruins. None of them constitutes a legitimate military target. These attacks are not accidental; they reflect a deliberate strategy that flagrantly violates international humanitarian law. The scale of devastation is staggering. According to Ukrainian government

statistics, over 183,000 incidents of war crimes have been recorded to date.[1]

Impunity for those who commit atrocity crimes remains the rule, not the exception, with only a small fraction ever held accountable. Enforcement efforts are frequently weakened by the lack of cooperation from states and the political protection afforded to alleged offenders.

At the domestic level, lack of capacity, lack of independence, and, most importantly, a lack of political will to bring the perpetrators of such crimes to justice have severely hindered judicial systems. The vast majority of human rights violations committed against civilians worldwide remain unpunished.[2] Unless impunity for these violations is meaningfully addressed, the cycle of violence will continue, endangering the realization of human rights for all.[3] Under international human rights law, states have a legal obligation to combat impunity and ensure that victims have access to effective remedies and adequate reparation when violations occur.[4]

One of the most urgent issues facing Ukraine is whether those responsible for these crimes will ever be brought to justice. The answer depends largely on how "justice" is defined. If there is an expectation that justice should be obtained through in-person trials, then disappointment is inevitable. Evidence suggests that over ninety-five percent of those responsible for the crimes, including senior political and military leaders, will remain at large. They will not surrender, nor are they likely to be apprehended. Thus, in these exceptional

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[1] Dan Peleschuk, *Zelenskiy Says Russia Has Committed over 183,000 War Crimes in Ukraine*, REUTERS (July 15, 2025), https://www.reuters.com/world/europe/zelenskiy-says-russia-has-committed-over-183000-war-crimes-ukraine-2025-03-31/.

[2] M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 3 (M. Cherif Bassiouni ed., Intersentia 2010).

[3] U. N. Hum. Rts. Off. of the High Comm'r, *States Must End Impunity to Break Cycle of Violence Against Defenders* (Oct. 15, 2019), https://www.ohchr.org/en/press-releases/2019/10/states-must-end-impunity-break-cycle-violence-against-defenders-un-expert.

[4] *Id*.

circumstances, alternative mechanisms must be employed when alleged perpetrators are beyond the reach of traditional in-person justice. The use of universal jurisdiction and an increase in states' cooperation with international arrest warrants are two of these mechanisms. However, the most effective alternative mechanism, albeit still controversial, is trials *in absentia*.

III. Trials in Absentia

The use of trials *in absentia*, *d*erived from the Latin word meaning "in absence," remains a contentious issue in international law, oscillating between two imperatives: (1) the demand for efficient justice and (2) the need to protect the rights of the accused. International law generally leans towards the latter. The right of the accused to be present during their trial is widely recognized as a core component of international human rights law.[5]

Under prevailing standards, the accused's physical presence at trial is considered a fundamental element of a fair trial. The Council of Europe has emphasized the "*vital importance*" of the accused's presence to exercising their right to be heard and to establishing the facts.[6] Similarly, the International Covenant on Civil and Political Rights (ICCPR) explicitly entitles the accused "to be tried in his presence,"[7] while the European Convention on Human Rights (ECHR) has been interpreted to entitle the accused to "take part in the hearing."[8] The

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[5] *See* Caleb H. Wheeler, Right or Duty? Is Presence at Trial a Right?, 21 TILBURG L. REV. 5, 6 (2016), https://doi.org/10.1007/s10609-016-9298-z.

[6] Council of Eur., Comm. of Ministers, *Resolution (75)11 on the Criteria to Be Followed in Criminal Proceedings in the Absence of the Accused* ¶ 2 (Sept. 17, 1975) [hereinafter *Resolution (75)11*].

[7] International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 16, 1966, 999 U.N.T.S. 171.

[8] Letter from Richard Dicker & Brad Adams, Hum. Rts. Watch, to the Secretariat of the Extraordinary Chambers in the Courts of Cambodia (Nov. 17, 2006), *available at* https://www.hrw.org/legacy/backgrounder/ij/cambodia1106/cambodialetter1106web.pdf; Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(3), Nov 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

European Court of Human Rights (ECtHR) has also affirmed that to participate in one's trial is a cornerstone of fair trial rights.[9] In addition, the Council of Europe Committee of Ministers Resolution (1975) and the Framework Decision on the European Arrest Warrant (2009) provide legal guarantees for trials *in absentia*.[10] The African Charter has also been understood to require "in presence" proceedings.[11] Collectively, these instruments have embedded a strong normative expectation that trials occur face-to-face.

IV. Safeguarding *in Absentia* Defendants

However, clearly the accused cannot be allowed to delay the administration of justice by opting to be absent from the court. Accordingly, neither the ICCPR nor the ECHR imposes an absolute ban on *in absentia* trials. The defendant's right to be present is conditional. The ECtHR has made clear that "proceedings that take place in the accused's absence are not of themselves incompatible" with fair trial rights.[12] Indeed, unlike common law systems, where trials *in absentia* occur only in exceptional circumstances,[13] most civil law systems allow them more readily, so long as there are stringent safeguards.[14] These

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[9] Colozza v. Italy, 89 Eur. Ct. H.R. (ser. A) at 89 (1985).

[10] *See Resolution (75)11*, *supra* note 6; Council Framework Decision 2009/299/JHA, 2009 O.J. (L 81) 24 (Feb. 26, 2009).

[11] African Charter on Human and Peoples' Rights art. 7(1)(c), June 27, 1981, 1520 U.N.T.S. 217.

[12] Sejdovic v. Italy, 2006-II Eur. Ct. H.R. 241 ¶ 82.

[13] Rule 43 of the Federal Rules of Criminal Procedure demands the defendant's presence "at every trial stage," but creates two narrow carve-outs: (i) removal for obstinate disruption and (ii) voluntary absence after the trial has commenced. *See* Fed. R. Crim. P. 43(b). English criminal law historically disfavoured trials *in absentia*, yet modern doctrine grants measured discretion. Crown Court practice is governed by *R v. Jones* (Anthony), where the House of Lords laid down a two-stage test: (1) whether the defendant's absence amounts to a knowing and voluntary waiver; (2) if so, whether "having regard to the interests of justice," the trial should proceed. Crim. Proc. R. 24.12(3); *R v. Jones* [2002] UKHL 5

[14] *Resolution (75)11*, *supra* note 6; ECHR, *supra* note 8, art. 6(3), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

safeguards include: (1) effective notification, (2) legal representation, and (3) right to retrial.

The first of these safeguards is **effective notification** to the accused. Authorities must take diligent, well-documented steps to notify the accused of the charges and trial date.[15] This is a very high bar to meet. The accused's vague or informal knowledge of proceedings is insufficient to establish a waiver of the right to be present.[16] For instance, the mere assumption that the accused is aware of proceedings because of widespread media coverage does not meet the required safeguard standard.[17] Moreover, the ECtHR has rejected the argument that the accused had waived his right to appear simply because the accused was untraceable.[18] The United Nations Human Rights Council (UNHRC) has also held that *in absentia* proceedings violate the accused's rights if the accused was not adequately informed of a new date, time, or location of the trial.[19]

The second safeguard is the right to **legal representation**. If absent, the accused must be represented by qualified defense counsel. Denying this right would render proceedings manifestly unjust.[20] The ECtHR has stated that the "crucial importance" that the defendant be "adequately defended" prevails over the "capital importance" that the defendant be physically present at trial.[21] While an accused may waive his right to be present at a trial, international human rights standards require that such absence be counterbalanced by counsel appointed by the court or by the accused.[22] These safeguards align closely with the

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[15] Mbenge v. Zaire, Commc'n. No. 16/1977, U.N. Doc. CCPR/C/OP/2 at 76 (1990).
[16] Somogyi v. Italy, 2004-IV Eur. Ct. H.R. 519.
[17] Human Rights Comm., *Monguya Mbenge v. Zaire*, Comm. No. 16/1977, ¶ 14.1-2, U.N. Doc. CCPR/C/18/D/16/1977 (Sept. 25, 1983).
[18] Sejdovic, 2006-II Eur. Ct. H.R. ¶ 12.
[19] AMAL CLOONEY & PHILIPPA WEBB, THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW (2021) (discussing *Osiyuk v. Belarus*, Commc'n. No. 1311/2004, U.N. Doc. CCPR/C/96/D/1311/2004 (2009)).
[20] Neziraj v. Germany, App. No. 30804/07, Eur. Ct. H.R. ¶ 16 (2012); ECHR, *supra* note 8, art. 6(3).
[21] CLOONEY & WEBB, *supra* note 19, at 466.
[22] *Id*. at 50.

ECtHR and UNHRC jurisprudence, which emphasizes that representation must be effective, free from undue influence or pressure, and proportionate to the seriousness of the charges.[23]

The third key safeguard is the **right to a retrial** if the accused is apprehended at a later date. The UNHRC emphasizes retrial as a full trial at first instance, whereas the ECtHR permits retrial to take the form of a *de novo* appellate review, based on the facts.[24] The court has held:

> Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted *in absentia* is unable subsequently to obtain from the court which heard his case a fresh determination of the merits of the charge—in respect of both law and fact—where it has not been established that he waived his right to appear and to defend himself, or that he intended to escape trial.[25]

The right to a retrial is steeped in case precedent and treaty law. The ECtHR has held that the absence of an automatic right to a retrial constitutes a violation of the accused's fair trial rights.[26] If any doubt exists as to whether the accused had actual knowledge of the proceedings, the court must offer an opportunity for a retrial.[27] Failure to do so, without clear evidence of waiver, would be a flagrant denial of justice.

Similarly, the African Commission's Principles on the Right to a Fair Trial affirmed that "[i]f an accused is tried in absentia, the accused shall have the right to petition for a reopening of the proceedings upon a showing that inadequate notice was given . . . [or] that the notice was

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[23] Colozza, 89 Eur. Ct. H.R. (ser. A) at 89; Lala v. Netherlands, App. No. 14861/89, Eur. Ct. H.R. ¶ 34 (1994).
[24] *See* Medenica v. Switzerland, 2001-VI Eur. Ct. H.R. ¶¶ 57-59; Sejdovic, 2006-II Eur. Ct. H.R. ¶¶ 84, 101.
[25] *See, e.g.*, Coniac v. Romania, 4941/07, Eur. Ct. H.R. ¶ 49 (2016); *Sejdovic*, 2006-II Eur. Ct. H.R. ¶ 82.
[26] Sejdovic, 2006-II Eur. Ct. H.R. ¶ 39.
[27] *Id*. ¶ 121.

not personally served on the accused."[28] However, where the accused had actual knowledge of the proceedings and unequivocally waived their right to be present, and could instruct counsel of their choosing, no obligation existed to provide an automatic retrial.[29]

The Court of Justice of the European Union (CJEU) has also underscored the importance of retrial rights for *in absentia* cases.[30] A retrial must be granted unless the prosecution can show the accused was: (1) properly informed of the judgment, (2) received the full decision, and (3) understood their rights, including how and where to apply for a new trial.[31] The CJEU has further clarified that such retrials need not be held before the same court, provided the accused is promptly informed of the judgment and afforded a realistic opportunity to exercise their rights under the applicable legal framework.[32] This stricter approach complements the protections of the ECHR and offers a robust model for ensuring that *in absentia* trials remain fair, legitimate, and defensible.

V. When *in Absentia* is Permissible

Proceedings *in absentia* occupy a narrow and carefully regulated space in international law, permitted only when strict conditions are met to protect the accused's right to a fair trial as discussed above. Whether due to a voluntary and informed waiver, deliberate evasion of justice, or removal from the courtroom for serious misconduct, the

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[28] CLOONEY & WEBB, *supra* note 19, at 465, 468 (discussing African Commission's Principles on the Right to a Fair Trial princ. N(6)(c)(ii)).

[29] *Medenica*, App. No. 20491/92, ¶ 59; Ravina Ambwani, *Extending the International Criminal Law Scope of Absentia Trials Towards Death and Mental Capacity*, CAN. BAR ASS'N (Oct. 21, 2024), https://www.cba.org/sections/international-law/resources/extending-the-international-criminal-law-scope-of-absentia-trials-towards-death-and-mental-incapacit/#_ednref63.

[30] Council Directive 2016/343, art 8, 2016 O.J. (L 65) 1 (EC).

[31] Case C-569/20, VB II v. Procureur général près la cour d'appel de Paris, ECLI:EU:C:2022:303, Judgment of the Court (Apr. 13, 2022).

[32] *Id*. ¶ 46; Thomas Wahl, *ECJ Rules on Conditions for In Absentia Judgements*, EUCRIM (Jan. 29, 2025), https://eucrim.eu/news/ecj-rules-on-conditions-for-in-absentia-judgments/.

decision to proceed without the accused requires compelling justification and adherence to procedural safeguards.

First, if a defendant has been properly notified yet *knowingly declines* to appear, then proceedings *in absentia* may be permitted "in the interest of the proper administration of justice."[33] However, the burden lies on the prosecuting authority or court to demonstrate that the accused's waiver was unequivocal and voluntary.[34]

Another scenario that would justify an *in absentia* trial is deliberate evasion of justice, where an accused intentionally avoids attending their trial despite receiving proper notification. This situation is particularly relevant in the context of Russian suspects currently outside Ukraine's jurisdiction. However, the ECtHR has cautioned that mere absence is insufficient to prove intentional evasion. Remaining outside Ukraine is not the same as intentional evasion, because the person might never have been effectively notified or may be unable to enter Ukraine (e.g., due to security risks, border closures, political status).[35]

A third scenario arises when the accused is removed from the courtroom because of inappropriate behavior.[36] The ECtHR has affirmed that a defendant can be removed from the trial for persistent disruption, and that the trial may proceed *in absentia* so long as procedural safeguards are observed.[37] However, this scenario is largely inapplicable to the Ukrainian context, where the issue is not disruption but the failure to apprehend the accused.

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[33] Alexandra M. Smith, *Absent Justice: A Proposal for Trial In Absentia after the Death of the Defendant in International Human Rights Cases*, COMP. JURIST (Oct. 12, 2021), https://comparativejurist.org/2021/10/12/absent-justice-a-proposal-for-trial-in-absentia-after-the-death-of-the-defendant-in-international-human-rights-cases/#:~:text=,14.

[34] Hermi v. Italy, App. No. 18114/02, Eur. Ct. H.R. ¶ 75 (2006).

[35] Stoyanov v. Bulgaria, App. No. 25714/05, Eur. Ct. H.R. ¶ 31 (2014).

[36] *See* JEREMY MCBRIDE, OVERVIEW OF THE EUROPEAN STANDARDS REGARDING CRIMINAL PROCEEDINGS HELD IN ABSENTIA, COUNCIL OF EUROPE (2024), at 2, ¶ 4, *available at* https://rm.coe.int/overview-of-the-european-standards-regarding-criminal-proceedings-held/1680b2d095.

[37] Idalov v. Russia, App. No. 5826/03, Eur. Ct. H.R. ¶ 178 (2012).

In sum, international law permits *in absentia* proceedings under specific and narrowly defined conditions. The key considerations are whether the accused was properly and effectively notified, voluntarily and unequivocally waived their right to be present, or deliberately evaded justice. In each case, procedural safeguards, such as legal representation and the right to a retrial, remain essential to uphold the fairness and legitimacy of the proceedings.

A. International Tribunals

The use of trials *in absentia* as an alternative mechanism to ensure justice for victims when the accused is not present is also reflected in the experience of international criminal tribunals. At the outset of the modern international criminal justice system, the 1945 Charter of the International Military Tribunal at Nuremberg authorized trials *in absentia*.[38] Article 12 of the charter stated that the tribunal "shall have the right to take proceedings . . . in [the accused's] absence" if the individual cannot be found or the interests of justice so require.[39] The tribunal only tried and convicted one person *in absentia*, Martin Bormann.[40]

B. UN Ad Hoc Tribunals (ICTY & ICTR)

When international criminal tribunals once again emerged after the end of the Cold War—specifically with the creation of the United Nations *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)—the drafters adopted a more cautious approach to trials *in absentia.* While both tribunals initially implied that the presence of the accused was a prerequisite for trial, they ultimately expanded the scope of *in absentia* proceedings in innovative ways, reflecting their hybrid civil law-common law procedural structure.[41] Though their mandates

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[38] Charter of the International Military Tribunal art. 12, Aug. 8, 1945, 82 U.N.T.S. 279.
[39] *Id*.
[40] PAUL MANNING, MARTIN BORMANN, NAZI IN EXILE 16 (2005); *Judgement : Bormann*, YALE L. SCH., https://avalon.law.yale.edu/imt/judborma.asp (last visited Aug. 13, 2025).
[41] *See* William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* 407–10 (Cambridge Univ. Press 2006).

have since concluded, the jurisprudential and procedural experience gained has proved invaluable.

In general, the ICTY or ICTR did not permit trials *in absentia*. Unless the accused was temporarily remanded for misconduct, the tribunals required the accused's presence.[42] This position was aligned with the standards set forth in the ICCPR and the ECHR.[43] Nevertheless, the tribunals faced the reality that many indictees would likely remain at large. The framers were aware that international justice would face significant enforcement obstacles, such as states refusing to cooperate or the accused deliberately evading justice.[44] To address this challenge, the drafters designed a way to maintain momentum in the face of enforcement obstacles. Each tribunal utilized an alternative mechanism—a "Rule 61" procedure initially included in their Rules of Procedure and Evidence.[45]

Under Rule 61, if an arrest warrant had not been executed within a reasonable time and personal service of the indictment could not be effected, the pre-trial judge could refer the case to the trial chamber.[46] At a public hearing, the prosecutor could present evidence and call witnesses to substantiate the charges despite the absence of the accused. The trial chamber could then determine whether reasonable grounds existed to believe the accused had committed the alleged crimes.[47] If so, the chamber would formally reconfirm the indictment, issue a new international arrest warrant, and potentially order additional

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[42] ABA Int'l Law Section, Extending the International Criminal Law Scope of Absentia Trials: Towards Death and Mental Incapacity? (Oct. 21, 2024), https://cba.org/sections/international-law/resources/extending-the-international-criminal-law-scope-of-absentia-trials-towards-death-and-mental-incapacit

[43] Rep. of the S.C., art. 21(4)(d), U.N. Doc. S/25704 (1993), *revised by* U.N. DOC. S/25704/Corr. 1 (1993); Rep. of the S.C., art. 18(4), U.N. Doc. S/RES/955 (1994).

[44] Int'l Crim. Trib. for the Former Yugoslavia, Sixth Annual Report, U.N. Doc. A/54/187–S/1999/846, at 3 (1999).

[45] Int'l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.50, R. 61 (2009); Int'l Crim. Trib. for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.1, R. 61 (1995).

[46] *Id.*

[47] *Id.* r. 61(C).

provisional measures such as freezing the accused's assets and notifying the Security Council when states failed to comply with arrest warrants.[48]

Crucially, the Rule 61 procedure was not a trial *in absentia* in the strict sense. No verdict of guilt was rendered, and no sentence was rendered at this stage.[49] Instead, the procedure preserved the indictment, publicly aired the evidence, created a public record and applied additional pressure on uncooperative states.[50] These hearings were often televised or widely reported, thereby increasing public awareness of the crimes and attention to the suffering of victims. This latter point was critical. As the ICTY emphasized, Rule 61 ensured that "the rights of alleged victims should not be denied; the Rule 61 proceedings provide them with the opportunity to be heard in a public hearing and to become a part of history."[51] If the accused were later apprehended, they retained the right to a full *de novo* trial.

For the ICTY, Rule 61 was first applied in *Prosecutor v. Dragan Nikolić*, where the tribunal held a public hearing from October 9 through 13, 1995.[52] During the hearing, the prosecutor presented evidence and ultimately obtained a reconfirmation of the indictment and an international arrest warrant.[53] Serbia's failure to cooperate was referred to the Security Council.[54] Similar *in absentia* aspects arose in the proceedings against Radovan Karadžić and Ratko Mladić before the ICTY, both of whom initially evaded capture, and both were later

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[48] *Id*. r. 61(D), (E).

[49] Prosecutor v. Rajić, Case No. IT-95-12-R61, Review of the Indictment Pursuant to Rule 61, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 29, 1996).

[50] Int'l Crim. Trib. for the Former Yugoslavia, Seventh Annual Report, U.N. Doc. A/55/273–S/2000/777, ¶ 39 (2000).

[51] Prosecutor v. Nikolić, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 20, 1995), https://www.legal-tools.org/doc/6e9de4/.

[52] *Id.*

[53] *Id*. ¶ 34.

[54] *Id.*

apprehended and faced trial with legal representation.[55] In contrast, the ICTR never applied its Rule 61 in practice.[56]

Despite the practical aspects of Rule 61, critics argued that the rule "significantly diminished the due process rights" of the accused. One commentator described the rule's purpose as to allow "the functional equivalent of a trial in absentia"—broadcasting accusations—"without a binding judgment."[57] However, it is important to stress that these hearings produced no formal convictions.[58] Thus, as mentioned earlier, a Rule 61 hearing was not a full trial *in absentia.* The shared Appeals Chamber for both tribunals emphasized that an accused's presence was fundamental (relinquished only in narrow circumstances), and it cautioned that *in absentia* judgments would undermine fairness.[59]

C. Special Tribunal for Lebanon (STL)

In contrast, the Special Tribunal for Lebanon (STL)—another international criminal tribunal which came into being in 2009—took a much more assertive approach. It explicitly authorized trials *in absentia* under certain safeguards. Article 22 of the STL Statute provided that the tribunal "shall conduct trial proceedings in the absence of the accused" if the person either: (a) expressly waived the right to be present, (b) has not been surrendered by state authorities, or (c) "has absconded or

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[55] Dicker, *supra* note 8, at 2; *Q&A: International Criminal Tribunal for the Former Yugoslavia Trial of Radovan Karadžić*, HUM. RTS. WATCH (Oct. 23, 2009), https://www.hrw.org/news/2009/10/23/qa-international-criminal-tribunal-former-yugoslavia-trial-radovan-karadzic.

[56] Int'l Crim. Trib. for Rwanda, Annual Report of the President to the UN General Assembly and Security Council ¶ 15, U.N. Doc. A/54/850 (2000), https://undocs.org/A/54/850.

[57] Michael Scharf, *Confirmation of Charges in Absentia for Joseph Kony: Paving the Way for Putin*, JUST SEC. (Aug. 30, 2024), https://www.justsecurity.org/99033/joseph-kony-in-absentia-putin/#:~:text=Professor%20Gregory%20Gordon%20%28p,freeze%20the%20assets%20of%20the.

[58] Prosecutor v. Rajić, Case No. IT-95-12-R61, Review of the Indictment Pursuant to Rule 61, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 29, 1996)

[59] Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment (Int'l Crim. Trib. for the former Yugoslavia July 29, 2004), https://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf.

otherwise cannot be found" despite reasonable efforts.[60] In other words, if a Lebanese defendant remained at large after indictment, the STL could proceed without waiting indefinitely. This gave the tribunal great flexibility in utilizing trials *in absentia.*

Still, the STL Statute incorporated procedural protections similar to those set forth in both the ICCPR and ECHR. The tribunal had to show that sufficient effort existed to ensure that the accused had been notified of the charges.[61] The accused had to have qualified defense counsel—either chosen by the accused or appointed by the STL's Office of the Defense (at the STL's expense if the accused is indigent).[62] Crucially, a person convicted *in absentia* retained the right to be retried upon appearance unless the person waived that right or expressly accepted the verdict.[63] Retrial rights are also not provided in cases where the absent defendant designated a defense counsel of his choosing.[64] Thus, a trial *in absentia* at the STL was a full trial including the presence of witnesses, presentation of evidence, and the rendering of a reasoned judgment.

In practice, the STL applied these provisions in its landmark trial of Salim Jamil Ayyash and four co-accused, who were charged in connection with the assassination of Minister Rafik Hariri, the Lebanese prime minister, in 2005.[65] Despite efforts to locate them, all remained at large.[66] The tribunal proceeded *in absentia*, convicting Ayyash in 2020

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[60] Rep. of the S.C., art. 22, U.N. Doc. S/RES/1757 (2007).
[61] *Id.* art. 22(2).
[62] *Id*.
[63] *Id.* art. 22(3).
[64] *Id*.
[65] Habib Nassar, *Special Tribunal for Lebanon: The Mountain That Gave Birth to a Mouse,* JUSTICEINFO (Jan. 8, 2021), https://www.justiceinfo.net/en/46418-special-tribunal-for-lebanon-the-mountain-that-gave-birth-to-a-mouse.html.
[66] Marko Milanovic, The Special Tribunal for Lebanon: How Did It Survive for So Long, EJIL: Talk! (Sept. 20, 2021), https://www.ejiltalk.org/the-special-tribunal-for-lebanon-how-did-it-survive-for-so-long/.

(sentenced to life imprisonment) but acquitting three co-defendants for lack of evidence.[67]

It is not surprising that the STL's *in absentia* practice proved to be controversial. Critics contended that any *in absentia* trial departs from core fair-trial guarantees and breaches international norms.[68] Yet, the STL's own judges argued that when applied sparingly and in line with fair-trial principles such as notice, counsel, and retrial, the proceedings could comply with fundamental principles.[69] The STL experience, thus, stands as a rare modern example of a fully adjudicated international *in absentia* trial, backed by statutory protections but still subject to debate.

D. International Criminal Court (ICC)

The International Criminal Court (ICC) generally forbids the trial of the defendant in their absence. Article 63(1) of the Rome Statute provides that "the accused *shall* be present during the trial."[70] The rule reflects the ICC's commitment to the highest fair trial standards. Similarly to the ad hoc tribunals, if a defendant present at trial absconds or disrupts proceedings, the court may temporarily remove him.[71] Still, the trial may only continue if the defendant had already been before the court.[72] No provision in the statute permits a final verdict *in absentia*.

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[67] Janet H. Anderson, *Special Tribunal for Lebanon's Second Best Justice*, JUSTICEINFO (Mar. 17, 2022), https://www.justiceinfo.net/en/88918-special-tribunal-for-lebanons-second-best-justice.html#:~:text=Trials%20in%20absentia&text=After%20collecting%20evidence%2C%20the%20UN,in%20absentia%2C%E2%80%9D%20it%20said.

[68] For example, Chris Jenks has contended that STL's in-absentia provisions "violate human rights norms," noting that earlier international tribunals expressly rejected absentia trials. Chris Jenks, *Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights*, 33 FORDHAM INT'L L. J. 57, 63 (2009).

[69] *See* Maggie Gardner, Reconsidering Trials in Absentia at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence, 43 *Geo. Wash. Int'l L. Rev.* 91, 91–92 (2011)

[70] Rome Statute of the International Criminal Court art. 63, July 17, 1998, 2187 U.N.T.S. 90. (emphasis added).

[71] *Id*.

[72] Prosecutor v. Kony, Case No. ICC-02/04-01/05-466, Decision on the Prosecutor's Request to Hold a Confirmation of Charges Hearing in the Absence of Joseph Kony, ¶ 42 (Int'l Crim. Ct. Appeals Chamber Nov. 23, 2023)

That said, the ICC does allow a limited form of *in absentia* proceeding at the pre-trial stage. Under Article 61 of the statute, the pre-trial chamber (although not at the trial chamber) may hold a confirmation of charges hearing to determine whether the evidence suffices to proceed to trial. That hearing occurs typically with the accused present, but the Statute explicitly authorizes the pre-trial chamber to proceed *in absentia* if, after being charged, the person either (a) "has waived [the right to be present]" or (b) "has fled or otherwise cannot be found" despite reasonable efforts.[73] In practice, if an indicted suspect remains at large, the prosecutor can seek a confirmation hearing without waiting indefinitely.

For example, the ICC invoked Article 61(2) in the case against Joseph Kony, the notorious leader of the Lord's Resistance Army in Uganda.[74] In late 2022, the ICC's prosecutor, having exhausted efforts to apprehend Kony, who had been indicted on war crime charges in 2005, requested an *in absentia* confirmation hearing.[75] In March 2024, the Pre-Trial Chamber granted the request, affirming that Article 61(2)(b) permitted such a hearing where the accused "cannot be found."[76] On appeal in June 2025, the Appeals Chamber confirmed that the statute allows a confirmation hearing without an initial appearance, emphasizing that the statute provides "adequately robust safeguards" even when the accused is absent.[77] Notably, the court ensured that

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[73] *Id.* art. 61; Irene V. Massimino, *The ICC and in Absentia Proceedings: Finding a Response to the Difficulties of Executing Arrest Warrants*, ESIL REFLECTIONS (Oct. 17, 2024), https://esil-sedi.eu/esil-reflection-the-icc-and-in-absentia-proceedings-finding-a-response-to-the-difficulties-of-executing-arrest-warrants-2/.

[74] *See* Anthony Deutsch, ICC Judges Allow Absentia Hearings in Case Against Ugandan Warlord Joseph Kony, *Reuters* (Mar. 4, 2024), https://www.reuters.com/world/africa/icc-judges-allow-absentia-hearings-charges-against-ugandan-warlord-joseph-kony-2024-03-04/; Mike Corder, ICC Approves First In Absentia Hearing Against Joseph Kony, *AP News* (June 3, 2025), https://apnews.com/article/321e012b028b5e0c381f18f3447390eb.

[75] Prosecutor v. Kony, Case No. ICC-02/04-01/05, Prosecution's Request to Hold Confirmation of Charges Hearing in the Absence of Joseph Kony ¶ 2 (Nov. 24, 2022).

[76] *Id.* ¶ 12.

[77] Prosecutor v. Kony, ICC-02/04-01/05 OA4, Judgment on the Appeal of Mr Joseph Kony Against the Decision of Pre-Trial Chamber III of 29 Oct. 2024, ¶ 75 (June 3, 2025).

defense rights were protected. The registrar appointed counsel to represent Kony's interests, and the court required that he be given notice and that evidence be disclosed to defense and victims as in any Article 61 proceeding.

Additionally, in 2013, the ICC Rules of Procedure and Evidence were amended to introduce Rule 134 *bis*, which permits the trial chamber to excuse an accused from attending portions of their trial, provided that they are continuously represented by counsel and have expressly waived their right to be present.[78] This amendment addresses the unique logistical and political challenges of prosecuting high-ranking government officials, who claim that their official duties necessitated their presence in their home countries.

The Kenya cases illustrate this development. The ICC permitted *in absentia* proceedings against President Uhuru Muigai Kenyatta and William Samoei Ruto in the Kenya situation before the ICC for limited procedural hearings. However, the core of the proceedings still required the accused to appear before the court.[79]

The record of international criminal tribunals demonstrates that trials *in absentia* have been approached with caution, employed only in limited circumstances, and almost always coupled with procedural safeguards designed to preserve fairness and the accused's rights. From the symbolic precedent at Nuremberg to the procedural innovations of the ICTY and ICTR, the assertive stance of the STL, and the narrow

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[78] ICC R. P. & Evid. r. 134ter ("Excusal from presence at trial"); *Id.* r. 134quater ("Excusal from presence at trial due to extraordinary public duties"). *See also* Assembly of States Parties, Resolution ICC-ASP/12/Res.7 (Nov. 27, 2013).

[79] In *Prosecutor v. Kenyatta* and *Prosecutor v. Ruto & Sang*, the majority of the judges in Trial Chambers V(B) and V(A) respectively recognized that the presence of the accused during the trial is not only a right by virtue of Article 67(l)(d)) of the Rome Statute, but also a duty on the accused by virtue of Article 63(1)). The Chambers ruled that the presence of the accused is the default position, but that Trial Chambers have the discretion to make reasonable exceptions on a case-by-case basis. *See* Prosecutor v. Ruto & Sang, ICC-01/09-01/11-777, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, ¶ 104 (June 18, 2013); Prosecutor v. Kenyatta, ICC-01/09-02/11-830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial ¶ 124 (Oct. 18, 2013).

exceptions recognized by the ICC, the trend has been to balance the imperative of combating impunity with the equally fundamental obligation to ensure a fair trial. While the practice remains controversial, the variations across tribunals show a shared recognition that *in absentia* proceedings, when used at all, must be exceptional, proportionate, and firmly rooted in established legal protections.

VI. What *in Absentia* Means for Ukraine

This historical trajectory explained in the last section offers valuable context for Ukraine's current accountability efforts. Understanding how past tribunals have navigated the legal and procedural complexities of trials *in absentia* helps frame the opportunities and constraints facing Ukraine as it seeks justice for atrocity crimes committed against its citizens. Ukraine is conducting efforts to hold perpetrators accountable for atrocity crimes committed against its citizens through two primary avenues: (1) domestic trials and (2) the Special Tribunal for the Crimes of Aggression against Ukraine.

Prior to 2014, Ukrainian law barred *in absentia* trials. International instruments such as the ICCPR were incorporated into Ukrainian law, guaranteeing the accused's right to be present and to participate in criminal proceedings. However, Russia's annexation of Crimea changed that position. On the domestic front, Ukraine is simply unable to secure the attendance of accused for in-person trials. In response, Ukraine has, by necessity, shifted to trials *in absentia* as a means of providing "a degree of accountability and potential closure for the victims."[80]

[80] Maya Nicholson, *Ukraine's Precarious Pursuit of Justice Through In Absentia Trials*, LAWFARE (June 18, 2025), https://www.lawfaremedia.org/article/ukraine-s-precarious-pursuit-of-justice-through-in-absentia-trials#:~:text=By%20conducting%20trials%20in%20absentia%2C,secure%20proper%20justice%20for%20victims.

Ukraine's Criminal Procedure Code (CPC) was amended to allow trials *in absentia* under specific conditions.[81] A special pre-trial investigation may commence where the suspect is: (a) charged with treason, aggression, terrorism, war crimes, or "particularly grave corruption"; (b) wanted on an INTERPOL Red Notice; and (c) located in an occupied territory of Ukraine or in the country of an aggressor state (e.g., Russia, Belarus, North Korea) to avoid criminal liability.[82] Ukraine's CPC incorporates the safeguards under international human rights law, allowing for *in absentia* trials, including proper notification requirements,[83] the right to legal representation,[84] and criteria for determining whether a waiver is valid.[85] Importantly and most relevant to Russia's war against Ukraine, the CPC provides that if reasonable efforts to serve the summons fail, the summons may be published in mass media outlets and on the official website of the Prosecutor General's Office. The accused is legally deemed notified of the summons once authorities publish it.[86]

Once the special pre-trial investigation is completed, a "special judicial proceeding" can take place. A motion to initiate such proceedings must include records showing that the accused "was aware or must have been aware of the criminal proceedings that have been initiated."[87] Pursuant to Article 297-5 of the CPC, the summons is again published in the national mass media and on the official website of the court. This dual notification procedure satisfies the requirement for constructive notice under both Ukrainian and international law.[88]

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[81] *See* Comparative Analysis of Criminal Proceedings in Absentia in the Legislation of Federal Republic of Germany and Ukraine, 20(2) L.J. Nat'l Acad. Internal Affs. 112, 113 (2021)
[82] Criminal Procedure Code of Ukraine art. 297 (Ukr.).
[83] *Id*. art. 297-5.
[84] *Id*. arts. 7, 374.
[85] *Id*. art. 302.
[86] *Id*. art. 297-5.
[87] *Id*. art. 323.
[88] Criminal Procedure Code of Ukraine, *supra* note 82, art. 297-5; *see also* International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 16, 1966, 999 U.N.T.S. 171; European Convention on Human Rights art. 6(3)(c), Nov. 4, 1950, 213 U.N.T.S. 221.

The CPC also requires the participation of defense counsel for both the pre-trial investigation and the special judicial proceeding. The accused may choose their own counsel, or the Coordination Centre for Legal Aid Provision (CCLAP) must assign competent defense counsel.[89] It is important to note that the assigned counsel must be competent. The Ukrainian Supreme Court has ruled on this point, affirming that assigned cases must meet standards of competence and independence.[90]

One significant divergence between the CPC and international standards is that Ukraine does not provide procedures for a rehearing at the trial level once the accused is convicted through a trial *in absentia*. If the accused later appears, they can file an appeal, but they are not entitled to a new trial at the trial level.[91] The accused can argue only a valid reason for failing to respond to the original summons.[92]

Since the start of Russia's invasion in 2022, Ukraine's War Crimes Department has notified 277 individuals of suspicion of war crimes. The overwhelming majority remains outside Ukrainian custody. Despite effective notification, suspects will not be secured. As of early 2024, Ukrainian courts have delivered over one hundred verdicts, the majority rendered *in absentia*.[93]

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[89] Criminal Procedure Code of Ukraine, *supra* note 82, arts. 297-3, 297-4.
[90] Supreme Court (Ukr.), Resolution, No. 607/498/16-K (June 13, 2019).
[91] Criminal Procedure Code of Ukraine, *supra* note 82, ch. 31.
[92] *Id*. art. 138 (listing grounds for failure to appear, including: (1) apprehension, custody, or service of punishment; (2) restriction of the freedom of movement under law or based on court's decision; (3) force-majeure circumstances (epidemics, military hostilities, floods or any other similar disasters); (4) absence of the summoned person in the place of residence during prolonged time due to official mission, travel, etc.; (5) serious disease or sojourn in a medical establishment in connection with treatment or pregnancy, on condition of impossibility to temporarily leave the establishment; (6) death of close relatives, family members, or any other close persons, or a serious threat to their life; (7) untimely receipt of the summons; (8) other circumstances objectively preventing appearance of a person on summons).
[93] *See* Victoria Matola, *War Crimes Justice in Absentia in Ukraine*, INST. FOR WAR & PEACE REPORTING (Apr. 18, 2024), https://pravo.org.ua/en/blogs/war-crimes-justice-in-absentia-in-ukraine; Diana Kolodiazhna, *How Ukraine Passes Judgment on Violations of the Laws and Customs of War*, ZMINA (Apr. 24, 2024), https://zmina.info/en/articles-en/how-ukraine-passes-judgment-on-violations-of-the-laws-and-customs-of-war.

Ukraine's **second** legal avenue for accountability for atrocity crimes is through the Special Tribunal for the Crime of Aggression against Ukraine, whose mandate is to prosecute senior leaders of aggression against Ukraine. Because these individuals will remain fugitives, the tribunal's statute explicitly addresses how *in absentia* trials can occur.[94]

The unique challenge of prosecuting the crime of aggression against high-level officials who are unlikely to submit to Ukraine's jurisdiction voluntarily has led the drafters of the new Tribunal to include *in absentia* mechanisms.

The tribunal's preliminary documents explicitly permit *in absentia* procedures, apart from trials for members of the "Troika," (president, prime minister, and foreign minister) "where the interests of justice require their presence.[95] Even in those exceptional cases, proceedings can go forward," only if the suspect has waived participation or if "all reasonable steps have been taken" to bring them to trial "and to inform the person of the charges and the consequences of their non-appearance before the Special Tribunal."[96] This includes "being given notice through publication in the media or communication to the state of residence or nationality."[97]

The tribunal's statute further guarantees core safeguards. Specifically, the accused must be represented by counsel and is entitled to request reopening of the case upon appearance, unless he has waived

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[94] *Ukraine and the Council of Europe sign Agreement on establishing a Special Tribunal for the Crime of Aggression against Ukraine*, COUNCIL EUR. (June 25, 2025), https://www.coe.int/en/web/portal/-/ukraine-and-the-council-of-europe-sign-agreement-on-establishing-a-special-tribunal-for-the-crime-of-aggression-against-ukraine.

[95] *Frequently Asked Questions - Special Tribunal for the Crime of Aggression against Ukraine*,
COUNCIL EUR., https://www.coe.int/en/web/portal/frequently-asked-questions (last visited Aug. 13, 2025).

[96] *Id.*

[97] Agreement Between the Council of Europe and Ukraine on the Establishment of the Special Tribunal for the Crime of Aggression Against Ukraine art. 28(2)(a), June 25, 2025, https://rm.coe.int/agreement-and-statut-english/1680b66127

that right or accepted the original judgment.[98] In other words, the framework for the Special Tribunal on Aggression already parallels the stringent conditions discussed earlier, requiring actual notice or waiver, ensuring that defense counsel is assigned, and guaranteeing a retrial if the accused appears. Without such guarantees, any convictions *in absentia* would be highly vulnerable to legal challenge under the ICCPR and ECHR and could even hinder international cooperation such as extradition of suspects.[99]

VII. Conclusion

Trials *in absentia* help ensure that serious offenders do not escape justice simply by fleeing or refusing to appear in court. These trials serve as focal points for victims, offering public acknowledgment of their suffering and a pathway to accountability. In cases of mass atrocities, leaving cases untried because the accused is unavailable frustrates victims' expectations, leaving them without redress and erodes the rule of law.

When conducted with appropriate procedural safeguards, *in absentia* trials streamline prosecutions and ensure expeditious adjudication. They serve victims' rights and the interests of justice. Victims of crime have a legitimate expectation of seeing the case resolved, even if the accused is absent.[100] Denying them any judicial verdict because the defendant evades trial prolongs trauma. Indeed, at the international level, commentators have noted that final verdicts—even *in absentia*–help fulfill transitional justice goals like deterrence, the elucidation of facts, and symbolic justice for victims.[101] From this perspective, permitting trials *in absentia*, subject to safeguards, can

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[98] *Id*.

[99] Nicholson, *Ukraine's Precarious Pursuit*, *supra* note 80.

[100] GLOB. RTS. COMPLIANCE LLP, TRIALS IN ABSENTIA 4 (2018), https://www.asser.nl/media/795064/grc-trials-in-absentia-english.pdf.

[101] INT'L BAR ASS'N, REPORT ON THE EXPERTS' ROUNDTABLE ON TRIALS IN ABSENTIA IN INTERNATIONAL CRIMINAL JUSTICE (2016), https://www.ibanet.org/document?id=Experts-roundtable-trials-in-absentia.

vindicate victims' rights by giving official closure to criminal proceedings when otherwise none would occur.

Looking to Ukraine and beyond, *in absentia* trials should shape all future international justice efforts. Trials *in absentia* are not inherently unlawful, but with exacting conditions they can satisfy due process concerns. Any tribunal that embraces *in absentia* trials, whether the Special Tribunal for the Crime of Aggression against Ukraine or another international forum, must do so carefully, without compromising the fundamental right to a fair trial. Failure to implement safeguards would breach longstanding human-rights obligations, undermine the legitimacy of verdicts, and ultimately impair the quest for justice. However, by respecting strict standards of fairness when conducting *in absentia* trials, courts can reconcile the imperative to punish perpetrators of atrocity crimes with the equally fundamental imperative of protecting defendants' rights, even in the most difficult and politically charged contexts.

Chapter 3. Forcible Transfer and Deportation of Children in Armed Conflict: From Law to Action

Helena Kennedy and Eleonora Scala

I. INTRODUCTION

When war rages, children are the most exposed to its tremors. Beyond the immediate threats to their physical safety, they face risks of deeper harms that may fracture their sense of identity and constrain their potential for development. The effects of such violations can reverberate across a lifetime, shaping not only their own futures but also that of the societies to which they belong.

Recognizing their inherent vulnerability, international law affords special protection to children, both in peacetime and during armed conflict, requiring a higher standard of care than that owed to the adult civilian population. This distinct legal regime warrants dedicated examination, and this chapter contributes to that effort by focusing on one of the most serious violations of children's rights in situations of armed conflict: forcible transfer and deportation.

The reflections offered here are informed by the authors' direct experience addressing the plight of Ukrainian children who were forcibly transferred to temporarily occupied territories and deported to Russia following the 2014 invasion of Donbass and the 2022 full-scale invasion. Through their co-leadership of the *Bring Kids Back Task Force* alongside the Office of the President of Ukraine, their efforts focus on developing a mechanism for the repatriation and family reunification of those affected by such crimes. For reasons of confidentiality and given the ongoing nature of this work, no direct reference to specific

operational efforts in this context appears in the text. Yet this is only the most recent instance of a phenomenon with deep historical roots, spanning continents and political contexts. This analysis seeks to illuminate both contemporary challenges and enduring patterns in the protection of children during armed conflict.

The chapter begins by examining the international legal framework that governs situations in which children are forcibly separated from their families and communities. It demonstrates that a robust set of substantive rules exist to safeguard children in contexts of international and non-international armed conflict, occupation, and peacetime. The analysis is structured around three interconnected bodies of law. First, international humanitarian law (IHL) prohibits the forcible transfer and deportation of protected persons, permitting them only in narrowly defined circumstances, mainly under the evacuation regime, with stricter conditions for children due to their heightened vulnerability. Second, international criminal law (ICL), closely intertwined with humanitarian law, defines how these acts may amount to war crimes, crimes against humanity, or genocide, depending on additional constitutive elements. Third, international human rights law (IHRL) enshrines rights, such as to identity and family unity, which are flagrantly violated whenever children are forcibly transferred or deported.

The chapter then shifts from law to action, examining the key challenges in implementing this solid protective framework. It begins by exploring the underlying reasons for the chronic inadequacy of enforcement instruments, particularly under IHL. It then turns to two legal mechanisms that have received comparatively little attention in scholarship, which could be activated to protect children from such violations. The first, Protecting Powers, is referenced in multiple provisions of the Geneva Conventions relating to child evacuations. While the Protecting Powers played a significant role historically, it has become largely obsolete over time, though it could potentially be revitalized to address contemporary protection needs. The second is the United Nations agenda on Children and Armed Conflict, together with

its associated mechanisms, which, although political in nature, have demonstrated a notable potential for effectiveness, even if their application to cases of abduction has so far been limited.

By combining legal analysis with practical insights, this chapter aims to illuminate how international norms can be translated into action to safeguard children's rights, even amid the complex realities of armed conflict.

II. THE PHENOMENON

Millions of children around the world continue to bear the brunt of armed conflict, with 2024 marking an unprecedented escalation in violence directed against them.[1] Among the gravest violations of their rights are forcible transfer and deportation, practices with deep historical roots that have been carried out in diverse contexts to serve varying political, military, or ideological objectives. The situation of thousands of Ukrainian children who have been forcibly transferred to the occupied territories and deported to Russia, following both the 2014 invasion of Donbass and the 2022 full-scale aggression, represents one of the most recent large-scale manifestations of such crimes.[2] History,

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[1] U.N. Secretary-General, *Children and armed conflict,* ¶ 5, U.N. Doc. A/79/878-S/2025/247 (June 17, 2025).

[2] ORG. FOR SEC. & CO-OPERATION IN EUR. (OSCE), OFFICE FOR DEMOCRATIC INSTITUTIONS & HUMAN RIGHTS, REPORT ON VIOLATIONS AND ABUSES OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, WAR CRIMES AND CRIMES AGAINST HUMANITY, RELATED TO THE FORCIBLE TRANSFER AND/OR DEPORTATION OF UKRAINIAN CHILDREN TO THE RUSSIAN FEDERATION, ODIHR.GAL/37/23/Rev.1/Corr.1 (May 4., 2023); G.A. Res. ES-11/7, Advancing a Comprehensive, Just and Lasting Peace in Ukraine, ¶6 (Feb. 25, 2025); U.N. HIGH COMM'R FOR HUMAN RIGHTS, THE IMPACT OF THE ARMED CONFLICT AND OCCUPATION ON CHILDREN'S RIGHTS IN UKRAINE, 24 FEBRUARY 2022–31 DECEMBER 2024, https://ukraine.ohchr.org/sites/default/files/2025-03/2025-03-21%20OHCHR%20Report%20on%20Children%27s%20Rights%20in%20Ukraine.pdf; ANDREAS UMLAND, RUSSIA'S FORCIBLE TRANSFERS OF UNACCOMPANIED UKRAINIAN CHILDREN: RESPONSES FROM UKRAINE, THE EU AND BEYOND (Stockholm Ctr. for E. Eur. Studies, Report No. 1 2024).

however, offers many other examples of this grave phenomenon, occurring not only in international and non-international armed conflicts but also during peacetime. The factual pattern under consideration can be broadly sketched as follows: the forcible removal of children from their habitual place of residence; their separation from families and communities; the implementation of measures aimed at eradicating their culture of origin; the imposition of the perpetrator's culture in its place; and the assertion that such actions are carried out for the children's purported benefit.

One of the earliest recorded practices dates back to the fourteenth century, when the Ottomans imposed the *Devshirme*, "blood tax" in Ottoman Turkish, on Christians. This involved the forcible taking and recruitment of Christian boys, mostly from the Balkans, for service in the Ottoman government as either soldiers or bureaucrats. The boys were taken to Istanbul, converted to Islam, and then placed with Muslim families or schools. The aim of the sultans was to create a group of soldiers and officials who would be loyal to them rather than to their Turkish families.[3] During the Armenian genocide, Ottoman authorities again systematically forcibly transferred Armenian Christian children to Muslim households or orphanages and converted them to Islam, this time with a genocidal intent.[4]

By the mid-nineteenth century, programmes started to arise in Australia, Canada and the United States to remove indigenous children from their families and communities to place them in missions or schools—so called boarding or residential schools. There, the

[3] *See, e.g.,* GODFREY GOODWIN, THE JANISSARIES (Saqui books 1994); PETER F. SUGAR, SOUTHEASTERN EUROPE UNDER OTTOMAN RULE, 1354–1804 (Univ. of Wash. Press 1977).

[4] *See, e.g.*, TANER AKÇAM, THE YOUNG TURKS' CRIME AGAINST HUMANITY: THE ARMENIAN GENOCIDE AND ETHNIC CLEANSING IN THE OTTOMAN EMPIRE (Princeton Univ. Press 2012).

indigenous children were re-educated in accordance with the culture of the majority, mainly a Christian one.[5]

During the Second World War, the Nazi regime institutionalised forcible transfers through the *Heuaktion* programme to "Germanise" foreign children deemed racially valuable. Under this scheme, thousands of Polish and Ukrainian children between the ages of ten and fourteen were seized and transported to the Reich, where Schutzstaffel (SS) officials conducted racial examinations. Those considered racially valuable were placed in institutions, rural households, or foster families of "good race," and enrolled in special folk schools, with the stated aim of achieving a "genuine ethnic transformation" or "final Germanization," which was considered possible only up to eight to ten years of age. By contrast, children deemed racially unsuitable were sent to forced labour or concentration camps for extermination. The abduction of children formed a central part of the broader Nazi project to weaken and ultimately destroy other nations while strengthening Germany both territorially and biologically.[6] This policy was carefully examined in one of the Nuremberg Subsequent Trials, known as the RuSHA Trial, where the acts were recognized as part of a genocidal program, although the legal concept of genocide had not yet been codified, and the Tribunal therefore lacked jurisdiction over that specific crime.[7]

In the Greek civil war (1944-49), two large schemes, with opposite but parallel aims, tore children from their families. On one side, the

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[5] *See* U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT vol. 2 (July 30, 2024); TRUTH & RECONCILIATION COMM'N OF CAN., CANADA'S RESIDENTIAL SCHOOLS: THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA vol. 6 (2015); ROLAND DAVID CHRISJOHN, SHERRI LYNN YOUNG, & MICHAEL MARAUN, THE CIRCLE GAME: SHADOWS AND SUBSTANCE IN THE INDIAN RESIDENTIAL SCHOOL EXPERIENCE IN CANADA (rev. ed. 2006); NAT'L INQUIRY INTO THE SEPARATION OF ABORIGINAL & TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES, BRINGING THEM HOME: REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (1997).

[6] *United States vs. Greifelt (the RuSHA Case)*, 5 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 [T.W.C.] 88 (1948).

[7] *Id*; *see also* Diane Marie Amann, *Child-Taking*, 45 MICH. J. INT'L L. 305, 321-33 (2024).

paidomazoma: invading communist forces began the mass abduction of about 28,000 children, sons of nationalists, from northern Greece to "socialist re-education camps" in communist Balkan countries, under the pretext of safety evacuations.[8] The plan drew direct inspiration from the *devshirme* system.[9] In response, government forces also initiated the forcible transfer of another 25,000 children to the southern part of Greece, placing them in a network of fifty-four child villages set up under the patronage of Queen Federika, justified by the claim of preventing abductions from communist forces.[10]

Cold War rivalries also prompted child transfers. The U.S.-led Operation Peter Pan, in the early 1960s, airlifted over 14,000 children from Cuba to Miami under the pretext of saving them from communism. The operation relied on U.S. propaganda claiming the Castro government intended to kidnap children which persuaded parents to send them to the United States for safety. Only about half of the children were eventually reunited with their families.[11]

In Argentina, the legacy of the Dirty War of the military dictatorship (1976–1983) continues to haunt hundreds of now-adult children who were forcibly taken from their detained or disappeared parents—targeted as political opponents—and placed into illegal adoptions. Many of their mothers were forced to give birth while in captivity and

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[8] *See* Dimitrios A. Kourtis, *The Greek Civil War and Genocide by Forcible Transfer of Children*, 26 J. GENOCIDE RSCH. 142 (2024); N. KARAVASILIS, THE ABDUCTED GREEK CHILDREN OF THE COMMUNISTS: PAIDOMAZOMA (Rosedog Pr, 2006).

[9] Stefano D'Urso, *Παιδομάζωμα ("Children's Recruitment") and παιδούπολεις ("Children's City"): Two Genocides at the Time of the Greek Civil War (1944–1949)*, 2 NUOVI AUTORITARISMI E DEMOCRAZIE: DIR., ISTITUZIONI, SOCIETÀ 172 (2024).

[10] *Id*. at 176–80; *See also* LORING M. DANFORTH & RIKI VAN BOESCHOTEN, CHILDREN OF THE GREEK CIVIL WAR: REFUGEES AND THE POLITICS OF MEMORY (Univ. of Chi. Press 2011).

[11] *See, e.g.*, MARÍA DE LOS ANGELES TORRES, THE LOST APPLE: OPERATION PEDRO PAN, CUBAN CHILDREN IN THE U.S., AND THE PROMISE OF BETTER FUTURE 89 (Beacon Books 2003); YVONNE M. CONDE, OPERATION PEDRO PAN: THE UNTOLD EXODUS OF 14,048 CUBAN CHILDREN (Routledge 2000); JUAN CARLOS RODRÍGUEZ CRUZ, THE BAY OF PIGS AND THE CIA 54 (Ocean Press 1999).

immediately separated from their child.[12] Estimates indicate that more than 500 children were subjected to this fate.[13] Many were given to families linked to the regime, with falsified birth certificates and identities designed to erase all connection to their biological families.[14] Decades later, a significant number of these individuals still ignores the truth about their identity.[15]

As can be seen from the illustrated precedents, which are by no means exhaustive, the motives underlying forcible transfers and deportations of children may vary and often overlap. First, children may be removed from 'enemy' populations to instil loyalty to another regime or ideology, undermine resistance and provide leverage during potential negotiations. Second, transfers may occur under the pretext of civilization, erasing minorities or indigenous identities to create a more 'homogenous' national population. Religious justifications often play a role in this process. Third, racial and eugenic policies may target children deemed to belong to a 'desirable' group, forcibly integrating them into the dominant population to reinforce racial hierarchies or fill demographic gaps caused by conflict or decline. Finally, such practices can morph into genocidal ambitions, seeking the destruction of a group by targeting its children.

While motives are largely irrelevant to the legal qualification of international law violations (except insofar as they may serve as evidence to infer intent or other elements of a crime) there are at least two important reasons to consider them in the context of forcible

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[12] Fabricio Laino Sanchis, *Abuelas de Plaza de Mayo and the Search for Appropriated Children: Repertoires of Contention and Political Strategies in Dictatorship and Democracy*, 10 DEUSTO J. HUM. RTS. 186 (Dec. 2022).

[13] CARLOS OSORIO, STOLEN BABIES: ARGENTINA CONVICTS TWO MILITARY DICTATORS, Nat'l Sec. Archive, Elec. Briefing Book No. 383 (July 5, 2012) https://nsarchive2.gwu.edu/NSAEBB/NSAEBB383/.

[14] RITA ARDITTI, SEARCHING FOR LIFE: THE GRANDMOTHERS OF THE PLAZA DE MAYO AND THE DISAPPEARED CHILDREN OF ARGENTINA (Univ. of Cal. Press 1999); Victor B. Penchaszadeh, *Abduction of Children of Political Dissidents in Argentina and the Role of Human Genetics in Their Restitution,* 13 J. PUB. HEALTH POL'Y 291 (1992).

[15] ABUELAS DE PLAZA DE MAYO, LA FAMILIA RESTITUIDA MÁS RECIENTE (Jan. 21, 2025), https://www.abuelas.org.ar/prensa-y-difusion/noticias/2029 (the most recent family reunification, at the time of the writing, occurred on 21 January 2025).

transfer and deportation. One reason is general and relates to how international law is implemented. The second is specific to the legal framework governing the crimes under examination.

First, it must be acknowledged that international law operates as a *Law+* regime. It is a legal system that is more closely intertwined with, and in many aspects shaped by, broader economic and geopolitical dynamics than domestic systems. Decisions to pursue international accountability are rarely taken *motu proprio*. Many cases only reach international courts because a state, or a coalition of states, decides to act, such as initiating inter-state proceedings before the International Court of Justice (ICJ), or by voting in the Security Council to refer a situation to the International Criminal Court (ICC). Such decisions are invariably shaped by diplomatic, strategic, and realpolitik considerations. Advocates for accountability must understand and engage with these dynamics in order to persuade states to take action. Moreover, the prevention and cessation of violations, as well as the provision of reparations, often occur not solely through legal channels, but also through political and peace-making processes. While grounded in international legal principles, such initiatives involve a broader set of calculations, where understanding the underlying motives for specific crimes becomes critical to developing effective and context-sensitive advocacy and negotiation strategies.

Secondly, motives come to the fore more prominently in relation to the forcible transfer and deportation of children than in other categories of international law violations. As will be further explored in the following section, much of the legal controversy revolves around whether the conduct falls under the narrowly defined exception of lawful evacuation. Perpetrators of these violations will often invoke such regime such as asserting that children were removed from their families and communities for their own protection or benefit. This defense invites a careful analysis of whether the stated humanitarian purpose is genuine or merely a pretext to shield unlawful conduct. In this context, investigating the motives may support the assessment of the legality of the acts.

III. THE TRIPARTITE INTERNATIONAL LEGAL FRAMEWORK

To situate the tripartite legal framework relevant to this analysis, it is first necessary to appreciate the extent to which war undermines the fundamental rights of children:

> War violates the rights of every child: the right to life, the right to be with family and community, the right to health, the right to development of personality and the right to be nurtured and protected. Many of today's conflicts last the length of a 'childhood', meaning that from birth to early adulthood, children will experience multiple and accumulative assaults. Disrupting the social networks and primary relationships that support children's physical, emotional, moral, cognitive and social development in this way, and for this duration, can have profound physical and psychological implications.[16]

Recognising their intrinsic vulnerabilities and different experience, international law considers children as a separate group to which increased protection is owed, both under peacetime and in conflict. Acts of forcible transfer and deportation of children during armed conflict raise serious concerns under several overlapping legal regimes, including IHL, ICL, and IHRL.

This section will look at those three frameworks, embracing the interpretation, endorsed by the ICJ, according to which, in times of armed conflict, IHRL applies in parallel to IHL. Thus, when a factual situation engages both IHRL and IHL, the two regimes are complementary rather than mutually exclusive. The same action or omission can give rise to violations under both bodies of law. In the

[16] Graça Machel (Expert of the U.N. Secretary General), *Impact of Armed Conflict on Children*, ¶ 30, U.N. Doc. A/51/306 (Aug. 26, 1996).

provisions that will be analysed below, IHRL and IHL in fact end up reinforcing each other.[17]

A. International Humanitarian Law

In times of armed conflict, authorities typically strive to implement special measures to shield children from the harmful effects of war as much as possible. One common approach has been to move children away from zones of active hostilities to safer locations, whether within the country, abroad, or to allied states. When these transfers are properly overseen and based on the genuine consent of parents, they have generally proven effective.[18] However, as the examples in the previous section illustrate, instrumentalization of evacuations to achieve aims that have little to do with the well-being of children is always close at hand.

These factors underscore why such inherent ethical complexity to the regimes governing the forcible transfer, deportation, and evacuation of children during conflict exists. On one side, the need to permit urgent and decisive action to protect children from harm. On the other, especially in situations of occupation, the need to avoid granting states excessive leeway to separate children from their families and communities under the pretext of removing them from the theatre of war.

This tension means that the prohibition of forcible transfers and deportations of children under IHL is not a granitic, static provision. Rather, it exists in constant dynamic balance with its opposite and complementary regime, that of child evacuations. The boundaries of the

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[17] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 178 ¶ 106 (July 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 240 ¶ 240 (July 8); U.N. Hum. Rts. Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

[18] Int'l Comm. of the Red Cross, Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I Commentary) ¶ 3209, at 908 (1987).

violation can only be defined by examining how, in each factual circumstance, the regime of evacuations applies.

1. Forcible transfers and deportations

Article 49 of the Fourth Geneva Convention (GCIV)[19] sets forth a prohibition against individual or mass forcible transfers and deportations of protected persons. Within the category of civilians, protected persons are "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals."[20] The Article 49 GCIV prohibition is complemented by Article 17 of Additional Protocol II to the Geneva Conventions (APII) for what concerns non-international armed conflict, providing that "[c]ivilians shall not be compelled to leave their own territory for reasons connected with the conflict."[21]

Such prohibition against forcible transfers and deportations is recognised as part of customary international law in both international and non-international armed conflicts.[22] There are scholarly debates on whether the prohibition was also part of customary law prior to the adoption of the Geneva Conventions in 1949.[23] As emerges from the discussions in the Conventions' Drafting Committee, the deportations carried out by the Nazi regime were the propeller for the adoption of an absolute prohibition in the Geneva Conventions.[24] However, the text

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[19] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV].
[20] *Id.* at art. 4(1).
[21] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.
[22] 2 Int'l Comm. of the Red Cross, *Customary International Humanitarian Law* r. 129, ch. 38, § A (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).
[23] Etienne Henry, *Deportation and Forcible Transfer of Civilian Populations, in* REVISITING THE GENEVA CONVENTIONS: 1949–2019 at 77 (Borhan Uddin Khan & Jahid Hossain Bhuiyan ed., 2019).
[24] Remarks of the French Delegate, in 16.C.III B7/D, *Conférence Diplomatique de 1949: Sténogrammes de la Commission III*, vol. II, at 30–39, 44–45 (1950) (Call No. 345.21/11-6 (II)).

of Article 49 GCIV derives from the 1934 Tokyo draft by the International Committee of the Red Cross (ICRC) for a 'Convention on the protection on civilians in occupied territories' which also included strong prohibition against deportations.[25] Moreover, another argument pointing to the widely recognised nature of the provision before 1949 is found in the post-World War I Versailles Treaty of Peace. The Treaty indicates that compensation could be sought for damage caused by Germany or its allies to civilians who fell victim of a series of acts of cruelty, violence, and maltreatment, including deportation.[26] Even prior to that, the 1863 Lieber code, prepared during the American Civil War as the first attempt to codify the laws of war, also foresaw that "private citizens are no longer . . . carried off to distant parts."[27]

The prohibition against forcible transfers and deportations set forth under IHL is considered of absolute nature.[28] Violation of Article 49 GCIV is also listed among the grave breaches of the Convention, defined in Article 147 GCIV as entailing the most severe criminal sanctions.[29] As will be seen *infra*, under section 3.2, breaches of this prohibition not only give rise to state responsibility but also to individual criminal responsibility, amounting to international crimes. Finally, despite some differing opinions within the ICJ,[30] prohibition of

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[25] Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality Who Are on Territory Belonging to or Occupied by a Belligerent, art. 19(b) (Int'l Comm. of the Red Cross draft, 1934) (prepared for the Fifteenth Int'l Red Cross Conf., Tokyo).

[26] Treaty of Peace Between the Allied and Associated Powers and Germany, annex I to art. 232, June 28, 1919, 225 Consol. T.S. 188.

[27] Instructions for the Government of Armies of the United States in the Field (Lieber Code), art. 23 (Apr. 24, 1863).

[28] *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 278–79 (Jean S. Pictet ed., 1958).

[29] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 85(4)(a), June 8, 1977, 1125 U.N.T.S. 3.

[30] Jurisdictional Immunities of the State (Ger. v. It.; Greece Intervening), Judgment, 2012 I.C.J. Rep. 99, 140 ¶ 93 (Feb. 3).

deportation of civilians has been argued to constitute a rule of *jus cogens*.[31]

a. Actus reus

The prohibited conducts of forcible transfer and deportation are substantially similar. They have been defined in constant international courts jurisprudence,[32] and crystalized in the Rome Statute to the ICC under Article 7(2)(d),[33] as: (i) the forced displacement of one or more persons by expulsion or other forms of coercion, (ii) from an area in which they are lawfully present, (iii) without grounds permitted under international law.

The distinction between the two prohibitions lies in the fact that for deportation, the displacement of persons must be across a national border,[34] while for forcible transfer, the removal may take place within national boundaries.[35] Forcible transfer was in fact an introduction of

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[31] *Id*. at 249 ¶ 192; *id*. at 297 ¶ 190 (Cançado Trindade, J., dissenting); Henry, *supra* note 23, at 84.

[32] Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Trial Judgment, ¶¶ 488–95 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016); Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeal Judgment, ¶ 304 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009); Prosecutor v. Stakić, Case No. IT-97-24-A, Appeal Judgment, ¶¶ 278, 317 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); Prosecutor v. Stanišić & Župljanin, Case No. IT-08-91-T, Trial Judgment, vol. I, ¶ 61 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 27, 2013); Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Trial Judgment, ¶ 793 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012); Prosecutor v. Popović, Case No. IT-05-88-T, Trial Judgment, ¶ 891 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010); Prosecutor v. Milutinović, Case No. IT-05-87-T, Trial Judgment, vol. I, ¶ 164 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009).

[33] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

[34] Prosecutor v. Đorđević, Case No. IT-05-87/1-A, Appeal Judgment, ¶¶ 532, 535 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 27, 2014); Krajišnik, IT-00-39-A, Appeal Judgment, ¶ 304; Stakić, IT-97-24-A, Appeal Judgment, ¶¶ 278, 289–300, 317; Stanišić & Župljanin, Case No. IT-08-91-T, Trial Judgment, vol. I, ¶ 61; Tolimir, IT-05-88/2-T, Trial Judgment, ¶ 793; *Popović*, IT-05-88-T, Trial Judgment, ¶ 892; Milutinović, IT-05-87-T, Trial Judgment, vol. I, ¶ 164.

[35] Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, ¶ 521 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Stakić, IT-97-24-A, Appeal Judgment, ¶ 317; Stanišić & Župljanin, Case No. IT-08-91-T, Trial Judgment ¶ 61; Tolimir, IT-05-88/2-

GCIV that expanded the prohibition of deportation from only trans-boundary acts to instances of unlawful displacement of individuals within the occupied territory. In the *Stakic* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) further specified that deportation can occur both through the passing of a *de jure* border between two states or, in circumstances of constantly changing frontlines, a *de facto* border, based on a case-by-case assessment.[36]

There is no hierarchy of gravity between the two norms. While the ICTY Statute specifically classifies deportation as a crime against humanity, whereas forcible transfer would only amount to "other inhumane acts,"[37] no further elements support an interpretation that establishes a hierarchy of gravity between forcible transfer and displacement. Under the Geneva Conventions and their transposition in the Rome Statute to the ICC, whether or not an internationally recognised border is crossed is irrelevant in determining the existence of a crime. Therefore, apart from the element of crossing an international border, the norms are currently regarded as essentially equivalent. For the sake of brevity, the term 'deportations' will be used throughout the remainder of the text to encompass instances of forcible transfer.

A key element to establish deportation is the forced nature of the displacement of individual(s). While initial drafts of the Geneva Conventions foresaw a general prohibition against deportation and

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T, Trial Judgment, ¶ 793; Popović, IT-05-88-T, Trial Judgment, ¶ 892; Milutinović, IT-05-87-T, Trial Judgment, vol. I, ¶ 164.

[36] Đorđević, IT-05-87/1-A, Appeal Judgment, ¶¶ 532, 535 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 27, 2014); *Krajišnik*, IT-00-39-A, Appeal Judgment, ¶ 304 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009); Stakić, IT-97-24-A, Appeal Judgment, ¶¶ 278, 289–300, 317 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); Stanišić & Župljanin, IT-08-91-T, Trial Judgment, vol. I, ¶ 61 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 27, 2013); Tolimir, IT-05-88/2-T, Trial Judgment, ¶ 793 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012); Popović, IT-05-88-T, Trial Judgment, ¶ 892 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010); Milutinović, IT-05-87-T, Trial Judgment, vol. I, ¶ 164 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009).

[37] Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 5(d), 5(i), S.C. Res. 827, U.N. Doc. S/RES/827 (1993).

transfers,[38] the subsequent discussions acknowledged that, in some cases, protected persons themselves might wish to leave the country, for instance because they belong to a minority group particularly at risk in a conflict scenario.[39] The adjective 'forcible' was therefore included in the text, implicitly authorizing voluntary transfers.[40]

However, the forcible nature of displacement should not be interpreted as entailing only physical force. While physical force certainly falls within the definition, other forms of coercion are also encompassed, which may include "threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment." This broad standard for the interpretation of what constitutes a forcible transfer was initially offered by the International Criminal Tribunal for Rwanda (ICTR) in *Akayesu*,[41] reinforced through subsequent jurisprudence,[42] and ultimately reflected in the ICC Elements of Crimes.[43] The forced character of the displacement is therefore determined by the absence of genuine choice on the part of the victim.[44] Accordingly, while

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[38] Int'l Comm. of the Red Cross [ICRC], *Draft Conventions submitted to the 1948 Stockholm Conference*, art. 45 (May 1948).

[39] Int'l Comm. of the Red Cross [ICRC], *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II-A, at 759 (June 6, 1950) (The delegate for the United States stated: "the addition (suggested by the Soviet Delegation) of the words 'any other transfer' would have hampered the evacuation of the religious and political minorities which the Allies, on entering Germany, had discovered in labour and concentration camps.").

[40] Pictet, *supra* note 28, at 278–79.

[41] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 509 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

[42] Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Judgment, ¶ 475 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002); Krnojelac, IT-97-25-A, Appeal Judgment, ¶ 233 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003).

[43] Pursuant to Article 9 of the Rome Statute to the ICC, Elements of Crimes shall assist the Court in the interpretation and application of the crimes of genocide, crimes against humanity and war crimes: Preparatory Comm'n for the Int'l Criminal Court, *Finalized Draft Text of the Elements of Crimes,* note 12, U.N. Doc. PCNICC/2000/INF/3/Add.2 (July 6, 2000).

[44] Krstić, IT-98-33-T, Trial Judgment, ¶ 148 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

individuals may appear to consent to, or even request, their removal, any such consent or request must be given voluntarily and reflect the individual's free will, assessed in light of the circumstances of the particular case.[45]

b. Mens rea

The *mens rea* required for deportation is the intent to forcibly displace the population across a *de jure* or *de facto* border. The *mens rea* for forcible transfer is the intent to forcibly displace the population within a national border.[46]

c. Duration

As for the temporal duration of the displacement, namely whether there should be a minimum duration of the transfer, jurisprudence establishes that duration has no impact on the configuration of a violation of Article 49 GCIV or of the crimes of forcible transfer or deportation under ICL. Neither the text of the relevant provisions, the preparatory works, nor subsequent interpretations by courts and scholars provide for any explicit minimum length requirement for the period of displacement.[47]

Some authors have argued that a permanency requirement is implicit in the provision of forcible child transfer in the Genocide Convention.[48] However, as another strand of scholarship has pointed out, in the absence of any explicit reference to a minimum duration, the interpretative principles of the Vienna Convention on the Law of Treaties preclude applying a restrictive interpretation when no such

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[45] Stakić, IT-97-24-A, Appeal Judgment, ¶¶ 279, 282 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

[46] Stakić, IT-97-24-A, Appeal Judgment, ¶ 278 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); Krstić, IT-98-33-T, Trial Judgment, ¶ 521 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Simić, IT-95-9-T, Trial Judgment, ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003).

[47] RUTH AMIR, TWENTIETH CENTURY FORCIBLE CHILD TRANSFERS. PROBING THE BOUNDARIES OF THE GENOCIDE CONVENTION 270 (Lexington Books 2019).

[48] GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 203 (Oxford Univ. Press 2005).

reason can be inferred from the text.[49] On the other hand, as will be seen below, even a displacement carried out on permissible grounds (namely, the limited grounds allowing for evacuations), can entail an IHL violation if the temporary nature of evacuations is not respected.

On the *mens rea* side, jurisprudence has now settled on the interpretation that it is not necessary for the perpetrator to intend the permanent displacement of the victim(s).[50] This was explicitly clarified by ICTY in *Simić et al*,[51] notwithstanding previous jurisprudence from the same tribunal which had argued that, to qualify as a war crime or crime against humanity, the displacement had to be committed with the intent of permanent removal.[52]

d. Scope of application

As highlighted at the beginning of this section, Article 49 GCIV applies to protected persons, defined as "all those who those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." The only category excluded from this protection are therefore nationals of the occupying power.[53]

The placement of Article 49 GCIV under the section titled "Occupied territories," might however suggest that an occupation must first be established for the prohibition of deportations to apply. Under

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[49] Kurt Mundorff, *Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention*, 50 HARV. INT'L L.J. 61, 90 (2009); Amir, *supra* note 47, at 89-90.

[50] Prosecutor v. Brđanin, Case No. IT-99-36-A, Appeal Judgment, ¶ 206 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007); Stakić, IT-97-24-A, Appeal Judgment, ¶¶ 278, 304, 307, 317; Tolimir, IT-05-88/2-T, Trial Judgment, ¶ 801; Popović, IT-05-88-T, Trial Judgment, ¶ 905; Milutinović, IT-05-87-T, Trial Judgment, vol. I, ¶ 164.

[51] Simić, IT-95-9-T, Trial Judgment, ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003).

[52] Brđanin, IT-99-36-T, Trial Judgment, ¶ 545 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004); Stakić, IT-97-24-T, Trial Judgment, ¶ 687 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003).

[53] José Luis Fernandez Sanchez, *Forced Transfer of Aliens During Armed Conflicts, in* REVISITING THE GENEVA CONVENTIONS: 1949–2019 at 164 (Borhan Uddin Khan & Jahid Hossain Bhuiyan ed., 2019).

Article 42 of the 1907 Hague Regulations, occupation arises when a territory "is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[54]

Nonetheless, as held by the ICTY in *Naletilić and Martinović,* for the purpose of the application of individuals' rights, "a state of occupation exists upon their falling into 'the hands of the occupying power.' Otherwise civilians would be left, during and intermediate period, with less protection than that attached to them once occupation is established."[55] With specific regard to the crime of deportation, the ICTY Trial Chamber further clarified that the existence of an occupation is not an element of the crime.[56]

This reasoning reflects a functional approach to the law of occupation, according to which the relevant rules apply as soon as the material conditions for their breach are created—namely, as soon as there is contact between protected persons and enemy troops.[57]

2. *Evacuations*

a. Legal grounds

The absolute prohibition of deportations is mitigated by the fact that there is one permissible ground for the forced displacement of person(s), namely the regime of evacuations established under the Geneva Conventions. When the conditions for a forced displacement to qualify as an evacuation are met, the act does not fulfil all the elements of the crime of deportation and therefore falls outside its scope. This exception reflects the recognition that, when carried out within lawful

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[54] Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

[55] Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Trial Judgment, ¶ 221 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003); Prosecutor v. Gotovina, Case No. IT-06-90-PT, Decision on Several Motions Challenging Jurisdiction, ¶ 55 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 19, 2007).

[56] Gotovina, IT-06-90-PT, Decision on Several Motions Challenging Jurisdiction, ¶ 55 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 19, 2007).

[57] Henry, *supra* note 23, at 87.

grounds, evacuations can serve as a vital instrument of humanitarian protection. However, to prevent abuses and safeguard the interests of affected populations, the Geneva Conventions impose a series of strict *caveats* regulating evacuations, with even more stringent protections when children are involved.

The first safeguard is that evacuations may be ordered only in two circumstances: when required to ensure the "security of the population" or when dictated by "imperative military reasons." This is explicitly provided in Article 49(2) of GCIV and Article 17(1) of APII. Accordingly, while deportations are generally unlawful, total or partial evacuations justified on one of these two grounds and conducted in compliance with the prescribed rules constitute a lawful sub-category.[58] In such cases, where necessary to shield civilians from the consequences of armed conflict, forcible displacement of population has been characterised not merely as permissible but as an imperative.[59] Scholars have thus described this framework as a "realist and moderately protective regime."[60]

Secondly, as exceptions to the general prohibition, the two grounds that may justify evacuations must be interpreted restrictively. The principle of good faith is central to the interpretation of these provisions, given the long history of military necessity being invoked as a pretext for grave rights violations.[61] In *Stakić*, the ICTY underscored this point by holding that evacuation cannot be justified where the humanitarian grounds invoked were themselves the result of the perpetrator's own unlawful conduct.[62]

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[58] Ted A. van Baarda, *Seeing through the Fog: Distinguishing Between Evacuation and Deportation,* 18 HUM. EXCHANGE MAG. 15 (2001).
[59] Sanchez, *supra* note 53, at 163.
[60] Henry, *supra* note 23, at 104.
[61] Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331; *Id.* at 99.
[62] Stakić, IT-97-24-A, Appeal Judgment, ¶ 287 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); Popović, IT-05-88-T, Trial Judgment, ¶ 903 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010).

Furthermore, in accordance with Article 49(2) GCIV, protected person shall not be evacuated outside the bounds of the occupied territory unless "for material reasons it is impossible to avoid such displacement." A stricter regime therefore applies when evacuations entail the crossing of an international border.

With respect to children, the tension between the deportation and evacuation regimes is even more acute: their heightened vulnerability gives rise to a stronger humanitarian imperative to protect them, yet for that same reason it is equally vital to prevent abuses that could inflict irreparable harm by severing them from their family and familiar environment. The conundrum is addressed as follows.

On one side, the Geneva Conventions framework recognises that, in certain circumstances, parties may need to remove children from the theatre of war and even encourages such measures.[63] Article 24 GCIV explicitly provides that children under fifteen who are orphaned or separated from their parents due to the conflict shall be received in a neutral country for the duration of the hostilities, subject to the consent of the Protecting Power.

On the other side, the 1977 adoption of Additional Protocol I to the Geneva Conventions (API)[64] further tightens the safeguards surrounding evacuations, establishing a special regime specifically for children. Article 78 API provides that the permissible grounds for children's evacuations are narrower than for protected persons generally: they may only be evacuated when compelling reasons of health or medical treatment or their safety so require. However, when evacuations occur from the occupied territory, safety is not considered a condition for evacuation. This means that evacuations outside of the occupied territory are permissible solely when the medical treatment necessary for the child's recovery or convalescence cannot be provided in their own country. This also requires a careful balancing exercise

[63] Protocol I Commentary, *supra* note 18, ¶ 3209, at 908.
[64] Protocol I.

between the potential medical benefit for the child and the adverse psychological effects of a separation from their familiar environment.[65]

This cautious approach reflects the assessment of API's drafting committee that "the dangers of Occupying Powers abusing their discretion are greater than the dangers of prohibiting evacuations for reasons of safety."[66] Notably, Article 78 API was adopted following a debate at the 1972 Conference of Government Experts, where a UNESCO study was presented, highlighting that the gravest repercussions on children's psychological wellbeing did not stem from armed conflict itself, but rather from the severance of family affective ties and the disruption of their customary framework of life.[67]

Moreover, the written consent of parents or legal guardians is required for evacuations, when they can be located. In their absence, however, the impossibility of reaching them should not prevent an evacuation deemed necessary. In such cases, the written consent of the persons who by law or custom are primarily responsible for the care of children must be sought. The fact that the consent of the state whose children are evacuated is not sufficient reflects the drafting committee's concern that puppet governments might otherwise readily authorise abusive evacuations.[68] In any case, Protecting Powers shall supervise such evacuations, in agreement with all Parties involved.[69]

b. Resulting obligations

Once evacuations take place on the permitted grounds, they give rise to an additional set of obligations. This follows from the consideration that evacuations, involving displacement from one's home and relocation into an unfamiliar environment, constitute a

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[65] HOWARD S. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 542 (Oceana Publications, 1980).

[66] 15 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 466, CDDH/407/Rev.1 ¶ 66 (1977).

[67] Protocol I Commentary, *supra* note 18, ¶ 3212.

[68] *Id.*, ¶ 3232.

[69] API Art. 78(1).

profound disruption for those affected. Therefore, to minimise the hardship caused by such measures, they must be accompanied by a minimum level of humanitarian safeguards designed to alleviate their adverse consequences. Failure to comply with one of these subsequent obligations has been considered as an indication of the unlawful nature of the evacuation.[70]

Firstly, with reference to protected persons in general (both adults and children), Article 49(2) GCIV *in fine* clarifies that evacuations are by definition temporary and, therefore, those evacuated "shall be transferred back to their homes as soon as hostilities in the area in question have ceased." The rule that displaced persons have a right to voluntary return in safety to their homes as soon as the reasons for displacement cease to exist has been identified by ICRC as a rule of customary IHL.[71]

Secondly, Article 49(3) GCIV requires that an occupying power conducting an evacuation ensures the satisfaction of the evacuated population's basic needs, including accommodation, hygiene, health, safety and nutrition. While earlier drafts had imposed a stricter obligation,[72] the final wording tempered this requirement in recognition of the often-improvised nature of evacuations, providing instead that these needs must be met to the greatest practicable extent. The provision further stipulates that members of the same family must not be separated.

Thirdly, notification of such evacuations must be given to the Protecting Power or to the ICRC as soon as they occur.

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[70] Naletilić & Martinović, IT-98-34-T, Trial Judgment, ¶ 526 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003); Co-Prosecutors v. Nuon Chea, 002/01, 002/19-09-2007/ECCC/TC, Trial Judgment, ¶ 450 (Extraordinary Chambers in the Cts. of Cambodia Aug. 7, 2014); Brđanin, IT-99-36-T, Trial Judgment, ¶ 556 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

[71] 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 468 (Cambridge Univ. Press 2005).

[72] 1 Final Record of the Diplomatic Conference of Geneva of 1949 at 120–21 (1949); 2-A Final Record of the Diplomatic Conference of Geneva of 1949 at 759–60 (1949).

When it comes to children, Article 78 API establishes additional protective obligations with two primary objectives. On one hand, these obligations aim to mitigate the psychological impact of evacuation on children's development. On the other, they seek to ensure proper tracing of evacuated children and facilitate their smooth return to their families and country of origin.

To achieve the first objective, all feasible measures must be taken to allow children to continue their education in accordance with their parents' wishes. All attempts to convert children to a different religion, even if conversion is voluntary, or to indoctrinate them, are explicitly prohibited. These obligations fall primarily on the receiving state, though the state facilitating the evacuation also bears responsibility for upholding the rights of the children.[73]

Regarding the second objective, the whole Geneva Conventions framework emphasises the importance of preserving family unity wherever practicable and safe. When children have been separated from their families—whether due to evacuation or other circumstances—IHL seeks to facilitate family reunification as soon as possible.[74] This principle is reflected across multiple provisions of GCIV, including Articles 25, 26, 27, and 82, and is reinforced by the specific obligations arising from evacuation procedures. Article 78(3) API establishes a precise tracing mechanism to support this goal. Notification of the evacuation must be provided by the party arranging it, and, as appropriate, by the receiving state, to the ICRC Central Tracing Agency.[75] A systematic tracing process is then used to record the whereabouts of each evacuated child and to facilitate their family reunification and repatriation. In particular, an individual card must be prepared for each child and transmitted to the Central Tracing Agency. This card contains information necessary to identify and trace the child, as well as their parents and family members. Given concerns about the

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[73] Protocol I Commentary, *supra* note 18, ¶ 3238.
[74] R.K. Dixit, *Special Protection of Children During Armed Conflict Under the Geneva Conventions Regime*, 1 INDIAN SOC'Y INT'L L. Y.B. INT'L HUM. & REFUGEE L. 12 (2001).
[75] GRADIMIR DJUROVIC, THE CENTRAL TRACING AGENCY OF THE ICRC 259 (1986).

potential risks if sensitive information were to fall into the wrong hands, the procedure allows for the omission of any details that might endanger the children.[76]

Finally, it is worth noting that Article 50 GCIV establishes in absolute terms the principle of inviolability of a child's personal status, prohibiting the occupying power from altering it. Personal status has been interpreted to include a child's nationality, ethnicity, family, and religion.[77]

B. International Criminal Law

Under the international criminal law regime, deportation can morph into a war crime, a crime against humanity, or genocide, depending on the presence of specific additional constitutive elements. Its precise legal characterisation is determined by the context in which the acts occur, the intent of the perpetrators, and the broader patterns of conduct in which they are embedded.

1. Deportation as a war crime

With respect to their qualification as war crimes, the London Charter of the Nuremberg International Military Tribunal—the foundation of modern international criminal law—already recognised in Article 6(b) the deportation of civilian population of or in occupied territory as a war crime.[78]

Today, Articles 8(2)(a)(vii), 8(2)(b)(viii) and 8(2)(e)(viii) of the Rome Statute explicitly criminalise the unlawful deportation or transfer of civilians. Deportation constitutes a war crime in the context of international armed conflict, military occupation, and non-international

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[76] Sandra Singer, *The Protection of Children During Armed Conflict Situations,* 26 INT'L REV. RED CROSS 119 (1986).

[77] Dixit, *supra* note 74.

[78] Charter of the International Military Tribunal, annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement"), Aug. 8, 1945, 82 U.N.T.S. 280.

armed conflict.[79] The key constitutive elements of these offences have been analysed under section 3.1.1. Of note, however, such crimes will fall under the material scope of ICC's jurisdiction "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[80]

It was precisely on the basis of these provisions that, in March 2023, the ICC issued arrest warrants against the President of the Russian Federation, Vladimir Putin, and his Commissioner for Children's Rights, Maria Lvova-Belova.[81] The Court found reasonable grounds to believe that both individuals bear responsibility for the war crimes of unlawful deportation and transfer of Ukrainian children from occupied areas to the territory of the Russian Federation.[82] These constitute the first arrest warrants ever issued by the ICC specifically on these charges[83]

2. *Deportation as a crime against humanity*

Alongside its recognition as a war crime in both international and non-international armed conflicts, deportation may also qualify as a crime against humanity when the relevant contextual elements are satisfied. Specifically, the deportation must form part of a widespread or systematic attack directed against any civilian population, and the perpetrators must have been aware of the attack and that their acts were carried out within its framework. Unlike war crimes, crimes against humanity do not require a connection to an armed conflict and can

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[79] Vincent Chetail, *Is There Any Blood on My Hands? Deportation as a Crime of International Law*, 29 LEIDEN J. INT'L L. 917, 919 (2016).

[80] Rome Statute, Article 8(1).

[81] *See* ICC Press Release, noting that the ICC Chamber decided to keep the warrants confidential to protect the investigation and victims and witnesses, but held that publicizing the suspects' names, charges, and modes of liability serves the interests of justice and may help prevent further crimes. Int'l Crim. Ct., *ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

[82] *Id.*

[83] INT'L CRIM. CT., CASE LAW DATABASE, (Sept. 5, 2025), https://legal-tools.org/cld.

therefore be committed even in peacetime.[84] Acts of deportation have been consistently recognised as crimes against humanity in the statutes of most international criminal tribunals (ICTY; ICTR; Special Courts of Sierra Leone; Cambodian Extraordinary Courts)[85] and are included in the Rome Statute under Article 7(1)(d).

Moreover, deportation can contribute to the commission of additional crimes against humanity. Deportation may constitute persecution under Article 7(1)(h) when the act is carried out on discriminatory grounds.[86] Deportation may also fall within the residual category of "other inhumane acts" under Article 7(1)(k) when it is carried out in a way that causes "great suffering, or serious injury to body or to mental or physical health."[87]

3. Deportation as a crime of genocide

The Genocide Convention, under Article 2(e), recognises the "forcible transfer of children from one protected group to another" as a genocidal act.[88] Notably, while deportation in general is not listed among the acts that can constitute genocide, deportation *of children* can amount to genocide when the other elements of the crime are present. Forcible child transfer is thus listed among acts that can constitute genocide on the same standing as acts of killing, forced sterilization,

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[84] YVES SANDOZ, CHRISTOPHE SWINARSKI & BRUNO ZIMMERMANN, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1473 (International Committee of the Red Cross, Marinus Nijhoff Publishers, 1987).

[85] Statute of the Int'l Crim. Trib. for the Former Yugoslavia art. 5(d), May 25, 1993, 32 I.L.M. 1159; Statute of the Int'l Crim. Trib. for Rwanda art. 3(d), S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the Special Court for Sierra Leone art. 2(d), Jan. 16, 2002, 2178 U.N.T.S. 145; Law on the Establishment of the Extraordinary Chambers, art. 5, as amended Oct. 27, 2004, NS/RKM/1004/006 (Cambodia).

[86] Karadžić, IT-95-5/18-T, Trial Judgment, ¶¶ 2519–21 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016); Blaškić, IT-95-14-T, Trial Judgment, ¶¶ 222–23, 234 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); Blaškić, IT-95-14-A, Appeal Judgment, ¶ 153 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

[87] Prosecutor v. Kupreškić, Case No. IT-95-16-T, Trial Judgment, ¶ 566 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

[88] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

and others.[89] This definition has been incorporated in the statutes of international criminal tribunals and is codified in the Rome Statute under Article 6(e).

The *actus reus* of genocidal forcible transfer of children requires an assessment of whether the transfer was carried out forcibly, applying the same broad standard used for the prohibition of deportation. This encompasses not only physical coercion but also psychological pressure or violence.

It must further be established that the children belonged to a protected group and were transferred to another group. Regarding group membership, the Convention requires that the children belong to a protected group—religious, ethnic, national or racial—for the transfer to constitute genocide. Some scholars, however, argue that children themselves constitute a distinct protected group. Advocates of this view draw on the enhanced protection afforded to children under IHRL, IHL and other treaty regimes, suggesting that children could be considered a fifth protected group under the Genocide Convention. [90]

With respect to the transfer to another group, there is no geographical requirement to their relocation. Rather, the children must be moved from one protected group to another, as relocation within the same group falls outside the scope of the provision.

The *mens rea* element required the genocidal *dolus specialis*—that is, the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. This element warrants separated, detailed analysis, which is provided in the following two sub-sections.

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[89] *But see* THOMAS W. SIMON, THE LAWS OF GENOCIDE: PRESCRIPTIONS FOR A JUST WORLD 53–55 (Bloomsbury Publishing, 2007) (contending that the essence of genocide lies in killing, and that the other forms of group-targeted harm described in Article 2(b)–(e) should be recognized as genocide only when they occur alongside acts of genocidal killing).

[90] SONJA C. GROVER, *HUMANITY'S CHILDREN: ICC JURISPRUDENCE AND THE FAILURE TO ADDRESS THE GENOCIDAL FORCIBLE TRANSFER OF CHILDREN* 8 (Springer 2013).

a. Drafting history

To fully understand the boundaries of the definition provided in Article 2 of the Genocide Convention, it is useful to distinguish between physical, biological and cultural genocide, even though these categories do not appear in the Convention's text. The U.N. Economic and Social Council's Draft Convention on the Crime of Genocide originally proposed three distinct forms of genocidal destruction: physical, biological, and cultural. Physical genocide addressed acts "[causing] the death of members of a group or injuring their health or physical integrity."[91] Biological genocide prohibited "systematic restrictions on births," while cultural genocide prohibited "the destruction by brutal means of the specific characteristics of a group."[92] Raphael Lemkin, father of the notion of genocide, described cultural genocide as "the destruction of the cultural pattern of a group, such as the language, the traditions, the monuments, archives, libraries, churches. In brief: the shrines of the soul of a nation."[93]

Whether or not to include the notion of cultural genocide within the definition of the crime sparked long debates during the drafting of the Convention. Opponents argued that cultural genocide is not comparable in gravity to other forms of genocide and should be addressed separately. Including cultural genocide in the Convention, they claimed, could dilute its force.[94] This view prevailed, and cultural genocide was ultimately excluded from the Convention.[95] The Soviet Union attempted to reintroduce a broad cultural genocide provision

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[91] Draft Convention on the Crime of Genocide, U.N. Doc. E/447, at 25–26 (June 26, 1947).

[92] *Id.* at 26–28 (June 26, 1947).

[93] Raphaël Lemkin, *Totally Unofficial Man,* in PIONEERS OF GENOCIDE STUDIES 365, 393 (Samuel Totten & Steven Leonard Jacobs eds., 2002).

[94] *E.g.* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 51–101 (Cambridge Univ. Press 2000); Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B.U. INT'L L.J. 1 (1985).

[95] During the 83rd session of the Sixth Committee of the U.N. General Assembly, it was eventually voted to exclude the notion of cultural genocide from the Convention: U.N. GAOR, 6th Comm., 3d Sess., 83d mtg. at 206, U.N. Doc. A/C.6/SR.83 (Oct. 25, 1948).

during the final debates, but the proposal was rejected by a wide margin.[96]

Rather than categorising acts into physical, biological, or cultural, the final text of the Convention enumerates specific prohibited acts. Among these is the forcible transfer of children, included in the final drafts by the Greek delegation.[97] Some scholars consider the inclusion of this provision an "afterthought" or an exception to the exclusion of cultural genocide, since forcible transfer had originally been proposed under the cultural genocide provisions.[98] Others argue that, while included in the text, forcible transfer of children does not belong to the approved definition of genocide and might constitute a distinct crime, such as ethnocide.[99]

Historical context clarifies the provision. At the time of drafting, Greece had recently experienced the forced removal of children known as the *paidomazoma*.[100] During the short debate preceding the adoption of the child forcible transfer provision, the Greek delegate emphasized that the act was "not primarily an act of cultural genocide. Although it could in certain cases be considered as such, it could be perpetrated rather with the intent to destroy or to cause serious physical harm to

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[96] U.N. GAOR, 6th Comm., Draft Convention on the Prevention and Punishment of Genocide: Amendments Proposed by the Union of Soviet Socialist Republics, U.N. Doc. A/766 (Dec. 5, 1948).

[97] U.N. GAOR, 6th Comm., 3d Sess., 82d mtg. at 190, U.N. Doc. A/C.6/SR.82 (Oct. 23, 1948); U.N. GAOR, 6th Comm., Greece: Amendment to the Enumeration in Article II of the Draft Convention, U.N. Doc. A/C.6/242 (Oct. 20, 1948).

[98] William A. Schabas, *Convention on the Prevention and Punishment of the Crime of Genocide*, U.N. Audiovisual Libr. of Int'l L. 2 (2008); SCHABAS, *supra* note 94, at 175; Mundorff, *supra* note 49, at 62; LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 115 (Duke Univ. Press 1991).

[99] Samuel Totten, *A Matter of Conscience*, *in* PIONEERS OF GENOCIDE STUDIES 545, 566 (Samuel Totten & Steven L. Jacobs eds., 2002).

[100] Lemkin, *supra* note 93, at 168 (Lemkin included the forcible transfer of children in the legal notion having the Greek example in mind. He wrote "Greece, now a nation of seven million, would have a population of sixteen million if not for the Greek children who were taken away for four hundred years. Such were the frightful consequences of this genocidal technique").

members of a group."[101] Along similar lines, the U.S. delegate emphasized the parallels between child forcible transfer and imposing measures aimed at preventing births, noting that there was little difference between preventing birth by abortion and abducting a child after birth.[102] The Greek delegate further argued that "there could be no doubt that that act also constituted an effective means of committing genocide, since there was no difference between sterilization, abortion and abduction."[103]

b. Dolus specialis

In light of the previous analysis on the provision's genesis, its role within the notion of genocide is best understood through an interpretation focused on intent. When the intent behind forcible transfer of children is directed toward the physical (preventing children from returning to the group) or biological (preventing future reproduction) destruction of the group, it constitutes genocide.[104] As highlighted by the Report by the Australian Human Rights Equal Opportunity Commission on the forcible transfer of Aboriginal and Torres Strait Islander children:

> When a child was forcibly removed that child's entire community lost, often permanently, its chance to perpetuate itself in that child. The inquiry has concluded that this was a primary objective of forcible removals and is the reason they amount to genocide.[105]

Childrearing is, in fact, the fundamental process through which racial, ethnic, religious, or national groups sustain and perpetuate themselves. By forcibly removing children from their original group

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[101] U.N. GAOR, 6th Comm., 3d Sess., 82d mtg. at 188, U.N. Doc. A/C.6/SR.82 (Oct. 23, 1948) (statement of Mr. Vallindas, Greece).
[102] *Id*. at 1496.
[103] *Id*. at 188 (statement of Mr. Vallindas, Greece).
[104] Grover, *supra* note 90, at 41-42.
[105] Austl. Hum. Rts. & Equal Opportunity Comm'n, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* 190 (1997).

and transferring them to another, the group's reproductive capacity is directly undermined, contributing to its ultimate destruction.[106]

In contrast, when the purpose is solely to destroy the group's culture, forcible child transfers fall outside the Convention's scope.[107] Genocide thus remains confined to the intentional physical and biological destruction of a group—including through the destruction of its reproductive capacity—rather than attacks on the group's cultural existence, such as the assimilation of children into the perpetrator group's culture.[108] Nevertheless, in practice, the physical or biological destruction of a group through forced child transfer often occurs also through a process of cultural extermination, as children are removed from their group of origin and forced to align and embrace the perpetrators' culture.[109] However, it is important to note that for forcible transfer to qualify as genocidal, full assimilation into the perpetrators' group is not required: it is sufficient that children fall under the group's control.[110]

Therefore, for the purposes of the Genocide Convention, re-acculturation practices are not directly relevant to the *actus reus* or *mens rea*, except insofar as they allow inferences on the specific intent to destroy. The ICTY and ICTR have recognised that specific intent to destroy a group can be inferred from circumstantial evidence of acts of cultural genocide, such as ethnic cleansing, destruction of places of worship and libraries, rape, and the political doctrine underpinning a crime.[111] By way of explicit reference to the *Krstić* judgment, this

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[106] Claus Kreß, *The Crime of Genocide Under International Law*, 6 INT'L CRIM. L. REV. 461, 484 (2006).

[107] U.N. Econ. & Soc. Council, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Study of the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2/416, at 89–92 (July 4, 1978).

[108] Schabas, *supra* note 98, at 3; Kreß, *supra* note 106, at 484.

[109] Mundorff, *supra* note 49, at 117.

[110] Kreß, *supra* note 106, at 484.

[111] Karadžić & Mladić, Case No. IT-95-5-R61 & IT-95-18-R61, Review of Indictments, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia July 11, 1996); Brđanin, IT-99-36-T, Trial Judgment, ¶ 704 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004);

approach was endorsed by the ICJ in *Bosnia & Herzegovina v. Serbia & Montenegro*, which held that "attacks on the cultural and religious property and symbols of the targeted groups," when conducted alongside "physical" or "biological" attacks, "may legitimately be considered as evidence of an intent to destroy the group."[112]

C. International Human Rights Law

The deportation of children strikes at the core of fundamental human rights protections. Key IHRL instruments—applicable at all times, including during armed conflict—set out explicit guarantees that are directly engaged when children are forcibly removed from their homes or communities. This sub-section provides an overview of how such deportations violate these rights, focusing primarily on the individual rights of children. However, depending on the circumstances, deportation may also implicate collective rights, such as when entire communities are targeted in ways that threaten the preservation of their cultural, linguistic, or religious identity.

Central to IHRL is the protection of the family as the natural and fundamental social unit, as well as the protection of children and childhood. The Universal Declaration of Human Rights,[113] recognises in

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Jelisić, IT-95-10-T, Trial Judgment, ¶ 47 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999); *Krstić*, IT-98-33-A, Appeal Judgment, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); Stakić, IT-97-24-T, Trial Judgment, ¶ 526 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003); Akayesu, ICTR-96-4-T, Judgment, ¶ 523 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998); Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Appeal Judgment, ¶ 159 (Int'l Crim. Trib. for Rwanda June 1, 2001); Prosecutor v. Rutaganda, Case No. ICTR-96-3-A, Appeal Judgment, ¶ 525 (Int'l Crim. Trib. for Rwanda May 26, 2003); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 313 (Int'l Crim. Trib. for Rwanda May 15, 2003); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Separate & Dissenting Op. of Judge Mehmet Güney, ¶¶ 62–64 (Int'l Crim. Trib. for Rwanda June 7, 2001).

[112] Bosn. & Herz. v. Serb. & Mont., Judgment, 2007 I.C.J. Rep. 43, ¶ 344 (Feb. 26) (citing Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, ¶ 580 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001)). According to some, the same decision also seems to have raised the standard of proof for the *dolus specialis* compared to the ICTY and ICTR case law, *see* Andrea Gattini, *Evidentiary Issues in the ICJ's Genocide Judgment*, 5 J. Int'l Crim. Just. 889, 903 (2007).

[113] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

Article 16(3) that the family is entitled to special protection and assistance. This recognition is mirrored in Article 23(1) of the International Covenant on Civil and Political Rights (ICCPR)[114] and in Article 10(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[115] Additionally, Article 17(1) of the ICCPR protects against arbitrary or unlawful interferences with one's family and home.

A second set of relevant rights, focusing specifically on children, is contained in the Convention on the Rights of the Child (CRC), the most widely ratified human rights treaty.[116] The CRC provides some of the strongest protections of a child's right to identity, family unity, and protection against illegal adoption, while also establishing the corresponding state obligations.

Regarding the right to identity, Article 7 of the CRC guarantees that children, to the greatest extent possible, have the right to know and be cared for by their parents. Article 8 is particularly significant, as it conceptualises the child's right to identity—including nationality, name, and family relations—as a legal right to be safeguarded against unlawful interference. States also have an obligation to restore this right should it be infringed. The critical importance of this right has been underscored in jurisprudence addressing illicit abductions, such as those that that occurred during Argentina's Dirty War. In one judgment of the Inter-American Court of Human Rights (IACtHR) on the matter, the Court noted that abductions "affected the right to identity of the victims every time that the children's civil status had been changed and there had been an attribution of birth information that hindered knowing the true identity, eliminating any indication of the true origin and preventing contact with the true family members."[117] The IACtHR

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[114] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

[115] G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

[116] G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

[117] *I/A Court H.R. Case of Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶¶ 122, 124 (Feb. 24, 2011).

underscored how the right to identity is inherently linked with the right to private and family life.[118]

The right to family is enshrined in Article 9 of the CRC, which provides that children should not be separated from their parents against their will. Practices of family separation are restricted to instances where they are in the best interest of the child. Article 10 guarantees the right to family reunification, while Article 16 prohibits unlawful interference with family life. The Committee on the Rights of the Child has emphasized that in order for states to pay full respect to the obligation under Article 9 of the Convention, there is also a positive duty upon them to make all efforts to return unaccompanied or separated children to their parents, unless continued separation is required to protect the child's best interests, while also respecting the child's right to express their views. [119]

Strict rules govern the separation of children from their parents. Adoption is not permitted in the absence of an evaluation regarding the child's status concerning parents, relatives, and legal guardians.[120] Intercountry adoption is considered as a last resort, as mandated by Article 21 (b).[121]

Finally, deportations may indirectly infringe other rights under the CRC, including the right to freedom of thought, conscience and religion (Article 14), the right to access to information (Article 17), the right to education (Articles 28 and 29), the right to the highest attainable standard of health (Article 24), the right to rest, leisure, play, recreation and participation in cultural life and arts (Article 31) and the right to personal liberty (Article 37).[122]

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[118] Contreras et al. v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232, ¶ 116 (Aug. 31, 2011).
[119] U.N. Comm. on the Rights of the Child (CRC), Gen. comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, ¶ 81, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).
[120] Convention on the Rights of the Child, *supra* note 116, Art. 21(a).
[121] *Id.*, Art. 21(b).
[122] *Id.*, Art. 14, 17, 24, 28, 29, 31, 27.

IV. FROM LAW TO ACTION

Implementation is the Achille's heel of the international legal order, as it is in constant tension with the principle of state sovereignty. Consequently, the international legal system relies largely on decentralized enforcement mechanisms, based on self-policing by states and reciprocal control among them. Against this backdrop, while IHRL has seen the development of a broad range of monitoring mechanisms and accountability bodies, in the realm of IHL such options remain far more limited. The IHL implementation challenge is, in fact, amplified by the very nature of armed conflict: States have already resorted to force as the last means of dispute settlement and are therefore at their most hostile and uncooperative when it comes to respecting and enforcing legal obligations.[123]

A. The international law implementation gap

Under common Article 1 of the Geneva Conventions, all states have the obligation "to respect and to ensure respect" for the Conventions in all circumstances. While the duty to respect is primarily directed at belligerent states that are parties to the conflict, the duty extends to all states. On one side, this duty entails a negative obligation not to facilitate, assist or encourage violations of IHL. On the other, states have a positive obligation to use all means reasonably available, individually or collectively with other states, to prevent or halt the violations. These obligations are widely recognised as part of customary international law.[124]

On the accountability front, the ICJ has played a limited role in enforcing IHL, largely due to jurisdictional constraints.[125] Its

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[123] INT'L COMM. OF THE RED CROSS, *THE DOMESTIC IMPLEMENTATION OF IHL: A MANUAL* 534 (2015).

[124] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Volume I: RULES 495 (Rule 139), 509 (Rule 144) (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., Cambridge Univ. Press 2005).

[125] Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168 (Dec. 19); Armed Activities on the Territory

contentious jurisdiction applies only to dispute between states and relies on both parties to the case having consented to the jurisdiction of the Court. Since no IHL treaty contains a clause conferring jurisdiction to the ICJ, the Court's ability to address IHL's violations is significantly restricted.[126] This is why, for instance, in the rulings concerning conflict in former Yugoslavia,[127] the Court was limited in its assessment to violations of the Genocide Convention (which foresees an ICJ jurisdiction clause)[128] and could not delve into violations of the Geneva Conventions and Protocols.[129]

By contrast, the system of individual criminal responsibility, developed through ad hoc tribunals and the ICC, has contributed more robustly to the interpretation and enforcement of both customary and treaty-based IHL. Outside this judicial framework, accountability has often been advanced through UN-mandated investigative bodies and fact-finding missions, typically established in response to specific country situations.

On the prevention and protection side, the existing supervisory mechanisms built into IHL are widely regarded as outdated and ill-equipped, as they rely heavily on state consent and lack effective reporting or compliance mechanisms. Meetings of the High Contracting Parties are foreseen under API, but they have never been convened.

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of the Congo (Dem. Rep. of the Congo v. Uganda), Judgment on Reparations (Feb. 9, 2022); Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly), Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9).
CLAUS KRESS, *The ICJ and International Humanitarian Law*, in CHRISTIAN J. TAMS & JAMES SLOAN (EDS.), THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 263 (2013).

[126] Statute of the International Court of Justice art. 36.

[127] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, Judgment, 2007 I.C.J. 43 (Feb. 26).
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, 2015 I.C.J. 3 (Feb. 3).

[128] Statute of the International Court of Justice ch. IV, art. 65.

[129] C. GREENWOOD, *The International Court of Justice and the Development of International Humanitarian Law*, 104 INT'L REV. RED CROSS 1842, 1842–43 (2022).

Article 50 of the First Geneva Convention envisages an enquiry procedure into alleged violations of the Convention, but it requires agreements between parties on the procedure and scope, or the appointment of an umpire if no agreement is reached. In practice, no such enquiry has ever taken place.

Article 90 of API establishes the International Humanitarian Fact-Finding Commission (IHFFC), a permanent body mandated to enquire into any alleged grave breaches of the Convention and facilitate, through its "good offices," the restoration of respect for the Convention. The reference to the good offices of the body allows for confidentiality in its work where needed, the possibility of concluding ad hoc agreements, and other measures as required, offering flexibility in sensitive contexts.[130] However, states must formally declare their acceptance of its competence, and to date, only a limited number of states have done so.[131] Moreover, under Article 90(2)(d), the IHFFC may undertake ad hoc enquiries upon the request of a party to the conflict, but only with the consent of the opposing party. In practice, the IHFFC has been activated only once, at the request of the Organization for Security and Co-operation in Europe (OSCE), to conduct an independent forensic examination in Eastern Ukraine following the death and injury of its staff. Since this request came from an international organisation rather than a party to the conflict, its legal basis has been subject to debate.[132]

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[130] Sofia Poulopoulou, *Strengthening Compliance with IHL: Back to Square One*, EJIL: TALK! (Feb. 14, 2019), https://www.ejiltalk.org/strengthening-compliance-with-ihl-back-to-square-one/.

[131] At the time of writing, 78 states have made a comprehensive declaration under Article 90. Int'l Humanitarian Fact-Finding Comm'n, *State Parties*, https://www.ihffc.org/recognition/states-parties.html.

[132] Poulopoulou, *supra* note 130; CELIA SCHMADL, *The Sleeping Beauty Has Awoken: The International Humanitarian Fact-Finding Comm'n*, VERFASSUNGSBLOG (Aug. 16, 2024) https://verfassungsblog.de/the-sleeping-beauty-has-awoken/. *See also,* Press Release, International Humanitarian Fact-Finding Commission, OSCE Special Monitoring Mission was not targeted, concludes Independent Forensic Investigation into tragic incident of 23 April 2017 (Sept. 7, 2017), https://www.ihffc.org/news/osce-special-monitoring-mission-was-not-targeted.html.

Recognising these weaknesses, Switzerland and the ICRC led a consultation process between 2012 and 2015 to explore ways to strengthen compliance with IHL.[133] During the discussions, states acknowledged the existence of an institutional gap in the implementation of IHL. Unlike most multilateral treaties, the Geneva Conventions did not establish a Conference of States Parties or any comparable institutional forum where states could regularly discuss the application of IHL or address emerging compliance challenges. To address this shortcoming, support emerged for the creation of a regular "Meeting of States," envisaged as the central pillar of a future system to enhance respect for IHL, designed to be voluntary and non-politicized in nature. Although consensus initially appeared to be forming around this proposal, it ultimately failed to gain approval. Progress has therefore remained limited, largely due to political resistance from states concerned about sovereignty and external scrutiny.[134]

As for IHLR, while it does not contain an explicit provision obliging states to ensure respect for human rights beyond their own jurisdiction, human rights are ontologically considered *erga omnes*—that is, obligations owed to the international community as a whole and of concern to all states.[135] Moreover, fundamental human rights rise to the level of *jus cogens* norms, whose serious violation triggers a duty of all states to cooperate to end the breach thereof.[136] To promote

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[133] Int'l Comm. of the Red Cross, *Facts and Figures on the ICRC's Humanitarian Activities* (2015), https://www.icrc.org/sites/default/files/external/doc/en/assets/files/2015/fact sheet-compliance-01-2015-english.pdf.

[134] 32ND INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT, STRENGTHENING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW, CONCLUDING REPORT, 32IC/15/19.2 (Oct. 2015). *See also* Yvette Zegenhagen & Michael Meyer, *Improving Compliance with IHL: A Long-Term Enterprise*, Lieber Inst. West Point, Articles of War (Nov. 22, 2021), https://lieber.westpoint.edu/improving-compliance-ihl-long-term-enterprise/.

[135] *Barcelona Traction, Light, and Power Company, Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

[136] *See, e.g.*, Thomas Weatherall, *Peremptory Norms of General International Law (Jus Cogens), in* JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT 1 (Cambridge Univ. Press 2015).

accountability for violations of IHRL, a wide range of mechanisms have been established at both international and regional levels. These include judicial bodies (e.g. ICJ; the European Court of Human Rights; the Inter-American Court of Human Rights), quasi-judicial bodies (e.g. the nine U.N. human rights treaty bodies; the U.N. Special Procedures) and political bodies (notably the U.N. Human Rights Council). These mechanisms provide avenues for both individual complaints and inter-state proceedings, thereby reinforcing the collective responsibility to uphold human rights.

Finally, it is to be reminded, that while most of these bodies are mandated to oversee compliance with IHRL, they may also engage indirectly with IHL. This occurs in situations where IHL operates as the *lex specialis* and informs the interpretation and application of human rights norms. Judicial and quasi-judicial bodies have at times relied on IHL to interpret the scope and limits of human rights obligations, particularly regarding the right to life, liberty, or humane treatment of detainees.[137] In this way, even though these bodies do not have jurisdiction to adjudicate IHL violations *per se*, they contribute to reinforcing respect for IHL by integrating its principles into the assessment of human rights claims.

B. Child protection enforcement

Child deportation offers a telling example of the international law implementation gap outlined above. The international community has too often failed to prevent displacements resulting from armed conflicts, with the situation in Ukraine representing the most recent case. This failure, however, cannot be ascribed to a lack of legal norms or a deficient regulatory framework. On the contrary, it has been

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[137] *See, e.g.*, Oksana Taran & Mykola Hryha, *Application of International Humanitarian Law by the European Court of Human Rights*, 29 SCI. J. NAT'L ACAD. OF INT'L AFFAIRS 9, 9–17 (2024); Julie Tenenbaum, *Application of IHL by the ECtHR*, EUR. J. INT'L L. BLOG (Sept. 23, 2020), https://rm.coe.int/application-of-ihl-by-the-ecthr/1680a05735; Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT'L L. 585, 591–94 (2010).

illustrated how international law provides robust prohibitions against the deportation of children and subsequent violations of their rights, applicable both in times of conflict and peace. The real difficulty lies elsewhere: in the inherent limitations of enforcement instruments, whose effectiveness is constrained by their reliance on state cooperation.

This section will therefore turn its attention to two mechanisms that could be activated to protect children from such violations. These mechanisms are the Protecting Powers and the U.N. Mandate on Children and Armed Conflict.

1. The Protecting Powers

a. History and practice

A Protecting Power is a neutral state, or a state not party to the conflict in question, designated to represent and safeguard the interests of one state and its nationals in the territory of another, particularly during armed conflicts or when diplomatic relations between the two states have been severed. Its functions typically include serving as a liaison, facilitating relief actions, and monitoring the application of the Geneva Conventions.[138]

The notion of Protecting Powers has deep historical roots, traceable to the sixteenth century, when only larger states had the resources to establish embassies in foreign countries, and they would agree to protect the interests not only of their nationals but also of other small or medium-sized countries. At that time, the institute was "a creature of custom and usage, with no conventional basis, definition, or functions"

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[138] Voneki Silja, *Protecting Power and Their Substitutes*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1420–21 (Dieter Fleck, 2013); Robert Kolb, *Protecting Powers*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 549–60 (Andrew Clapham, Paola Gaeta & Marco Sassoli, eds., 2015); Neville Wylie, *Protecting Powers in a Changing World, in* 40 POLITORBIS, REVUE DE POLITIQUE ÉTRANGÈRE 6-14 (2006).

and its mandate varied extensively from case to case.[139] The institution then gained prominence during the two World Wars, when neutral states, such as Switzerland and Sweden, acted on behalf of belligerent powers to monitor the treatment of prisoners of war and maintain communication channels, representing the interests of numerous states on both sides of the conflict.[140]

The Geneva Conventions, taking advantage of this diplomatic institute, have further codified it and elevated it as an international humanitarian institution.[141] They established an obligation for the parties to an international armed conflicts to designate Protecting Powers, defined a number of their duties and powers, and specified their functions, including cooperation and oversight of IHL compliance.[142] The designation procedure for Protecting Powers requires a tripartite agreement: (i) the Power of Origin, whose interests are protected, instructs the Protecting Power to act on its behalf; (ii) the enemy party consents to the appointment; (iii) the Protecting Power accepts the mandate. If agreement on a Protecting Power cannot be reached, an occupying power may request a third state to act as substitute, or the ICRC may offer to do so—an offer which must be accepted. In practice, however, no Protecting Power can effectively

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[139] Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 NAVAL WAR COLL., INT'L L. STUD. 256 (1978).

[140] "During the Second World War Switzerland became a protecting power par excellence on account of its neutrality, representing the interests of 35 states—including the major warring powers—with over 200 individual mandates." *See* FED. DEP'T OF FOREIGN AFFS., *Protecting Power Mandates* (last visited Oct. 20, 2025), https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/human-rights/peace/switzerland-s-good-offices/protective-power-mandates.html.

[141] Vienna Convention on Diplomatic Relations, arts. 45-46, Apr. 18, 1961, 500 U.N.T.S. 95.

[142] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, arts. 8, 9, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 8, 9, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, arts. 8, 9, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; GCIV, *supra* note 19, arts. 9, 10; Protocol I *supra* note 29, art. 5.

exercise its functions without cooperation and consent of both belligerent parties.[143]

Over time, the institute of Protecting Powers has gradually grown obsolete: since the Second World War, only five conflicts have involved their designation.[144] Its decline is widely regarded as a failure of the mechanism.[145] In practice, the ICRC has assumed many of the functions that could otherwise be delegated to Protecting Powers, doing so under its own mandate, without the need for formal appointment as substitute Protecting Power—thereby avoiding the impression that it represents the interests of a single state rather than all victims. Moreover, it should be noted that the ICRC has a long history of taking the initiative to protect children even when no legal basis explicitly mandated it to assist: "throughout conflicts the ICRC's initiatives preceded the legal protection of children and endeavoured to complete or compensate for it, when the machinery for applying international law was wanting."[146]

Though its Central Tracing Agency, often supported by National Red Cross and Red Crescent Societies, the ICRC played a crucial role after World War II in tracing missing persons, facilitating family correspondence, and reuniting families separated by the conflict. The German Red Cross established a specialised Children's Tracing Service and developed innovative methods to locate children who could not

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[143] *See* Protocol I art. 5(2)–(4); Dražan Djukic & Niccolò Pons, *Protecting Powers, in* THE COMPANION TO INTERNATIONAL HUMANITARIAN LAW 585–87 (Drazan Djukic & Niccolo Pons, eds., 2018).

[144] The Suez Crisis pitting Egypt against France and the United Kingdom in 1956; the conflict in Bizerte between France and Tunisia in 1961; the crisis in Goa between India and Portugal in 1961; the conflict between India and Pakistan in 1971; and the Falkland/Malvinas war between the United Kingdom and Argentina in 1982. Marco Sassòli, Antoine Bouvier, Anne Quintin, & Julia Grignon, *Implementation Mechanisms, in How Does Law Protect in War?* (Inl't Comm. Red Cross 2014), https://casebook.icrc.org/law/implementation-mechanisms#footnoteref19_ts7c2m4.

[145] Howard S. Levie, *Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals During Armed Conflict* in WHEN BATTLE RAGES, HOW CAN LAW PROTECT? 1, 139 (John Carey, ed., 1971)

[146] Denise Plattner, *Protection of Children in International Humanitarian Law*, 24 INT'L REV. RED CROSS 140 (1984).

provide basic identifying information, such as their name and date of birth. Information cards were created, recording details such as approximate age, hair, and eye colour, distinguishing marks, and even items like clothing, blankets, or toys that might assist in identification. Much of this work was carried out through press announcements and radio broadcasts, yielding very positive results. Thousands of posters with pictures of the lost children were printed and put up in public places such as post offices, city halls, and train stations. Of the 294,354 enquiries from or concerning children all except 3,271 were solved.[147]

Consequently, what the Geneva Conventions envision with respect to child evacuations is a system in which both Protecting Powers and the ICRC play complementary roles, each entrusted with distinct responsibilities: oversight for Protecting Powers and tracing for the ICRC. Protecting Powers are tasked with supervising the evacuation of children, in agreement with the parties concerned. Meanwhile, the authorities of the state arranging the evacuation, and where appropriate the receiving state, must provide a card containing specific information on the child's identity to the ICRC's Central Tracing Agency, to fulfil the obligation foreseen under Article 78(3) API.[148]

Even outside the evacuation regime, the Geneva Conventions provide that, at the outbreak of a conflict and in all cases of occupation, each party to the conflict must establish an Official Information Bureau (OIB) responsible for receiving and transmitting information concerning protected persons under its control.[149] Within the OIB, a dedicated section must be created to take all necessary steps to identify children whose identity is in doubt, recording, whenever possible, details of their parents or close relatives.[150] A Central Information Agency for protected persons is then to be established in a neutral country to consolidate the information transmitted by the belligerent's OIBs, which often are not in a position to communicate directly with

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[147] Sandra Singer, *The Protection of Children During Armed Conflict Situations*, 26 INT'L REV. RED CROSS 155, 155–56 (1986).
[148] *Cf supra,* section titled "Resulting obligations" of this chapter.
[149] GCIV, *supra* note 19, art. 136.
[150] *Id*. at art. 50.

one another and therefore require a neutral third party to act as a liaison.[151]

4.2.1.1. Challenges and prospects

The primary limitation of the Protecting Powers system is its dependence on the consent of both belligerent parties to function effectively—a condition that is often politically unworkable. This limitation is starkly illustrated in the case of Ukraine and Russia. Following Russia's full-scale invasion in 2022, Ukraine agreed to have Switzerland represent its interests in Russia. Switzerland also offered to act on behalf of Russia in Ukraine, but the Russian Ministry of Foreign Affairs rejected the proposal, arguing that Switzerland had compromised its neutrality by joining E.U. sanctions against Russia, leading Russia to formally designate Switzerland as an "unfriendly" state. Nevertheless, as noted also by experts of the OSCE Moscow Mechanism investigating the forcible transfer and deportation of Ukrainian children, Protecting Powers would have a much valuable role to play in such conflict, offering their good offices to support protective measures and facilitate family reunification efforts.[152]

The experience of World War II demonstrated that having one Protecting Power for both belligerents offers a distinct advantage: it places even a small neutral state in a unique position to secure broader compliance with IHL on the basis of reciprocity. As noted, "a more uniform administration and a higher standard of treatment of enemy interests by both belligerents result from a reciprocal protection of the interests of those belligerents by the same protecting power throughout the territories under the control of each belligerent."[153]

With regard to the relationship between Protecting Powers and the work of the ICRC and other humanitarian agencies, it is important to

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[151] *Id*. at art. 140.

[152] OSCE, *supra* note 2, at 70.

[153] WILLIAM MCHENRY FRANKLIN, PROTECTION OF FOREIGN INTERESTS: A STUDY IN DIPLOMATIC AND CONSULAR PRACTICE 164–65 (U.S. Government Printing Office, 1946). *See also* Howard S. Levie, *Prisoners of War and the Protecting Power*, 55 AM. J. INT'L L. 374, 374–97 (1961).

emphasize that the two are intended to function in a complementary manner rather than as mutually exclusive alternatives, making a case-by-case assessment necessary. The ICRC and other humanitarian agencies bring decades of experience in monitoring compliance with IHL and IHRL, supported by institutional expertise, trained staff, operational infrastructure, and a consistent interpretation of the law. Yet, the ICRC's principle of confidentiality makes it difficult to assess the extent to which states comply with their obligations, such as those arising from evacuations. By contrast, a third state acting as Protecting Power would not be constrained by the same principle and could exercise greater latitude in exposing violations. Nonetheless, cooperation with the ICRC and other humanitarian organizations remains indispensable for the Protecting Power, not least because it is mandated under the Geneva Conventions. Ultimately, the choice between prioritising confidential dialogue or applying diplomatic and political pressure will depend on the political context, shaping whether reliance should fall more heavily on Protecting Powers or on the ICRC and other humanitarian agencies.

In both cases, the heart of the matter lies in the absence of, and the corresponding necessity for, a mechanism capable of ensuring the presence, within the territory of each state party to an armed conflict, of either a Protecting Power or an international body vested with sufficient authority to monitor compliance with the law or, when necessary, enforce it for protection purposes. Scholarship has proposed the establishment of an 'International Commission for the Enforcement of Humanitarian Rights during Armed Conflict' (ICEHRAC), comprising around twenty-five individuals of high international standing, acting independently and free from political influence. Under this proposal, when a state of armed conflict is recognised by the states involved or determined by the ICEHRAC, and no Protecting Powers have been designated within one week, ICEHRAC would automatically assume that role, exercising all associated rights and duties. The key advantage of such mechanism is its ability to immediately undertake

the functions of a Protecting Power as soon as the need arises, thereby circumventing the requirement for the consent of parties.[154]

Securing sufficient political will to establish such a body would undoubtedly be challenging. Framing its mandate specifically around the protection of children during armed conflict, however, could significantly enhance its prospects. The international community already demonstrates near-universal commitment to safeguarding children, as evidenced by the widespread ratification of the Convention on the Rights of the Child and the global prioritization of children affected by conflict through the United Nations Children and Armed Conflict agenda. Focusing the body's mandate on protecting society's most vulnerable could transform a politically sensitive proposal into a more viable initiative, and would significantly strengthen the overall framework for the protection of children's rights.

2. *The U.N. Children and Armed Conflict Agenda*

In confirmation of the urgency and importance attributed by the international community to the protection of children during armed conflict, a dedicated central and multilateral architecture has been established under the auspices of the U.N. Security Council: the Children and Armed Conflict (CAAC) agenda. This framework recognises the specific vulnerabilities of children in conflict and the pressing need to prevent and halt violations of their rights while hostilities are ongoing. Given the widespread consensus on protecting children, the CAAC agenda enjoys broad support from member states and is considered one of the less contentious agenda items at the U.N. Security Council and, as a consequence, one of the most developed thematic issues.[155]

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[154] Levie, *supra* note 145.

[155] Rep. of the S.C., *Children and Armed Conflict: Progression, Regression or Maintenance of the Agenda?*, at 1, No. 3 (June 12, 2025); GEMMA DAVIES & ALEXANDRA SPENCER, COLLABORATIVE ADVOCACY ON THE PROTECTION OF CIVILIANS: CHILDREN AND ARMED CONFLICT AND EXPLOSIVE WEAPONS IN POPULATED AREAS 18 (Humanitarian Pub. Grp. 2022), www.odi.org/en/publications/collaborative-advocacy-on-theprotection-of-civilians-children-and-armed-conflict-and-explosive-weapons-in-populated-areas.

a. Origins and scope

The origins of this mandate trace back to 1994, when Mozambican politician and child rights expert Graça Machel was commissioned by the U.N. Secretary-General to lead a study on the impact of armed conflict on children.[156] The findings of the report—highlighting the disproportionate impact of war on children—fostered consensus around one of its key recommendations: the establishment of the Office of the Special Representative to the Secretary-General on Children and Armed Conflict (SRSG on CAAC), which was subsequently created in 1997.[157]

In 1999, the Security Council adopted its first thematic resolution on the CAAC subject, identifying six grave violations against children in times of armed conflict. These are currently listed as: killing and maiming, sexual violence, abduction, recruitment and use, attacks on schools and hospitals, and the denial of humanitarian assistance.[158] It should be noted that the U.N. CAAC agenda represents a political mandate rather than a legal one. While its work is firmly grounded in IHL and IHRL, the CAAC mandate does not aim to carry out legal analysis to establish violations of international law. Rather, it focuses on assessing whether acts contrary to children's rights have occurred, halting them, and preventing their recurrence. In this sense, the mandate goes beyond strict legal enforcement and embodies a broader protective approach. This broader scope is reflected in the nomenclature and definitions of the six grave violations, which do not always align perfectly with international legal norms.

The specific grave violation of abduction—most closely linked to the crimes of forcible transfer and deportation—was recognized and condemned through Security Council Resolution 1539 in 2004. However, it is only through Resolution 2225 that abduction was formally recognized in 2015 as a violation that could trigger inclusion in the Secretary-General's "list of shame," as discussed in the following

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[156] Machel, *supra* note 16.
[157] G.A. Res. 51/77, U.N. Doc. A/RES/51/77 (Dec. 12, 1996).
[158] S.C. Res. 1261, U.N. Doc. S/RES/1261 (Aug. 25, 1999).

sub-section. The Office of the SRSG on CAAC defines abduction as "the removal, seizure, capture, apprehension, taking or enforced disappearance of a child either temporarily or permanently, including for the purpose of any form of exploitation of the child. The abduction must be perpetrated by a party to conflict in the context of and be associated with an armed conflict. This definition is also applicable in situations where a spillover into the territory of one or more neighbouring states has taken place."[159]

The definition of abduction therefore largely overlaps with that of forcible transfer and deportation as analysed above. However, the first notable difference is that the definition of abduction does not explicitly require the acts to be 'forcible'; instead, it incorporates the criterion of an exploitative purpose. Additionally, there is no reference to lawful exceptions, such as children's evacuations under Article 78 of API. Interpretation, however, narrows the divergence between the two definitions. Guidance from the SRSG on CAAC clarifies that all incidents meeting the material requirements which, based on the information available at the time of documentation, can be presumed to be for an exploitative purpose, should be included.[160] In any case, children's assent is irrelevant, as they are automatically presumed not to have the capacity to consent.[161] Ultimately, the presumption of exploitation ends up compensating for the lack of a forcibility requirement and the exclusion of circumstances of lawful evacuation. Moreover, the explanatory annex on the elements of the working definition of abduction for monitoring and reporting purposes explicitly excludes child transfers dictated by 'imperative security or public order reasons' from the definition, providing a broader margin for exceptions than that offered under the IHL regime.[162] In practice,

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[159] UNITED NATIONS OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT, GUIDANCE NOTE ON ABDUCTION 14–15 (Apr. 2022), https://childrenandarmedconflict.un.org/wp-content/uploads/2022/05/22-00040_Abduction-Guidance-for-CAAC_FINAL_WEB-1.pdf.

[160] *Id.* at 17.

[161] *Id.* at 38.

[162] *Id.* at 39.

abductions are recognised as among the most difficult violations of children's rights to document, due to the frequent lack of evidence and information regarding the circumstances of the abduction and the fate of the children.[163]

b. Mechanisms for compliance

The U.N. CAAC agenda stands out among other international law mechanisms for the very practical toolkit attached to it. Over the 26 years since its inception, the U.N. CAAC agenda has developed an array of instruments to influence states and armed groups toward compliance with international norms on the protection of children's rights, primarily leveraging reputational pressure and constructive advocacy.[164] Key components of this toolkit include: (i) the U.N. Secretary-General's (UNSG) annual reports on CAAC and the annexed list of perpetrators; (ii) the mandate of the U.N. SRSG on CAAC; (iii) the monitoring and reporting mechanism; and (iv) the U.N. Security Council Working Group on CAAC.

The yearly UNSG report on CAAC, first established in 2001, is drafted with input from the SRSG on CAAC. It includes in its annex a list of shame, which identifies states and armed groups responsible for grave violations against children and serves as a strong accountability tool for the reputational damage attached to it.[165] Moreover, inclusion on this list triggers the activation of the monitoring and reporting mechanism and the establishment of a country-specific task force. The UNSG reports on situations involving listed parties to the Security Council Working Group on CAAC, which in turn issues recommendations to the relevant actors. Listed parties are then requested to develop action plans—written commitments outlining concrete, time-bound steps to prevent and remedy violations—which, once implemented, can lead to delisting. To date, the mechanism has

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[163] *Id.* at 5.

[164] ROB GRACE, IMPLEMENTING THE 'CHILDREN AND ARMED CONFLICT' AGENDA: ANALYZING DATA ON TRENDS, ENABLING FACTORS, AND PERSISTENT CHALLENGES IN SITUATIONS WITH LISTED PARTIES 3 (Watchlist on Child & Armed Conflict 2024).

[165] *Id.*

worked with eleven states and twenty-seven non-state armed groups to develop thirty-eight action plans.[166] Parties that refuse to comply may face sanctions, including arms embargoes, travel bans, and asset freezes.[167]

An example of a successful case occurred in the Democratic Republic of Congo (DRC), where the government signed a joint action plan with the United Nations in 2012, leading to improvements in policies regarding the recruitment of children and their subsequent delisting for that violation.[168] It must be noted, however, that the achievement was facilitated through convergent efforts, including a critical role played by the United States, which conditioned certain military aid and training on the DRC's adoption of the action plan.[169] Other examples of actors who improved their protection of children as a result of being listed include the armed forces of Ivory Coast, the Chadian National Army, the Ugandan Peoples Defence Forces, armed groups in Sri Lanka and Nepal.[170]

c. Strengths and weaknesses

There have been differing evaluations on the effectiveness of the CAAC agenda. The list of shame is generally considered an effective tool for increasing compliance with human rights. Despite the obvious factual difficulties in establishing a causal link between an initiative—such as inclusion in the list of shame—and the desired deterrence and legal compliance, the number of action plans signed and implemented

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[166] U.N. Office of the SRSG, *Action Plans*, https://childrenandarmedconflict.un.org/tools-for-action/action-plans/.
[167] S.C. Res. 1612, ¶ 10 (July 26, 2005).
[168] *See* U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo*, U.N. Doc. S/2014/453, 11–16 (June 30, 2014); U.N. Secretary-General, *Children and Armed Conflict in the Democratic Republic of the Congo: Report of the Secretary-General*, U.N. Doc. S/2018/502, 12 (May 25, 2018).
[169] *U.S. Must Get Tough Over Child Soldiers*, (CNN television broadcast Sept. 28, 2015).
[170] Rocco Blume & Samatha Holmes, *Beyond Compliance Symposium: The UN Children and Armed Conflict Agenda as an Accountability Mechanism*, ARMED GROUPS & INT'L L. (Dec. 19, 2024), https://www.armedgroups-internationallaw.org/2024/12/19/beyond-compliance-symposium-the-un-children-and-armed-conflict-agenda-as-an-accountability-mechanism/.

by listed parties can already be regarded as an indication of commitment towards greater IHL and IHRL compliance. From the perspective of states, the reputational repercussions of being included in the list may already act as an accountability mechanism: since the list addresses both states and armed groups, the stigma of being included alongside terrorist groups can generate detrimental geopolitical effects.

However, to date, only one concluded action plan has included measures specifically addressing abductions, namely the comprehensive action plan in South Sudan.[171] In that case, child abduction was closely linked to recruitment as the purpose of exploitation. There is no precedent of action plans dealing with abductions for exploitative purposes other than recruitment, such as hostage-taking, which is more politicised and would require a different approach, yet is closer to the instances of forcible transfer and deportation considered in this analysis.

Others have noted increased compliance from state actors, but not armed groups.[172] On the other hand, providing an accountability framework for non-state actors can already be regarded as a significant advancement, given that they are typically excluded from state-centric international law mechanisms.[173] Some observers, however, caution that inclusion on the list can instead provoke an increase in violations, potentially inciting internal rebellions which can in turn lead to further state violations.[174] Another criticism of the mandate points to the fact that, while operational and financial constraints are understandable,

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[171] *See* Office of the SRSG on CAAC, South Sudan: Comprehensive Action Plan to End & Prevent All Grave Violations Against Children Signed by Government (Sept. 7, 2020) https://childrenandarmedconflict.un.org/2020/02/south-sudan-comprehensive-action-plan-to-end-prevent-all-grave-violations-against-children-signed-by-government/.

[172] Jovana Ostojic, *United Nations' Naming and Shaming of Children's Rights Abusers in Conflict. A Critical Assessment* (B.A. Thesis, Malmö Univ., Dep't of Global Political Studies Oct. 24, 2019).

[173] GRACE, *supra* note 164, at 43.

[174] Jacob Ausberdan, *How Naming and Shaming Affects Human Rights Perceptions in the Shamed Country*, 51 J. PEACE RSCH. 81, 81–95 (2014).

the focus on six specific violations has effectively created a hierarchy of harms.[175]

The most problematic feature of the CAAC agenda, however, lies in the politicisation of its implementation, which has led to selective approaches in the listing and delisting process that risks eroding its authority and credibility, with several country files directly impacted by underlying political dynamics within the Council.[176] One of the first explicit moments of political tension affecting the mandate occurred in 2016, when Saudi Arabia threatened to withdraw its funding to the United Nations unless it was removed from the list in relations to crimes committed in Yemen. Despite describing the move as unacceptable, then-Secretary-General Ban Ki-moon was compelled to concede to the demand.[177]

Similarly, political pressure from the five permanent members of the Security Council has enabled certain states to evade accountability more effectively.[178] This dynamic is exemplified by the repeated failure to include in the list the Israel Defense Forces for killing and maiming Palestinian children, as well as the Afghan National Army and U.S. forces for similar violations in Afghanistan.[179] In the debate that followed the presentation of the Secretary-General's report in 2020, many states called for a more credible and accurate list based on objective and consistently applied criteria, following the delisting of Saudi Arabia.[180]

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[175] Blume & Holmes, *supra* note 170; President of the Security Council, Letter dated June 26, 2020 from the President of the Security Council addressed to the Secretary-General and the Permanent Representatives of the members of the Security Council, S/2020/594 (July 6, 2020).

[176] Security Council Report, *supra* note 155, at 5.

[177] *Yemen: Ban Removes Saudi-Led Coalition from Report on Conflict-Affected Children, Pending Joint Review*, UN NEWS (June 6, 2016), https://news.un.org/en/story/2016/06/531412.

[178] Davies & Spencer, *supra* note 155, at 21.

[179] U.S. Must Get Tough Over Child Soldiers, *supra* note 169.

[180] WATCHLIST ON CHILD. & ARMED CONFLICT, REVIEW OF THE JUNE 2020 OPEN DEBATE ON CHILDREN AND ARMED CONFLICT (Sept. 2, 2020), https://watchlist.org/wp-content/uploads/2020-open-debate-analysis-final.pdf.

The situation of Ukrainian children following the 2022 full-scale invasion further exposed the political tensions surrounding the CAAC agenda. In response to reports of large-scale deportations, Council members requested several formal and Arria-formula Security Council meetings. These sessions became highly contentious: in one instance, representatives of several Council members staged a walkout, while others downgraded their representation to junior diplomats, after Russia invited its ICC-sanctioned Commissioner for Children's Rights to deliver a briefing.[181] Although the ICC has issued arrest warrants based on reasonable grounds to believe that the war crimes of unlawful transfer and deportation of children occurred, Russia was not included in the list of shame for abduction in 2022, 2023, or 2024. The CAAC mandate has considered it unclear whether such actions meet the working definition of abduction. Only limited references to the abduction of Ukrainian children by Russian armed forces and authorities in the temporarily occupied territories appear in the narrative sections of the reports.[182] This underscores, on the one hand, the discrepancy that can arise between the IHL framework and the CAAC agenda, and on the other, the extent to which political dynamics can influence the listing process.

At the same time, it should not be overlooked that the very flexibility and pragmatism of the mandate have been key factors contributing to the successes achieved to date. The risks of politicisation can, to some extent, be viewed as collateral effects of maintaining a mechanism that has enough leeway to engage in moral suasion and discreet diplomacy with states and armed groups. Civil society advocacy has served as a crucial counterweight to this risk, bolstering the mandate's credibility and offsetting political pressures. For

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[181] *Arria-Formula Meeting on Addressing the Abduction and Deportation of Children During Armed Conflict*, YOUTUBE (Apr. 28, 2023), https://www.youtube.com/watch?v=LgzALyVmkHU.

[182] U.N. Secretary-General, *supra* note 1, ¶ 226; U.N. Secretary-General, *Children and Armed Conflict, Report of the Secretary-General*, A/78/842, ¶ 327(June 3, 2024); U.N. Secretary-General, *Children and Armed Conflict, Report of the Secretary-General*, A/77/895, ¶ 318.

example, sustained public campaigning led to the Saudi-led coalition in Yemen being relisted in 2017—though subsequent treatment once again reflected a more lenient approach.[183]

Given its demonstrated potential, the CAAC agenda warrants closer attention and consideration for further institutional support. Strengthening both the operational capacity of the mechanism and the role of civil society actors engaged in monitoring could enhance its ability to address diverse country situations in a more consistent and coherent manner. Such reinforcement would improve the systematic documentation and analysis of violations, bolster the agenda's credibility, facilitate structured engagement with actors on the list of shame, and reduce the extent to which political contingencies shape outcomes.

V. CONCLUSION

Too often during armed conflicts, children are torn from their families and communities to serve the cynical aims of belligerent parties. They are treated as pawns in a war not of their making. International law is alert to this vulnerability, and a special set of protections has been established to limit forcible displacement of children to narrow circumstances—where it is absolutely necessary for health or medical reasons—and to hold perpetrators accountable for crimes against children.

Yet, implementing international law, and IHL in particular, presents inherent difficulties, with the consequences of non-implementation falling most heavily on children. This chapter has sought to plant the seed for further reflections on how to bridge this implementation gap in the context child protection, by looking at two different mechanisms.

On one hand, a dedicated child protection mechanism could ensure the presence, within the territory of each state party to an armed conflict, of either an appointed Protecting Power or, if consent cannot

[183] Davies & Spencer, *supra* note 155, at 31.

be obtained, a permanent substitutive body vested with sufficient authority to monitor compliance with the law and, where necessary, enforce it for protective purposes. Given the strong international consensus on children's rights, establishing such a body may be less ambitious than it initially appears.

On the other hand, greater focus and resources could be devoted to the U.N. CAAC agenda. Thanks to its flexible, political nature and the range of linked mechanisms, the CAAC framework has demonstrated potential to respond promptly and effectively to violations of children's rights. Its effectiveness, however, has yet to be fully tested in cases of child abduction for politically motivated purposes; to date, it has primarily addressed abduction linked to recruitment. Expanding the mandate into this more politically sensitive terrain will require robust civil society monitoring and advocacy to ensure that the CAAC agenda is not undermined by state pressure.

Ultimately, bridging the gap between law and action requires both innovation and vigilance. Innovation involves designing mechanisms that can operate effectively even in politically complex or obstructed contexts. Vigilance involves continuous monitoring and advocacy to ensure that these mechanisms are applied consistently and remain resilient against political interference. Only through a proactive and sustained efforts can international law fulfil its promise of meaningful protection for the world's most vulnerable.

Chapter 4. The CNN Effect and Social Media Moderation in Taliban Afghanistan

Sara Segneri

I. ABSTRACT

This chapter explores the diplomatic and foreign policy challenges arising from Meta's content moderation policies concerning Dangerous Organizations and Individuals, particularly during periods of armed conflict. Focusing on post-2021 Afghanistan, the chapter analyzes the applicability of the CNN Effect theory, namely, the influence of media on policy decision-making, and the resultant power dynamics in the context of social media governance. Special attention is given to the complexities that emerge when a designated terrorist organization, such as the Taliban, assumes the role of de facto governing authority.

The discussion begins with a review of existing scholarship on the CNN Effect and its implications for diplomacy and foreign policy in the digital era. It then turns to an examination of Meta's content moderation practices, assessing their alignment with international legal and ethical standards. The final section applies these conceptual frameworks to the case of Taliban-ruled Afghanistan, evaluating the extent to which the CNN Effect and social media content moderation have coexisted or clashed in this context.

The chapter concludes by considering the broader implications for public discourse, democratic participation, and international accountability. It emphasises the necessity of preserving access to uncensored and unfiltered information as a means for citizens to influence governmental decisions and to document and publicize war crimes and atrocities in conflict settings.

The contents of this chapter are the sole opinion of the author and do not reflect any entities or organisations she works with or otherwise represents.

For Rae, Liam, and Darius – may you grow up to inherit a world where armed groups, widespread violence, and human rights violations are historical learning experiences rather than current events. In memory of Saleh Aljafarawi (1997-2025) – I will continue to fight against the censorship of your voice and erasure of your documentation of war crimes.

II. Introduction

In an era marked by pervasive conflict and global instability, images and videos of human suffering circulate with unprecedented immediacy through smartphones and laptops, collapsing the distance between viewers and the atrocities unfolding in real time. Social media platforms have become pivotal arenas during armed conflicts and episodes of civil unrest, not only as conduits for news dissemination and real-time documentation, but also as vital spaces for emotional expression, collective mourning, advocacy for peace, and civic mobilization. Individuals use these platforms to articulate fears, denounce violence, and influence policy, while government officials engage with constituents, international audiences, and diplomatic counterparts. This dynamic has been powerfully illustrated in recent crises, including the Taliban's return to power in Afghanistan, and ongoing conflicts in Palestine, Yemen, Syria, and Ukraine, where digital media has shaped global awareness and political response.

Social media platforms have become a vital resource for those documenting war crimes and human rights abuses, including important open-source intelligence investigations and preservation of evidence by entities such as Bellingcat, Eyewitness to Atrocities, Yemen Archive, and a multitude of other organisations assisting in the investigation and prosecution of war crimes. In recent years, Meta, the parent company of the social media platforms Facebook, Instagram,

and Whatsapp, has become a source of evidence for those documenting war crimes and human rights abuses, and preserving an archive of pivotal points of history to ensure accurate stories are told for centuries to come. The ability of users to share such information also helps civil society and government actors working on investigations identify possible crimes and abuses and further investigate them, as well as to make foreign policy decisions or engage in diplomatic efforts in the pursuit of peace.

Meta is now considered the most prominent social media platform and news purveyor in the world. What now transpires on social media in shaping foreign policy and public opinion represents a more rapid and broadly disseminated extension of phenomena that previously unfolded through global television. The CNN Effect exemplified the power dynamic between broadcast media and governmental authority, an interplay that has continued to evolve in response to technological advancements and the proliferation of online information sources.

When the Taliban gained governing power of Afghanistan in August 2021, and the new Islamic Emirate of Afghanistan (IEA) assumed control of communications and media, Meta faced the challenge of distinguishing between a designated terrorist organization and the government of a nation. Because the Taliban and Haqqani networks were classified by Meta under their Dangerous Organisations and Individuals (DOI) policy, users were banned, content was removed; thus silencing reporting on a humanitarian crisis and restricting the voice of an entire government. Given social media's growing influence on news and public opinion, concerns arose as to the appropriateness of a private company having such control over information flows, and the level of government influence on these determinations.

This situation presents questions of whether Meta's content moderation acts as a restriction on the CNN Effect, conflicts with international human rights law, prevents government officials, organisations, and individuals from speaking or sharing information about emerging events, and interferes with efforts at peace,

accountability, and the diplomatic processes necessary for foreign policy. With these principles in mind, Meta's DOI content moderation policy needs to be evaluated to ensure people have an informed voice and can influence government policies, and that private companies do not become government agents, tasked with censorship and controlling the narrative to counter the online CNN effect created by emerging social media and internet news sources.

A. Research Question

What diplomatic and foreign policy challenges emerge from Meta's content moderation policy on Dangerous Organisations and Individuals? Utilizing post-August 15, 2021 Afghanistan, this paper will examine how the CNN Effect theory and the power struggles it creates apply to social media content moderation, and the emerging challenges when a designated organisation such as the Taliban becomes the de facto state power.

B. Methodology

Scholars examining the CNN effect primarily utilize an interdisciplinary approach, drawing on communication studies, political science, diplomacy, international relations, and foreign policy.[1] These theories, taken together, help examine the interplay of news media, social media, and political power to analyse "media as a catalyst for political action," and the challenge to government influence on media.[2] Propaganda and strategic communication theories will be

[1] Matthew A. Baum & Philip B. K. Potter, *The Relationships Between Mass Media, Public Opinion, and Foreign Policy: Toward a Theoretical Synthesis*, 11 ANN. REV. POL. SCI. 39, 39-65 (2008); Eytan Gilboa, *Global Communication and Foreign Policy*, 52 J. COMMC'N, 731-48 (2002) [hereinafter Gilboa, *Global Communication*]. *See also* Philip N. Howard & Malcolm M. Parks, *Social Media and Political Change: Capacity, Constraint, and Consequence*, 62 J. COMMC'N 359, 359-62 (2012) [hereinafter Howard, *Social Media*]; William L. Youmans & Jillian. C. York, *Social Media and the Activist Toolkit: User Agreements, Corporate Interests, and the Information Infrastructure of Modern Social Movements* 62 J. COMMC'N 315, 315-29 (2012).

[2] Piers Robinson, *The CNN Effect Reconsidered: Mapping A Research Agenda for the Future*. 4 MEDIA, WAR & CONFLICT 3, 4 (2011) [hereinafter Robinson, *CNN Effect Reconsidered*].

included in this analysis, although they do not feature prominently in existing literature on the CNN effect.

Qualitative research was used to examine various literature sources, including books, journal articles, and news pieces, as well as videos or read outs of public statements, reports, and the findings of quantitative studies into Meta's content moderation policies, social media use in Afghanistan and Taliban specific content moderation. Official websites, annual reports, and the decisions of Meta's Oversight Board were also consulted in this analysis given their insights and legal and policy reactions to various content moderation decisions.

This process also involved creating two sets of data, which are on file with the author. The first extrapolated all names of Taliban or Haqqani Network individuals and entities from the leaked Meta DOI list in 2021 and cross-checked them against all U.S. and U.N. sanctions lists and designations. The second data set was created by compiling data from open-source intelligence to create a list of high-level current Taliban government entities and ministries, including those individuals listed in leadership positions. This list was cross-checked with U.S. and U.N. sanctions databases and the leaked Meta list. Searches were conducted on Meta's Instagram and Facebook platforms to determine whether the government office, ministry, or individual had an account on Meta's platforms, whether that account was dormant or actively engaged in posting content, and, if active, what content was being allowed by moderators.

Further, this chapter will only examine Meta's policies because its platforms are the most commonly used in Afghanistan, and because Meta continues to enforce its ban on the Taliban. Twitter does not ban the Taliban outright, but lacks published policies, reports, or decisions on content moderation.

The author is not taking a position whether the Taliban government is or should be legitimised, or whether the Taliban and its leaders should remain sanctioned, as those topics are not within boundaries of the case study. The foregoing analysis starts from the premise that the Taliban is in control of the IEA and that sanctions are in place against

related organisations and a number of individuals holding government office. Furthermore, due to its status as the governing authority of a sovereign and internationally recognised state, the post-2021 Taliban is regarded as distinct from non-state armed groups such as Al-Qaeda and Da'esh.

The foregoing issues are complex, remain largely unstudied, and the discussion will create more questions than answers. Yet this debate is an important one, balancing foreign relations and diplomatic processes, the need to investigate and document war crimes and atrocities, the right of the people to have a voice and be informed, and the sovereign power of governments to govern their citizens.

III. The CNN Effect and the Role of Social Media in Diplomacy, Armed Conflict, and Foreign Policy

To critically assess the power dynamics among the media, the public, and state actors in shaping narratives and influencing foreign policy, it is essential to first engage with the existing scholarship on the CNN Effect and its evolution. This includes examining governmental responses to the perceived encroachment of media on their traditional monopoly over narrative control and propaganda. Moreover, attention must be given to how social media has reconfigured this phenomenon, creating a technologically driven iteration of the CNN Effect that impacts diplomacy, the documentation of atrocities, and peace negotiations during armed conflicts, thereby intensifying the ongoing tensions between governments, media institutions, and civil society.

A. What is the CNN Effect?

As television media gained prominence during the wars of the 1990s, broadcasting photos and videos of the battlefield in real-time, questions arose as to television's influence on diplomacy and foreign policy, particularly in war or humanitarian settings. The CNN Effect is the phenomenon whereby televized coverage, particularly of graphic humanitarian crises, compels policymakers to undertake actions they

might not have otherwise pursued, including military interventions.[3] The increased capacity of the media to shape foreign policy decisions diminished the relative influence of elected and appointed government officials.[4] The phrase was first used during the 1991 Gulf War to refer to "the adverse psychological, economic, and financial consequences of CNN's war coverage."[5] Studies examined how global television news led to "the changing attitudes of the international community, which gets more information faster than ever."[6]

The CNN effect built upon traditional war and media theories such as propaganda, strategic communication, and the use of media to gain support for government action.[7] Propaganda remains relevant to modern warfare, diplomatic relations, and foreign policy given its ability to shape, influence, and change public opinion for the benefit of the propagandist, often the government.[8] The deployment of media and narratives are necessary for the government to convince the people to support domestic and foreign policy decisions.[9] Narratives about heroes and villains, used to rally and unify crowds to support government action, persist in the media over one hundred years after Le Bon's work revealing people's susceptibility to manipulation.[10] This is especially the case in coverage on the war on terror or similar conflicts wherein parties to a conflict are de-humanized. Propaganda has been described as "one of the most dangerous sources of international

[3] Robinson, *CNN Effect Reconsidered*.
[4] Eytan Gilboa, *Searching for a Theory of Public Diplomacy,* 616 ANNALS AM. ACAD. POL. SOC. SCI. 55, 62 (2008) [hereinafter Gilboa, *Searching for a Theory*].
[5] *Id*.
[6] Eytan Gilboa, *Global Television News and Foreign Policy: Debating the CNN Effect*, 6 INT'L STUD. PERSPECTIVES 325, 327 (2005) [hereinafter Gilboa, *Global Television*]
[7] Eytan Gilboa et al., *Moving Media and Conflict Studies Beyond the CNN Effect*, 42 REV. INT'L STUD., 654, 654-72 (2016) [hereinafter Gilboa, *Moving Media*].
[8] JACQUES ELLUL, PROPAGANDA: THE FORMATION OF MEN'S ATTITUDES (1973). *See also* GUSTAVE LE BON, THE CROWD: STUDY OF THE POPULAR MIND (Pretorian Books 2019) (1985).
[9] *Id*.
[10] Le Bon, *supra* note 8.

friction and war" and when unrestrained, "can sometimes make the difference between peace and war."[11]

Historically, government officials and influential elites with access to information primarily exercised persuasion and control over foreign policy.[12] For decades, media depended on the government for information, acting more as a microphone for government narratives due to the influence of leaders who valued and prioritized control of the media.[13] Akin to Ellul's propaganda theory, to re-gain support of the citizenry, governments engage in "information management" by exerting "control of information and manipulation of the mass media,"[14] allowing leaders to manipulate communication channels in their pursuit of foreign policy objectives.[15] Governments may control the media agenda by strategically choosing what they share or disclose in the interests of maintaining or building positive public opinion, thus manipulating information flows.[16] This is frequently accompanied by claims that the disclosure of information is precluded in the interest of national security or to safeguard ongoing military, intelligence, or law enforcement operations.

Global television changed this power dynamic, with early works concluding that "global television has become a direct and perhaps even dominant actor in the formulation of policies in defence and foreign affairs," and "in major international conflicts of the post-Cold War era."[17] Real-time footage created the ability for global audiences to watch news "from the streets and frontlines of battle, rather than from the traditional venues of institutionally-situated reporting of official

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[11] M.E. Badar et al., *The Prosecutor v. Vojislav Šešelj: A Symptom of the Fragmented International Criminalisation of Hate and Fear Propaganda*, 20 INT'L CRIM. L. REV. 405, 406 (2020).
[12] Piers Robinson, *The CNN Effect Revisited*, 22 CRITICAL STUD. MEDIA COMMC'N 344, 344 (2005) [hereinafter Robinson, *CNN Effect Revisited*].
[13] Baum, *supra* note 1.
[14] Gilboa, *Searching for a Theory*, *supra* note 4, at 62.
[15] Gilboa, *Global Communication*, *supra* note 1, at 744.
[16] Gilboa, *Global Television*, *supra* note 6.
[17] Gilboa, *Global Communication*, *supra* note 1, at 733.

pronouncements and descriptions."[18] The underlying result was that "[c]itizens, shocked by dramatic, real-time television images of suffering and hardship, may demand that their leaders 'do something' to alleviate the problem."[19] Mass media channels became the foundation upon which the government and foreign populations built successful relationships to gain necessary credibility with foreign audiences.[20] This new phenomenon disrupted and interfered with traditional diplomacy and policy making as news media gained influence on foreign policy formulation, "at times against the interests and wishes of foreign-policy establishments."[21]

As scholarship on the CNN Effect evolved, divergent perspectives emerged regarding the extent to which mass media shapes public opinion and, consequently, influences policy decisions, particularly given that information dissemination has become significantly faster and more widespread. This acceleration has amplified public discourse, altered the balance of power between media and government, and compelled policymakers to engage more actively with public opinion.[22] Gilboa, in examining the CNN Effect on diplomatic relations, applied the well-established Signitzer and Coombs definition of public diplomacy: "the way in which both government and private individuals and groups influence directly or indirectly those public attitudes and opinions which bear directly on another government's foreign policy decisions."[23] Aside from traditional public diplomacy, a new school of thought developed, called "media diplomacy," wherein leaders move away from traditional channels and instead utilize print,

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[18] Steven Livingston, *Diplomacy in the New Information Environment*, 4 GEO. J. INT'L AFF. 111, 114 (2003).

[19] Baum, *supra* note 1, at 51-52.

[20] INTERNATIONAL PUBLIC RELATIONS AND PUBLIC DIPLOMACY: COMMUNICATION AND ENGAGEMENT (G. J. Golan et al. eds., 2014). *See also* PHILIP SEIB, REAL TIME DIPLOMACY (2012); Fitry Wayhuni & Hasbi Aswar, *Shaping Perceptions: The Taliban's Use of Digital Media for Public Diplomacy and Image Building After Seizing Power in Afghanistan*, 7 ISLAMIC WORLD & POL. 129 (2023).

[21] Robinson, *CNN Effect Reconsidered*, *supra* note 2, at 3.

[22] Gilboa, *Global Television*, *supra* note 6.

[23] Gilboa, *Searching for a Theory*, *supra* note 4, at 57.

radio, or television media to conveys signals of a desire to engage in negotiation or to encourage public support or confidence in proposed agreements or policy decisions.[24] Media-Broker diplomacy further develops this concept to address situations in which journalists or news presententers, vis-à-vis their broadcasts, interviews, or written articles, act as diplomats or mediators by engaging in dialogue and debate along government talking points or narratives; thus abandoning traditional media neutrality or simply reporting the facts.[25]

Gilboa subsequently examined the trajectory of CNN Effect scholarship, finding overall agreement on two aspects: "(1) Global television news coverage has accelerated the foreign-policy making process; and (2) it can affect the conduct of policy—as opposed to its establishment—by showing graphic images that tend to undermine elite and public support for specific policy goals."[26] Robinson's 2011 article sets out in depth the debate amongst international relations scholars on the level of influence of media in foreign policy decisions.[27] Gilboa posits that any divergence in results from various studies are the result of a focus on mass media's role in one particular incident or situation, subject to diverse media or political environments, rather than comprehensive examinations of the overall landscape.[28] The accelerant aspect of modern media and social media, in shifting the power over information flows from the government to the populace, creates a world with instant communication between diplomats or populations. This potentially leads to the adoption of rapidly adopted policies due to public pressure to act with expediency as to foreign affairs and impedes more thoughtful and time-consuming traditional diplomacy.[29]

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[24] Gilboa, *Global Communication*, *supra* note 1, at 741. *See also* Robert Entman, *Theorizing Mediated Public Diplomacy: The U.S. Case* 13 INT'L J. PRESS/POL. 87 (2008).
[25] Gilboa, *Global Communication*, *supra* note 1.
[26] Gilboa, *Global Television*, *supra* note 6.
[27] Robinson, *CNN Effect Reconsidered*, *supra* note 2.
[28] Gilboa, *Global Television*, *supra* note 6.
[29] *Id*.

B. Government Responses to the CNN Effect

As time went on, governments and elites struggled to regain media power amidst a challenging diplomatic landscape and increased public attention to foreign policy. A shift began to occur, wherein the world experienced a decrease in the CNN Effect due to governments retaking a significant level of control and influence over media. Strengthened media management and information control by government undermined the CNN effect by creating "a new era of media deference to government reminiscent of the Cold War era."[30] In the aftermath of September 11, a new government-media relationship emerged from the "good versus evil" and "war on terror" discourse, with the need for governments to gain support for new military offensives in multiple theatres.[31] One example was U.S. Government pressure on domestic media outlets not to air Al Jazeera broadcasts of Osama bin Laden videos; however, Al Jazeera (owned by the Qatari government) ensured the videos of its broadcasts were available on websites accessible in the United States.[32] This shift in influence led Gilboa to ask in 2002 "whether the media are functioning today . . . as independent controlling actors", as the CNN Effect theory suggests, or a "more [] sophisticated tool in the hands of government officials" seeking to encourage or avoid media coverage.[33] Similar present-day scenarios include the U.S. blockage of Russian television broadcasts amidst the Russian-Ukraine war, and the Israeli ban on Al Jazeera following intensified hostilities in October 2023.

Social media policies and DOI lists reflect government attempts to control narratives and raise the question of whether Robinson's conclusions in 2005 continue to permeate narratives and social media approaches to content moderation. However, government attempts to reinvigorate control of media proved short-lived, as the world

[30] Robinson, *CNN Effect Revisited, supra* note 12, at 344.
[31] *Id*. *See also* Baum, *supra* note 1.
[32] Livingston, *supra* note 18.
[33] Gilboa, *Global Communication*, *supra* note 1, at 732.

experienced the invention and growth of multiple social media platforms where individuals primarily control information flows.

Although measuring media's influence on decision-making is challenging to quantify, scholars broadly agree that the media performs critical functions and exerts meaningful influence on citizens, diplomats, and government officials given its power to shift public opinion on foreign policy and operate as a bridge between governments and the populace.[34] Research has shown a "strong link between media content and public attention to issues,"[35] thus supporting the premise that media may not tell people what to think, but it does influence what they think about.

C. The Internet, Social Media, and a New CNN Effect

In 2005, recognizing the renewed government influence on media, Robinson predicted that "[f]or political alternatives and fresh perspectives, U.S. citizens will have to look beyond mainstream media."[36] The answer to this became a new technology known as social media, which emerged amidst a power struggle between television news and governments. Social media is categorized in three basic forms:

> (a) the information infrastructure and tools used to produce and distribute content that has individual value but reflects shared values; (b) the content that takes the digital form of personal messages, news, ideas, that becomes cultural products; and (c) the people, organizations, and industries that produce and consume both the tools and the content.[37]

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[34] Gilboa, *Global Television*, *supra* note 6. *See also* Stuart Soroka, *Media, Public Opinion, and Foreign Policy*, 8 INT'L J. PRESS/POL. 27 (2003).
[35] Soroka, *supra* note 34, at 30.
[36] Robinson, *CNN Effect Revisited, supra* note 12, at 348.
[37] Howard, *Social Media*, *supra* note 1, at 359.

In its early years, social media emerged as a mechanism to broadly share information and report on events as they happen.[38] The shift in media control "led to a rise in event-driven news stories" rather than just parroting government statements.[39] Traditional and social media now enable and empower information flows for domestic and international communities and the transmission of information about armed conflict, impacting the intensity or dynamics of a conflict or peace negotiations.[40]

As populations turned to social media for news and current events, particularly as conflicts unfolded or catastrophic events occurred, the world experienced a large decline in television and print news viewers and readers because "the online sphere provides citizens with unlimited sources, types, and a diversity of political information."[41] The internet and social media became key forums for governments, NGOs, individuals, and businesses to exchange ideas and communicate about world affairs, with an unlimited array of diverse sources.[42] This led to the concept of mediatization: "the ways in which communication technologies have become so integrated into everyday activities that our knowledge and experience of the world is significantly altered," as communication, diplomacy, and public diplomacy are all inextricably linked via social media.[43] According to a 2023 Carnegie Foundation study, Facebook had become the most used social media platform in the

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[38] Alexandra Segerberg & W. Lance Bennett, *Social Media and the Organization of Collective Action: Using Twitter to Explore the Ecologies of Two Climate Change Protests*, 14 COMMC'N REV. 197 (2011).

[39] Baum, *supra* note 1, at 51.

[40] Anita R. Gohdes, *Studying the Internet and Violent Conflict*, 35 CONFLICT MGMT. & PEACE SCI. 89 (2018) [hereinafter Gohdes, *Studying the Internet*].

[41] Mark Boukes, *Social Network Sites and Acquiring Current Affairs Knowledge: The Impact of Twitter and Facebook Usage on Learning about the News*, 16 J. INFO. TECH. & POL. 36, 39 (2019).

[42] *Id*. *See also* Jennifer Cobbe, *Algorithmic Censorship by Social Platforms: Power and Resistance*, 34 PHIL. & TECH. 739 (2020).; Kate Crawford & Tartelton Gillespie, *What Is a Flag For? Social Media Reporting Tools and the Vocabulary of Complaint*, 18 NEW MEDIA & SOC'Y 410 (2016); Gilboa, *Searching for a Theory*, *supra* note 4.

[43] James Pamment, *The Mediatization of Diplomacy*, 9 HAGUE J. OF DIPL. 253, 253 (2014).

world, giving it "an enormous impact on civil discourse,"[44] especially "in countries that heavily censor mass media news."[45]

Social media launched a new forum for international and domestic outreach, documentation of atrocities, voicing complaints or criticisms, calls for reform, and raising awareness.[46] Social media's rapid information flow created an even more urgent challenge for governments and information management than they faced with global television.[47] The speed of online media upended the traditional diplomatic structure which previously left time to examine issues, receive advice and feedback, and investigate the veracity of information and potential outcomes of decisions.[48] Events now unfold in real time, on a global scale, prompting immediate reactions and the rapid formation of public opinion, often without the benefit of full context, fact-checking, or verification. The flow of information, disseminated at unprecedented speed by citizens, journalists, activists, and resistance groups, is largely facilitated by the widespread use of smartphones and digital communication technologies.[49] Drawing on Gilboa's theory of the accelerant aspect of the CNN effect, this new sense of expediency for action caused another power shift by frustrating government-controlled diplomacy.[50] Networks formed that transcended boundaries, requiring that government actors interact with multiple forms of media and audiences, considering a global audience in which a diverse range of voices joined the discussion and exerted influence.[51]

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[44] Caroline Crystal, *Facebook, Telegram, and the Ongoing Struggle Against Online Hate Speech. Carnegie Endowment*, CARNEGIE ENDOWMENT INT'L PEACE (Sept. 7, 2023). https://carnegieendowment.org/research/2023/09/facebook-telegram-and-the-ongoing-struggle-against-online-hate-speech?lang=en.

[45] ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 139 (2017) [hereinafter TUFEKCI, TWITTER AND TEAR GAS].

[46] Stein Tonnesson et al., *Pretending To Be States: The Use of Facebook by Armed Groups in Myanmar*, 52 J. CONTEMP. ASIA 200 (2022).

[47] SEIB *supra* note 20.

[48] *Id.*

[49] P.W. SINGER & EMERSON BROOKING, LIKE WAR: THE WEAPONIZATION OF SOCIAL MEDIA (2019).

[50] Baum, *supra* note 1, at 52.

[51] Pamment, *supra* note 43. *See also* SEIB, *supra* note 20.

As technology, media, and social media became more intertwined, journalists also began to use social media as a source to gather information and discover emerging stories.[52] Specialist or niche media sites emerged, broadcasting diverse viewpoints challenging government narratives and sharing content online or via social media platforms.[53] Journalists benefitted from access to a multitude of content, which allowed them to present various points of view and imagery of the same event.[54] This facilitated both the authentication of information and the de-bunking of false reports, while encouraging greater public participation in discourse.[55] All of this took place relatively outside the reach of government regulations or control, and more rapidly than traditional media operated in the past.

Traditional forms of media, such as print, radio, and television, were characterized by asymmetrical, one-way communication, in which citizens assumed a passive role. Audiences received information solely at the discretion of media outlets, which determined not only the timing and content of dissemination, but also the framing through which that information was presented.[56] The internet changed the traditional dynamic, allowing citizens to become active participants and creating new channels for information sharing between multiple participants.[57] This change acted as a catalyst for a new, stronger, form of the CNN Effect, creating additional power shifts and increased foreign policy influence.[58] A reduction in asymmetry in communication enabled the populace to collect information and formulate opinions, channelling

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[52] Gilboa, *Moving Media*, *supra* note 7. *See also* Shannon McGregor & Logan Molyneux, *Twitter's Influence on News Judgment: An Experiment among Journalists*, 21 JOURNALISM: THEORY, PRACTICE & CRITICISM 597 (2020).

[53] Gilboa, *Moving Media*, *supra* note 7.

[54] Zeynep Tufekci & Christopher Wilson, *Social Media and the Decision to Participate in Political Protest: Observations from Tahrir Square*, 62 *J. COMMC'N* 363 (2012) [hereinafter Tufekci, *Social Media*]. *See also* TUFEKCI, TWITTER AND TEAR GAS, *supra* note 45.

[55] *Id*.

[56] Philip N. Howard, & Muzammil M. Hussain, *The Role of Digital Media* 22 J. DEMOCRACY 35 (2011) [hereinafter Howard, *Role of Digital Media*]. *See also* SEIB, *supra* note 20.

[57] McGregor, *supra* note 52; *See also* SEIB, *supra* note 20.

[58] *Id*.

those into demands.[59] Questions emerged about the level of control or influence social media now had over public discourse,[60] and whether the CNN Effect was re-emerging in the online world, once again shifting the information power balance. Quantitative studies examined the extent of this effect on social media, news reporting, and political opinion changes.[61]

Multiple governments and private corporations swiftly developed entire social media units to handle diplomacy and public relations to regain control of the narrative.[62] A new era of legal regulation emerged to enable governments to play a strong role in the development and regulation of social media in a way that aligns with their interests, protects against misuse of artificial intelligence (AI) and other disruptive technologies, and responds to the impact of digital technology on diplomacy.[63] One observer notes "[a]dvances in information and communication technologies challenge the dominant position of diplomats in international affairs news . . . more likely to find their assertions questioned, their premises challenged, and their objectives scrutinized by the news media and other organizations now empowered by the internet."[64] All of which may indicate renewed government attempts to reclaim control of foreign policy narratives and public discourse.

Academic inquiry into the implications of social media content moderation has only begun to gain substantive traction over the past decade. A significant portion of this research has concentrated on counter-terrorism policies, with particular emphasis on the distinctive cases of ISIS and Al-Qaeda. These groups, due to their explicit use of

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[59] Baum, *supra* note 1. *See also* Livingston, *supra* note 18; Robinson, *CNN Effect Reconsidered*, *supra* note 2.

[60] SEIB, *supra* note 20.

[61] Trevor Diehl et al., *Political Persuasion on Social Media: Tracing Direct and Indirect Effects of News Use and Social Interaction*, 18 NEW MEDIA & SOC'Y 1975 (2016). *See also* McGregor, *supra* note 52.

[62] Cathryn Ashbrook & Alvaro Zalba, *Social Media Influence on Diplomatic Negotiation: Shifting the Shape of the Table,* 37 NEGOT. J. 83 (2021). *See also* Pamment, *supra* note 43.

[63] *Id*.

[64] Livingston, *supra* note 18, at 111.

social media for terrorist purposes, are treated as legal outliers, yet much of the current policy framework and content moderation strategies are disproportionately based on these atypical examples. In parallel, scholars have examined the role of AI in moderation practices, the use of social media in democratic movements and protests (most notably during the Arab Spring), and specific atrocity contexts. These include incitement to genocide in Myanmar, Facebook's complex role in African countries—where it navigates between expanding digital access with the need to mitigate ethnic and political tensions[65]—and the Indian government's restriction on Facebook's platform as a means to curtail free expression.[66] More recent scholarship has turned to the increasing presence of violent right-wing extremist content on social media platforms.

IV. HOW IS SOCIAL MEDIA UTILIZED IN ARMED CONFLICT?

To gain a deeper understanding of this phenomenon, this chapter will examine the functions social media serves in the context of armed conflict: disseminating news and information, shaping peace negotiations, documenting war crimes and atrocities, and constructing a historical archive to support post-conflict reconciliation efforts.

In the last century, humans grappled with innovative technology and the exponential increase in the speed of communications. Technology changes the weapons used on the battlefield, creates new battlefields in cyberspace, and alters the portrayals of war on television, in print media, and overwhelmingly, on social media. An emerging area is how AI adds another layer, including its use in targeting decisions, the spread of deep fakes, and its frequent use in automated content moderation determinations on social media.

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[65] Toussant Nothias, *Access Granted: Facebook's Free Basics in Africa*, 42 MEDIA, CULTURE, & SOC'Y 329 (2020).

[66] S.B. Prasad, *Effective Leadership in Democracy*, 7 OPEN J. POL. SCI. 345 (2017).

In 2018, amidst growing apprehension about the sociopolitical uses of corporate owned platforms, Gohdes raised a concern about "how corporate interests of large internet companies affect the nature of violent conflict."[67] Other scholars began to question whether it was appropriate for social media companies to wield such power over armed conflict, almost exclusively controlling the tide of the information war by promoting or censoring one side of the conflict.[68] Fears emerged as to whether social media can tilt the power balance in favor of one side of a conflict by restricting the information that reaches the public.[69] These platforms offer powerful tools for influencing public perception, but critical questions arise regarding the nature of the content disseminated: to what extent is this content shaped by corporate interests, and how vulnerable is it to governmental influence or manipulation, particularly by actors with vested interests in the outcome of a conflict?

A. Social Media as a News Source to Inform the Public

Social media emerged in its early years as an important mechanism to instantly share information and report on war or violent events,[70] allowing content from the most remote places to reach a global audience.[71] Platforms became an online coffee shop, underground newspaper, and meeting room for civil society, combining "multiple functions that are indispensable to social movement, from the public to the private, for access to large audiences and to facilitate interpersonal transactions."[72] Internet freedom and social media allowed almost unfettered access to information, the ability to produce one's own media content, and the freedom of citizens to converse with one another,[73] erasing "the distinction between citizen, journalist, activist,

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[67] Gohdes, *Studying the Internet, supra* note 40, at 98.
[68] Gilboa, *Moving Media*, *supra* note 7. *See also* SINGER, *supra* note 49; Tonnesson, *supra* note 46.
[69] Gohdes, *Studying the Internet, supra* note 40.
[70] Segerberg, *supra* note 38.
[71] TUFEKCI, TWITTER AND TEAR GAS, *supra* note 45.
[72] *Id*. at 138.
[73] Clay Shirky, *The Political Power of Social Media*, 90 FOREIGN AFF. 28 (2011).

and resistance fighter."[74] Social media supplements news reporting by allowing citizens to provide information when journalists have limited access.[75]

Policymakers swiftly recognised the benefits of social media as a means to engage directly or indirectly with actors across the globe[76] and as a new source of intelligence gathering. Diehl's quantitative study found that "social uses of social media directly influence political persuasion," and led to "more flexibility in the formation of political attitudes based on encounters" in social media.[77]

In an era of global democracy movements, social media became known as "liberation technology," defined as "information and communication technology that can expand political, social, and economic freedom."[78] Liberation technology is, in other words, the online CNN effect to engage in public speech and undertake collective action with greater power to demand change and challenge government narratives.[79] As one scholar observes, social media "enables citizens to report news, expose wrongdoing, express opinions, mobilize protest, monitor elections, scrutinize government, deepen participation, and expand the horizons of freedom."[80] As citizens learn about living conditions and governance in other countries via the internet and social media, they demand reform in their own, creating a challenge for authoritarian regimes to control the narrative and exercise exclusive control of media.[81] Faced with losing power over media narratives, governments respond with propaganda.[82] The expansion of

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[74] SINGER, *supra* note 49, at 70.
[75] *Al Shifa Hospital*, OVERSIGHT BD. (Dec. 19, 2023), https://www.oversightboard.com/decision/ig-wuc3649n/.
[76] Gilboa, *Global Television*, *supra* note 6.
[77] Diehl, *supra* note 61, at 1889.
[78] Larry Diamond, *Liberation Technology*, 21 J. DEMOCRACY 69, 70 (2010).
[79] Ashbrook, *supra* note 62. *See also* Howard, *Social Media*, *supra* note 1; Shirky, *supra* note 73.
[80] *Id*.
[81] Epsen Rød & Nils Weidmann, *Empowering Activists or Autocrats? The Internet in Authoritarian Regimes*, 52 J. PEACE RES. 338 (2015).
[82] Shirky, *supra* note 73.

content moderation on social media platforms and government attempts to rein in platforms by influencing content removal and imposing liability on platforms for content posted or shared on them demonstrates the struggle to control speech.

Despite the U.S. Government's own involvement in content moderation practices, it recently implemented a visa ban targeting foreign nationals who censor Americans or take punitive actions based on social media activity.[83] The U.S. State Department asserted that it is "unacceptable for foreign officials to demand that American tech platforms adopt global content moderation policies or engage in censorship activity that reaches beyond their authority and into the United States," while notably remaining silent on comparable domestic initiatives.[84] These dynamics will be further examined in the context of content moderation policy and its broader implications.

B. The Role of Social Media in Peace Negotiations

The social media iteration of the CNN Effect emerged in peace negotiations, wherein political actors leverage digital platforms for agenda-setting, strategic decision-making, mobilizing public action, and disseminating conflict narratives to both the public and governmental actors.[85] The facilitation and amplification of information flows across domestic and international audiences potentially influencing both the intensity and trajectory of conflict and peace processes.[86] Social media serves multiple roles in this context: supporting pre-negotiation dialogue, facilitating conflict resolution, signaling, spurring public discourse, and eroding dehumanizing or adversarial portrayals of opposing parties, all in pursuit of cultivating domestic support and enhancing the feasibility of negotiations.[87] Given

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[83] Marco Rubio, *Announcement of a Visa Restriction Policy Targeting Foreign Nationals Who Censor Americans*, U.S. DEP'T ST. (2025), https://www.state.gov/announcement-of-a-visa-restriction-policy-targeting-foreign-nationals-who-censor-americans/.
[84] *Id*.
[85] Gilboa, *Moving Media*, *supra* note 7.
[86] Gohdes, *Studying the Internet, supra* note 40.
[87] Gilboa, *Global Communication*, *supra* note 1.

its global accessibility, social media also enables diasporic communities to participate in shaping public opinion by raising awareness and lobbying international actors and governments.[88] While "[s]ocial media may reduce information asymmetries among conflicting parties, possibly motivating them to find agreements faster than was previously the case,"[89] questions remain whether the emergence of censorship or content moderation on platforms work against this.

Social media provides a means for parties to an armed conflict to communicate directly with outside actors, especially foreign audiences. It also facilitates more open information sharing as groups broadcast political platforms and plans, creating greater transparency and public awareness about a conflict.[90] As one author highlights, "[s]ocial media's vast global reach can drastically change what is possible 'away from the table' in a negotiation,"[91] including the risk of vulnerabilities or escalation given the potential for the rapid spread of disinformation or harmful narratives.

Studies found that combining of social media with diplomatic processes resulted in shifts in the media strategies and tactics of conflict actors.[92] Shaping public opinion can directly impact funding or logistical support for a nation, or even provide a moral base to support advocacy, influencing how governments respond to conflicts or utilize media to facilitate diplomatic or military assistance.[93] The online sphere provides a cost-effective and efficient means to bring together people from isolated areas, revealing greater diversity (or uniformity) in viewpoints, fostering dialogue and problem solving, and providing insights for how to reach compromises or solutions in peace

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[88] Gilboa, *Moving Media*, *supra* note 7.
[89] Gohdes, *Studying the Internet, supra* note 40, at 97.
[90] Benjamin Jones & Eleonora Mattiacci, *A Manifesto, in 140 Characters or Fewer: Social Media as a Tool of Rebel Diplomacy*, 49 BRIT. J. POL. SCI. 739 (2017).
[91] Ashbrook, *supra* note 62, at 92.
[92] Jones, *supra* note 90. *See also* Tonnesson, *supra* note 46.
[93] Baum, *supra* note 1. *See also* Gilboa, *Moving Media*, *supra* note 7; Gohdes, *Studying the Internet, supra* note 40; SINGER, *supra* note 49.

negotiations.[94] In decision making, "[d]iplomats must recognise even weak signals early on, and take them very seriously, precisely because social media enables and amplifies rapid shifts in public opinion."[95] Those engaging in conflict resolution and peace negotiation must consider that parties to a conflict "are also paying extraordinary attention to what others are saying about them on social media."[96] Warren argues based on empirical evidence that "mass media technologies represent some of the most powerful forces for peace and stability yet observed in the modern world."[97]

Social media functions as a critical intermediary during armed conflict by reducing communication barriers, accelerating the speed of information exchange, and facilitating rapid shifts in media strategies by conflict actors due to its instantaneous reach.[98] Within the context of conflict and peace negotiations, a type of "information warfare" has emerged, wherein competing actors strive to influence the post-conflict trajectory by asserting control over the prevailing revolutionary narrative.[99] This dynamic gives rise to a landscape in which "a variety of governmental, non-governmental, civil society, para-diplomatic, public, and private representatives vie for recognition as legitimate actors in the diplomatic sphere."[100] A notable illustration of these dynamics occurred in Libya, where social media served as a primary channel for the dissemination of information and played a pivotal role in diplomatic interactions among foreign states, the Libyan government, and opposition groups.[101] Rebel groups, in particular, leveraged content disseminated by the government to contest, counter,

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[94] Jenny Gregory, *Connecting with the Past through Social Media: The 'Beautiful Buildings and Cool Places Perth Has Lost' Facebook Group*, 21 INT'L J. HERITAGE STUD. 22 (2015).
[95] Ashbrook, *supra* note 62, at 91.
[96] Gohdes, *Studying the Internet, supra* note 40, at 94.
[97] T. Camber Warren, *Not by the Sword Alone: Soft Power, Mass Media, and the Production of State Sovereignty*, 68 INT'L ORG. 111, 123 (2014).
[98] Tonnesson, *supra* note 46.
[99] Howard, *Role of Digital Media*, *supra* note 56, at 42.
[100] Pamment, *supra* note 43, at 255.
[101] Jones, *supra* note 90.

and discredit official narratives, thereby fostering a visible, transparent, and internationally accessible dialogue.[102]

Social media also influences armed conflict through a process called scale shifting, where local crises rapidly gain international attention given social media's ability to provide supporters of intervention abroad with detailed information and arguments that may not be accessible through traditional news sources.[103] This method of utilizing social media outlets and their global reach and ability to provide more complete information to the broader public is important for garnering support for third party intervention.[104] Global audiences, often with minimal direct connection to a conflict, increasingly utilize social media platforms to advocate for governmental action, whether in the form of military intervention, diplomatic engagement, or humanitarian assistance. In response to the broader use and influence of social media, a range of specialized industries has developed to optimize strategic messaging campaigns, especially in human rights or humanitarian situations. These industries disproportionately benefit actors with financial resources and political influence, enabling them to shape and amplify social media content to achieve greater reach and impact.

An understudied aspect of media's role in foreign diplomacy and peace negotiations is the concept of branding, wherein states and non-state actors must protect or re-create their brand and image, often as part of peace negotiations.[105] Globalisation and the internet make state branding an essential aspect for a state's survival and success, especially if a state wants to change its image to encourage domestic trust in its government, foreign affairs, and economic matters.[106] Whether considered branding or propaganda, state and non-state actors in armed conflict utilize social media to create their image,[107] mobilize

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[102] *Id*.
[103] *Id*. at 744.
[104] *Id.*
[105] Gilboa, *Searching for a Theory*, *supra* note 4, at 68.
[106] Peter Van Ham, *The Rise of The Brand State: The Postmodern Politics of Image and Reputation*, 80 FOREIGN AFF. 2 (2001).
[107] SINGER, *supra* note 49.

support, and gain legitimacy,[108] all with the goal of attracting favourable public opinion.[109]

Armed groups are increasingly employing social media platforms to boost their reputation and portray an image that they are acting "as capable and legitimate states."[110] These actors engage in strategic communication campaigns to highlight positive actions, cultivate public support and goodwill, and disseminate adversarial narratives targeting the enemy state. In doing so, they foster interactive online communities among their constituents. However, further research is needed to examine the dynamics of post-conflict and transitional periods, particularly with regard to the implications of terrorist designations, the growing significance of branding and public image for regime legitimacy, and the reintegration of individuals and groups into society.[111] Understanding the extent to which social media facilitates or impedes these processes remains a critical area of inquiry.

C. Social Media as a Tool to Document War Crimes and Atrocities

Social media created the ability for real-time documentation, monitoring, and investigation of ongoing war crimes and human rights abuses due to the speed of communication and accessibility.[112] The further integration of social media into traditional print and television news platforms has significantly enhanced "citizens' ability to document and share, by greatly increasing the odds that misconduct by authorities will become widely known."[113] With widespread access to smartphones and digital cameras, individuals are now able to capture and disseminate images, videos, and other forms of evidence

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[108] Tonnesson, *supra* note 46.
[109] Jones, *supra* note 90.
[110] Tonnesson, *supra* note 46, at 212.
[111] Sophie Haspeslagh, *The 'Linguistic Ceasefire': Negotiating in an Age of Proscription*, 52 SEC. DIALOGUE 361 (2021) [hereinafter Haspeslagh, *Linguistic Ceasefire*].
[112] Anna Banchik, *Disappearing Acts: Content Moderation and Emergent Practices to Preserve At-Risk Human Rights-Related Content*, 23 NEW MEDIA & SOC'Y 1527 (2021). *See also* Gilboa, *Moving Media*, *supra* note 7; Ty Solomon, *Ontological Security, Circulations of Affect, and the Arab Spring*, 21 J. INT'L REL. & DEV. 934 (2018).
[113] Tufekci, *Social Media, supra* note 54, at 367.

documenting war crimes, casualties, injuries, arms transfers, troop movements, property destruction, and looting. Such content can play a crucial role in investigative and judicial processes, while also providing evidence to challenge and potentially discredit official narratives.

Content on platforms provides competing views of events,[114] especially where states censor information or limit access to media, researchers, or investigators.[115] Social media brings the battleground to a new audience, facilitating communications directly at or in response to regimes or armed groups.[116] Greater public awareness of atrocities on social media can also lead to greater domestic or international outreach, lobbying campaigns, or pressures on government to act, shifting foreign policy decisions.[117]

In addition to traditional investigations conducted by law enforcement and government agencies, advances in the internet and social media allowed for organisations such as Bellingcat and Eyewitness to Atrocities to develop new technology to aid in the documentation and investigation of atrocities, often based on open-source intelligence. The assessment of civilian targeting, legal liability, casualties, and population displacement has become increasingly feasible through the systematic analysis of the timing, content, and multifaceted perspectives captured in videos and photographs disseminated via social media platforms.[118] The Office of the Prosecutor at the International Criminal Court created a special team and specifically trains staff on the gathering and use of social media evidence in investigations and prosecutions. Other entities have developed special highly secure applications to ensure backup copies of data and media, immediately transmitted to a third party for storage

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[114] Jones, *supra* note 90.
[115] Banchik, *supra* note 112.
[116] Tonnesson, *supra* note 46.
[117] Katrin Doveling et al., *From Mediatized Emotion to Digital Affect Cultures: New Technologies and Global Flows of Emotion*, 4 SOC. MEDIA & SOC'Y 1 (2018). *See also* Robin Ekelund, *Fascination, Nostalgia, and Knowledge Desire in Digital Memory Culture: Emotions And Mood Work in Retrospective Facebook Groups*, 15 MEMORY STUD. 1248 (2022); Gregory, *supra* note 94; Tonnesson, *supra* note 46.
[118] SINGER, *supra* note 49.

and analysis, whilst providing protections for those capturing evidence on the ground. This process is not without significant challenges. Investigators must not only verify the authenticity of reports and reconcile conflicting accounts but also contend with emerging technologies capable of manipulating digital content. The proliferation of altered images and artificially generated deepfakes poses a serious risk to the integrity of evidence, and can significantly distort public narratives.

Additionally, as platforms began to remove or censor content, researchers and investigators encountered a race against time, using limited resources to preserve content before it is removed. Meta's Oversight Board recognises that Meta has a "responsibility to preserve evidence of potential human rights violations and violations of international humanitarian law," to document pivotal points of history, and assist with accountability efforts.[119] Despite this recognition, the platform continues to censor content and ban accounts, particularly during armed conflict.

D. Post-Conflict Reconciliation: Social Media's Historical Truth

Finally, social media platforms serve as digital archives of the collective nostalgia of groups, especially for the diaspora, creating historical records, filling gaps in memory or knowledge, and providing space for addressing past trauma and grieving.[120] The creation of a historical truth is important for post-conflict reconciliation and rebuilding, particularly to promote lasting peace and community healing. The prevention of future conflicts and the mitigation of generational trauma depends directly on preserving memory, emotion,

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[119] *2023 Annual Report*, OVERSIGHT BD. (June 17, 2023), https://www.oversightboard.com/news/2023-annual-report-shows-boards-impact-on-meta/?_hsenc=p2ANqtz-_X5coL3xVA6ZQ0JLwPJ6WSUBYow35LDPjlTZpBbMdEYlooHbt33s9y6Ybcv6KlkI5lvYwz0i8y1z_sm_1VGvy3jP_Myg&_hsmi=313443788 [hereinafter *Annual Report*]; *Al Shifa Hospital*, *supra* note 74; SINGER, *supra* note 49.

[120] Sergio Davalos et al., *'The Good Old Days': An Examination of Nostalgia in Facebook Posts*, 83 INT'L J. HUM.-COMPUT. STUD. 83 (2015). *See also* Ekelund, *supra* note 117; Anne Kaun & Fredrik Stiernstedt, *Facebook Time: Technological and Institutional Affordances for Media Memories*, 16 NEW MEDIA & SOC'Y 1154 (2014).

recognition, and memorials, ensuring stories are told and remembered. Recent studies revealed that "individuals interested in the past seem to turn more and more towards using social networking sites such as Facebook to connect with each other and produce their own digital memory space."[121] Social media enables this because in times of armed conflict or atrocities, platforms are a means for "spontaneous acts of remembering online," leading to a contemporary "digital memory culture" and emotional bonding.[122]

Post-conflict reconciliation and reparations involve the memorialisation and recognition of past atrocities, whether as part of the accountability process or a stand-alone aspect of justice. Experts examining social media's emergence in this area found that "humans need social affiliation and strive for belonging to social groups," especially when struggling with grief or war or traumatic situations.[123]

Social media functions as a virtual support community, fostering a sense of security, shared victimhood, and collective resistance against perceived evil or violent forces. It facilitates solidarity with a movement, as atrocities elicit not only locally rooted emotional responses from directly affected individuals but also empathetic engagement and support from distant or global audiences who encounter these events through online platforms.[124] Online social media platforms also become a resource to build social capital in response to the destruction of heritage or cultural sites, documenting and sharing evidence of what was destroyed, coordinating rebuilding efforts, and warning against future destructive efforts in other conflicts.[125] Social media thus fosters nostalgia, for negative and positive emotions, providing the ability for post-conflict diaspora to revisit the past, share memories, compare experiences, connect to the homeland, and heal, either in pre-existing social or familial groups, or with complete

[121] Ekelund, *supra* note 117, at 1248.
[122] Doveling, *supra* note 117, at 2.
[123] *Id*. at 4.
[124] *Id*; Gregory, *supra* note 94.
[125] Gregory, *supra* note 94.

strangers.[126] However, if platforms censor, remove, or restrict content, they risk negative impacts on post-conflict reconciliation and memorialisation processes for the communities attempting to recover from the horrors of armed conflict.

Social media has thus emerged as an expansive and dynamic platform for the dissemination of news and information, an influential actor in peace negotiations, a tool for documenting atrocities and contesting dominant narratives, and a mechanism for constructing historical archives that may contribute to post-conflict restorative justice processes. This evolution presents a significant challenge to states aiming to preserve control over public discourse and retain exclusive authority in diplomatic and peacebuilding arenas. The following analysis will focus on a specific dimension of social media's role in armed conflict: the ways in which corporations and governments engage in moderation of online content and controlling what information may be shared.

V. Social Media Content Moderation and the CNN Effect

This section proceeds by first defining social media content moderation and tracing its evolution from a safety mechanism into a tool with significant political and diplomatic consequences. It then examines its intersection with terrorism-related policies and Meta's Dangerous Organizations and Individuals list. Finally, it analyzes the broader debates about content moderation, state influence, and the CNN Effect.

A. What is social media content moderation and why does it exist?

In its early years, social media operated without rules or gatekeepers, allowing free and unhindered discourse. With time, those with improper or illegal motives sought to exploit this unregulated environment. As a solution to curb the spread of hate speech, violence, nudity, child exploitation, and harmful false information, platforms

[126] Davalos, *supra* note 120.

were tasked with policing content on their platforms and penalizing users who do not follow the rules.[127] Social media companies assumed the role of gatekeeper, implementing rules and penalties to govern users and moderate content, regulating who has access to the platforms and what those with access are allowed to post.[128] Recognising a new shift in control over global dialogue, one scholar concluded that "Facebook literally is the internet. For all the internet's creative chaos, it has come to be ruled by a handful of digital kings, . . . to control which ideas and opinions are seen and shared" by "shaping the nature of society, the economy, and now war and politics."[129]

As social media platforms evolved into influential news sources capable of shaping public opinion, content moderation policies developed to counter this shifting communicative landscape. Going beyond its original purpose, content moderation became "a form of censorship or restraint on a user's voice; it quite literally removes the content of their speech, and in the case of an account suspension, prevents their access to a channel for future expression."[130] In response, scholars examined whether "[s]ocial media has seen state media censorship replaced with a new kind of external censorship,"[131] concerned that "user agreements and design decisions by social media builders can limit civic discourse and discourage social movements."[132] Although scholarly attention to the operational mechanisms, technical foundations, and implications of social media content moderation dates back to 2012, ongoing technological advancements and evolving policy

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[127] Robyn Caplan, *Networked Platform Governance: The Construction of the Democratic Platform*, 17 INT'L J. COMMC'N 3451 (2023). *See also* Segerberg, *supra* note 38.
[128] *Id*.
[129] SINGER, *supra* note 49, at 24, 50.
[130] Sarah West, *Censored, Suspended, Shadowbanned: User Interpretations of Content Moderation on Social Media Platforms*, 20 NEW MEDIA & SOC'Y 4366, 4374 (2018).
[131] Tonnesson, *supra* note 46, at 221.
[132] Howard, *Social Media*, *supra* note 1, at 361.

frameworks have left many dimensions of the phenomenon underexplored.[133]

Meta's content moderation practices are guided by its Community Standards, which are enforced through various mechanisms, often in response to requests or directives from state authorities, to remove content deemed 'illegal' within specific jurisdictions or to ban users.[134] Penalties for violations may include content warnings, temporary suspensions of user privileges, permanent removal of material, or complete bans from the platform, a framework that has evolved with new policy and legal considerations.[135]

Meta's content moderation policies may, under certain circumstances, be subject to appeal by users through an independent entity known as the Oversight Board (the Board). The establishment of the Board was prompted by mounting criticism of Meta's moderation practices and the acknowledged inaccuracy of its internal review mechanisms. Meta's founder and CEO, Mark Zuckerberg, envisioned the Board as a "quasi-judicial unit with autonomous powers," drawing inspiration from constitutional law frameworks.[136] The Charter governing the Board stipulates that its primary objective is to safeguard freedom of expression and that, in instances of conflict, international

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[133] Marguerite Borelli, *Social Media Corporations as Actors of Counter-Terrorism*, 25 NEW MEDIA & SOC'Y 2877 (2023). *See also* Gohdes, *Studying the Internet, supra* note 40; Nothias, *supra* note 65; Prasad, *supra* note 66; Jeffrey Sablosky, *Dangerous Organizations: Facebook's Content Moderation Decisions and Ethnic Visibility in Myanmar*, 43 MEDIA, CULTURE & SOC'Y 1017 (2021); Youmans, *supra* note 1. *See also* Angel Diaz & Laura Hecht-Felella, *Double Standards in Social Media Content Moderation*, BRENNAN CTR. JUST. (2021), https://www.brennancenter.org/our-work/research-reports/double-standards-social-media-content-moderation and Mandy Lau, *Content Moderation as Language Policy: Connecting Commercial Content Moderation Policies, Regulations, and Language Policy*, 2 APPLIED LINGUISTICS & LINGUISTICS AT YORK 1 (2022).

[134] Chinmayi Arun, *Facebook's Faces*, 135 HARV. L. REV. 236 (2022).

[135] Rotem Medzini, *Enhanced Self-Regulation: The Case of Facebook's Content Governance*, 24 NEW MEDIA & SOC'Y 2227 (2021).

[136] *Annual Report, supra* note 119, at 2. *See also* Mark Sullivan, *Exclusive: The Harvard Professor behind Facebook's Oversight Board Defends its Role*, FAST CO. (2019), https://www.fastcompany.com/90373102/exclusive-the-harvard-professor-behind-facebooks-oversight-board-defends-its-role.

human rights law shall serve as the prevailing standard over Meta's internal policies.[137] Functioning with judiciary-like authority, the Board conducts policy reviews, issues rulings, initiates investigations, and makes formal recommendations for reform.[138] The rationale for creating an appeals process was further reinforced by Zuckerberg's own admission that Meta's content moderation teams have an error rate greater than ten percent.[139]

As of 2023, the Board had received approximately three million appeals of content moderation decisions,[140] and reported overturning Meta's original determinations in approximately ninety percent of the cases reviewed.[141] The Board's decisions and reports contribute meaningfully to the growing body of comprehensive scholarship on content moderation and the role of social media in contemporary governance.[142]

The power struggle between social media platforms, governments, and users is important because it directly relates to the fundamental human rights of free speech and expression. As set forth in Article 19(2) of the International Covenant on Civil and Political Rights, this includes the right to seek, receive, and speak of or impart information and ideas of all kinds.[143] Freedom of expression protects an individual's right to speak or express, but also the "public's right to receive such information."[144] The United States Supreme Court noted the prominence of social media for information and opinion sharing,

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[137] OVERSIGHT BOARD, OVERSIGHT BOARD CHARTER (2019).
[138] *Id*.
[139] John Koetsier, *Report: Facebook Makes 300,000 Content Moderation Mistakes Every Day*, FORBES (Jun 9, 2020), https://www.forbes.com/sites/johnkoetsier/2020/06/09/300000-facebook-content-moderation-mistakes-daily-report-says/.
[140] Paul M. Barrett, *Meta's Oversight Board and the Need for a New Theory of Online Speec*h, LAWFARE (Nov. 9, 2023), https://www.lawfaremedia.org/article/meta-s-oversight-board-and-the-need-for-a-new-theory-of-online-speech.
[141] *Annual Report, supra* note 119, at 2.
[142] Laurence R. Helfer & Molly K. Land, *The Meta Oversight Board's Human Rights Future*, 44 CARDOZO L. REV. 2233 (2022).
[143] Eugénie Coche, *Privatised Enforcement and the Right to Freedom of Expression in a World Confronted with Terrorism Propaganda Online*, 7 INTERNET POL'Y REV. 1382 (2018).
[144] *Id*. at 5.

warning that "to foreclose access to social media altogether" would be to "prevent the user from engaging in the legitimate exercise" of free speech rights.[145]

Despite the widespread acceptance of core principles in international human rights law, the growing prevalence of content moderation on social media platforms has raised significant concerns regarding restrictions on freedom of expression and potential violations of fundamental norms. As Common notes, content moderation practices "pose a threat to human rights and the rule of law, as these platforms become important forums to exercise free speech."[146] The governance of expression on social media is largely dictated by corporate policies, which may diverge from domestic legal standards and international human rights obligations. This divergence creates a conflict between the commercial imperatives of social media companies and their responsibilities to uphold human rights standards.[147] A growing body of scholarship has concluded that Meta's approach to content moderation undermines freedom of expression, impedes journalism and activist mobilization, and constrains civic discourse by determining which narratives are permitted to circulate within online communities.[148]

Meta's Oversight Board indicated its preference for protecting the emerging social media CNN Effect, noting in its reports and findings that although a private company has greater discretion to limit or censor speech than a government, these actions must be necessary and proportionate, with heightened responsibilities during armed conflict and elections, or when social media is one of the primary sources of

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[145] Ari Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845 (2018).

[146] MacKenzie Common, *Fear the Reaper: How Content Moderation Rules Are Enforced on Social Media*, 34 INT'L REV. L., COMPUT. & TECH. 126, 126 (2020).

[147] Borelli, *supra* note 133. *See also* Coche, *supra* note 143.

[148] BENNETT CLIFFORD, MODERATING EXTREMISM: THE STATE OF ONLINE TERRORIST CONTENT REMOVAL POLICY IN THE UNITED STATES (2021). *See also* Common, *supra* note 146; Gohdes, *Studying the Internet, supra* note 40; Sarah Koslov, *Incitement and the Geopolitical Influence of Facebook Content Moderation*, 4 GEO. L. TECH. REV. 183 (2019); Sablosky, *supra* note 133.

information and news sharing.[149] The Board even warned that "counterterrorism and counter-extremism efforts should not be used to repress media freedom" and "individuals have as much right to repost news stories as media organisations have to publish them in the first place."[150]

Through its content moderation practices, Meta appears to engage in political judgment and, arguably, censorship, whether autonomously or in response to governmental pressure. It does this through its internal policies and determinations of which groups, and by extension which discourses, are considered legitimate and thus permitted to engage with national and international audiences on Meta's platforms. Conversely, other groups are systematically excluded from communication with key stakeholders and policymakers, effectively silenced and rendered invisible, thereby undermining their prospects for legitimacy and influence.[151] In a 2021 statement, responding to growing criticism, Mark Zuckerberg articulated his vision for the platform, focusing on making the world a better place through giving people a voice and inhibiting governments and media companies from censoring speech, whilst preventing actual harms and ensuring the safety and security of those using the platform.[152] This raises a critical question: to what extent does this stated commitment to free expression align with the realities of Meta's expansive and increasingly scrutinized content moderation regime?

To engage more critically with this issue, this chapter must examine the central point of contention: Meta's Dangerous Organizations and Individuals (DOI) policy. This policy has been the subject of extensive critique, particularly with regard to its lack of transparency, its

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[149] *Shared Al Jazeera Post*, OVERSIGHT BD. (Sept. 14, 2021), https://www.oversightboard.com/decision/fb-p93jpx02/.

[150] *Id.*

[151] Common, *supra* note 146. *See also* Sablosky, *supra* note 133.

[152] *Mark Zuckerberg Stands for Voice and Free Expression.* META. October 19, 2019. https://about.fb.com/news/2019/10/mark-zuckerberg-stands-for-voice-and-free-expression/#:~:text=October%2017%2C%202019,about%20speech%20on%20our%20own.

perceived vulnerability to governmental and corporate influence, and its far-reaching implications for diplomacy, foreign policy, conflict resolution, human rights, and freedom of expression.

B. Terrorism and Social Media Content Moderation

Terrorism related content moderation developed in response to international concerns about non-state armed groups such as Al-Qaeda and Da'esh utilizing social media and the internet as a means to publish propaganda, engage in recruiting, and plan or encourage violent attacks. Under pressure from the United States and other governments, including threats of legal liability, social media companies implemented content moderation policies for dangerous or violent users or content based on underlying government counterterrorism law. Initially, public and private actors had a shared interest: "to remove terrorist content as swiftly as possible, or, ideally, to prevent it from appearing in the first place."[153] Platforms were a "key frontline in the struggle between terrorist organisations and the governments seeking to rein them in."[154] At the time, the U.S. Government relied heavily on the private sector to carry out online counterterrorism efforts, in part because private entities are legally permitted to moderate or restrict speech in ways that would be constitutionally prohibited for the government.[155]

To understand the basis for lists such as Meta's DOI list, this chapter must examine the underlying government structures and regulations that influence or inform these policies. Sanctions (or designations) are a means to compel or deter behaviour by imposing either broad restrictions on a country, or targeted sanctions on individuals or organisations. Sanctions occur under a number of areas: terrorism, organised crime, drug trafficking, corruption, war crimes, and Global Magnitsky, which focuses on the individuals and entities responsible for the most serious human rights abuses. These designations all inform

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[153] Stuart Macdonald et al., *Regulating Terrorist Content on Social Media: Automation and the Rule of Law*, 15 INT'L J. L. IN CONTEXT 183, 184 (2019).
[154] Borelli, *supra* note 133, at 2880.
[155] CLIFFORD, *supra* note 148.

a platform's decision as to who is deemed dangerous or prohibited from engaging with the platform.

Designations and sanctions, also called "listing," may be imposed by the United Nations, individual countries, or regional blocs such as the European Union. The penalties for designated individuals or entities include arms embargoes, trade restrictions, asset freezes, prohibitions on business transactions or access to financial markets, criminalization of material support or association, and visa or travel bans. Licenses are general or specific exemptions crafted to allow for humanitarian or other activities that would otherwise be prohibited, most importantly to enable aid during times of war. As the U.S. and U.N. frameworks are the most applicable to Meta's polices and practices (as a U.S. headquartered company), this chapter utilizes the language of those systems.

For decades, counterterrorism scholars highlighted the difficulties posed by the lack of a uniform definition of terrorism, and its potential for biased application in the face of revolutionaries or misuse of counterterrorism laws by regimes.[156] The two relevant terrorist designations that apply to the foregoing analysis and the Taliban, specifically, are the U.S. designations of a Foreign Terrorist Organization (FTO), and a Specially Designated Global Terrorist (SDGT). A FTO is a foreign organisation that engages or intends to engage in terrorist activity that threatens the security of U.S. nationals or the national security of the United States. Similarly, SDGT designations, developed following the attacks of September 11, 2001, are based on a finding that the individual or organisation has committed or poses a risk of committing acts of terrorism or provides support or assistance to such individuals or entities.

The Taliban are designated as SDGTs and the Haqqani Network is designated as both a SDGT and a FTO.[157] The U.S. Government, via

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[156] Banchik, *supra* note 112. *See also* MacDonald, *supra* note 153.

[157] U.S. Dep't of the Treasury, Office of Foreign Assets Control, *Afghanistan Related Sanctions* (2024), https://ofac.treasury.gov/faqs/topic/8126#:~:text=The%20

extraterritorial jurisdiction, can criminally prosecute any individual or entity that engages in business or financial transactions or otherwise provides material support to a designated individual or entity, creating liability risks for platforms and social media users.

Despite exemptions or licenses, sanctions potentially limit humanitarian operations, leave vulnerable populations more dependent on sanctioned actors, frustrate diplomatic efforts, and can negatively impact peace negotiations. Designations "tend to reinforce stigmas" creating a hesitancy for governments and private actors to engage in peace negotiations with designated entities when the vilification and lack of legitimacy resulting from a terrorist designation creates an almost impossible to remove barrier to peace.[158] The U.S. Government has "taken the position that facilitating conversations [with] those who are 'designated' under the government's sanctions regimes—is a violation of federal law," making it "impossible to facilitate the vibrant political discourse necessary for genuine understanding and enabling the peacemakers of tomorrow."[159] Third parties face extensive hurdles, creating reluctance and obstacles for those engaged in peacebuilding efforts due to risk of criminal prosecution if they attempt to advise individuals or entities, begin negotiations, or facilitate peace talks.[160] Imposition of the terrorist label has the power to instill ideas and opinions on an audience, especially when a designated entity is vying for public support, further compounded when one party has control over media outlets and

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Taliban%20are%20designated%20as%20Specially%20Designated%20Global%20Terrorists%20(SDGTs,and%20Nationality%20Act%20(INA).

[158] Sophie Haspeslagh, *U.S. Terrorist Designation for Houthis is Bad for Yemen, Even Beyond Crippling Aid Efforts*, JUST SEC. (Jan. 25, 2021), https://www.justsecurity.org/74340/us-terrorist-designation-for-houthis-is-bad-for-yemen-even-beyond-crippling-aid-efforts/. *See also* Delaney Simon, *America's Sanctions Habit is Hurting Peacemaking*, JUST SEC. (Apr. 24 2024), https://www.justsecurity.org/94952/americas-sanctions-habit-is-hurting-peacemaking/.

[159] Nicholas Noe & Joshua Andresen, *Talking to the "Enemy" Shouldn't Be Illegal*, JUST SEC. (April 8, 2024), https://www.justsecurity.org/94412/talking-to-the-enemy-shouldnt-be-illegal/.

[160] Haspeslagh, *Linguistic Ceasefire*, *supra* note 111. *See also* Noe, *supra* note 159.

narratives reaching the public.[161] A long history of civil wars and rebellions demonstrates how "yesterday's 'terrorists' can become today's politicians," referencing Nelson Mandela whose decades-long struggle against apartheid, initially labeled him a terrorist, but culminated in his presidency in South Africa.[162] Further, a designation can "render its targets politically mute and place them beyond the boundaries of political participation."[163]

In an effort to address power asymmetries and counteract wartime governmental narratives that serve to dehumanize and delegitimize opposition groups, Haspeslagh introduced the concept of a "linguistic ceasefire."[164] This approach seeks to mitigate the detrimental effects of terrorist designations and to facilitate peace processes by advocating for the suspension of such labels in public discourse. The aim is to enable open, uncensored, and constructive dialogue between parties. Implementing a linguistic ceasefire requires time, strategic communication, and careful selection of language, narratives, and public statements. It also necessitates engagement with media at both the local and global levels.[165] However, the feasibility of linguistic ceasefires has been called into question in light of persistent online power dynamics and the expanding role of content moderation and platform bans. These mechanisms may obstruct peacebuilding efforts by silencing particular voices and restricting the circulation of relevant discourse in the public sphere.

C. Meta's Sanctions: The Dangerous Organisations and Individuals List

The most recent iteration of Meta's DOI policy bans "organisations or individuals that proclaim a violent mission or are engaged in

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[161] Michael V. Bhatia, *Fighting Words: Naming Terrorists, Bandits, Rebels and Other Violent Actors*, 26 THIRD WORLD Q. 5, 10 (2005).
[162] Jeroen Gunning, *A Case for Critical Terrorism Studies?*, 42 GOV'T & OPPOSITION 363, 381 (2007).
[163] Marieke de Goede, *Terrorism and Political Violence*, 30 PROSCRIPTION'S FUTURE 336, 337 (2018).
[164] Haspeslagh, *Linguistic Ceasefire*, *supra* note 111.
[165] *Id*.

violence" from having accounts or "presence" on any of Meta's platforms, or for users to glorify, support, or represent them.[166] Meta makes clear its reliance on U.S. sanctions lists with its most severe Tier 1 designation for terrorist organisations, including those designated as FTOs or SDGTs, subjecting them to the highest level of content moderation.[167]

Meta's DOI policy might allow the sharing of content referencing designated organisations or individuals as part of political discourse, reporting on activities, "peaceful advocacy for particular political outcomes," or neutrally discussing or condemning the DOIs or their activities.[168] However, a problem arises in the realities of implementation in that "the policy requires individuals to 'clearly indicate their intent' in order to avoid removal,"[169] an aspect that discriminates against those with lower literacy rates or that lack understanding of Meta's content moderation policies.

Despite the published general policies, Meta's practices as to specifically designating or listing individuals or groups are secretive and its DOI list is highly confidential. This is different from the designations by governments or international bodies, which are official regulations, made widely available to the public, and often the subject of prominent press releases or speeches by government officials. Google and Twitter are more transparent in their actual lists and reliance on government designations of terrorist organisations than Meta.[170]

A leaked version of Meta's DOI list, published by *The Intercept* in 2021, revealed that the platform's "terrorist" designations aligned almost entirely with those of the U.S. Government and were applied predominantly to individuals and groups originating from the Middle East and North Africa (MENA) region, such as Al-Qaeda, Hamas, the

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[166] Meta, *Dangerous Organisations and Individuals Policy*, https://transparency.meta.com/en-gb/policies/community-standards/dangerous-individuals-organizations/ (Last visited July 15, 2024).
[167] *Id*.
[168] *Id*.
[169] Diaz, *supra* note 133, at 5.
[170] Borelli, *supra* note 133.

Haqqani Network, the Taliban, and Da'esh.[171] In contrast, white supremacist and right-wing extremist groups were typically categorized under less severe classifications, which entailed comparatively milder content moderation measures and enforcement.[172]

Meta is widely regarded as the most proactive social media platform in regulating terrorist content. However, its policies and content removal strategies have been predominantly concentrated on groups such as Al-Qaeda and Da'esh, with limited consideration for the complexities and contextual nuances of other groups or conflict situations. While Meta asserts that it is legally obligated to censor references to groups designated as terrorist organizations by the United States, legal scholars have contested this interpretation of sanctions law, with some characterizing the claim as "fiction."[173] Meta has defended its position by stating, "we don't want to get into politics; it isn't our place to distinguish the good terrorists from the bad terrorists, those who commit violence in pursuit of a legitimate aim and those who do not."[174] Nonetheless, the platform's content moderation practices remain heavily influenced by the rhetoric of the "War on Terror," a framework historically employed by governments to shape media coverage, and appear to be increasingly applied in response to global protests, including those surrounding the war in Gaza.

Blanket content moderation policies present significant challenges due to the absence of a universally accepted definition of terrorism. This ambiguity has resulted in vague regulatory standards, inconsistent and inequitable enforcement of content moderation policies, lack of

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[171] Sam Biddle, *Revealed: Facebook's Secret Blacklist of "Dangerous Individuals and Organizations"*, THE INTERCEPT (Oct. 12 2021), https://theintercept.com/2021/10/12/facebook-secret-blacklist-dangerous/ [hereinafter Biddle, *Revealed*].

[172] Sam Biddle, *Facebook Report Concludes Company Censorship Violated Palestinian Human Rights*, INTERCEPT (Sept. 21, 2022), https://theintercept.com/2022/09/21/facebook-censorship-palestine-israel-algorithm. *See also* Biddle, *Revealed*, *supra* note 171.

[173] *Id*.

[174] Borelli, *supra* note 133, at 2884.

transparency, and overly expansive content removal practices.[175] Human rights organisations have repeatedly called on social media platforms to resist governmental pressure to apply excessively broad definitions of terrorism, emphasising that such practices often lead to the deletion of human rights documentation and the suppression of legitimate expression.[176] These concerns underscore the risk of enabling political interference in public discourse and facilitating digital censorship.[177] Meta has faced particular criticism over the opacity of its DOI list and related moderation policies. In response, the Oversight Board and numerous scholars have urged the company to make the DOI list public; an appeal Meta has consistently declined to fulfill.[178]

An increasingly pressing question arises concerning the implications for diplomatic engagement and peace negotiations when a group designated on Meta's DOI list becomes the de facto governing authority of a state, or when individuals living under such regimes seek to protest or advocate for reform. This scenario has materialized in several geopolitical contexts, including the Revolutionary Armed Forces (FARC) in Colombia, regime transitions in Myanmar, the Houthis in Yemen, the Taliban in Afghanistan, Hezbollah in Lebanon, and Hamas in Gaza. The Electronic Frontier Foundation has expressed

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[175] *Id*. *See also* Common, *supra* note 146; Amy-Louise Watkin, *Countering Online Terrorist Content: A Social Regulation Approach*, 15 POL'Y INTERNET 528 (2023).

[176] Banchik, *supra* note 112.

[177] Diaz, *supra* note 133.

[178] *Id*; Biddle, *Revealed*, *supra* note 171; Common, *supra* note 146; Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L. J. 1353 (2018); Julia Angwin & Hannes Grasseggar, *Facebook's Secret Censorship Rules Protect White Men From Hate Speech But Not Black Children*, PROPUBLICA (June 28, 2017); MacDonald, *supra* note 153; *Content Moderation in a Historic Election Year: Key Lessons for Industry*, OVERSIGHT BD. (2024), https://www.oversightboard.com/news/content-moderation-in-a-historic-election-year-key-lessons-for-industry/?_hsenc=p2ANqtz-8ZDWaBWDT71h6IONZR-OD4bVpZPsnloP7epzr2WUPJoxxQj4BgKJWAbicP8P5Pj8U9__FQ318fVcL1NonLETmOZ6V0xw&_hsmi=305317685 [hereinafter Oversight Board, *Content Moderation*]; Faiza Patel & Mary Dwyer, *So, What Does Facebook Take Down? The 'Secret' List of Dangerous Individuals and Organizations*, JUST SEC. (Nov. 1, 2021), https://www.justsecurity.org/78786/so-what-does-facebook-take-down-the-secret-list-of-dangerous-individuals-and-organizations/; West, *supra* note 130.

particular concern about the consequences of content moderation when entities classified as 'banned' by Meta subsequently assume governmental authority.[179] Such designations risk silencing not only the group itself but also citizens, civil society actors, and political opposition attempting to engage in discourse, mobilization, or reform under these regimes:

> a Lebanese citizen must carefully avoid coming across as supporting Hezbollah, one of many political parties in their country that have historically engaged in violence against civilians. An Afghan seeking essential services from their government may simply not be able to find them online. And the footage of violence committed by extremist groups diligently recorded by a Syrian citizen journalist may never see the light of day, as it will likely be blocked by an upload filter.[180]

What may be interpreted as glorification from the vantage point of U.S. based content moderators may, in certain contexts, represent mere statements of fact by individuals living under the governance of groups designated as terrorist organizations.[181] In regions where such groups wield political authority or territorial control, residents must retain the ability to share news, discuss policies and governance, and engage in public discourse, including commentary on electoral processes in which sanctioned individuals may be candidates. However, Meta's content moderation policies frequently preclude such engagement, thereby restricting information sharing and hindering public participation in diplomacy and political processes.[182] Sablosky's analysis of Meta's content moderation framework highlights the platform's failure to

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[179] Jillian York & David Greene, *Facebook's Secret Dangerous Organizations and Individuals List Creates Problems for the Company – and Its Users*, ELECTRONIC FREEDOM FOUND. (Dec. 1, 2021), https://www.eff.org/deeplinks/2021/12/facebooks-secret-dangerous-organizations-and-individuals-list-creates-problems.

[180] *Id*.

[181] Patel, *supra* note 178.

[182] Biddle, *Revealed*, *supra* note 171. *See also* Borelli, *supra* note 133; Patel, *supra* note 178.

address these challenges effectively, particularly in conflict-affected contexts such as Myanmar, where deficiencies in moderation contributed to the spread of hate speech and incitement to violence, including content amounting to incitement to genocide.[183]

A final critique of terrorism related content moderation to briefly mention is the use of technology and AI versus humans to moderate content as "AI cannot always deduce 'what supports terrorism and what does not.'"[184] Comparing statistics highlights some of the problems, because although Meta boasts that "98 or 99% of the terrorist content" it removes is identified by AI rather than a human,[185] studies also found that the "algorithms used to detect terrorist content in Arabic wrongly flag posts 77 percent of the time."[186] Unfortunately, no statistics exist as to the error rate in Pashto or Dari, the primary languages in Afghanistan.

D. The Debate About Content Moderation, Diplomacy, and the CNN Effect

As private technology companies increasingly determine the parameters of permissible news and content on their platforms, scholarly discourse has shifted from questioning whether media can influence policymaking, to the more urgent inquiry into who holds the authority to shape the news agenda.[187] Central to this debate are questions concerning whether, how, and to what extent companies should regulate speech and information.[188] As Borelli notes, "social

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[183] Sablosky, *supra* note 133.
[184] MacDonald, *supra* note 153, at 190.
[185] Katie Canales, *Mark Zuckerberg Said Content Moderation Requires "Nuances" That Consider the Intent Behind A Post, but Also Highlighted Facebook's Reliance on AI to Do That Job*, BUS. INSIDER (Mar. 25, 2021), https://www.businessinsider.com/zuckerberg-nuances-content-moderation-ai-misinformation-hearing-2021-3#:~:text=Mark%20Zuckerberg%20said%20content%20moderation,AI%20to%20do%20that%20job.
[186] Tom Simonite, *Facebook Is Everywhere; Its Moderation Is Nowhere Close*, WIRED (2021), https://www.wired.com/story/facebooks-global-reach-exceeds-linguistic-grasp/.
[187] Adam Lusk, *Moving Beyond the CNN Effect or Stuck in the Middle? How Relational Sociology Remaps Media and Security Studies*, 21 INT'L STUD. REV. 1, 6 (2019).
[188] SINGER, *supra* note 49.

media firms are left with a considerable margin of discretion to decide which political groups to silence,"[189] a discretion often exercised under governmental influence and in ways that exceed what states could legally enact themselves.[190]

Amid growing tensions between the sociopolitical use of digital platforms and the evolving regulatory landscape, Gohdes highlights a critical oversight in scholarly research: the insufficient attention paid to "how corporate interests of large internet companies affect the nature of violent conflict."[191] Although these platforms are widely utilized by state regimes, reformists, revolutionaries, and journalists alike, the profit-driven imperatives of platform owners frequently clash with principles of free expression and the goals of social movements. Such conflicts may result in reduced visibility, restricted access, or diminished media presence for particular groups, especially when their activism threatens advertising revenue or undermines business models centered on user engagement and commodified content.[192]

Social media corporations have come to resemble quasi-governments, globally regulating speech as a state would, influencing information flows, public opinion and societal action.[193] The presence of only a few dominant platforms leads to concerns that "centralised platforms operating as sites of surveillance and corporate power and control."[194] More frightening is the assertion that the world now has "a small number of politically-unaccountable technology oligarchs exercis[ing] state-like censorship powers without any similar limitation,"[195] allowing them to adjudicate "political speech claims

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[189] Borelli, *supra* note 133, at 2891.

[190] *Id*. *See also* Common, *supra* note 146; Thiago Dias Oliva, *Content Moderation Technologies: Applying Human Rights Standards to Protect Freedom of Expression*, 20 HUM. RIGHRS L. REV. 607 (2020).

[191] Gohdes, *Studying the Internet, supra* note 40, at 98.

[192] TUFEKCI, TWITTER AND TEAR GAS, *supra* note 45. *See also* West, *supra* note 130; Youmans, *supra* note 1.

[193] Caplan, *supra* note 127. *See also* Cobbe, *supra* note 42; Langvardt, *supra* note 178; Sablosky, *supra* note 133.

[194] Cobbe, *supra* note 42, at 744.

[195] Langvardt, *supra* note 178, at 1358. *See also* Barrett, *supra* note 140.

around the world with virtual impunity."[196] Additionally, a growing body of literature warns that the priorities of platforms are commercial, prioritizing profitability, reputational concerns, shareholder responsibilities, government regulation, and avoiding liability, and minimizing focus on free discourse or obligations towards promoting societal good.[197]

Growing concerns of censorship led to demands that international standards and free speech laws applicable to governments should also apply to social media platforms that "collectively make hundreds of millions of daily decisions about who gets to say what online."[198] The complexities surrounding corporate governance and the regulation of free speech on social media platforms have led many to argue that content moderation policies should be grounded in universal human rights norms and adhere to the principles of the rule of law.[199]

In response, governments have enacted, or threatened to enact, a range of regulatory measures aimed at imposing liability on social media platforms. These measures stem from growing concerns that such companies are either acting as proxies for foreign governments or assuming quasi-sovereign powers with global reach. Efforts to influence content moderation practices encompass both direct and indirect strategies, including the removal of legal immunities, the imposition of civil or criminal penalties, the invocation of antitrust legislation, and, in some cases, the outright banning of platforms.[200] Through these legal instruments, states seek to shape the behaviour of

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[196] Sablosky, *supra* note 133, at 1017.

[197] Borelli, *supra* note 133; CLIFFORD, *supra* note 148; Cobbe, *supra* note 42; Diaz, *supra* note 133; Medzini, *supra* note 135; Oliva, *supra* note 190; SINGER, *supra* note 49; Youmans, *supra* note 1.

[198] Barrett, *supra* note 140; Common, *supra* note 146; Oliva, *supra* note 190.

[199] JOAN BARATA, THE DECISIONS OF THE OVERSIGHT BOARD FROM THE PERSPECTIVE OF INTERNATIONAL HUMAN RIGHTS LAW (2022); Common, *supra* note 146; Oliva, *supra* note 190; Oversight Board, *Annual Report, supra* note 119; Watkin, *supra* note 175.

[200] CLIFFORD, *supra* note 148. *See also* Lau, *supra* note 133; Rubio, *supra* note 83; Majid Yar, *A Failure to Regulate? The Demands and Dilemmas of Tackling Illegal Content and Behaviour on Social Media*, 1 INT'L J. CYBERSECURITY INTELLIGENCE & CYBERCRIME 5 (2019).

social media companies in ways that align with national interests, thereby reasserting governmental control over the role of digital technology in diplomacy and public discourse.[201] As governments increasingly regulate platforms, they exert indirect influence over how those platforms regulate others, particularly in terms of what content is permitted in the public domain.[202] The result is a fragmented and contested regulatory landscape in which divergent legal and normative frameworks govern the corporate moderation of online speech.

Decisions surrounding social media content moderation must be understood within the broader context of regulatory compliance and state influence, whereby platforms such as Facebook are incentivized to "change [their] global content policies at the behest of other states."[203] Because Facebook is headquartered in the United States, the U.S. Government has considerable influence over its moderation policies, raising questions about the extent to which such influence may be aligned with U.S. foreign policy objectives or efforts to shape public opinion by managing media narratives and constraining digital discourse.[204]

The European Union's Digital Services Act further complicates this environment by imposing legal obligations on online service providers, including social media platforms, to manage harmful content and enforce content regulation frameworks.[205] Concurrently, recent U.S. regulations caution social media companies against enabling foreign governments to censor speech or facilitate transnational repression of users.[206] However, such measures often fail to acknowledge the U.S. Government's own involvement in directing platforms like Meta to remove content or suspend user accounts.

These regulatory developments have already provoked significant debate, particularly concerning their commercial implications, namely

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[201] Ashbrook, *supra* note 62.
[202] Medzini, *supra* note 135.
[203] Arun, *supra* note 134.
[204] *Id*.
[205] Barrett, *supra* note 140. *See also* Caplan, *supra* note 127.
[206] Rubio, *supra* note 83.

the risk of substantial financial liabilities for platforms failing to remove prohibited content, and the potential chilling effects on online expression. As Yar notes, these laws may incentivize platforms to adopt overly restrictive moderation policies, thereby increasing the likelihood of over-removal and enhancing state control over online discourse.[207] Coche similarly warns that such regulatory environments risk enabling censorship under the guise of legal compliance.[208] Even Mark Zuckerberg has acknowledged the limitations of corporate governance in this domain, stating: "I do not believe individual companies can or should be handling so many of these issues of free expression and public safety on their own,"[209] a position supported by multiple scholars.[210]

Given the capacity of social media to serve as a tool for mobilization and a platform through which dissidents can challenge authoritarian regimes and advocate for reform or revolution, many governments increasingly perceive these platforms as sources of threat or instability. Due to limited institutional capacity and resources to monitor online content independently, states often rely on social media companies to perform these functions. Consequently, platforms have effectively become proxies of governmental authority, rendering them susceptible to state manipulation and control, and in some cases functioning as a "veil for state censorship."[211]

Recent scholarship has examined the extent to which governments exploit social media for repressive purposes, prompting debate over whether digital communication technologies expand or constrain state power, or alternatively, whether they assist regimes in mitigating the effects of the CNN Effect.[212] A 2018 study by the Oxford Internet Institute found that forty-eight regimes engaged in systematic online

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[207] Yar, *supra* note 83, at 15.
[208] Coche, *supra* note 143.
[209] META, *supra,* note 151.
[210] Langvardt, *supra* note 178.
[211] Coche, *supra* note 143. *See also* Koslov, *supra* note 148.
[212] Jones, *supra* note 90. *See also* Rød, *supra* note 81; SINGER, *supra* note 49; Tufekci, *Social Media, supra* note 54.

censorship to steer public opinion, disseminate misinformation, and suppress dissent.[213]

Contrary to Diamond's characterization of social media as "Liberation Technology," emerging evidence suggests that it simultaneously operates as a form of "Repression Technology." Both democratic and authoritarian regimes have used these platforms to surveil users, monitor dissent, gather evidence against activists, infiltrate protest movements and armed groups, censor content, block access to websites, and conduct targeted surveillance.[214] Governments also intervene in content moderation processes through formal mechanisms such as takedown requests, aimed at silencing dissidents or erasing documentation of human rights abuses.[215] Meta provides limited transparency regarding the frequency and nature of such governmental requests for content removal or account suspension,[216] and scholars have noted that corporate moderation practices can unintentionally legitimize or embolden domestic censorship frameworks.[217] Meta's Oversight Board has acknowledged these concerns, concluding that "journalists, civil society groups, and political opposition must be better protected from online abuse as well as over-enforcement by social media companies."[218] Moreover, a leaked internal document from Meta in 2023 disclosed an admission that its DOI policy had inadvertently censored more speech than originally intended.[219]

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[213] SINGER, *supra* note 49, at 116. *See also* Pablo Barberá & Thomas Zeitzoff, *The New Public Address System: Why do World Leaders Adopt Social Media?*, 62 INT'L STUD. Q. 121 (2018).

[214] Anita Gohdes, *Pulling the Plug: Network Disruptions and Violence in Civil Conflict*, 52 J. PEACE RES. 352 (2015). *See also* Rød, *supra* note 81; Tonnesson, *supra* note 46; Waldman, *supra* note 145.

[215] Banchik, *supra* note 112, at 1533.

[216] West, *supra* note 130.

[217] Evelyn Douek, *More Content Moderation Is Not Always Better*, WIRED (June 2, 2021), https://www.wired.com/story/more-content-moderation-not-always-better/. *See also* Rød, *supra* note 81.

[218] Oversight Board, *Content Moderation*, *supra* note 178.

[219] Biddle, *Facebook*, *supra* note 172.

These issues converge in the following case study, which explores the 2021 Taliban takeover of Afghanistan and the ensuing struggle among governments, journalists, and civilians to access, disseminate, and advocate through digital media amidst contested narratives and competing diplomatic agendas.

VI. Case Study: Taliban Governed Afghanistan

Afghanistan presents a challenging scenario for social media content moderation: an armed group designated as a terrorist organisation and classified under Meta's DOI policy becomes the de facto government authority. Notably, this occurred via a negotiated agreement with a major world power, i.e., the United States, a nation with the most prominent influence on Meta's content moderation policies. During the negotiations of the Doha Agreement (which excluded representatives or voices from the Afghan government or Afghan society), the United States appeared to legitimise the Taliban and treat them as a governing authority by allowing them to enter into international peace agreements and giving them a voice on the international stage.

The agreement was met with widespread criticism from the international community and followed by global expressions of outrage as the world witnessed the unfolding humanitarian crisis precipitated by the Taliban's return to power. In the aftermath of the takeover, intense scrutiny surrounded foreign policy responses to the newly established Taliban government, as they rapidly abandoned key provisions of the Doha Agreement and implemented repressive measures in violation of international human rights norms.[220] In response, many states reverted to policies of diplomatic isolation, treating the Taliban as a sanctioned entity and limiting official

[220] Feresha Abbasi & Patricia Gossman, *How to Engage with the Taliban, If You Have To*, HUM. RIGHTS WATCH (July 11, 2024), https://www.hrw.org/news/2024/07/11/how-engage-taliban-if-you-have.

engagement. In mid-2025, the Taliban made the troubling decision to restrict internet access for almost all Afghans.

The Taliban's assumption of power raised significant questions regarding whether the group should continue to be banned from social media platforms and denied access to public communication channels. Particular challenges emerged in distinguishing between official accounts representing governmental functions (e.g., the Ministry of Health) and those associated with the individuals occupying those offices. Restrictions on individuals—including foreign diplomats—from engaging with the Taliban government, whether through criticism or endorsement, prompted broader concerns about the implications for foreign policy and peacebuilding efforts. Moreover, in the context of an ongoing investigation by the International Criminal Court, such limitations posed obstacles to the collection of digital evidence related to war crimes and other atrocities. Central to these debates is a larger unresolved question: who, if anyone, should possess the authority to determine access to online platforms, regulate information flows, and thereby control the extent to which the CNN Effect is manifested through social media?

A. Social Media in Pre-2021 Afghanistan

The people of Afghanistan were accustomed to the regular use of social media by the government. Almost all Afghan government entities and ministries pre-August 2021 had social media accounts and used them with great frequency to communicate with the citizens and in foreign diplomacy efforts.[221] Former President Ghani even used Facebook to announce the 2018 ceasefire with the Taliban.[222]

The Taliban has historically leveraged social media, including its "Voices of Jihad" website launched in 2010 and its official Twitter

[221] Hazrat Bahar, *Social Media and Disinformation in War Propaganda: How Afghan Government and the Taliban Use Twitter*, 47 MEDIA ASIA 34 (2020).
[222] *Id*.

account in 2011,[223] to recruit new members and spread propaganda across multiple language and platforms.[224] Social media was a tool for the Taliban to exercise soft power by broadcasting their narratives in an effort to gain global legitimacy and domestic support.[225] One study found that by 2020, "the number of tweets made by the Taliban [was] higher than that of the [Afghan] government,"[226] as the group increased its social media use to justify their fight, report on military successes, establish support, and communicate globally.[227] As of 2024, at least 2.5 million Afghans were using Meta's platforms (or eighty-one percent of social media users), and the platforms are replacing the mainstream news media as they became the prominent source of information and the primary means "for changing or making public opinion."[228] Irrespective of which entity was sharing online content, in Afghanistan, social media was a prominent source of news, information, and diplomacy, and various factions battled for control of media and policy narratives.

Historically, Afghanistan has not been prioritized within Meta's corporate policy framework. This is exemplified by a December 2020 internal memorandum on combating hate speech in Afghanistan, which acknowledged that users faced difficulties in reporting harmful content due to the absence of Facebook's community standards in Pashto or Dari, the country's two official languages.[229] It was not until

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[223] Marie Lamensch, *The Fall of Kabul: When Platforms Enable Propaganda.*, CIGI (Aug. 27, 2021), https://www.cigionline.org/articles/the-fall-of-kabul-when-platforms-enable-propaganda/?utm_source=cigi_newsletter.

[224] BRADLEY KNOPP ET AL., COMPARING TALIBAN SOCIAL MEDIA USAGE BY LANGUAGE (2023).

[225] Austin Bodetti, *The Taliban's Last Battlefield: Social Media*, DIPLOMAT (Sept. 8, 2016), https://thediplomat.com/2016/09/the-talibans-latest-battlefield-social-media/. *See also* KNOPP, *supra* note 224.

[226] Bahar, *supra* note 221, at 43.

[227] Lamensch, *supra* note 223.

[228] *Afghanistan*, MEDIA LANDSCAPES (2024), https://medialandscapes.org/country/afghanistan/media/social-networks. *See also Social Media Stats in Afghanistan – July 2025*, STATCOUNTER (2025), https://gs.statcounter.com/social-media-stats/all/afghanistan.

[229] Simonite, *supra* note 186.

2023, two years after the Taliban's return to power and following extensive content removals and user bans, that Meta translated its rules and community standards into Pashto.[230]

B. Social Media Reactions to the 2021 Taliban Takeover

In August 2021, as a historically violent organisation known for human rights violations took control of the government of Afghanistan, Meta responded quickly, dedicating a team specifically tasked with "monitoring and removing content supporting the Taliban."[231] This was an urgent problem, as the Taliban now controlled "a slew of valuable digital assets: Twitter and Facebook accounts once operated by the nation's democratically elected government."[232] The concern was widespread as to whether a privately owned social media platform should resolve the difficult question of who the legitimate government of Afghanistan is and thus allowed to operate official government social media accounts.[233] Platforms were also struggling with the rapid creation of new social media accounts affiliated with or in support of the Taliban, spreading messages of peace, celebration, praise, and optimism for reform.[234] This content arguably did not violate Meta's guidelines, but was undesirable by those with an anti-Taliban foreign policy strategy.

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[230] *Annual Report, supra* note 119.
[231] Lamensch, *supra* note 223.
[232] Abram Brown, *Twitter, Facebook May Let Taliban Control Afghan Government Social Media Accounts*, FORBES (Aug. 17, 2021), https://www.forbes.com/sites/abrambrown/2021/08/17/twitter-facebook-taliban-social-media-accounts/.
[233] *Id*. *See also* Shirin Ghaffary, *How Facebook, Twitter, and Youtube are Handling the Taliban*, VOX (Aug. 21, 2021). https://www.vox.com/recode/22630869/facebook-youtube-twitter-taliban-ban-social-media-afghanistan; Alex Hern, *Facebook No Twitter Yes: Which Tech Firms Let the Taliban Post?*, Guardian. (Aug. 18 2021), https://www.theguardian.com/world/2021/aug/18/how-are-tech-firms-dealing-with-taliban-social-media.
[234] Wayhuni, *supra* note 20.

Meta removed multiple Taliban accounts after New York Times journalists flagged the accounts[235] and closed the Facebook and Instagram accounts of state run Radio Television Afghanistan and Bakhtar News Agency, both of which were set up by the previous Afghan government, and "left for the Taliban, who used them to disseminate news of their [IEA] government."[236] Twitter, on the other hand, allowed accounts by senior Taliban and Haqqani leaders, but noted that it would focus on applying its moderation policies with regard to violent, hateful content, rather than the identity of the account holder.[237] Twitter's defense to allowing the Taliban maintain its accounts was that "[i]f the NATO coalition could tell its side of the story in Afghanistan, the thinking went, why not the Taliban?"[238] Contrary to this, Meta defended its ban on the Taliban and Haqqani networks because the company "does not make decisions about the recognised government in any particular country but instead respects the authority of the international community in making these determinations."[239] What remains unclear is who or what constitutes the international community and how this determination of authority is made.

As of 2021, numerous leaders affiliated with the Taliban and the Haqqani Network were subject to bans on Facebook due to their designation as terrorist entities.[240] Meta's position on the matter has been explicit: "[t]he Taliban is sanctioned as a terrorist organisation under U.S. law, and they are banned from using our services under our Dangerous Organizations policy . . . we remove accounts maintained by or on behalf of the Taliban, and prohibit praise, support, and representation of them."[241] Analysis of the author's data reveals that

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[235] Sam Shead, *Facebook, TikTok Won't Lift Ban on Posts That Promote Taliban after the Fall of Afghanistan*, CNBC (Aug. 18, 2021), https://www.cnbc.com/2021/08/17/taliban-content-banned-on-facebook-instagram-whatsapp.html.
[236] Akmal Dawi, *Are the Taliban Losing Their Digital Clout?*, VOA (July 28, 2022), https://www.voanews.com/a/are-taliban-losing-their-digital-clout/6676585.html.
[237] KNOPP, *supra* note 224. *See also* Shead, *supra* note 235; Wayhuni, *supra* note 20.
[238] SINGER, *supra* note 49, at 235.
[239] Lamensch, *supra* note 223. *See also* Shead, *supra* note 235.
[240] Dawi, *supra* note 236. *See also* U.S. Dep't of the Treasury, *supra* note 157.
[241] Dawi, *supra* note 236. *See also* Shead, *supra* note 235.

several individuals associated with the Taliban and the Haqqani Network, some of whom have been designated by the U.S. Government, currently occupy senior positions within the IEA Government. A comparison of the 2021 leaked Meta DOI list with current U.S. sanctions databases indicates that while the majority of Taliban- and Haqqani-affiliated persons or entities included on Meta's list are currently under U.S. sanctions, a notable subset of those listed by Meta are not individually sanctioned. Nevertheless, these individuals may still fall within the scope of broader organizational designations.

Meta's enforcement of its content moderation policies in Afghanistan was marked by inconsistency, and, in many cases, the outcomes undermined the company's stated objectives. Reports indicate that the platform removed content critical of the Taliban regime and suspended the accounts of anti-Taliban activists solely due to their use of the term "Taliban," even though the content's oppositional or informative nature did not otherwise violate the Community Standards.[242] Additionally, Meta reportedly blocked posts disseminating safety and security information from official government sources, including one that shared an IEA government hotline for reporting violence and looting. These removals occurred not because of the content itself, but as a consequence of the blanket prohibition against any presence by the Taliban on the platform.[243]

Further inconsistencies were revealed when Business Insider reported that Facebook allowed certain Taliban government communications related to public health and traffic regulations to remain accessible.[244] In response to such criticisms, Meta stated: "We've

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[242] Lau, *supra* note 133; *Mention of the Taliban,* OVERSIGHT BD. (Sept. 15, 2022); Jalal Nazari, *Don't Say 'Taliban': Facebook Suppresses Afghan Activists and Artists Leading the Resistance*, Toronto Star (Oct. 3, 2021), https://www.thestar.com/news/world/don-t-say-taliban-facebook-suppresses-afghan-activists-and-artists-leading-the-resistance/article_36ab40a7-e603-5b93-9fb7-56f67e47a3ec.html.

[243] Hern, *supra* note 233.

[244] Isobel Hamilton, *Facebook Made Niche Exceptions to Its Taliban Ban, Internal Documents Show*, BUS. INSIDER (Nov. 24 2021), https://www.businessinsider.com/facebook-exceptions-to-its-taliban-ban-report-the-intercept-2021-11?r=US&IR=T.

allowed some content about the provision of essential public services in Afghanistan," while simultaneously disabling or removing the pages of several governmental ministries.[245] These inconsistent enforcement practices, compounded by the use of automated moderation technologies and AI, raised concerns that Meta's policies were obstructing the delivery of essential services to the Afghan population and impeding the ability of civil society actors to document and disseminate information about abuses under the Taliban regime.[246] Ultimately, Meta was perceived by some observers as unilaterally controlling the flow of information from the Taliban government and interfering with the communication infrastructure of a sovereign state. This control extended not only to official government messaging but also to oppositional voices, thereby shaping the digital public sphere in a highly consequential political context.

Disagreement persists as to whether Meta should continue to ban the Taliban from the platform, or allow exceptions for government functions. One concern was that "these Afghan government platforms could give Taliban social media posts an added sheen of respectability and legitimacy,"[247] particularly as the regime was attempting to re-brand itself and gain legitimacy and a more positive reputation globally. The counter-argument is that as a de facto government, the Taliban should not be subject to an absolute ban from the platform. Matt Perault from the Center on Science and Technology noted that is it "important that political organizations that run a country are able to speak so that people can see what those organizations believe."[248] The negative consequences are not just for the Taliban government, as Meta's decisions have the potential of "placing serious constraints on the public's ability to discuss or even merely depict it . . . . A commentator on television could praise the Taliban's promise of an

[245] *Id*.
[246] Bkaskar Chakravorti, *Facebook's Taliban Ban Will Prove Costly for Afghans*, FOREIGN POL'Y (Aug. 26 2021), https://foreignpolicy.com/2021/08/26/taliban-facebook-ban-social-media-afghanistan/.
[247] Brown, *supra* note 232.
[248] *Id*.

inclusive government in Afghanistan, but not on Facebook."[249] Another expert, in support of ensuring that all leaders have a presence on social media, asserts that stifling the voices of the people has a higher cost than Taliban misinformation, intimidation, and extremist propaganda.[250] Ghaffary and Shirky agree, arguing that platforms should not censor regimes per se, out of risk of "silencing the online presence of an entire country's government" and denying the opportunity of the people to engage with their government.[251]

Since 2021, Meta's Board issued multiple decisions on Taliban content. The cases all involved Meta removing content: one of a news story about the Taliban takeover,[252] another of a satirical cartoon showing Taliban oppression of women,[253] and the third of a post discussing the importance of girls' education in Afghanistan and lobbying the Taliban about education.[254] In all three decisions, the Oversight Board concluded that Meta's content moderation policies require greater nuance when applied to material involving, depicting, or referencing entities that, while previously designated as terrorist organizations, have since assumed governing authority and exercise direct control over the daily lives of the population.[255] The Board emphasised the critical importance of ensuring that journalists and members of the public retain the ability to report on current events, political developments, and societal issues via social media platforms.[256] It further determined that Meta's blanket policy on the Taliban "unjustifiably restricts freedom of expression, which

[249] Biddle, *Revealed*, *supra* note 171.
[250] Chakravorti, *supra* note 246.
[251] Ghaffary, *supra* note 233. *See also* Shirky, *supra* note 73.
[252] *Mention of the Taliban*, *supra* note 242.
[253] *Cartoon Showing Taliban*, OVERSIGHT BD. (Mar. 7, 2024), https://www.oversightboard.com/decision/fb-l0xmz0rp/.
[254] *Girls Education*, OVERSIGHT BD. (Dec. 8, 2023), https://www.oversightboard.com/decision/fb-hffvzenh/.
[255] *Id*; *Cartoon Showing Taliban, supra* note 253; *Mention of the Taliban*, *supra* note 242.
[256] *Id*.

encompasses the right to impart and receive information, including on terrorist groups."[257]

Based on initial analysis, consensus began to emerge that social media "companies aren't designed to be the ones deciding when to grant legitimacy to contentious regimes,"[258] and that social media content moderation was interfering with global dialogues and foreign diplomacy. Even Katie Harbath, former policy executive at Meta, voiced concern, stating that "you can't expect, nor should you want, social media companies to make these decisions independently."[259]

C. Social Media, Diplomacy, and Foreign Policy in Taliban Governed Afghanistan

According to the European Journalism Center, as of 2024 there were 2.5 million Afghans using Facebook, and Facebook is replacing the mainstream news media as the prominent source of information and shaping of public opinion.[260] The Taliban government, like most governments, developed a strong engagement with social media as a tool of governance and provision of services for its citizens, but also to engage in diplomacy with the international community by posting in multiple languages, conducting media interviews in English, and live-streaming press conferences.[261] Given that traditional diplomatic channels are largely closed, the Taliban pursued creative methods to communicate with a global audience, attempting to rehabilitate their negative image on human rights and violence, gain legitimacy, and

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[257] *Id.*

[258] Ghaffary, *supra* note 233.

[259] *Id*.

[260] *Afghanistan*, *supra* note 228.

[261] Paul Mozur & Zia ur-Rehman, *How the Taliban Turned Social Media Into a Tool for Control*, N. Y. TIMES, (Aug. 20, 2021), https://www.nytimes.com/2021/08/20/technology/afghanistan-taliban-social-media.html. *See also* Zakira Rasooli, *Policy Brief No.179: The Digital Battlefield: The Taliban's Case of Co-opting Social Media for Warfare and Governance*, TODA PEACE INST. (Nov. 20, 2023), https://toda.org/policy-briefs-and-resources/policy-briefs/the-digital-battlefield-the-talibans-case-of-co-opting-social-media-for-warfare-and-governance.html; Farooq Yousaf & Moheb Jabarkhail, *US Withdrawal and the Taliban Regime in Afghanistan: Future Policy Directions. Policy Brief*, 5 SWISSPEACE 1 (2021).

achieve recognition in the international community.[262] Those studying the Taliban's use of social media found that "the Taliban responds to events on social platforms faster and more actively than the Afghan government did."[263]

Between August 2021 and May 2022, Taliban related content on Twitter reached over 3.3 million accounts, as more than 126,000 Twitter accounts either shared Taliban content or posted content later shared by Taliban accounts.[264] This level of engagement on the least used social media platform in Afghanistan begs the question of how much content and dialogue is being silenced due to Meta's ban? Why should a private company or another government prohibit the world from knowing what the Taliban is about or silence individuals from challenging and criticising them?

In 2023, the Rand Institute released one of the few quantitative studies on post-2021 Taliban Twitter usage, finding that Taliban social media usage was primarily to inform and persuade domestic, regional, and international audiences about Taliban government policies and actions related to security, economics, education, and foreign diplomacy.[265] The study reveals the Taliban emphasis on meetings and ties with particular countries.[266] They maintain a strong focus on security, trade, economic investments, and humanitarian aid.[267] Simultaneously, the Taliban often uses social media to share official IEA statements on both domestic or foreign policy matters.[268] Examining topic and tone differences in Taliban posts shows a variance depending on which language the posts were in and especially as to the U.S. presence in Afghanistan (and thus the perceived target audience).[269] The study concluded that the Taliban "appear to be highly interested in

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[262] Rasooli, *supra* note 261. *See also* Wayhuni, *supra* note 20.
[263] *Id*. at 11.
[264] *Id*.
[265] KNOPP, *supra* note 224.
[266] *Id*. at 32-35.
[267] *Id*.
[268] *Id*.
[269] *Id*.

maintaining good diplomatic relations across the world and have robustly engaged a multitude of actors—from individual countries to humanitarian organizations to multinational bodies like the European Union."[270]

Rand's study highlights challenges for the international community to document ongoing atrocities and human rights abuses in Taliban-governed Afghanistan, for governments to have access to non-traditional and indirect channels to engage in diplomacy, and even for the Taliban to have a platform to set forth its own policies and narratives. One such example of this occurred when the U.N. Special Rapporteur published his 2022 Report on human rights post-Taliban. The Taliban spokesperson used Twitter to respond to and rebuke the contents of the report by putting forward facts and statistics to contradict what the report contained.[271] These tweets often claim that the sources for these reports are either fictitious or misinterpreted, all in the name of anti-Taliban propaganda.[272] However, Meta's policies limit Facebook users' ability to challenge these Taliban statements, or even view them, thus hindering public debate, decreasing awareness of false propaganda, and interfering with independent verification of reported atrocities.

The dissemination of contradictory narratives and misinformation by the Taliban through their official accounts and ministry-affiliated pages, absent mechanisms for external actors to challenge or fact-check these claims, poses a significant risk of shaping foreign policy and strategic decisions in other countries based on a unilateral perspective.[273] Some scholars have expressed concern that banning the Taliban from mainstream social media platforms may have adverse implications for intelligence gathering and international policy formulation. As Chakravorti argues, "deplatforming the group may make a monumental failure of U.S. intelligence and nation-building

[270] *Id*. at 31.
[271] Wayhuni, *supra* note 20.
[272] KNOPP, *supra* note 224, at 49. *See also* Wayhuni, *supra* note 20.
[273] Rasooli, *supra* note 261.

even worse."[274] Moreover, the restrictions imposed by Meta on Taliban-related content hinder the ability of institutions such as the Rand Corporation to conduct similar empirical analyses on Meta-owned platforms. This limitation underscores broader concerns not only about gaps in information and intelligence but also about the constraints Meta places on civic engagement and diplomatic discourse.

A comparative analysis conducted by the author of current IEA leadership and government ministries comparing U.S. and U.N. sanctions lists with Meta's 2021 DOI list revealed several noteworthy findings. Currently, seven individuals in IEA leadership are subject to U.S. sanctions, one of whom is also sanctioned by the United Nations, while an additional four are designated by the United Nations. Conversely, eighteen senior IEA officials or ministers were included in the leaked 2021 Meta DOI list. Regarding Meta platforms, no high-ranking officials or ministers were found to maintain individual profiles on Facebook or Instagram. Nonetheless, searches yielded a range of content referencing these figures, including neutral, laudatory, and critical materials, such as user posts, public commentary, video footage, and journalistic coverage. The visibility and activity of official ministry-related pages on Meta varied considerably. While no official Instagram accounts were identified, approximately half of the IEA ministries or senior offices retained publicly accessible Facebook pages. Some of these accounts have remained inactive since August 2021, effectively serving as digital relics marking the Taliban's return to power. Others, as the author found, exhibit more recent activity, with certain ministries maintaining verified pages that frequently disseminate official announcements, video content, and citizen-facing information.

Although preliminary in nature, this exploratory comparison highlights Meta's ongoing challenges in enforcing consistent moderation standards concerning Taliban-affiliated content. These inconsistencies are further exacerbated by the platform's opacity regarding its content moderation practices, particularly in relation to

[274] Chakravorti, *supra* note 246.

official ministry pages. Scholars and policymakers would find it highly valuable to observe a case in which Meta removes IEA-affiliated content, the decision is appealed to the Oversight Board, and details of the case, along with Meta's evolving policies toward the Taliban and the IEA, are made publicly available.

D. Implications of the CNN Effect and Content Moderation in Afghanistan

One of the oft-repeated concerns is the importance of unrestricted social media in countries that have strict control over mainstream media and journalists, a factor that is of utmost concern in Afghanistan. Since taking power in 2021, experts note a "Taliban clampdown on media freedom in Afghanistan."[275] News sources have been greatly reduced, with at least half of media outlets shut down by the Taliban[276] and nearly sixty percent of journalists—especially female—having fled.[277] Censorship is widespread to eliminate any reporting that is not under the government's control and approval, or in compliance with the fourteen Taliban media directives, which are primarily focused on prohibiting any criticism or opposition.[278] The Taliban prohibits foreign media from broadcasting in Afghanistan; however, foreign news agencies still have Facebook pages that can be accessed by those in the country, demonstrating the importance of social media as an alternative

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[275] *Four Journalists Arrested, Two TV Channels Closed in Latest Taliban Crackdown on Afghan Media*, REPORTERS WITHOUT BORDERS (Apr. 28, 2024), https://rsf.org/en/four-journalists-arrested-two-tv-channels-closed-latest-taliban-crackdown-afghan-media [hereinafter *Four Journalists*].

[276] Faisal Karimi, *Afghanistan's Media Crisis: How the Taliban Assaults Media Freedom*, MEDIUM (2024), https://jskfellows.stanford.edu/afghanistans-media-crisis-f36cc12d60a3.

[277] Wayhuni, *supra* note 20, at 135.

[278] *The Taliban's 17 Directives on Freedom of Media and Access to Information*, AFG. JOURNALISTS CTR. (Dec. 4, 2023). https://afjc.media/english/index.php/killed/the-taliban-s-13-directives-on-freedom-of-media-and-access-to-information. *See also*, James O'Donnell, *Amid the Taliban's Worsening Crackdown on Journalists, News in Afghanistan is Forced to Adapt*, PBS (2023), https://www.pbs.org/wgbh/frontline/article/taliban-crackdown-news-media-afghanistan/; *Four Journalists, supra* note 275.

news source for populations living under repressive government censorship.[279]

The widespread censorship and the closure of media outlets not only limited sources for independent Afghan news but also forced journalists and news organizations to adapt, blurring the lines between citizens and journalists.[280] The result was that more Afghans began turning to social media platforms for news, discourse, information sharing, and documenting atrocities, as social media is presently the only outlet for activists and those resisting the Taliban rule to raise international awareness of human rights violations.[281] Journalists in exile and others became dependent on social media to report on the Taliban, utilizing information obtained from social media posts by those who remain in Afghanistan to expose abuses and wrongdoing, pushing back against the Taliban's attempts to legitimize its rule and control the narrative.[282] Open access to social media is essential because "Facebook is one of the most popular social media platforms widely used by media outlets to disseminate news and information in Afghanistan,"[283] and a critical tool for Afghans to raise their voices, organise protests, and share personal experiences of violence they encounter. All of this is at risk should the Taliban decide to limit or prohibit social media in Afghanistan in its attempt to control the narrative and limit the online CNN Effect.

Double standards or platform-imposed censorship can backfire, resulting in unintended and damaging consequences. The Taliban has "monitored influential social media accounts and detained individuals

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[279] *CPJ Calls on Taliban to Drop Plans to Restrict Facebook Access in Afghanistan*, COMM. TO PROTECT JOURNALISTS (Apr. 8 2024), https://cpj.org/2024/04/cpj-calls-on-taliban-to-drop-plans-to-restrict-facebook-access-in-afghanistan/ [hereinafter *CPJ Calls on Taliban*].

[280] O'Donnell, *supra* note 278.

[281] Chakravorti, *supra* note 246. *See also* Roshan Noorzai & Waheed Faizi, *Taliban Facebook Plan is Attempt to Silence Critics, Journalists Say*, VOA NEWS (Apr. 11 2024), https://www.voanews.com/a/taliban-facebook-plan-is-attempt-to-silence-critics-journalists-say/7566996.html.

[282] Karimi, *supra* note 276.

[283] *CPJ Calls on Taliban, supra* note 279.

for posting criticism online,"[284] used violent tactics to halt peaceful protests, and detained journalists who criticized the regime or disobeyed Taliban media directives.[285] Censorship could result in Afghanistan blocking or banning Facebook, which would lead to even more restrictions on free speech, silencing critics, and further disrupting the ability of information from within Afghanistan to reach the outside world and enable meaningful dialogue.[286] In response to Meta's DOI policy ban, the Taliban spokesman criticized what he described as online censorship, claiming Western hypocrisy and restrictions on the Taliban's freedom of speech.[287] The IEA's Ministry of Telecommunications and Information announced a plan to limit or entirely block access to social media platforms, specifically focusing on Meta, which would further disrupt the flow of information from within Afghanistan, silence dissent, and hinder indirect channels of foreign diplomacy.[288]

Continued monitoring of social media provides useful intelligence for policy leaders and diplomats to understand how Taliban leadership and governance are evolving and thus how other nations can engage. Banning the Taliban may also have intelligence gathering implications, limiting the ability to analyze statements, speeches, or press conferences.[289] Monitoring social media "demonstrated an ability to identify Taliban leadership policies, to highlight efforts to manage messaging to different constituencies, and to expose potentially conflicting views between and among leaders."[290]

Many official diplomatic channels with Afghanistan remain closed as the questions of legitimization and formal recognition continue to

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[284] O'Donnell, *supra* note 278.
[285] *Id*; *Four Journalists, supra* note 275.
[286] Chakravorti, *supra* note 246. *See also* Mozur, *supra* note 261; Noorzai, *supra* note 282.
[287] Dawi, *supra* note 236. *See also* Shead, *supra* note 235.
[288] Chakravorti, *supra* note 246. *See also CPJ Calls on Taliban, supra* note 279; Mozur, *supra* note 261.
[289] Chakravorti, *supra* note 246.
[290] KNOPP, *supra* note 224, at 54.

plague governments around the world.[291] Although the United States legitimized the Taliban during the Doha peace talks,[292] it now refuses to recognise the IEA or the Taliban diplomatically. As one analyst observed, "[f]ormal diplomatic recognition of the Taliban could take years, if it ever happens,"[293] although "a majority of governments now appear to favour some level of engagement, while staying away from formal recognition."[294]

Despite opposition to Taliban policies and grave concerns about human rights abuses, Afghanistan experts are generally calling for diplomatic and civilian communication and engagement with the Taliban IEA Government. Such engagement would benefit from and require a revision in Meta's policy.[295] Haqpal, a former Afghan diplomat, notes that due to a significant shift in the political landscape, a pressing need exists for innovative and inclusive strategies to navigate the complexities of post-conflict scenarios that requiring "sustained dialogue, collaboration, and unwavering commitment from all stakeholders and sides," and that these strategies "invoke intra-Afghan dialogue, with all sides of the conflict."[296] Global actors must take steps towards peace, stability, and security, because "whatever the world

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[291] Lama El Baz, *Reflecting on Two Years of Taliban Rule*, CHI. COUNCIL GLOB. AFF. (Sept. 11, 2023). https://globalaffairs.org/commentary-and-analysis/blogs/reflecting-two-years-taliban-rule. *See also* Graeme Smith & Ibraheem Bahiss, *The World Has No Choice But to Work With the Taliban: How to Help Afghanistan Without Normalizing Relations*, FOREIGN AFF. (2023), https://www.foreignaffairs.com/afghanistan/world-has-no-choice-work-taliban.

[292] Yousaf, *supra* note 261.

[293] Smith, *supra* note 291.

[294] Sultan Barakat & Antonio Giustozzi, *Beyond Deadlock: Opportunities for Western Engagement with the Taliban*, ROYAL UNITED SERV. INST. (May 30, 2024). https://rusi.org/explore-our-research/publications/emerging-insights/beyond-deadlock-opportunities-western-engagement-taliban.

[295] Nazifa Haqpal, *Navigating the Afghanistan Conundrum by Engaging With Afghanistan's Next Generation*, DIPLOMAT (May 29, 2024), https://thediplomat.com/2024/05/navigating-the-afghanistan-conundrum-by-engaging-with-afghanistans-next-generation/. *See also* KNOPP, *supra* note 224; Smith, *supra* note 291; Yousaf, *supra* note 261.

[296] *Id*.

thinks, the Taliban now run a country, with aims and urgent needs."[297] Security risks are heightened if Afghanistan becomes a failed state, and "global isolation will only make the Taliban more difficult to work with."[298]

Some countries in 2024 "informally recognized the Taliban and stepped up outreach to the IEA to further their own economic, trade, and security interests."[299] Donors in the humanitarian sector "maintain[] a distinction between isolating the Taliban authorities[,] trying not to cause further misery for Afghans."[300] Thus, given the ongoing debate and pressures on all sides, including the Afghan diaspora, and the lack of formal diplomatic channels, the diplomatic benefits of social media and its related CNN Effect remain vital as a means of sustaining minimal engagement, enabling informal diplomacy, and keeping global populations informed so they can influence government policies toward the Taliban.

E. Reflections on Social Media and Diplomacy in Taliban Afghanistan

Meta's content moderation policies concerning the Taliban risk undermining the CNN effect of social media by restricting the flow of vital information to and from the Afghan population, both domestically and within the diaspora. By limiting the Taliban's presence on its platforms, Meta, a private corporation, effectively exercises significant control over what a governing authority can communicate publicly. This not only obstructs global visibility into potential human rights violations and restrictive governance practices but also hampers the ability of Afghan citizens to express dissent, challenge disinformation, or engage in civic discourse. Such restrictions impair the public's

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[297] Smith, *supra* note 291.
[298] *Id*.
[299] Giorgio Cafiero, *Is It Time for the U.S. To Recognize the Taliban?*, RESPONSIBLE STATECRAFT (July 8, 2024), https://responsiblestatecraft.org/afghanistan-taliban-sanctions/.
[300] Abbasi, *supra* note 220.

capacity to hold de facto authorities accountable and diminish opportunities for political engagement, both online and offline.

The suppression of information flows also presents broader geopolitical ramifications. It obstructs diplomatic, intelligence, and policy-making processes by depriving stakeholders of timely, unfiltered, and first-hand accounts of developments on the ground. Furthermore, this form of moderation poses potential legal consequences; for example, the International Criminal Court has requested digital evidence for ongoing investigations related to Afghanistan. The removal of relevant content from social media platforms may therefore interfere with future prosecutions of Taliban officials and hinder efforts toward international justice and accountability.

Reflecting retrospectively, it is worth considering whether the Taliban's full participation on social media could have altered the international community's perception ahead of the 2020 Doha Agreement. Greater visibility into the group's rhetoric and activities could have provided a more accurate assessment of the level of popular support for the Taliban and their intended approach to governance. Unrestricted access to the Taliban's digital communications could have enabled intelligence agencies, diplomats, and civil society actors to make better-informed decisions regarding the Doha Agreement and the subsequent U.S. withdrawal from Afghanistan. These considerations raise critical questions about the extent to which U.S. influence shaped Meta's moderation policies and whether such interventions were, in part, aimed at mitigating the CNN effect to maintain domestic and international support for controversial foreign policy decisions.

The issue of content moderation also directly impacts the implementation of the Doha Agreement itself, which contains provisions for democratic elections in Afghanistan. Should such elections occur in the future, they would likely include candidates affiliated with the Taliban and the Haqqani network. A meaningful electoral process requires that all political actors, including controversial or bad actors, have equitable access to public platforms to

articulate their positions and be scrutinized by the electorate. In the absence of direct diplomatic channels, social media provides an indispensable mechanism for signaling intentions, fostering public debate, and enhancing transparency.

Access to open digital forums not only supports international diplomatic and legal processes but also serves as a critical resource for Afghan civilians. This access enables the population to publicly denounce injustices, deliberate on national identity and policy direction, and assert agency over their political future. Denying such space, through decisions made by foreign governments or private corporations, risks silencing those most affected by conflict and stifling democratic participation at a crucial juncture in Afghanistan's history.

Ultimately, the facilitation of open dialogue and the preservation of digital spaces for free expression are essential. These processes must be led by the Afghan people themselves, free from undue external censorship or manipulation.

VII. CONCLUSION

The historical tendency of governments to control narratives and regulate information flows has led to a persistent power struggle, especially as emerging media platforms and digital technologies diminish state control. As a result, populations are increasingly active in disseminating information and interacting with governmental institutions in a fast-paced environment characterized by real-time engagement. In light of these developments, it is imperative to continue to critically examine both governmental and private sector restrictions on media and speech across democratic and autocratic regimes. This scrutiny is essential in understanding the ongoing contest between state authorities and media actors over the extent and impact of the CNN effect, that is, the influence of media on public awareness and foreign policy formation.

In democratic contexts, content moderation or censorship often occurs under the pretext of national security or counterterrorism. Such

actions warrant deeper investigation to assess the legitimacy of the motives behind them, their broader societal impacts, and their alignment with democratic values and international human rights standards.

Given the complex global landscape, wherein proscribed entities may simultaneously function as governing authorities, further scholarly inquiry is needed into whether Meta's DOI policy sufficiently reflects these nuances. Effective diplomacy, foreign policy, and peacebuilding depend on the free flow of information and the ability of all stakeholders to participate in informed public discourse, including both critique and commendation of governmental actions.

As technological innovation continues to outpace academic inquiry, numerous areas remain underexplored. These include the application of AI and other technologies in content moderation, the implications of sanctions and proscription mechanisms, and pathways for the rehabilitation or removal of such designations during peace and reconciliation processes. Additionally, researchers must conduct comprehensive studies into the role of social media during political unrest and armed conflict, particularly regarding its manipulation by non-state armed groups. The literature on post-conflict reconstruction and reconciliation has yet to adequately address how social media might serve as a constructive tool in these contexts.

Current debates also center on inconsistencies in freedom of expression laws and the extent to which security-oriented legislation or corporate policies may inadvertently curtail civil liberties and inhibit meaningful public discourse. The situation in Afghanistan exemplifies the challenges inherent in moderating content related to entities that serve as both designated organizations and de facto governing bodies. In such scenarios, access to social and traditional media is vital for civilian populations during conflict, as it helps counteract the monopolization of narratives and promotes transparency.

Content documents atrocities during armed conflicts should not automatically be classified as support for dangerous groups. Even within the framework of sanctions regimes, exceptions are recognised

for humanitarian, democratic, and human rights-related activities. Meta's DOI policy, if applied rigidly, risks suppressing a wide range of legitimate content, including statements from international organizations and reputable media sources. Such practices may contravene human rights principles, hinder atrocity documentation, obstruct peace negotiations, and reduce accountability.

Nonetheless, these concerns must be weighed against the foundational objectives of sanctions and designations. Governments are urged to re-evaluate these policies, particularly when implemented unilaterally during armed conflict, due to their far-reaching consequences for diplomacy, freedom of expression, foreign policy, and peacebuilding. Limiting access to accurate information and objective realities undermines the foundational democratic principle of an informed and engaged citizenry.

Freedom of expression is a cornerstone of democratic governance and aids accountability efforts and transparency in armed conflict. Citizens must have access to uncensored information, the freedom to document atrocities, and a channel to influence government policy, conditions that are fostered when the CNN effect and its online counterpart operate without undue restriction by public or private actors.

Chapter 5. Reinforcing the Ban: Challenges and Opportunities for Accountability in Wars of Aggression[1]

Federica D'Alessandra

I. Introduction

In international law, the large-scale threat or use of military force by a State against the territorial sovereignty or political independence of another State is unlawful and is known as international or inter-state aggression. For most of history, States' ability to resort to war was nearly unfettered, with inter-state war being so prevalent and recurring that, in his 1832 treatise *On War*, renowned Prussian General Carl von Clausewitz famously described it as the "continuation of politics by other means."[2] Today, the prohibition against inter-state aggression is a bedrock principle of international law binding on all States, which is both reflective of customary international law and enshrined in treaty instruments, most notably, though not exclusively, the U.N. Charter.[3] Post-World War II, inter-state aggression is also recognized as an international crime, of which Axis leaders were tried and convicted at Tokyo and Nuremberg. After the Nuremberg trials, however, its definition became contested and its prosecution became controversial to the point that, until 2025, only the statute of the International

[1] The author and editor would like to extend a special thank you to Major Grant Jenson, Attorney Advisor at the Marine Corps Logistics Command and United States Army Reserve Judge Advocate, for serving as lead editor of this chapter.

[2] CARL VON CLAUSEWITZ, ON WAR 280 (1832).

[3] Albrecht Randelzhofer & Oliver Dörr, *Article 2(4), in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 230 (Bruno Simma et al. eds., 3d ed. 2012).

Criminal Court contained provisions explicitly addressing the crime. The jurisdictional regime for the crime is nonetheless so narrow that, following Russia's 2022 full-scale invasion of Ukraine, the court could not exercise jurisdiction over Russia's aggression, even though it had jurisdiction over other statutory crimes committed on its territory and arising, precisely, from the unlawful invasion.

In many ways, Russia's 2022 invasion of Ukraine was indeed a watershed moment for accountability for aggressive wars. Although the prohibition against the use of force among States had been eroding for some time,[4] inter-state aggression had been rare post-World War II, and no international border belonging to a U.N. Member State had been changed by military force since 1945.[5] Russia's attempt to "conquer" Ukraine was such a shock to the international community as to revive international debates on accountability for the conduct. The invasion energized the international community's will to re-commit to the prohibition against aggression as one of the most foundational tenets of global order. This was particularly so given the gravity of Russia's aggression, its role as a permanent member of the U.N. Security Council, and the catastrophic consequences the war wreaked on the global economy and world order. Debates spanned avenues to hold Russian leaders and the Russian State accountable politically, judicially, and non-judicially. As they unfolded, they revealed the many challenges and controversies of pursuing accountability for inter-state aggression against a military and geopolitical heavyweight with the power to veto multilateral action by the United Nations. At the same time, accountability debates led to unprecedented mobilization by Ukraine's international partners, and to a series of unprecedented policy and institutional innovations, particularly within Europe as the directly affected region. As geostrategic competition and geopolitical tensions continue to intensify around the world, violations of the prohibitions against the use of force have become more frequent and,

[4] Oona Hathaway, *War Unbound: Gaza, Ukraine, and the Breakdown of International Law*, *FOREIGN AFF.* (Apr. 23, 2024).

[5] Oona Hathway & Scott Shapiro, *Might Unmakes Right: The Catastrophic Collapse of Norms Against the Use of Force*, *FOREIGN AFF.* (June 24, 2025).

after decades of decline, inter-state war is once again on the rise.[6] Accordingly, debates on accountability for inter-state aggression are destined to continue for some time.

Against this background, this chapter is intended as a contribution to ongoing and future debates on the issue. It will first proceed with a brief overview of the legal history of aggression. It will then turn to reviewing the only two existing judicial avenues to prosecute the crime of aggression—namely, the International Criminal Court and the Special Aggression Tribunal for Ukraine—discussing both institutional successes and some of their main challenges. The chapter will then turn to alternative international law remedies for aggression and reflect on the role of U.N. vetoes, as well as the broader institutional and geopolitical dynamics which often hinder accountability for international aggression.

II. A brief legal history of aggression

The outlawing of aggressive war in international affairs is a relatively recent development. Although its history traces back at least to the middle ages, when Just War Theory began to articulate conditions under which the resort to war was *morally* "righteous,"[7] prior to the twentieth century, there was no international *legal* regulation of the use of force.[8] States could lawfully resort to military force to pursue a multitude of objectives ranging from territorial expansion to "debt collection and the enforcement of treaty provisions even when concluded under duress."[9] It was only at the turn of the nineteenth century that consensus began to galvanize around the regulation of war

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[6] *Id*.

[7] Randall Lesaffer, *Too Much History: From War as Sanction to the Sanctioning of War*, *in* THE OXFORD HANDBOOK ON THE USE OF FORCE IN INTERNATIONAL LAW 35 (Marc Weller ed., 2015).

[8] Erin Pobjie, *How and When Did the Customary Prohibition of the Use of Force Emerge?: The Status of the Customary Norm Pre-1945, in* PROHIBITED FORCE: THE MEANING OF 'USE OF FORCE' IN INTERNATIONAL LAW 17-29 (2024).

[9] Oona Hathaway & Scott Shapiro, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 51 (2017).

as a legal subject matter and, in 1899 and 1907, the Hague Peace Conferences made early attempts to restrict States' freedom to resort to force. Ultimately, most provisions contained in the final conventions text concerned regulating the *jus in bello*, not the *jus ad bellum*, except for the Hague Convention III of 1907, which codified rules for the opening of hostilities,[10] marking the first step in a long process aimed to regulate, and to ultimately prohibit, the use of force among States.

It was not until the end of World War I that the international community began to seriously question the role of war in foreign relations. In 1919, the Covenant of the League of Nations became the first international treaty imposing restraint on the use of war as an instrument of international politics, to crystallize the concept of inter-state aggression, and to envision the first embryonic system of collective maintenance of international peace and security.[11] Another key legal development was the 1928 Paris Treaty also known as the Kellogg-Briand Pact, which imposed a binding legal obligation on its parties to "renounce war as an instrument of national policy."[12] In the inter-war period, two regional anti-war treaties also emerged in the Americas and the Soviet Union: the Anti-War Treaty of Non-aggression and Conciliation, proposed by Argentine Foreign Minister Saavedra Lamas in the midst of the Chaco War between Bolivia and Paraguay;[13] and the Litvinov treaty, promoted by Soviet Foreign Minister Maxim Litvinov, which proposed the first explicit legal definition of aggression.[14]

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[10] By regulating *how* to open hostilities, in fact the Convention provided a substantive definition of what constituted an illegal use of force at that time, e.g. any war launched without a previous declaration of war. *See* Convention Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 205 Consol. T.S. 263.

[11] The treaty defined "external aggression" as "any war or threat of war" against "the territorial integrity and existing political independence" of a League Member. Covenant of the League of Nations arts. 10-11, 13 (June 28, 1919).

[12] General Treaty for Renunciation of War, Aug. 27, 1928, 94 L.N.T.S. 57.

[13] Anti-War Treaty of Non-Aggression and Conciliation, Oct. 10, 1933.

[14] Protocol for the Immediate Entry into Force of the Treaty of Paris of Aug. 27, 1928, Regarding the Renunciation of War as an Instrument of National Policy art. 2 (1929) provided that

Although important as early efforts to restrain the waging of inter-state war, the treaties came to be seen as lacking real enforcement mechanisms, eventually leading the international community to temporarily lose faith in the power of international law and institutions to regulate and address inter-state conflict.[15]

The horrors of World War II, however, brought back the urgency to regulate the recourse to war by States and, in 1945, the United Nations was established as the world's new collective security organization, enshrining the prohibition against the use of force at the heart of the U.N. Charter.[16] The year 1945 was also watershed in that it saw the creation of the International Military Tribunal (IMT) at Nuremberg, established by the victorious Allies to criminally prosecute Axis leaders accused of violating the laws of war.[17] Followed by the International Military Tribunal for the Far East and the Nuremberg Military Tribunal, both set up by the United States as the Occupying Power,[18] these criminal tribunals became foundational precedents in international

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> the aggressor in an international conflict shall, subject to the agreements in force between the parties to the dispute, be considered to be State which is the first to commit any of the following actions: (1) Declaration of war upon another State; (2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State; (3) Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State; (4) Naval blockade of the coasts or ports of another State; (5) Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

While art. 3 of the same stipulated that "No political, military, economic or other considerations may serve as an excuse or justification for the aggression referred to in Article 2."

[15] Pobjie, *supra* note 8, at 20.

[16] Charter of the United Nations art. 2(4), June 26, 1945, 59 Stat. 1031, 1 U.N.T.S. 16.

[17] Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter IMT Charter].

[18] Control Council Law No. 10, Dec. 20, 1945; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946.

law,[19] legally sanctioning the notion that individual criminal liability, alongside State responsibility for internationally wrongful acts, also attaches to breaches of international law so serious as to amount to international crimes.[20]

More specifically, the IMT Charter defined "crimes against peace," as inter-state aggression was known at Nuremberg, as the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[21] The Axis' waging of aggressive war in Europe and the Pacific was so central to the proceedings that the Nuremberg judgement ultimately described crimes against peace as "the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[22] Yet, even as legal definitions for other international crimes addressed at Nuremberg—namely, war crimes, genocide,[23] and crimes against

[19] Prior to the Nuremberg trials, there are only scant examples of attempts to try high level officials for breaches of the peace. Discussions to this effect did materialize, for example, after World War I, when the idea of putting the German Kaiser on trial for initiating the war was discussed as part of the post-War settlement. Ultimately, however, the Kaiser was simply exiled and received asylum in the Netherlands. *See* Bohrer Z., *The (Failed) Attempt to Try the Kaiser and the Long (Forgotten) History of International Criminal Law: Thoughts Following the Trial of the Kaiser by William A Schabas*. 53 ISR. L. REV. 159, 159-86 (2020).

[20] *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, in 1950 2 Y.B. Int'l L. Comm'n 374, U.N. Doc. A/CN.4/SER.A/1950/Add.1, ¶ 97.

[21] IMT Charter art. 6(a).

[22] IMT, Trial of the Major War Criminals before the International Military Tribunal: 14 November 1945–1 October 1946, vol. 1, (Nuremberg: 1947), 186.

[23] Genocide was not formally charged at Nuremberg because a legal definition of the crime was only agreed upon in 1948 with the relevant U.N. convention. Thus, the crime of genocide did not appear in the Nuremberg statute as a separate offense. Genocidal acts were however a key component of the Nuremberg proceedings and were addressed as part of the prosecution's charges of crimes against humanity. *See* Federica D'Alessandra, *Ben Ferencz's Pioneering Transitional Justice Legacy, Including and Beyond Accountability*, 8 CARDOZO INT'L & COMP. L. REV. 683 (2025).

humanity—crystallized in subsequent treaty law,[24] the legal definition of inter-state aggression, and particularly of the *crime* of aggression, has been fraught with controversy ever since. This, primarily, is due to the nature of aggression as a State act with self-evident political implications.[25]

For example, although Article 1(1) of the U.N. Charter lists the "suppression of acts of aggression or other breaches of the peace" as a core purpose of the United Nations, the U.N. Charter does not directly define what constitutes inter-state aggression. Rather, Article 2(4) contains a general prohibition against the threat or use of force by States, subject only to two possible exceptions: individual or collective self-defense, and under authorization by the U.N. Security Council.[26] Under the Charter, it is the U.N. Security Council that "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression," and "make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security."[27]

To aid the Council in dispensing its obligations, in 1974, the U.N. General Assembly passed Resolution 3314, defining aggression as the "threat or use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State," and listing a series of "acts" amounting to inter-state aggression. These include: the military invasion of the territory of another State, or any occupation or annexation resulting from such invasion; bombardments; blockades; an armed attack on the land, sea or air forces, or marine and air fleets of another State; the sending by or on behalf of a State of armed

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[24] *See, e.g.* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, May 25, 1993; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Nov. 8, 1994; Rome Statute of the International Criminal Court art. 8 bis(1), July 17, 1998, 2187 U.N.T.S. 90, amended June 10, 2010 [hereinafter R.S.].

[25] Federica D'Alessandra, *Pursuing Accountability for the Crime of Aggression Against Ukraine*, 5 REV. EUR. DROIT INT'L 1 (2023).

[26] U.N. Charter arts. 1, 2, ¶ 4, 42, 51.

[27] *Id.* art. 39.

bands, groups, irregulars or mercenaries; the use of the armed forces of one State within the territory of another State without the consent of the receiving State; and the action of a State in allowing its territory to be used by another State for perpetrating an act of aggression against a third State.[28] However, even though the definition of aggression provided in the U.N. resolution was passed by consensus, the resolution is a non-binding instrument. More importantly, it was developed by States to address conduct that would give rise to *State* responsibility under international law and was thus deemed inappropriate to capture the legal definition of the underlying *criminal* offense.[29]

Debates on the definition of the crime had instead proceeded in parallel since the 1950s when, at the request of the General Assembly, the U.N. International Law Commission (ILC) began drafting statutes for a permanent international criminal court to be established after the Nuremberg trials.[30] As the Cold War intensified, the idea of a permanent criminal court was shelved for some time. That was, until the collapse of the Soviet Union brought about a new wave of engagement at the U.N. Security Council. Throughout the 1990s, in no small part thanks to U.S. leadership, the Nuremberg precedent was finally revived through a series of international criminal tribunals set up to address breaches of international law and international peace and security arising from various conflicts, including the Rwandan genocide, the war in the former Yugoslavia, Pol Pot's legacy in Cambodia, and the war in Sierra Leone, among others.[31] Although none of these courts were concerned with the crime of aggression, given they

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[28] G.A. Res. 3314 (XXIX) art. 3 (Dec. 14, 1974).

[29] THE CRIME OF AGGRESSION: A COMMENTARY (Claus Kress & Stefan Barriga eds., 2016).

[30] Draft Code of Offences Against the Peace and Security of Mankind, in 1954 2 Y.B. Int'l L. Comm'n.

[31] Leading to the creation of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC), among others. *See* THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW (Milena Sterio & Michael Scharf eds., 2019).

were chiefly established to address infra-state—rather than inter-state—conflicts, the subsequent establishment of multiple ad hoc tribunals led to re-opening negotiations for the establishment of a permanent one.[32] In 1996, the ILC presented its final draft statute to the General Assembly and, in 1998, the Rome Statute of the International Criminal Court (ICC) was finalized and adopted by a vote of 120 to 7, with twenty-one countries abstaining. Following sixty ratifications, the Rome Statute entered into force on 1 July 2002 and the ICC was formally established.[33]

Even though the 1998 Rome Statute included provisions recognizing the crime of aggression as falling under the court's jurisdiction, States could not agree on a substantive definition of the crime, nor on acceptable terms for the court's exercise of jurisdiction over the offense. It took many additional years of negotiations to achieve this but, in 2010, provisions defining the crime of aggression for the purposes of the Rome Statute and setting forth conditions for the court's exercise of jurisdiction over the crime—collectively known as the Kampala amendments on aggression—were ultimately approved unanimously by all States Parties to the court, as well as non-States Parties which also participated in the negotiations, including the United States, Russia, and China.[34]

III. The crime of aggression and the International Criminal Court

The ICC definition of the crime of aggression makes it clear that liability for the crime of aggression attaches only to those in a position to "effectively *exercise control over* or to *direct* the political or military

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[32] Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L.F. 1 (1999).

[33] *Id*.

[34] Christian Wenaweser & Stefan Barriga, *18 Forks in the Road: Personal Reflection on the Kampala Amendments on the Crime of Aggression, in* FOR THE SAKE OF PRESENT AND FUTURE GENERATIONS 281-97 (Suzannah Linton et al. eds., 2015).

action of a State."[35] This, in contrast to the customary law standard, which was articulated by the Nuremberg Military Tribunal in the *High Command* case in reference not to "a person's rank or status, but his power to *shape or influence* the policy of his State."[36] According to this latter standard, for example, private and industry actors could also be liable for the crime of aggression.[37] Through the years, much of the controversy was aimed at who exactly would meet this leadership requirement; and whether specific iterations of the use of force by States should, in fact, be captured by the definition of the crime. That, it was argued, either because they did not rise to a threshold of gravity comparable to the unleashing of a full-scale war, or because States maintained these should be considered as falling under one of the existing exceptions to the prohibition against the use of force.[38]

For this latter reason, the Rome Statute also introduced a "gravity threshold" differentiating between an *act* of aggression (only giving rise to State responsibility) and a *crime* of aggression (impugning the penal liability of specific leaders), where the underlying act of aggression by its "character, gravity and scale, constitutes a manifest violation" of the U.N. Charter.[39] This was intended to align as much as possible the Rome Statute provisions with the core "essence" of the customary law definition of the crime, which is that the unlawful use of force ought to be large scale enough to amount to a war to be criminal.[40] Consistent with the 1974 U.N. definition of aggression, the ICC definition also lists a series of *acts* of aggression that, meeting the requisite gravity threshold, and where perpetrated against the territorial integrity or

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[35] R.S. art. 8 bis(1). (emphasis added).

[36] United States v. von Leeb (High Command Case)., Military Tribunal XII, *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 462, 489 (1950).

[37] *Id*. at 1124.

[38] D'Alessandra, s*upra* note 25.

[39] R.S. art. 8bis(1).

[40] Although its precise contours are debated, various possible definitions under customary international law have been catalogued by scholars, including Claus Kress and Stefan Barriga. D'Alessandra, s*upra* note 25.

political independence of another State, will amount to a crime of aggression.[41]

Finally, because of the nature of the crime of aggression, States insisted on a separate jurisdictional regime for this particular offense, which would be a lot more stringent than the ICC's jurisdiction over war crimes, crimes against humanity, and genocide. Over the many years they spanned, negotiations around the conditions for the ICC exercise of jurisdiction over the crime of aggression were extremely fraught, and resulted in a regime that is so narrow as to cast doubt as to whether the Court might, in fact, ever be able to prosecute anyone for this offense.[42] Explicitly, the ICC cannot exercise jurisdiction on the crime of aggression over non-States Parties to the Court or their nationals.[43] In fact, even if aggression is committed against a State Party, the ICC's exercise of jurisdiction over aggression would require the consent of the aggressor State.[44] At the moment, the only way for the ICC to exercise jurisdiction on aggression over a non-State Party, and even over a State Party that has not "fully" subjected itself to said jurisdiction under provisions relating to its 2017 activation,[45] is through a referral by the U.N. Security Council.[46]

The deep flaws of the ICC's narrow jurisdictional regime for aggression became apparent in February 2022, following Russia's full-scale invasion of Ukraine. At the time, the ICC was the only existing international criminal tribunal with competence over aggression. Furthermore, it already had jurisdiction over war crimes, crimes against humanity, and potential acts of genocide committed on the territory of Ukraine dating back to 2013,[47] and had been petitioned by forty-three

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[41] R.S. art. 8bis(1).
[42] CLAUS KRESS, THE CRIME OF AGGRESSION (2017).
[43] R.S. art. 12(2)(b).
[44] *Id*. art. 15,(4) & 5.
[45] Assembly of States Parties, Activation of the Jurisdiction of the Court over the Crime of Aggression, ICC-ASP/16/Res.5 (Dec. 14, 2017).
[46] R.S. art. 15.
[47] Declaration of the Verkhovna Rada of Ukraine Accepting the Jurisdiction of the International Criminal Court Pursuant to Article 12(3) of the Rome Statute (Sept. 8, 2015).

of its Member States to move speedily with investigations.[48] However, given the jurisdictional limitations outlined above, the ICC lacked jurisdiction over the crime of aggression committed on Ukraine's territory, leading to renewed debate about the possibility of re-amending the Rome Statute to avoid a similar paradox in the future;[49] as well as a sense of urgency among Ukrainian officials and their supporters in the international community that a different solution would have to be conceived to address Russia's 2022 full-scale invasion.[50] It is on this account that, with the support of a coalition of more than forty States—hereinafter the Core Group—Ukraine proposed the establishment of a special aggression tribunal which would have *ad hoc* jurisdiction over the crime of aggression on its territory.[51] Given the nature of the crime, as mentioned both a State act and a leadership crime, negotiations for the establishment of the tribunal lasted over three years and presented a number of thorny legal and political questions, as well as debates over various proposed models further discussed below.

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[48] British Embassy The Hague, Referral Letter to the Office of the Prosecutor of the International Criminal Court Submitted in Coordination with Thirty-Eight States Parties (Mar. 2, 2022).

[49] Debates centred around amending the ICC Statute to either remove the clause that bars it from exercising jurisdiction over nationals of non-State parties, or to allow for referrals by the U.N. General Assembly where the U.N. Security Council is gridlock on a given situation. Although debate continues among ICC Member States concerning potential further amendments to the Rome Statute, and another review conference will be held in 2029 to discuss further amendments, amending the statute in the immediate aftermath of the 2022 Russian invasion of Ukraine proved unrealistic. It requires ratification of amendments by 2/3 of ICC States Parties, followed by a 7/8 (or consensus) vote by its Assembly, a very high bar. More importantly, it is highly unlikely that the long-standing policy posture of those States that made the ICC aggression regime weak to begin with has changed significantly since 2017, when the provisions entered into force. *See* D'Alessandra, *supra* note 25. *See also* Assembly of States Parties to the International Criminal Court, Review of the Amendments on the Crime of Aggression, ICC-ASP/S-1/Res.1 (July 9, 2025).

[50] Federica D'Alessandra, *In Fraught Geopolitical Times, Accountability for Russian Aggression Remains Crucial Despite U.S. Policy Reversals*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 2026).

[51] Dan Sabbagh, *Ukraine Calls for International Tribunal to Bring Putin to Justice More Quickly*, GUARDIAN (July 21, 2022).

IV. Legal challenges relating to prosecuting inter-state aggression

Russia's 2022 full-scale invasion of Ukraine is a text-book example of what constitutes the crime of aggression as defined in both treaty and customary international law,[52] and of the countless legal, political, and geopolitical challenges relating to accountability for its perpetrators. For this reason, it is helpful to look back at some of the main issues arising as inter-state debates unfolded on the potential establishment of an aggression tribunal for Ukraine, and how—or whether—they were ultimately resolved in the case at hand. Arguably, in fact, the case for the establishment of a special tribunal for Russia's aggression against Ukraine was often framed by its proponents in geopolitical terms: the tribunal was not only necessary to punish the leadership in the Kremlin for their ongoing conduct in Ukraine, but also as a way to signal the international community's recommitment to the prohibition against inter-state aggression and its determination to hold criminally accountable those who militarily threatened the sovereignty and territorial integrity of other States. This, it was hoped, would serve as admonition and deterrent to the leadership of other States who might be considering similar action.[53] Even more pertinently, many of the legal and political issues that arose in the course of such debates were reminiscent of questions that also arose in the context of ICC inter-state debates, and might again re-present themselves in future debates. Leaving aside the substantive definition of the crime,[54] the most important set of questions—foundational to addressing all others—were the jurisdictional questions. Namely, who has jurisdiction over the

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[52] Yoram Dinstein, *The Crime of Aggression Under Customary International Law*, *in* SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 285 (Leila Nadya Sadat ed., 2018).

[53] *See* D'Alessandra, *supra* note at 25.

[54] For a discussion on the substantive definition of the crime that would be adopted in the draft statute of the Special Aggression Tribunal for Ukraine, *see* Frank Hoffmeister, IV. *The Council of Europe Model, Chapter I: Jurisdiction and Applicable Law*, *in* ASSER INSTITUTE, THE SPECIAL TRIBUNAL FOR THE CRIME OF AGGRESSION AGAINST UKRAINE LEGAL ASSESSMENT AND POLICY RECOMMENDATIONS, 29-31 (2025).

alleged perpetrators and under what conditions would they be able to exercise it. This, particularly, given the biggest accountability gap concerned those vested with leadership roles in the Kremlin.[55]

In the case of Ukraine's 2022 full-scale invasion, both Russia and Belarus[56]—as the national States of the alleged perpetrators—have jurisdiction over the crime, which is also criminalized in their respective criminal codes.[57] Clearly, short of a significant change in leadership, it would be unrealistic to expect either State to exercise jurisdiction over the current situation, given it is their top political and military echelon that stands accused. An equally strong claim to jurisdiction is that of Ukraine itself, and there are at least two different principles anchoring it. First, given aggression is, by nature, a transboundary act, as the victim State, Ukraine has the strongest jurisdictional claim, as the crime is being committed on its territory.[58] Secondly, Ukraine can also rely on the principle of protective jurisdiction, a rule of international law that allows a sovereign State to assert jurisdiction over persons whose conduct outside its national boundaries threatens the State's security or interferes with the operation of its government functions. Other countries, such as Poland and Lithuania, for example, have also tried to assert jurisdiction (on the basis of protective and universal jurisdiction respectively), given their domestic criminal codes also criminalize aggression.[59] However, observers disagree on whether protective jurisdiction can be exercised by States that are *indirectly* affected.[60] In

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[55] D'Alessandra, *supra* note 25, at 57.

[56] The latter, if we consider the role Lukashenko played in allowing its territory to be used to launch the initial assault.

[57] Russian Federation Criminal Code art. 353; Criminal Code of the Republic of Belarus art. 122.

[58] Cedric Ryngaert, *Public International Law Approaches to Jurisdiction*, *in* JURISDICTION IN INTERNATIONAL LAW 21-41 (2008).

[59] Polish Penal Code, ch. XVI, art. 105; Criminal Code of the Republic of Lithuania, Ch. XV, art. 110.

[60] For differing opinions, i.e., "no" and "maybe" respectively, *see* Carrie McDougall, *Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics'*, OPINIO JURIS, (Mar. 15, 2022); Kevin Jon Heller, *Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis*, 24 J. GENOCIDE RSCH. 1 (2022).

fact, on this basis, Ukraine has the strongest claim under both principles as the *directly* affected State.

Aggression is explicitly criminalized in Ukraine's domestic penal code,[61] and its domestic definition of the crime is not limited to leaders, unlike the Rome Statute definition. In fact, Ukraine has already identified hundreds of Russian soldiers who might be prosecuted under its domestic penal provisions,[62] and its judicial system does have precedent for prosecuting and convicting both Russian and Ukrainian nationals on this basis.[63] However, such proceedings within Ukraine's domestic judicial system had drawn concerns among international observers in the past: chiefly on the basis of due process, but also due to the fact that the only precedent for trying a "leader" for aggression concerned a Ukrainian—not a Russian—national, with the trial and conviction having occurred *in absentia*.[64] It should be clarified that trials *in absentia* are controversial but not *per se* unlawful under international law,[65] and we will return to this below.

Having established who can claim jurisdiction, the question becomes who can exercise it. In the case at hand, the answer is not Ukraine, or rather, not on its own. The reasons are varied but, at a minimum, Ukraine's status as a victim State could have cast concerns over the legitimacy and especially impartiality of any proceedings it

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[61] Criminal Code of Ukraine art. 437.

[62] Sergey Vasiliev, *The Reckoning for War Crimes in Ukraine Has Begun,* FOREIGN POL'Y (June 17, 2022).

[63] Specifically, two low-ranking Russian soldiers were convicted of violating Art. 437(2) by entering Ukraine and participating in hostilities in the Luhansk region, as well as the former President of Ukraine, Viktor Yanukovych, for complicity in conducting an aggressive war on the basis of the same provision for asking Putin to send Russian troops into Ukraine after he was removed from office.

[64] In 2019, Ukrainian courts convicted former Ukrainian President Viktor Yanukovych of "complicity in waging a war of aggression." The proceedings were carried out in absentia because Yanukovych fled to Russia in 2014. *See* INT'L SERV. FOR HUM. RTS., OBSERVANCE OF THE RIGHT TO FAIR TRIAL IN THE CASE OF VIKTOR YANUKOVYCH. FINAL REPORT, (June 29, 2019).

[65] Sergey Sayapin, *A Curious Aggression Trial in Ukraine: Some Reflections on the Alexandrov and Yerofeyev Case*, 16 J. INT'L. CRIM. J. 1093, 1094 (2018); Sergey Sayapin, *The Yanukovych Trial in Ukraine: A Revival of the Crime of Aggression*, 50 ISR. Y.B. HUM. RTS. 63, 65 (2020).

would administer *alone* against the top-level political and military leadership of its battlefield enemy for what is, ultimately, a crime with massive political implications—no matter the talent and integrity of its judicial ranks. The key issue at stake is nevertheless a different one, and centers around *sovereign immunities*. International law is fundamentally, though not exclusively, an inter-state affair, the conduct of which is anchored on the principle of *sovereign equality*. A corollary of this principle is that *par inter parem no habet imperium*—meaning that, generally, a sovereign State cannot exercise jurisdiction over another sovereign State and cannot try in its domestic courts the official of another State without that State's consent.[66]

Various forms of immunity are awarded in international law to representatives of the State to allow them to carry out their sovereign functions. In the context of our discussion, at least two levels of immunity arise. The first is *personal immunity*, or immunity *ratione personae*, a status-based immunity applying to a small number of high-level State officials, commonly referred to as the troika—that is the Head of State, Head of Government, and Foreign Minister—because of their highest offices. These immunities apply as long as the person is in office, for both private and official acts. And secondly, *functional immunity*, or immunity *ratione materiae*, a conduct-based immunity applying to most State officials but only with respect to acts performed in an official capacity. Functional immunities, in essence, protect State officials both during and after their time in office, but only for *official acts* they carried out while in office.[67]

In international law, there are few grounds for exception to the obligation to respect sovereign immunity. The first is that, as the State victim of aggression, Ukraine might be entitled to *override* immunities by relying on other cardinal rules of international law, such as the rights to self-help and self-defense, as well as other principles of international

[66] Malcolm N. Shaw, *Immunities from Jurisdiction*, *in* IMMUNITIES IN INTERNATIONAL LAW 621-93 (2003).
[67] *Id*.

law.[68] If Ukraine can use lethal force to defend itself, the argument goes, including by targeting the commander-in-chief of the adversary, it should also be able to recur to non-lethal measures to repel the aggression—for example, arresting and detaining the enemy command. Under Ukraine's right to self-help, then, what would otherwise be an unlawful exercise of jurisdiction over Russian officials could be considered a lawful countermeasure in response to the aggressor State's own breach of international law.[69] Legally speaking, both arguments had merit. On their own, however, they were rejected by various States, and are untested before a court of law, making reliance on them much safer in combination with other potential grounds for exception.

Beyond those already described above, the most widely debated grounds for exceptions are either that immunities do not apply for international crimes, and / or that immunities do not apply before international tribunals. On the first argument, i.e. that functional immunities cannot be invoked when the relevant act constitutes an international crime, many authoritative legal scholars are proponents of this view,[70] and the question has been under study by the U.N. ILC since 2008. Nevertheless, this exception is not firmly established in international law, at least with respect to aggression itself: in its study, the ILC found a "*discernible* trend"—not a clear one—in State practice in this regard, but only "for *certain* types of acts that constitute crimes under international law."[71] Aggression is generally not listed among those acts,[72] presumably because aggression is *by nature* a State act—as

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[68] Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SEC. (Mar. 10, 2022); Dapo Akande, *A Criminal Tribunal for Aggression in Ukraine*, CHATHAM HOUSE (2023) (at 41:20).

[69] Anton Moiseienko, *Russian Assets, Accountability for Ukraine, and a Plea for Short-Term Thinking*, EJIL:TALK! (Mar. 5, 2022).

[70] Inst. of Int'l L., Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes, Napoli Session art. III, §§ 1-2 (2009).

[71] Report of the International Law Commission on the Work of Its Sixty-Ninth Session, U.N. Doc. A/72/10, at 178–79 (2017).

[72] Immunity of State Officials from Foreign Criminal Jurisdiction—Texts and Titles of the Draft Articles Adopted by the Drafting Committee on First Reading, U.N. Doc. A/CN.4/L.969, at 2 (May 31, 2022).

opposed to war crimes, crimes against humanity, or genocide, with respect to which international law very clearly states these cannot be recognized and protected as such.[73] And even if one were to take the view that the exception exists and that it applies to aggression, this only covers functional immunities, and does not apply to personal immunities, at least according to the prevalent view.[74]

The other, and somewhat stronger ground for exception, which some say is applicable to both personal and functional immunities, and others say only to the latter, is that these cannot be invoked before an *international* tribunal. This exception is more widely, though not universally,[75] accepted to be grounded in established international law, and has been upheld in the jurisprudence of various international courts, including the U.N. International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone—as well as, more controversially, the International Criminal Court.[76] That is, precisely, the reason why Ukraine initially requested the international community's assistance in establishing an international tribunal to preside over the inter-state aggression it has suffered, instead of exercising jurisdiction itself.

For a tribunal to be considered "international" with respect to the inapplicability of sovereign immunities, two conditions would need to be met. First, the tribunal must be established under international law, either through creation on the basis of a source of international law,

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[73] Dapo Akande, *Sangeeta Shah, Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EJIL 815, 815-52 (2010).

[74] OLIVER CORDEN & VAIOS KOUTROULIS, TRIBUNAL FOR THE CRIME OF AGGRESSION AGAINST UKRAINE – A LEGAL ASSESSMENT (2022). Finally, even if there is some support for a view that the exception to immunity for serious international crimes reflects existing international law and covers the crime of aggression, it should be noted that this does not seem to be shared by all E.U. Member States.

[75] Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea*, OPINIO JURIS (Mar. 7, 2022).

[76] The Prosecutor v. Al-Bashir Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶¶ 113-17 (May 6, 2019); Prosecutor v. Taylor, Case No. SCLS-2003-01-I, Decision on Immunity from Jurisdiction, ¶¶ 52-53; Prosecutor v. Milošević, Case No. ICTY-99-37-PT, Decision on Review of the Indictment and Application for Consequential Orders (May 24, 1999).

such as a treaty; or on the basis of authority derived from a source of international law, such as through the decision by an organ of an international organization—which can be the U.N. or a regional organization—acting within the competencies given to that organ under the treaty establishing said organization.[77] Secondly, the "nature of an international criminal court or tribunal must be such that, through its establishment and its institutional design, it is sufficiently detached from national jurisdictions," and "sufficiently reflects the will of the international community" to enforce crimes under customary international law.[78]

V. The Special Aggression Tribunal for Ukraine

Various models for the proposed aggression tribunal were explored during inter-state negotiations, all grounded in existing international law precedent. These included: its creation by treaty at the request of the U.N. General Assembly; its creation by treaty through a European regional organization; its creation by limited multilateral treaty; and the creation of an internationalized set of chambers.[79] While Ukraine and a number of European States initially favored an international tribunal established by an agreement between the United Nations and Ukraine (like the Special Court for Sierra Leone), G7 States favored an internationalized model, in which the tribunal would be created under Ukrainian legislation but complemented with international elements (like the Extraordinary Chambers in the Courts of Cambodia or the Kosovo Specialist Chambers).[80]

When discussions within the Core Group reached an impasse in September 2023, the European Union (E.U.) floated the idea of another model. According to this approach, the tribunal would be "set up by a multilateral agreement between the Core Group-participating States

[77] CORDEN, *supra* note 74, at 67.
[78] *Id*.
[79] For a discussion of each model, and the differences and challenges they presented, *see* D'Alessandra, *supra* note at 25. *See also* Hoffmeister, *supra* note 54.
[80] *Id*.

and receive international legal personality."[81] Importantly, the tribunal's independent prosecutor could only investigate cases if the Prosecutor-General of Ukraine transferred relevant Ukrainian criminal proceedings to the tribunal.[82] Although this option allowed the Core Group process to move forward, delegations felt that negotiating a multilateral treaty between forty States would be too difficult. Wanting to avoid protracted negotiations, on April 30, 2024, the Council of Europe (CoE) gave a mandate to its Secretary-General to "prepare any necessary documents to contribute to consultations within the Core Group on a draft agreement between Ukraine and the CoE, including a draft statute and a possible draft enlarged partial agreement governing the modalities of support to such a tribunal, its financing, and other administrative matters."[83]

On May 9, 2025, Ukraine's Prime and Foreign Ministers, with President Zelensky on remote connection, gathered in Lviv with forty European and non-European partners, including high representatives of the E.U. and the CoE to approve the draft texts. A notable absence was that of the United States, which had played an instrumental leadership role in earlier debates, and had supported the establishment of the special aggression tribunal for Ukraine.[84] Per the agreement, the tribunal would be established by the CoE, a European regional institution like the E.U., which is nonetheless separate.[85] Setting up the tribunal with the CoE rather than the E.U. was perceived to be a better choice for a few reasons. First, the E.U. only has twenty-seven Member States, whereas the CoE has forty-seven. It also includes countries like Turkey, and even Russia itself before its expulsion following its 2022

[81] *Id*.
[82] Council of Europe, Statute of the Special Tribunal for the Crime of Aggression against Ukraine, June 25, 2025, art. 23(1) [hereinafter Stat. Spec. Trib.].
[83] Council of Europe, Meeting of the Ministers' Deputies on 30 April 2024 (Apr. 30, 2024).
[84] Beth Van Schaack, Ambassador-at-Large for Global Criminal Justice, Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression (Mar. 27, 2023).
[85] Council of Europe, Ukraine and the Council of Europe Sign Agreement on Establishing a Special Tribunal for the Crime of Aggression against Ukraine (July 25, 2025).

invasion of Ukraine. Second, and more importantly, on account of its more diverse composition, its membership is representative of a wider grouping of political and even military alliances, meaning it is better representative of the international community as a whole—even if the tribunal is constituted regionally within Eurasia as the region directly affected by Russia's aggression.

This means that if all forty-seven members of the CoE become parties to the tribunal, they will be legally bound to comply with its orders, whether arrest warrants or executing judgements around asset seizures and the likes,[86] which is another key rationale that has been given for wanting a court adjudicating liability for Russia's aggression. Billions of dollars in Russian assets are already frozen in Europe, but European governments have been reluctant to confiscate them and transfer them to Ukraine without a legal judgement to that effect. Another advantage is that, given the statute and creation of the tribunal would eventually need to go to a vote, going through the E.U. (which generally makes decisions by consensus) could have risked countries like Hungary and Slovakia (which have hindered E.U. support for Ukraine in many other cases) vetoing its creation. Whereas at the CoE, the same issue would not present itself.

In addition to the bilateral agreement between the CoE and Ukraine, the tribunal's establishment is also supported by an enlarged partial agreement open to non-Member States and other international organizations.[87] This serves multiple objectives. First, it anchors the tribunal in Ukraine's own jurisdiction, which is important given that Ukraine itself is not party to the CoE but, as mentioned, as the directly affected / victim State, it has the strongest jurisdictional claims, including around the immunity issue. In addition, the fact that the tribunal will be constituted as international, and will include international judges and counsel,[88] also gets around a few issues under the Constitution of Ukraine, which does not allow external judges to be

[86] Stat. Spec. Trib. arts. 39, 46-48.
[87] Parliamentary Assembly of the Council of Europe, Res. 2556, ¶ 11.
[88] Stat. Spec. Trib. art. 8.

embedded in its judicial system (and cannot be easily amended while Ukraine remains under martial law).[89] This, too, helps to create a few layers of separation between the Ukraine domestic system and the tribunal's operation, which are extremely important for reasons of legitimacy, given the political nature of the crime, and especially the international law requirement that international specialist / extraordinary chambers ought to maintain a certain degree of independence from the national juridical systems within which they are nevertheless anchored.[90] Importantly, opening the agreement to parties outside of the CoE, be they non-member States or other international organizations, is a further way to enhance the international legitimacy of the tribunal, and to open avenues for cooperation outside of the CoE framework through what is defined as an "association status," available to other States as well as other international organizations with related competences, like the Register of Damages for Ukraine, for example.[91]

Despite the ability to successfully reach compromise on some of the thorny questions relating to the legal basis for the tribunal's creation, the applicable law, and its specific formulation, the tribunal will doubtlessly also face a number of downsides and limitations, not all of which could be resolved during inter-state negotiations. A controversial aspect of the tribunal is that it will be able to carry out trials *in absentia*,[92] which, as mentioned, are controversial—particularly in common law jurisdictions—but not illegal per se. Many European civil law jurisdictions, in fact, foresee these within their penal systems, as long as due safeguards are in place to protect the rights of the

[89] Const. of Ukraine art. 125. Legal jurists in Ukraine agree, however, that "if a court to try the crime of
aggression is created not as a domestic court but as a wholly international one, then Article 125 of the Ukrainian Constitution is not a bar to establishing such a tribunal," *See* Alexander Komarov & Oona Hathaway, *Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression,* JUST SEC. (Apr. 5, 2022).
[90] CORDEN, *supra* note 74.
[91] Asser Inst., *The Special Tribunal for the Crime of Aggression against Ukraine Legal Assessment and Policy Recommendations* (June 27, 2025).
[92] Stat. Spec. Trib. art. 28.

defense.[93] Even more controversially, although the special tribunal's statute bars the applicability of functional immunities,[94] the tribunal will honor the personal immunity of the troika as long as President Putin, Prime Minister Mishustin, and Foreign Minister Lavrov remain in office.[95] Although there have been countless negotiations on the matter, the immunity issue ultimately proved insurmountable because, as mentioned, international law authority is split on this particular question. Hence, the tribunal will be able to indict all three, but not able to try them, nor request their surrender, as long as they remain in office, which is a major limitation.

It is also important to acknowledge that, beyond the *legal* issues at stake, considerable policy disagreement persists among many officials and observers on the effectiveness, viability, and even desirability of criminal trials as part of war settlements, particularly for officials of major geopolitical actors, or where there is a risk that such trials might hinder, rather than facilitate, the end of hostilities.[96] It is on this account that the Rome Statute, for example, foresees the possibility of ICC proceedings being suspended for a renewable period of twelve months if the U.N. Security Council so requests under its Chapter VII powers, or where there otherwise are "substantial reasons to believe that an investigation would not serve the interests of justice."[97] Although there had been some early discussions about the possibility to include a similar provision in the statute of the special tribunal,[98] the final statute does not ultimately contain similar provisions, nor does it give any special powers to the U.N. Security Council. This, presumably, on

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[93] Anne-Marie de Brouwer, Diverse Approaches to Total and Partial in Absentia Trials by International Criminal Tribunals 26 CRIMLF, 181-224 (2015). Under the Tribunal's Statute, these are protected under arts. 16-20.

[94] Stat. Spec. Trib. art. 23 § 4.

[95] *Id*. art. 23 § 5.

[96] *See*, *e.g.,* Mark Kersten, *Peace and/or/with/Versus Justice*, *in* JUSTICE IN CONFLICT: THE EFFECTS OF THE INTERNATIONAL CRIMINAL COURT'S INTERVENTIONS ON ENDING WARS AND BUILDING PEACE MARK KERSTEN, (2016). Specifically on the situation in Ukraine, *see* Rebecca Hamilton et al., *Would Prosecute Russia Prolong the War in Ukraine?*, FOREIGN AFF. (July 12, 2023).

[97] R.S. art. 16; 53 § 1(c).

[98] D'Alessandra, *supra* note 25, at 65.

account of the fact that Russia's permanent seat on the Council could inject undue political interference in the decisions of a judicial body that was explicitly constituted independently from the U.N. by decision of multilateral institutions representing the will of the region directly affected by the aggression. That being said, the tribunal's statute does contain provisions allowing for the "suspension" of proceedings where "an appropriate waiver has been presented to the Special Tribunal,"[99] as well as provisions for the "dissolution of the Special Tribunal upon fulfilment of its mandate" that explicitly address "circumstances where a fugitive remains at large," and "the Prosecutor and the Registrar have taken all reasonable steps to ascertain the fugitive's whereabouts and secure his or her arrest."[100] This could be interpreted to grant the tribunal some discretion over the fate of proceedings against members of the troika, if political and practical circumstances so required.

Regardless of the fate of proceedings against the troika, however, the Special Aggression Tribunal for Ukraine will still be able to indict, try in absentia, convict and sentence, including to life imprisonment where warranted,[101] anyone else involved at the highest levels in the war, be they politicians or generals. This includes, for example, Valery Gerasimov, the Chief of the General Staff of the Russian Armed Forces; Sergey Kobylash, former Commander of the Russian Air Force; and Sergei Shoigu, the former Minister of Defense and current Secretary of the Security Council—all also wanted by the ICC—alongside another twenty to thirty Kremlin and military officials who have already been identified.[102] Once indicted, if any of them wished to evade arrest, they will only be able to travel to a handful of countries moving forward. And, if found guilty, their frozen assets will have unequivocally lawful grounds to be confiscated and transferred to Ukraine.[103] Although this

[99] Stat. Spec. Trib. art. 23 § 5.
[100] *Id*. art. 54 § 1(a)-(b).
[101] Stat. Spec. Trib. art. 36.
[102] Yuliia Akymova & Kateryna Danishevska, *'Putin is a war criminal. That will never change.' Interview with Mark Ellis*, RBC UKR., (Sept. 30, 2025), https://newsukraine.rbc.ua/interview/putin-is-a-war-criminal-that-will-never-change-1759214250.html.
[103] Stat. Spec. Trib. art. 37.

balancing act around the immunities question might be perceived by critics as a major flaw of the tribunal, it is worthy of note that history regularly demonstrates that even once all-powerful warlords and dictators may, sooner or later, eventually fall (i.e., Milošević, Karadžić, Charles Taylor). As a former U.S. Ambassador has often said, the arm of international justice is long and it never tires out.[104] If and when political circumstances around the troika do change, the tribunal will be there awaiting.[105] That is, if the will of Europe as the directly affected region persists to bring them to justice for their aggression against Ukraine.

VI. Additional international law remedies for aggression

It is also important to acknowledge that the special tribunal for aggression will not exist in a vacuum, but is part and parcel of a broader web of accountability and related remedy measures aimed at punishing the Kremlin for its military aggression at both the State and individual levels. Such measures, in combination, firmly entrench the precedent that never again will European States tolerate similar threats to the peace and security of their continent.[106] That is why the bulk of measures deployed to confront Russia's aggression against Ukraine, beyond the widespread condemnation it already received before the U.N. General Assembly,[107] have been imposed within the competences of European regional organizations (with the support of many non-European States) as the region directly affected. For example, although

[104] Remarks by U.S. Ambassador (ret.) Stephen J. Rapp, "Law, Ethics, and Armed Conflict" International Legal Symposium (May 14, 2025).

[105] It is important to acknowledge that, beyond the legal issues at stake, there is very considerable policy disagreement among various officials and observers about the effectiveness, *viability*, and even desirability of criminal trials as part of war settlements, particularly for officials of major geopolitical actors, or where there is a risk that such trials might hinder, rather than facilitate, the end of hostilities. *See, e.g.*, Kersten, note 96. It is on this account that the Rome Statute, for example, foresees the possibility of proceedings being suspended for a renewable period of twelve months under art. 16.

[106] D'Alessandra, *supra* note 50.

[107] G.A. Res. ES-11/1 (Mar. 2, 2022).

the U.N. Uniting for Peace mechanism was leveraged early on to ask for a U.N. General Assembly vote calling for the establishment of an international mechanism for war reparations for Ukraine,[108] both the Registry of Damages for Ukraine and the International Claims Commission for Ukraine were ultimately created outside the U.N. framework, again under the auspices of the CoE.[109]

There was also a desire among Ukrainians, particularly at the beginning, to use the same mechanism to create the special tribunal through the United Nations, but it became clear the initiative might not have had enough votes, which shifted the conversation to its creation through a European regional organization.[110] Other avenues leveraged by Ukraine's regional partners in Europe have concerned: bringing inter-state proceedings against Russia before competent tribunals for international law violations relating to its aggression, including proceedings before the International Court of Justice for violations of the U.N. Genocide Convention and other relevant instruments;[111] imposing an unprecedented sanctions regime and freezing €200-300 billion in Russian assets present in European jurisdictions—the seizure of which E.U. Member States continue to debate to financially support Ukraine;[112] providing roughly €169 billion in financial, military, and humanitarian assistance to Ukraine,[113] including a €90 billion loan to finance Ukraine's defense, humanitarian, and reconstruction needs

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[108] *Id*. Furtherance of remedy and reparation for aggression against Ukraine (Nov. 15, 2022).

[109] *See* Council of Europe, Resolution CM/Res(2023)3, Establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine (May 12, 2023) (as amended Sept. 27, 2023); Convention Establishing an International Claims Commission for Ukraine (Dec. 16, 2025), signed by the European Union and thirty-five States at the time of writing.

[110] D'Alessandra, *supra* note 25.

[111] U.N. ICJ, Application Instituting Proceedings, Allegations of Genocide Under the Convention on the Prevention and Punishment of Genocide (Ukraine v. Russian Federation), General List No. 182 (Feb. 26, 2022).

[112] *Frozen Russian Assets, Russia Lawfare, And Europe's High-Stakes Gamble*, FORBES (Dec. 18, 2025).

[113] European External Action Service, EU Assistance to Ukraine (Dec. 11, 2025).

over the next two-years term;[114] protection for 5-6 million Ukrainian refugees who have since fled to European States;[115] and supporting a variety of investigations to broaden pathways for accountability and Ukraine's access to legal remedy.[116]

In response to the need to coordinate international support for Ukraine's domestic prosecutions, for example, the E.U., the United States, and the United Kingdom established the Atrocity Crimes Advisory Group, a collaborative initiative to support Ukraine in domestically investigating and prosecuting atrocity crimes committed during the ongoing conflict with Russia.[117] In order to support prosecutions in other relevant European jurisdictions, the E.U. Agency for Criminal Justice Cooperation (Eurojust) set up a Joint Investigative Team (JIT) to coordinate Ukraine-related investigations.[118] European countries, jointly with partners from other regions, also took the unprecedented step of collectively referring the situation in Ukraine to the International Criminal Court—which swiftly issued indictments, including against Putin himself.[119] And, after the Parliamentary Assembly of the CoE, the E.U. Parliament, and the NATO Parliamentary Assembly passed resolutions calling for a special aggression tribunal, the E.U. Commission announced the creation of an International Center for the Prosecution of Russia's Crime of

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[114] Gregorio Sorgi, *EU approves €90B loan to Ukraine: Hungary and Slovakia lifted their vetoes after oil flows resumed through the Druzhba pipeline*, POLITICO (Apr. 23, 2026).

[115] U.N. Regional Information Centre for Western Europe, Ukraine: Over 6 million Refugees Spread Across Europe, (Sept. 11, 2022).

[116] D'Alessandra, *supra* note 50.

[117] ATROCITY CRIMES ADVISORY GROUP, A NEW APPROACH TO ADVANCING ACCOUNTABILITY IN UKRAINE, https://www.aca-ukraine.org/.

[118] Eurojust, *Two Years On: A Timeline of Eurojust's Response to the War in Ukraine* (Jan. 29, 2024). The JIT is part of a complex support system for Ukraine-related investigations which included EUROJUST's Core International Crimes Evidence Database (CICED) and the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA).

[119] ICC, Warrant of Arrest for Vladimir Vladimirovich Putin, ICC-01/22-18-SECRET, cited in ICC PTC II, Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties, ICC-01/22-90 (Oct. 24, 2024).

Aggression, to begin gathering evidence to a criminal standard and coordinate investigations embedded within the JIT.[120] Finally, Russia was also expelled from the CoE as mentioned,[121] and the European Court of Human Rights has been seized of a number of proceedings in relation to breaches of the European Convention on Human Rights arising from its military operations in Ukraine.[122] These initiatives collectively illustrate how an affected region can mobilize against a geopolitical heavy weight espousing revanchist ideologies and waging aggressive war at its doorstep.

VII. The geopolitics of accountability for great power perpetrators

Given the current status of the legal and institutional framework surrounding efforts to uphold accountability for inter-state aggression, conversations on the key political constraints have often turned to the role of veto powers at the U.N.[123] This, chiefly, is on account of the fact that military superpowers with a permanent seat on the U.N. Security Council are both more capable—if not likely in the current strategic landscape[124]—to commit violations of the prohibition on the use of force that might amount to aggression; while, at the same time, being ideally positioned to hinder the few accountability avenues available under the

[120] European Parliament, Ukraine War: MEPs Push for Special Tribunal to Punish Russian Crimes (Jan. 19, 2023); Parliamentary Assembly of the Council of Europe, PACE Unanimously Demands an International Tribunal to Prosecute Russian and Belarusian Leaders for the Crime of Aggression Against Ukraine (Jan. 26, 2023); European Commission, Statement by President von der Leyen on the Establishment of an International Criminal Centre for the Prosecution of Crimes of Aggression Against Ukraine (Mar. 4, 2023); NATO Parliamentary Assembly, Res. 479 (Nov. 21, 2022).

[121] Council of Europe, Exclusion of the Russian Federation from the Council of Europe and Suspension of All Relations with Belarus (Mar. 17, 2022).

[122] European Court of Human Rights, Announcement of a Grand Chamber Decision in the Inter-State Case Ukraine and the Netherlands v. Russia (Jan. 18, 2023).

[123] Federica D'Alessandra, *Conceptualizing Great Power Perpetrators*, 18 J. GENOCIDE STUD. & PREVENTION 151 (2024).

[124] U.S. Office of the Director of National Intelligence, Annual Threat Assessment of the U.S. Intelligence Community (Mar. 2025).

existing multilateral framework.[125] In short, veto powers are increasingly recognized as central to the international community's inability to confront great power misconduct, whether it is inter-state aggression or any other egregious international law violation.[126] This has become apparent since at least 2011, when geostrategic competition began to play out visibly in U.N. Security Council debates, leading to protracted gridlock over a series of proposed accountability measures aimed at confronting egregious conduct by a permanent member, or a close ally under its diplomatic protection. More specifically, the seventeen consecutive vetoes Russia cast during the Syria civil war became a watershed in the conversation. As a consequence, other U.N. bodies, such as the General Assembly and the Human Rights Council, which under the Charter have residual responsibility for international peace and security, began to assert them in more forceful and innovative ways.[127]

An example of this, concerning Syria, was the creation of the International Independent Investigative Mechanism (IIIM).[128] Essentially, a pre-prosecutorial body created in 2016 by the U.N. General Assembly to gather and preserve, to a criminal standard, evidence of international crimes committed in the Syrian civil war, precisely to support prosecutions and other forms of judicial and non-judicial remedy in the situation. Its groundbreaking work has already led to a case at the U.N. International Court of Justice against Syria for violations of the torture convention, and a number of criminal cases pursuant to universal and other grounds of jurisdiction in a number of European States—all of which can now be leveraged to support Syria's

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[125] *See* D'Alessandra discussion on *Wielding Great Power as a Perpetrator: An Empirical Analysis,* 169-75, *supra* at 123.

[126] JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO THE SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES (2020).

[127] *See* D'Alessandra discussion on *Confronting Great Power Abuse: A System-Level Challenge,* 175-81, *supra* at 123. *See also* Federica D'Alessandra & Gwendolyn Whidden, *Whither Atrocity Prevention at the UN? Look Beyond R2P and the Security Council,* STIMSON CTR. (Nov. 6, 2023).

[128] G.A. Res. 71/248 (Dec. 21, 2016).

post-Assad transition.[129] Another example was when, after Russia vetoed a U.N. Security Council resolution condemning its 2022 full-scale invasion, the Council leveraged its emergency special power and other tools like the Uniting for Peace mechanism to call for a vote on the issue at the U.N. General Assembly, where 141 countries voted to condemn Russia's aggression. It was a major diplomatic success.

Yet, when it came to impose real costs on the Kremlin for its invasion, the General Assembly split on the matter, due to the geopolitical interest prevailing for many voting States. For instance, when it came to imposing sanctions on the Kremlin, many of the countries that voted to condemn its aggression—including pivotal and emerging powers such as India, Brazil, Mexico, Turkey, Indonesia, and South Africa, among others—refused to join the sweeping regime the United States, Europe, and others imposed. Some countries, like India, tried to justify their position by arguing that the war in Ukraine was a European regional problem which did not require the international community to intervene. While others called out "hypocrisy" in the West's response to Russia's aggression, which they criticized on account of other recent military campaigns, such as Iraq's 2003 U.S.-led invasion.[130] Principle and rhetoric aside, a better explanation lies in the fact that, particularly within larger multilateral bodies, diplomacy is always affected by country-specific and regional interests which, more often than not, take center-stage in multilateral efforts to hold accountable international law violators.

U.N. voting records are particularly illustrative of the dynamics that are often at play in such debates. For example, of the 181 States voting on U.N. General Assembly Resolution ES-11/1 condemning Russia's aggression, only five countries voted against.[131] Namely, Russia itself, Belarus, and North Korea—both of which are not only military allies,

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[129] Federica D'Alessandra, *International Crimes Accountability Matters in Post-Assad Syria*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 2025).

[130] Sophie Eisentraut, *Standard Deviation: Views on Western Double Standards and the Value of International Rules*, MUNICH SEC. REP. (2024), at 4.

[131] Voting Records, U.N. Digital Library, available https://www.un.org/en/library/page/voting-information.

but have since taken an active role in hostilities alongside Russia. Also included were Syria, at the time still under the control of Bashar al-Assad—Russia's embattled ally on whose behalf the Kremlin military intervened in the Syrian civil war in 2013 and casted seventeen vetoes since 2011—and Eritrea, with whom Russia has since developed a strategic partnership and which is often described as the Kremlin's gateway to the Horn of Africa.[132] Even more remarkable is the list of the thirty-five countries that abstained from voting, all of which are either military and / or close political allies of Russia—i.e., Armenia before the thawing of relations following recent escalations in Nagorno-Karabakh;[133] China, Cuba, Iran, Kazakhstan, Kyrgyzstan, and Nicaragua—or direct recipients of Russian military and security assistance,[134] including the deployment of mercenary groups such as Wagner / Africa Corps (as it has been renamed)—i.e., Sudan since 2017, Madagascar and the Central African Republic since 2018, Mozambique since 2019, and Mali since 2020.[135]

Similar dynamics have indeed been observed at the U.N. Human Rights Council (HRC), another key avenue for recent efforts aimed to support alternative pathways for accountability for serious international law violations.[136] An illustrative example concerns China's alleged violations against the Uyghurs and other Turkic minorities in Xinjiang. After the U.N. High Commissioner issued a long-awaited report denouncing crimes against humanity in Xinjiang,[137] the HRC—which takes decision by vote by its forty-seven

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[132] Margherita Rigoli, Russia Strengthens Ties with Eritrea: A Strategic Shift in the Horn of Africa, NATO DEF. C., (July 23, 2024).

[133] Alexander Atasuntsev, Long-Standing Ties Between Armenia and Russia Are Fraying Fast, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 3, 2023).

[134] i.e., Algeria, Angola, Bangladesh, Bolivia, Burundi, Congo, El Salvador, Equatorial Guinea, India, Iraq, Laos, Namibia, Mongolia, Pakistan, Senegal, South Africa, South Sudan, Sri Lanka, Tajikistan, Tanzania, Uganda, Vietnam, Zimbabwe.

[135] U.N. Digital Library, *supra* note 107.

[136] *See* Federica D'Alessandra, *UN Accountability Mandates in International Justice*, 21 J. INT'T CRIM. J., Vol. 21 551 (2023).

[137] U.N. Office of the High Commissioner for Human Rights, OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China, 31 August 2022.

members, an even lower threshold than that required by the General Assembly—failed to pass (by a very narrow margin of 17-19) a resolution even *calling for a debate* on the issue.[138] Again, looking at voting records is illustrative of the dynamics and interests at play. All of the nineteen countries that, besides China, voted against the draft resolution are part of the Belt and Road Initiative (BRI), meaning that China wields significant "structural power" over their economic domain.[139] Ukraine, which is not in BRI but is highly dependent on China for trade, also voted against—even though it sought to reverse its vote the following day—as it did not "want to annoy the dragon while it fights with the bear," officials later said.[140] And even countries like The Gambia and other Members of the Organization of Islamic Cooperation (all in BRI) voted against—which is particularly striking given that, two years prior, they had brought a case against Myanmar to the U.N. International Court of Justice precisely on account of their kinship to the Rohingyas, another Muslim minority under persecution by the Myanmar military junta.[141] Thus, beyond the power of the veto, other forms of structural power—be they economic or military assistance, or other arrangements that render a country's sector or range of sectors intertwined and especially dependent on a great power—can, and likely will, become leverage that hampers international response to alleged violations.[142]

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[138] Draft Resolution A/HRC/51/L.6, Debate on the situation of human rights in the Xinjiang Uyghur Autonomous Region, China.

[139] i.e., Bolivia, Cameroon, Cuba, Eritrea, Gabon, Indonesia, Ivory Coast, Kazakhstan, Mauritania, Namibia, Nepal, Pakistan, Qatar, Senegal, Sudan, the United Arab Emirates, Uzbekistan and Venezuela), as are six of the eleven that abstained (Armenia, Benin, Gambia, Libya, Malawi, Malaysia, *see* U.N. Digital Library, *supra* at 107. For a definition of "structural power," *see* D'Alessandra, supra note 25, at 118, 161.

[140] *UN Human Rights Council Blocks Debate on China's Abuses in Xinjiang*, FINA TIMES (Oct. 6, 2022).

[141] U.N. ICJ, Application instituting proceedings and Request for the indication of provisional measures,
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), eleven States intervening) (Nov. 11, 2019).

[142] D'Alessandra, *supra* note 123.

That is why, where alternative avenues are available, such as in Europe with respect to Russia's aggression, regional responses have become of primary focus in confronting great power perpetrators.[143] This, however, raises a number of important questions about the future direction of accountability for wars of aggression and other serious violations of core international norms. After a decades-long push towards universalization in international law and related enforcement mechanisms, are we witnessing a reversal of trend towards de-centralization, "diffusion," or even fragmentation? If so, what risks and opportunities do current trends present for the more equitable enforcement and normative coherence of international law moving forward, given significant differences persist in the capacity, access to resources, and institutional set-up across regions? What, if anything, can be learned from existing innovations and adaptations around the enforcement of peremptory norms of international laws of war and related prohibitions—such as the ban on inter-state aggression—that could inform better enforcement of the same and other norms, which are key to maintaining an international rules-based order? Where is global leadership already emerging or likely to emerge? And what visions, strategies, and coalitions will be needed to build on existing progress, seize current opportunities, and mitigate the greatest global risks relating to inter-state aggression and other serious international law violations?

VIII. Conclusions

Such questions could not be more urgent and timelier today. According to the United Nations, last year marked the highest number of conflicts since 1946, and one of the most violent years since the end of World War II, with civilian deaths in conflict surging globally at a whopping forty percent rate.[144] Importantly, the year also marked the highest number of *inter-state* conflicts since the end of World War II,

[143] D'Alessandra, s*upra* note 25.
[144] Siri Aas Rustad, *Conflict Trends: A Global Overview, 1946–2024* (2025).

after they had been in steady decline for decades.[145] Without a doubt, the return of inter-state conflict is a tragic development, which nonetheless results from decades of erosion of the norms prohibiting the use of force among States. It is also dangerous and rendered ever more treacherous by the current strategic landscape underpinned by the return of great power competition, a shift to multipolarity, and surging revisionist and revanchist ideologies among the world's most powerful States.[146] Against this backdrop of world affairs, we are also witnessing the return of wars of conquest, and the normalization of territorial expansion and forceful acquisition of territory.[147] Particularly at times of global crisis and of profound instability, such as those we are experiencing today, international laws prohibiting and restraining the use of force do not, and *should not*, lose relevance. On the contrary, history has amply demonstrated that respect for international law is crucially important to stabilize inter-state relations, protecting States' sovereignty and territorial integrity, as well as their people's right to self-determination.

Yet, the institutions aimed at enforcing such laws are, today, often gridlocked or under attack, and diplomatic efforts to settle disputes peacefully are too often overtaken by power politics driven by militarist and expansionist agendas. Reversing this trend before it is too late will be crucial for our collective stability, if not survival, in the years and decades ahead. That is why learning from the controversies, innovations, and experimentation of European and other States in the wake of Russia's 2022 full-scale invasion of Ukraine remains essential. It will, of course, take time for any of the mechanisms activated against the Russian Federation to wield results, and many of these seem inapplicable to confronting geopolitical aggressors outside of Europe, given their firm entrenchment within the European institutional and legislative frameworks. Nevertheless, many of the measures put in place in Europe with respect to Ukraine were admittedly considered all

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[145] *Id*.

[146] Graham Allison & James Winnefeld, *The End of the Longer Peace?*, FOREIGN AFF. (Nov. 24, 2025).

[147] Tanisha Fazal, *Conquest is Back*, FOREIGN AFF. (Mar. 21, 2025).

along not simply on account of their anticipated effects on Russia, but precisely as an admonition to other military powers harboring hopes to pursue geopolitical objectives at the cost of other States sovereignty, stability, and territorial integrity.[148] Seizing on this momentum, and finding alternatives that might be equally, or even more, effective in other regions is thus an urgent task. Indeed, it is the collective responsibility of both proponents and critics of Europe's response to Russian aggression. For the alternative can only be a world where Might returns to Make Right, where "the weak suffer what they must, and the powerful take what they can."[149] With this in mind, it is my hope that the analysis and discussion contained within this chapter can be a helpful frame of reference in guiding and hopefully enriching future debates to this end.

[148] D'Alessandra, *supra* note 25, at 118, 151-89.
[149] THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 5.89 (431 BC).

Chapter 6. Legal Accountability in Gray Zone Conflicts: A Discussion

Douglas K. Bryson

I. Acknowledgements

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II. Abstract

This paper seeks to further the conversation regarding challenges of legal accountability in gray zone conflicts, activities which blur the boundaries between war and peace and the distinction between military and civilian actors. It discusses how modern states increasingly employ hybrid warfare tactics, such as information operations, lawfare, and proxy forces, to achieve strategic objectives while remaining below the threshold of traditional armed conflict. Through an exploration of case studies involving Russia, China, and Iran, the paper demonstrates the exploitation of legal gaps and norm erosion in contemporary gray zone operations. Finally, it suggests ways in which frameworks like the

Geneva Conventions and the Martens Clause can be applied to promote accountability and protect non-combatants.

III. Introduction

Since 1899 and the first Hague Convention, the modern nations of the world have attempted to regulate the means and methods of warfare, the *jus in bello,* ultimately codified in numerous treaties concerning armed conflict.[1] While technological advances during the twentieth century altered the tactics and strategy of war, they did little to alter the fundamental premise of warfare as an armed conflict between two nation states[2] and little to alter the means and methods of warfare. Following the signing of the United Nations charter and the outlawing of the use of force,[3] however, the conflict landscape has evolved, and the world has seen an increase in the number of gray zone activities.[4]

Despite this evolving conflict landscape, the traditional legal paradigms governing conflict have not changed or been adapted to account for this new form of hybrid warfare. The result is a lack of accountability for acts conducted in the gray zone, which otherwise would be subject to well-defined legal paradigms. Accordingly, this paper offers a discussion of how existing legal frameworks, such as the Geneva Conventions, and the expansive language of the Martens clause

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[1] *See* KARMA NABULSI, 'THE MODERN LAWS OF WAR FROM 1874 TO 1949', TRADITIONS OF WAR: OCCUPATION, RESISTANCE AND THE LAW (2003).

[2] *See*, Tamseel Aqdas, *Hybrid Wars: Technological Advancements and the Generational Evolution of Warfare*, SMALL WARS J. (Sep. 9, 2021), https://smallwarsjournal.com/2021/09/09/hybrid-wars-technological-advancements-and-generational-evolution-warfare/.

[3] *See* U.N. Charter art. 2 (¶ 3 stating specifically that "all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered," and ¶ 4 stating that "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.").

[4] *See* Aurel Sari, *War Diffused: Warfare Between Metaphor and Reality*, 16 U. ST. THOMAS J.L. & PUB. POL'Y 594 (2023).

can aid in framing the conversation about accountability for actions in gray zone conflicts while also ensuring mitigation of harm to, and protection of, non-combatants.

Through an examination of gray zone activity, specifically Information Operations and the purposeful erosion of existing legal norms, two specific kinds of gray zone activities, this paper seeks to start a discussion about how existing legal paradigms can be applied to counter gray zone activities, and how they may prevent the undermining of those same existing international law frameworks. Part I of the chapter first discusses the modern conflict spectrum and how gray zone actions are used by nation states. Part I then discusses how the gray zone's position in the liminal space between war and peace has blurred the traditional lines between military and civilian actions, as well as the duality of war/conflict and peace. Part II provides an in-depth look at some tools being used by gray zone actors, providing real-world examples highlighting the legal gaps those tools exploit. Part III rounds out the discussion through considering existing legal tools of accountability and applying them to hypothetical and current gray zone actions; this highlights how nation states and legal practitioners may utilize current legal frameworks when planning or responding to, gray zone actions without resorting to armed conflict.

IV. Modern Conflicts & The Gray Zone

A. Modern Conflict Trends

Conflict between states, particularly between traditional great power nations, is no longer characterized by large-scale combat operations as it was in the early part of the twentieth century.[5] Nor is the traditional paradigm of the competition continuum, with clearly delineated peacetime through armed conflict settings, an effective tool

[5] *See* Anthony King, *Twentieth-Century Operations*, *in* COMMAND: THE TWENTY-FIRST CENTURY GENERAL 73 (2019) (noting that the combined arms division, which typically consists of large numbers of troops, cavalry and artillery, was the principle formation for land warfare from 1914 through the end of the Cold War).

for analysis given that many conflicts often exhibit multiple elements of several parts of the continuum simultaneously.[6] For example, if we look at the United States of America's use of armed conflict over the past century, only five conflicts fit the traditional model of war featuring large force-on-force engagements. Conversely, there are fifty-seven instances of U.S. foreign military operations which are typified by lower level uses of troops, if not lower level uses of force.[7] The United States is not the only country engaged in such low-level actions,[8] and the reasons for this are myriad and may include legal rationale, such as adherence to the United Nations Article 2(4) prohibition on the use of force or treaty requirements,[9] other political reasons revolving around their strategic view of the world, or possibly how they would like the world to be understood.

Understanding and framing the strategic environment this way is of particular importance in modern conflict. The competition model within the modern international order is often presented as one of three possible primary configurations: unipolarity, bipolarity, or multipolarity.[10] The cold war between the United States and the Union of Soviet Socialist Republics was a clear example of a bipolar system, and the end of that conflict in 1991 led to a unipolar system with the

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[6] *See* Mara Karlin, *The Return of Total War*, FOREIGN AFF. (Oct. 22, 2024), https://www.foreignaffairs.com/ukraine/return-total-war-karlin.

[7] *See* 4 Philip Kapusta, *The Gray Zone*, 28 SPECIAL WARFARE 17 (2015), https://www.swcs.mil/Portals/111/October%202015%20Special%20Warfare.pdf.

[8] *See, e.g.,* Adrian Johnson, WARS IN PEACE: BRITISH MILITARY OPERATIONS SINCE 1991 (2014), https://static.rusi.org/wars_in_peace_foreword_and_intro.pdf (the United Kingdom has been involved in over seven "non-war" military operations since 2000); Aelön Messiaen, *French military interventions in the Sahel*, 3 GIES HONOURS PAPERS 1 (2024) (French forces have conducted numerous military operations within the Sahel); May Darwich, *The Saudi intervention in Yemen: struggling for status*, 20 INSIGHT TURK. 125 (2018) (discussing the Saudi air campaign in Yemen).

[9] *See* Michael Howard, *War and the Nation-State,* 108 DAEDALUS 101, 106 (1979).

[10] *See* Mark Yeisley, *Bipolarity, Proxy Wars, and the Rise of China*, 5 STRATEGIC STUD. Q. 3, 75 (2011) (Unipolar systems are those that have a single nation state as a hegemon, bipolar systems are those where two states control the majority of power and the weaker states align with one or the other, and multipolar systems where the power resides with three or more nations who are powerful enough to act as poles in the system).

United States as the world's only remaining superpower.[11] However, today's global context is characterized by much greater examples of transnational, social, and industrial connectedness where policy makers for nation states increasingly view problems in both transnational and global terms.[12] Accordingly, policy makers and military strategists alike are concerned not just with the physical conduct of warfare but also with how their actions fit into the global narrative and how they can either control or shape that narrative.[13]

States today, in lieu of pushing their political objectives though the use of their military in clearly defined conventional land and naval battles in declared interstate war, are now taking action in what has been described as the gray zone of conflict. Gray zone conflict utilizes types of hybrid warfare, low-level competition actions,[14] and actions which take place across the full diplomatic, informational, military, economic, financial, intelligence, and law enforcement (DIMEFIL) construct.[15] These actions typically range from low-level information warfare operations by military units (and others), to limited armed force operations sized to fall below the accepted definition of armed attack.[16] In addition to direct state action, the prevalence of state-aligned and state-backed militia groups, some of which even possess global reach, provides another forum for state conflict while still ensuring that

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[11] *See* Charles Krauthammer, *The Unipolar Moment*, 70 FOREIGN AFF. (1990); William C. Wohlforth, *The Stability of a Unipolar World,* 24 INT'L SEC. (1999).

[12] *See* Gregory Shaffer, *New Legal Realism and International Law*, *in* THE NEW LEGAL REALISM: STUDYING LAW GLOBALLY 145-59 (H. Klug & S.E. Merry eds., 2016).

[13] *See* Media Ajir & Bethany Vailliant, *Russian Information Warfare: Implications for Deterrence Theory*, 12 STRATEGIC STUD. Q. 70, 76 (2018).

[14] *See* Sari, *supra* note 4.

[15] *See* Cesar Augusto Rodriguez et al., *Putting the FIL into DIME Growing Joint Understanding of the Instruments of Power,* 97 JOINT FORCES Q. 121, 122 (2011) (The traditional instruments of state power are often labeled as Diplomatic, Informational, Military, and Economic. However, there is a growing acceptance of the idea of including Financial, Intelligence and Legal/Law Enforcement into the model to account for modern practices by nations.).

[16] *See* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Protocol I, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API] (attack defined as "acts of violence against the adversary, whether in offence or in defence.").

state actors remain below the threshold of force which would trigger Article 2(4) of the United Nations Charter.[17]

Gray zone actions are also notable for how extensively non-military actors and stakeholders are leveraged in the political, informational, economic, and legal dimensions of the DIMEFIL model to further military aims.[18] When a nation state's military is preparing for war, they are typically tasked with conducting operations to prepare the battlefield space in a way most advantageous to their objectives. In modern gray zone conflicts, however, states are also utilizing civilian entities such as cyber troll farms in Russia,[19] fishing fleets in China,[20] and even Iran's use of front companies and irregular financial networks.[21] As such, not only are nations moving away from reliance on large-scale combat operations, they are also blurring the distinction between military and civilian actions in the gray zone. Consequently, the traditional divide between combatants and non-combatants is also becoming blurred. This is in part because the perpetrators of a number of these gray zone conflict actions, as well as the targets of informational campaigns[22] are straddling the line between military and civilian actors.

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[17] *See* U.N. Charter art. 2, ¶ 4.

[18] *See* David Carment & Dani Belo, *Gray-zone Conflict Management: Theory, Evidence, and Challenges*, 2 J. OF EUR., MIDDLE E., & AFR. AFF. 21 (2020).

[19] *See* Joseph Vann, *Modern Propaganda*, PER CONCORDIAM (2020) at 7, https://www.marshallcenter.org/sites/default/files/files/2020-09/pC_V10N2_en_Vann.pdf (discussing the use of Russian civilian cyber operations to conduct cyber propaganda campaigns against adversary nations in both an offensive and defensive manner in support of Russian national security objectives).

[20] *See* TODD HELMUS ET AL., UNDERSTANDING AND COUNTERING CHINA'S MARITIME GRAY ZONE OPERATIONS (2024), https://www.rand.org/pubs/research_reports/RRA2954-1.html (noting that civilian Chinese fishing vessels are being used to harass other nations militaries, support intelligence collection, and engage in illegal fishing activities to undermine existing legal norms).

[21] *See* Robert Muller, *Real World Examples of Successful Gray Zone Operations*, MEDIUM (Sep. 3, 2024), https://medium.com/@DrRobertMuller/real-world-examples-of-successful-gray-zone-operations-746531715b98 (Through circumventing financial sanctions Iran is able to continue its financing of aligned militia groups within the region helping to further its political and national security objectives.).

[22] *See* Josep Baques, *Towards a Definition of the 'Gray Zone' (GZ) Concept*, INSTITUTO ESPAÑOL DE ESTUDIOS ESTRATÉGICOS 26 (The hybridization, or blurring between

Additionally, states are making use of combined economic pressures, and uses of force which even if not traditional armed conflict, are militaristic in nature and often conducted by military actors,[23] which obfuscates the civilian/military divide.

B. Situating the Gray Zone in Current Legal Paradigms

Although evidence shows that states are making greater use of the gray zone, and that those actions are blurring the traditional delineation between civilian and military actors, it does not do anything to help define what the gray zone is, nor how the current legal paradigms and norms apply to the gray zone. Indeed, one of the fundamental questions concerning the gray zone for legal practitioners is not just what the gray zone is or how it differs from traditional warfare, but rather how can gray zone actions be countered through existing lawful means, what the specific legal challenges are, and whether there are legal gaps, loopholes, or gray zones which adversaries may exploit.[24] Accordingly, this next section discusses gray zone actions using the existing lexicons of war, armed attack, the crime of aggression, and peacetime. Specifically, the section discusses (a) where the existing legal paradigms neatly align with gray zone actions and (b) where the gaps in the law exist, due to the delay in the adoption of new positivist laws or the adaptation of existing positivist law to these hybrid conflicts.[25]

The first question in a legal analysis of state-led gray zone actions, then, is if these actions are governed by the laws of war? While a

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military and civilian, or between military convention and the more typical role of the irregular forces, constitutes a new way of promoting and, if necessary, managing conflicts.).

[23] *See* Aurel Sari, *Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats*, 33 CAMBRIDGE REV. INT'L. AFF. 846, 857-67 (2020).

[24] *See* Morten Fogt, *Legal Challenges Or "Gaps" By Countering Hybrid Warfare – Building Resilience In Jus Ante Bellum*, 27 SW. J. INT'L L. 28, 31 (2021).

[25] *See* Outi Korhonen, *The Crisis In Ukraine: Deconstructing the Conflict in Ukraine: The Relevance of International Law to Hybrid States and Wars*, 16 GER. L. J. 452, 460 ("The emergence of positive rules always lags behind the development of the new methods of warfare, which by necessity engender new patterns of behavior, and in turn give rise to the questions of what constitutes compliance with international law in particular cases.").

seemingly simple "yes" or "no" question, with the likely answer of "no it does not,"[26] the question becomes more problematic when we ask the follow-on question of how do we define *war*? Then, once defined does that definition itself require an armed attack, and if so, is there an accepted understanding of what constitutes an armed attack? Looking at gray zone actions from this perspective, there is an argument that a simple doctrinal analysis alone is not sufficient to examine the question. Rather, one should approach the question from an interdisciplinary and comparative legal studies perspective, emphasizing the political and social realities of the subjects, the actors, and their actions.[27]

Defining war has been attempted in both a positive and negative sense. From a positive perspective, war can be described as a period of intense armed conflict between two or more organized groups, without a third party with the authority or capability to adjudicate between the two sides or otherwise end the conflict.[28] Alternatively, war may be defined as Carl von Clausewitz famously said: as the application of violence to achieve political ends.[29] Defining war in the negative sense can be said to be the absence of peace between two countries. Whether we accept either the positive or negative characterization of war, there is a general consensus that, in some semblance or another, war is a *legal* condition with ethical and normative frameworks and clearly defined boundaries.[30] When a country is in a "war" the laws of war, the *jus ad*

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[26] While there is as yet no universally accepted definition of what gray zone conflict is many authors agree that it is conducted in a manner that is coercive and aggressive, with a view to obtaining strategic goals and yet purposefully remains below the threshold of conventional war; *see, e.g.*, Sari, *supra* note 4, at 615; Javier Jordan, *International Competition Below the Threshold of War: Toward a Theory of Gray Zone Conflic*t, 14 J. STRATEGIC SEC. 1, 2 (2020); Philip Kapusta, *The Gray Zone*, 28 SPECIAL WARFARE 18, 20 (2015); Isaiah Wilson III & Scot Smitson, *Solving America's Gray-Zone Puzzle*, 46 PARAMETERS 55, 56 (2016).

[27] *See* Korhonen, *supra* note 25, at 456.

[28] *See* Jessica Wolfendale, *Defining War*, *in* SOFT WAR: THE ETHICS OF UNARMED CONFLICT 16 (Michael Gross & Tamar Meisels eds., 2017).

[29] *See* CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard et al. trans., 1976).

[30] *See* Steven Metz & Phillip Cuccia, *Defining War For The 21st Century*, *in* STRATEGIC STUD. INST. 2 (2011), http://www.jstor.org/stable/resrep11336.

bellum, govern their actions within that conflict even if one of the parties does not choose to recognize a "war."[31]

These boundaries, however, have certainly changed from the historic, international law requirement for one country to formally declare the assumption of hostilities. Today's hostilities may well begin somewhere else along the competition continuum with other actions designed to weaken the target state or population.[32] The United States Military defines the idea of a competition continuum as "a world of enduring competition conducted through a mixture of cooperation, competition below armed conflict, and armed conflict."[33] During this period of enduring competition, nation states are not necessarily operating within the legal framework of the laws of war because they may not have resorted to armed attack. Still, they are operating in a manner which is clearly antagonistic to their adversary. Absent a declared war or some form of armed conflict,[34] gray zone actions should be undertaken using peacetime legal paradigms, such as International

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[31] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [hereinafter Geneva Convention I], Aug. 12, 1949, 6 U.S.T. 3114; 75 U.N.T.S. 31, art. 2 (". . . the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.").

[32] *Id.* at 9.

[33] DEPT. OF DEF., JOINT DOCTRINE NOTE 1-19 COMPETITION CONTINUUM 2 (2019).

[34] While there is no universally accepted definition of what constitutes an armed conflict, one test which has gained popular support is that set forth in the International Tribunal for the Former Yugoslavia in Prosecutor v Tadić, IT-94-1-T, Trial Chamber Judgement (May 7, 1997), ¶ 562 (footnotes omitted) ("The test applied [for] the existence of an armed conflict for the purpose of the rules contained in common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, at a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrection, or terrorist activities, which are not subject to humanitarian law.").

Human Rights Law (IHRL)[35] and the United Nations Convention on the Law of the Sea (UNCLOS),[36] among others. However, for pragmatic reasons, activities conducted by nation state militaries within the competition continuum may not fall neatly into these legal paradigms. For example, security detention operations conducted by military units for limited durations and strictly for operational necessity may not comply with IHRL norms on detention.[37]

This idea of a continuum is therefore somewhat problematic. It is problematic because it implies inclusive limits of action and clearly delineated stages beginning, with peace at one end of the continuum and traditional warfare at the other. Indeed, some theorists now argue that we are in an age of comprehensive conflict, similar in composition to what some in the past have referred to as *total war*. In *total war*, nations mobilize their societies and prioritize some form of warfare, however it is defined, over all other state activities.[38] If this is the case, and no clear bounded differentiations exists between different sections of the competition continuum, then perhaps a better way of understanding the legal paradigm for gray zone conflicts is to ask whether or not those actions themselves constitute an armed attack. While gray zone activities are typically designed to remain below the threshold of armed attack,[39] there is no accepted definition of what actions by states exactly constitute an armed attack. Therefore, gray zone activities themselves

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[35] *See, e.g.*, International Covenant on Civil and Political Rights [hereinafter ICCPR], art. 9, *opened for signature* Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171; Hum. Rts. Comm., General Cmt. No. 35, ¶¶ 8, 10-11; Council of Eur. Convention for the Protection of Human Rights and Fundamental Freedoms Nov. 4, 1950, C.E.T.S. No. 213 [hereinafter Protection of Human Rights]; Org. Am. States Pact No. 17955, American Convention on Human Rights: "Pact of San Jose, Costa Rica" [hereinafter Convention on Human Rights] (Nov. 22, 1969); African [Banjul] Charter on Human and Peoples' Rights [hereinafter African Charter], Org. Afr. Unity OAU Doc. CAB/LEG/67/3 rev. 5 21 I.L.M. 59, (June 27, 1981).

[36] *See* United Nations Convention on the Law of the Sea [hereinafter UNCLOS], *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

[37] For a more in-depth analysis of this point, *see* Douglas Bryson, *Bridging the Legal Gap in Grey Zone Detention Operations*, 12 NAT'L SEC. L.J. 1, 53 (2025).

[38] *See* Karlin, *supra* note 6.

[39] Sari, *supra* note 4.

are potentially helping to shape the understanding of international norms, both through their application and through countries' responses to those actions.[40]

The United Nations Charter specifies in Article 51 that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."[41] However, the article fails to specify what constitutes an armed attack, nor does the charter elsewhere describe what constitutes an armed attack by one country against another. There was also no discussion of a definition during the San Francisco Conference in 1945 when drafting the charter.[42] In addition to this, perhaps purposeful, oversight in the U.N. Charter,[43] the four Geneva Conventions also lack any definition of what constitutes an armed attack. Thus, they are yet another source of customary international law,[44] that state plainly that they will apply in the case of armed conflict.[45]

While the International Court of Justice (ICJ) did attempt to offer some clarity on this topic by providing examples of what might constitute an armed attack,[46] focusing on scale and effect, this effort still fell short of an unambiguous or universally accepted definition.[47]

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[40] *See* Michael Newton, *Winning at the Strategic Seams*, HYBRID THREATS AND GREY ZONE CONFLICTS (Mitt Regan & Aurel Sari eds., 2024).

[41] U.N. Charter art. 51.

[42] *See* Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT'L L. 183, 244 (1961).

[43] See Laurie Blank, *Irreconcilable Differences: The Thresholds for Armed Attack and International Armed Conflict*, 96 NOTRE DAME L. REV. 249, 253 (2020).

[44] *See* Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L., 348, 350 (1987).

[45] *See* Geneva Convention I, *supra* note 31.

[46] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27) (stating that while mere frontier incidents will not rise to the level of an armed attack [despite the use of armed force] but that only "the most grave forms of the use of force," including acts like invasion, sending armed bands, or bombardment will).

[47] In objection to this standard, the United States refused to participate further in the case Nica. v. United States, *id* ¶ 228; Israel and El-Salvador voted against a non-binding resolution in 1986 which would have urged the United States to comply with

Indeed, when looking at modern gray zone activities, the Court's ruling suggests that use of low-intensity gray zone actions explicitly do not reach the threshold level of an armed attack and therefore should not be governed by the laws of war. Gray zone activities, however, as discussed in more depth later, do not always manifest themselves physically. Examples include activities conducted by states' militaries within the cyber domain against one another, or against civilian institutions and locations, for the purposes of operational preparation or fomenting civil unrest in anticipation of military action. While a detailed discussion of the developing laws and norms of the cyber domain are beyond the scope of this piece, it is worth noting that even amongst likeminded states there is not a consensus regarding accepted norms.[48]

Specifically looking at the Tallinn Manual, which is arguably one of the most influential resources compiled by a group of legal experts, we find that ongoing state practice illustrates that there is not only disagreement about whether or not the Tallinn rules should even be accepted, let alone how,[49] but also that non-state actors are informing the application of international law in cyberspace.[50] Additionally, looking at the U.N. General Assembly's Group of Governmental Experts (GGE) report on advancing responsible state behavior in cyberspace in the context of international security from 2021, representatives from twenty-five different states[51] could only agree that

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the court's ruling, Deborah Tyroler, *Notes On U.N. General Assembly Vote In Favor Of Nicaraguan Demand That U.S. Abide By June 27 World Court Decision*, LATIN AM. DATABASE (1986), https://digitalrepository.unm.edu/noticen/122.

[48] *See* Newton, *supra* note 40.

[49] *See* Dan Efrony & Yuval Shany, *A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice*, 112 AM. J. INT'L L. 583, 585 (2018).

[50] *See* Michael Schmitt, *The Law of Cyber Conflict: Quo Vadis?*, ARTS. OF WAR (2022), https://lieber.westpoint.edu/law-cyber-conflict-quo-vadis/.

[51] *See* U.N. Secretary-General, *Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security*, U.N. Doc. A/76/135 (July 14, 2021) (the countries represented were; Australia, Brazil, China, Estonia, France, Germany, India, Indonesia, Japan, Jordan, Kazakhstan, Kenya, Mauritius, Mexico, Morocco, the Netherlands, Norway, Romania, the Russian

"voluntary, non-binding norms of responsible State behavior can reduce risks to international peace, security[,] and stability."[52] Even acknowledging that many countries were developing military applications of the cyber realm, and that such actions posed a significant risk to international security and stability,[53] the countries were unable to agree on normative application of the existing laws to the cyber realm. Accordingly, while some states such as Australia, Estonia, and the United States believe that a cyber-attack can rise to the level of an armed attack,[54] other nations such as Brazil and Russia hold the opposite to be true.[55]

Accordingly, gray zone activities conducted in the cyber realm, or the associated informational realm are not *per se* actions which should be governed under the law of armed conflict. Even if one country claims that their actions, or actions' effects, rise to the level of such severity that they meet the factors outlined in the *Tadić* case,[56] the clearly stated division amongst the GGE illustrates the lack of crystalized customary international law. Were the gray zone actions to move outside of the cyber/informational/coercive realm, and into the more traditional kinetic realm, no matter the scale, then existing law does provide more clarity. Specifically, Article 49 of the of the 1977 Additional Protocol I to the Geneva convention states that attacks are "acts of violence against the adversary, whether in offence or in defence."[57] However, as

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Federation, Singapore, South Africa, Switzerland, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and Uruguay).

[52] *Id*. at 8.

[53] See *id*. at 7.

[54] *See* U.N. Secretary-General, Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States, U.N. Doc. A/76/136 (July 13, 2021).

[55] *See id.*

[56] *See Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). (Noting that a certain level of Intensity in the level of fighting such as frequency, seriousness of attacks, destruction must be reached for a non-international armed conflict. Also holding that the parties must also maintain a certain threshold level of organization and structure to be an armed group.).

[57] *See* API.

previously noted, one of the hallmark distinctions of gray zone conflict is the propensity of actors to stay purposefully below this threshold by using a combination of hard and soft power in an unconventional manner.[58]

If then, gray zone activities are not easily situated within the traditional law of war framework, should legal practitioners instead attempt to address these coercive activities within the existing legal framework of the law of peace? The very fact that gray zone activities are coercive in nature refutes that alternative approach; it flies in the face of the primary source of peacetime law for nation states, the U.N. Charter, specifically, Articles 2(3) and 2(4).[59] While the U.N. Charter is primarily concerned with the *jus ad bellum*, the law concerning when the moral and legal justifications for going to war, and not specific *jus in bello* concerns, the U.N. Charter arguably governs a state's lawful use of force.[60] Gray zone activities purposefully undermine this by design in threatening peace and security.

This, in turn, begs the question of whether such activities, while aggressive, are acts which violate the "supreme international crime" of aggression?[61] Here again, legal practitioners applying existing legal paradigms must face the issue that certain gray zone activities, such as the use of economic coercion, disinformation, and even the introduction of covert forces into the territory of another state[62] have not traditionally

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[58] *See generally* MICHAEL J. MAZARR, MASTERING THE GRAY ZONE: UNDERSTANDING A CHANGING ERA OF CONFLICT 33-34 (2015).

[59] *See* U.N. Charter art. 2.

[60] *See* Francis Grimal & Michael Pollard, *A Blurring of Lines: The Jus ad Bellum Past, Present, and Future*, 11 J. ON THE USE OF FORCE & INT'L L. 1, 4-5 (2024).

[61] 22 Nuremberg Trial Proceedings, 30 Sept. 30, 1946, 426 (The Avalon Project, 2008), http://avalon.law.yale.edu/imt/09-30-46.asp.

[62] This would of course be a violation of the principle of non-intervention and a violation of state sovereignty; *see generally* Alexandra Perina, *Black Holes and Open Secrets: The Impact of Covert Action on International Law*, 53 COLUM. J. INT'L. L. 3 (2015).

been found to violate the U.N. Charter's prohibition of force under article 2(4), at least not in an enforceable way.[63]

V. Tools of Gray Zone Warfare

While nation states may not have an agreed upon legal paradigm governing gray zone conflict, the methods and means of conducting gray zone campaigns have existed for many years. However, by using these tools of warfare and statecraft within the liminal space between war and peace, at a level below treaty obligations concerning self-defense against a use of force,[64] actors with malign intent may undermine the values and norms which bind liberal democracies, as well as the current rules-based international order.[65]

A. Information Operations

One area of operations ripe for blending military and non-military tools to conduct operations which traditionally fall below the level of armed conflict, but are still coercive, is that of information operations or information warfare. Information operations are conducted within the information environment, defined by the U.S. government as "the aggregate of individuals, organizations, and systems that collect, process, disseminate, or act on information."[66] Such operations are

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[63] *See* Thomas Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 Am. J. Int'l L., 5, 809; *see also*, Noah Jager, *A Law Without Teeth? The Limits and Relevance of UN Article 2(4)*, WAR ROOM (2025), https://warroom.armywarcollege.edu/articles/un-article-2-4/.

[64] See, *e.g.,* North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. ("The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.").

[65] *See* Newton, *supra* note 40.

[66] JOINT CHIEFS OF STAFF, JOINT PUB.3-13 INFORMATION OPERATIONS (hereinafter JP 3-13), at I-1 (27 Nov. 2012) (C1, 20 Nov. 14).

designed to "influence, disrupt, corrupt, or usurp the decision making of [target audiences] to create a desired effect,"[67] in support of a desired objective within the DIMEFIL spectrum. While not exclusively a tool of military organizations, the liminal nature of gray zone warfare means that the distinction between civilian and state military information operations is also being blurred.[68]

Information campaigns can take many forms. For example, cyber operations, which include both open-source social media campaigns and more nefarious hacking attacks, military deception or psychological campaigns, and even more traditional propaganda or disinformation campaigns conducted via traditional print, radio, and television media. The sections below examine each of these areas in more detail, as well as situate them within possible gray zone campaigns using real world and hypothetical examples.

The proliferation of cyberspace capabilities over the past three decades has presented national governments with a unique force multiplier for information warfare activities. At one end of the spectrum, cyber-attacks can be levied against an adversary in either a direct destruction or degradation of a network capability, or in support of a kinetic strike.[69] On the other end of the spectrum, cyber effects can be used for espionage or manipulation of the information environment.[70] The advances in computing and the development of the internet mean that no longer must nations employ kinetic munitions (such as missiles, bombs or even bullets) against their enemy. Rather, they may now use lines of code sent across communications networks in order to either (a) degrade an enemy's ability to wage war through disruption of their supporting networks, or (b) in some cases cause physical damage through hijacking command and control systems

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[67] *Id*. at II-1.
[68] *See* DEPT. OF THE ARMY, ATP 7-100.1, *Russian Tactics*, 2-7.
[69] *See* Christopher Whyte and Brian Mazanec, UNDERSTANDING CYBER WARFARE: POLITICS, POLICY AND STRATEGY 100-101 (2019).
[70] *See id*.

through the use of a computer virus.[71] While the use of cyber in a means similar to kinetic effects arguably constitutes an act akin to a traditional armed attack,[72] cyber operations excel as gray zone activities by providing the ability for actors to operate in a non-attributable manner and thus achieving strategic goals without exceeding the threshold which could lead to armed conflict.[73]

Perhaps the most notorious example of a non-attributable gray zone cyber operation is that of the STUXNET computer virus which *attacked* the Iranian nuclear program. The employment of the STUXNET virus against the Iranian nuclear control systems caused the Iranian centrifuges to spin wildly out of control, causing damage which set back the Iranian nuclear program significantly.[74] This kind of a cyber-attack, while not causing any reported injuries, shows that "computer technology has advanced to the point where military forces now have the capability to inflict injury, death[,] and destruction via cyberspace."[75] While certainly the equivalent of an armed attack according to the understanding laid out by countries such as the United States, the STUXNET program was never officially claimed by any country and so falls into the liminal gray zone sphere of operations.

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[71] *See* Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 CAL. L. REV. 817 (2012).

[72] While some commentators such as Yoram Dinstein argue that "a use of force not involving loss of life or significant destruction of property falls short of an armed attack," other legal theorists support the notion that some cyber operations can be sufficiently grave enough to equal an armed attack, drawing from the reasoning in the International Court of Justice's Nuclear Weapons advisory opinion and arguing that "the choice of means of attack is immaterial to the issue of whether an operation qualifies as an armed attack." *See* Yoram Dinstein, *Cyber War and International Law: Concluding Remarks at the 2012 Naval War College International Law Conference,* 89 INT. L. STUD., 276, 279 (2013); *but see* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael Schmitt ed., 2017).

[73] *See* Tahir Azad et al., *Understanding Gray Zone Warfare From Multiple Perspectives*, 186 WORLD AFF. 81, 92 (2023).

[74] *See* Jonathan Fildes, *Stuxnet Worm Targeted High-Value Iranian Assets,* BBC NEWS (Sep. 23, 2010), http://www.bbc.com/news/technology-11388018.

[75] Davis Brown, *A Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict*, 47 HARV. INT. L. J. 179, 180 (2006).

The Stuxnet attack also illustrates how militaries increasingly operate in domains traditionally regarded as civilian.[76] Although the internet is probably too recent a development to be considered a traditionally civilian realm, its ubiquitous presence around the globe—in schoolrooms, public libraries, and even individual fridges and freezers through the use of *smart* appliances—places the internet as firmly civilian in nature. The internet's civilian designation is further reinforced by U.S. Cyber Command who, upon becoming operational in 2010, categorically stated that they have no desire to take over civilian internet security. Rather, any individual (civilian) who wished to be protected by Cyber Command must opt in on a voluntary basis.[77] This is a strong indicator that even the military forces charged with conducting military operations within the cyber environment consider the internet a civilian space.

However, as previously noted, cyber operations are not only those which cause effects comparable to traditional kinetic effects but also include espionage activities to collect data which may later be used in further actions, and the purposeful manipulation of the information environment. Such actions may then be used to influence the target audience through manipulation of their understanding of the rules, norms, and beliefs which make up their information environment.[78] For example, Russia in the last year alone has been accused of cyber espionage actions, such as infiltrating water treatment plants in Finland, Sweden, and Germany, and has almost certainly conducted

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[76] *See* Michael N. Schmitt, *Bellum Americanum: The U.S. Vieu of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict,* 19 MICH. J. INT'L LAW 1051 (1998).

[77] Noah Shachtman, *Cyber Command: We Don't Wanna Defend the Internet (We Just Might Have To)*, WIRED (May 28, 2010), https://www.wired.com/2010/05/cyber-command-we-dont-wanna-defend-the-internet-but-we-just-might-have-to/.

[78] *See* JP 3-13, *supra* note 65, at I-5 (noting that rules are the explicit regulative processes such as policies, laws, inspection routines, or incentives; norms are the regulative mechanisms accepted by the social collective; and beliefs are collective perception of fundamental truths governing behavior).

other cyber activities not yet attributed to it.[79] Russia was also notably accused of combining social media and big data to massively target individual voters in the 2016 U.S. elections in an attempt to undermine U.S. political integrity.[80] Similarly, China openly states that it is focused on the 'cognitive' domain of information operations and publicly states that it aims to *precondition* the political, strategic, operational, and tactical arenas to advance its strategic goals.[81] These preconditioning efforts are common in military operations, and typically fall under the military deception (MILDEC) and psychological operations (PSYOPS) nomenclature.

While MILDEC and PSYOPS are unique military disciplines,[82] both provide a means below the traditional use of armed conflict, to make an adversary take actions aligned with the practicing state's goals. Much like the cyber operations discussed above, MILDEC and PSYOPS are also conducted within the civilian sphere and form part of the arsenal states use within the liminal space of the gray zone.[83] Indeed, as one author put it in 1989, "psychological operations may become the dominant operational and strategic weapon in the form of media [or] information intervention . . . . A major target will be the enemy population's support of its government and the war. Television news may become a more powerful operational weapon than armored divisions."[84] If these two disciplines were used during a period of

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[79] *See* Peter Apps, *Russia's Suspected Sabotage Campaign Steps Up in Europe*, REUTERS (Oct. 20, 2024), www.reuters.com/world/russias-suspected-sabotage-campaign-steps-up-europe-2024-10-21.

[80] *See* Ferry Oorsprong et al., *Cyber-Attacks and the Right of Self-Defense: A Case Study of the Netherlands,* POL'Y DESIGN & PRAC. 6:2, 217, 224 (2023).

[81] *See New Tactic: COVID Information Warfare and the Future of Great Power Competition*, 44 FLETCHER F. WORLD AFF. 11, 12-13.

[82] *See* JOINT CHIEFS OF STAFF, JP 3-13.5 MILITARY DECEPTION, (Jan. 26, 2012) (defining MILDEC as actions executed to deliberately mislead the adversary so that they take specific actions); *see also* JOINT CHIEFS OF STAFF, JP 3-13.2 (07 Jan. 2010) (noting that PSYOPS are planned to influence the perceptions, attitudes, objective reasoning, and, ultimately, the behavior of adversary).

[83] *See* Ajir, *supra* note 13, at 73.

[84] William Lind et al., *The Changing Face of War: Into the Fourth Generation*, MARINE CORPS GAZ. 22-26 (1989)

armed conflict they would of course be limited to such objectives as those which have the possibility of achieving a definitive military advantage[85] under the traditional LOAC rule of distinction.[86]

Another unique twist to operations conducted in the information sphere, and one that is still the subject of both academic and political debate, is that of sovereignty as it applies to such operations. Arguably, the above actions are a violation of the principle of sovereignty as "the exercise of jurisdiction by one state over matters and parties within the territorial limits of another independent state."[87] Such violations are typically forbidden.[88] While there is no single accepted definition of what exactly sovereignty is,[89] the relevant question for this discussion is one of whether or not information operations, and other similar gray zone operations, are a violation of sovereignty in an internal or external capacity?[90] When discussing states' authority and exclusivity over their own territories, the discussion concerns internal sovereignty.[91] Whereas the notion of external sovereignty is focused on the principle that all states are equal within the international system and should remain free from any external control, or imposition of restraint, by another state.[92]

Gray zone operations conducted in the information sphere below the level of traditional armed conflict, as discussed previously, are designed to intrude into at least one, if not both, internal and external

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[85] *See* API art. 52.
[86] *See id*.
[87] Patricia McKeon, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN'S J. LEGAL COMMENT. 535, 535-36 (1997).
[88] *Id*.
[89] *See* Winston Nagan and Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 142 (2004).
[90] *See* Ronald A. Brand, *External Sovereignty and International Law*, 18 FORDHAM INT'L L. J. 1685, 1689 (1995).
[91] *See* Theodore Richard & Sean Watts, *Baseline Territorial Sovereignty and Cyberspace*, 22 LEWIS & CLARK L. REV. 708, 830 (2018) (citing Memorandum from Jennifer M. O'Connor, Gen. Counsel of the Dep't of Def., International Law Framework for Employing Cyber Capabilities in Military Operations (Jan. 19, 2017)).
[92] *See id*. at 828-29.

sovereignty spheres. They do so in manners which range from overt incursions of territory, such as taking control of computers or signals in a country's territory, or more attenuated influence operations which may cause damage and harm by inciting action. Regardless of the type of action taken, states typically may assert jurisdictional control, or exercise defense of sovereign property under theories of passive nationality[93] or protective principle during times of peace,[94] and of course retain the right to national self-defense if the subject of armed attack.

As a matter of international law and historical practice, one state exercising jurisdiction over matters and parties within the territorial limits of another independent state is forbidden.[95] This is largely because the principle of sovereignty identifies "the nation-state as the legitimate international actor entitled to the protection of international law,"[96] and the principle applies equally to all members of the international community.[97] When discussing violations of another state's territory, the ICJ interprets the term quite broadly. For example, in the *Corfu Channel* case, the ICJ held that the United Kingdom violated Albanian sovereignty by entering Albanian territorial waters and conducting minesweeping operations.[98] The United Kingdom had not taken any territory or imposed directly upon any citizen of Albania, however the court ruled that in conducting operations, rather than just engaging in innocent passage, the United Kingdom's unilateral actions

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[93] John McCarthy, *The Passive Personality Principle and Its Use in Combatting International Terrorism*, 13 FORDHAM INT'L. L. J. 298, 301 (1989).

[94] *See generally* Todd Hutchins, *Safeguarding Civilian Internet Access During Armed Conflict: Protecting Humanity's Most Important Resource in War*, 22 COLUM. SCI. & TECH. L. REV. 127, 151 (2020)

[95] *See* Patricia McKeon, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN'S J. LEGAL COMMENT 535, 535-36 (1997).

[96] David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 260 (1992).

[97] *See* U.N. Charter art. 2, ¶ 1.

[98] *See* Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, at 35 (Apr. 9) (holding that "between independent states, respect for territorial sovereignty is an essential foundation of international relations.").

amounted to a breach of Albanian sovereignty. Notably however, the court gave little credence to Albania's argument that the British warships were engaged in a political act, rather than innocent transit, just because they were in a combat formation with soldiers on board.[99]

The ICJ provided further precedent in the 1986 *Nicaragua* case. There, the court found that U.S. activities supporting Contra rebel group violated customary international law obligations to not intervene in the affairs of another State, not use force against another State, not infringe the sovereignty of another State, and not interrupt peaceful maritime commerce.[100] Specifically, the court found that

> the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.[101]

It is important to note however, that the ICJ did not find that U.S. actions led to effective control over the Contra forces by the United States.[102] Rather the ICJ required that the Contras not only be paid or financed by the United States, but that their actions be coordinated or supervised via specific instructions. However, there was no unambiguous evidence of the United States exercising that degree of control.[103] This distinction is important, because while the United States was found guilty of violating Nicaraguan sovereignty, the lack of effective control over the Contras meant that the United States could not be found guilty of engaging in armed attack. Accordingly, as a matter of international law Nicaragua was not entitled to use armed force in a self-defense response.

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[99] *See id.* at 32.
[100] *See* Nicar. v. U.S., 1986 I.C.J. ¶ 242.
[101] *Id.* ¶ 292.
[102] *See id.* ¶109.
[103] *See* Leo Van den hole, *Towards A Test of the International Character of an Armed Conflict: Nicaragua and Tadic*, 32 SYRACUSE J. INT'L L. & COM. 269, 275 (2005).

Countries who are subject to a violation of sovereignty that does not rise to the level of an armed attack, are limited to non-forcible response measures. Appropriate responses may include diplomatic protests or sanctions, but the use of force purely for retaliation is illegal.[104] This prohibition on the use of force to respond to violations of sovereignty, while written to discourage violence and reduce the use of armed conflict as a tool of national power, creates legal gaps which state and non-state actors can exploit in their gray zone operations. This is in large part because "as a sovereignty-based legal regime, international law's normative value and effectiveness depends primarily on its national implementation in good faith."[105]

When countries such as Iran, Russia, and China take actions which undermine good faith implementation of the legal framework to further their own political agendas, the credibility of international law as a tool to manage international relations is weakened. The credibility is especially weakened when a country's actions are designed to exploit an adversary's adherence to the existing international structures,[106] or erode existing legal normative structures.[107] The current fragmented geopolitical landscape offers many opportunities for gray zone actions which take advantage of these legal gaps as the following section examines in more detail.

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[104] *See* Michael N. Schmitt, *Retaliation, Retribution, and Punishment and International Law*, ARTS. OF WAR (Apr. 18, 2024), https://lieber.westpoint.edu/retaliation-retribution-punishment-international-law/#:~:text=In%20that%20reprisals%20involve%20an,not%20amount%20to%20a%20reprisal.

[105] Hitoshi Nasu, *Hybrid Threats and Grey Zone Conflict Symposium–Challenges in the Twilight of International Law*, ARTS. OF WAR (Oct. 30,2024), https://lieber.westpoint.edu/challenges-twilight-international-law/.

[106] *See id*.

[107] *See* Erica Harper, *War Reloaded: The Erosion of Norms and the Urgency of Prevention*, ARTS. OF WAR (June 17, 2025), https://lieber.westpoint.edu/war-reloaded-erosion-norms-urgency-prevention/.

B. Lawfare Activities & Norm Erosion

Since 2013, the Peoples Republic of China (PRC) has engaged in a series of island building operations in the South China Sea.[108] The PRC has also made assertive maritime claims, such as the now-infamous "nine-dash line,"[109] low-level clashes around and *de facto* occupations of shoals involving Chinese Coast Guard vessels,[110] and attempted to use legal proceedings to shape international law in favor of the PRC's actions.[111] The PRC's actions are an interesting use of lawfare techniques and other low-level gray zone activities.[112] On one hand their use highlight the PRC's claimed interests in adherence to international law, but on the other hand highlight their complete disregard for the legal claims of their South China Sea neighbors to territorial and Exclusive Economic Zones under UNCLOS.[113]

Through efforts to legitimize their own claims and discredit those of others, the PRC is strategically moving forward with an expansionist

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[108] *See* Derek Watkins, *What China Has Been Building in the South China Sea*, N.Y. TIMES (Feb. 29, 2016), http://nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea-2016.html.

[109]Xavier Francis, *Indonesia Rejects Chinese Claims To The South China Sea; Says 'Nine-Dash Line' Puts Its Interests At Risk*, EURASIAN TIMES (June 5, 2020), https://eurasian times.com/indonesia-rejects-chinese-claims-to-the-south-china-sea-says-nine-dash-lineputs-its-interests-at-risk/.

[110] *See China Conducts Patrols in South China Sea Amid Ongoing Run-Ins*, REUTERS, Jan. 3, 2024, https://www.reuters.com/world/china/china-conducts-patrols-south-china-sea-amid-ongoing-run-ins-2024-01-03/.

[111] *See* Fu Ying, *Why China Says No to the Arbitration on the South China Sea*, FOREIGN POL'Y (July 10, 2016), https://foreignpolicy.com/2016/07/10/why-china-says-no-to-the-arbitration-on-the-south-china-sea/ ("Beijing's position is clear: no acceptance, no participation, no recognition, and no implementation." The position of the PRC is that the matter before the tribunal implicated issues of sovereignty, which they claim do not fall within the mandate of the UNCLOS treaty and tribunal.).

[112] *See* Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, YALE J. INT'L AFF'S 146 (2008) (lawfare is "the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective."); *see also* Orde Kittrie, LAWFARE: LAW AS A WEAPON OF WAR 8 (2016) (arguing that lawfare is the use of law to create the same or similar effects as those traditionally sought from conventional military action, provided that the party using law in this manner is motivated by a desire to weaken or destroy an adversary).

[113] *See* Garret Bowman, *Securing The Precipitous Heights: U.S. Lawfare As A Means To Confront China At Sea, In Space, And Cyberspace*, 34 PACE INT'L L. REV. 81, 119 (2021).

agenda based on existing international norms. However, they are doing so in increments so gradual that their adversaries in this space either do not concentrate their efforts against it, or are reticent to move against them, because they themselves do not wish to appear aggressive in the liminal space of gray zone activities.[114] This in turn sets the stage for the PRC to assert not only a historical title to certain regions of the South China Sea, but also that it is practicing regional customary international law based on general practice and the PRC's understanding of what the prevailing *opinion juris* should be.[115]

The PRC response to the 2009 Malaysian and Vietnamese submission to the U.N. Commission on the Limits of the Continental Shelf claims for an extended continental shelf in the South China Sea is a perfect example of these actions.[116] Rather than disputing the authority of UNCLOS, which the PRC is a party to, they instead responded to the filing by sending two *notes verbale* to the Secretary-General of the United Nations. The PRC claimed that they had "indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over

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[114] *See* Matt Petersen, *Competition and Decision in the Gray Zone: A New National Security Strategy*, STRATEGY BRIDGE, Apr. 20, 2021, https://thestrategybridge.org/the-bridge/2021/4/20/competition-and-decision-in-the-gray-zone-a-new-national-security-strategy.

[115] *See* Chenhong Liu, *Regional Customary International Law Related to China's Historic Rights in the South China Sea*, 7 THE KOREAN J. OF INT'L & COMP. L. 262-76 (2019), https://doi.org/10.1163/22134484-12340128 (arguing that "the practice of the ICJ is uniform in the cognizance of regional customary international law. According to the international judicial practice, the establishment of regional customary international law is mainly based on the two elements, which are general practice and *opinio juris* of related States.").

[116] *See* JOINT SUBMISSION BY MALAYSIA AND THE SOCIALIST REPUBLIC OF VIET NAM, COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF, https://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm (last updated June 28, 2024); *see also* UNCLOS, *supra* note 36, art. 76 (Claims for an extended continental shelf may be made by parties to UNCLOS under Art. 76 on the convention. If successful, a State would be able to make exclusive claims on the economic resources on or below the seabed beyond the traditional 200 nautical mile economic exclusion zone.).

the relevant waters as well as the seabed and subsoil thereof."[117] The PRC further requested that the notes be circulated to all 193 member states of the United Nations, highlighting their state practice and laying the foundations for a claim that they were acting consistently with historical, regional legal obligations. Just as the goal of information operations is to influence behaviors of a particular target audience, the PRC's use of lawfare activities are active attempts to simultaneously (1) use the normative structures of the existing international legal regime and (2) create new customary international law supporting their strategic world view.[118]

Russia has also made use of legal tools in an attempt to undermine the existing legal world order. For example, it has issued almost 200,000 Russian passports to Ukrainian citizens living in the Donbas since 2019.[119] While the Russian government's actions were not in direct violation of the Minsk agreements of 2014,[120] the Ukrainian government was quick to argue that Russia's actions were a violation of both state sovereignty and were an attempt to occupy Ukraine by non-military means.[121] Notably, in 2025 Russian president Vladimir Putin issued a decree requiring all Ukrainians still residing in Russian held parts of Ukraine to obtain Russian passports, or be subject to expulsion from the

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[117] Note Verbale CML/17/2009 from the Permanent Mission of the People's Republic of China to the U.N. Secretary General (May 7, 2009) [hereinafter CML/17/2009], available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf; *see also* Note Verbale CML/18/2009 from the Permanent Mission of the People's Republic of China to the U.N. Secretary.

[118] *See generally* Paul Gewirtz, *China, the United States, and the Future of a Rules Based International Order*, BROOKINGS (July 22, 2024), https://www.brookings.edu/articles/china-the-united-states-and-the-future-of-a-rules-based-international-order/#:~:text=In%20short%2C%20the%20BRICS%20summit,the%20existing%20international%20order%20collapses.

[119] *See* Fabian Burkhardt, *Russia's "Passportisation" of the Donbas,* 41 SWP COMMENT 1, 1 (2020).

[120] *See* Protocol on the results of consultations of the Trilateral Contact Group, Sept. 5, 2014.

[121] *See* Burkhardt, *supra* note 119.

country and restricted from work, in a much clearer violation of international law and the law of occupation.[122]

Of course, not all lawfare actions taken within the liminal spaces between war and peace are designed to subvert the existing international order. The United States regularly conducts activities known as "freedom of navigation operations"[123] as a means of showing their commitment to the customary international law status of Article 87(1) of UNCLOS,[124] and as a means of combatting excessive maritime (and air) claims by other nations.[125] While arguably peaceful in operation and intent,[126] these freedom of navigation operations are a form of legal posturing and enforcement by the United States in a manner that was in direct competition with twenty-six separate states in 2018.[127] Typically, freedom of navigation operations are conducted by a countries' military forces. This again highlights the blurring of the lines between military forces conducting competitive, and potentially coercive, acts within the civilian realm, during the period of competition historically considered as peacetime.

C. Use of "Traditional" Military Force in Gray Zone Operations

These uses of military forces in an arguably aggressive military manner further adds to Mara Karlin's argument that the competition spectrum is collapsing,[128] and that the legal dichotomy of war and peace

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[122] *See* Kseniya Kvitka, *Get a Passport or Leave: Russia's Ultimatum to Ukrainians*, HUM. RTS. WATCH (Mar. 25, 2025), https://www.hrw.org/news/2025/03/25/get-passport-or-leave-russias-ultimatum-ukrainians.

[123] DEPT. OF DEF., FREEDOM OF NAVIGATION REPORT FOR FISCAL YEAR 2022 (2023), http://policy.defense.gov/OUSDPOffices/FON.aspx.

[124] *See* UNCLOS, *supra* note 36, art. 87(1) ("The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; . . .").

[125] *See* Raul Pedrozo, *U.S. Freedom of Navigation Program*, 97 INT'L L. STUD. 70, 71 (2021).

[126] *See* UNCLOS, *supra* note 36, art. 88 (requires that the high seas be reserved for peaceful purposes).

[127] *See* Raul Pedrozo, *supra* note 125, at 73.

[128] *See* Karlin, *supra* note 6.

is increasingly harder to define.[129] By making use of the gray zone and lower-level uses of force below the threshold of armed conflict, nation states are combining their information and lawfare operations with more traditional kinetic means. This combination is an attempt to keep their activities from being defined as an armed conflict, and thus subject to the legal requirements and accountability which accompany that classification.[130] Countries such as China and Russia are highlighting the tensions between the accepted black letter law of what constitutes an armed conflict[131] and the political messaging that some parties are attempting to use to circumvent such definitions[132] through use of military forces in the gray zone "to achieve the fruits of war, in the form of territorial gains, and revision of existing regional and international arrangements."[133]

For example, since 2009, there have been numerous clashes between Chinese and Filipino vessels in the South China Sea.[134] Some of these altercations are focused on the garrisoning and supply of troops on

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[129] *See* Inger Österdahl, *The Disappearance of Some Crucial Dichotomies in the Law of Armed Conflict*, RIKSBANKENS JUBILEUMSFOND (2012), https://www.rj.se/en/grants/2007/the-disappearance-of-some-crucial-dichotomies-in-the-law-of-armed-conflict/.

[130] *See* Jordan, *supra* note 26, at 2.

[131] *See* ICRC, HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW? (2024), https://www.icrc.org/sites/default/files/document_new/file_list/armed_conflict_defined_in_ihl.pdf (stating that once one state uses force against another or occupies their territory that an international armed conflict is triggered, even if there is no "high intensity of violence").

[132] *See* Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No. 26, Order of May 25, 2019, ¶ 31, https://itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_25.05.pdf.
(with both Russia and Ukraine claiming that no armed conflict existed between them and that their actions were perhaps even non-military in nature).

[133] Hal Brands, *Paradoxes of the Gray Zone,* FOREIGN POL'Y RES. INST. (2016), https://www.fpri.org/article/2016/02/paradoxes-gray-zone/.

[134] *See generally* Dean Cheng, *Rising Tensions Between China and the Philippines in the South China Sea,* U.S. INST. OF PEACE (Dec. 14, 2023), https://www.usip.org/publications/2023/12/rising-tensions-between-china-and-philippines-south-china-sea; *see also* Jim Gomez, *Philippine and Chinese Vessels Collide in Disputed South China Sea and 4 Filipino Crew Are Injured*, AP NEWS (Mar. 5, 2024, 2:33 PM), https://apnews.com/article/philippines-china-south-china-sea-collision-e69d9506e85d1d23685db4f220b50d71.

shoals and islands by Chinese troops. Other altercations have involved disagreements over the extraction of natural resources, such as fish stocks, with PRC military vessels and aircraft using aggressive maneuvers against civilian Filipino fishing vessels to deter those activities.[135] While these altercations previously only involved interventions by Chinese Coast Guard (CCG) vessels and Chinese fishing vessels,[136] possibly in an attempt to avoid further escalation or intervention by the United States and other actors.[137] The People's Liberation Army Southern Theater Command has more recently increased "combat readiness patrols" around the area, deploying both naval and air forces to "reinforce patrols and vigilance, further strengthen control and management of relevant areas, and effectively counter unlawful infringements and provocations."[138]

This strong language and use of military forces to *strengthen control*, when taken alongside the 2016 Permanent Court of Arbitration (PCA) tribunal ruling that limited the PRC's claims around the Scarborough shoal,[139] raises questions concerning both the law of occupation as it

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[135] *See* Nathan Strout, *China, Philippines Continue to Clash Over Fishing Rights in South China Sea*, SEAFOOD SOURCE, (October 3, 2025), https://www.seafoodsource.com/news/supply-trade/china-increases-patrols-around-scarborough-shoal-filipino-fishers-find-underwater-drone.

[136] These fishing vessels are overtly civilian fishing vessels. *But see* Shuxian Luo & Jonathan Panter, *China's Maritime Militia and Fishing Fleets: A Primer for Operational Staffs and Tactical Leaders*, 101 MIL. REV. 7, 7-12 (2021) ("The maritime militia, a separate organization from both the PLAN and China Coast Guard, consists of citizens working in the marine economy who receive training from the PLA and CCG to perform tasks including but not limited to border patrol . . . and auxiliary tasks in support of naval operations in wartime.").

[137] *See* Cheng, *supra* note 134.

[138] Huaxia, *Chinese Military Intensifies Combat Readiness Patrols over Huangyan Dao*, XINHUA (Oct. 1, 2025), https://english.news.cn/20251001/08a3e90abf8847fe8fabb2f3edc0a5aa/c.html.

[139] *See* The South China Sea Arbitration (Phil. v. China), PCA Case Repository No. 2013-19, Award of July 12, 2016 (ruling that China's actions, such as blocking Filipino fishermen and establishing a "nature reserve," illegitimate and a violation of UNCLOS; additionally noting that China's nine-dash line claim is illegitimate and that the man-made islands which China had constructed were rocks and not islands and therefore only entitled to a 12 nautical mile territorial water and not a 200-mile

applies to the maritime domain,[140] and the legal framework for the use of military force outside of an armed conflict setting. Adding further nuance to this situation, a 2021 PRC law redesignated the CCG as a quasi-military force, stating it was an "important maritime armed forces"[141] and "operated in maritime areas subject to Chinese jurisdiction."[142] The PRC's use of both lawfare information campaigns and military force in a gray zone setting to normalize their own interpretations of what UNCLOS should be, while subverting the existing legal paradigms of UNCLOS and law of armed conflict requirements in a gray zone conflict highlights the slow escalation towards a potential international armed conflict between the PRC and the Philippines.[143]

Russia also used the tactic of conducting military operations at a level below armed conflict, but provided a post-hoc legal justification, in their annexation of the Crimean peninsula.[144] When questioned about the legitimacy of the occupation, Vladimir Putin, President of Russia, claimed that the intervention in Ukraine was based upon various humanitarian purposes, including a request for aid by the deposed legitimate government.[145] However, the majority of the peninsula's

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economic exclusion zone. The tribunal did not however rule on the sovereignty of the Scarborough shoal itself.).

[140] *See generally* Louis McDonough, *UNCLOS and the Law of Occupation: On the Rights and Duties of Occupying States in Maritime Areas*, 103 INT'L L. STUD. 230 (2024).

[141] Coast Guard Law of the People's Republic of China (promulgated at 25th Meeting of the Standing Committee of the 13th National People's Congress, Jan. 22, 2021, effective Feb. 1, 2021), art. 2.

[142] *Id*. at art. 3.

[143] *See* Li Mingjiang & Xing Jiaying, *The Possibility of a China-Philippines Conflict in the South China Sea*, CARNEGIE CHINA (June 3, 2024), https://carnegieendowment.org/posts/2024/06/the-possibility-of-a-china-philippines-conflict-in-the-south-china-sea?lang=en.

[144] *See* John Simpson, *Russia's Crimea Plan Detailed, Secret and Successful*, BBC NEWS (Mar. 19, 2014), https://www.bbc.com/news/world-europe-26644082 ("The entire operation was very cleverly planned and carried out. But there is absolutely no doubt what it was - a remarkable, quick and mostly bloodless coup d'etat.").

[145] *See Transcript: Putin Defends Russian Intervention in Ukraine*, WASH. POST (Mar. 4, 2014), http://www.washingtonpost.com/world/transcript-putin-defends-russian-intervention-in-ukraine/2014/03/04/9cadcd1a-a3a9-11e3-a5fa-55f0c77bf39c_story.html.

population viewed Crimea as a legitimate part of Ukraine, and themselves as legitimate citizens of Ukraine.[146] Still, the portrayal of Russian actions as humanitarian in nature and based upon the existing international norm of the responsibility to protect,[147] provided the Russian government with the veneer of justification necessary for their use of military special forces,[148] to occupy the Crimean Peninsula—even if actually in contravention of existing international law. This veneer was especially important in light of the *little green men's* failure to wear distinguishing insignia in an attempt to hide their association with Russia.[149]

Covert use of national military forces are not the only way in which countries are capitalizing on the ambiguity offered by gray zone conflict. Iran's use of proxy forces in regional influence operations is a prime example of how countries make use of their economy and military in conjunction to further strategic aims without directly committing forces to the endeavor. While the use of proxies and the provision of materiel support to armed groups in furtherance of a country's strategic aims is by no means a new concept, the increasing global interconnectedness and the increasing ability of nonstate actors to compete with states when it comes to using physical force in cause large-scale death and physical injury, creates new vulnerabilities for

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[146] *See* Eleanor Knott, *Were Crimeans Really Pro-Russian before Annexation?*, LONDON SCH. OF ECON. RSCH. FOR THE WORLD (Nov. 15, 2022), https://www.lse.ac.uk/research/research-for-the-world/society/were-crimeans-really-pro-russian-before-annexation.

[147] *See* G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 138-39 (Oct. 24, 2005).

[148] *See* Vitaly Shevchenko, *Little Green Men" or "Russian Invaders?*, BBC NEWS (Mar. 11, 2014), http://www.bbc.com/news/world-europe-26532154.

[149] *See* Shane Reeves and David Wallace, *The Combatant Status of the "Little Green Men" and Other Participants in the Ukraine Conflict*, 91 INT'L L. STUD. 361, 393 (2015).

states.[150] Iran's sophisticated use of its Quds force,[151] as well as its surrogates and proxies, support not only Iran's power projection across the region but provide significant local legitimacy in Iraq, Syria, and Lebanon because of the political capital those proxy forces inherently have.[152]

Iran's use of proxy forces adds an additional, but unique layer of complexity to their gray zone operations. The ICJ's ruling in the *Nicaragua Case,* establishing that actions cannot be legally attributed to a state unless that state established effective control of nonstate actors, is commonly referred to as "the effective control test."[153] This is important in gray zone conflicts because without the ability to attribute an armed attack to a particular state, an injured state cannot responsively use force in self-defense under article 51 of the U.N. Charter.[154] So, when a country such as Iran is seeking to improve their relative position in the international order, either at the expense of an adversary or through altering existing power dynamics, they can do so via proxies. Moreover, they can do so much more aggressively and with less risk of escalation or retribution, so long as they remain distantly involved and not in effective control of the proxy.

Iran's use of proxy forces leads to further questions about the correct legal paradigm when considering gray zone proxy dyads conducted between two states, such as the conflict in Yemen.[155] The current conflict

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[150] *See* Rosa Brooks, *Rule of Law in the Gray Zone*, MOD. WAR INST. (July 2, 2018), https://mwi.westpoint.edu/rule-law-grayzone/#:~:text=On%20the%20margins%2C%20these%20legal,law%20are%20also%20nothing%20new.

[151] *See* Thomas Gilmore, *Iran Owns the Gray Zone*, PROCEEDINGS (Mar. 2018), https://www.usni.org/magazines/proceedings/2018/march/iran-owns-gray-zone ("Iran's armed forces are organized to conduct terror, subversion, proxy operations, naval guerrilla warfare, and long-range strike operations.").

[152] *See* Ilan Goldenberg et al., *Iran-U.S. Conflict in the Gray Zone. In Countering Iran in the Gray Zone: What the United States Should Learn from Israel's Operations in Syria,* CTR. FOR A NEW AM. SEC. (2020), http://www.jstor.org/stable/resrep24223.4.

[153] Nicar. v. U.S., 1986 I.C.J. ¶ 105-15.

[154] *See* Waseem Ahmad Qureshi, T*he Rise Of Hybrid Warfare*, 10 NOTRE DAME J. INT'L & COMP. L. 173, 186 (2020).

[155] *See* Jordan, *supra* note 26, at 2.

in Yemen has evolved into an international armed conflict with the introduction of the Saudi-led coalition against the Houthi rebel forces,[156] and accordingly governed by the *jus in bello* of International Humanitarian Law. However, it began as a non-international armed conflict between the Government of Yemen and Houthi rebels.[157] Iran acknowledges their support to the Yemeni based Houthis, with the Islamic Revolution Guard Corps (IRGC) stating that they provide assistance to the group, but the Iranian government stops short of acknowledging that they provide the group with "military or missile assistance."[158] This support has led to some claims that the Houthis are, in fact, a proxy of Iran owing to their effective control[159] and that Iran should accordingly be held accountable as the nation state under existing armed conflict legal paradigms and the process of attribution under international law.[160]

However, the question of attribution is not solved simply through the labeling of one group of non-state actors as a proxy of another nation. It requires that the conduct of that group be of such nature that it is "acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[161] Additionally, the proxy's acts need to show a breach of an international obligation[162] that the controlling party was bound to at the time,[163] and that arguably the controlling state directed such actions with knowledge of the

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[156] *See* Rep. of the High Comm'r. for Hum. Rts., Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014: Report of the Detailed findings of the Group of Eminent International and Regional Experts on Yemen, U.N. Doc. A/HRC/42/CRP.1 (2019).

[157] *See id.* ¶ 108.

[158] Ahmad Majidyar, *I.R.G.C. Admits Aiding Houthis against Saudi-Led Coalition in Yemen*, MIDDLE E. INST. (Nov. 27, 2017), https://www.mei.edu/publications/irgc-admits-aiding-houthis-against-saudi-led-coalition-yemen.

[159] *See* Thomas Juneau, *Iran's Policy Towards the Houthi's in Yemen: A Limited Return on a Modest Investment*, 92 INT'L AFF. 647, 647 (2016).

[160] *See* Procopio Lucas, *Yemen's Houthis: Legal Dilemmas in the Fog of War*, 7 TRENTO STUDENT L. REV. 111, 140 (2025).

[161] Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/83, art. 8, (2001).

[162] *See id.* art. 12.

[163] *See id.* art. 13.

circumstances of the internationally wrongful act.[164] If these elements were applied to the relationship between the Houthis and the Iranian government, however, then the conflict in Yemen could take on the guise of an international armed conflict; with the Saudi Arabian-led nation state coalition on one side, and the non-state actor forces under the overall control of Iran on the other in an armed conflict dyad. Such overall control by Iran would place the conflict firmly within the governance of existing law of armed conflict.[165]

However, as noted earlier, one of the key aspects of gray zone conflict is a country's desire to remain below the threshold of armed conflict so that they may exploit the legal and political ambiguities that doing so affords them. Further, it should be noted that non-state actor groups are becoming increasingly complex non-sovereign actors. They have control over territory, semblances of governance structures, and even the capacity to engage in foreign relations with nation states. These attributes not only place these non-state actors remarkably close to the definition of statehood,[166] but also highlight their position as political actors with their own agenda and decision-making capabilities. In the case of the Houthis, this has been exhibited in their willingness to engage in measures that are sometimes at odds with Iranian interests, such as their declaration of a unilateral cease-fire in 2019, even as Iran sought to use them to further exacerbate regional tensions.[167] While this demonstrated independence may at first seem to undermine Iran's strategic aims, from a legal perspective, it affords them with much greater flexibility. The independence provides straightforward evidence that Iran is not in overall control of Houthi activities, while

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[164] *See id*. art. 17 (This article specifically deals with instances where a nation state directs and controls another nation state, however allowing states to escape accountability through use of non-state actors in such a way would undermine the purpose of the article.).

[165] *See* Geneva Convention I, *supra* note 31.

[166] *See* Montevideo Convention on the Rights and Duties of States art. 1, (1933), https://www.ilsa.org/Jessup/Jessup15/Montevideo Convention.pdf.

[167] *See* Allison Minor, *The Danger of Calling the Houthis an Iranian Proxy,* BROOKINGS (Sep. 23, 2024), https://www.brookings.edu/articles/the-danger-of-calling-the-houthis-an-iranian-proxy/.

still providing Iran with the ability to provide material support to a group which shares some ideological alignment and strategic goals.[168]

The foregoing examples all highlight the very real problem that the existing international legal regime is readily employed as a tool against victim states in hybrid and gray zone conflict, but offers little in the way of enforcement or applicability to state and non-state actors engaging in these acts.[169] This is problematic not only for nation states concerned with their national security, but also for civilian populations who may be affected or even targeted by such actions. As such, there is a need to address both legal applicability and accountability regarding gray zone actions within the current legal paradigm. These can be addressed either as a matter of policy by nations states,[170] or through the argument that the underlying premise and intent of the existing customary and treaty law norms already provide for applicable remedies, and only need to be more consistently applied in order to reduce the legal ambiguity currently being exploited by bad actors.[171]

VI. Creating Accountability for Gray Zone Actions Through Existing Legal Paradigms

When discussing accountability for gray zone actions, there are a number of possible legal frameworks which could be applied.[172] This section will be narrowly focused only on the existing legal norms addressing traditional armed conflict, in keeping with the militaristic activities discussed previously. This is because the ambiguity and gaps

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[168] *See id.*

[169] *See* Waseem Ahmad Qureshi, *supra* note 154, at 187.

[170] *See generally* Laura Dickinson, *National Security Policymaking in the Shadow of International Law*, 21 UTAH L. REV. 629, 629 (2021) (discussing how IHRL norms and values are being adopted as a matter of policy and practice in U.S. national security policymaking); *see also* Bryson, *supra* note 37.

[171] *See* Richard Maass, *Legal Deterrence by Denial: Strategic Initiative and International Law in the Gray Zone*, 8 TEXAS NAT. SEC. R. 54, 70 (2025).

[172] Primary amongst these is the special question of reprisal. For a detailed discussion, *see* Fiona Mckinnon, *Reprisals as a Method of Enforcing International Law*, 4 LEIDEN J. INT'L L. 2, 221 (1991).

in the law, as they relate to activities close to armed conflict, are those that are currently more readily exploited and which pose a greater risk to the civilian population owing to their blurring of legitimate and illegitimate security behaviors. Additionally, while individual criminal culpability for international crimes could also offer a potential tool of accountability,[173] the focus here will remain with the larger-scale, macro systems of the international legal system rather than focus on the potential for imposition of domestic legal regimes, especially to counter actions such as cybercrime or unlawful interference.

A. Existing Tools of Legal Accountability

One area of accountability and governance for armed conflict stems from the identification of who within the conflict is entitled to what, known as combatants privilege. This privilege offers limited legal immunity for individuals lawfully involved in armed conflict, so long as they observe the requirements of the law of armed conflict.[174] This privilege confers upon a combatant involved in armed conflict the right to commit acts which otherwise might be considered under domestic legal regimes as murder, assault, or the destruction of property. However, it also allows that individual to be attacked at any time and place by other parties to the conflict, with limited exceptions.[175] The underlying principle supporting combatants' privilege is that armed conflicts are not conflicts between individuals, but rather between nation states, with the combatant acting as a lawful agent of that state.[176] As such, the expectation is that the owning state will regulate and hold

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[173] *See generally* Beth A. Simmons & Hyeran Jo, *Measuring Norms and Normative Contestation: The Case of International Criminal Law,* 4 J. OF GLOB. SEC. STUD. 41 (2019).
[174] *See* API art. 43(2).
[175] *See* Geneva Convention Relative to the Treatment of Prisoners of War [hereinafter Geneva Convention III] art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (While combatants may typically be targeted during international armed conflict even when they are not actively participating in armed conflict, the law of armed conflict prohibits attacking a combatant when they have surrendered or have been rendered hors de combat through injury or are engaged in attempting to preserve their life after being sunk at sea or having ejected from an aircraft.).
[176] *See* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 9 (2004).

accountable the actions of its agents during periods of conflict, both because of its international law obligations[177] as well as its own individual security concerns and desire for other nation states to regulate their own troops accordingly.[178] Such a structure provides the individual actor with both specific legal guidelines, in the form of accepted international and domestic law, as well as the moral imperative to act in a manner they would wish to be subject to themselves.[179] However, if combatants act in a manner which seriously violates specific tenets of the law of armed conflict, then they could be guilty of a grave breach and subject to either domestic prosecution or extradition to another party for prosecution.

Grave breaches are specified in the four Geneva Conventions of 1949 and the Additional Protocol of 1977. The Grave Breaches common to the four Geneva Conventions are: the prohibition on the willful killing of a protected person; the prohibition on torture or inhumane treatment, including conducting biological experiments; the prohibition on willfully causing great suffering or serious injury to the body or health of a protected person; and the prohibition on causing extensive destruction or the appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[180] While these crimes are ordinarily considered as a separate and distinct set of crimes from war crimes, grave breaches are now almost synonymous with war crimes.[181] The accountability derived from grave breaches, much like that of combatants' privilege, relies primarily upon the criminal jurisdiction and enforcement of the nation employing the

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[177] *See* Sir Michael Wood, *The Evolution and Identification of the Customary International Law of Armed Conflict*, 51 VAND. L. REV. 727, 735 (2021).

[178] *See* Dale Stephens & Michael W. Lewis, *The Law Of Armed Conflict – A Contemporary Critique*, 6 MELBOURNE J. OF INT'L L. 55, 57 (2005).

[179] *See* Harry van der Linden, *Combatant's Privilege Reconsidered*, 50 PROCEEDINGS OF THE XXII WORLD CONGRESS OF PHIL. 81, 821-24 (2008).

[180] *See* Geneva Convention I, *supra* note 31, art. 50.

[181] *See* Marko Divac Öberg, *The Absorption of Grave Breaches into War Crimes Law*, 91 INT'L REV. OF THE RED CROSS 873, 163-64 (2009) (noting that whereas a grave breach should entail criminal consequences in domestic law, a war crime entails criminal consequences in international law).

individual actor.[182] This state-led accountability not only imparts obligations on the domestic state to aid in actual enforcement of the law,[183] but is also linked in application to the combatant's privilege through the explicit requirement of command responsibility.[184] Through imposing obligations on both the state and individual actors (as well as their commanders), the grave breach system provides both an accountability and a legal enforcement mechanism. However, relying upon the grave breach system as a tool of legal accountability, while possibly effective, is limited to the enumerated offenses discussed above. In times of conflict there will undoubtedly be scenarios and occasions where a more nuanced and flexible alternative to such rigid definitions is necessary.

Drafted in 1899 as a last-minute compromise to the Hague Convention II, in an effort to provide residual humanitarian rules in occupied territories,[185] the Martens Clause offers a catch-all provision filling in the lacunae left by international treaty regimes in an evolving competitive landscape.[186] Though only written into the preamble, the clause has subsequently been included in numerous international

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[182] *See id*.

[183] *See* Marco Sassòli et al., HOW DOES LAW PROTECT IN WAR? 44 (3d ed. 2011) ("The regular prosecution of war crimes would have an important preventive effect, deterring violations and making it clear even to those who think in categories of national law that [international humanitarian law] is law.").

[184] *See* API art. 88 (requiring military commanders to prevent, suppress, and report violations of the Conventions and Protocols and requiring state parties to "require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof").

[185] *See* Meron, *supra* note 44, at 81.

[186] *See* Convention with Respect to the Laws and Customs of War by Land and its Annex: Regulations Respecting the Laws and Customs of War on Land, July 29, 1899, 187 Consol. T.S. 429 ("Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.").

treaties and their preambles,[187] and has been cited as a source of customary international law in various proceedings before international courts. Notably, in her dissent to the ICJ's Advisory Opinion on Nuclear Weapons, Judge Shahabuddeen noted that:

> In effect, the Martens Clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community. The principles would remain constant, but their practical effect would vary from time to time: they could justify a method of warfare in one age and prohibit it in another.[188]

This statement highlights not only the principle that the Martens clause is accepted customary international law, but also emphasizes the idea that the Martens clause is considered relevant even in light of evolving concepts of international law.[189] Two years later, in ruling on the *Furundzija* case, the International Criminal Tribunal for the former Yugoslavia cited the Martens clause to support the proposition that the prohibition of torture as part of international humanitarian law is a part of customary international law.[190]

However, this discussion of torture in the *Furundzija* case raises an important discussion point concerning the Martens Clause: whether *lex specialis,* such as the U.N. Convention Against Torture (UNCAT),[191]

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[187] *See e.g.*, Geneva Convention I, *supra* note 31, arts. 63(4) & 142(4); Geneva Convention III, *supra* note 175, art. 1(2); AP I pmbl.

[188] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 406 (July 8) (Shahabuddeen, J., dissenting).

[189] *See* Meron, *supra* note 44, at 81.

[190] *See* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgement, ¶ 137 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

[191] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

would render the Martens Clause either unnecessary or displaced, and as such superfluous? Though such discussion misses the point that it is the Martens Clauses ability to fill gaps left by treaties, such as UNCAT, that make it important as a tool of international law. It is generally agreed that the language of the Martens Clause signifies that the adoption of a treaty regulating particular aspects of international law does not in and of itself necessarily deprive the affected persons of the protection of those customary humanitarian law norms that were not included in the codification.[192] Indeed, this idea of duality was specifically noted by the *Nicaragua* Court, who held that "even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence."[193]

One key aspect of customary international law, of course, is that states themselves are acting in a manner which shows that they themselves believe themselves bound by the practice as a matter of law. It is telling, then, that in the case of the Martens Clause numerous international military manuals either include the clause explicitly, or adopt the language in some manner.[194] Conversely, some countries, such as Russia, believe that the Martens Clause no longer has a function following the adoption of the Geneva Conventions and their Additional Protocols.[195] They argue that as these international law treaties provide a more complete code of the laws of war, that a stop-gap like the Martens clause is no longer necessary.[196] However, as noted earlier,

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[192] *See* Meron, *supra* note 187, at 87.

[193] Nicar. v. U.S., 1986 I.C.J. ¶ 178.

[194] *See* OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1: DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES (2017), § I-21, ¶13. *See also* Joint Doctrine and Concepts Center, THE UK JOINT SERVICE MANUAL ON THE LAW OF ARMED CONFLICT, ¶ 1.12.2, (2004); FEDERAL MINISTRY OF DEFENSE, HUMANITARIAN LAW IN ARMED CONFLICTS-MANUAL, ¶ 129 (1992).

[195] *See* Written Statement of the Russian Federation, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1995 I.C.J. Pleadings (Written Statements) 13 (July 13, 1995).

[196] See *id.*

Russia is a strong practitioner of gray zone lawfare operations and excels in exploiting the gaps inherent in modern international legal regimes. Accordingly, they, of course, would not be in favor of reading the Martens Clause as a potential limiter on gray zone activities.

B. Applying Accountability to Norm Erosion & Proxy Operations

With these legal tools of accountability available under existing international law, how then can the legal practitioner apply them to gray zone activities—like Russia's use of little green men, the issuance of Russian passports, Iranian proxy activities, and Chinese coercive acts within the South China Sea? Does the existence of these activities within the liminal space of gray zone conflict mean the theoretical application of existing legal paradigms is unworkable in a pragmatic sense? Or are there other non-legal factors at play which might cause the actions to falter?

Looking first to the issue of Russia's little green men in Crimea. The facts, as they subsequently emerged, are that professional Russian troops illegally entered the sovereign state of Ukraine, created roadblocks, seized strategic points, and then were issued medals for the return of Crimea.[197] Armed with these facts, an advocate for a country attempting to impart some form of accountability at the outset of the invasion could certainly argue that these are clear examples of lawful combatants under the Geneva conventions. As such, the actors would be subject to all of the possible ramifications inherent in such a status, including the ability to be lethally targeted by Ukrainian troops. However, while these troops wore military style uniforms they did not bear any distinctive insignia or markings.[198] The requirement to wear distinctive markings is a cornerstone of the principle of distinction,[199]

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[197] *See* Steven Pifer, *Watch Out For Little Green Men*, BROOKINGS (July 7, 2024), https://www.brookings.edu/articles/watch-out-for-little-green-men/#:~:text=The%20Ukraine%20crisis%20has%20seen,points%20on%20the%20Crimean%20peninsula.

[198] *See id.*

[199] *See* Geneva Convention III, *supra* note 175, art. 4A(2) (the requirement for military members is usually achieved through wearing of their standard military uniform).

which protects the civilian population by distinguishing those who may be lawfully targeted (combatants) from those who should be protected (civilians). This purposeful act by Russia, whether identified at the time or not, created a question of risk. Should the Ukrainian government treat these little green men as lawful combatants and apply lethal force to reclaim their territory and strategic assets under the law of armed conflict, or should they err on the side of caution and treat the belligerents as possible civilians engaged in an illegal action, which more correctly requires a police response and a respect for the right to life under international human rights law?[200] In hindsight the answer may seem obvious, as the actions by Russia certainly constitute a clear violation of sovereignty and territorial integrity. However, from the Ukrainian perspective at the time, it would have been a difficult call.

The question of how to address PRC activities is in some way clearer, at least from a status classification perspective. They are using regular Chinese forces to conduct combat readiness patrols and operations to strengthen control and management of what they have termed, relevant areas.[201] These then are regular armed forces, identified as such, and conducting military operations. Were they in traditional armed conflict they would be filling a traditional combatant role but because they are not in traditional armed conflict the *lex specialis* of law of armed conflict does not apply, and they do not have a combatant's privilege to use lethal force nor be targeted themselves. It is here, then, that the expansive language of the Martens Clause becomes useful in gray zone operations. Where there is not a more complete code of law that deals with gray zone operations, and there are clear legal gaps being exploited, the prevailing customary international law is that "populations and belligerents remain under the protection and empire of the principles of international law, as they

[200] *See* ICCPR, *supra* note 35, at Art. 6 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").
[201] *See* Cheng *supra* note 134.

result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."[202]

Applying the Martens Clause to the aggressive maneuvers that the PRC was conducting against civilian fishing vessels,[203] like using water cannons against civilian fishermen and injuring them is certainly at odds with the laws of humanity and the principles of public conscience. Typically, the principles of humanity are interpreted as prohibiting means and methods of warfare unnecessary for the attainment of a concrete and definite military advantage.[204] While the PRC may argue that the use of water cannons, vice lethal kinetic effects, is an appropriate level of force given the activities that they are engaged in and the military advantage that they wish to achieve, the fact that they are targeting civilians rather than other military units is still a clear violation of the principles of humanity and public conscience. Setting aside the very clear and well understood principle of distinction,[205] it is well understood that even when a legitimate military objective may necessitate harm to civilians, the military should spare civilians to the greatest extent possible.[206] While such interpretations still necessitate that the PRC act against their own troops if true legal accountability is sought, efforts taken by other countries in the region, such as the Philippines, would promote the view that the Martens Clause is applicable in gray zone actions would certainly show a move towards state practice and regional adherence for norm formation.

In addition to direct military action, proxy groups acting at the behest of, or in conjunction with, an adverse nation should be assessed. First, a test should be conducted to determine if they should be considered as lawful combatants engaged in actions which are the equivalent of armed conflict. Assuming for the sake of discussion that

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[202] Meron, *supra* note 44.
[203] *See* Cheng, *supra* note 134.
[204] *See* EDWARD KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION 36 (1992).
[205] *See* API art. 48.
[206] *See* Jean Pictet, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 62 (1985).

they are not yet involved in actual armed conflict, but instead are engaged in some form of influence operation or coercive activity not yet of a level of violence sufficient to be considered as armed conflict, then the legal community should again look towards use of some of the existing legal accountability tools in order to shape the discussion, and provide gray zone accountability.

Take for example, Iran's support of the Houthi rebels in Yemen. Even if the Houthis are not under the effective control of Iran, the level of support provided by Iran enables the Houthis to conduct operations aligned with Iran's strategic goals, and Iran is forthright about this.[207] Were the Saudi Government to make demands of the Iranians and require that their actions be governed by laws of humanity and the requirements of the public conscience, then they, as with the South China Sea example, would help lay the foundation for future legal culpability of individual Iranian actors in a venue such as the International Court of Justice for possible violations of these tenets linked to their support for Houthis. This, of course, is a more tenuous link given the purposeful distancing by states using proxy actors, but such political and legal messaging could help shape future accountability norms through application of accepted and existing legal doctrine.

C. Applying Accountability to Information Operations

The final area of consideration for accountability in gray zone conflicts is that of the information domain. Creating accountability in this realm is more difficult than others, as the law governing this space even outside of gray zone conflict is itself a matter of discussion and debate amongst nation states.[208] However, this discussion is not focused

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[207] *See* Jordan, *supra* note 26.

[208] *See The UN GGE Final Report: A Milestone in Cyber Diplomacy, but Where Is the Accountability?*, CYBERPEACE INST. (June 9, 2021), https://cyberpeaceinstitute.org/news/the-un-gge-final-report-a-milestone-in-cyber-diplomacy-but-where-is-the-accountability/#:~:text=The%20Group's%20final%20report%20is,further%20on%20

on what the law should be, but rather how states can use pre-existing bodies of law to shape accountability for actors using the information realm to conduct gray zone operations. Accordingly, the question here is not whether cyber effects constitute an armed attack,[209] or even if a country can respond in self-defense kinetically.[210] Rather, the question is how can principles which already frame the law of armed conflict also guide actions within gray zone conflicts, to ensure accountability and protection of those not directly involved in the conflict.

Traditionally, information campaigns in their broadest sense have not been subjected to strict law of armed conflict scrutiny because they have not been seen as having the potential to cause mass harm to the civilian population. However, cyber operations are now perfectly capable of causing physical damage,[211] as well as targeting and altering the daily lives of civilian populations.[212] Be that through election interference,[213] reducing access to civilian infrastructure,[214] or numerous other means, gray zone operations' capacity to target the civilian population and gain a strategic advantage, without ever resorting to traditional military means, is now stronger than ever.

As such, in either planning such attacks or providing a public legal response to such attacks, states who look to the existing body of law on

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in%20the%20comments (noting that while there has been movement towards establishment of norms, there are still strong disagreements between numerous states as to what norms and laws should govern the cyber realm); *but see* Michael Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 914 (1999) (providing a list of factors in his paper in 1999 which have since been largely adopted by the Tallinn Manual as indicators of what would constitute coercion and attack via cyber means).

[209] *See generally* Terry Gill & Paul Ducheine, *Anticipatory Self-Defense in the Cyber Context*, NAVAL WAR COL. INT'L L. STUD. 89, 438 (2025).

[210] *See, e.g.*, Dinstein, *supra* note 72, at 108; Tallinn Manual, *supra* note 72, at 59-60 ¶ 3, 60 ¶¶ 5-6.

[211] *See* Hathaway et al., *supra* note 71.

[212] *See* Oorsprong, *supra* note 80.

[213] *See generally* Francesco Seatzu & Nicolás Carrillo-Santarelli, *Towards A Strengthening of Non-Interference, Sovereignty, and Human Rights from Foreign Cyber Meddling in Democratic Electoral Processes*, 48 BROOKLYN J. INT'L L. 579 (2023).

[214] *See* Zen Chang, *Cyberwarfare and International Humanitarian Law*, 9 CREIGHTON INT'L & COMP. L.J. 29, 42 (2017).

accountability, the principle of distinction, the requirement to consider the laws of humanity and the requirements of the public conscience, can help to frame the protections for their own and other civilian populations. For example, if in targeting and infiltrating a water treatment plant in Germany, Russian hackers had turned off the water supply to a city or region, the potential harm to the civilian population could have resulted in possible public health emergencies and social disruption. Without a declared armed conflict, however, such attacks against a civilian population would have no legal basis.[215] But if we accept that gray zone actions are part of a *conflict*, even if not an armed one, then the actions of a nation state's military cyber units should be subject to some form of accountability and limitation.

When considering information operations, Judge Shahabuddeen's words that international law "could justify a method of warfare in one age and prohibit it in another"[216] take on a particular relevance, and the necessity for examining such actions through the expansive remit of the Martens Clause becomes apparent. But while distributing leaflets to a population in the early part of the twentieth century may have been a legitimate method with only limited ability to affect a population, how does that principle apply to the modern era—the era of artificial intelligence and the ability to create "deep-fake" images and news? With these new tools, today's military psychological operations units can alter people's understanding of the truth and can even turn fiction into apparent truth.[217]

In one study, which tested 2000 individuals in the United States and the United Kingdom, only 0.1% of respondents were able to accurately distinguish the real from the fake when exposed to multiple stimuli

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[215] Attacks on water treatment facilities could of course be potentially legal under LOAC but would be subject to the balancing test of proportionality. *See* Judith Gail Gardam, *Proportionality and Force in International Law*, 87 A. J. I. L. 391, 409 (1993).

[216] *See* Meron, *supra* note 44.

[217] *See* John Villasenor, *Artificial Intelligence, Deepfakes, and the Uncertain Future of Truth*, BROOKINGS (Feb. 14, 2019), https://www.brookings.edu/articles/artificial-intelligence-deepfakes-and-the-uncertain-future-of-truth/.

including videos and images.[218] The law of armed conflict permits deception; a state may mislead the enemy, but they are specifically prohibited from feigning a protected status to betray an enemy's confidence in order to conduct an unlawful attack.[219] Given the use of such modern tools by nation states it is unlikely that sufficient state practice or a more complete codification of a legal regime will emerge to control these tools any time soon. Once again, the Martens Clause's ability to fill the gaps in this evolving competitive landscape could be relied upon to ensure that human rights principles are upheld and that civilian populations are protected from the new *horrors* of gray zone warfare.[220]

VII. Conclusion

There is still much work to be done in understanding both the evolving nature of modern conflict, and how gray zone activities influence that evolution. However, there is currently an opportunity to utilize established legal paradigms that traditionally govern the conduct of states and non-state actors, when considering how to create legal accountability for gray zone actions. Given the U.N. Charter's prohibition on the use of force, it is likely that states will continue to deliberately exploit the legal ambiguities—whether through information operations, lawfare, or the use of proxies—and undermine the efficacy and legitimacy of the existing international legal order. The blurring of lines between war and peace, combatant and civilian, and state and non-state actors, will also continue, and the significant gaps in accountability and enforcement which leave victim states and civilian populations vulnerable to harm will become increasingly apparent.

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[218] *See Most Consumers Can't Identify AI-Generated Fakes*, IPROOV https://www.iproov.com/press/study-reveals-deepfake-blindspot-detect-ai-generated-content.

[219] *See* J. Ashley Roach, *Ruses and Perfidy: Deception during Armed Conflict*, 23 U. TOL. L. REV. 395, 400 (1991).

[220] *See* Geneva Convention I, *supra* note 31, pmbl.

Yet, the persistence of these emerging norms and gaps in the law do not render the existing legal regime powerless. Through application and discussion of existing frameworks such as the Geneva Conventions, the principle of command responsibility, and the Martens Clause, states and state actors can continue to provide essential tools for accountability. Tools such as the Martens Clause, and its decree that states adhere to the customary international law principles of humanity and the dictates of public conscience, offer a normative anchor when positive law proves insufficient or incomplete.

Advocating for the consistent application of customary international law, promoting the development of new norms where gaps persist, and leveraging international fora to hold violators accountable, existing legal paradigms can remain a meaningful constraint on state behavior as well as a source of protection for those most at risk. So, while gray zone conflicts challenge the boundaries of legal accountability, they also reaffirm the necessity of a dynamic and principled international legal order—one capable of evolving in response to new threats, while remaining rooted in the fundamental values of humanity and justice.

Chapter 7. Why The Gulf War Matters: The Promise of the U.N. Charter and the Vindication of Collective Security

John D. Ford and Frank Lumpkin IV

I. Introduction

The 1991 Gulf War was not merely a military triumph—it was a pivotal moment in the evolution of international law, a moral stand against aggression, and a proof of concept for collective security in the post–Cold War world. As President George H. W. Bush proclaimed, a "new world order" had emerged—one in which violations of international law would no longer go unanswered.[1]

In 2015, data scientist Max Roser captured the attention of observers with a sweeping chart illustrating deaths from armed conflict between 1400 and 2000 (see Figure 1).[2] His findings were striking: after centuries of carnage, the world had entered an unprecedented era of relative peace. Inspired by Roser's model, the authors of this chapter compiled data from 2000 onward, revealing a continuation of this downward

[1] George H. W. Bush, Pres. Of the U.S., Address Before a Joint Session of the Congress on the State of the Union (Jan. 29, 1991).

[2] Zack Beauchamp, *600 Years of War and Peace, in One Amazing Chart*, VOX (Jun. 24, 2015, 12:19 PM), https://www.vox.com/2015/6/23/8832311/war-casualties-600-years; Mark Jones, *War Is Killing Fewer People Than Ever Before,* WORLD ECON. F. (Jun 23, 2015), https://www.weforum.org/stories/2015/06/war-is-killing-fewer-people-than-ever-before/; Drake Baer, *This Insane Chart Shows How Violence has Spiked — and Declined — Since 1400*, BUS. INSIDER (Jun 23, 2015, 2:59 PM), https://www.businessinsider.com/max-roser-violence-chart-2015-6.

trend—though with troubling signs of recent reversal (*see* Figure 2).[3] Some critics dismiss this long peace as a historical fluke. They are mistaken. As leading thinkers in psychology, history, economics, and international relations—including Steven Pinker, who coined the term "New Peace"—have argued, this momentous change is the result of deliberate efforts to establish a prohibition on military aggression in international law and to punish aggression when necessary.[4] This new and fragile order now finds itself under pressure from revisionist powers.

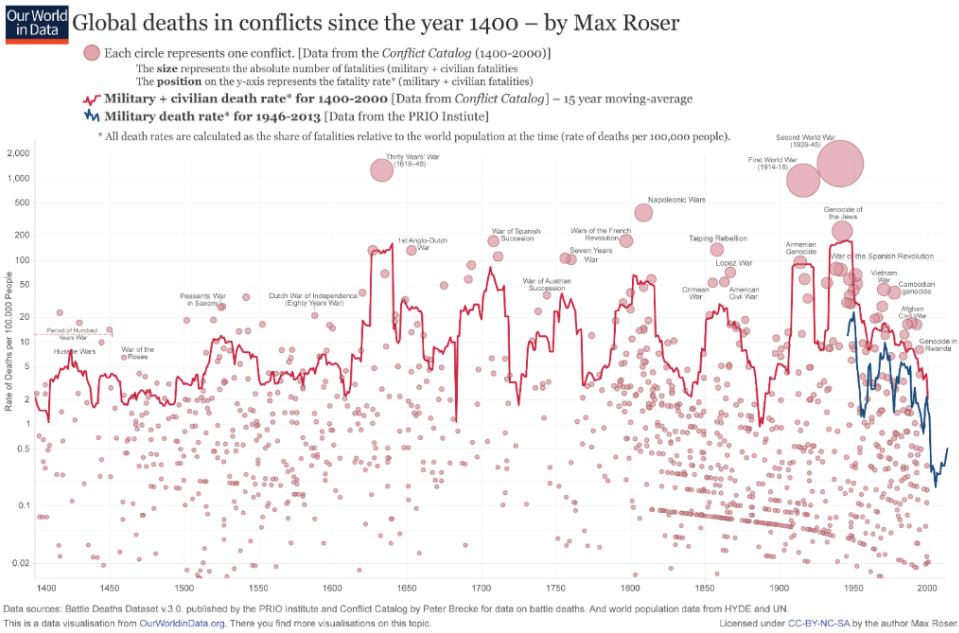

Figure 1[5]

[3] This paper draws on conflict-related fatality data from multiple sources, covering the years 1400-2024. While the primary focus of this article is legal and historical analysis, the data was used to illustrate trends in the frequency of armed conflict over time. A full description of the dataset and methodology can be found in Appendix A.

[4] *See* STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED (2011). *But see,* BEAR BRAUMOELLER, ONLY THE DEAD: THE PERSISTENCE OF WAR IN THE MODERN AGE (2019).

[5] Max Roser, *War and Peace*, OUR WORLD IN DATA (2016), https://ourworldindata.org/war-and-peace/.

Figure 2

The laws that underpin this peace were not born in 1991. Their evolution traces back centuries, through ancient Greece and the Roman Empire, Westphalia and Versailles, and Nuremberg and the U.N. Charter. But the Gulf War marked an inflection point: The moment when those laws were enforced decisively in defense of a sovereign state. It demonstrated that international law could be more than aspirational—it could be actionable.

This article traces how international law came to prohibit the crime of aggression, how it helped shape the New Peace, and why the Gulf War stands as a watershed moment in that journey. Most importantly, it argues that peace is not self-sustaining; it must be defended by the free world through hard power, or it will erode.

To understand how today's international norms emerged, we must first trace the long arc of humanity's struggle to constrain war. This journey begins in the ancient world, where appeals to justice first collided with the realities of raw power.

II. War and Justice in the Ancient World

In 431 BCE, the Delian League, led by Athens, and the Peloponnesian League, led by Sparta, plunged into a protracted conflict now known as the Peloponnesian War.[6] In 416 BCE, Athens besieged the island city-state of Melos, a neutral party in the conflict.[7] Thucydides, in his *History of the Peloponnesian War*, recounts the negotiations between the Athenian envoys and Melian leaders in what had become known as the Melian Dialogue.[8]

The Melians begin by appealing to the Athenians' sense of justice, for Melos is neutral in the war and has committed no offenses against Athens. The Athenians dismiss appeals to justice and appeal only to power and interest, arguing, ". . . the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept."[9] The Melians counter by appealing both to justice and self-interest, stating

> [s]ince you force us to leave justice out of account and confine ourselves to self-interest [,] . . . you should not destroy a principle that is to the general good of all men—namely, that in the case of all who fall into danger there should be such a thing as fair play and just dealing.[10]

The Melians' plea falls on deaf ears.[11] Athens sacks the city, massacres the men, and enslaves the women and children—an act of brutality that marked one of the war's darkest episodes.[12]

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[6] THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 21 (Rex Warner trans., Penguin Books 1972) (c. 411 B.C.E.).
[7] *Id.* at 1155.
[8] *Id.* at 753-69.
[9] *Id.* at 756.
[10] *Id.* at 757.
[11] *Id.* at 769.
[12] Thucydides, *supra* note 6, at 769.

While the Athenians won the battle, they ultimately lost the war.[13] Thirteen years later, with Persian support, Sparta emerged victorious.[14] It was Athens' turn to suffer what they must. By rejecting justice as a principle of international relations when it was powerful, Athens forfeited any claim to justice when it was defeated. The Melian Dialogue endures as an early warning of the dangers of power unchecked by principle. Nearly a thousand years would pass before the concept of justice in war would reemerge as a foundational idea in Western thought.

III. Medieval Ideas on the Law of War: St. Augustine of Hippo and Just War Theory

In the late fourth and early fifth centuries CE, barbarian invaders ransacked the Roman Empire, prompting widespread reflection across the Roman world.[15] Pagan critics blamed the fall on Christian pacifism, claiming the Church had weakened Rome's martial spirit.[16] In response, St. Augustine of Hippo articulated a moral and theological framework to reconcile Christian ethics with the reality of warfare. His writings laid the intellectual foundation for what would become Just War Theory, helping formalize thinking on the morality of using military force.

Augustine distinguished between wars fought for personal gain and those fought to restore justice and order. His framework introduced the fundamental categories of *jus ad bellum* (the conditions under which it is just to go to war) and *jus in bello*[17] (the principles

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[13] XENOPHON, HELLENICA, bk. II, ch. III (H.G. Dakyns, trans., Duke Classics 2014) (c. 356 B.C.E.).

[14] *Id*.

[15] JORDANES, *THE GOTHIC HISTORY* CHARLES 95-96 (Charles Mierow trans., Princeton Univ. Press 1915).

[16] Benjamin Elkins, *Practical Just War: St. Augustine & His Framing of Just War Theory*, DISCENTES (Oct.13, 2024) https://web.sas.upenn.edu/discentes/2024/10/13/practical-just-war-st-augustine-his-framing-of-just-war-theory/.

[17] Augustine also lays out the principle of *jus in bello,* or the principles governing conduct during war. These principles are discrimination, proportionality, and

governing conduct during war).[18] Today, modern discussions of Just War Theory emphasize whether a war's cause is just—focusing on proportionality, right intent, and just cause. But for Augustine, these were secondary to a far more foundational concern: legitimate authority.

Augustine outlines what would later become hallmark *jus ad bellum* principles: a war must have a just cause, be pursued with right intention, be a last resort, hold a reasonable hope of success, and aim

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necessity. *See id.* at 2, 9 (Augustine praises acts of mercy that spare those not actively fighting. Describing the Alaric's Gothic sack of Rome, he marvels that

> "savage barbarians showed themselves in so gentle a guise, that the largest churches were . . . filled with the people to whom quarter was given, and . . . none were slain, . . . none [were] forcibly dragged; . . . many [were] led by their relenting enemies to be set at liberty, and . . . none were led into slavery."

This extraordinary clemency, "contrary to the custom of war," illustrates the principle that combatants must distinguish between enemies who must be fought and innocent people who should not be deliberately harmed.); *id.* at 2, 89 (Augustine indicates that any violence in war must be measured and necessary, not wanton or excessive. He admires rulers who "compensate with the lenity of mercy and the liberality of benevolence for whatever severity they may be compelled to decree." In other words, even when force or harsh measures are used against wrongdoers, they should be proportional to the goal. The harm inflicted must not outweigh the good to be achieved, and whenever possible mercy should mitigate the suffering caused by war.); *and id.* at 89 (Augustine's thought implies that no greater violence should be used than is truly necessary. He counsels Christian rulers to be "slow to punish, ready to pardon," using force only reluctantly. Any collateral damage to noncombatants is permissible only if there is no other way to secure justice. The emphasis is on restraint. All warlike action should be governed by charity and a desire to minimize harm. Even amid conflict, Augustine upholds the ideal that compassion should "bridle" rage and cruelty, reflecting the necessity of choosing the least harmful option consistent with achieving a just outcome.).

[18] Yitzhak Benbaji, *Legitimate Authority in War*, OXFORD HANDBOOK OF ETHICS OF WAR, 294 (Oct. 5, 2015), https://academic.oup.com/edited-volume/28369/chapter-abstract/215265934?redirectedFrom=fulltext; Seth Lazar, *War*, STAN. ENCYC. OF PHIL. (Edward N. Zalta ed., Spring 2020), https://plato.stanford.edu/archives/spr2020/entries/war/.

for a just peace.[19] But crucially, these criteria are subordinate to the authority of the sovereign.[20] Augustine believed that only duly constituted rulers could declare war, and that their judgment—when directed toward the peace and safety of the community—carried moral and theological weight.[21] As he wrote, "the natural order which seeks the peace of mankind, ordains that the monarch should have the power of undertaking war if he thinks it advisable."[22] In this view, justice is not determined by universal standards or public consensus, but by the decisions of legitimate political authority. This sharply contrasts with modern frameworks, such as the United Nations (U.N.) Charter, which center on collective judgment and the legality of the cause itself.

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[19] Augustine also lays out the principles of *jus ad bellum*. *See* SAINT AUGUSTINE, CONTRA FAUSTUM MANICHÆUM 415 (Philip Schaff ed., Richard Stothert trans., Nicene & Post-Nicene Fathers, ser. 1, vol. IV 1887) (c. 400) (Augustine contends that War must be declared by a sovereign acting on behalf of the political community as explained in this section); SAINT AUGUSTINE, CITY OF GOD 624 (Roman Roads Media 2015) (c. 426) (Agustine writes, "it is the wrongdoing of the opposing party which compels the wise man to wage just wars." He sees war as a regrettable but necessary response to injustice that cannot be otherwise addressed.); *Id*. at 89 (Augustine insists rulers must not act out of hatred or vengeance but in service of justice by "apply[ing] that punishment as necessary to government and defense of the republic, and not in order to gratify their own enmity."); *Id*. at 624 (on last resort: the wise man "would not all the rather lament the necessity of just wars . . . for if they were not just he would not wage them." War is a reluctant last measure when no peaceful option remains.). *Id*. at 628 (Augustine writes, "even they who make war desire nothing but victory,—desire, that is to say, to attain to peace with glory." War must be pursued with hope that peace can actually be secured.); *and id*. (on ultimate aim of peace: "it is therefore with the desire for peace that wars are waged . . . peace is the end sought for by war." The final goal of any just war is not conquest, but a more righteous and lasting peace.).

[20] SAINT AUGUSTINE, CONTRA FAUSTUM MANICHÆUM, *supra* note 19 at 415; *See* SAINT AUGUSTINE, CITY OF GOD, *supra* note 19, at 30 (Roman Roads Media 2015) (c. 426)

> (they who have waged war in obedience to the divine command . . . have represented in their persons the public justice or the wisdom of government, and in this capacity have put to death wicked men; such persons have by no means violated the commandment, "Thou shalt not kill.").

[21] *Id.*

[22] *Id.*

Those states that honored this budding theory of authority-bound warfare tended to experience less violence overall.[23] Even during their most war-torn periods, modern Western nations experienced only a fraction of the violence seen in nonstate societies—roughly one-quarter as much, and less than one-tenth compared to the most violent tribal communities.[24] Nevertheless, while Augustine's framework laid the groundwork for later thinkers like Aquinas and Grotius, the widespread adoption of Just War principles as international norms would not occur until well into the 17th century.[25] Still, his writings mark a turning point: the introduction of moral constraints on warfare after a millennium ruled by might alone.

IV. The Westphalian System

Following the Protestant Reformation in 1517, more than one hundred years of intermittent conflicts raged across Europe between Catholics and Protestants.[26] Religious intolerance and the desire of rulers to enforce religious uniformity fueled these conflicts.[27] This culminated in the Thirty Years War (1618-1648), a brutal struggle that pulled in nearly every major European power and killed nearly a third of Germany's population.[28]

The Thirty Years War was finally ended by the Peace of Westphalia.[29] The Peace of Westphalia was not a single treaty but rather a collection of treaties, most notably the Treaty of Münster (January

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[23] PINKER, *supra* note 4, at 148.
[24] *Id.*
[25] Benbaji, *supra* note 18, at 294; Seth Lazar, *War*, STAN. ENCYC. OF PHIL. (Edward N. Zalta ed., Spring 2020), https://plato.stanford.edu/archives/spr2020/entries/war/.
[26] MICHEAL CLODFELTER, WARFARE AND ARMED CONFLICTS: A STATISTICAL ENCYCLOPEDIA OF CASUALTY AND OTHER FIGURES, 1492–2015 40 (2017).
[27] Muharrem Doğan, *The Westphalian System of Modern International Relations: Violation of Sovereignty, Ignoration of Indigenous Rights, and Extension of Medieval Practices in The Case of Mosul Occupation,*15 ALTERNATIF POLITIKA 368, 372 (2023).
[28] *Id.*
[29] Doğan, *supra* note 27, at 371.

30)[30] between Spain and the Dutch Republic and the Treaties of Osnabrück (October 24)[31] and Münster (October 24)[32], involving the Holy Roman Empire, France, Sweden, and their respective allies.[33] These treaties brought an end to the Thirty Years' War, and, with it, the larger era of Europe's wars of religion.[34]

The carnage of Europe's religious wars in the 16th and 17th centuries forced European statesmen to confront the question of *jus ad bellum* (just cause for war). In place of warring over divine truth, the Peace of Westphalia ushered in a new order based on the principles of sovereignty, non-intervention, the legal equality of nation-states, and the decentralization of power away from any universal authority.[35] The Westphalian settlement affirmed the state—not empire, church, or supranational order—as the fundamental building block of the international system.[36] Multiplicity, not centralization, was the guiding principle.[37] This "Westphalian" system did not emerge overnight in 1648, but over the next two centuries it became the foundation of modern international relations.[38] War itself remained a prerogative of sovereigns, but states largely relinquished religion as a justifiable catalyst to commence war.[39] The result was a political equilibrium that prioritized state sovereignty over religious uniformity.

A. Sovereignty and Non-Intervention: A New Principle of Order

The Peace of Westphalia's core achievement was to establish a basis for coexistence among states with different religions by removing

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[30] Treaty of Münster, Neth.-Spain, Jan. 30, 1648, 1 Consol. T. S. 1.
[31] Treaty of Osnabrück, Holy Roman Empire-Swed., Oct. 24, 1648, 1 Consol. T. S. 119.
[32] Treaty of Münster, Fr.-Holy Roman Empire, Oct. 24, 1648, 1 Consol. T. S. 271.
[33] HENRY KISSINGER, WORLD ORDER 62 (2014).
[34] Treaty of Münster, Neth.-Spain, Jan. 30, 1648, 1 Consol. T. S. 1; Treaty of Osnabrück art. 1, Holy Roman Empire-Swed., Oct. 24, 1648, 1 Consol. T. S. 119; Treaty of Münster §3, Fr.-Holy Roman Empire, Oct. 24, 1648, 1 Consol. T. S. 271; Doğan, *supra* note 27, at 372.
[35] Doğan, *supra* note 27, at 372.
[36] KISSINGER, *supra* note 33, at 56.
[37] *Id.* at 60.
[38] Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 20 (1948).
[39] *Id*.

religion from European statecraft. The parties agreed to reaffirm the principle of *cuius regio, eius religio* ("whose realm, his religion") from the 1555 Peace of Augsburg.[40] Since neither side could impose its faith by force, each state ruler gained the sovereign right to determine the religion of his state without external interference. This also included limited guarantees for religious minorities, protecting them from persecution and foreign intervention on their behalf.[41] Europe would no longer answer to a single "Christendom" under one imperial or papal order.[42] This represented a decentralization of power away from supranational authorities to territorially defined, sovereign polities.

Westphalia also laid the groundwork for peaceful diplomacy by setting a precedent for future gatherings of states to settle disputes before they turned into conflict.[43] It encouraged the permanent exchange of resident ambassadors, an innovation previously practiced only on a smaller scale in the Venetian Republic.[44] These two diplomatic instruments helped manage disputes before they escalated into war.

However, when diplomacy failed, war remained an accepted instrument of policy for sovereigns in the Westphalian framework.[45] The peace agreements did not outlaw war—they simply recalibrated what causes were deemed worth fighting over.[46] The Peace of Westphalia did not overturn the idea that war was the sovereign right of the ruler, but did undermine the premises the idea was based on.

After Westphalia, wars of religion largely ceased in Europe as no state could claim a "just war" to enforce religious uniformity abroad, but wars for dynastic, territorial, or balance-of-power reasons continued.[47] In short, Westphalia tried to impose restraints on

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[40] Treaty of Osnabrück art. 5, §1, Holy Roman Empire-Swed., Oct. 24, 1648, 1 Consol. T. S. 119; Resolution of the Imperial Diet of Augsburg art. 24, Sep. 25, 1555.
[41] KISSINGER, *supra* note 33, at 59.
[42] Gross, *supra* note 38, at 35.
[43] KISSINGER, *supra* note 33, at 59.
[44] *Id*.
[45] Gross, *supra* note 38, at 35.
[46] *Id*.
[47] Doğan, *supra* note 27, at 372 (2023).

warmaking, but did not establish the concept that a "war of aggression" was an illegal act.

B. The Westphalian Legacy: State Sovereignty in International Law

Although the Peace of Westphalia itself did not use the word "sovereignty" or set out a grand theory of international relations, its practical resolution of the Thirty Years' War gave birth to a new system in the decades and centuries that followed.[48] The Westphalian principles of state sovereignty and non-intervention undeniably underlie the modern international system of states exemplified by the U.N. Charter and the norms of international law established in 1945. The U.N. Charter enshrines the "principle of the sovereign equality of all [U.N.] Members," and pointedly says that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[49]

In the words of former U.S. Secretary of State, Henry Kissinger, "Westphalian peace reflected a practical accommodation to reality, not a unique moral insight. It relied on a system of independent states refraining from interference in each other's domestic affairs and checking each other's ambitions through a general equilibrium of power."[50] In other words, Westphalia's logic was pragmatic: after exhausting religious strife, Europe's rulers agreed to live and let live. Each would govern at home and respect the sovereignty of others abroad. If one grew too powerful, others would balance against it.

In the century following Westphalia, European powers continued to test the boundaries of sovereignty—often cloaking it under expansionism in dynastic claims or national interest. From Louis XIV's relentless wars to Frederick the Great's reason-of-state campaigns, the

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[48] *Id*.
[49] U.N. Charter art. 2 ¶ 2, 7.
[50] KISSINGER, *supra* note 33, at 22.

balance of power became the chief constraint on aggressive ambition.[51] These conflicts, while often devastating, remained bounded by the Westphalian understanding that sovereigns had wide latitude within their own territories, but limited legitimacy when projecting force beyond them. It was not until Napoleon, however, that one sovereign so thoroughly shattered this equilibrium that the entire international system was forced to respond.

V. Napoleon

Between 1803 and 1815, Napoleon Bonaparte dramatically expanded the territory of the French Empire through a series of campaigns known as the Napoleonic Wars.[52] By 1814, Napoleon's expansionist ambitions had drawn the most formidable coalition yet assembled against him.[53] Following his disastrous invasion of Russia in 1812, a renewed alliance—Great Britain, Austria, Prussia, Sweden, and Russia—formed what became known as the Sixth Coalition.[54] This coalition dealt Napoleon a decisive defeat at the Battle of Leipzig in October 1813, paving the way for the capture of Paris in March 1814.[55]

Although the Allied powers were unified in their belief that peace was unattainable so long as Napoleon remained on the French throne, they were equally hesitant to violate monarchical legitimacy by outright

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[51] *See id.* at 66-72 (2014) (Louis XIV pushed the boundaries of Westphalian sovereignty by exploiting dynastic claims, leading to repeated coalitions formed to contain him—a pattern that foreshadowed the international response to Napoleon.); *and id.* 67-72 (Frederick the Great of Prussia justified the First Silesian War and others through *raison d'état* or reason of state, provoking broader European responses.). *See also, id.* 92 (Charles XII of Sweden tested the limits of preemptive war during the Great Northern War against Poland and Russia.); *and id.* (2014) (Peter the Great of Russia redefined sovereignty through modernization and empire-building, expanding aggressively into the Baltic and challenging Swedish dominance.).

[52] ANDREW ROBERTS, NAPOLEON 882-83, 972 (2014).

[53] *Id.* at 1,305-06.

[54] ROBERTS, *supra* note 52, at 1,305-88.

[55] *Id*; KISSINGER, *supra* note 33, at 88-90.

stripping him of his imperial title.[56] The result was the Treaty of Fontainebleau (1814), in which Napoleon agreed to abdicate the French throne.[57] In return, the Allies allowed him to retain the title of Emperor—but only over the tiny island of Elba, located off the coasts of France and Italy.[58]

On Elba, Napoleon exercised a curious and constrained form of sovereignty. He retained many of the trappings of imperial authority, including the ability to establish a court, implement reforms, oversee infrastructure projects, and perform ceremonial functions, all while being hailed as Emperor by the islanders.[59] Yet, his powers were deliberately curtailed under the terms of the treaty. He was denied substantial wealth, stripped of meaningful political influence in Europe, and subjected to restrictions that limited his freedom, privacy, and personal security.[60]

Napoleon's dissatisfaction with life on Elba soon led him to violate the treaty he had signed.[61] In 1815, he escaped the island and returned to France, launching the Hundred Days campaign, a bold but ultimately doomed attempt to reclaim his former power.[62] This campaign culminated in the Battle of Waterloo, where Napoleon was decisively defeated by the Seventh Coalition.[63]

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[56] Adam Rowe, *Prometheus caged: The exiling of Napoleon and the Law of Nations, 1814–1821*, 36 LEIDEN J. INT'L L. 495, 505, 508 (2023).

[57] Treaty of Fontainebleau art. 2 & 3, April 11, 1814, https://www.napoleon-empire.org/en/official-texts/treaty-of-fontainebleau-1814.php ("Their Majesties the Emperor Napoleon and the Empress Marie-Louise, will preserve their titles and qualities to enjoy them during their lives.")(" The island of Elba, adopted by his Majesty the Emperor Napoleon, for the place of his residence, shall form, during his life, a separate principality, which shall be possessed by him in all sovereignty and property."); Rowe, *supra* note 56, at 509.

[58] *Id.*

[59] Rowe, *supra* note 56, at 509; ROBERTS *supra* note 52, at 1391-445.

[60] *Id*.

[61] ROBERTS *supra* note 52, at 1391-445.

[62] *Id*.

[63] *Id*.

This second breach of peace left the Allied powers unwilling to risk another negotiated settlement.[64] Napoleon was stripped of all remaining authority and exiled to the remote island of Saint Helena, where he remained until his death in 1821.[65] The principle the Sixth and Seventh Coalitions appear to have embraced is that war is still the right of the sovereign, but if a sovereign signs a treaty of peace and violates that treaty the sovereign can be held to account. Europe was now on a course that would ultimately establish that international law, formed by treaties and state practice, set rules that could be enforced against states and heads of state. Napoleon's arc from emperor to exile demonstrates how sovereignty, once abused in defiance of international consensus, can be forcibly revoked by the international community.

While Napoleon's punishment came through exile rather than prosecution, his fall foreshadowed a larger shift in the way the world would treat leaders who wage aggressive war. That shift would crystallize a century later, when the victors of World War I took an even bolder step: not just removing a sovereign but holding him legally and morally accountable.

VI. The Treaty of Versailles and the League of Nations: A World Cataclysm Brings Dramatic Change

World War I's end produced unprecedented legal and moral judgments about war and leadership. The Treaty of Versailles (1919) embodied a dramatic shift: it treated the act of starting a war as wrongful aggression, no longer an acceptable sovereign prerogative, and it aimed to hold leaders personally liable for unjust wars. This section explores how these ideas were implemented through three main developments: The assignment of war guilt to Germany, the unprecedented attempt to hold Kaiser Wilhelm II personally accountable, and the creation of the League of Nations as a new system to prevent aggressive war.

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[64] *Id*. at 1495-558.
[65] *Id*.

A. Germany's "War Guilt" – Blaming Aggression on the Aggressor

One of the Treaty's most consequential clauses was the famous "war guilt" clause. Article 231 explicitly placed blame for World War I on Germany and its allies.[66] In it, the Allied powers "affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage" of the war "imposed upon them by the aggression of Germany and her allies."[67] This provision made Germany acknowledge that starting the war was an act of wrongful aggression, setting the stage for demanding reparations. In essence, the Treaty formally branded Germany as the aggressor, a moral and legal condemnation that waging an aggressive war is a violation, not a sovereign right.[68] This clear assignment of responsibility was unprecedented in its directness—it marked the first time a peace treaty so pointedly criminalized a state's initiation of war.[69]

B. A Plan to Punish the Kaiser – Personal Accountability for War

Beyond blaming Germany as a nation, the Treaty of Versailles took the radical step of planning to hold Germany's leader personally accountable for the war.[70] Article 227 of the Treaty accused former Kaiser Wilhelm II of "a supreme offence against international morality and the sanctity of treaties," and called for his prosecution before a special international tribunal.[71] Despite his abdication of the German throne, the Allies envisioned putting Wilhelm in the dock as the defendant in the world's first international trial of a head of state.[72]

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[66] Treaty of Versailles pt. VIII, § I, art. 231, June 28, 1919, 2 Bevans 43, 225 Consol. T.S. 188 [hereinafter Versailles].

[67] *Id*.

[68] U.S. Dep't of State, *Milestones in the History of U.S. Foreign Relations* (2016), https://history.state.gov/milestones.

[69] *Id*.

[70] Versailles, *supra* note 66, at pt. VII, art. 227; Arshan Barzani, *Trying (and Failing) to Put Kaiser Wilhelm II on Trial*, LAWFARE (July 30, 2019, 4:57 PM), https://www.lawfaremedia.org/article/trying-and-failing-put-kaiser-wilhelm-ii-trial#:~:text=In%20these%20discussions%20among%20political,the%20eventual%20Treaty%20of%20Versailles.

[71] Versailles, *supra* note 66, at pt. VII, art. 227.

[72] WILLIAM SCHABAS, THE TRIAL OF THE KAISER 3 (2018).

Unlike Napoleon Bonaparte, who, after two defeats, was exiled to live out his days in St. Helena, Kaiser Wilhelm was to face formal punishment by trial.[73] Never before had the victors of a war convened an international court to judge a defeated sovereign.[74] Previous fallen leaders were usually exiled, deposed, or quietly eliminated—not tried by a global tribunal.[75]

Under the Treaty's terms, the Allies would request the Kaiser's extradition and convene a five-judge tribunal (with judges from the United States, Britain, France, Italy, and Japan) to try him and other high-ranking German officials as war criminals for offenses against international morality.[76] However, Wilhelm had fled to the Netherlands on the eve of the Armistice.[77] The Netherlands refused to surrender him to the Allies despite extradition requests.[78] Thus, the trial never progressed as intended and the Kaiser would live out his remaining days in the Dutch countryside.[79]

Though the trial never happened, the Allies' intent to punish the man held responsible for unleashing an unjust war, signaled that heads of state could no longer start wars with impunity. By indicting the Kaiser for the crime of aggression, the Treaty of Versailles advanced the bold principle that sovereign leaders are not above international law in matters of war and peace. Although the Netherlands refused to extradite Wilhelm, this marked the first time that governments entertained the idea of an international criminal court.[80] The commission established during this process also developed the first formal list of war crimes, building a foundation on which to prosecute

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[73] Versailles, *supra* note 66, at pt. VII, art. 227.
[74] Barzani, *supra* note 70.
[75] *Id*.
[76] Versailles, *supra* note 66, at pt. VII, arts. 227, 229.
[77] SCHABAS, *supra* note 72, at 3 (2018).
[78] Versailles, *supra* note 66, at pt. VII, arts. 227 ("The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial."); SCHABAS, *supra* note 72, at 3 (2018).
[79] SCHABAS, *supra* note 72, at 3 (2018).
[80] *Id*.

Nazi leaders at Nuremberg and shape the statutes of the International Criminal Court.[81]

C. The League of Nations and the Outlawing of War

The Treaty of Versailles not only assigned guilt and intended punishment—it also created a new international system to prevent aggressive war in the future. It established the League of Nations, whose founding Covenant enshrined the principle of collective security.[82] Article 10 of the League's Covenant committed all member states to "respect and preserve as against external aggression the territorial integrity and existing political independence" of every League member.[83] For the first time, the international community agreed that wars of aggression were forbidden. Members of the League pledged not to resort to war, and an attack on one was to be regarded as a concern of all.

1. The Failure to Define Aggression

While the League's Covenant banned "external aggression" in principle, it failed to define aggression in concrete terms. This ambiguity undercut the League's authority from the start. The lofty promise of collective security was undermined by the League's structural and political weaknesses. Key decisions required unanimous agreement, so determined aggressor states (or their sympathizers) could paralyze any response.[84] The result was that when aggression actually occurred, the League often could not agree on timely or forceful action.[85] For example, when Japan invaded Manchuria in 1931, the League's response was painfully slow and toothless: it took two years for the League to merely issue a resolution condemning the invasion, with no agreed-upon sanctions or military action.[86] Japan simply

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[81] Barzani, *supra* note 70.
[82] Covenant of the League of Nations arts. 10-11, June 28, 1919, 225 Consol. T.S. 195.
[83] *Id.* at art. 10.
[84] *Id.* at art. 5.
[85] Joseph Ebegbulem, *The Failure of Collective Security in the Post World Wars I and II International System*, 2 TRANSCIENCE 23, 26 (2011).
[86] *Id.*

ignored the censure and withdrew from the League, with no real consequences.[87] Subsequent failures followed: Italy's conquest of Ethiopia in 1935 went unchecked, and Hitler's early acts of aggression met only hesitant protest.[88]

2. *The Self Determination Dilemma*

One of the major proponents of this shift in international law was U.S. President Woodrow Wilson. However, Wilson complicated the idea of prohibiting wars of aggression by raising the idea of national self-determination as one of his Fourteen Points—an idea that has proven both inspiring and destabilizing.[89]

Conflating nation states with the ethnic makeup of the state's population would be the cause of enduring trouble. The existence of ethnically mixed regions and regions in one state with ethnic ties to a neighboring state generated geopolitical tension. Ethnic and historical claims created a pretext for aggressive behavior. History and nationality are used and abused in selective, opportunistic, and often contradictory ways to press historic and territorial claims. Today, Russia justifies its war in Ukraine by citing cultural and historical ties, claiming Ukraine was artificially separated from Russia by foreign interference.[90]

The conflation of nation states and ethnic nationality has contributed to the most recent spikes in global conflict deaths—most notably, Russia's invasion of Ukraine. This is not an isolated

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[87] *Id*.

[88] *Id*.

[89] *Id*.

[90] Vladimir Putin, The Historical Unity of Russians and Ukrainians, July 12, 2021, http://en.kremlin.ru/events/president/news/66181 (Putin argues that Ukraine should be reunited with Russia because he believes Russians and Ukrainians are "one people," sharing a common historical, cultural, and spiritual heritage that dates back to Ancient Rus. He claims Ukraine was artificially separated through foreign intervention, political manipulation, and forced identity shifts—especially during and after the Soviet era. He frames modern Ukraine's independence and alignment with the West as part of an "anti-Russia" project that threatens both Russian security and the shared legacy of a unified Slavic civilization.); KISSINGER, *supra* note 33, at 93-94.

phenomenon either. In regions like the Balkans and Africa, where ethnic and religious groups are often intermingled, questions of identity and sovereignty regularly fuel violence and instability.[91] These intranational and civil conflicts have proven devastating—accounting for an estimated 1.9 million deaths since 1989, or nearly half of all conflict-related fatalities during that period.[92]

3. Laying the Groundwork for Modern International Law

The League left behind unresolved tensions about how to reconcile competing national identities within a legal framework aimed at peace and what qualified as aggression. Despite its failings, the League of Nations was a groundbreaking experiment. For the first time in modern history, the world tried to formally create a legal system to govern warfare and punish aggressive behavior, even though the rules were not yet perfect or fully developed. The Treaty and League signaled that war would no longer be seen as a sovereign free-for-all—but something subject to international law and judgment. The experiment paved the way for future treaties. The Treaty of Versailles and the League of Nations thus represent a dramatic turning point: the moment when war itself was put on trial, and the age of unbridled war-making by sovereigns began to come to an end.

VII. The World Formally Bans Aggressive War: The Kellogg-Briand Pact

World leaders would return to Paris and form the General Treaty for the Renunciation of War, better known as the Kellogg-Briand Pact.[93] The Pact was a well-intentioned step toward outlawing war through

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[91] KISSINGER, *supra* note 33, at 423, 429-30.

[92] Bastian Herre, *Millions have died in conflicts since the Cold War; most of them in Africa and intrastate conflicts*, OUR WORLD DATA (2024), https://ourworldindata.org/conflict-deaths-breakdown.

[93] Herbert Hoover, Pres. of the U.S., Address on Kellogg-Briand Pact (July 24, 1929), *in* Univ. of Va., *July 24, 1929: Address on Kellogg-Briand Pact* (last seen on Jul 24, 2025), https://millercenter.org/the-presidency/presidential-speeches/july-24-1929-address-kellogg-briand-pact.

international agreement, but it lacked any enforcement mechanism.[94] However, the Pact's wide adoption reflected the continued movement towards world order—one where individuals and state leaders saw wars as a decision rather than an inevitability, believed in the sovereign rights of states, and sought alternate means to solving disagreements.[95]

The pact was the brainchild of U.S. Secretary of State, Frank B. Kellogg, and French Foreign Minister, Aristide Briand.[96] Briand initially proposed a bilateral no-war pact with the United States, and Kellogg expanded it into a multilateral treaty open to all nations.[97] On August 27, 1928, representatives of fifteen countries—including the United States, France, Great Britain, Italy, Germany, and Japan—formally signed the pact in Paris.[98] Soon after, many other states adhered to the treaty, and by mid-1929 the pact was in force among 46 nations (the fifteen original signatories plus thirty-one additional countries).[99]

All parties to the Kellogg-Briand Pact "condemn[ed] recourse to war for the solution of international controversies and renounced it as an instrument of national policy."[100] This famous clause encapsulates the pact's core principle of outlawing war as a tool of national policy. Furthermore, the signatories agreed that "the settlement or solution of all disputes or conflicts . . . shall never be sought except by pacific means," pledging the signatories to resolve international disagreements through peaceful diplomacy rather than military force.[101] Each signatory thus publicly affirmed that aggressive war is illegitimate, marking a radical shift in international norms even if the pledge proved

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[94] General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57; Julie Bunck & Michael Fowler, *The Kellogg-Briand Pact: A Reappraisal*, 27 TULANE J. INT'L & COMP. L. 229, 234-35 (2019).

[95] David Koplow, *Nuclear Kellogg-Briand Pact: Proposing a Treaty for the Renunciation of Nuclear Wars as an Instrument of National Policy*, 42 SYRACUSE J. INT'L & COMP. L. 123, 125 (2014-15).

[96] Hoover, *supra* note 93.

[97] *Id*.

[98] *Id*; Bunck, *supra* note 94, at 230.

[99] Bunck, *supra* note 94, at 230.

[100] General Treaty for Renunciation of War as an Instrument of National Policy art. I, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

[101] *Id*. at art. 2.

difficult to enforce in practice.[102] The idea was if the entire world embraced these principles, wars of aggression would cease.

Notably, the Pact contained no sanctions or enforcement provisions to uphold its anti-war commitment.[103] Like the Treaty of Versailles, the Pact fails to define "war" making it impossible for enforcers to draw a line in which to be crossed.[104] Moreover, because of its intention to entirely prevent a war from starting, it also failed to distinguish an offensive war from a defensive war or clearly define a "just war."[105] As a result, the Pact relied purely on the signatories' goodwill and public opinion for enforcement.[106] In the ensuing years, observers often derided the Kellogg-Briand Pact as a naïve or "utopian" gesture with little practical impact.[107]

World War II would begin a decade later, overshadowing the goals of the Pact. However, the Pact provided essential intellectual and legal underpinnings for the Nuremberg War Crimes Tribunals, substantiating the doctrine of prosecuting aggressors for "crimes against the peace."[108]

VIII. Nuremberg Trials

The Nuremberg Trials marked a turning point in international law, transforming the renunciation of aggressive war from high-minded rhetoric into enforceable legal precedent. Following World War II, between 1945 and 1949, 1,672 German government officials were prosecuted for violations of international law.[109] Of those tried, 1,416

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[102] Bunck, *supra* note 94, at 235; Koplow, *supra* note 95, at 131.
[103] General Treaty for Renunciation of War as an Instrument of National Policy art. I, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57; Bunck, *supra* note 94, at 230.
[104] Koplow, *supra* note 95, at 130.
[105] *Id*. at 130-31.
[106] General Treaty for Renunciation of War as an Instrument of National Policy art. I, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57; Bunck, *supra* note 94, at 234-35.
[107] Bunck, *supra* note 94, at 233; Koplow, *supra* note 95, at 144-45.
[108] Koplow, *supra* note 95, at 144.
[109] ANNE NELSON, RED ORCHESTRA: THE STORY OF THE BERLIN UNDERGROUND AND THE CIRCLE OF FRIENDS WHO RESISTED HITLER 305-06 (2009).

were convicted and roughly 200 were executed.[110] The main Nuremberg trial, held from 1945 to 1946, brought senior Nazi leaders before an international tribunal on four charges: (1) conspiracy; (2) crimes against peace (*jus ad bellum*); (3) war crimes (*jus in bello)*; and (4) crimes against humanity (i.e. murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population).[111]

The tribunal's judgment directly invoked the Kellogg-Briand Pact as the legal foundation for condemning the Nazi war of aggression.[112] In his opening statement, Chief U.S. Prosecutor, Robert H. Jackson, emphasized that Germany, along with nearly all nations, had "renounced war as an instrument of national policy," making the planning and waging of aggressive war a prosecutable offense.[113] Nuremberg established, for the first time, that national leaders could be held criminally responsible for initiating unjust war.

Yet while the trials imposed accountability after the fact, they also revealed the urgent need for a permanent international system to prevent aggression before it ignites. The legacy of Nuremberg is thus twofold: it affirmed that war-making is subject to the rule of law and underscored the importance of building enduring institutions to protect peace through legal means.

IX. The U.N. Charter: The Idea of Collective Security

In 1945, in the aftermath of World War II, the Allied nations and other world powers convened in San Francisco to establish a new international organization for peace—Representatives of fifty countries

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[110] *Id*.

[111] UNITED NATIONS, CHARTER AND JUDGMENT OF THE NÜRNBERG TRIBUNAL – HISTORY AND ANALYSIS 4, 6 (1949).

[112] *Id*. at 43.

[113] 2 Transcript of Trial of the Major War Criminals at 144-45 (Int'l Mil. Trib. Nov. 21, 1945).

drafted and signed the U.N. Charter on June 26, 1945.[114] The Charter then entered into force on October 24, 1945, after the required number of nations, including all five permanent Security Council members, ratified it.[115] This founding moment was meant to "save succeeding generations from the scourge of war" by instituting a collective security system under international law.[116]

One of the most revolutionary principles of the U.N. Charter is the outlawing of aggressive war. The Charter explicitly prohibits states from using force against other states, effectively outlawing the war of aggression under international law. [117] In place of the old system of unilateral war, the Charter establishes a collective security framework. The Charter states, "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace . . . ."[118]

The Charter entrusts the U.N. Security Council with primary responsibility for peace and security and the sole authority to decide when force may be used.[119] The Security Council determines the existence of any "threat to the peace, breach of the peace, or act of aggression" and may authorize enforcement action, including military force, to address it.[120] In essence, apart from a nation's inherent right of self-defense, only the Security Council can legitimize the use of military force, marking a clear departure from the pre-U.N. era of unfettered national war-making.[121] All member states pledge to unite their

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[114] U.S. Nat'l Archives, *United Nations Charter (1945)*, https://www.archives.gov/milestone-documents/united-nations-charter#:~:text=organization,officially%20United%20Nations%20Day (last visited Jul. 10, 2025).
[115] *Id*.
[116] United Nations Charter pmbl.
[117] *Id.* at art. 2, ¶ 4.
[118] *Id.* at art. 1, ¶ 1.
[119] Id. at arts. 39-42; DANISH INST. FOR INT'L STUDIES, NEW THREATS AND THE USE OF FORCE 89-90 (2005).
[120] *Id*.
[121] *Id*.

strength to achieve these ends, meaning that peace would be preserved not by individual national might alone, but by the collective action of the international community.

The promise of the U.N. Charter would be tested in the decades that followed. The Charter was imperfectly enforced during the Cold War. In August 1990, almost one year after the fall of the Berlin Wall, Iraq's invasion of Kuwait presented the international community with a clear choice for what the post-Cold War would look like: Order or upheaval.

X. Saddam Tests the Post-Cold War Order

A. Iraq's Invasion of Kuwait

After the ruinous eight-year Iran-Iraq War, Iraq was economically devastated and saddled with enormous debts estimated at around $80 billion.[122] About $15 billion of this debt was owed to Kuwait, and Iraq's Saddam Hussein pressed the smaller nation to forgive these loans.[123] He also accused Kuwait of economic sabotage, charging that Kuwait overproduced oil beyond OPEC quotas and engaged in slant drilling into the Rumaila oil field in an effort to undercut Iraq's economy.[124] Saddam viewed these actions as acts of war and betrayal.[125] When Kuwait refused to relent on the debt and oil output, he became convinced that Kuwait was part of a larger U.S.-Israeli conspiracy aimed at weakening Iraq.[126]

In the early hours of August 2, 1990, Iraq invaded and overran Kuwait.[127] Saddam justified this aggression in sweeping ideological terms, claiming that the Soviet Union's decline left a unipolar world in

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[122] Megan Joyce, *Gulf War: Why Did Saddam Hussein Invade Kuwait?*, IMPERIAL WAR MUSEUMS (Feb 19, 2025), https://www.iwm.org.uk/history/gulf-war-why-did-saddam-hussein-invade-kuwait [hereinafter *Why Invade Kuwait*].
[123] *Id*.
[124] Daniel Chardell, *The Origins of the Iraqi Invasion of Kuwait Reconsidered*, 6 TX. NAT'L SEC. L R. 51, 72 (2024); *Why Invade Kuwait*, *supra* note 122.
[125] Chardell, *supra* note 124, at 72.
[126] *Id*.
[127] *Why Invade Kuwait*, *supra* note 122.

which American and Israeli ambitions were now unchecked and had to be challenged.[128] Framing the attack as resistance to U.S.-Israeli hegemony, Saddam portrayed Kuwait's ruling Sabah family as puppets of an American-Israeli plot to control Middle East oil and threaten Arab interests.[129] While Saddam's genuine intentions remain unknown, responding to what he saw as acts of war against Iraq was likely a pretext towards economic redemption and strategic military advantage.[130] The invasion force of some 120,000 Iraqi troops swiftly occupied Kuwait.[131]

B. Iraqi Violation of Sovereignty Presents the World with a Choice

Saddam's pretext proved unconvincing to most of the world.[132] Instead, his actions were viewed as a blatant breach of international law and Kuwaiti sovereignty.[133] The U.N. Security Council immediately condemned the invasion as a violation of international law and demanded Iraq's withdrawal.[134] World leaders universally decried Saddam's action as naked aggression against a peaceful neighbor.[135] U.S. President George H. W. Bush affirmed that "the acquisition of territory by force is unacceptable," and the global response reflected the view that this clear violation of a nation's sovereignty could not stand.[136]

The Iraqi invasion posed an inflection point for the international community, forcing a choice about what kind of world order would prevail after the Cold War. Would the world tolerate armed aggression and "might-makes-right," or uphold principles of collective security

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[128] Chardell, *supra* note 124, at 52.
[129] *Id.* at 54.
[130] Nur Atika Hairi, *The Justifications for Saddam Invading Kuwait and the World Reaction*, 8 SAINS INSANI 58, 59 (2023).
[131] *Why Invade Kuwait*, *supra* note 122.
[132] S.C. Res. 660 (Aug 2, 1990).
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] George H. W. Bush, Pres. of the U.S., Address to the Nation Announcing the Deployment of United States Armed Forces to Saudi Arabia (Aug. 8, 1990).

and the rule of law? U.S. officials and other leaders argued that Kuwait's fate would set a precedent for the new era.[137] As one British ambassador noted, the crisis became "of far greater significance for all countries in the world" than a typical regional conflict—it marked the world community's determination not to allow the law of the jungle to replace the rule of law in international affairs.[138] How the world responded to Saddam's aggression would signal whether post-Cold War international norms truly rejected unilateral aggression and respected national sovereignty.

The first response, a few days following the initial resolution, was a comprehensive Arms embargo imposing sweeping sanctions on Iraq.[139] U.N. Security Council Resolution 661 enacted a trade embargo, banning virtually all exports to and imports from Iraq with the exception of humanitarian supplies.[140] This embargo crippled an already suffering economy and prevented Saddam from obtaining new weapons or spare parts, thereby freezing Iraq's economic progress and military capabilities.[141] These sanctions, unprecedented in their scope, demonstrated the international community's resolve to isolate Saddam's regime.

The decision by the United States and a coalition of nations to go through the U.N. and build a broad coalition against Iraq was a deliberate policy choice, not an automatic or inevitable response. President Bush and his Secretary of State James Baker opted to invoke the U.N. Charter principles of sovereignty and non-aggression, rather than acquiesce to the invasion or strike Iraq unilaterally.[142] This multilateral approach was a conscious effort to preserve world order by

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[137] Samuel Helfont, *The Origins of the Iraqi Invasion of Kuwait Reconsidered*, 4 TX. NAT'L SEC. L R. 25, 29 (2021).
[138] *Id. citing* U.N. SCOR, 2981st mtg., U.N. Doc. S/PV.2981, at 111 (Apr. 3, 1991).
[139] S.C. Res. 660, *supra* note 132.
[140] *Id*.
[141] Helfont, *supra* note 137, at 28.
[142] S.C. Res. 660, *supra* note 132; S.C. Res. 661 (Aug. 6, 1990); *Why Invade Kuwait*, *supra* note 122.

upholding the norm that international borders cannot be changed by force.[143]

C. Unconditional Total Withdrawal

Throughout the latter half of 1990, various diplomatic initiatives were explored to resolve the crisis peacefully.[144] The U.S.-led coalition maintained a firm stance that only Iraq's complete and unconditional withdrawal from Kuwait was acceptable, rejecting partial compromises or face-saving arrangements for Saddam.[145] Saddam attempted to link his withdrawal to broader regional issues, proposing that Iraqi forces would leave only if Israel withdrew from occupied territories and Syria pulled out of Lebanon, which the United States and its allies rejected, as did the U.N. Security Council.[146] Additionally, Saddam suggested replacing Western forces with a pan-Arab peacekeeping force under U.N. auspices, but this idea was dismissed, as it failed to gain traction among Arab states.[147] As the conflict escalated, Saddam floated additional partial compromises—including offers to withdraw from Kuwait in exchange for retaining control of the Rumaila oil field and the Bubiyan and Warbah islands.[148] The coalition stood firm by rejecting these offers, insisting any concession would legitimize the invasion and risk portraying Saddam's aggression as a diplomatic success.[149]

By the end of 1990, the international community had hardened its stance, with leaders like British Prime Minister, Margaret Thatcher, and

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[143] Helfont, *supra* note 137, at 28.

[144] David Lauter, *Crisis In The Persian Gulf : Oil Field, 2 Isles May Be Iraq's Real Goal*, L.A. TIMES (Oct. 17, 1990), https://www.latimes.com/archives/la-xpm-1990-10-17-mn-2413-story.html#:~:text=Now%2C%20however%2C%20the%20Bush%20Administration,unconditionally%20from%20all%20Kuwaiti%20territory.

[145] *Id*.

[146] William Claiborne, *Saddam Links New Crisis To Old Mideast Disputes*, WASH. POST (Aug. 12, 1990), https://www.washingtonpost.com/archive/politics/1990/08/13/saddam-links-new-crisis-to-old-mideast-disputes/f9a6fe8f-3327-40b9-a089-b5a41fd864d3/.

[147] *Id*.

[148] Lauter, *supra* note 144.

[149] *Id*.

President Bush warning against appeasement and emphasizing that Iraq had to face the consequences of its aggression.[150] The unwillingness to make a deal meant that when the U.N.'s January 15, 1991 deadline expired with Iraqi forces still in Kuwait, the stage was set for war.[151] In short, Saddam found no buyers for his compromise ideas, as the world consensus was now that Iraq had to unconditionally reverse its conquest or be ejected by force.

D. A "New World Order" Emerges

Ironically, the very superpower intervention Saddam most feared is what sealed his downfall in Kuwait.[152] Once Iraq occupied Kuwait, the U.S.-led coalition assembled the largest military force seen since World War II.[153] In January 1991, Operation Desert Storm began with a massive U.S.-led air campaign, followed by a swift ground offensive in February.[154] In just six weeks, Iraq's military in Kuwait was decisively defeated by American and allied forces.[155] Saddam's elite Republican Guard units were shattered, and Iraqi troops fled or surrendered.[156] By February 27, 1991, President Bush was able to declare that "Kuwait is liberated."[157]

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[150] *Id*.

[151] S.C. Res. 678 (Nov. 29, 1990).

[152] Chardell, *supra* note 124, at 72; Megan Joyce, *Operation Desert Storm: How to Win a War in 100 Hours*, IMPERIAL WAR MUSEUMS (Nov. 8, 2023), https://www.iwm.org.uk/history/gulf-war-why-did-saddam-hussein-invade-kuwait [hereinafter *Desert Storm*].

[153] *Desert Storm*, *supra* note 152.

[154] Megan Joyce, Operation Desert Storm: How to win a war in 100 hours, Imperial War Museums, Nov 8, 2023, https://www.iwm.org.uk/history/gulf-war-why-did-saddam-hussein-invade-kuwait.

[155] *Id*.

[156] *Id*.

[157] Rick Atkinson & Steve Coll, *Bush Orders Cease-Fire*, WASH. POST (Feb. 27, 1991), https://www.washingtonpost.com/archive/politics/1991/02/28/bush-orders-cease-fire/7ba92d7c-8e83-4258-8ef5-7bc79174b624/.

In the aftermath, leaders characterized the collective response to Iraq's aggression as a model for the post-Cold War era.[158] President Bush, in a speech to Congress, famously said:

> What is at stake is more than one small country; it is a big idea: a new world order, where diverse nations are drawn together in common cause to achieve the universal aspirations of mankind—peace and security, freedom, and the rule of law. Such is a world worthy of our struggle and worthy of our children's future.[159]

Bush's "new world order" referred to the vision of nations cooperating through the United Nations to deter and punish aggression, as seen in the Gulf War coalition. It referred to the success in expelling Iraq from Kuwait without triggering East-West superpower conflict. The Soviet Union's ambassador to the United Nations concurred with President Bush, noting victory was possible "because of the unique unanimity demonstrated by the majority of the international community in condemning the aggression, and the resolve to put an end to it within the generally accepted contours of the authority of the United Nations."[160] Would-be aggressors, like Saddam Hussein, would face a united international community, rather than a divided world that they could exploit.

XI. The Unipolar Moment and Global Peace

The Gulf War's collective response seemed to vindicate the U.N. system and herald a new era. In *The Better Angels of Our Nature*, Pinker argues that we are currently living in the most peaceful era in history.[161] He attributes this sustained decline in violence to structural and

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[158] U.N. Doc. S/PV.2981, *supra* note 138, at 82, 99, 111-12.
[159] George H. W. Bush, Address Before a Joint Session of the Congress on the State of the Union, Jan. 29, 1991.
[160] U.N. Doc. S/PV.2981, *supra* note 138, at 99.
[161] PINKER, *supra* note 4, at 22.

cultural changes, including the rise of international law and global institutions.[162]

During what Pinker coins the "New Peace," defined as the era following the collapse of the Soviet Union, the world saw a significant decrease in the frequency of interstate wars.[163] Most of the conflicts that have occurred in recent decades have been civil wars or insurgencies, which tend to result in fewer deaths per capita compared to the large-scale state-on-state wars that once defined global conflict.[164] This New Peace has continued since the release of his book in 2011, despite a spike in interstate in 2023.

Even in the early twentieth century, prominent thinkers optimistically predicted a decline in war.[165] Norman Angell made this argument most famously in his book, *The Great Illusion*, published just four years before World War I—one of the bloodiest conflicts of all time.[166] As Figure 2 illustrates, today's optimism may again prove premature. The trend of declining violence could be reversing, particularly with the outbreak of the Russia-Ukraine War. The conflict has raised concerns about the return of interstate wars, particularly those driven by foreign invasion and expansionist ambitions. Furthermore, smaller nations, such as Rwanda in its involvement in the Democratic Republic of the Congo, are increasingly looking to Russia's example, potentially signaling a broader pattern of military aggression among state actors.[167] Countries like China are watching closely to

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[162] *Id*. at 437.
[163] *Id*. at 442.
[164] *Id*.
[165] Nikita Lalwani & Sam Winter-Levy, *Is the World Getting Safer?*, FOREIGN POLICY (Jan. 12, 2020, 7:51 AM), https://foreignpolicy.com/2020/01/12/is-the-world-getting-safer/.
[166] *Id*; NORMAN ANGELL, THE GREAT ILLUSION 191 (1909), ("How can we possibly expect to keep alive warlike qualities, when all our interests and activities—all our environments, in short—are peace-like?").
[167] Jason Stearns, *Rwanda's Troublemaking in DRC Would Be Easy to Stop*, FIN. TIMES (Jan. 26, 2025), https://www.ft.com/content/8bae4ecd-9fd8-48c6-824c-41b929b640d7

gauge the international response, potentially weighing their own actions toward Taiwan.[168]

As demonstrated by the failures of the Kellogg-Briand Pact and the League of Nations Covenant, international law is only as effective as the mechanisms that enforce it. To endure, the law must be upheld by social, economic, and military deterrence and retribution.

A. Social deterrence

Social deterrence or "soft power" is "getting others to want the outcome that you want" through attraction and legitimacy rather than coercion says Joseph Nye, who coined the term.[169] Soft power derives from a country's culture, political values, and the "perceived legitimacy and moral authority of its foreign policies."[170] In practice, this means building broad international support through legitimate policies.[171] For example, when the U.S. built its coalition for the 1991 Gulf War, it did so with the backing of a large majority of nations and the support (or at least the acquiescence) of the remaining permanent members of the U.N. Security Council. In contrast, its 2003 Iraq invasion was launched without a second U.N. mandate and with fewer allies.[172] As Nye observes, this approach "produced doubts about the legitimacy of [its] actions, and widespread anxieties about how the United States would use its preponderant power."[173] This led to a drop in the United States'

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[168] Kwan Wei Kevin Tan, *The US Must Stop Russia, or China Will Learn That It Pays to Use Force Against America's Interests, Nato Chief Says*, BUS. INSIDER (Feb. 1, 2024, 10:26 PM), https://www.businessinsider.com/china-learn-use-force-if-russia-prevails-nato-chief-2024-2.

[169] JOSEPH NYE, SOFT POWER 5 (2004).

[170] *Id*. at 11.

[171] *Id*.

[172] Permanent members like France, Russia, and China signaled they would veto. Due to the near-certainty of a veto, the U.S. withdrew its draft resolution in March 2003 rather than face a diplomatic defeat. *France, Russia to Vote Against UN War Resolution - 2003-03-1*, VOICE OF AM. (Oct. 30, 2009 5:05 AM), https://www.voanews.com/a/a-13-a-2003-03-11-51-france/389786.html; NYE, *supra* note 169, at XII.

[173] NYE, *supra* note 169, at XII.

image around the world, making it difficult to recruit support for the postwar reconstruction.[174]

However, with a belligerent Russia holding a veto on the Security Council, consensus today is harder to achieve. Yet, even in the absence of formal U.N. authorization, legitimacy can be instilled through broad coalition building. The world's almost unanimous condemnation of Iraq's aggression turned Saddam Hussein into a global pariah. The U.N. mandate stemmed from the world's condemnation, not the other way around. As opposed to unilateral action by one or a handful of states, social deterrence should be cultivated through broad coalitions and near-unanimous international condemnation, as seen in response to Iraq's 1990 invasion of Kuwait even if it lacks a formal U.N. Resolution.

B. Economic Deterrence and Retribution

Free trade and global economic integration are powerful deterrents to aggressive war.[175] Pinker notes, Modern international cooperation is "partly dependent on institutions of cooperation that make it more profitable to trade with other countries than to invade them.[176] He adds, "you don't kill your customers."[177] Economic ties can pull even unconventional states into the global fold. For example, despite having religious and cultural similarities with Iraq, the Gulf Cooperation Council states aligned with the West largely because of oil-market interests.[178] More recently, when Iran threatened to close the Strait of

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[174] *Id*.

[175] *Id*. at 10.

[176] Michel Martin, *Despite The Headlines, Steven Pinker Says the World Is Becoming Less Violent*, NAT'L PUB. MEDIA (July 16, 20165:02 PM), https://www.npr.org/2016/07/16/486311030/despite-the-headlines-steven-pinker-says-the-world-is-becoming-less-violent.

[177] *Id*.

[178] Osamah Alsayegh, *How Economic and Political Factors Drive the Oil Strategy of Gulf Arab States*, BAKER INST. (Jan. 9, 2023), https://www.bakerinstitute.org/research/how-economic-and-political-factors-drive-oil-strategy-gulf-arab-states.

Hormuz in 2025, even China reacted strongly and Iran restrained escalation, in part due to the economic interdependence at stake.[179]

Despite economic and political turbulence sparking speculation about so-called deglobalization, evidence such as sustained growth in digital and regional trade flows suggests that global integration is enduring.[180] A McKinsey report divided the world into eight regions and found each region, including China, imports at least twenty-five percent of a key resource or manufactured good it requires, and in many cases, much more.[181] No region operates independently. Maintaining and increasing this norm is essential for continued economic deterrence.

C. Economic Retribution

"Smart power," as Nye says, "is neither hard nor soft. It is both."[182] When economic deterrence proves insufficient, economic sanctions are a key tool of retribution. When a state flagrantly violates international law, the violator can be economically isolated. For instance, sweeping U.N. sanctions on Iraq in 1990-91 demonstrated the power of such collective action: the Iraqi economy was devastated, with electricity, transportation, healthcare, and food supplies all collapsing under the embargo.[183] The embargo affected all segments of Iraqi society, including the elite.[184] Similar sanctions contributed to pressuring Yugoslavia in the 1990s and Libya in 2011.[185] Notably, resolutions imposing sanctions on the former Yugoslavia and on Libya passed the

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[179]Jeremy Fleming-Jones, *China calls for global efforts to defuse tensions over vital Strait of Hormuz*, EURO NEWS (Jun. 23, 2025 8:17 PM), https://www.euronews.com/my-europe/2025/06/23/china-calls-for-global-efforts-to-defuse-tension-over-vital-strait-of-hormuz.

[180] Jeongmin Seong, et. al, *Global flows: The ties that bind in an interconnected world*, MCKINSEY GLOBAL INST. (Nov. 15, 2022).

[181] *Id*.

[182] NYE, *supra* note 184, at XIII

[183] Joy Gordon, *The Enduring Lessons of the Iraq Sanctions*, 249 MIDDLE EAST REP. (2020).

[184] Helfont, *supra* note 137, at 43; S.C. Res. 660 (Aug. 2, 1990).

[185] S.C. Res. 757 (May 30, 1992); S.C. Res. 1160 (Mar. 31, 1998); S.C. Res.1970 (Feb. 26, 2011); S.C. Res. 1973 (Mar. 17, 2011).

Security Council with only minor abstentions (in each case China abstained).[186]

However, sanctions only work when broadly applied and carefully balanced. If major traders continue business with the target of the sanctions those sanctions falter. For example, Europe's partial dependence on Russian gas has undermined pressure on Russia.[187] In 2024, the European Union (E.U.) paid about €21.9 billion for Russian fossil fuel imports—more than the €18.7 billion it gave in financial aid to Ukraine that year.[188] This remittance effectively funded Russia's war effort. Although E.U. gas imports from Russia have declined, falling from around forty-five percent of gas supply in 2021 to approximately eighteen percent in 2024, Europe still accounts for roughly a quarter of Russia's fossil fuel export revenues.[189] Until that economic lever is fully severed, deterrence via trade will be incomplete.

D. Military Deterrence

When sanctions fail to change behavior or are undermined by major trading partners, deterrence must rest on military strength. The threat of force underpins international order. As Thomas Schelling observed, "[t]o be coercive, violence has to be anticipated. . . . The power to hurt is bargaining power. To exploit it is diplomacy—vicious diplomacy, but diplomacy."[190] Greater equality in military spending across the free world and increased spending on emerging technologies is essential to maintain proper deterrence.

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[186] *Id*.

[187] Vitaly Shevchenko, *How the West Is Helping Russia to Fund Its War on Ukraine*, BBC (May 29, 2025), https://www.bbc.com/news/articles/cdxk454kxz8o; Ajit Niranjan, Eu Spends More on Russian Oil & Gas Than Financial Aid to Ukraine, According to New Report, BUS. & HUM. RTS. RESOURCE CTR. (Feb. 24, 2025), https://www.business-humanrights.org/en/latest-news/eu-spends-more-on-russian-oil-gas-than-financial-aid-to-ukraine-according-to-new-report/.

[188] *Id*.

[189] Vaibhav Raghunandan, et. al., *Eu Imports of Russian Fossil Fuels in Third Year of Invasion Surpass Financial Aid Sent to Ukraine*, CTR. FOR RES. ON ENERGY & CLEAN AIR (Feb. 24, 2025), https://energyandcleanair.org/publication/eu-imports-of-russian-fossil-fuels-in-third-year-of-invasion-surpass-financial-aid-sent-to-ukraine/.

[190] THOMAS SCHELLING & ANNE-MARIE SLAUGHTER, ARMS AND INFLUENCE 2 (2020).

During his presidency, Barack Obama urged European allies to bolster their defense capabilities, famously stating that Europe was "complacent about its own defense."[191] The lack of military readiness in countries like Germany may have allowed Russian President Vladimir Putin to invade Ukraine. In response to Russia's Ukraine invasion and demands from the United States under President Donald Trump, North Atlantic Treaty Organization (NATO) allies have begun to recommit to collective defense.[192] At the June 2025 NATO summit, members agreed to raise their core defense spending target up toward five percent of GDP, up from the previous two percent.[193] This surge in investment is intended to counter threats from revisionist powers like Russia.

Like military spending, the free world's innovations in technology must similarly stay ahead of adversaries. The Cold War demonstrated how technological superiority could shape the global balance of power, and similar considerations are now being applied to emerging technologies like cyber, artificial intelligence (AI), and autonomous systems.[194] Former Chairman of the U.S. Joint Chiefs of Staff General Mark Milley questioned the long-term viability of manned aircraft, asking, "Do we really think a manned aircraft is going to be winning the skies in 2088?"[195] General Milley's statement reflects an awareness

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[191] *Obama Calls On 'Complacent' Europe to Raise Defence Spending*, FR. 24 (Apr 25, 2016), https://www.france24.com/en/20160425-obama-calls-complacent-europe-raise-defence-spending; *Obama Urges Cameron to Keep 2% Defence Spending Target*, BBC (Jun 7, 2015), https://www.bbc.com/news/uk-33043087.

[192] Andrew Gray, *Nato Agrees To Higher Defence Spending Goal, Spain Says It Is Opting Out*, REUTERS (Jun. 23, 2025), https://www.reuters.com/world/europe/nato-countries-approve-hague-summit-statement-with-5-defence-spending-goal-2025-06-22/#:~:text=BRUSSELS%2FMADRID%2C%20June%2022%20%28Reuters%29%20,be%20a%20show%20of%20unity.

[193] *Id*.

[194] U.S. Dept. of Def., *Department of Defense Releases the President's Fiscal Year 2024 Defense Budget* (March 13, 2023), https://www.defense.gov/news/releases/release/article/3326875/department-of-defense-releases-the-presidents-fiscal-year-2024-defense-budget/.

[195] *America's military supremacy is in jeopardy*, ECONOMIST (Feb 13, 2025), https://www.economist.com/briefing/2025/02/13/americas-military-supremacy-is-in-jeopardy.

from some Department of Defense (DoD) officials as to the importance of new technologies in modern warfare. In 2024, the U.S. DoD requested $1.8 billion to fund AI capabilities, but this amount constitutes only 0.2% of the total defense budget, highlighting the disproportionate emphasis on traditional military systems.[196] Even achieving technical parity with adversaries may not suffice; the free world must maintain technological superiority.[197] As Palantir CEO, Alexander Karp, observes, U.S. "adversaries will not pause to indulge in theatrical debates about the merits of developing technology with critical military and national security applications," underscoring the urgency for the free world to advance its technological capabilities, lest it fall behind authoritarian rivals in future conflicts.[198]

E. Total Defeat of Adversaries

Leaders who violate international law must be held accountable. From Nazi Germany to Ba'athist Iraq, there have been times where force must be met with force and total military defeat of an adversary becomes necessary. To ensure effective deterrence, the costs of aggression must be severe enough to impose massive costs on aggressor states. This can range from the overthrow of the regime itself, as was the result of Allied victory in World War II, to the destruction of its offensive military capabilities, as was the result of the Gulf War. Aggressors cannot always be deterred, and the free world needs to be strong enough to enforce the norm against the crime of aggression through overwhelming military force that shatters an aggressor's will to continue fighting. If the consequences of aggressive actions are not severe enough, punishment becomes ineffective.[199] Hermann Göring, facing execution, remarked that if given another opportunity, he would follow Hitler again.[200] This is a remarkable statement that suggests

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[196] ALEXANDER KARP & NICHOLAS ZAMISKA, THE TECHNOLOGICAL REPUBLIC: HARD POWER, SOFT BELIEF, AND THE FUTURE OF THE WEST, 29 (2025).
[197] *Id*.
[198] *Id*.
[199] Donald Taft, *Punishment of War Criminals*, 11 AM. SOC. REV. 439, 441-42 (1946).
[200] *Id*. at 442.

deterrence of the Nazi regime was impossible. His statement, coupled with the support of other Germans, highlights how leaders may not feel deterred if the personal and societal rewards of their actions are greater than the potential costs.

In contrast, following the Gulf War, the United States offered Saddam Hussein only unconditional surrender, denying him any political leverage or opportunity to save face. This firm stance underscored a clear message: aggression would yield no political gain and would be met with decisive consequences. By contrast, the West's responses to Russia's invasions of Georgia in 2008 and Crimea in 2014 involved political concessions that allowed Russian leaders to retain legitimacy on the world stage.[201] Such outcomes send a dangerous signal—when rogue leaders profit from violating international law, it emboldens others to follow suit. And emboldened they were when in 2022, Russia launched a full-scale invasion of Ukraine. To deter future aggression, the international community must be prepared to impose serious and direct consequences not just on the state, but on its leaders personally.

XII. Conclusion

As explored in this chapter, the ideas of international law and justice stretch back to the ancient world; however, it was the past century that saw the most significant advances. The Kellogg-Briand Pact formally banned war, the Nuremberg Trials punished war criminals, the U.N. Charter pledged collective security, and finally, the Gulf War put all of

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[201] Peter Dickinson, *The 2008 Russo-Georgian War: Putin's Green Light*, ATL. COUNCIL (Aug. 7, 2021), https://www.atlanticcouncil.org/blogs/ukrainealert/the-2008-russo-georgian-war-putins-green-light/#:~:text=The%20international%20reaction%20to%20Russia%E2%80%99s,in%20relations%20with%20the%20Kremlin; Janne Matláry, *Containing and Deterring Russia: Can Europe Act Strategically?*, ENGELSBERG IDEAS (May 25, 2022), https://engelsbergideas.com/essays/containing-and-deterring-russia-can-europe-act-strategically/#:~:text=They%20have%20an%20economic%20impact%2C,easy%20to%20exploit%20in%20a.

these principles to the test. A century represents just 1% of human history—so what prevents us from slipping back into the violent patterns that defined the other 99%?

If international law against the crime of aggression is not upheld, we risk reverting to a 5,000-year-old cycle of violence, where authoritarian leaders, like those of Russia and China, will use their power to dominate weaker nations. The United Nations' ability to enforce international law is only as strong as the resolve of its members to act. With revisionist powers like Russia and China holding permanent seats on the U.N. Security Council, maintaining strength to counterbalance these actors is more critical than ever. The free world must be ready to act—not only through diplomacy, but by leveraging credible social, military, and economic deterrents and, when necessary, exercising retributive force to preserve the international rule of law.

XIII. Appendix A: Data Methodology

The authors examined two sets of data to arrive at the conclusion that global death rates from armed conflict have been falling: (1) Conflict Death Rate 1950-99; and (2) Deaths in State-Based Conflicts by Region.

The first set of data contributed to the creation of *Figure 1*, in which its author, Max Roser, illustrates the global deaths from conflict from 1400 to 2000 by using data from the extensive Conflicts Catalog.[202] Roser charts rates of death using a fifteen-year moving average as the share of fatalities relative to the world population at the time (rate of deaths per 100,000 people). The data includes both direct and indirect deaths from conflict. Indirect deaths include famine, disease, genocide, displacement-related deaths.[203]

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[202] Peter Brecke, *Conflict-Catalog-18-vars* [dataset] (1999), https://brecke.inta.gatech.edu/wp-content/uploads/sites/19/2018/09/Conflict-Catalog-18-vars.xlsx.

[203] Roser, *supra* note 5.

The second set of data tracks deaths from conflict from 1946 through 2024; however, this data set understates deaths from conflict because it only includes direct deaths (i.e. battle related deaths of combatants and civilians).[204] To compare this data, the authors combined fatalities for each year and divided the total number of deaths by the world population for that year.[205] This percentage was then multiplied by 100,000 to present the data as a share of fatalities relative to the world population at the time (rate of deaths per 100,000 people) like in Roser's chart. A fifteen-year moving average for each year starting in 1963 was then calculated for this data set.

To compensate for the discrepancy between the two data sets and to continue the Roser's chart through 2024, the authors found the fifteen-year moving average from both the first and second data sets from between 1984 and 1999.[206] With these averages, they calculated an average multiplier based on the quotient of the first set's annual fifteen-year moving average and that of the second set. The multiplier was then applied to years 2000 through 2024 of the second set to roughly reflect the additional indirect deaths caused by conflict. This method allowed the authors to estimate the total direct and indirect deaths from armed conflict from 2000 through 2024 as illustrated by *Figure 2*.[207]

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[204] Our World in Data, *Deaths in State-Based Conflicts by Region* [dataset], https://archive.ourworldindata.org/20250718-160421/grapher/deaths-in-state-based-conflicts-by-region.html (last visited Jul. 18, 2025) (compling data from Uppsala Conflict Data Program, *Georeferenced Event Dataset v25.1* [dataset] (2025); geoBoundaries, *Comprehensive Global Administrative Zones (CGAZ) 6.0.0* [dataset] (2023); and Peace Research Institute Oslo, *Battle deaths v3.1* [dataset] (2017)).

[205] Yearly world population was derived from Worldometer, *World Population by Year*, https://www.worldometers.info/world-population/world-population-by-year/ (last visited Jul. 18, 2025) (compiling data from U.N., *World Population Prospects 2024*, https://population.un.org/wpp/).

[206] The first data set does not provide data from 2000.

[207] Data is on file with the authors.

Chapter 8. Henfield's Dilemma: Originalism, Customary International Law, and the American Warfighter

M. Braxton Marcela[1]

I. Introduction

Chief Justice John Jay, a principal mind among the United States of America's Founders, both in law and international relations, described international law as:

> [T]hose laws by which nations are bound to regulate their conduct towards each other, both in peace and war. Providence has been pleased to place the United States among the nations of the earth, and therefore, all those duties, as well as rights, which spring from the relation of nation to nation, have devolved upon us.[2]

Jay wrote these instructions not as a paragraph in a legal primer, but as a charge to a jury seated in a criminal trial against a U.S. citizen for violating a law not written and passed by any federal or state authority yet still prosecuted by the U.S. government. Filed shortly after the country's founding, *Henfield's Case* reflects an abiding belief among the U.S. founding generation and the framers of the U.S. Constitution—

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[1] The views in this chapter are the author's own and do not reflect the opinions, positions, or viewpoints of the U.S. Department of War, the U.S. Army, or the Army Judge Advocate General's Corps.

[2] Henfield's Case, 11 F. Cas. 1099, 1099-1105 (C.C.D. Pa. 1793); *see also* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1028-134 (2010).

customary international law (CIL) is embedded and incorporated into the American legal regime, and until discarded by Congress, it remains binding on its citizens and government. The founding generation's commitment to international law was actually fairly consistent across its often bitter and rancorous political and ideological divide.[3] In the Pacificus-Helvidius papers, a time-honored debate between Alexander Hamilton (writing as Pacificus) and James Madison (writing as Helvidius) over the nature of foreign policy powers under the U.S. Constitution, a striking point of agreement between them is the binding nature of international law upon the U.S. government, both the Congressional and executive branches.[4] The U.S. Supreme Court has

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[3] *See generally id*. at 936

> (The philosophical worldview of many framers closely identified the law of nations with the law of nature, and they saw compliance with its principles not only as a prerequisite in fact to recognition, but as appropriately so. The European law of nations was not just an externally imposed demand, but also an important part of the Enlightenment project to which the founders were profoundly committed);

Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1094 (1985) (In conclusion, during the first twenty years of American independence, jurists and statesmen established that fundamental international law principles reflecting the law of nature were inviolate and binding on the political branches of government. The leaders of a weak and newly independent nation recognized the need to rely heavily on international law to guide foreign policy.).

[4] Golove, *supra*, note 2, at 1035 (stating that the belief that international law was "incorporated into the law of the land . . . was one of the few points on which Hamilton and Madison agreed in their Pacificus-Helvidius exchange."); ALEXANDER HAMILTON, PACIFICUS NUMBER I (June 29, 1793), https://founders.archives.gov/documents/Hamilton/01-15-02-0038 (last visited Jan. 18, 2026) ("The President is the constitutional executor of the laws. Our Treaties and the laws of Nations form a part of the law of the land. He who is to execute the laws must first judge for himself of their meaning."); JAMES MADISON, HELVIDIUS NUMBER II (Aug. 31, 1793), http://founders.archives.gov/documents/Madison/01-15-02-0061 (last visited Jan. 18, 2026) (agreeing with *Pacificus I*, stating:

taken a consistent stance as well, most notably in its seminal case, *The Paquete Habana*, where the Court rejected the seizure and condemnation as prizes of war of two Cuban unarmed fishing vessels intercepted while returning to their home ports in Cuba during a U.S. naval blockade, despite having no knowledge of the blockade or involvement in the conflict, stating that:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[5]

From these sources alone—charging documents in the founding era seeking to hold citizens liable for violations of CIL, the Founders' clear manifestations that international law is incorporated into the Constitution, and Supreme Court precedent that affirms CIL as a source of U.S. authority—it should be evident that international law, including CIL, generally binds and restrains the U.S. government, particularly the executive branch. However, the applicability of international law to U.S. government action constantly receives scrutiny and skepticism,

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> [t]hat the executive is bound faithfully to execute the laws of neutrality, whilst those laws continue unaltered by the competent authority, is true . . . . It is bound to the faithful execution of these as of all other laws internal and external, by the nature of its trust and the sanction of its oath, even if turbulent citizens should consider its so doing as a cause of war at home, or unfriendly nations should consider its so doing, as a cause of war abroad.).

[5] The Paquete Habana, 175 U.S. 677, 678-79 (1900).

especially among Executive Branch actors.[6] Recent debates concerning civilian harm mitigation policies within the Department of War (previously Department of Defense) illustrate the continuing relevance of these constitutional questions. The current U.S. Secretary of War (previously Secretary of Defense), Pete Hegseth, serves as an instructive case study in this debate. Hegseth has expressed reservations regarding the operational relevance of international law and has questioned the extent to which international law and related legal frameworks should constrain the actions of military personnel, particularly regarding rules of engagement in combat, civilian harm mitigation, and treatment of detainees.[7] Shortly after taking office, Hegseth removed the Judge

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[6] *See generally* Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213 (2005) (offering a thorough rebuttal to Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President (Aug. 1, 2002); Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President, & William J. Haynes II, General Counsel, Department of Defense (Jan. 22, 2002), http://washingtonpost.com/wpsrv/nation/documents/012202bybee.pdf); Memorandum from John Yoo, Deputy Assistant Attorney General, & Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defense (Jan. 9, 2002), http://msnbc.msn.com/id/5032094/site/newsweek); and DEP'T OF DEF.,
WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM (Apr. 4, 2003), http://www.washingtonpost.com/wp-srv/nation/documents/040403dod.pdf.

[7] *E.g., To Conduct a Confirmation Hearing on the Expected Nomination of Mr. Peter B. Hegseth on the Expected Nomination to be Secretary of Defense: Hearing Before the S. Armed Servs. Comm.*, 119th Cong. 122-25 (2025) (Response to Questioning from Senator Angus King where Mr. Hegseth states:

> [w]e are a country that fights by the rule of law, and our men and women always do. And yet we have too many people here, in air-conditioned offices, that like to point fingers at the guys in dark and dangerous places . . . . What an America First national security policy is not going to do is hand its prerogatives over to international bodies that make decisions about how our men and women make decisions on the battlefield.");

Paul McLeary, *'Roadblocks' or Supports, Military Lawyers Question Hegseth's Firings*, POLITICO (February 25, 2025), https://www.politico.com/news/2025/02/25/military-lawyers-fear-firings-will-enable-hegseth-to-bend-law-00206069 (noting

Advocates General for three military branches, questioning their role in military decision-making.[8] He also ended a Department of Defense program designed to improve U.S. military's targeting to reduce civilian harm and risks to non-military targets, and asked Congress to cease authorization and funding for the Department's Civilian Protection Center of Excellence, which Congress created in 2024.[9]

Scholars and practitioners have noted that Hegseth's approach to international law and human rights, as well as his criticisms of military lawyers, signals a potential divergence from the U.S. military's traditional and longstanding consideration of international law in its operations and commanders' adherence to legal norms.[10] The heightened debate regarding international norms as applied to civilian harm mitigation and military targeting that follows from Hegseth's approach on these issues offers an academic opportunity to explore whether the U.S. Constitution binds the Executive Branch to adhere to CIL, especially with regards to armed conflict. By examining this question through an originalist framework and analyzing the Constitution and its obligations according to its original meaning and the intent of the Founders, this analysis will answer that question in the affirmative.

II. Originalism and Foreign Affairs

Originalism, broadly defined as the view that the Constitution should be interpreted based on the public meaning of the text as it was

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Secretary Hegseth's record of seeking pardons for U.S. Service Members convicted of war crimes, and noting that in his 2024 book WAR ON WARRIORS, Hegseth referred to military judge advocates as "jagoffs" and questioned whether the United States should follow the Geneva Conventions or whether the United States was just "better off in winning our wars according to our own rules?").

[8] *See id.*

[9] Alex Horton, et al., *Pentagon Moves to Gut Operations Focused on Reducing Civilian Harm*, WASH. POST (Mar. 4, 2005), https://www.washingtonpost.com/national-security/2025/03/04/trump-hegseth-pentagon-firings-civilian-harm/.

[10] *See, e.g.*, Dan Mauer, *JAGs Alone Can't Defend Rule of Law*, LAWFARE (Mar. 5, 2025), https://www.lawfaremedia.org/article/jags-alone-can-t-defend-rule-of-law.

understood at the time of the founding or ratification, has long faced scrutiny by scholars regarding its utility in the legal analysis of foreign affairs.[11] However, originalism provides a theoretical framework useful for addressing weighty and consequential foreign affairs questions in which the Constitution's text is not per se determinative,[12] such as the question this article raises regarding the applicability of CIL under the U.S. Constitution. Originalist thought and scholarship use interpretation of history and tradition to fill gaps in the easily ascertainable meanings of the Constitution, relying on constitutional thematics such as promoting liberty, popular sovereignty, and pragmatism.[13] Randy Barnett fills this gap with consideration of whether the interpretation of the law advances freedom and liberty—if

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[11] *See generally* Ingrid Wuerth, *An Originalism for Foreign Affairs*, 53 ST. LOUIS L. J. 5 (2008)

> (This Article describes several normative arguments for originalism and then attempts to apply them to foreign affairs. It contends that these arguments are at best underdeveloped and at worst weak when it comes to many constitutional issues that arise in the foreign affairs area . . . [P]ragmatic or consequentialist justifications for originalism are potentially weak in the area of foreign affairs, particularly given the profound changes over time in the Presidency as an office, the military and economic strength of the United States, the conduct of war, and the content of international law. Finally, foreign affairs may be an area in which original understanding is particularly hard to discern and in which the constitutional text leaves many questions open.).

[12] *Id*. at 6-7

> (Originalists could, for the reasons canvassed above and described in greater detail below, clarify and strengthen their normative arguments if they focused greater attention on foreign affairs, particularly non-judicial constitutional interpretation, the relationship between executive and congressional power, and consequentialist problems . . . . In this way, originalism might work out some of the tension with foreign affairs, particularly if the constitutional text is vague or ambiguous with respect to some aspects of the relationship between Congress and the President.).

[13] *Id.*

the Constitution is legitimate, in that its provisions protect freedom without improperly violating the rights of those whose freedom is restricted, then the obligations of the Constitution become "locked in" or binding on its key actors, particularly the branches of government and their actors.[14] Keith Whittington focuses on popular sovereignty, obligating the branches of government to follow the Constitution's provisions as originally intended because they reflect an expression of popular will.[15] Lastly among the main three bodies, John O. McGinnis and Michael Rappaport argue that an originalist interpretation of the Constitution best promotes the common good in that it incorporates and reinforces public conception of good at the time that the law was adopted.[16] Facially, this appears to be something of a compromise viewpoint between Barnett and Whittington. Because the Constitution was overwhelmingly passed and adopted by the people, originalist interpretation will ultimately lead to positive outcomes.[17]

Foreign affairs questions are often contentious and the Constitution leaves many of them undeterminable, rendering the task of constructing the meaning based on constitutional principles a key directive of finding an originalist answer to critical foreign affairs questions.[18] When it comes to CIL and its overlap with the U.S. Constitution, a historical analysis of the principles underlying the construction of the Constitution in this area, as well as the principles

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[14] *Id*. at 14.
[15] Horton, *supra*, note 9, at 17.
[16] *Id*. at 19-20.
[17] *Id*.
[18] *Id*. at 26-27

> (Ironically, some of the very things that make originalism difficult to apply to foreign affairs simultaneously steer foreign affairs back toward history. The lack of judicial opinions in this area make issues of judicial review less pressing but also enhances the salience of history - both original and evolving. History is essential to understanding the relationship between executive authority and war and the struggle and acquiescence of Congress vis-a-vis the President. And yet, even with history as the coin of the interpretive realm, originalism itself seems to be an awkward fit.).

under which those who wrote the document governed themselves, can be particularly instructive in determining each constitutional actor's obligations thereunder.

III. The Constitution's Text

The starting point of any originalist analysis is the text of the Constitution itself, as ratified by the Founders. The Constitution obligates the President to "take care that the laws be faithfully executed."[19] Among the powers of Congress, the Constitution lists "to define and punish piracies and felonies committed on high seas, and offenses against the law of nations."[20] The distinction between the two clauses is subtle, yet notable. The President's obligation in Article II obligates him to ensure that "the laws" are executed; whereas Congress has the power to explicitly define and punish the law of nations with which the Government must adhere.

A conventional view of CIL's consideration in the Constitution submits that as the sole organ of international relations under the Constitutional framework,[21] the nature of the two phrases creates a space where the President must recognize and abide by principles of international law and its sources under his "take care" duties, even if Congress does not specifically define and punish those laws under their Article I, Section 8 authority. Therefore, under the text, the President can still be read as obliged to follow law binding in foreign affairs, even absent a congressional action designating *opinio juris* as law. However, this argument can be attacked on the grounds that its primary tenets are external to the text. In fact, the Constitution is entirely silent on CIL, instead only explicitly referring to treaties "in pursuance of" the Constitution under the Supremacy Clause.[22] While the Supremacy

[19] U.S. CONST., Art. II, §3.
[20] U.S. CONST., Art. I, § 8.
[21] United States v. Curtiss-Wright Export Company, 299 U.S. 304 (1936).
[22] Ramsey, *supra*, note 6, at 1246-48

Clause's "in pursuance of" language clearly would exclude customary law, scholars generally disfavor reading the same language into the Take Care Clause, despite a common temptation to do so.[23] Therefore, while Congressional and Presidential powers regarding recognizing and defining international law are starkly different, the Constitution sets a permissive role for Congress, allowing them to define and punish violations of the law of nations, versus an obligatory role for the President to ensure that the law of nations is followed.[24]

> (If [customary international law (CIL)] is federal law, then one would suppose that the President is bound to enforce it, as part of his obligations under the Take Care Clause. But the equation of CIL with federal law has difficulties, as numerous academic commentators have argued. Among other things, nothing in the Constitution seems to say so. The constitutional clause most nearly directed to identifying the content of federal law is the Supremacy Clause of Article VI. But that clause refers to treaties of the United States and laws made "in pursuance of" the Constitution. CIL is not made "in pursuance of" the Constitution, but by a complex and much-debated process of interaction among all the nations of the world; it may not require any affirmative input by the United States, and it certainly does not depend on U.S. constitutional procedures being followed.)

[23] *Id*.

> (On the one hand, the primary point of the "in pursuance of" language in the Supremacy Clause was probably to exclude from "supreme Law" unconstitutional laws and laws predating the Constitution. Presumably these laws are also excluded from the Take Care Clause, despite the lack of parallel language. Thus, one could argue that little significance should be assigned to the different language. On the other hand, reading a part of the Constitution as surplusage is disfavored . . .).

[24] *Id*. at 1249

> (The Take Care Clause, applying treaties and statutes as limits on the President, is such a constraint. And presumably . . . Congress could exercise its specific power to define and punish offenses against the law of nations in a way that would constrain the President in foreign affairs. The Constitution does impose some

Finding no clear answer in the text, this analysis turns to evaluate the Founders' understanding of legal principles at the time of the Constitution's ratification and whether that understanding informs the text as written. If an originalist methodology demonstrates that the President must "take care" to enforce laws or legal norms not otherwise defined by Congress in Article I—especially with regards to the law of nations—then the proposition that the executive is bound to adhere to CIL is positively answered.

IV. Sources of the Founders' International Law Understanding

The eighteenth century legal community viewed law within the context of a single fundamental natural law, rather than the bifurcated domestic and international law that has developed in subsequent generations of legal thought.[25] The Enlightenment legal scholars on whom the Founders regularly relied on—John Locke, Montesquieu, Emer de Vattel, Samuel von Pufendorf, Grotius, William Blackstone, and Jean-Jacques Burlamaqui—were well-recorded as stating national governments did not have authority to violate the fundamental

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> constraints on the President in foreign affairs; the question is whether it imposes a CIL constraint.).

[25] Lobel, *supra*, note 3, at 1078-79

> (The generation that fought the American Revolution and drafted the Constitution generally believed in an unwritten "higher" law imposing legal restrains on governmental power. Courts and scholars viewed international law as a crucial component of that fundamental national law. Domestic law and international law were not two separate bodies of law, but simply two branches of the law of nature.).

principles of the natural law.[26] For example, Grotius and Burlamaqui argued that natural law prohibited a nation from forcing an unjust war on their own population, and Vattel argued that a citizen did not owe obedience to their sovereign if such obedience would violate the natural law.[27] For Blackstone, "the law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities and to [e]nsure the observance of justice and good faith," and the law of nations could only be violated through the mutual agreement of nations pursuant to the law of nature.[28] The Founders also relied on Lord Edward Coke's argument that an act of the English Parliament would be adjudge void if it violated the common law and the "immutable" law of nature.[29]

V. Law of Nature and Law of Nations in Constitutional Understanding

The Founders' commitment to these international legal scholars continued through and after the American Revolution,[30] with Hamilton

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[26] *Id*. ("These theorists viewed the law of nations as a critical component of the natural law constraints on sovereign power."); *see also* Golove, *supra*, note 2, at 937-43

> (The philosophical worldview of many framers closely identified the law of nations with the law of nature, and they saw compliance with its principles not only as a prerequisite in fact to recognition, but as appropriately so. The European law of nations was not just an externally imposed demand, but also an important part of the Enlightenment project to which the founders were profoundly committed.).

[27] Lobel, *supra*, note 3, at 1081.

[28] Jason N. Workmaster, *A Blackstonian Approach to International Relations*, 12 REGENT U. L. REV. 297, 303-04 (*citing* 1 WILLIAM BLACKSTONE COMMENTARIE 66-68).

[29] Lobel, *supra*, note 3, at 1081-83.

[30] *Id*. at 1084 ("The early American leadership believed that the attainment of independence obligated the United States to receive and to follow the law of nations. Attorney General Randolph, Chief Justice Jay, Justice Wilson, Alexander Hamilton, and others viewed adherence to international law as a concomitant to sovereignty.").

citing Vattel and Coke in a case defending property owners facing trespass suits after property damage by the enemy, stating that the subject law violated the law of nations.[31] James Wilson, a Pennsylvania ratifier and avid participant at the Constitutional Convention, argued that the Constitution itself could not supersede the law of nature, stating that the law of nature was

> indispensably binding upon the people in whom the sovereign power resides; and who are, consequently, under the most sacred obligations to exercise that power, or to delegate it to such as will exercise it, in a manner agreeable to those rules and maxims, which the law of nature prescribes to every state.[32]

Wilson and many other Founders held this line through the drafting of Article I, Section 8, giving Congress itself the power to "define" the law of nations.[33] In fact, the language of Section 8 initially only allowed Congress to punish violations of the law of nations, distinguishing it from piracy and felonies on the seas.[34] The language as written passed despite and with some considerable caveats, as New York ratifier Gouverneur Morris argued that it should be read narrowly, authorizing Congress only to clarify parts of the law of nations that were vague or insufficiently defined to be punished.[35]

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[31] *Id*. at 1086.
[32] *Id*. at 1092.
[33] *Id*. at 1093-94.
[34] *Id*.
[35] Lobel, *supra*, note 3, at 1093-94.

> (Wilson argued in opposition that Congress could not define the law of nations, which "depended on the authority of all the Civilized Nations of the World." Morris maintained that the word define was proper, because it gave Congress only the authority to clarify those parts of the law of nations that were "too vague and deficient to be a rule."

Even with this narrower interpretation, the amendment passed only by a 6-5 margin. Because many of the framers were reluctant to give Congress even the power to

As the next section will indicate, the Founders' understanding of these concepts played both a foundational role in their drafting and ratification of the Constitution and the broader vision for the American Republic, including their conception of the legal and political commitments necessary for the nation to endure. Their commitments to these ideals also highlighted the insufficiency of pre-Constitutional governance under the Articles of Confederation.

VI. The Quest for Recognition and the Founders' Constitutional Understanding

Despite the Constitution's scattered and scarce language, it is particularly helpful to view it as a foreign policy document, rooted more in establishing an enduring government that could receive the respect and recognition of a tumultuous international community—comprised of stronger states with storied legal histories and powerful ambitions over weaker states that the founding generation did not recognize as having lasting power.[36] For the Founders, compliance with the laws of nature developed in the European Enlightenment was vital

define offenses against the law of nations, it is unlikely that they intended to grant Congress the power to enact statutes in clear derogation of international law.).

[36] *See generally* Golove, *supra*, note 2, at 935.

> (the failure to appreciate that a core purpose of American constitution-making was to facilitate the admission of the United States into the European-based system of sovereign states governed by the law of nations. Viewed in this light, the founding looks dramatically different from the conventional image. Foreign affairs did not merely contribute to American constitution-making; they were the main event. The fundamental purpose of the Federal Constitution was to create a nation-state that the European powers would recognize, in the practical and legal sense, as a "civilized state" worthy of equal respect in the international community.).

to the creation of an enduring American nation-state.[37] Crafting the Constitution required balancing the desire for republican government that emphasized popular sovereignty and separation of powers alongside international legitimacy, which required federal government supremacy over the states in key matters, crafting government institutions that could be checked and controlled by the others, and a system with the inherent ability to resolve conflicts among its actors in manners that accounted for the law of nature.[38] The initial post-Revolutionary legal arrangement, the Articles of Confederation, essentially created a framework where the United States served thirteen separate republics under one umbrella, and those individual republics governed relations with each other according to the law of nations.[39] However, following the conclusion of the war, this framework grew incredibly complicated as individual states began to object to provisions of the national government's Treaty of Peace with Great Britain, and took their own initiative to punish Britain in their respective states for actions that they perceived violated the law of war, despite the Treaty's provisions.[40] The Founders were highly attuned and aware of this friction between state and national treaty interpretation and the complications that it posed for both international recognition and the American government's ability to perform foreign affairs in the post-Enlightenment world, a sentiment that appears regularly in some of the

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[37] *Id*. at 938 ("The European law of nations was not just an externally imposed demand, but also an important part of the Enlightenment project to which the founders were profoundly committed.").

[38] *Id*. at 939-43

> (The founders' quest for recognition forced leading framers to confront the tension between two fundamental goals of the Revolution, international legitimacy and popular sovereignty, and to develop a systematic constitutional solution for reconciling the two . . . . The Constitution drafted in 1787 served the dual purpose of signaling to Europe that the Americans were prepared to act like an international state and capable of building the foundations for a polity capable of sustaining that performance.).

[39] *Id*. at 947-48.

[40] *Id*.

most prominent Founders' writings.[41] Individual states' failure to comply with the Treaty of Peace caused Great Britain, in particular, great consternation, causing European diplomats to regard the American government's commitments as unreliable or merely performative.[42] British perceptions of the United States as an unserious diplomatic partner even prompted them to eschew customary norms around enforcing treaty obligations, through either outright defiance of the treaty or through sham court proceedings against Americans in the English courts.[43] The post-war experience informed a clear view among the constitutional generation that the disjointed nature of the Articles of Confederation precluded the United States from participating in the international system and would prevent the realization of its national ambitions.[44] Hamilton famously stated as much in the *Rutgers Case*, a New York case challenging the Trespass Law, which permitted local seizure of loyalists' and Britons' property.[45] Arguing on behalf of a loyalist client, Hamilton contended that the nation's conduct in violation of the law of nations, being a part of the common law incorporated by the state constitution, "has done us infinite injury, and has exhibited us in light of a people, destitute of government, on whose engagements of course no dependence can be placed."[46]

The Founders had a particular manner of connecting the personal obligations under common law with that of nations under the law of nations. John Jay, author of five of the Federalist Papers and then serving as American Foreign Secretary under the Confederation government, closely followed international criticism of the American experiment through the written correspondence of European diplomats

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[41] *Id.*

[42] Golove, *supra*, note 2, at 956-60.

[43] *Id*.

[44] *Id*. at 961 ("Over the course of the 1780s, those who conducted foreign policy for Congress gradually realized that the Confederation was inadequate because it did not allow the United States to engage with the larger world as an equal.").

[45] *Id*. at 962-68 (citing Alexander Hamilton, *The Rutgers Briefs, Brief No. 6*, *in* 1 THE LAW PRACTICE OF HAMILTON: DOCUMENTS AND COMMENTARY 331, 368-73 (Julius Goebel, Jr. ed., 1964)).

[46] *Id*.

and elites.[47] He once stated to a grand jury that "every nation in like manner is obliged by a due regard to its own dignity and character to behave towards other nations with decorum," a standard which he wrote that the early American nation had failed.[48] Only by participating in the Anglo-European code of chivalry and diplomatic etiquette could the United States secure recognition as a legitimate nation within the global community. This thinking pervaded the writings of the Founding generation.[49] This generation had concluded that integrating America into that society, in the manner each of them had integrated into the society, was vital to the country's ultimate success.[50] To achieve this integration, the Constitution set specific limits on the populist tendencies of the post-revolutionary people and restrained the exercise of American power in accordance with international legal standards.[51] In his own constitutional advocacy, Hamilton envisioned creating a

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[47] *Id*. at 972-74.

[48] Golove, *supra*, note 2 (citing GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT 24 (2006)).

[49] *Id*. at 974-76 ("Indeed, personal and national morality overlapped in substance and method . . . . The cross-fertilization between the ideas of sociability in both individual moral sense philosophy and the law of nations leaps off the page of the leading treatises. It pervaded the writings of American constitutional reformers, too.").

[50] *Id*. at 977

> (Playing by the rules of this Atlantic world would slow down the emigration of loyalists, reopen traditional trade networks, and attract international investment. It would therefore facilitate the circulation of people, ideas, and credit. Reintegration of the American states into this Atlantic world would also bring, for the first time, full membership in that world.).

[51] *Id*. at 979-81

> (The problem was how, structurally, to reconcile the revolutionary principle of popular sovereignty with commitments under the law of nations that these men believed were necessary to vindicate the revolutionary desire for respect . . . . They sought to create a republic that, by pursuing a "respectable" foreign policy, could both claim and earn recognition as a sovereign on an equal footing in the existing world of European sovereigns and, they believed in their more visionary moments, achieve national greatness.).

Constitution strong enough to "dictate the terms of the connection between the old and the new world."[52] Madison noted that "[n]othing seems more difficult under our new Governments, than to impress on the attention of our Legislatures a due sense of those duties which spring from our relation to foreign nations."[53]

In the Constitutional Convention's debates and drafting, Founders designed the Constitution with concerns regarding national legitimacy, recognition, and ambition in mind, seeking to ensure that a national government with international ambitions could ensure compliance with international law. Particularly, the power of foreign policy, either executive or Congressional, was placed exclusively at the federal level, in order to insulate the foreign policy of the United States from the more inherently populist sentiments of the states.[54] For example, the Constitution granted Congress the power to tax and spend for the common defense and general welfare;[55] declare war;[56] raise, support, and govern the armed forces;[57] and regulate foreign commerce and commerce with Native American Tribes.[58] The Constitution placed the President as the Commander in Chief of the armed forces and the vessel of American diplomacy, with the power to appoint U.S. ambassadors and receive other nations' ambassadors.[59] The feature of these delegations of power is that they conspicuously excluded the states

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[52] *Id*.

[53] *Id*.

[54] Golove, *supra*, note 2, at 988-89

> (Considered as a whole, and understood in historical perspective, the text establishes a comprehensive regime for dealing with foreign affairs with an eye equally on centralizing all of the relevant powers in the federal government and on ensuring, as far as possible, that the federal government would uphold the nation's international duties. It thereby signaled the nation's capacity and resolution to be a responsible member in the community of civilized states.).

[55] U.S. CONST., Art. I § 8, cl. 1.

[56] U.S. CONST., Art. I § 8, cl. 11.

[57] U.S. CONST., Art. I § 8, cls. 14-16.

[58] U.S. CONST., Art. I § 8, cl. 3.

[59] U.S. CONST. Art. II, §§ 2, 3 .

from the full scope of the foreign affairs power.[60] Combined with the Supremacy Clause's emphasis that the national government would supersede the actions and laws of individual states, the Constitution's drafting reflected the lessons of the Articles of Confederation: adherence to the post-Enlightenment law of nations required separating national power from populist state legislatures and centering power in the national government, which each branch would check and exercise according to post-Enlightenment principles.[61] The Founders' commitment to ensuring the political branches' compliance with international law is evident in the Take Care Clause, which obligates the President to ensure compliance with the law.[62] The Constitution's description of the Congressional powers also represented commonly understood international legal concepts of the period, reflecting both the Founders' values and carefully considered international legal principles, including the law of nations, as binding on Congress.[63] The Founders tested their views of the Constitution's power through the French Revolution, the ensuing Neutrality Crisis,

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[60] Golove, *supra*, note 2 at 993.

[61] *Id*. at 997 ("That the framers adopted this approach reflects the broader lesson that they had drawn from their experience during the Confederation. In the face of an impassioned public, popular assemblies would be too vulnerable to immediate political pressures to uphold national obligations reliably.").

[62] *Id*; *see also infra* Section *The Constitution's Text*.

[63] Golove, *supra*, note 2, at 1009-10

> (More generally, the terms that the Constitution employed in its grants of foreign affairs powers to Congress came from the lexicon of the law of nations... Whatever the precise meanings of the more ambiguous and potentially far-reaching aspects of the text, the general direction of the framers' approach was clear. Those Federalists who had most closely experienced the difficulties of conducting foreign affairs in the heady populist atmosphere of the Confederation period took the lead in constructing constitutional mechanisms that would facilitate the new government's respect for national obligations and enhance its ability to conduct what they viewed as an honorable, respectable, and effective foreign policy. These mechanisms were essential, in their view, if the new nation was to earn the equal position in the European-centered community of states that it claimed and that many of them desired.).

and a treaty that John Jay negotiated with Great Britain to resolve their lingering issues arising from that crisis.[64]

VII. Court Opinions Shortly After the Founding

Within the Constitution, the Founders further indicated their commitment to ensuring American compliance with the law of nations by placing some of the most contentious international legal issues squarely within the theoretically least political branch of the new government—the judiciary. Particularly, maritime and admiralty law most heavily emphasized international legal norms between states, and the Judiciary has exclusive purview over, as neither the executive nor legislative branch have any delineated powers over the law of the seas.[65] These cases relied primarily on the law of nations, which the Founders likely understood and entrusted in their hands to insulate admiralty and maritime law from domestic political sensitivities—a choice further reinforced by their decision to exclude admiralty and maritime cases from the guarantee of a jury trial.[66] *Prize Cases*, or maritime seizure and salvage cases, offered federal courts another opportunity to verify that

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[64] *See generally* Golove, *supra*, note 2.

[65] *Id.* at 1002-04

> (Most importantly, Article III granted the federal courts jurisdiction over maritime and admiralty disputes. It was well understood that the greatest number of cases raising questions under the law of nations would fall under admiralty jurisdiction . . . . Article I nowhere grants Congress a complementary legislative power over admiralty and maritime law. This lapse is probably best explained by the widespread understanding that admiralty law was part of the law of nations and would be governed by it, not by statute. Because the new government intended to observe the law of nations, it was sufficient simply to grant the courts jurisdiction to apply the law of nations.).

[66] Golove *supra*, note 2, at 1004 ("[T]he grant of admiralty jurisdiction to the federal courts - with their constitutionally guaranteed independence from the legislative and executive branches - was an important signal to European powers of the willingness and capacity of the new nation to uphold its legal obligations.").

domestic laws were unsuited to displace the law of nations, and prize courts were essentially treated as international tribunals.[67]

A view of the Judiciary's handling of maritime and seizure cases is particularly instructive in seeing the founding generation's views of CIL as binding under American law. This can be instructive even from an originalist lens. As a legal philosophy articulated most voraciously as a response to the Supreme Court's jurisprudence,[68] analysis of case law is often a secondary tool in an originalist methodology. However, the Supreme Court of the late eighteenth-century represents the unique moment in time where the Supreme Court brought a number of the scholars who drafted, ratified, and defended the Constitution to the bench to interpret the same. Like a mirror for constitutional interpretation, judges at bar in the eighteenth century were often, in one form or another, tasked with interpreting a document that they themselves envisioned, drafted, adopted, and ratified. President George Washington inadvertently gave the Supreme Court an opportunity to issue its first groundbreaking precedent by directly requesting an advisory opinion on the tenets of international law posed by the British and French alliances and the machinations of French Envoy Edmond Charles Genet—a request which the Court famously declined.[69] The Court did, however, address Washington's questions in contested litigation, holding in *Glass v. The Sloop Betsey* that its jurisdiction extended to cases involving the legality of French captures brought to port.[70]

The manner in which the Founders viewed international law came particularly into view with the Britain-France crisis of 1793 and the U.S. neutrality proclamation. The judiciary would be most directly implicated by the Washington Administration's direction that federal attorneys prosecute American citizens criminally for violating neutrality, a decision which signaled their commitment to the law of

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[67] Lobel, *supra*, note 3, at 1088.
[68] Wuerth, *supra*, note 11, at 15.
[69] Golove *supra*, note 2, at 1023-27.
[70] *Id*; Glass v. The Sloop Betsey, 3 U.S. 6 (1794).

nations being incorporated into domestic law, as no federal penal statute prohibiting violating a presidentially declared neutrality existed.[71] It is undisputed that Congress could have, under Article I, Section 8, punished violations of neutrality, yet the Washington Administration acted unilaterally with the support of all of the leading political and legal minds of the day, including Thomas Jefferson and James Madison who disagreed with the neutrality policy but recognized the importance of managing public sentiment to preserve the nation's legitimacy internationally.[72] In *Henfield's Case*, the Supreme Court rubber stamped Washington's approach, with Chief Justice Jay, Justice James Iredell, and Justice James Wilson—all participants in the Constitutional Convention, ratifying conventions, and public defense of the Constitution—holding that violating the U.S. position of neutrality was an offense against the United States and punishable because

> [a]s a citizen of the United States, he was bound to act [in] no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an ex post facto

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[71] Golove *supra*, note 2, at 1028

> (The administration pursued this course despite the fact that there was no federal statute that made it a crime for a citizen to engage in unneutral conduct. The decision to prosecute reflected the administration's confidence that the law of nations was incorporated into the law of the United States not only as part of the civil law, but also as part of the criminal law.).

[72] *Id.* at 1030-32

> (All of the leading political actors thus perceived nonstatutory criminal prosecutions founded on the law of nations as constitutionally appropriate measures that would both obviate the need for legislative endorsement of the administration's policy and demonstrate to the European powers the capacity of the federal government to fulfill the nation's international responsibilities.).

> law, but a law that was in existence long before Gideon Henfield existed.[73]

Henfield himself was quickly acquitted.[74] However, his case represents a key indicator of the Founders original intent regarding CIL: the law of nations is incorporated into the U.S. federal law, and the President is obligated to ensure compliance therewith.[75]

The late 1790s did not end the Supreme Court's foray into this question. In the 1814 case of *Brown v. United States*, wherein the U.S. government, after the beginning of the War of 1812, found and seized a timber shipment that U.S. citizens had purchased from British subjects but was left idle in a creek bed.[76] The litigant for Brown, the purchaser, based his argument on the law of war at the time of the timber's purchase, noting Vattel's teaching that a nation declaring war cannot seize an adversary's persons or property that entered prior to the declaration, as their arrival was based on "public faith."[77] The appellant further argued that Vattel's principles on the right of seizure were deeply incorporated into the common law and modern law of nations, and were therefore binding on the U.S. government, stating that "[t]he laws and customs of the United States ought to be so expounded as to conform to the modern law of nations, which is adverse to the confiscating of debts."[78] The U.S. Attorney General and the Circuit Court of Appeals held that the declaration of war granted the executive branch legislative imprimatur under both international law and the Constitution to seize the timber.[79] Chief Justice Marshall concurred in the Appellant's summary of Vattel, noting that the right of seizure only takes effect after the declaration of war and does not apply to property

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[73] Henfield's Case, 11 F. Cas. At 1120; *Id*. at 1034.
[74] Golove *supra*, note 2, at 1036.
[75] *Id*. ("this meant that the President and the courts would have substantial nonstatutory powers to ensure respect for the law of nations, but it also implied that the President was constitutionally obligated to uphold the law of nations.").
[76] Brown v. United States, 12 U.S. 110 (1814).
[77] *Id*.
[78] *Id*.
[79] *Id*.

properly in the country before war's outbreak.[80] Marshall stated further that because the rule was in force at the time of the framing, the Court should not interpret the Constitution in a manner that would contradict the long-held international law.[81] Therefore, Marshall concluded that merely declaring war alone did not authorize the executive branch to seize enemy property that was in the United States prior to the war, as international law respected adversary nations' rights to remove their people and property at the time war was declared.[82] Marshall ultimately concluded that without specific congressional action, the executive may not expand the scope of his power in a manner that would permit him to violate CIL. Therefore, the early Court theorized, albeit in dicta, that congressional action was required in order to allow the President to violate international law.[83] While Justice Story

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[80] *Id*. at 125

> (The modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property . . . . It may be considered as the opinion of all who have written on the jus belli, that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to the exercise of this right.).

[81] *Id.*

> (The [C]onstitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us.).

[82] Brown, 12 U.S. at 125.

[83] *Id*. at 128-29

dissented from the outcome of Marshall's opinion, he shared the opinion that the CIL standards governed the case's disposition.[84] In fact, Story's dissent noted the concern that requiring a President to adhere to international law would expand the scope of their powers beyond that of Congress, which Marshall ultimately disclaimed.[85]

The Supreme Court would scarcely touch the issue of CIL under the Constitution until the 1900 case of *The Paquete Habana*, another wartime seizure case involving Cuban fishing vessels that had drifted into the scope of an American naval blockade of Cuba.[86] The Court broadly stated:

> (The rule which we apply to the property of our enemy will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; and for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or the judiciary.).

[84] *Id*. at 135

> (I have been led into this discussion of the doctrine of foreign jurists, farther than I originally intended . . . . Having disposed of the question as to the jurisdiction of this Court, I come to one of a more general nature; viz. Whether, by the modern law of nations, the sovereign has a right to confiscate the debts due to his enemy, or the goods of his enemy found within his territory at the commencement of the war. I might spare myself the consideration of the question as to debts; but, as it has been ably argued, I will submit some views respecting it, because they will illustrate and confirm the doctrine applicable to goods. It seems conceded, and indeed is quite too clear for argument, that, in former times, the right to confiscate debts was admitted as a doctrine of national law. It had the countenance of the civil law.).

[85] Michael J. Glennon, *Raising the Paquete Habana: is Violation of Customary International Law by the Executive Unconstitutional*, 80 NW. U.L. REV. 321, 336-37 ("The Constitution, Marshall wrote, did not authorize the president to seize enemy property. Because of the potentially far [sic] reaching consequences of such acts (here, the possibility of reprisals against American property located in the belligerent state), Marshall believed that Congress must authorize acts which violate international law.").

[86] Paquete Habana, 175 U.S. at 678-79.

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for this determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.[87]

This writing, however, is ultimately dicta, as the Court focused its opinion ordering the return of the vessels on the seizure violating an equivocal order from the Secretary of the Navy, rather than that it violated international law generally.[88] *The Paquete Habana* generally favors a long precedential line of courts, including the Supreme Court being deferential to the executive on diplomatic, military, and international matters.[89] The Court's foray into international law and the

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[87] *Id*. at 700.

[88] Golove *supra*, note 2, at 338-339

> (A close reading of *The Paquete Habana* reveals that the Court invalidated acts of lower-level executive branch officials, not those of the President, because the acts violated the President's orders . . . *The Paquete Habana*, therefore, does not address the issue whether the President is bound by international law. The Court clearly distinguished between the President and the lower-level military officials who effected the seizure in violation of his proclamation, which incorporated international law. Moreover, the Court's apparent willingness to except personal orders of the President from the constraints of international law is of course dictum, since no personal order was given to violate international law.).

[89] *Id*; *see also* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 183-86

> ("Even when faced with the modern wars of the twentieth century, the Court has continued to recognize that foreign affairs questions often are beyond judicial competence . . . . Even if the necessary facts were to be laid before it, a court would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith. Otherwise a

stare decisis rationales that inform our understandings of the Constitution's voice on international law are likely the subject of a larger study than this analysis of narrower focus. However, the canon of scholars on originalism and foreign affairs often note that the Court has frequently and continuously struggled with the role of CIL in federal common law and the extent to which both bound U.S. conduct of foreign affairs.[90]

VIII. Summary

The above analysis, from the Enlightenment principles that informed the Founding generation's political and legal project to the enduring jurisprudence of the Marshall Court, demonstrates that adherence to the law of nations was a foundational constitutional value embedded in the Constitution's ideological origins, structural design, ratification, and practice. The law of nature applied to relations among

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> court would be ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs must be allowed to the President if this country is to play a responsible role in the council of the nations.).

[90] *Id*. at 349-50

> (A close reading of Sabbatino and related cases suggests that the act-of-state doctrine was not the only common-law foreign relations rule that the Court did not have in mind when it decided *Erie*. In formulating such rules the Court abandoned its earlier posture of extreme deference toward executive "legislation" in the foreign relations realm . . . . Thus, the act-of-state doctrine, at least for "supremacy" purposes, falls squarely into the same category of federal common law into which customary international law falls. Both are interstitial and give way to subsequent, inconsistent acts of Congress. Yet both nonetheless are promulgated pursuant to the constitutional authority of the courts and, therefore, are the supreme law of the land.)

(citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Louis Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 817-19 (1964).

nations just as it applied to legal relationships among individuals. The Founders, relying on these values to shape a Revolutionary philosophy and then a governing document, crafted the Constitution in a manner that placed the crux of the foreign policy power in the hands of a federal government exclusively tailored to administer the country's affairs in accordance with the post-Enlightenment law of nature, ergo the law of nations in foreign policy. Lastly, the federal judiciary, insulated from the most base populist instincts of the American political community, upheld the law of nations in its most significant area of jurisdiction that touched relations among other nations.

Underlying all of these dynamics is a fundamental original understanding that the law of nations binds the American government and its actors. As to the Presidency, if the Take Care Clause of Article II is read to reflect this understanding, then it obligates the President to ensure that the law of nations, to include CIL, is respected. The Court has affirmed as much, especially as it applies to the President's supervision of subordinate officers, who must obey the law of nations.[91] At a minimum, scholars have stated that the Take Care Clause requires the executive branch to consider international law and interpret its duties in a manner to ensure that his stewardship of the foreign affairs power accords fully therewith.[92]

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[91] 175 U.S. 677, 175 U.S. at 678-79; Glennon, *supra* note 86.

[92] Ramsey, *supra*, note 6

> (One could comfortably assert that the President has a constitutional power, at least as an initial matter, to interpret CIL on behalf of the United States, and that any court (or other domestic entity) which might ultimately review the issue would owe substantial, if not complete, deference to the President's conclusions. This more modest view would impose a duty on the President to take international law seriously. But as discussed, international law is rarely a fixed and definite command. Even on core points it is highly unsettled. The President has an international duty to determine what CIL requires. Responsible exercise of foreign policy powers would seem to entail at least determining what international law requires if not always following it.).

The Constitution and Civilian Harm Mitigation

The last section of this analysis will address Secretary Hegseth's position that the Department of War and the U.S. military are not legally obligated by the Constitution to conduct civilian harm mitigation and compliance with the laws of war. While the Geneva Conventions establish clear and enduring rules for the conduct of war, which the United States has ratified,[93] and would therefore clearly be binding on the executive branch under the Take Care Clause, a question may exist as to how much civilian harm mitigation is obligated under CIL.[94] Among the list of rules that govern civilian harm mitigation within the International Committee of the Red Cross (ICRC) primer on CIL are rules against indiscriminate attacks that fail to separate combatant targets from civilian ones, rules against area bombardment without regard for civilians in the area, and a duty to choose the

[93] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[94] *See, e.g.*, Charles Pede & Peter Hayden, *The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on "Battlefield Next"*, MIL. REV. (2021), https://www.armyupress.army.mil/Journals/Military-Review/English-Edition-Archives/March-April-2021/Pede-The-18th-Gap/.

> (Humanitarian groups, for example, advocate that explosive weapons should not be used in urban areas because of the enhanced risk of civilian casualties. Some recommend avoidance policies against the use of indirect fire weapons in urban areas. Still others have posited that some attacks may be lawful only with precision weapons, but unlawful for artillery, mortars, and "dumb bombs," and that precision weapons, if possessed, must be used "as soon as they are part of a state's arsenal and their use is practically possible." Yet none of these idealized and often uninformed notions of warfighting are required by the robust rules of war.).

methods and means of targeting in a manner to reduce collateral harm to civilians and civilian infrastructure.[95]

While Secretary Hegseth is somewhat vague about which laws of war he specifically objects to, his decision to terminate the Department of Defense Civilian Harm Mitigation Response Plan and associated civilian risk mitigation measures is particularly instructive. The Civilian Harm Mitigation Action Plan, drafted by his predecessor, and developed in response to significant reporting on civilian casualties from Department of Defense strikes on terrorist targets throughout the War on Terror, primarily sought to incorporate consideration of the civilian population and collateral harm from military operations into the military planning process, improve reporting and investigation of harm to civilian populations, and emphasize civilian harm mitigation in security cooperation programs.[96] These programs were tailored to ensure compliance with both international accords and CIL regarding civilian harm mitigation and response during armed conflict. Although some legal scholars note that the Department's civilian harm mitigation programs did not create new binding international law, many of the prerogatives of the policy could be seen as a reflection of the Department's and the international community's understanding of international law at the time of its drafting.[97] Even this interpretation would provide military commanders with leeway to pursue and attack enemy combatants while also fulfilling a moral imperative to protect and account for civilians and mitigate harm to them.[98] Charles L. Pede, former Army Judge Advocate General, has written extensively that

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[95] INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE, rr. 13, 14, 15, 17, https://ihl-databases.icrc.org/en/customary-ihl/v1 (last visited Jan. 18, 2026).

[96] *See generally The Department of Defense Issues Civilian Harm Mitigation and Response Action Plan in* 2 *Contemporary Practice of the United States Relating to International Law*, 117 AM. J. INT'L. L. 352 (2023).

[97] *See generally* Charles N. Pede, *Mind the Gap: The COIN Hangover & DOD's New Policy to Protect Civilians on the Battlefield*, LIEBER INSTITUTE (Nov. 22, 2024), https://lieber.westpoint.edu/mind-gap-coin-hangover-dods-new-policy-protect-civilians-battlefield/.

[98] *Id*.

restrictive rules of engagement should not be taken as CIL in and of themselves, but rather as an operation-specific legal framework adopted in order to comply with the law of armed conflict, which incorporate broader principles of distinction and civilian protections that are considered customary.[99] It is likely that the full scope of civilian harm mitigation measures within operational rules of engagement may require a larger body of experience with different means and manners of warfare, as well as a deeper analysis of state practice across the various late-twentieth and twenty-first century contexts of armed conflict.[100] However, the conclusion sufficient for present purposes, based on the ICRC Database of Rules of Customary International Law and the Department of Defense Law of War Manual, which Pede frequently cites in his analysis, is that CIL requires rules of engagement that specifically require military commanders to give due consideration to the impacts of military operations and particular munitions on civilian populations and to mitigate that damage to the extent possible while still meeting a well-defined military objective.

If the foregoing rule proposed in this analysis is accepted as CIL governing civilian harm mitigation, then, under an originalist understanding of the executive branch's obligations with respect to CIL under the Take Care Clause, Secretary Hegseth's view that the U.S.

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[99] *Id*; *see also* DEP'T OF DEF., *supra*, note 7.

[100] DEP'T OF DEF., LAW OF ARMED CONFLICT MANUAL 31 n. 138 (2023)

> (Determining that a principle has become customary international law requires a rigorous legal analysis to determine whether such principle is supported by a general and consistent practice of states followed by them from a sense of legal obligation. Although there is no precise formula to indicate how widespread a practice must be, one frequently used standard is that state practice must be extensive and virtually uniform, including among States particularly involved in the relevant activity (i.e., specially affected States)

(citing Harold Koh, Legal Adviser, Department of State, Responses to Questions Submitted by Senator Richard G. Lugar, in Libya and War Powers: Hearing Before the Committee on Foreign Relations, U.S. Senate, 112th Congress, First Session, 53, 57 (Jun. 28, 2011).).

military should "untie the hands of our warfighters"[101] to operate with fewer constraints in armed conflict likely suffers from some constitutional deficiency.[102] As previously discussed, the President has a constitutional obligation to "take care" that the laws are faithfully executed,[103] and precedent supports the assertion that the Secretary of War, an Officer of the executive branch, is bound similarly to adhere to applicable law that falls under the "take care" duty.[104] Therefore, absent a congressional declaration under Article I, Section 8 defining the law of nations in a manner that does not pose any inherent restrictions on the conduct of military operations, the Constitution likely requires the Department of War to accept some restrictions and limitations on its conduct of hostilities.

A more conservative view on the topic is seen in Michael D. Ramsey's summation that pursuant to the Take Care Clause, the President is obligated to "take international law seriously" and that "[t]he President has an international duty to determine what [CIL] requires. Responsible exercise of foreign policy powers would seem to entail at least determining what international law requires if not always following it."[105] Under this view, the President and his subordinate

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[101] Pete Hegseth, Secretary of War, Address to General and Flag Officers at Quantico, Virginia (September 30, 2025) (transcript can be found at https://www.war.gov/News/Transcripts/Transcript/Article/4318689/secretary-of-war-pete-hegseth-addresses-general-and-flag-officers-at-quantico-v/).

[102] It is imperative to note that this statement that Secretary Hegseth's viewpoint suffers a constitutional deficiency is not a contemptuous statement under Article 88, Uniform Code of Military Justice (UCMJ). Rather, to the extent it criticizes the Secretary, it is a purely academic expression that does not reflect any personal malice or contempt. To the extent it constitutes a criticism of the Secretary, it constitutes an adverse criticism that is protected within the plain text of Article 88, UCMJ. This expression is the author's personal view as protected in Department of Defense Instruction 5400.17, Chapter 8, and it is a nonpartisan statement protected by Department of Defense Directive 1344.10.

[103] U.S. CONST., Art. II, §3.

[104] Paquete Habana, 175 U.S at 678-79.

[105] Ramsey, *supra*, note 6, at 1250-51

departments are obliged to consider and account for CIL, and the executive branch is required to provide a responsible interpretation of it but cannot eschew it entirely. Even under this conservative view, the executive branch does not have authority to act unrestricted by international law, and the executive must pay careful attention to the nature and sources of law to fully ascertain and abide by the "take care" obligation.[106] Therefore, a more constitutionally nuanced approach that the Department of War could take may be offering a delineated viewpoint of which customs of armed conflict that it accepts as CIL, and fully stating the basis of this interpretation. Under the constitutional processes, if Congress determined such a statement to be inadequate, the Constitution would empower legislation under Article I, Section 8 defining the law of nations to caveat that definition and codify a

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> (This more modest view would impose a duty on the President to take international law seriously. But as discussed, international law is rarely a fixed and definite command. Even on core points it is highly unsettled. In particular, the customary law regarding treatment of wartime prisoners in the circumstances of members of al Qaeda and the Taliban is surely not settled. The President likely could make a case that international law did not impose strong directives for treatment of such prisoners, particularly in light of the memorandum's earlier conclusion that the Geneva Conventions did not apply. That might not have been well received in all quarters, but it would have become part of the continuing dialogue on the scope of CIL, and would have become much more productive than the flat statement that CIL is inapplicable.).

[106] *Id*. at 1252

> (with respect to CIL, the issue turns on the scope of the Take Care Clause: whether its reference to "laws" includes CIL, or only statutes and treaties. That question cannot be answered by invoking the Executive Power Clause . . . the Executive Power Clause does not give the President unrestricted authority to conduct foreign affairs. Rather, it gives the President the authority to conduct foreign affairs subject to the limitations elsewhere in the Constitution. Whether the Take Care Clause is one of those limitations in the case of CIL must be answered by reference to other sources.).

legislative understanding of CIL, which would then be binding on the executive under the Take Care Clause.

IX. Conclusion

A careful analysis of the Founders' understandings of international law and their intents manifested from their governance of the early Republic and advocacy in prize cases and maritime litigation, make abundantly clear that the law of nations, to include CIL, was incorporated into and accepted as obligatory under the U.S. Constitution. In the military context, even an area where the President experiences significant leeway and deference under the Constitution, the original meaning of the Take Care Clause continues to guide and obligate the executive's Commander-in-Chief power. While ascertaining and applying CIL remains a difficult and nuanced task, the American constitutional experience that informs the original meaning of the text indicates that the President has an obligation to do so. This analysis reserves to future research the task of interpreting the Take Care Clause as applied to armed conflict and enhanced experience with twenty-first century warfare. While the academic and storied experience of the Founders, viewed through the prosaic and informed writings of Alexander Hamilton, James Madison, James Wilson, and John Marshall, urged an American populace against to disavowing the judgments of CIL, Gideon Henfield was ultimately acquitted. In a more final analysis, it is quite possible that, even against the weight of the same originalist history, popular understanding may acquit Pete Hegseth as well.

Chapter 9. Limiting the Cumulative Impact of Conflict on Civilians through IHL Proportionality[1]

Sarah McIntosh[2]

I. Introduction

From Gaza to Ukraine and Sudan, today's protracted urban conflicts wreak unimaginable havoc on civilian populations. This harm increases over time as the death toll climbs, civilian infrastructure collapses, repeated psychological harm accumulates into personal and societal trauma, and injury and property damage erode the socioeconomic fabric of society. International humanitarian law (IHL) and international criminal law (ICL) are two bodies of law intended to mitigate against the harm that civilians experience in armed conflict. One core principle of these bodies of law is the concept of proportionality, which requires civilian harm not to be excessive in light of the anticipated military advantage. But to what extent can this

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The author and editor would like to extend a special thank you to Keely Brock, a law student at the University of Georgia School of Law, for serving as lead editor of this chapter.
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principle actually provide meaningful protection to civilians, particularly as protracted conflicts extend in space and time? There is increasing recognition that military commanders must take into account the reasonably foreseeable reverberating (or indirect) effects of the use of explosive weapons in populated areas, such as disruption to health care and other essential services, among other harms.[3] This is an important development that signals a greater appreciation for the wide-ranging harms that flow from military operations for civilians and the civilian environment. Yet despite this expansion, the potential impact of targeting decisions on civilians is still assessed under IHL on a case-by-case basis, rather than looking cumulatively at the impact of strikes over time, leaving a critical blind spot in international law and policy. Moreover, operational and strategic-level decisions and *ex post* assessments of civilian harm do not generally account for the accumulation of multiple lawful attacks over time that nevertheless cause levels of harm that would be considered to be excessive by the reasonable person in light of the immense devastation and suffering that armed conflict creates.

This blind spot has the potential to create an imbalance in prevailing interpretations of the IHL proportionality principle. The concept of "military advantage" (an integral part of proportionality) is the point of reference for determining what level of civilian harm is excessive. As this article explains, military advantage in fact appears to be assessed by most states cumulatively to varying degrees, with understandings falling on a spectrum from immediate tactical gains to "overall" contribution to prevailing in a conflict. An under-appreciated implication of this understanding of military advantage is that it should open the door to an expansive and more protective conception of civilian harm that encompasses and considers not only the effects of individual attacks but also the harm that accumulates over time in conflict settings. This approach would create more internal coherence

[3] Explosive Weapons in Populated Areas, *Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas* (Nov. 18, 2022).

within IHL by rectifying the conceptual imbalance between military advantage and civilian harm, and allow for IHL to live up to its mandate of protecting civilians to the fullest extent possible. This chapter does not argue that the notion of military advantage should be expanded, but rather that it is *already* expansive, encompassing the advantages gained from multiple attacks over time. Some have argued (or simply suggested) that a cumulative conception of military advantage is less protective of civilians because it implies that the value of each strike is greater than the sum of its parts: one strike that kills or injures what most reasonable people would consider to be a disproportionate number of civilians could be "lawful" or "proportionate" when considered in light of the broader military advantage gained from the attack. As stated above, this chapter argues that the opposite is true: in order to maintain IHL's internal coherence, a cumulative approach to military advantage must also be taken to civilian harm.

As early as 2000, the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Kupreskic* correctly identified that there are circumstances in which the cumulative impact of conflict on civilians should be considered, though this position has never been codified into prevailing interpretations of IHL.[4] The Tribunal's Trial Chamber hypothesized about a scenario in which repeated single attacks that "fall[] within the grey area between indisputable legality and unlawfulness" have a cumulative effect on civilians that would render such attacks unlawful.[5] The Trial Chamber found that "this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians," citing the principle of humanity.[6] Over time, according to the Court's pronouncement, multiple legally questionable attacks may accumulate such that the harm caused to civilians is

[4] The conviction was overturned on appeal in 2001, but the Court did not reference the Trial Chamber's dicta on cumulative harm.
[5] Prosecutor v. Kupreškić, Case No. IT-95-16-T, Trial Chamber, ¶ 526 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).
[6] *Id*.

inconsistent with the *Martens Clause* (which ensures that even in situations not covered by existing IHL obligations, the principles of humanity and the dictates of public conscience continue to apply, offering a level of protection to people affected by conflict, even when states have not signed onto the relevant treaties).[7] This chapter takes this concept of cumulative civilian harm as a starting point, and argues that there is also a legal basis for considering it as part of the IHL proportionality analysis.

This chapter, which is informed by desk research and expert interviews conducted as part of a collaborative project, jointly funded by the U.K. Research Institute and the National Science Foundation, proceeds in two parts. First, it considers treaty law, military manuals, and similar documents, state interpretative declarations and reservations, and existing scholarship to unpack the various qualifiers to "military advantage," such as "overall," "concrete and direct," and "attack considered as a whole." It argues that as a matter of practice, most states interpret military advantage cumulatively in light of the broader operational picture to varying degrees. Decision-makers consider longer-term effects of attacks when assessing military advantage, despite the terms "concrete and direct" which ostensibly limit military advantage. Moreover, attacks are not viewed in isolation but rather cumulatively, with some states even arguing that the attack can be situated in the context of the entire war strategy.

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[7] The Committee Established to Review the NATO Bombing Campaign described this as a "progressive statement of the applicable law." The Committee found that "where individual (and legitimate) attacks on military objectives are concerned, the mere cumulation of such instances, all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime." FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶ 52 (2000). However, as Benvenuti points out, the Committee's assertion is based on a non-trivial misunderstanding of the ICTY's formulation. The ICTY referred to grey area cases whereas the Committee only referred to lawful attacks. Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR. J. INT'L L. 503, 517-18 (2001).

In a second part, this chapter argues that to be a true balancing exercise, the civilian harm side of the proportionality analysis must also be assessed cumulatively. It explores the legal tests of causation and foreseeability that limit the scope of assessable civilian harm and argues that cumulative civilian harm can both be causally connected to the original attack and a reasonably foreseeable consequence of the attack. It then describes recent advances in the kinds of civilian harm that must be considered to include reverberating and longer-term effects and argues that despite these advances, a gap nevertheless remains regarding cumulative civilian harm. It then explores how existing *ex ante* proportionality calculations should accommodate and account for the cumulative and aggregate impact of conflict on civilians.

The following chapter is a reply from Ambassador Stephen Rapp, which focuses on the prospects for, advantages of, and potential difficulties associated with criminal prosecution for war crimes and grave breaches, with a particular focus on proportionality violations. As Ambassador Rapp explains, criminal accountability mechanisms can prevent and/or deter war crimes and other international crimes. Other justice measures such as reparations, memorialization, truth-telling, provision of services, and guarantees of non-recurrence (which are not discussed in detail) may also be available and can be valuable, not only for victims and survivors but also for society. Ambassador Rapp's reply canvases the history of ICL, dating back to the end of the Cold War. It specifically discusses legal and policy issues that these tribunals and courts faced in their efforts to enforce, promote, and, at times craft, ICL. There have been few prosecutions based on attacks by bombardment resulting in civilian harm. In the most serious case, the ICTY Appeals Chamber pronounced a life sentence for Stanislav Galic, the Bosnian Serb commander who was found to have terrorized the Bosnian Muslim civilian population of Sarajevo by constant bombardment during a thirty-nine-month siege. But the case was not based on proportionality. There was the one ICTY prosecution based on disproportionate civilian harm, specifically involving the effects of the bombardments of Croatian Serb neighborhoods in Knin ordered by Croatian General Ante Gotovina. The ICTY Trial Chamber convicted

him and sentenced him to a twenty-four-year sentence, but the Appeals Chamber reversed his conviction and ordered a full acquittal by a 3-2 vote. This difficulty in obtaining convictions based on proportionality violations can be attributed in part to the relative indeterminacy of proportionality (and its constituent components) and the challenges of applying *ex post* knowledge of specific outcomes to an evaluation that is conducted *ex ante*. However, given the legal basis for recognizing overall civilian harm, and the highly-visible cumulative civilian harm in recent conflicts, Ambassador Rapp foresees that prosecutions may begin to occur, particularly in the national systems of third countries exercising universal jurisdiction.

II. Part I: Defining military advantage

The conceptual simplicity of the proportionality principle belies the difficult task of balancing the "incidental" civilian harm against the "concrete and direct" military advantage anticipated. The challenge is first to define these two concepts, and then to determine what weight to afford to each side of the equation when the objects of the balancing exercise are entirely incommensurate. This section will define the concept of military advantage as understood by states, international organizations, and commentators. As this section will make clear, there is at times a disconnect between the statutory language defining proportionality and how states apply it. Some do require a "concrete and direct" military advantage that is more or less timebound and closely related to the individual strike, while other states argue that military advantage can be derived from a longer time frame and a broader spatial scope, including ending the conflict.[8]

The principle of proportionality under codified IHL requires an *ex ante* assessment of whether a planned attack will cause harm to civilians (defined as death, injury, and/or damage to civilian objects) that would be excessive in relation to the "concrete and direct military advantage." The principle, which complements the principles of distinction, precautions, and necessity, is codified in Articles 51(5)(b) and

[8] This position may blend IHL and *jus ad bellum* proportionality to varying degrees.

57(2)(a)(iii) of Additional Protocol I to the Geneva Conventions (API),[9] which are now part of customary IHL and apply during both international and non-international armed conflicts, according to the International Committee of the Red Cross (ICRC).[10] According to API, the principle of proportionality is violated by:

> an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[11]

The precise nature of the balancing act required by API is the subject of much debate, with questions surrounding how expansive or narrow the definitions of military advantage and its various qualifiers are or should be, as well as how decision-makers do or should weigh the entirely incommensurable concepts of military advantage and civilian harm. The varied views on this issue are charted out herein.

A. "Concrete and direct"

The primary source of friction with the notion that military advantage is (or can be) assessed cumulatively stems from the statutory qualifiers "concrete and direct," both in API and the Rome Statute. Despite this apparent limitation, various states and commentators have generally interpreted the requirement that military advantage be "concrete and direct" in a fairly permissive manner. This section will first discuss how the terms "concrete and direct" are understood in relation to the temporal and causal connections between the attack and its anticipated advantage. It will argue that both indirect and intangible

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[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

[10] Françoise Bouchet-Saulnier, *The Practical Guide to Humanitarian Law*, DRS. WITHOUT BORDERS, https://guide-humanitarian-law.org/content/article/3/proportionality; INT'L COMM. OF THE RED CROSS, CUSTOMARY IHL r. 14.

[11] Protocol I art. 51(5)(b).

military advantages can be considered as part of the proportionality weighing exercise, such as longer-term effects.

In broad terms, there are two positions expressed both through state practice and in IHL scholarship regarding the extent to which the terms "concrete and direct[]" meaningfully limit military advantage. On one end of the spectrum are those that consider military advantage to be significantly curtailed through a "plain language" reading of the terms "concrete and direct" that appear both in the Rome Statute and API. At the other end of the spectrum, the broader view considers that military advantage can be and is often treated more loosely, in a manner that encompasses temporally and physically attenuated advantages. We will explore each of these perspectives herein through the lens of the meaning of the terms "direct" and "concrete," and argue that the broader view is more consistent with current day understandings of military advantage.

The first step is to define the terms "concrete and direct," and to argue that a plain language reading confers considerable latitude on military decision-makers. Despite the inclusion of these terms, it is generally understood that military decision-makers can include second and third order advantages as part of the proportionality assessment. The ICRC's Commentary on API has defined "concrete and direct" as "substantial and relatively close," while ruling out "advantages that are hardly perceptible and those which appear only in the long term."[12] The U.K. Law of War Manual similarly states that the terms "concrete and direct" mean that military advantage must be "identifiable and quantifiable" and must "flow[] directly from the attack . . . ."[13] According to these approaches, "direct" appears to be understood as

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[12] INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 § 2209 (Yves Sandoz et al., eds. 1987).

[13] U.K. MINISTRY OF DEFENCE, JSP 383 THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.33.3 (2004), [hereinafter U.K. 2004 Military Manual]; *see also* LAURENT GISEL, THE PRINCIPLE OF PROPORTIONALITY IN THE RULES GOVERNING THE CONDUCT OF HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 12 (2016) (Support for this interpretation can also be found in the abovementioned declarations by Australia and New Zealand with regard to Articles 51 and 57 of AP I.30).

requiring an unmediated causal and temporal connection between the planned attack and the anticipated military advantage.[14] However, Rogers correctly argues that the Commentary's definition of "concrete and direct" does not actually accord with a plain language interpretation. He argues instead that "concrete" means "specific" or "perceptible" (rather than "substantial") and that "direct" means "without intervening condition of agency" (as opposed to "relatively close.")[15] However, regardless of which of these approaches one takes, it is clear that the terms "concrete and direct" require some kind of causal and temporal connection between the planned attack and the anticipated military advantage.

Regarding the requisite causal connection, this chapter asserts that a broad and flexible definition of that term reflects the prevailing view. Of course, there is significant debate on this issue. Cohen and Zlotogorski argue that the directness requirement means that the advantage must not be "just one small element in a long chain of causation."[16] One expert at a 2016 convening of experts hosted by the ICRC argued that "direct" means "one causal step" but conceded that this could be assessed "from the attack as a whole and/or at the strategic level."[17] On the one hand, this position is more permissive, in that it allows those conducting proportionality assessments to consider the attack viewed "at the strategic level"; on the other hand, it is confined to only "one causal step." The ambivalence of this position highlights the difficulty of developing workable and reliable tests for assessing military advantage in dynamic targeting. Indeed, other experts at the ICRC convening stated that modern militaries would not accept the "one causal step" approach.[18] According to these experts, "[a]ny military advantage that could be identified as being offered by

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[14] JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 101 (2004).
[15] A.P.V. ROGERS, LAW ON THE BATTLEFIELD 59-60 (1996).
[16] AMICHAI COHEN & DAVID ZLOTOGORSKI, PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW: CONSEQUENCES, PRECAUTIONS, AND PROCEDURES 63 (2011).
[17] GISEL, *supra* note 13, at 18.
[18] *Id*.

the attack is considered sufficiently 'concrete and direct' to meet the requirement of the principle of proportionality."[19] The New Zealand Manual of Armed Forces Law appears to endorse this broad view of "concrete and direct" as "a good-faith expectation that the use of the weapon or munition will make a relevant and proportional contribution to the objective of the military attack involved."[20] Moreover, some commentators, like Henderson, argue that military advantage can be both direct and indirect, arguing that it is not limited to "immediate tactical gains," can encompass "other related actions," and "may arise in the future."[21] Indeed, it is clear that regardless of what may have originally been intended by the inclusion of the words "concrete and direct," as a matter of practice, military decision-makers do consider more causally attenuated anticipated advantages when conducting proportionality assessments.

Similarly, in addition to the broad causation requirement, the temporal connection between the anticipated advantage and the attack can be fairly wide. There are of course some who disagree with this perspective. One expert at the ICRC's expert convening argued that the term "direct" means that the military advantage must be felt in the "relevant area" and occur in the "short run" while another expert similarly concluded that "[a]dvantages which appear only in the long term should therefore be disregarded or at least considered cautiously."[22] However, several other experts argued that "long-term effects, in terms of eroding the military strength of the enemy," are relevant.[23] Meanwhile, Dinstein disagrees with the ICRC's position on

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[19] *Id*.

[20] 4 N. Z. DEF. FORCE, NEW ZEALAND MANUAL OF ARMED FORCES LAW 7.2.2 (2nd ed. 2017). *See also* OFF. OF THE JAG, LAW OF ARMED CONFLICT: AT THE OPERATIONAL AND TACTICAL LEVELS B-GJ-005-104/FP-021 415 (2001) (similarly states that "[a] concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation.").

[21] IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I 71 (2009).

[22] GISEL, *supra*, note 13, at 19.

[23] *Id*.

temporality, arguing that "military advantage does not necessarily have to occur in close temporal proximity."[24] Under this view, an attack against a weapon that the enemy was not intending to use immediately, would nevertheless constitute a "direct" military advantage. The U.S. Law of War Manual adopts a middle ground approach, stating that "the military advantage may not be merely hypothetical or speculative, although there is no requirement that the military advantage be 'immediate.'"[25] As a matter of practice, "concrete and direct" is not generally confined to short term gains but can also include longer-term, more temporally attenuated advantages.

While the letter of the law suggests otherwise, the terms "direct and concrete" do not appear to exert substantial influence over how military advantage must be defined in practice. In addition, state practice and several other statutory terms suggest the existence of a broader definition of military advantage than that which is afforded to the concept of civilian harm. As the ICRC Commentary on API states, "the words 'concrete and direct' impose stricter conditions" than what is implied by Article 52, which defines military objectives and refers to the slightly distinct concept of a "definite military advantage."[26] However, some commentators and states acknowledge that longer-term and causally attenuated impacts can be considered when evaluating military advantage. Moreover, some states, like Canada, sidestep the question of what constitutes "concrete and direct" by simply asserting that if an attack is made with the "honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation" it will satisfy the proportionality requirement.[27] The

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[24] COHEN & ZLOTOGORSKI, *supra*, note 16, at 63; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 133-34 (2010).

[25] U.S. DEPT. OF DEF., LAW OF WAR MANUAL § 5.12.2 (2023).

[26] Protocol I Art. 52(2) ("Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.").

[27] OFF. OF THE JAG, LAW OF ARMED CONFLICT: AT THE OPERATION AND TACTICAL LEVELS 415 (2001).

foregoing discussion has highlighted that despite the inclusion of the terms "concrete and direct," which may appear to limit the temporal and spatial scope of military advantage, the prevailing view is more permissive. The following sections further highlight this point.

B. "Overall"

Another important factor that indicates that military advantage is indeed considered cumulatively comes from the inclusion of the term "overall" as a qualifier for military advantage in the Rome Statute of the International Criminal Court (ICC). The Rome Statute codifies certain enumerated war crimes as violations of ICL. The linguistic differences between the Rome Statute and API exert an important influence on what war criminals consider to be acceptable conduct for which they can evade prosecution (even if their acts constitute a violation of IHL). The Rome Statute states that it is a "serious violation[] of the laws and customs applicable in international armed conflict" to:

> Intentionally launch[] an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct **overall** military advantage anticipated.[28]

(emphasis added). Linguistic differences between API and the Rome Statute include: (1) the addition of the word "intentionally," which restricts the *mens rea* requirement; (2) the requirement that the collateral harm be "*clearly* excessive" (emphasis added), rather than merely "excessive"; and, most relevant here, (3) the inclusion of the

[28] Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 3 (emphasis added). Note: There is no equivalent provision criminalizing proportionality violations in the context of non-international armed conflicts under Article 8(2)(e) of the Rome Statute. However, as noted above, the ICRC has confirmed that the API provision prohibiting proportionality violations is considered customary international law and applies during both international and non-international armed conflicts.

word "overall" as a qualifier to military advantage.[29] Footnote 36 in the Elements of Crimes states the military advantage does not have to be "temporally or geographically related to the object of the attack."[30] The footnote also states that "justifications for war or other rules related to *jus ad bellum*" are not encompassed within this definition.[31] Kilcup offers a realist perspective on the value of the more lenient standard of proportionality under the Rome Statute, arguing that it is more in line with customary international law and today's "legal and military realities" than the linguistically stricter definition under API.[32]

The two bodies of law—ICL and IHL—codify distinct definitions of proportionality because they serve different purposes. IHL aims to govern the actions of belligerents in conflict while ICL aims to hold individuals criminally responsible for violations of international law. As Arai has correctly noted, it is important to keep these two bodies of law separate.[33] Nevertheless, according to the ICRC, the words "clearly" and "overall" do not change existing law (i.e., the principle of proportionality as defined in API and codified in customary international law).[34] The ICRC states that the word "overall" in the Rome Statute "indicate[s] that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself."[35] It is somewhat curious then, that the ICRC explains that the

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[29] *Id*.

[30] INT'L CRIM. CT., ELEMENTS OF CRIMES 13 n. 36 (2013) (adopted by article 9 the Rome Statute of the International Criminal Court).

[31] *Id*.

[32] James Kilcup, *Proportionality in Customary International Law: An Argument Against Aspirational Laws of War,* 17 CHI. J. INT'L L. 253, 272 (2016).

[33] Yutaka Arai, *Excessive Collateral Civilian Casualties and Military Necessity: Awkward Crossroads in International Humanitarian Law Between State Responsibility and Individual Criminal Liability*, *in* SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY 325, 339 (C. Chinkin & F. Baetens eds., 2015).

[34] Int'l Comm. of the Red Cross, *Paper Submitted to the Working Group on Elements of Crimes of the Preparatory Commission for the International Criminal Court*, U.N. Doc. A/CONF.183/INF/10, at 225 (July 13, 1998).

[35] *Id*.

word "overall" is "redundant" because, it argues, this is already covered by API.[36]

The Rome Statute's inclusion of the word "overall" as a qualifier for "military advantage" has substantially expanded the scope and meaning of military advantage, as applied in ICL and potentially IHL.[37] This position is not universally recognized, but a plain language reading of the Rome Statute clearly indicates the drafters' intention to include more than merely the military advantage incurred from specific strikes or attacks disconnected from the broader battleground strategy. Indeed, several delegations at the Rome Conference saw the term as a "mere improvement" on API,[38] a position that aligns with the ICRC's pronouncements mentioned above. Several commentators align with this position. As Dinstein has correctly argued, the term "overall" "clearly permits looking at the larger operational picture, as distinct from focusing on the particular point under attack."[39] Similarly, Bartels argues that given that the Elements of Crimes states in a footnote that the "advantage may or may not be temporally or geographically related to the object of the attack," both direct and indirect military advantage should be considered in the proportionality equation.[40] According to Bartels, this means that the military advantage does not need to occur at the same time or place as the attack; a longer time frame can be

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[36] *Id*.

[37] As discussed in Part III below, to date the notion of "proportionality" has been an ineffective basis for accountability—criminal and otherwise. At the time of writing, there have been no judgements relying on disproportionate attacks that withstood appeal.

[38] Julian Wyatt, *Law-Making at the Intersection of International Environmental, Humanitarian and Criminal Law: The Issue of Damage to the Environment in International Armed Conflict*, 92 INT'L REV. RED CROSS 593, 634 (2010).

[39] Yoram Dinstein, *The Principle of Proportionality, in Searching for a "Principle of Humanity," in* INTERNATIONAL HUMANITARIAN LAW 76 (K.M. Larsen, et al. eds., 2013). *See also* Kilcup, *supra*, note 32, at 254 (Kilcup, correctly asserts, the inclusion of "overall" would suggest that there is a "greater degree of flexibility in the proportionality calculation.").

[40] Rogier Bartels, *Dealing with the Principle of Proportionality in Armed Conflicts in Retrospect: The Application of the Principle in International Criminal Trials*, 46 ISR. L. REV. 301, 309 (2013).

considered.[41] While Bartels stops short of saying that cumulative military advantage of multiple strikes over time can be taken into account, he acknowledges that military advantage is not necessarily time bound, which opens the door to the possibility that civilian harm may also be assessed cumulatively in light of the need to maintain internal coherence of IHL and fulfill its fundamentally protective function. Meanwhile, Kilcup reflects that the inclusion of the word "overall" in the Rome Statute allows decision-makers to consider using tactics that would be appropriate "in light of a broader view of the conflict."[42] There is therefore significant support for the view that the inclusion of the term "overall" in the Rome Statute indicates a definition of military advantage that extends in time and space from the original attack.

However, some experts and states have worried that the inclusion of the word "overall" would allow the "long-term political advantages or the winning of a war *per se*" to be considered.[43] For example, upon signing the Rome Statute, Egypt stated "[t]he overall military advantage must not be used as a basis on which to justify the ultimate goal of the war or any other strategic goals."[44] In this regard, Dörmann in his seminal work on the Elements of Crimes of the Rome Statute, noted the risk that the term "overall" may lead to "abusive interpretation of the concept of 'concrete and direct military advantage.'"[45] Similarly Dörmann, expressed the concern that the inclusion of the term "overall" may lead to "abusive interpretations" of the proportionality principle. The concern here appears to be that expanding military advantage beyond "concrete and direct"

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[41] *Id*.
[42] Kilcup, *supra*, note 32, at 259.
[43] Knut Dörmann, *War Crimes Under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, 7 MAX PLANCK Y.B. U.N. L. 341, 386 (2003).
[44] Egypt, *Declarations Made Upon Signature of the Rome Statute of the International Criminal Court*, Dec. 26, 2000, ¶ 4(c).
[45] Dörmann, *supra*, note 43, at 163.

advantages would thereby increase tolerance for civilian harm. In other words, if military advantage can be considered cumulatively, more civilians may be injured or killed in distinct attacks (given that the military advantage is measured against the overall war aims). This issue merits further discussion.

In order to preserve the protective function of IHL and to uphold its internal coherence, it should be possible to measure both civilian harm and military advantage cumulatively, provided that both sides of the ledger are equal. Kilcup argues that the "overall" standard could "offer compelling grounds" for decision-makers to attack targets protected by human shields in limited circumstances if the military campaign would otherwise be unwinnable.[46] This claim by itself could suggest a higher tolerance for civilian harm under the Rome Statute definition of proportionality. However, Kilcup goes on to contemplate the possibility that consistently targeting human shields may discourage insurgents from using human shields by removing the protection they otherwise offer to military objectives and therefore ultimately may be more protective of civilians—with the important caveat that rigorous empirical evidence on this question is needed to support this claim.[47] Applying what he calls the "secondary effects doctrine of proportionality," which requires decision-makers to consider broader harms to civilians beyond immediate harm, Kilcup concludes that in this case "an overly strict definition of proportionality could itself be disproportionate."[48] Without endorsing Kilcup's argument about human shields, his wider point about the protective function that a broader notion of military advantage that encompasses the "overall" effects of an attack could offer to civilians is significant.

Far from being a "redundant" addition to the Rome Statute's definition of proportionality as a grave breach as the ICRC suggests, the author considers that the term "overall" offers substantial insight into the views of nation states into how military advantage can and should

[46] Kilcup, *supra*, note 32, at 259.
[47] *Id*.
[48] *Id*.

be understood. The addition of this word, which was omitted from API, suggests the intention of drafters to widen the "military advantage" side of the ledger; it is important to note, then, that this same debate has not extended to the civilian harm side of the ledger. We will discuss this issue in more detail in Part II. For now, we will continue to unpack the definition of military advantage so as to provide a firm basis for our argument that military advantage is already considered cumulatively and that civilian harm should receive similar treatment.

C. "Attack considered as a whole"

The broadening of statutory language and qualifiers surrounding military advantage was not confined to the Rome Statute or API. Upon signing API, multiple states made reservations that military advantage refers to "the advantage anticipated from the military *attack considered as a whole* and not only from isolated or particular parts of that attack"

(emphasis added).[49] Several military manuals also endorse this view.[50] Indeed, the ICRC Commentary on API states that a concerted attack

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[49] Australia, Statement on Ratification of Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Nov. 20, 1990), 1591 U.N.T.S. 462, ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=172FFEC04ADC80F2C1256402003FB314 ("the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack"); Canada, Statement on Ratification of Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Nov. 20, 1990); INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: PRACTICE RELATING TO RULE 14 – PROPORTIONALITY IN ATTACK (CÔTE D'IVOIRE), ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14; France, Statement on Ratification of Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Apr. 11, 2001), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=D8041036B40EBC44C1256A34004897B2; Italy, Statement on Ratification of Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Feb. 27, 1986), 1425 U.N.T.S. 438, ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=E2F248CE54CF09B5C1256402003FB443; New Zealand, Statement on Ratification of Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Feb. 8, 1988), 1425 U.N.T.S. 445, ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=8A5E4A7E5F6B8C4DC1256402003FB4A3; United Kingdom, Reservation to Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (July 2, 2002), ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2; COHEN & ZLOTOGORSKI, *supra*, note 16, at 66-67; *see also* Dörmann, *supra*, note 43, at 164-65.

[50] AUSTRL. DEF. DOCTRINE PUB'N NO. 06.4, THE MANUAL ON THE LAW OF ARMED CONFLICT §§ 5.10–5.11 (2006); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW ch. 2, § 334 (2005) (citing ITALY., ISTRUZIONI PER L'APPLICAZIONE DELLA CONVENZIONE DI GINEVRA DEL 12 AGOSTO 1949 NELLE FORZE ARMATE ch. 5, § 2 (1991)); Netherlands, Declarations Made Upon Ratification of Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts § 5 (June 26, 1987); N. Z. DEF. FORCE *supra*, note 20; NOR. MINISTRY OF DEF., MANUAL OF THE LAW OF ARMED CONFLICT ¶¶ 7.11-.12 (2013); SPAIN, 1 ORIENTACIONES: EL DERECHO DE LOS CONFLICTOS ARMADOS, PUBL'N OR7-004, DOCTRINE, ORGANIZATION & MATERIEL

conducted in multiple places "can only" be viewed in its entirety.[51] However, it is not clear that states intended to confine themselves to a "concerted attack" as the ICRC suggests or if they had in mind broader operational and strategic objectives that could be included on the military advantage side of the ledger in proportionality analysis. Meanwhile, there is considerable debate about what "attack considered as a whole" means as it is not officially defined.[52] Broadly speaking, the debate falls into three categories: (1) a narrow approach, which accepts the language of "attack considered as a whole" but nevertheless requires military advantage to be assessed solely in terms of a "finite operation with defined limits"; (2) a broad approach, which allows military decision-makers to consider the anticipated military advantage based on its contribution to the overall war strategy; and (3) a middle ground approach, which falls somewhere in between. Through an overview of these various approaches, this chapter posits that the second and third categories are most reflective of the prevailing view on military advantage, without going so far as to endorse equating anticipated military advantage with prosecution of the entire conflict.

First, some scholars and states advocate for a narrow or strict perspective on the notion of military advantage as an attack considered as a whole, confining it tightly to the advantage gained from specific attacks. In trying to define the outer limits of the notion of "attack as a whole," an expert panel convened by the ICRC in 2016 reflected on some states and commentators who claim that the analysis of military advantage cannot extend to the "'armed conflict as a whole' but must remain 'a finite operation with defined limits.'"[53] This approach,

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DIRECTORATE, TRAINING & DOCTRINE COMMAND § 2.5(b) (2d ed. 2007); U. K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT § 5.33.5 (2004); U.S. DEP'T OF DEF., *supra*, note 25, § 5.6.7.3 (2023).

[51] INT'L COMM. OF THE RED CROSS, *supra*, note 12, at 2218.

[52] Dörmann, *supra*, note 43, at 164-65, 171.

[53] Knut Dörmann, *Obligations of International Humanitarian Law*, 4 MIL. & STRATEGIC AFF. 15 (2012); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT ¶ 232 (2d ed. 2010); GISEL, *supra*, note 13, at 12-14 (citing K. Watkin, *Military Advantage: A Matter of 'Value', Strategy and Tactics*, 17 Y.B. OF INT'L HUM. L., 289 (2014)).

however, does not translate neatly into state practice and military manuals, which consistently avow a wider notion of military advantage. At an even more basic level, it does not appear to allow much room for decision-makers to assess the anticipated military advantage of attacks conducted in concert with one another.

Second, some states and commentators adopt a middle ground approach. For example, Dörmann argues that the phrase "attack viewed as a whole" cannot mean "in the sense of the whole conflict" as this would not be reconcilable with the terms "concrete and direct" (discussed below) and would blend *jus ad bellum* and *jus in bello* proportionality.[54] Sassoli, Bouvier, and Quintin similarly argue that while it is not necessary to demonstrate a link "with specific combat operations," it should not "be confused with the entire war."[55] Chiara-Gillard adopts a different approach. She argues that the definition of "attack as a whole" is clarified by considering the relationship of distinct attacks to other military objectives: a single attack that is "not dependent on or affected by other acts" is considered to constitute the "attack as a whole"; but if a single attack "is an element in a larger operation," then that whole operation is the "attack as a whole."[56] This position mostly aligns with that of the United Kingdom. The U.K. Joint Service Manual of the Law of Armed Conflict explains that attacks "may involve a number of coordinated actions" and that "the whole attack must be considered" when conducting a proportionality analysis.[57] This suggests a willingness on the part of some commentators and states to at least accept, if not advocate for, a cumulative understanding of military advantage that accounts for harm as it accrues in time and space during a conflict.

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[54] Dörmann, *supra*, note 43, at 164-65, 171.

[55] INT'L COMM. OF THE RED CROSS, STUDY ON THE USE OF THE EMBLEMS: OPERATIONAL AND COMMERCIAL AND OTHER NON-OPERATIONAL ISSUES 143 (2011).

[56] EMANUELA CHIARA-GILLARD, PROPORTIONALITY IN THE CONDUCT OF HOSTILITIES THE INCIDENTAL HARM SIDE
ASSESSMENT 9-10 (2018).

[57] U.K. 2004 MILITARY MANUAL, *supra*, note 13, ¶ 5.33.3.

Some commentators position themselves between these two competing perspectives: on the one hand, military advantage is limited to individual attacks; on the other, it encompasses the entire war strategy. Cohen and Zlotogorski adopt a middle-ground approach. They note that "single attacks are often only part of a broader operation that offers a greater military advantage" which, they say, is why an interpretation of military advantage that accounts for the whole operation is needed. They cite the example of an attack on a single radio tower. Alone, a single strike would not have a significant military advantage, as it is unlikely to take down the enemy's entire command and control structure. Taken cumulatively, however, attacks on many towers would produce a military advantage "much greater than the sum of each individual attack's military advantage, when viewed separately."[58] In this approach, military advantage is broad enough to encompass the cumulative effect of multiple attacks—provided that there is a strategic connection between them—but not so broad as to encompass the entire war strategy. This chapter posits that even a "middle-ground" approach accommodates a cumulative understanding of military advantage, which can and should also be reflected on the civilian harm side of the ledger in order to uphold internal cohesion within IHL and to fulfil its protective function. It also acknowledges that a narrower approach, focused only on evaluating military advantage in individual strikes, may not.

Nevertheless, there are some states that go beyond the middle-ground approach, allowing military commanders to consider the contribution of the military advantage to the overall war strategy. Some states have a distinct perspective, arguing military advantage to be assessed in light of the broader war strategy. For example, the United States Department of War (DoW) states in its Law of War Manual that "'military advantage' is not restricted to immediate tactical gains, but may be assessed in the full context of the war strategy."[59] In support of

[58] AMICHAI COHEN & DAVID ZLOTOGORSKI, PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW: CONSEQUENCES, PRECAUTIONS, AND PROCEDURES 68 (2021).
[59] HENDERSON, *supra*, note 21, at 63 (citing U.S. DEP'T OF DEF., *supra*, note 25, § 5.6.7.3).

its position, the Manual cites the Eritrea Ethiopia Claims Commission, which asserted that "military advantage" is a concept that "can only properly be understood in the context of the military operations between the Parties taken as a whole, not simply in the context of a specific attack."[60] Elsewhere, the DoW has further expounded upon this statement. In a report to Congress on the Conduct of the Persian Gulf War, the DoW explained that military advantage "is linked to the full context of a war strategy, in this instance, the execution of the Coalition war plan for liberation of Kuwait."[61] As noted above, some scholars have supported this perspective. Neuman has argued that as both a legal and moral matter,[62] commanders should "take into account both the tactical aspects of the attack and the strategic aspects of the overall operational plan or war strategy" when assessing military advantage.[63] After charting out the historical and legal origins and of the proportionality principle, he argues for an approach to IHL proportionality wherein military advantage is assessed both cumulatively and on a case-by-case basis (discussed in the next sub-section), allowing commanders to consider short-term and long-term effects of operations when delimiting the boundaries of military advantage. This approach, which admittedly appears to be somewhat of an outlier,[64] would ostensibly allow for the broadest understanding

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[60] U.N., ERITREA-ETHIOPIA CLAIMS COMM'N, PARTIAL AWARD: WESTERN FRONT, AERIAL BOMBARDMENT AND RELATED CLAIMS, ERITREA'S CLAIMS 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶ 113 (Dec. 19, 2005) (citing U.S. DEP'T OF DEF., *supra*, note 25, § 5.6.7.3).

[61] U.S. DEP'T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 699 (1992).

[62] Neuman argues that moral doctrine is relevant to IHL proportionality because it may be embedded within the law of armed conflict via the Martens Clause and because moral considerations might be helpful in disentangling disagreements during the drafting of various IHL instruments. Noam Neuman, *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality*, 7 Y.B. INT'L HUM. L. 79, 101 (2004).

[63] *Id*. at 100.

[64] *See, e.g.*, the New Zealand Manual of Armed Forces Law, which states "The term 'operation as a whole' is to be assessed realistically and in good faith. It is not to be expanded to routinely refer to the entire war or campaign. To do so would render the principle of proportionality meaningless as almost any target could be justified against such a balance." N. Z. DEF. FORCE *supra*, note 20, ¶ 8.6.5.

of military advantage and therefore increase the protective function of IHL for civilians and victims trapped in prolonged war zones.

As noted above, the expression "attack as a whole" has not been officially defined, leaving states' intended meaning of the phrase unclear. The author contends that it means that military advantage should be considered alongside a broader operational picture (beyond the specific series of attacks) and could even potentially consider overall war aims.[65] Some commentators, like Cohen and Zlotogorski, highlight that some states do (as a matter of practice) consider longer-term strategic and operational objectives when assessing military advantage, such as "disrupting enemy activities," "diverting an enemy force's resources and attention," and even "lowering the morale of enemy forces."[66] Experts at a 2016 convening hosted by the ICRC acknowledged this, stating that military advantage could be assessed at a tactical, operational, or strategic level.[67] They clarified that strategic does not equate with political, rather "it has to do with widespread or systemic military effects, which are those that weaken the enemy's ability to fight at theatre level."[68] Ultimately, however, state practice coupled with the reservations expressed upon signing API that attacks could be considered "as a whole," supports the view that anticipated military advantage can indeed be assessed cumulatively, over a broad temporal and spatial area.

D. Case-by-case or cumulative assessment of military advantage

Military advantage can be assessed both cumulatively and on a case-by-case basis. The simplicity of this statement is counterposed against the fact that this issue has historically been the source of

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[65] *E.g.*, Neuman argues that the relevant advantage is "the advantage anticipated from the military campaign, of which the attack is part, as a whole." This view of military advantage would encompass the overall war strategy. *See* Neuman, *supra*, note 62, at 100.

[66] AMICHAI COHEN & DAVID ZLOTOGORSKI, PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW: CONSEQUENCES, PRECAUTIONS, AND PROCEDURES 60-61 (2021) (footnotes omitted).

[67] GISEL, *supra*, note 13, at 17.

[68] *Id*.

disagreement and tension. There are essentially three approaches to this question. Some earlier scholars have argued for a strict case-by-case approach; others have argued that civilian harm can be assessed cumulatively; and more recent scholars have sought to find a compromise that treats the case-by-case approach as the default while allowing consideration of the broader attack as a whole. This section explores each of these positions and argues that, in practice, most states and commentators now accept the cumulative approach sitting alongside the case-by-case approach.

At one end of the spectrum lies scholars like Bernard Brown who defined the case-by-case approach as referring to "the specific tactical objective of a particular action."[69] He contrasted this with the cumulative approach to military advantage, which considers "the manner in which the action will contribute to the belligerent's overall strategic goals."[70] Writing before the adoption of API, Brown concluded that military advantage must be calculated on a case-by-case basis, meaning that each tactical decision should be considered in isolation.[71] This position no longer reflects the prevailing view, although some commentators continue to argue that "distinct military objectives in an urban area cannot be treated as one objective."[72]

Some commentators adopt a middle ground perspective, incorporating elements from the cumulative and case-by-case approaches. For example, Gardam has argued that according to API, military advantage should be assessed on a relatively short time frame as opposed to considering the "long-term cumulative impact of the attacks."[73] However, she goes on to clarify that military advantage need

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[69] Bernard Brown, *The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification*, 10 CORNELL INT'L L. J. 134, 141 (1976-77).
[70] *Id*.
[71] *Id*. at 142.
[72] HENDERSON, *supra*, note 21, at 200 (citing INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 § 2218 (Yves Sandoz et al., eds. 1987)).
[73] GARDAM, *supra*, note 14, at 102.

not be assessed on a "case-by-case basis" but rather should be assessed based on the attack as a whole.[74] Amongst those that adopt a middle-ground approach, there is discussion about how far the "cumulative" approach can stretch (including considering what this term means in practice). Henderson accepts that anticipated military advantage should not be considered in isolation (i.e., rejecting the case-by-case approach), but also repeats arguments mentioned above that it "cannot be achieving the end of the armed conflict (except, perhaps, for the rarest of targets)."[75] Norway's Manual of the Law of Armed Conflict aligns with this cumulative view of military advantage, stating that military advantage can encompass "not only the immediate benefit from the attack but also the cumulative benefit to the overall operation of which the attack is a part."[76] Similarly, Doswald-Beck argues that the principle of proportionality requires decision-makers to consider the overall strategic value of an operation rather than solely the casualties caused by individual actions.[77]

Many more commentators have adopted a more permissive perspective, allowing military advantage to be assessed cumulatively. This is the perspective endorsed by this chapter. For Laursen, there is a pragmatic basis for this basis perspective: simply put, a case-by-case approach is too simplistic and narrow.[78] As a matter of practice, attacks are often planned to "produce cumulative effects"[79] and "operate synergistically,"[80] and therefore should be assessed cumulatively. The absence of convictions that withstood appeal on proportionality

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[74] *Id*.

[75] HENDERSON, *supra*, note 21, at 70.

[76] NOR. MINISTRY OF DEF., *supra* note 50, ¶ 2.23.

[77] William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. OF COMP. & INT'L L. 539, 548 (1997) (citing LOUISE DOSWALD-BECK, THE VALUE OF THE 1977 GENEVA PROTOCOLS FOR THE PROTECTION OF CIVILIANS, *in* ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION 137, 156-7 (Michael A. Meyer ed. 1989)).

[78] HENDERSON, *supra*, note 21, at 200 (citing Andreas Laursen, *NATO, the War Over Kosovo, and the ICTY Investigation* 17 AM. UNIV. INT'L L. REV.795 (2002)).

[79] *Id*. at 70.

[80] Michael Schmitt, *Targeting and Humanitarian Law: Current Issues*, 34 ISR. Y.B. ON HUM. RTS. 59, 62 (2004).

violations, makes it challenging to determine how exactly military advantage should be weighed. This gap notwithstanding, the prevailing consensus amongst commentators is that military advantage can be assessed cumulatively. As Neuman acknowledges, the corollary of this cumulative conception of military advantage is that the assessment of civilian harm "has to be done both on a case-by-case basis and in light of the overarching operational plan and war strategy."[81] Neuman does not unpack this claim further and this statement is somewhat ambiguous. On the one hand, it may suggest a higher tolerance for civilian harm in discrete attacks when considered "in light of" the overall war strategy. On the other hand, it may suggest that commanders and operational planners should consider the cumulative civilian harm that arises as the war strategy is pursued over the long-term. As discussed in Part II, this article advocates for the latter interpretation.

This section has demonstrated that the prevailing understanding of military advantage amongst states and commentators is broad. It can encompass longer-term impacts that extend in time and space from the attack in question. Decision-makers can consider the role that a single attack plays in supporting a broader operation (including the entire war strategy in the case of the United States). It can be assessed on a case-by-case basis or cumulatively. Despite the inclusion of the term "direct," indirect effects are generally considered relevant for the purposes of assessing military advantage. The next section argues for a modest rebalancing of the relationship between military advantage and civilian harm in the proportionality equation such that longer-term, cumulative harms (both direct and indirect) are considered by decision-makers.

III. Part II: Defining incidental civilian harm

Given that military advantage can be (and often is) assessed cumulatively, civilian harm should be treated similarly in order to

[81] Neuman, *supra*, note 62, at 111.

preserve the internal coherence of IHL and to uphold its protective function. As stated above, the principle of proportionality requires decision-makers to consider whether a planned attack is " . . . expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof . . . ."[82] If the expected incidental civilian harm is excessive (or "clearly excessive" in the case of the Rome Statute) in relation to the anticipated military advantage, the attack cannot proceed.[83] However, neither API nor the Rome Statute defines the temporal or geographic scope of the civilian harm that must be considered as part of the proportionality analysis, leaving some ambiguity about whether, and if so how, civilian harm that is more remote, longer-term, or indirect must be considered in all cases. Moreover, civilian harm beyond deaths, injury, and property damage—such as harm to the civilian environment—is not always adequately factored into military decision-making in practice, in part due to poor information flows and a reliance on incomplete datasets.

This section first discusses factors that limit liability for incidental civilian harm: causation and foreseeability. It highlights how these concepts are poorly defined, and yet how cumulative civilian harm stemming from multiple attacks over time can both be causally connected to and a reasonably foreseeable consequence of an individual attack. Such harms should therefore be considered as part of the *ex ante* proportionality analysis. It then discusses recent developments regarding the recognition of so-called "reverberating effects" and longer-term harms and argues that cumulative harm can and should be considered alongside and in addition to these harms. In a third part, it explores how decision-makers can and should use a variety of sources of information to map the civilian environment and use this information to make decisions that mitigate harm as it accumulates over time. It concludes by arguing that a correct interpretation and

[82] Additional Protocol I art. 51(5)(b).

[83] The proportionality principle is concerned with limiting "incidental" or unintentional harm to civilians rather than intentional harm; intentional harm is covered by the principle of distinction, which categorically prohibits deliberately attacking civilians. *Id*. art. 51(4)(a).

application of the proportionality principle requires decision-makers to consider cumulative civilian harm given that anticipated military advantage is assessed cumulatively.

A. Factors limiting liability for incidental civilian harm

Two factors limit potential criminal liability for decision-makers in relation to incidental civilian harm in prospective targeting decisions: causation and reasonable foreseeability.[84] Only civilian harm that is sufficiently causally related to the original attack and a reasonably foreseeable consequence of the attack must be considered as part of the *ex ante* proportionality analysis. This sub-section outlines the potential limits of assessable cumulative civilian harm by discussing various approaches advanced by states and commentators for meeting the causation and foreseeability requirements. It argues that despite the conceptual ambiguity surrounding these concepts, cumulative harm can both be causally related and reasonably foreseeable, and may therefore be included within the scope of harm that military decision-makers must consider in operation and strategic planning.

1. Causation

Incidental civilian harm that is causally connected to an attack (and which is a reasonably foreseeable consequence of that attack) must be considered by decision-makers before launching an attack. While there are certainly straightforward cases in which the attack is the only cause of the harm in question, it can be difficult to establish a causal connection between an attack and incidental harm, especially when that harm is more attenuated (as in the case of reverberating, long-term, or cumulative effects). This difficulty stems from three interrelated issues.

First, as a legal matter, IHL does not provide a test for establishing causation. Commentators have proposed various tests, each of which

[84] CHIARA-GILLARD, *supra* note 56, at 13 (2018) (Chiara-Gillard rejects the position advanced by some commentators that "remoteness" is another factor that sets limits to the incidental harm that military decision-makers must consider.).

has its own shortcomings.[85] Multiple commentators have cited the perspectives of experts on reverberating effects that were expressed at a 2005 expert meeting on targeting hosted by the Geneva Academy.[86] According to Robinson and Nohle, one expert at that meeting advanced a "reasonable causality" test, meaning that liability can follow where there is "a reasonable expectation of causality" or that certain harms are "a likely or foreseeable consequence of the attack."[87] A similar, but distinct test, focuses on "expected" harm (not including harm that is "theoretical, remote, feared, conceivable, not likely, speculative, or a mere possibility").[88] While these approaches may be protective of civilians, they problematically blend the notions of foreseeability and causation (which as a practical matter are intimately linked but are nevertheless distinct legal concepts).[89] Others at the Geneva Academy expert meeting argued that there must be a "close nexus" between the (reverberating) harm and the attack, without defining what this would encompass.[90]

Meanwhile, Chiara-Gillard's work on the topic of proportionality advances a "but for" test (i.e., the harm would not occur *but for* the attack). This test has certain limits: it does not include "harm that results

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[85] Isabel Robinson & Ellen Nohle, *Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas*, 98 INT'L REV. OF THE RED CROSS 107, 119 (2016).

[86] UNIV. CTR. FOR INT'L HUM. L., TARGETING MILITARY OBJECTIVES (2005) (this report is no longer available online).

[87] *See* Robinson & Nohle, *supra*, note 85, at 118-19. *See also* HENDERSON, *supra*, note 21, at 211 (arguing "the law requires indirect or consequential harm to be counted as part of the collateral damage assessment but only where that harm will arise as an expected consequence of the attack.").

[88] Alberto Costi, Reverberating Effects in Armed Conflict: An Environmental Analysis, 29 ARIZ. J. Int'l & Comp. L. 317, 344-45 (2022).

[89] Nohle and Robinson argue that "foreseeability is the most appropriate standard for limiting the scope of the reverberating effects that must be taken into account," suggesting that the foreseeability test supplants the causation test. Chiara-Gillard takes a different approach, arguing that both causation and foreseeability are required. Robinson & Nohle, *supra*, note 85, at 119; CHIARA-GILLARD, *supra* note 56, at 14.

[90] Ben Clarke, *Proportionality in Armed Conflicts: A Principle in Need of Clarification?*, J. INT'L HUM. LEGAL STUD. 105 (2012) (citing UNIV. CTR. FOR INT'L HUM. L., *supra*, note 86, at 14).

from the conduct of another actor and is not due to the *physical effects* of the attack."[91] One potential analytical drawback to this approach is that the but for test appears to require decision-makers to trace incidental harm that has occurred back to the attack in question (*ex post*) and so reverses the proportionality assessment, which should be conducted *ex ante*. Moreover, as one early reader of this chapter pointed out, there is also the fatal conceptual flaw that if two strikes are directed simultaneously at the same target, the incidental civilian harm cannot be attributed solely to one of the attacks. This does not mean that a proportionality violation has not occurred. Even though Chiara-Gillard's causation test is limited to so-called "physical effects," decision-makers at the tactical (and potentially operational and even strategic) level(s) may nevertheless consider such an approach to be too broad to implement in real time decision-making. However, even if a narrower causation test is applied, many cumulative harms (such as the accumulated death toll of multiple attacks over time) can be directly, causally linked to the physical effects of the discrete attacks.

Second, it is unsettled how many steps in the causal chain the military decision-maker must take when considering potential civilian harm. Unlike military advantage, which ostensibly must be "concrete and direct" (but which in reality can also include indirect military advantages, as discussed in detail above), incidental civilian harm has no such treaty-based qualifiers: its temporal, geographic, and material scope is not defined. As will be discussed below, the current position of the ICRC, certain states, and numerous commentators is that decision-makers must take into account "more than the immediate kinetic effects of an attack" as well as how those kinetic effects will "'reverberate' to produce 'knock-on' effects that jeopardize the health and safety of civilians."[92] In other words, incidental civilian harm does not have to be a direct consequence of the attack but can instead be a result of a series of causal steps. This leaves the following question unanswered: how far

[91] CHIARA-GILLARD, *supra* note 56, at 18-19.

[92] Michael Meier, *The Principle of Proportionality in the DoD Law of War Manual*, JUST SEC. (2024), https://www.justsecurity.org/91319/the-principle-of-proportionality-in-the-dod-law-of-war-manual/. *See also* GISEL, *supra*, note 13, at 44.

removed can the harm be from the original attack for there to be a requirement that decision-makers consider it as part of the proportionality analysis? International law does not provide much guidance on this question.[93]

A third factor that complicates the analysis of causation—even if there were a settled test—is that in an active conflict zone, a vast number of potential intervening factors, events, and actors can coalesce to cause specific harmful outcomes for civilians, making it difficult to isolate the attack in the causal chain.[94] Some of these factors are beyond the control of the military decision-maker and creating liability in such situations would be problematic. Such factors may include: whether the opposing force is able and willing to repair damage, effects such as economic sanctions, civilian agency including the decision to return to areas with explosive remnants of war, as well as post-conflict reconstruction efforts[95] (Chiara-Gillard's clarification that the *but for* test excludes the conduct of other actors partially mitigates against this problem). However, there are also scenarios in which the civilian harm in question is the result of multiple attacks by own forces and is cumulative in nature, such as the progressive and complete destruction of all available hospitals and health care facilities, or the gradual but total eventual destruction of critical roadways through repeated (lawful) attacks over time. In other words, the harm caused may not be traced to a single attack but to multiple (potentially lawful) attacks operating in concert over time. As will be discussed below, this kind of cumulative harm from attacks taken in concert with one another should be factored into the proportionality analysis given that military advantage is assessed cumulatively.

[93] CHIARA-GILLARD, *supra* note 56, at 14, n. 30.
[94] GISEL, *supra*, note 13, at 44.
[95] *Id*. at 45.

2. Reasonable foreseeability

An additional factor limiting liability for incidental civilian harm is foreseeability.[96] The rationale for this limitation is that it is not feasible to expect commanders to predict or foresee every possible negative outcome when authorizing a strike. The incidental harm caused by an attack must have been "foreseeable at the time the attack was planned or launched" for there to be a requirement that decision-makers consider it as part of the proportionality analysis.[97] Again, it is a prospective standard, which forms part of the *ex ante* proportionality analysis. However, both API and the Rome Statute are silent on whether an objective or subjective standard is to be applied to assess foreseeability. In one of the few prosecutions for a proportionality violation, the ICTY in the *Galic* case shed some light on this question, stating that: " . . . it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."[98] Robinson and Nohle similarly advocate for a blended subjective/objective approach, using the "reasonable commander" standard (as opposed to "reasonable person," which would be entirely objective), introducing an expectation of a heightened awareness of the potential consequences for the civilian population of an attack based on the individual's knowledge as a military commander.[99] As Adams discusses, when faced with the task of "valuing" civilian harm and comparing this to anticipated military advantage, "commanders are

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[96] Clark suggests that foreseeability is a de minimis requirement, arguing that "at least" the foreseeable long-term effects on civilians must be considered when assessing potential incidental civilian damage. However, experts convened by the ICRC concluded that "[o]nly reverberating incidental harm that is foreseeable by the commander in the circumstances ruling at the time has to be considered" suggesting that foreseeability is a limiting principle rather than a threshold requirement. *See* Clarke, *supra*, note 92, at 114; GISEL, *supra*, note 13, at 46.

[97] CHIARA-GILLARD, *supra* note 56, at 15.

[98] Prosecutor v. Stanislav Galic, Judgement and opinion, Trial Chamber, IT-98-29-T, ¶ 58 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2000).

[99] Robinson & Nohle, *supra*, note 85, at 119.

forced to rely on intuition," making their decisions "vulnerable to heuristics" based on their biases and disposition.[100] This contrasts with Chiara-Gillard's approach, which is based on how foreseeability is conceptualized in other areas of public international law. She argues for an objective standard (based on a "reasonable person") of "reasonable" foreseeability in light of the circumstances at the time of the attack, with different expectations for dynamic targeting as opposed to planned operations.[101] The U.S. Law of War Manual simply states that the analysis of incidental harm "may be subjective and imprecise."[102]

Regardless of whether an objective or subjective approach is taken, the determination of whether incidental harm was foreseeable depends in large part on the information available—or which should have been reasonably available—to the decision-maker at the time of planning or launching an attack.[103] Certain kinds of cumulative harm—such as the complete destruction of a critical network of medical facilities through multiple (lawful) attacks over time—would no doubt be reasonably foreseeable, regardless of which standard is applied. The sources of information that decision-makers can and should draw on when making targeting decisions has profound implications for whether and how the cumulative impacts of conflict on civilians is considered, as discussed in more detail below. For now, it is worth highlighting Robinson and Nohle's position that "contextual factors" should be incorporated into decision-makers' consideration of foreseeable incidental (reverberating) harm. Such factors may include "economic sanctions, blockades, the protracted nature of a conflict or the inability of engineers to repair essential infrastructure due to denial of access."[104] This approach suggests that there is a requirement to develop, maintain, and seek out comprehensive and holistic sources of

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[100] R Scott Adams, *Power and Proportionality: The Role of Empathy and Ethics on Valuing Excessive Harm*, A.F. L. REV. 149, 165 (2019).
[101] CHIARA-GILLARD, *supra* note 56, at 16.
[102] U.S. DEP'T OF DEF., *supra*, note 25, § 5.12.4; *See also* Robinson & Nohle, *supra*, note 85, at 119.
[103] CHIARA-GILLARD, *supra* note 56, at 16.
[104] Robinson & Nohle, *supra*, note 85, at 125.

information to inform targeting decisions that would enable military decision-makers to consider the cumulative impact of conflict over time.

B. The current outer limits of incidental civilian harm

In the absence of more specific guidance, the ICRC, scholars, and commentators have sought to chart out the temporal and geographic limits of the civilian harm that must be considered by decision-makers, within the confines of causation and reasonable foreseeability. These discussions have done a great service to civilians by expanding the scope of what kinds of harm must be considered to include reverberating or "knock on," longer-term, and indirect effects,[105] such as threats to food security, mental harm and trauma, and infrastructure collapse.[106] However, to-date, these discussions have overlooked the cumulative dimension of some of these reverberating and longer-term harms. The other side of this same coin is that cumulative harms that are not reverberating or long-term in nature (such as the total aggregated death toll of a conflict) have been excluded from recent efforts to expand the scope of civilian harm against which the law protects. This section discusses the recent advances in recognizing reverberating and longer-term effects and highlights the gap that remains with respect to cumulative harm.

1. Reverberating and indirect effects

Reverberating and indirect effects refer to the broader spectrum of harms that extend beyond the immediate impact of a single strike or attack; they have ripple effects on critical civilian services, such as healthcare, water and sanitation, electricity, food supplies, education, and communication infrastructure. Some have even argued that it includes wide-ranging impacts on "violence, crime, political infrastructure, housing, environment, public health, water and sanitation infrastructure, power infrastructure, poverty, economy,

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[105] CHIARA-GILLARD, *supra* note 56, at 18-19.

[106] INTERACTION, BUILDING THE EVIDENCE BASE ADDRESSING THE REVERBERATING EFFECTS OF MILITARY OPERATIONS ON CIVILIAN LIFE 2 (2020).

labour and unemployment[,] and education."[107] To take another example, a party to a conflict bombs a power plant, which has the immediate effect of destroying the site; the reverberating effect is that a hospital loses power and water systems fail, leading to disease and increased mortality. This notion of reverberating harm is intimately linked to but distinct from the concept of cumulative civilian harm. Whereas reverberating harm typically refers to harms that occur "downstream" from the original attack or series of attacks, cumulative harm is typically the result of numerous attacks over time that progressively degrade infrastructure, lead to high mortality rates, increase post-traumatic stress disorder, and expose victims and survivors to sexual violence, among other harm. In other words, while reverberating effects may stem from striking a dam (to take one example) cumulative harms arise from multiple attacks over time and the compounding pain and suffering that this causes. The current position of the ICRC and numerous commentators is that decision-makers must take into account "more than the immediate kinetic effects of an attack" as well as how those kinetic effects will "'reverberate' to produce 'knock-on' effects that jeopardize the health and safety of civilians."[108] It remains silent on cumulative civilian harms.

Certain states also support this position. An Australian Defense Force Publication of 2009 on targeting states that sound military planning "considers the risks of unintended second- and third-order consequences . . . ."[109] Such collateral effects are to be "a major, deliberate consideration in planning, executing, and assessing military actions on any scale."[110] As part of a discussion about precautions, Norway's Manual of the Law of Armed Conflict acknowledges that

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[107] Robinson & Nohle, *supra*, note 85, at 130 (footnotes omitted).

[108] Michael Meier, *supra*, note 93. *See also* INT'L COMM. OF THE RED CROSS, 32ND INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT: INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 52-53 (2015); GISEL, *supra*, note 13, at 44; Michael Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L. J. 143, 168 (1999).

[109] AUSTRL. DEP'T OF DEF., AUSTRALIAN DEFENCE DOCTRINE PUBLICATION 3.14 ON TARGETING, ADDP 3.14 § 1.21 (2009).

[110] *Id*.

direct and indirect effects of means and methods that "are known or should have been known" must be considered as part of the assessment of whether an attack is disproportionate.[111] The Manual cites several illustrative examples of indirect effects, such as secondary explosions from an attack on ammunition dumps, longer term effects of specific weapons like unexploded munitions, and the destruction of dual use power plants that could cut energy supplies to hospitals.[112]

The U.K. Joint Service Manual adopts a slightly narrower approach, stating that "the foreseeable effects of the attack" must be considered, and cites the example of burning fuel flowing into a civilian area due to an attack on a fuel depot[113] (however, this contrasts with the expansive interpretation advanced in the U.K. Iraq Inquiry, which concluded in 2017 that assessable incidental civilian harm "also [includes] the indirect costs on civilians arising from worsening social, economic[,] and health conditions").[114] Additionally, the Danish Military Manual states that foreseeable incidental harm includes any damage that "is a consequence of the attack."[115] The Manual inserts the caveat that "there should be more of a direct than merely indirect connection" though it is not necessary for "such damage [to] follow directly from the attack."[116] This position, albeit somewhat opaque, leaves open the possibility of including second- and third-order harms in the proportionality analysis.

Other official sources also support the position that reverberating harms need to be considered. In November 2022, eighty-three states

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[111] NOR. MINISTRY OF DEF. *supra*, note 50, ¶ 7.7.

[112] *Id*.

[113] U.K. 2004 MILITARY MANUAL *supra*, note 13, ¶ 5.33.4. (2004). (Note however, as Cohen and Zlotogorsky point out, "it is unclear whether the example presented, which involves physical damage to civilian objects rather than the long- term repercussions on civilians from the loss of fuel and displacement, can serve as a basis for the broader position posited by the ICRC."). COHEN & ZLOTOGORSKI, *supra*, note 16, at 86.

[114] REPORT OF THE IRAQ INQUIRY § 277-78 (2016), http://www.iraqinquiry.org.uk/the-report/.

[115] DANISH MINISTRY OF DEF., MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS 311 (2020).

[116] *Id*.

signed a political declaration recognizing that military commanders must take into account the reasonably foreseeable reverberating effects of the use of explosive weapons in populated areas, such as disruption to health care and other essential services, among other harms.[117] In the context of cyber operations, the Tallinn Manual states that the assessment of expected civilian harm should include "any indirect effects that should be expected by those individuals planning, approving, or executing a cyber-attack."[118] Outside the context of specific means and methods, NATO's Protection of Civilians Allied Command Operations (ACO) Handbook states that as part of the targeting process, military decision-makers must consider "legal and engineering considerations and take into account second and third order effects that can negatively affect the civilian population for a longer time."[119] The Handbook provides examples of primary, secondary, and tertiary effects such as forced displacement and damage to infrastructure (amongst other secondary effects) and weakened government and judicial services, trauma, and market disruption (amongst other third order effects).[120] Meanwhile, in an open letter to NATO Defense Ministers concerning the 2001 through 2003 conflict in Afghanistan, Human Rights Watch argued that even if certain roads, bridges, and airports were legitimate military targets, if they were "essential to the delivery of humanitarian relief throughout the winter" the consequential harm suffered by the civilian population as a result would need to be factored into the proportionality analysis.[121]

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[117] Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas (Nov. 18, 2022).

[118] TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS r. 113 cmt. 6 (Michael N. Schmitt ed., 2d ed. 2017).

[119] N. ATL. TREATY ORG., PROTECTION OF CIVILIANS ACO MANUAL 24 (2021). *See also id*. at app'x A, 29, 31, 37.

[120] *Id*. at 24.

[121] Kenneth Roth, *International Humanitarian Law Issues and the Afghan Conflict: Open Letter to North Atlantic Treaty Organization (NATO) Defense Ministers (2001)*, *in* HENDERSON, *supra*, note 21, at 208.

Despite the recognition by certain states and other official sources that reverberating harm must be considered, the ICRC has questioned whether decision-makers actually take such harms into account in practice when making targeting decisions or conducting collateral damage assessments.[122] Some commentators and states have gone further to argue that reverberating and/or indirect effects should not be considered—or should only be considered narrowly—as part of the proportionality analysis.[123] Cohen and Zlotogorski argue for a narrow approach: API addresses certain reverberating effects by prohibiting attacks on all sources of food (including those used for military purposes) if it will cause starvation or forced displacement and by protecting "works or installations containing dangerous forces" if attacking them "may cause the release of dangerous forces and consequent severe losses among the civilian population."[124] However, they also argue that these specific examples do not "preclude[] taking into account other foreseeable severe reverberating effects."[125] Even if it were the case that as a practical, normative, or doctrinal matter, states do not consider reverberating effects, it leaves unanswered the question about whether cumulative effects must be considered. While there is certainly some conceptual overlap between reverberating effects and cumulative effects, because both cumulative and reverberating effects tend to be felt over a long time span, they are nevertheless distinct concepts. Current understandings of reverberating effects typically trace them back to a distinct attack, whereas cumulative harms are the consequence of multiple (potentially lawful) strikes acting in concert

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[122] INT'L COMM. OF THE RED CROSS, 32ND INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT: INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 53 (2015); *See also* Michael Schmitt, *'The Principle of Discrimination in 21st Century Warfare'* (1999) 2 YALE HUM. RTS. & DEV. L. J. 143, 168 (According to Schmitt, while "reverberating effects were theoretically always calculated when assessing proportionality," it is only being acknowledged now that states have "the means . . . to limit dramatically direct collateral damage and incidental injury.)

[123] *But see* COHEN & ZLOTOGORSKI, *supra*, note 16, at 86; HENDERSON, *supra*, note 21, at 208-09.

[124] COHEN & ZLOTOGORSKI, *supra*, note 16, at 85.

[125] *Id*.

over time. In either case (i.e., whether or not reverberating and indirect effects are considered), there is a legal lacuna surrounding cumulative impacts.

2. *Longer-term effects*

Longer-term effects partially overlap conceptually with reverberating effects and are often discussed as one concept. Nevertheless, while some longer-term effects are also reverberating in nature, they are nevertheless distinct concepts. Longer-term harms emerge well after the attack itself. Examples of longer-term effects of protracted conflict include the destruction of essential civilian infrastructure, collapsed healthcare systems, prolonged internal displacement and emigration, environmental damage, socio-economic decline, psychosocial harm and intergenerational trauma, and cycles of poverty and instability. Thus, while reverberating effects tend to be traced back to discrete attacks, longer-term effects by definition, emerge gradually over time. In this regard, they are conceptually more similar to cumulative harms than reverberating effects. However, cumulative harms too are distinct from longer-term harms: cumulative harms may be felt over a relatively short time span. For example, forty lawful attacks over the course of a few days, each of which kills twenty civilians, will lead to eight hundred deaths in total; a number which may be considered to be disproportionate by the ordinary person.

It is nevertheless worth considering ongoing discussions regarding the inclusion of longer-term effects. Some commentators argue that longer-term effects of attacks need not be considered as part of the proportionality analysis. In 2002, Greenwood argued that Article 51(5)(b) does not cover long-term effects in the context of explosive remnants of war, especially once the war has ended on the basis that they are "too remote to be capable of assessment."[126] According to Greenwood, only effects "during the attack and in the hours immediately after the attack" from explosive remnants of war should

[126] Christopher Greenwood, *Legal Issues Regarding Explosive Remnants of War*, CCW/GGE/I/WP.10, ¶ 23 (May 22, 2002).

be considered.[127] However, a number of States and commentators have argued in favor of considering longer-term effects. In 1996, Amended Protocol II to the Convention on Certain Conventional Weapons (CCW) asserted that decision-makers must consider "the short- and long-term effects of mines on the civilian population" as part of the requirement to take all feasible precautions to protect civilians.[128] Several States at the CCW endorsed the view that the long-term effects of explosive remnants of war should be considered.[129] More broadly, the Committee Established to Review the NATO Bombing Campaign concluded that there is a "need to avoid excessive long-term damage to the economic infrastructure and natural environment" that adversely affects the civilian population.[130]

Indeed, many have argued that foreseeability should be unlimited temporally, given there are no treaty-based limits on assessable incidental harm.[131] The U.K. Joint Services Manual on the Law of Armed Conflict simply states that "foreseeable effects of the attack" must be considered and goes on to cite the example of a longer-term harm: "a precision bombing attack of a military fuel storage depot" that carries with it a "foreseeable risk of the burning fuel flowing into a civilian residential area and causing [excessive] injury to the civilian population."[132] (The Manual characterizes this example as a violation of the principle of distinction but implicitly connects it with proportionality by stating that the foreseeable harm is to be balanced

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[127] Robinson & Nohle, *supra*, note 85, at 126 (citing *id*.).

[128] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (as amended 3 May 1996) art. 3(10)(a), May 3, 1996, 2048 U.N.T.S. 93; *See also* Jason D. Wright, *'Excessive' Ambiguity: Analysing and Refining the Proportionality Standard*, 94 INT'L REV. OF THE RED CROSS 819, 836 (2012).

[129] Robinson & Nohle, *supra*, note 85, at 126-27 (citing Brazil, Czech Republic, Norway, Sweden, Switzerland, and Ireland. They also reference Austria and New Zealand).

[130] *Id*. at 126-27 (footnotes omitted).

[131] CHIARA-GILLARD, *supra* note 56, at 18. *See also* GISEL, *supra*, note 13, at 44 (citing R. Geiss, *The Conduct of Hostilities in Asymmetric Conflicts*, 23 J. OF INT'L L. OF PEACE & ARMED CONFLICTS 122, 128 (2010)).

[132] U.K. 2004 MILITARY MANUAL, *supra*, note 13, ¶ 5.33.4.

against the anticipated military advantage.[133]) Meanwhile, Switzerland, Austria, and Norway take a more direct approach, stating that "foreseeable incidental long-term effects of an attack" must be considered as part of the proportionality assessment when considering means and methods of warfare.[134] Other commentators have argued that an open-ended foreseeability standard would be difficult for military decision-makers to implement in practice, and that longer-term effects should not be included.[135]

C. Cumulative civilian harm

As discussed throughout this paper, the concept of cumulative civilian harm refers to the aggregate or composite harm that accrues throughout time and space over the course of a conflict. Such harm includes but is not limited to deaths, injuries, and damage to civilian property; it also encompasses mental harm, economic decline, infrastructure collapse, and harm to the civilian environment writ large. It includes the climbing aggregate death toll from multiple strikes that may individually be lawful but which together produce a cumulative effect that is considered to be intolerably high. Other cumulative effects include the progressive or gradual total destruction or degradation of critical civilian infrastructure such as roads, bridges, and electricity sources, the gradual destruction of all health care services, desalination and sewerage systems, and other essential services when dual use objects are progressively targeted until they are completely eliminated, the severe negative impact on mental health and psychological well-being on civilians of repeated, long-term, and protracted exposure to conflict. According to Ní Aoláin, these "collective, and layered harms" are not protected under current "siloed" understandings of

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[133] *Id*.

[134] Switzerland, CCW/GGE/XI/WG.1/WP.13, ¶ 15 (Aug. 3, 2005). *See also* Austria, CCW/GGE/XI/WG.1/WP.14, ¶ 9 (Aug. 4, 2005); Norway, CCW/GGE/XI/WG.1/WP.5, ¶ 19 (July 29, 2005); Int'l Comm. of the Red Cross, CCW/GGE/XI/WG.1/WP.7, ¶ 21 (28 July 2005).

[135] Greenwood, *supra*, note 127, ¶ 23 (May 22, 2002). *See* Robinson & Nohle, *supra*, note 85, at 126.

international criminal and humanitarian law "that categorize[] civilian targeting and harm as a series of singular unconnected violences."[136]

This interpretation—that IHL proportionality allows military commanders to consider the overall impact of a military campaign but does not require them to consider the aggregate impact on civilians—results in a profound imbalance that does not reflect the purpose or spirit of the law. As Chiara-Gillard correctly asserts, the same "frame of reference" must be applied to both sides of the proportionality equation: military advantage and civilian harm.[137] Similarly, as part of a discussion about the requirement to consider longer-term impacts on civilian populations, Geiss argues that both sides of the proportionality equation—military advantage and civilian harm—must be weighted similarly.[138] As Clarke explains, a "similarly broad approach" should be applied to civilian harm as it is applied to military advantage. There is support for this position in state practice. For example, the U.S. Army Judge Advocate General's Corps Operational Law Handbook states that "balancing between incidental damage to civilian objects and incidental civilian casualties may be done on a target-by-target basis, but also may be done in an overall sense against campaign objectives."[139] This leaves open the possibility that civilian harm must be considered cumulatively, "in an overall sense." Similarly, the Committee Established to Review the NATO Bombing Campaign recognized the need to conduct "an overall assessment of the totality of civilian victims as against the goals of the military campaign."[140] Amongst the possible interpretations of this statement, "the most

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[136] Fionnuala Ní Aoláin, *Cumulative Civilian Harm in Gaza: A Gendered View*, JUST SEC. (Jun. 25, 2025), https://www.justsecurity.org/115407/cumulative-civilian-harm-gaza-gendered-view/.

[137] CHIARA-GILLARD, *supra* note 56, at 10.

[138] Geiss, *supra*, note 132, at 130.

[139] OFF. OF THE JAG, U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS OPERATIONAL LAW HANDBOOK 60 (2022).

[140] INT'L CRIM. TRIB. YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶ 52 (2000), http:// www.icty.org/ en/ press/ final- report- prosecutor- committee- established- review- nato- bombing- campaign-against-federal.

obvious" according to Cohen and Zlotogorski, is that civilian damage should be assessed in light of the overall operation, as in the case of military advantage.[141] However, Cohen and Zlotogorski argue that this expansive interpretation of civilian harm is not required under current interpretations of *jus in bello* proportionality.[142] They state that *jus ad bellum* proportionality may impose such a standard and query whether this was what the Committee actually meant.[143]

While Cohen and Zlotogorski are correct in asserting that it may be possible to formulate *jus ad bellum* proportionality in such a way that encompasses cumulative harm, the contention advanced herein is that objectively foreseeable cumulative civilian harm should also be considered as part of the IHL proportionality analysis. This makes the sources of information available to and sought out by operational and strategic level decision-makers critical. So what is objectively foreseeable cumulative harm? And how does the requirement to consider it map onto decision-making in both dynamic targeting and planned operations? Some twenty years ago, experts at a convening hosted by the Geneva Academy noted that war-fighters typically lack training to assess effects such as the public health risks posed by an attack and queried whether an individual with medical or public health expertise needed to be included in the mission planning cell.[144] Meanwhile, Lubell and Cohen concede that reasonably foreseeable reverberating and longer-term harms are increasingly recognized as part of the proportionality equation, "but at present time, armed forces lack the tools to measure these harms in a way that lends itself to the calculations made during attack planning and proportionality assessments."[145]

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[141] COHEN & ZLOTOGORSKI, *supra*, note 16, at 69-70.
[142] *Id*. at 70.
[143] *Id*.
[144] Clarke, *supra*, note 92 (citing UNIV. CTR. FOR INT'L HUM. L., TARGETING MILITARY OBJECTIVES 15 (2005).
[145] Noam Lubell & Amichai Cohen, *Strategic Proportionality*, 96 INT'L L. STUD. 106 (2020).

A rapidly developing information and technological environment has changed this calculus for many military decision-makers. Signals intelligence, geospatial and infrastructure mapping tools, open-source intelligence (OSINT), drone footage, and artificial intelligence (AI) software, have considerably changed this information landscape for military decision-makers, enabling them to better model potential scenarios and predict civilian harm. These technological advances expand the scope of what is reasonably foreseeable in numerous ways, including by allowing parties to armed conflicts to more accurately predict and assess the presence of civilians and their movements, and the humanitarian or indirect impact of attacks. For example, Project Maven is a data fusion initiative used by the U.S. Department of War (DoW) that draws on AI to continuously analyze geospatial signals and other intelligence with the goal of giving Combatant Commands situational awareness in real time. It identifies potential military targets and performs other tasks like transmitting human decisions to weapons systems. It can be used to speed up the decision-making cycle while also improving accuracy in distinguishing between protected civilian objects and military targets, especially in a dynamic environment that shifts in light of movements of civilian populations (these capabilities sit alongside DoW doctrine, which requires legal advisors to "highlight[] potential associated issues, such as harmful environmental impacts or other consequences, that should be considered in the targeting process").[146] However, even in the absence of sophisticated information technology, there are other avenues for foreseeing cumulative civilian harm. As Robinson and Nohle argue, in relation to "repeated or cumulative attacks," what is reasonably foreseeable is influenced by what is known (or what should have been known) in light of the impact of prior attacks that has already been observed.[147]

Nevertheless, the current information and technology landscape coupled with the expansive notion of military advantage opens the door for an extant requirement to consider cumulative civilian harm as

[146] Adams, *supra*, note 101, n. 211.
[147] Robinson & Nohle, *supra*, note 85, at 124-25 (footnotes omitted).

part of the *ex ante* proportionality analysis when conducting a campaign and the individual strikes that comprise such a campaign. There are countless real-world examples of reasonably foreseeable cumulative civilian harms. During the conflict in the former Yugoslavia, civilians in Sarajevo developed severe post-traumatic stress disorder, anxiety, and long-term mental health issues—a reasonably foreseeable consequence of prolonged exposure to violence in populated areas. In the current conflict in Gaza, repeated airstrikes on densely populated urban areas have caused mass displacement, homelessness, and infrastructure collapse, leading to cyclical displacement, trauma, and loss of educational and job opportunities. Naval blockades in Yemen have prevented the flow of food, medicine, and fuel over the long-term resulting in disease and death amongst the civilian population. As discussed throughout this section and in light of the proceeding section, there is a basis under existing IHL to require military decision-makers to consider objectively foreseeable cumulative harm, such as the harms mentioned above, as part of the proportionality analysis.

D. Other legal avenues for considering cumulative civilian harm

An expanded view of IHL proportionality, which encompasses both cumulative military advantages and civilian harm is one avenue that should provide increased protection of civilians in conflict. However, there are other legal avenues that merit discussion. As mentioned above, in the ICTY case against *Krupescic*, the Tribunal acknowledged that the Martens Clause could cover situations involving cumulative civilian harm that were not adequately covered elsewhere. Of course, this decision has been met with some skepticism, with the Committee Established to Review the NATO Bombing Campaign going so far as to describe this as a progressive statement of the law.[148] Whether, how, and to what extent the Martens Clause can protect from cumulative civilian harm is a question that merits its own investigation due to the indeterminacy of this concept.

[148] *See* Kupreškić, IT-95-16-T.

Others have advanced alternative arguments. For example, Lubell and Cohen advance the *lex feranda* concept of "strategic proportionality," which would require an ongoing and continuous assessment at the campaign or strategic level of whether the overall harm caused by a conflict remains justified in relation to the strategic objectives pursued.[149] Referencing the ICJ's decision in the Nuclear Weapons Case, the authors identify "another level of proportionality regulation which must be applied throughout the conflict" that falls outside the scope of the *jus ad bellum* and IHL.[150] They argue that strategic proportionality could step into this void to protect civilians against the cumulative or overall impact of conflict.[151] Lubell and Cohen concede that this approach would effectively widen both sides of the proportionality analysis; though they are quick to confirm that it would not detract from or weaken existing IHL standards.[152] Cohen and Lubell note that the notion of strategic proportionality does not blend IHL and *jus ad bellum* proportionality. Yet there is concern that bad actors could use the "justness of the overall cause" to excuse greater harm to noncombatants and civilians.

In 1992, Hampson advanced another potential approach to the cumulative civilian harm problem.[153] By way of background, Hampson was speaking in response to concerns raised about the lawfulness of the conduct of coalition forces in the Gulf War; concerns which related to the conflict's duration and geographic scope, the number of civilian casualties, and the occurrence of unnecessary military casualties.[154] As she noted, critics of the coalition's campaign pointed to proportionality and necessity violations. Hampson argues that in reality, many of these criticisms were not truly due to violations of "proportionality" as such (insofar as proportionality is fundamentally a balancing exercise);

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[149] Lubell & Cohen, *supra*, note, 145, at 176.
[150] *Id*.
[151] *Id*. at 181-82.
[152] *Id*. at 194.
[153] Francoise Hampson, *Proportionality and Necessity in the Gulf Conflict*, 86 PROCEEDINGS OF THE ASIL ANN. MEETING 45, 51 (1992),
[154] *Id*.

instead, she argued that they concerned whether the targets selected (like bridges and electricity-generating plants) could lawfully be characterized as military objectives, a question which "does not require a balance to be struck."[155] She correctly notes that the question of whether a target is a military objective needs to be examined individually, on a case-by-case and ongoing basis.[156] However, she concludes that this approach effectively leaves out "the cumulative effects on a particular type of target or the long-term effects on the civilian population" from the proportionality equation. She states that considering cumulative effects "involves balancing competing considerations; it is not of a threshold type."[157]

IV. Conclusion

With protracted conflicts proliferating around the globe and civilians left with few avenues for remedy, repair, and healing, it has become ever more important to explore creative ways for recognizing, limiting, and providing redress for the "composite" harm that accumulates over time as conflicts continue. This harm includes the potential for an intolerably high death toll, but also includes societal and individual trauma, progressive collapse of infrastructure, and harm to the civilian environment writ large, among other harms identified in this paper. While civilian harm is not currently typically assessed or considered cumulatively by those conducting proportionality analyses, this chapter illustrates that there is an imbalance between military advantage—which is assessed cumulatively—and incidental civilian harm. This imbalance leads to a lack of internal cohesion within IHL wherein concepts are not afforded the same weight and a loss of the protective function of IHL through the inadequate protection of civilians. Alongside this, avenues for social oversight for proportionality violations are fragmented and incomplete. This chapter

[155] *Id*. at 49.
[156] *Id*.
[157] Hampson, *supra*, note 153, at 47.

aims to fill a legal void wherein civilians are unprotected from the cumulative impact of conflict over time.

Chapter 10. The Prospects for Prosecution: A Reply to "Limiting the Cumulative Impact of Conflict on Civilians through IHL Proportionality"

Stephen Rapp[1]

I. Introduction

Protracted conflict inflicts horrific violence, trauma, loss, and grief on civilians. International Humanitarian Law (IHL) proportionality offers one of the key protections for civilians by requiring those making decisions in wartime to anticipate and mitigate against incidental civilian harm that would be excessive in relation to the anticipated military advantage. While Sarah McIntosh's detailed discussion of IHL proportionality in the last chapter is helpful in defining the content, meaning, and protective function of the various provisions that uphold proportionality, there is an additional body of law—International Criminal Law (ICL)—that overlays IHL and which I will show can

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provide additional protections from cumulative harm to civilians in conflict.

In her discussion of proportionality, McIntosh has primarily focused on IHL principles. She highlighted two interrelated issues:

1. Military advantage is often considered in light of an attack's contribution to the overall war strategy and/or its relation to an offensive or a series of connected attacks;
2. Civilian harm is usually assessed on a case-by-case basis, rather than considering the impact of conflict on civilians as it extends in time and space.

This reply aims to bring these threads together through the lens of ICL. It demonstrates how justice and accountability measures can be used to increase compliance with IHL and to ensure victims, survivors, and other civilians who have lived through protracted conflict can seek repair, reconstruction, and healing. This Reply focuses primarily on criminal mechanisms for justice and accountability (while also recognizing the importance and value of non-criminal justice mechanisms) and additionally focuses on criminally excessive harm (i.e., grave breaches and other war crimes).

II. Benefits of prosecution (as one justice modality among many others)

Research suggests that effective, impartial, efficient, and victim/survivor-centered prosecutions for serious violations of IHL can help to promote deterrence and prevention. However, international courts have focused almost all of their war crimes prosecutions on violations where civilians were attacked 'up close,' directly, and intentionally. As will be discussed below, there have been convictions for bombardments where civilians or civilian objects were harmed, but the only conviction based on proportionality was narrowly reversed on appeal.

Nonetheless, the ICRC acknowledges many potential benefits of prosecuting war crimes in its casebook, including prevention, deterrence, and promoting the legitimacy of IHL. The casebook goes on to say that prosecuting violations of IHL:

> . . . would also have a stigmatizing effect, and would individualize guilt and repression, thus avoiding the vicious circle of collective responsibility and of atrocities and counter-atrocities against innocent people.[2]

However, prosecutions for all atrocities are relatively rare both at the international and national levels. Writing in 1996, the late Cherif Bassiouni surveyed 250 internal and non-international armed conflicts and tyrannical regimes, finding significant *jus cogens* violations, and found only a handful where there was any judicial accountability.[3] Some twenty years later, Bassiouni noted that prosecutions increased after the end of the Cold War, with the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and five additional hybrid tribunals.[4]

With their closure, the ICC has become almost the only remaining avenue available for prosecutions at the international level.[5] Meanwhile at the national level, there have been historic universal jurisdiction convictions (discussed below), but their numbers have not been large. Nevertheless, multiple conflicts have produced immense civilian suffering, leading millions of individuals to flee their homes, both internally and across international borders. The U.N. High Commission on Refugees reported that in 2011 there were forty million refugees or internally displaced people (IDPs), and that by 2025, the number had

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[2] MARCO SASSÒLI ET AL., HOW DOES LAW PROTECT IN WAR? (2014), https://casebook.icrc.org/law/criminal-repression.

[3] CHERIFF BASSIOUNI, SEARCHING FOR PEACE AND ACHIEVING JUSTICE: THE NEED FOR ACCOUNTABILITY, LAW AND CONTEMPORARY PROBLEMS ¶ 59(4) (1996).

[4] CHERIF BASSIOUNI, GLOBALIZATION AND ITS IMPACT ON THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 62 (2015).

[5] *Id*.

increased to 123 million, with conflict-afflicted countries the overwhelming source of the displaced.[6]

In addition to the policy advantages of pursuing prosecutions for war crimes (e.g., deterrence, prevention, reducing forced displacement and other sources of societal trauma, and promoting justice, healing, and accountability), there are additional potential legal advantages to pursuing such cases: the judicial process can illuminate and define the law in areas where it once was unclear or disputed. Given the aggressiveness of international prosecutors, this has at times led to expansive definitions of international crimes, which have been accepted by international judges and made available for authoritative citation at the national level.

Moreover, there is a "bottom-up" demand for accountability from victims and survivors who have been aided by civil society organizations, public interest lawyers, and third country prosecutors and magistrates in taking advantage of open source material, new technical tools to analyze large datasets, and international precedents to build new pathways to justice.[7] These bottom-up processes are not dependent on great power consent, as was the case with the Nuremberg and Tokyo tribunals or those established for the former Yugoslavia and Rwanda by the U.N. Security Council.

III. The legal requirement to prosecute grave breaches and other war crimes

The task of legal advisers to military operations includes what the ICRC describes as the "fundamental work of endeavoring to prevent violations and protect the victims by means other than criminal law."[8] However, some states (like the United States) purport to go beyond

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[6] U.N. REFUGEE AGENCY, FIGURES AT A GLANCE, https://www.unhcr.org/us/about-unhcr/overview/figures-glan

[7] MELINDA RANKIN, DE FACTO INTERNATIONAL PROSECUTORS IN A GLOBAL ERA: WITH MY OWN EYES (2022), https://www.unhcr.org/us/about-unhcr/overview/figures-glan (last visited May 5, 2026).

[8] MARCO SASSÒLI ET AL., *supra*, note 2.

what is required by international humanitarian and criminal law, as a matter of "policy." In this regard, the "profession of arms" often requires adherence to standards that *exceed* what is necessary to avoid prosecution.

However, the most vital work of any lawyer who advises a client before action is to protect the client from trouble by warning if there is the possibility of criminal prosecution. This is particularly important where the contemplated act could constitute a "grave breach" which the Geneva Conventions require states to criminalize in their domestic law. Additionally, the Geneva Conventions also place states

> . . . under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts . . . [or] hand such persons over for trial to another High Contracting Party concerned . . .[9]

Grave breaches are defined in the following treaties:

- Article 50 of the First Geneva Convention,
- Article 51 of the Second Geneva Convention,
- Article 130 of the Third Geneva Convention, and
- Article 147 of the Fourth Geneva Convention.[10]

Significantly, for purposes of this chapter, Article 85(3)(b) of Additional Protocol I to the Geneva Conventions also makes violations of proportionality rules a "grave breach" in international armed conflicts.[11] This includes violations of the proportionality principle as defined in Part I.

Additional Protocol I (API) has been recognized as customary international law (CIL), and while nonparties to the Protocol may not

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[9] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

[10] *Id*.

[11] As noted above, the ICRC has stated that the provision of API related to proportionality violations is a crime under customary international law and therefore also applies in non-international armed conflicts.

be bound to criminalize and prosecute API grave breaches, the recognition of the Protocol as CIL would support their elective exercise of universal jurisdiction.

As will be described below, many States have criminalized grave breaches with most going beyond the listing in the Geneva Conventions and API, to include other acts as war crimes, either by enacting the Rome Statute's definition of core international crimes including war crimes, passing Geneva Convention implementing legislation, or adopting general references to the laws of war that their courts can interpret.

IV. The prohibition against ex post facto laws

When the *ad hoc* international tribunals and special courts were established after the end of the Cold War, their statutes were generally adopted after many, if not all of the crimes, were committed in the specific country situations where they were given jurisdiction. To avoid the objection that this violated the principle of *nullum crimen sine lege*, or the prohibition against *ex post facto* laws, the statutes were crafted to reflect relevant international criminal law as it existed at the time the alleged crimes were committed. When determining what international criminal law was in effect, the U.N. tribunals and courts invariably turned to the list of sources of law set out in Article 38 of the Statute of the International Court of Justice, specifically:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various

nations, as subsidiary means for the determination of rules of law.[12]

When the Yugoslavia tribunal was created in 1993, the Security Council provided a statute that allowed for prosecution of grave breaches of the Geneva Conventions of 1949 and more generally for violation of the "laws and customs of war" with a non-exclusive list of the types of conduct that would qualify.[13] In the following year the Security Council established the Rwanda tribunal in response to what appeared to be genocide, while it also recognized that this had occurred within a non-international armed conflict (NIAC), so it also provided for the prosecution of relevant war crimes.[14] The ICTR statute thus provides for prosecution of serious violations of the Common Article 3 of the Geneva Conventions of 1949, and Additional Protocol II of 1977, as these are provisions that relate to NIACs.[15] There was also a non-exclusive list of types of conduct that would qualify, with two provisions drawn in their original form from Common Article 3 of the Geneva Conventions, and six more that were either modified or added by Article 4 of Additional Protocol II (APII).

When the Special Court for Sierra Leone (SCSL) was created by agreement between the United Nations and government of Sierra Leone in 2002, it was done to achieve justice in a NIAC, and so the same provisions on war crimes were adopted as appeared in the Statute of the Rwanda Tribunal. But there were also additional violations of IHL included in a separate article, for attacks on peacekeepers and the conscription or enlistment of children under the age of fifteen into armed forces or for active participation in hostilities.

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[12] Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, 3 Bevans 1179.

[13] U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 art. 3,* (1993), U.N. Doc. S/25704 (May 3, 1993), *adopted by* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

[14] Statute of the International Criminal Tribunal for Rwanda art. 2, 4, *adopted by* S.C. Res. 955 (Nov. 8, 1994), *as amended by* S.C. Res. 1165 (Apr. 30, 1998).

[15] *Id*. art. 4.

However, as noted earlier, it remained necessary for the judges to determine whether the statutory language reflected ICL as it existed when the crime occurred. The child soldier issue was particularly challenging, with a dispute as to whether the voluntary enlistment prohibition had "crystalized" in international custom when the SCSL's temporal jurisdiction began in November 1996, with the Appeals Chamber only allowing the prosecution on a divided vote.[16]

V. The introduction and role of the ICC

Some of these concerns have been partially alleviated by the creation of the ICC: a world court established as a forum of last resort to prosecute individuals for violations of international criminal law. When the Statute of the ICC was drafted in Rome in 1998, the intention was to make it specific and wholly prospective, with jurisdiction applying only after its coming into force. The war crimes prohibitions set forth in Article 8 were very specific, without "not limited to" language. It included four sections, the first two for IACs, led by grave breaches from the Geneva Conventions (in 8(2)(a)), supplemented by 26 other violations coming from API and customary law (in 8(2)(b)), and the last two for NIACs, led by violations of Common Article 3 (in 8(2)(c)), and followed by fifteen others drawn from APII and customary law (in 8(2)(e)).[17]

The proportionality provision of the Rome Statute is the second section in Article 8(2)(b), and as discussed earlier uses different language than that in Article 53 of API. There is no proportionality provision relative to NIACs in Article 8. This is a significant omission, given that the ICRC has concluded that "State practice establishes this rule as a norm of customary international law applicable in both

[16] Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶¶ 17–24 (SCSL App. Ch. May 31, 2004).

[17] Rome Statute of the International Criminal Court art. 8(2)(a)–(e), opened for signature July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

international and non-international armed conflicts."[18] This was particularly important when the ICC Prosecutor considered allegations of war crimes committed during what she classified as a NIAC in Afghanistan, an ICC state party. As her preliminary examination reports revealed, she was limited to intentional attacks on protected persons, and because she found insufficient proof of such acts by U.S. and allied forces in their 'conduct of hostilities,' she pursued only an investigation of U.S. and allied forces as it related to their alleged acts of torture or other violations of detainees under Article 8(2)(e).[19]

By contrast, the ICC Prosecutors' actions and related judicial rulings as to Israeli acts in Gaza and the West Bank are based on there being a 'State of Palestine' in the territory defined by pre-1967 borders (that became an ICC state party on January 2, 2015) and thus the Rome Statute provisions relative to IACs apply.

VI. Complementarity and domestic prosecutions under universal jurisdiction

In addition to the ICC, domestic fora can provide a pathway to prosecution for war crimes, including violations of proportionality. The ad hoc tribunals (which have now closed except for residual functions) had primary jurisdiction in their country situations, while the ICC operates under the principle of "complementarity" with preference given to genuine investigations and prosecutions at the national level.

As such the most significant arena for war crimes cases is now at the national level. This is possible because most states have incorporated war crimes within their national statutes. The database of Justice Beyond Borders,[20] identifies 154 States that have domesticated war

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[18] INT'L COMM. OF THE RED CROSS, CUSTOMARY IHL r. 14.

[19] PROSECUTOR'S REPORT OF PRELIMINARY EXAMINATIONS ¶¶ 240, 243 (2017), https://www.icc-cpi.int/sites/default/files/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Afghanistan_ENG.pdf.

[20] INTERJUST, PROJECT MERIDIAN: A GLOBAL MAPPING TOOL, https://projectmeridian.org/ (last visited May 5, 2026); https://projectmeridian.org/ (Note, Justice

crimes, and includes translations of all of the relevant statutory provisions. Some fifty-seven States have specifically enacted legislation implementing the Rome Statute, providing for the prosecution of Article 8(2)(b)(iv) as to disproportionate attacks in IACs, though some of these States also have legislation that also allows prosecutions under the Geneva Convention, Additional Protocols, or customary international law.[21] For the ninety-seven States that have not passed implementing legislation for the Rome Statute, the most common practice has been to adopt general language that imports international law by reference to "the laws and customs of war," though sometimes together with an exclusive or non-exclusive list of violations.[22]

The statutes with broad references, and non-exclusive listings, would allow for the enforcement of API, Article 57(2)(a)(3), as well as the application of proportionality rules to NIACs. However, there are some older statutes that limit the reference to "grave breaches" and/or to the provisions of the Geneva Conventions of 1949, which would seem to limit prosecutions unless the attacks could be shown to have been "not justified by military necessity" and "carried out unlawfully and wantonly."

The United States, in its war crimes statute, follows the practice of both broad general references to the provisions of international treaties, and of providing specific definitions for some of the crimes. Interestingly, the United States appears to be the only State that excludes the applicability of war crimes law with respect to "(A) collateral damage; or (B) death, damage, or injury incident to a lawful attack."[23]

Of course, for professional militaries that follow targeting advice provided by legal advisers based on good faith interpretations of the laws of war, the possibility of prosecutions in their own countries for

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Beyond Borders was a project of the Clooney Foundation for Justice but its continued development has been assumed by InterJust as the Meridian Project.).

[21] *Id*.

[22] *Id*.

[23] 18 U.S.C. § 2441(d)(3) (2024).

attacks that result in so-called "collateral damage" is not the concern. Instead, it is the prospect of arrest when visiting another country, even an allied one. The threshold question is how many countries have laws that would allow such extraterritorial prosecutions.

On this question, the Justice Beyond Borders (JBB) database is also helpful. It shows that nineteen States have adopted some form of universal jurisdiction for genocide, crimes against humanity, and war crimes, though most of these statutes require some sort of "national interests" determination at a senior level. Eighty-nine other countries recognize universal jurisdiction over "grave breaches" consistent with the Geneva Conventions but require that the alleged perpetrator be present on the territory. Thirty-seven others provide for jurisdiction over war crimes more generally but require presence on the territory for any prosecution. There are also laws in most of these countries (and a few others) that allow for prosecution of persons, wherever they are located, who are alleged to have committed war crimes against a State's citizens (including dual nationals) on the basis of the 'passive personality' principle.

The tools are there to prosecute perpetrators of proportionality violations, among other crimes. The question is whether they are useful, and whether as a practical matter they will be used.

VII. A path towards prosecution

As stated above, there are several conceptual and legal hurdles that make it difficult to prosecute violations of proportionality—no matter how it is defined and understood. These challenges include the indeterminacy of the concept (e.g., the requirement to weigh two incommensurable concepts, which themselves are poorly defined and subject to considerable debate) coupled with the requirement that it is an *ex ante* obligation. Some harms, especially cumulative harms, may not easily be foreseen at the time of the attacks. Indeed, Janina Dill has argued that proportionality is too indeterminate a concept so as to be justiciable. Bearing these challenges in mind, this section discusses how

courts at both the international and national level have confronted similar legal issues.

A. At the International Level

The prosecutions at the post-Cold War international courts and tribunals have been characterized by an expansive use of their statutes to reach the full range of what appeared to be wrongful conduct. For instance, the co-author of this article, as the senior trial attorney leading the prosecution in the *Media trial* at the ICTR, successfully sought to expand the application of the Crime Against Humanity-Persecution to cover 'hate speech' that instigated actions against members of a protected group. This expansion allowed for accountability where the group was a political one not protected by the Genocide Convention, or where one could not prove intent to cause substantial physical destruction of a protected group as required for genocide.[24]

Later as the Prosecutor of the SCSL, his teams were successful in achieving convictions for "forced marriage" as a Crime Against Humanity-Other Inhumane Act, because it involved great suffering that was not fully recognized in other charges for rape and sexual slavery as crimes against humanity and war crimes.[25] This is relevant to war crimes because the expansive definition of 'inhumane acts' has opened the way for the ICC to charge crimes against humanity as an additional charge to war crimes when there is great civilian suffering.

[24] Prosecutor v. Nahimana et al., Judgement and Sentence, No. 99.52-T ¶¶ 1072-73 (Int'l Crim. Trib. for Rwanda Dec. 3, 2003).
[25] Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶¶ 190–202 (SCSL App. Ch. Feb. 22, 2008).

Such charges have been included in both the Gaza[26] and Ukraine[27] arrest warrants.

Most of the prosecutions at the post-Cold War international criminal tribunals have not involved the operations of professional militaries. To the extent that war crimes have been charged, the focus has been on acts where the evidence was strong that civilian populations or other protected persons were the intended target. Those convicted have generally been the leaders of non-state groups or irregular forces. To the extent that the officers of regular militaries, or their civilian superiors, were charged it was most often for exercising effective control or providing essential support to irregular forces.

The Yugoslavia tribunal prosecuted comparatively more military officers, many of whom had formerly served in a professional national army (JNA) when Yugoslavia was a federal state. Given the declarations of independence by Yugoslavia's former provinces, and the resulting war between them, the ICTY judges found that it was an international armed conflict (IAC), subject to the broader range of rules that apply to such conflicts. However, as so much of the conflict involved efforts to create and expand homogeneous ethnic areas, through acts of so-called 'ethnic cleansing,' it was often not difficult to find that the targeting of civilians was intentional.

However, there were cases where the harm to protected persons and property was great, but intention as to individual shots or bombardments was not so clear. The siege of Sarajevo lasted thirty-nine months, with Bosnia Serb forces firing from the hills and the Bosnian Muslim population suffering below. Proving responsibility and

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[26] Press Release, Int'l Crim. Ct., Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant (Nov. 21, 2024), https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges.

[27] Press Release, Int'l Crim. Ct., Situation in Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov (Mar. 5, 2024), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and.

intention for each shot was challenging, and the effect of each individual attack paled in significance compared to the effect on the civilian population of being under constant threat for more than three years. In its decision in the case of Bosnian commander during the Sarajevo siege, General Galic, the ICTY Appeals Chamber chose to characterize the cumulative attacks as "terrorization" of a civilian population, finding that the prohibition on "acts of terrorism" in Article 4(2)(d) of APII, explicitly applicable only to NIACs, also applied to IACs under customary international law.[28]The Appeals Chamber increased Galic's penalty from fifteen years to a life sentence—one of only two life sentences at the ICTY (the other for General Radko Mladic, who was found to be directly responsible for the genocide at Srebrenica).[29]

As noted by McIntosh, in the *Kupreskic* case, the ICTY turned to the *Martens clause* of the Hague Convention of 1899, and its recognition of the 'principle of humanity' to find that multiple legally questionable attacks may accumulate such civilian harm as to render the attacks illegal. In Strugar, faced with the attacks on Dubrovnik that caused relatively little civilian death but that threatened great harm to a well-preserved internationally recognized historic city, the ICTY Trial Chamber found the attacks illegal and sentenced Strugar to eight years, which conviction was upheld while the sentence was reduced to 7.5 years on appeal.[30]

The prosecution of the Croat General, Ante Gotovina, for bombardment of Serb neighborhoods in Knin, Croatia, presented the ICTY judges with one of their most challenging cases. The bombardments were part of Operation Storm (or *Oluja*), backed by the United States, which was a military campaign that successfully pushed Serb forces out of Croatia, and precipitated their further retreat in Bosnia, creating the conditions that allowed for the negotiation of the Dayton Peace Agreement that ended the war. In Knin, the

[28] Prosecutor v. Galic, IT-98-29-A, Appeals Judgement, ¶ 98 (Nov. 30, 2006).
[29] *Id*. ¶ 185.
[30] Prosecutor v. Strugar, Case No. IT-01-42-A, Appeal Judgement, ¶¶ 393 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008).

bombardments continued for only a brief period, but when combined with the acts of irregular Croat forces, resulted in the permanent displacement of ethnic Serbs whose families had lived in the area for centuries.[31]

The ICTY Prosecutor made intense efforts to obtain artillery maps used by Gotovina for the targeting and even held up Croatia's accession to the European Union for more than a year over the issue. However, the maps were not produced and the trial judges needed to rely on the effects of the bombardment to determine what was targeted. Finding that shells had fallen more than 200 meters from identifiable military targets, they concluded that the bombardments were unlawful and sentenced Gotovina to twenty-four years.[32]

The conviction and sentence were reversed by the ICTY Appeals, in a 3-2 majority decision. Essentially, the majority found that there was no '200-meter rule' in targeting and that the Trial Chamber failed to make "a concrete assessment of comparative military advantage" so that it could not be found that the artillery attacks in Knin were unlawful.[33]

At the ICC, all the convictions to date have been against leaders or other persons acting within non-state groups. However, the ICC has issued arrest warrants for several military leaders or their civilian superiors who have not yet been arrested or appeared before the court. These include former Sudanese President Omar Bashir, and former Sudanese Minister of Defense Abdul Hussein. Bashir and Hussein are charged with multiple counts of crimes against humanity and war crimes, and Bashir also for genocide. From the available information, these appear to charge intentional acts for which they are allegedly responsible, either directly or indirectly.

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[31] Prosecutor v. Gotovina et al, Case No. IT-06-90-A, Appeal Judgement, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).
[32] Gotovina et al., Case No. IT-06-90-A, Trial Judgement, ¶ 1903 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).
[33] Prosecutor v. Gotovina et al., IT-06-90-A, Appeal Judgement, ¶¶ 58-83.

The ICC judges have also approved arrest warrants against Israeli Prime Minister Benjamin Netanyahu and former Minister of Defense Yoav Gallant, as well as Russian President Vladimir Putin and his Commissioner for Children's Rights, Maria Lvova-Belova. The charges against the Israeli officials are for the war crime of starvation and appear to steer clear of the proportionality issues involved in the Israeli bombardment of targets in Gaza. The charges against Putin and Lvova-Belova are for the crimes of unlawful deportation and transfer of children and are based on alleged intentional conduct.

Of greater interest for purposes of this paper are the arrest warrants approved by ICC Pre-trial Chamber II in March 2024 against Lieutenant General Sergei Kobylash and Admiral Viktor Sokolov which include charges under Rome Statute Article 8(2)(b)(iv) for "excessive incidental harm to civilians and civilian objects" caused by a series of attacks against Ukrainian power plants and substations between October 10, 2023 and March 9, 2024.[34] Similar arrest warrants were approved by the judges in June 2024, charging Russian Defense Minister Sergei Shoigu and Chief of General Staff Valery Gerasimov with the same war crimes.[35]

While the prosecutor's application and the judges' order were not made public, the ICC press release makes it clear that the multiplicity of strikes over a five-month period was very relevant in determining that the civilian harm was excessive. Additionally, the charges against all four Russian military leaders included counts for the Crime Against Humanity-Other Inhumane Acts, as the judges found that

> . . . the alleged campaign of strikes constitutes a course of conduct involving the multiple commission of acts against a civilian population, carried out pursuant to a State policy, within the meaning of article 7 of the Statute. Therefore, there are reasonable grounds to believe that the suspects intentionally caused great suffering or serious injury to body or to mental or physical health,

[34] ICC, Situation in Ukraine, *supra*, note 27.
[35] *Id*.

> thus bearing criminal responsibility for the crime against humanity of other inhumane acts, as defined in article 7(1)(k) of the Rome Statute.[36]

The prosecution team at the ICC in the Ukraine cases was led by Colonel (ret.) Brenda Hollis, formerly with the U.S. Air Force Judge Advocate General Corps, and later senior prosecutor at the ICTY, and chief prosecutor at both the Sierra Leone and Cambodia tribunals. It is thus only reasonable to expect that charges for excessive civilian harm brought in international courts will consider cumulative harm in weighing proportionality.

B. At the national level

As noted earlier, it is relatively unlikely that military officers or their civilian superiors who rely on the good faith advice of military lawyers in targeting decisions will be prosecuted in their own national systems. There may be exceptions when there is a major political transition or significant international pressure to act (such as when preventing ICC prosecutions by exercising 'complementarity').

The greatest risk arises from prosecutions in third countries, and the possibility that those involved in military operations may find themselves arrested when they travel to what they thought were friendly countries.

The possibility of such extraterritorial prosecutions burst on the international scene in 1998 when former Chilean President Augusto Pinochet was arrested in the United Kingdom on a Spanish warrant for alleged acts of torture committed in Chile, and the United Kingdom's highest court decided that Pinochet could be extradited to Spain (which transfer was only avoided because of his ill health).[37]

Thereafter, investigative magistrates in Spain, and then in Belgium with its similar laws, began to consider allegations against senior leaders of a number of countries, including those against U.S. officials

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[36] *Id*.

[37] R. v. Bow Street Metro, Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L. 1999).

for alleged torture or cruel treatment of detainees in the 'global war on terror.' The United States successfully pressed Belgium and Spain to tighten their jurisdictional requirements.[38] Other countries also reacted to require high-level certification before private prosecutions could be commenced, as the United Kingdom amended its law after former Israeli Foreign Minister Tzipi Livni's trip to the United Kingdom was curtailed because she faced such charges for alleged war crimes committed by Israeli forces in the Gaza operation of 2008-2009 when she was part of the Olmert government.[39]

However, at the same time such prosecutions became more common as various states instituted "no safe haven" policies to prosecute alleged human rights violators who entered their countries as part of refugee flows. These violators could be excluded under Article 1(f) of the Refugee Convention of 1951, but proving the violations required effective investigations to obtain the necessary evidence. When such evidence showed the investigated persons had committed very serious crimes, this opened the possibility of criminal prosecution under the statutes cited earlier to send the "no safe haven" message loud and clear.

Because similar cases arose in various European states affected by the same refugee flows, this led to the establishment in 2002 of what became the European Genocide Prosecution Network. It now holds meetings at least twice annually, where information and professional advice is shared among the law enforcement officials of twenty-seven European Union States and six observer countries.[40] A similar group has recently been established in the Asia-Pacific region centered in Australia, known as the Pacific Justice Network.[41] The most common

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[38] NAOMI ROHT-ARRIAZA, UNIVERSAL JURISDICTION: STEPS FORWARD STEPS BACK (2004).
[39] Ben Quinn, *Former Israeli Minister Tzipi Livni to Visit UK after Change in Arrest Law*, GUARDIAN (Oct. 3, 2011), https://www.theguardian.com/world/2011/oct/04/tzipi-livni-arrest-warrant.
[40] E.U. AGENCY FOR CRIM. J. COOPERATION, GENOCIDE PROSECUTION NETWORK, https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-prosecution-network.
[41] PAC. JUST, PACIFIC JUST, https://www.pacificjust.org/.

advice conveyed at network meetings from the officials of the most successful countries is the importance of establishing specialized units to investigate and prosecute these crimes. According to the JBB Database, twenty-six specialized units have been created, several outside of Europe.

The results have included the successful prosecution of perpetrators of the Rwanda genocide in twelve different countries, as well as other serious violators from Liberia, Iraq, and the Gambia. In each of these situations, the extraterritorial prosecutors benefited from political transitions in the territorial state allowing for some cooperation and access to witnesses.

Prosecutions have also been launched where the territorial state was hostile to accountability. For instance, Argentina has exercised pure universal jurisdiction to investigate international crimes committed in Myanmar, and has issued arrest warrants against its military leader, General Min Aung Hlaing, and twenty-four of his officers for Genocide and Crimes Against Humanity.[42]

The most remarkable success of extra-territorial prosecutions involving an uncooperative State has been in the situation of Syria. Many of the prosecutions have been filed against officials of the regime of President Bashar Assad—a regime that U.N. investigators had found committed the vast majority of the crimes during the Syrian civil war that began in 2011.

Most famously, the German regional court in Koblenz in 2022 convicted Colonel Anwar Raslan, the officer in charge of interrogation of one the regime's detention centers of fifty-eight counts of murder committed through torture. Germany was able to try this case because of domestic legislation granting its courts universal jurisdiction subject to a national interest determination by the chief federal prosecutor, which determination was issued expansively to allow the opening of a

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[42] Sebastian Strangio, *Argentinian Court Issues Arrest Warrants for Myanmar Officials Over Rohingya Atrocities*, DIPLOMAT (Feb. 17, 2025), https://thediplomat.com/2025/02/argentinian-court-issues-arrest-warrants-for-myanmar-officials-over-rohingya-atrocities/.

'structural investigation' into all acts of torture by the Syrian regime.[43] Raslan and his co-defendant were present in Germany when arrested, but jurisdiction was not limited to those present in the country, and before the start of the Raslan trial, the Germans also issued an arrest warrant for General Jamil Hassan, the head of Air Force Intelligence, based on his responsibility in administering the notorious detention and torture center at the Al-Mazzeh Air Force base in SW Damascus.[44] The Germans have proceeded to convict other Syrian officers who were present in Germany for similar crimes, in each case finding that the conduct was part of a widespread or systematic attack against the civilian population and thus a crime against humanity.[45]

Several other European countries have charged officials of the Assad regime, and in December 2024 the United States indicted Samir Othman Al-Sheikh, the former Governor of the Eastern Syrian province of Deir Ezzor and former administrator of Adha Prison in Damascus. He was charged for violation of the U.S. torture statute, 18 U.S.C. § 2340A, which grants universal jurisdiction when the perpetrator is present in the United States.[46] On March 16, 2026, a federal trial jury in Los Angeles convicted him on all counts.[47]

Additionally, the United States has indicted Jamil Hassan, previously charged by the Germans and now in flight after the

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[43] Jenny Hill, *German Court Finds Syrian Colonel Guilty of Crimes Against Humanity*, BBC (Jan. 13, 2022), https://www.bbc.com/news/world-europe-59949924.

[44] *German Authorities Issue Arrest Warrant Against Jamil Hassan, Head of the Syrian Air Force Intelligence*, ECCHR, https://www.ecchr.eu/es/caso/?tx_ecchr_case%5Baction%5D=show&tx_ecchr_case%5Bcases%5D=93&tx_ecchr_case%5Bcontroller%5D=Cases&cHash=d8bb7b671215350d64332818797b5d96.

[45] Kate Connolly, *German Court Sentences Syrian Doctor to Life in Jail For Crimes Against Humanity*
GUARDIAN (Jan. 16, 2025), https://www.theguardian.com/world/2025/jun/16/german-court-sentences-syrian-doctor-alaa-mousa-to-life-in-jail-for-crimes-against-humanity.

[46] Press Release, U.S. Dept. of J., Former Syrian Prison Official Charged with Torture (Dec. 12, 2024), https://www.justice.gov/archives/opa/pr/former-syrian-prison-official-charged-torture.

[47] Edvard Pettersson, *Former Syrian Prison Boss Convicted of Torturing Inmates,* COURTHOUSE NEWS SERV. (Mar. 16, 2026), https://www.courthousenews.com/former-syrian-prison-boss-convicted-of-torturing-inmates/.

overthrow of Assad in December 2024. Hassan was charged together with his deputy, Abdul Salam Mahmoud. The U.S. case against Hassan and Mahmoud was filed under the U.S. War Crimes Act, 18 U.S.C. § 2441, which allows prosecution where a U.S. citizen is the victim of war crime committed abroad based on the 'passive personality' principle. In the Hassan case, it is alleged that he ordered the execution of an American medical worker who made a false confession after he ordered her tortured and her family threatened.[48]

Such passive personality prosecutions have gained popularity because they are seen as protecting a nation's citizens abroad. The French have been very active in pursuing such cases in the Syrian context. They also indicted Hassan and Mahmoud, and the Head of the Syrian National Security Bureau, Ali Mamlouk, for the torture and murder of two French citizens at the Air Force Intelligence detention facility in the Al-Mazzeh air base. When they could not arrest Hassan and his co-defendants, they proceeded to convict them *in absentia* in May 2024, as permitted by French law. [49]

The French have also issued arrest warrants for individuals allegedly responsible for the sarin chemical attack in East Ghouta in August 2013, which killed 1400 Syrian men, women and children and injured at least one French citizen. The defendants include President Bashar Assad's brother, General Maher Assad, and now with the overthrow of Bashar Assad in December 2024, and with end of this head-of-state immunity, a French arrest warrant for the chemical attack was recently issued against the former President.[50] Most recently, the French charged the former President, his brother, and five others for the

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[48] Press Release, U.S. Dept. of J., Criminal Charges Unsealed Against Two Former High-Ranking Syrian Government Intelligence Officials for War Crimes against Americans and Other Civilians (Dec. 9, 2024), https://www.justice.gov/archives/opa/pr/criminal-charges-unsealed-against-two-former-high-ranking-syrian-government-intelligence.

[49] Alice Austin & David Esposito, *Syrian Officials Convicted of Crimes Against Humanity in France*, HUM. RTS. WATCH (May 27, 2024), https://www.hrw.org/news/2024/05/27/syrian-officials-convicted-crimes-against-humanity-france.

[50] Cour de cassation [Cass.] [supreme court for judicial matters] Ass. plén., July 25, 2025, No. 24-84.393 (Fr.).

killing of French photojournalist, Remi Ochlik. Unlike all the cases of torture, this one involves the 'conduct of hostilities' and alleges a war crime in the military bombardment of Homs in February 2012 that killed Ochlik, and his famous American journalist colleague, Marie Colvin.[51]

With no official access to much of Syria, until recently, these investigations and prosecutions have benefited greatly from the work of civil society organizations, like Commission for International Justice and Accountability (CIJA) who employed up to forty Syrians who were on the ground during the conflict, enabling CIJA to gather more than 1.3 million pages of regime documentation.[52] These groups were aided by the creation by the U.N. General Assembly of an Independent Impartial Investigative Mechanism for Syria (IIIM), to consolidate and verify their information and build cases for possible prosecution in national systems.[53] They were also powerfully assisted by activist public interest lawyers from groups such as European Center for Constitutional and Human Rights[54] and International Federation for Human Rights[55] to build cases on behalf of specific victims and bring them to court, particularly in civil law countries like France, that allow victims to commence criminal cases in front of investigative magistrates, or like Germany, that allows victims to participate in proceedings once a case is filed by the public prosecutor.

The victims in other situations, and their lawyers, are pressing to use the successful Syrian experience and legal precedents to charge alleged war crimes that have occurred elsewhere, including in military operations conducted by western countries. Of course, this will not be

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[51] France Issues Arrest Warrant for Syria's Assad over Killing of Journalists, ALJAZEERA (Sept. 2, 2025), https://www.aljazeera.com/news/2025/9/2/france-issues-arrest-warrant-for-syrias-assad-over-killing-of-journalists.

[52] Ben Taub, *The Assad Files*, NEW YORKER (Apr. 11, 2016), https://www.newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed.

[53] INT'L, IMPARTIAL, & INDEP. MECHANISM, MANDATE, https://iiim.un.org/who-we-are/mandate/ (last visited May 5, 2026).

[54] ECCHR, SYRIA, https://www.ecchr.eu/en/topic/syria/ (last visited May 5, 2026).

[55] INT'L FED FOR HUM. RTS., SYRIA, https://www.fidh.org/en/region/north-africa-middle-east/syria/ (last visited May 5, 2026).

as easy as pursuing officials of outlaw regimes, like that of Bashar Assad. German prosecutions depend on high-level certification. At an international conference in Nuremberg in 2019, Christian Ritscher, then the leading German war crimes prosecutor, was asked why he was prosecuting Syrian officials for torture but not officials of countries like the United States for acts committed against detainees in the so-called 'black sites' during the 'global war on terror.' He answered that Germany did not proceed because countries like the United States have "a working and functioning judicial system."[56]

However, in national systems other than Germany it is possible to obtain arrest warrants without high-level certification, particularly if an alleged perpetrator is present on the territory.[57] Of course, if an American official were to be arrested, one would expect the U.S. government to pressure the government of the arresting state to free the American and end the prosecution. That could still work, though the opinions of the public in the arresting state about U.S. policies and adherence to the rule of law might make it hard for its government to continue to run political interference for the United States.

However, as to the conduct of the Israeli military in the Gaza operation that began in October 2023 and the accumulating harm to the civilian population, European leaders have expressed strong and increasing concern. This is in part a reflection of the advice of government legal experts and civil cases in the Netherlands and United Kingdom that assert that material support to Israeli military operations, in particular the provision of arms, violates international law. Two leading Israeli legal scholars, Professors Yuval Shany and Amichai Cohen, wrote in August 2025 that this represented "a key example of the changing landscape of international law applicable to armed

[56] Video: Nuremberg Forum, Panel V, held by the International Nuremberg Principles Academy (2019), https://www.nurembergacademy.org/public-discourse/nuremberg-forum/nuremberg-forum-2019 (timestamp 1:06:00).
[57] INTERJUST, *supra*, note 20.

conflict over the last two decades."[58] Views regarding Israel in the Global South are almost unanimous, and it is this region that may see the first active prosecutions. At a meeting in Bogota in mid-July 2025, the representatives of twelve nations—Bolivia, Colombia, Cuba, Indonesia, Iraq, Libya, Malaysia, Namibia, Nicaragua, Oman, Saint Vincent and the Grenadines, and South Africa—agreed to the immediate implementation of six measures against Israel " . . . including prosecuting international crimes in their national jurisdictions on the basis of universal jurisdiction.[59]

However, it is not only in the Global South. The Brussels-based Hind Rajab Foundation (named in honor of a six-year old Palestinian girl whose phone call from a car in which she died in Gaza in January 2024 was the subject of an award-winning film, *The Voice of Hind Rajab*) is building cases for prosecution of Israelis involved in the Gaza operation before national courts including those in Europe.[60] In July 2025, two Israeli soldiers on holiday in Belgium were questioned by national authorities based on a war crimes complaint filed by the Hind Rajab Foundation and the Global Legal Action Network.[61] At the Pacific Justice Network annual meeting in Brisbane, Australia, in October 2025, it was reported that a European specialized unit had begun an investigation of possible war crimes committed in Gaza.[62]

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[58] Yuval Shany & Amichai Cohen, *The Rules Have Changed: The German Arms Embargo and the War in Gaza,* Israel Democracy Inst. (Aug. 20, 2025), https://en.idi.org.il/articles/61526.

[59] Alessandra Bajec, *A War Crimes Net Is Tightening around Israeli Soldiers Abroad*, NEW ARAB (Aug. 4, 2025), https://www.newarab.com/analysis/war-crimes-net-tightening-around-israeli-soldiers-abroad; *Hague Group Announces Steps to Hold Israel Accountable in Bogota Summit*, ALJAZEERA (July 16, 2025), https://www.aljazeera.com/news/2025/7/16/hague-group-announces-steps-to-hold-israel-accountable-in-bogota-summit.

[60] THE HIND RAJAB FOUNDATION, https://www.hindrajabfoundation.org/

[61] Sondos Asem, *Israeli Soldiers Arrested in Belgium after War Crimes Complaint by Rights Groups,* MIDDLE EAST EYE (July 21, 2025), https://www.middleeasteye.net/news/two-israeli-soldiers-arrested-belgium-after-war-crimes-complaint-rights-groups.

[62] Author's notes as online participant in Second Annual PacificJust Meeting in Brisbane, Australia (Oct. 30, 2025), https://www.pacificjust.org/annual-meetings.

VIII. Conclusion

Prosecutions have already commenced for alleged violations of the rules of proportionality by military officers and their superiors. Before long, one can anticipate a trial to begin before competent judges. When that happens, given the development of the law as outlined in the McIntosh paper and this paper, and the expansive interpretation of international crimes that is common in such prosecutions, one should expect cumulative civilian harm to be weighed against overall military advantage in determining whether the attacks were lawful.

Chapter 11. Respect for and Protection of Human Dignity: A Guiding Principle of Operational Law[1]

Darío Luis Dangón Moisés

I. Introduction: The Importance of Human Dignity and Operational Law

Human dignity is the starting point for the most compelling reflections in the field of practical, Western philosophy.[2] Hence, it is recognized as the principle that underpins and gives meaning to the ideas of the rule of law and democracy. In this sense, it has always been postulated by liberal thought and developed by constitutionalism.[3] Likewise, the Universal Declaration of Human Rights (UDHR) affirms the fundamental nature of human dignity, a principle later incorporated into international treaties—both within the United Nations (U.N.) system and in regional frameworks such as the Organization of American States (OAS), Council of Europe (CoE), and African Union (AU)—which, along with subsequent doctrine and

[1] This chapter was originally drafted in Spanish. The author would like to extend a special thank you to Frank G. Lumpkin, IV and Sara Dangon, Associate Attorney at Curtis, Mallet-Prevost, Colt & Mosle LLP, for translating this chapter from Spanish into English for publication. The Spanish version was originally published as: Dangón Moisés, *Respeto y Protección de la Dignidad Humana: Principio Rector del Derecho Operacional*, *in* PROBLEMAS ABIERTOS EN TORNO DEL PRINCIPIO DE PROPORCIONALIDAD: ANÁLISIS DESDE EL DIDH Y EL DIH 19-51 (P. A. Velásquez Cardona & C. H. Prieto Fetiva eds., 2024), https://doi.org/10.21830/9786289544671.01.

[2] LUÍS BARROSO, LA DIGNIDAD DE LA PERSONA HUMANA EN EL DERECHO CONSTITUCIONAL CONTEMPORÁNEO: LA CONSTRUCCIÓN DE UN CONCEPTO JURIDICO A LA LUZ DE LA JURISPRUDENCIA MUNDIAL 130 (2014).

[3] *Id*. at 114.

jurisprudence, have shaped modern International Human Rights Law (IHRL).[4] Similarly, the instruments comprising International Humanitarian Law (IHL) are grounded in respect for human dignity, which inspires the protections to civilians and victims of hostilities as well as measures intended to limit excessive harm in armed conflict. Colombia's 1991 Political Constitution (CPC) likewise enshrines human dignity as a foundational principle in Article 1, forming the basis for the Constitutional Court's guarantees-based human rights doctrine.

Given its importance, this chapter offers a detailed analysis of the content and scope of the concept of *human dignity* as an ethical principle, as a foundation of Colombian constitutional law, and as a guiding principle of operational law. Article 4 of Decree 124 of 2014, as reflected in the Operational Law Manual for the Armed Forces, defines operational law as "the integration of international treaties ratified by Colombia, national legislation, and jurisprudence in the areas of human rights and IHL into the planning, execution, and monitoring of operations, missions, and procedures of the public security forces."[5]

In this sense, within the framework of operational law, IHRL and IHL must be integrated so that they function as coordinated and complementary bodies of norms, always with the aim of ensuring that public force operations, consistent with a rule-of-law state, are carried out with respect for, and in pursuit of the effective guarantee of, human dignity and, with it, the human rights of all persons. This is precisely how the ICRC's *Handbook of International Rules Governing Military Operations* puts it:

> The use of force is limited by LOAC and by specific provisions of IHRL. LOAC and IHRL are complementary. Both strive to protect the lives, health and dignity of individuals, albeit from a different angle.[6]

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[4] JÜRGEN HABERMAS, LA CONSTITUCIÓN DE EUROPA 13-17 (2012).

[5] COMANDO GENERAL DE LAS FUERZAS MILITARES, MANUAL DE DERECHO OPERACIONAL PARA LAS FUERZAS MILITARES 11 (2015).

[6] INT'L COMM. OF THE RED CROSS, HANDBOOK ON INTERNATIONAL RULES GOVERNING MILITARY OPERATIONS 21 (2023).

Given the evident complexities involved in achieving this goal, this chapter seeks to provide conceptual, ethical, and legal elements that contribute to the effort of normative integration. To this end, the first section explains some of the most relevant discussions regarding the content and meaning of the concept of *human dignity*, upon which a proposed understanding of its substance is then offered. The following sections illustrate its expression and development in the positive legal norms of Colombian constitutional law, IHRL, IHL, and, finally, its integration into operational law. In this way, from the perspective of social science, a qualitative method is employed, while from the philosophical perspective, elements of linguistic analysis are incorporated.

II. Human Dignity

The concept of human dignity will next be examined through the lenses of Christianity and liberalism, as these two traditions have shaped the moral, legal, and political culture of the West and share, despite originating from different perspectives—one theological and the other grounded in rational ethics—a firm affirmation of the fundamental value of the human person. After reviewing these two perspectives, a proposal will be presented to enable a more detailed analysis.

A. In Christianity

In the realm of ideas, "the human individual, as an irreplaceably valuable reality, acquires decisive importance with Christianity."[7] Christianity marked a radical shift in the way humanity and the world were conceived in classical antiquity, and with its spread throughout the Roman Empire, it initiated a growing process of humanizing social customs as well as political, economic, and legal institutions.[8] Likewise, as Christian thought developed and gained traction, deeper, more

[7] FERNANDO PRIETO, MANUAL DE HISTORIA DE LAS TEORÍAS POLÍTICAS 104 (1996).
[8] G. DEL VECCHIO, FILOSOFÍA DEL DERECHO 28 (Bosch, 1991).

complete, and more systematic concepts of human dignity also developed.[9] To the extent that these ideas laid the groundwork for humanist and secular thought, they would later give rise to liberal and democratic ideas.[10]

Christianity affirms the dignity of the person as an absolute value, grounded in the fact that the person is created in the image and likeness of God.[11] Accordingly, the person is the principle, the subject, and the end of all social, political, and economic institutions, being endowed with universal, inviolable, and inalienable rights. In this way, Christianity asserts the equal worth of all people before their Creator and conceives the human being as a moral agent, capable of discerning right from wrong and acting accordingly—that is, as a morally responsible and therefore free being (free will being the foundation of moral responsibility). Christianity thus also affirms the value of individuality: the person is a unique and irreplaceable being with a transcendent purpose.

It is necessary to begin our study of the content of the concept of human dignity with Christianity, because one cannot overlook the decisive influence that Christian thought has had on the shaping of Western moral, legal, and political institutions—particularly in orienting them around the value of the person through the scholastic doctrine of natural law. Due to its decisive influence on Western civilization, many authors emphasize the role of Christianity in shaping what came to be known as *human dignity*, and, in the Gospels, highlight elements of individualism, equality, and solidarity that have been fundamental to the contemporary development of its scope.[12]

Despite the plausible, practical implications that may be derived from the Christian concept of human dignity, insofar as it presupposes adherence to a particular model of moral and religious virtue, it is not

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[9] FERNANDO BASTOS DE AVILA, PEQUEÑA ENCICLOPEDIA DE LA DOCTRINA SOCIAL DE LA IGLESIA 215-216 (1994).

[10] MAURICIO BEUCHOT, LOS FUNDAMENTOS DE LOS DERECHOS HUMANOS EN BARTOLOMÉ DE LAS CASAS 33-35 (1994).

[11] BASTOS, *supra* note 9, at 499-500.

[12] BARROSO, *supra* note 2, at 21-22.

appropriate to rely on it as a normative foundation for the institutions of a democratic state and society. Such institutions, precisely because they are based on respect for the equal worth and freedom of every person, must be substantially pluralistic spaces—open to cultural diversity and, more generally, to differing worldviews and ways of life.

B. In Liberalism

In liberal thought, human dignity is that of the rational subject and, as such, equal and free. Like Christianity, liberalism affirms the universality of human dignity, but it does so in a formal sense, making it applicable across any cultural context. Accordingly, the liberal concept of human dignity is independent of cultural or religious references, grounding the value of the person in their capacity for reason. However, being a formal concept does not make it ethically neutral. On the contrary, it carries a precise and substantive content: the freedom of the person (autonomy). Autonomy does not consist in the faculty to do anything whatsoever, but rather in being subject to norms derived from rational principles, and not to the will of another person.

A paradigmatic expression of this liberal concept of human dignity is found in Kant's practical philosophy.[13] For Kant, the person, by virtue of being rational, must be recognized as autonomous and as self-legislator of the self-legislator of his or her own life.[14] As such, they must not be instrumentalized for the achievement of others' ends, must not be used merely as a means, but must always be recognized as an end in themselves.[15] Man, and indeed every rational being, exists as an end in itself, not merely as a means for the purposes of this or that will; in all of their actions—not only those directed toward themselves but also those directed toward other rational beings—they must always be regarded simultaneously as ends in themselves.[16]

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[13] *Id*. at 125.
[14] *Id.*
[15] MANUEL KANT, FUNDAMENTACIÓN DE LA METAFÍSICA DE LAS COSTUMBRES 54 (2010).
[16] *Id*. at 48.

Kant makes clear that personal autonomy must not be confused with arbitrariness.[17] On the contrary, autonomy is exercised in accordance with the *categorical imperative*, the term Kant uses in his ethics to designate the foundation of practical reason (the rational principle from which the autonomous person derives morality).[18] According to this principle, the standard for evaluating conduct is the universalizability of one's actions. Among the various formulations Kant gave of the categorical imperative throughout his work, the following most clearly expresses the radical affirmation of human dignity: "Act in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end, and never merely as a means."[19]

The American philosopher John Rawls stands as one of the most influential contemporary exponents of Kantian liberalism. Kant's notion of the self-legislating person—who, by virtue of rational agency, autonomously directs their conduct in accordance with the categorical imperative—forms the conceptual foundation of Rawls's theory of justice.[20] Rawls expands this Kantian framework by situating the autonomous person within an ideal, hypothetical setting: *the original position*.[21] In this setting, people deliberate to reach consensus on the principles that should structure the institutions of a just society. Their deliberation, however, takes place behind a "veil of ignorance," which conceals their particular circumstances and leaves them equipped only with the two moral powers: the capacity to be reasonable and rational—or, in Rawls's terms, "the capacity for a sense of justice and the capacity for a conception of the good."[22] By virtue of the foregoing, persons recognize themselves as free and equal.

In the original position, deliberators thus consider only interests that can be universalized, since they lack any knowledge of their own

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[17] *Id*. at 49.
[18] *Id*.
[19] *Id*.
[20] JOHN RAWLS, LA TEORÍA DE LA JUSTICIA 287 (1993).
[21] *Id*.
[22] *Id*. at 42.

specific social or personal situation. In this way, the fundamental requirement of the Kantian categorical imperative—the universalizability of human acts—is fully realized, a requirement that Rawls formulates as impartiality. The Kantian requirement of universalizability for human actions—recast by Rawls as the demand of impartiality in argumentation—ultimately seeks the same end: that judgments about the correctness of norms cannot legitimately rest on particularized interests or ends that are not capable of universal justification.

Rawls explains how, through deliberation in the original position, individuals construct the two principles of justice. As formulated in *Political Liberalism*, these are:

1. Each person has an equal right to a fully adequate scheme of basic liberties, compatible with the same scheme of liberties for all.
2. Social and economic inequalities must satisfy two conditions: (a) they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and (b) they must be to the greatest benefit of the least advantaged members of society.[23]

Although the above does not aim to reproduce the full breadth of Rawls's proposal, it does allow us to see how Rawls exposes, albeit in a way that takes into account the complex social realities of our time, the basic liberal vision, in which the autonomous person is recognized as the foundation of the social order and the recognition of their equal freedom as the substantial content of justice.

III. Proposal on the Content of Human Dignity

Building on the foregoing, we develop a proposed account of a liberal, Kantian-rooted concept of human dignity—one that recognizes the worth of the person as the ethical, and thus also the legal and

[23] JOHN RAWLS, LIBERALISMO POLÍTICO 31 (2011).

political, foundation of the rule of law and the democratic paradigm. In this view, by virtue of their rational capacity, people must be acknowledged as equally worthy and free. That is, every person must be recognized as autonomous and, thus, as possessing the faculty to determine the meaning of their lives and actions.

Likewise, each person must be regarded as an ethical subject,[24] or a being of practical reason—capable of judging the correctness of their conduct as well as of the institutions and norms that govern it, and capable of recognizing the equal worth and freedom of others. This, in turn, enables them to be reasonable and to act in a reasonable manner. To clarify this notion, it is useful to follow Rawls, who identifies several characteristics of reasonable persons: a willingness to propose and abide by fair terms of cooperation; a willingness to recognize the limits of reason and accept their implications; a willingness to conduct themselves according to a principle from which they and others can reason with one another; and a willingness to take into account the effects of their actions on the well-being of others.[25] Within this framework, human dignity may be defined as the principle in light of which every person must be recognized as autonomous and, therefore, equally worthy and free.

IV. Corollaries

In an effort to enrich—even if only in a modest way—the content of this concept of human dignity, and to advance the understanding of its meaning and scope within the framework of a rule of law state and a democratic society, we will further develop the definition proposed above.

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[24] Because the terms ethics and morality are often used interchangeably or with different meanings, it is worth clarifying here that ethics means the exercise of practical reason—that is, the subjective or intersubjective rational grounding of the correctness of conduct, of the institutions that govern it, and of the normative principles that follow from such argumentation. Morality, in turn, means the various cultural constructions regarding these same matters.

[25] RAWLS, *supra* note 20, at 49.

A. Autonomy

Personal autonomy is none other than the synthetic expression of the substantive content of human dignity: the idea that each person is equally worthy and free. In this same vein, as explained earlier, Kant identifies autonomy as the very foundation of human dignity: "Autonomy, then, is the basis of the dignity of human and of every rational nature."[26] More recently, Barroso articulates the same idea with notable clarity: "Autonomy is the ethical component of human dignity. It is the foundation of individual free will, enabling people to pursue, in their own way, what they understand it means to live well and to have a good life."[27]

In light of the principle of personal autonomy, each person must be recognized as the self-legislator of their own life: free to determine their conduct and to define and pursue their particular life plan. In exercising their autonomy, the person is bound by the limit imposed by the equal freedom of others; thus, the most genuine exercise of liberty demands the highest degree of responsibility. In this regard:

Kant's fundamental thesis is as follows: anyone who guides themselves by rational freedom cannot do anything other than respect that same rational freedom in all others; that is, they must recognize the same right in everyone else who possesses the capacity to guide themselves in a rational and free manner.[28]

Personal autonomy is expressed in the fact that no individual has, in themselves, any greater authority or entitlement to subordinate or determine the life of another without that person's consent. In this sense, the person is the most radical foundation of democracy. The substantive principle of a democratic order—and therefore its legitimacy—lies in the effective recognition, respect, and protection of the dignity of every person (through the guarantee of their human rights), and not in their subordination to the will of the majority.

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[26] KANT, *supra* note 15, at 54.
[27] BARROSO, *supra* note 2, at 147-48.
[28] CHRISTOPHER MENKE & ARND POLLMANN, FILOSOFÍA DE LOS DERECHOS HUMANOS 61 (2010).

B. Fundamental Character

By recognizing the person as autonomous, they become the necessary benchmark for the substantive evaluation of justice and correctness of any conduct or institution—whether moral, legal, political, social, economic, or cultural—as well as of any act of authority or any scientific practice or technological implementation that may affect the life and freedom of individuals.

The ethical, political, social, economic, and cultural demands that flow from human dignity are realized in rights, namely, human rights. Indeed, Habermas refers to human dignity as the substantive principle underlying human rights: ". . . human dignity . . . constitutes the moral source from which all fundamental rights derive their substance."[29] Similarly, Fernández argues that the moral and rational values and demands that ethically underpin human rights "revolve around the idea of human dignity, a basic idea and a sine qua non condition for speaking of fundamental rights."[30]

Based on the foregoing and taking human dignity as the substantive foundation of human rights, these can be defined as the set of capacities (civil, political, and economic freedoms) and conditions (guarantees and entitlements) necessary for the effective realization of the dignity of every person, within each historical and cultural context.[31]

In this sense, human rights must be recognized as having an equally fundamental value, such that they are to be acknowledged, respected, protected, and guaranteed by all individuals and by the state. In particular, from a liberal-democratic perspective, it is only within this framework that states can justify their existence, as well as the exercise

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[29] HABERMAS, *supra* note 4, at 16.

[30] EUSEBIO FERNÁNDEZ GARCÍA, DIGNIDAD HUMANA Y CIUDADANÍA COSMOPOLITA 25 (2001).

[31] Antonio Enrique Pérez Luño, *Sobre los Valores Fundamentadores de los Derechos Humanos*, *in* EL FUNDAMENTO DE LOS DERECHOS HUMANOS 279 (Javier Muguerza & Gregorio Peces-Barba eds., 1989), https://dialnet.unirioja.es/servlet/articulo?codigo=1961289.

of authority and the legitimacy of their actions, insofar as these represent a manifestation and exercise of power within social life.

From this also follows the substantive notion of the rule of law state, which is not defined merely by formal adherence to the principle of legality, but finds its foundation and meaning in the effective respect, protection, and fulfillment of human rights. In this way, human rights serve both as limits on state action and as fundamental guiding principles for the state itself. Ansuátegui explains this concept as follows: "Accordingly, a material or substantive concept of the rule of law state holds that, within it, the law's purpose is the defense, guarantee, and protection of the moral demands expressed through rights."[32]

C. Inviolability

By recognizing all persons as equally worthy and free, the good of one individual cannot justify the sacrifice of another's dignity. As Kant aptly stated, "the person must be treated as an end in themselves," meaning they must not be instrumentalized for purposes external to themselves, as often occurs for reasons of utility or the all-too-frequently invoked reason of state.[33] From this it follows that any act of authority, public policy, cultural practice, scientific development, or technological application must be deemed unjust and illegitimate if it violates human dignity. More broadly, any conception of society or the state that disregards the inviolability of the person and reduces them to a mere instrument in service of the interests of another individual or of an elite, caste, race, class, political party, or any other social category must likewise be rejected.

There are obvious forms of instrumentalization of the person, such as any form of slavery or human trafficking. Similarly, work performed under unsafe, unhealthy, or unfairly compensated conditions also constitutes instrumentalization. The same applies to oppressive

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[32] FRANCISCO J. ANSUÁTEGUI ROIG, DE LOS DERECHOS Y EL ESTADO DE DERECHO: APORTACIONES A UNA TEORÍA JURÍDICA DE LOS DERECHOS 79 (2007).
[33] KANT, *supra* note 15, at 48.

political regimes, in which the life, liberty, and corresponding rights of people are subordinated to the interests of the state, a dictator, a political party, or their particular vision of the collective good. There are also more subtle, yet equally unjust, forms of instrumentalization—for example, when the general preventive purpose of the law is invoked to justify the imposition of cruel or disproportionate punishments.

D. Universality

Human dignity describes the value that must be recognized in every person simply by virtue of being a person. Within this framework, there is no room for discrimination. To deny the universality of a person's worth is to deny human dignity itself. In this way, human dignity functions as a principle, as a critical and universal reference point, and as such, it must be recognized and respected by all individuals and by all institutions, at all times and in every place.[34]

In this sense, the dignity of all persons—those who have existed, those who exist, and those who will exist—must be recognized everywhere, regardless of whether they have been acknowledged as such by society or the state, and irrespective of the political, social, economic, or cultural context. In this way, the status of human dignity as a critical principle of social order is made clear, standing in opposition to political and moral currents that have subordinated the value of the person and their rights to history, culture, or the state.[35]

By recognizing the universality of a person's worth across time, human dignity allows for a critical perspective on history. One example is the condemnation of slavery in antiquity as a severe violation of human dignity, and, in turn, the denouncement of the various forms of slavery that still exist today. In light of human dignity, any social or legal institution that, in form or substance, has consisted or consists of some form of ownership over persons is necessarily unjust.

Similarly, denying the universality of human dignity across space would prevent a substantive critique of political and legal systems,

[34] EMMANUEL MOUNIER, EL PERSONALISMO 61-62 (1993).
[35] ANGELO PAPACCHINI, FILOSOFÍA Y DERECHOS HUMANOS 265 (2012).

social and economic structures, cultural institutions and practices, as well as public policies that are currently harmful to people. It would also leave one without a basis to challenge currents of thought that seek to subordinate the worth of the person to the sovereignty of the state or to cultural or communal traditions.

The universality of a person's worth is often questioned in light of cultural diversity. Yet cultural diversity is intimately connected with human dignity—after all, what is cultural diversity if not the clearest expression of human freedom? On the basis of the principle of human dignity, rather than denying it, one affirms the equal worth of all cultures, just as all people who create and participate in them must be recognized as equally worthy and free. However, culture, like any human creation, must have human dignity as a necessary critical reference. In this light, institutions or cultural practices that fail to respect each person's equal freedom to determine the meaning of their life can rightly be deemed unjust.

It is also important to clarify that the universality of human dignity implies its integrality—that is, its applicability to all areas of human life. Thus, it is not limited to the moral, legal, or political realms, but, as we have shown, extends as well to the social, economic, and cultural spheres, as well as to science and technology.

E. Concrete Realization

The effective realization of each person's equal freedom requires understanding that human dignity is realized concretely, for each individual, according to the particular social, economic, cultural, gender, and other circumstances in which their life unfolds.[36] For this reason, the demands of human dignity are not exhausted by general recognition of rights. There may be additional rights that must be acknowledged for each person, taking into account their individuality and the specific circumstances of their life. There may be additional rights that must be recognized for each person, reflecting their individuality and the particular circumstances of their life. This further

[36] HABERMAS, *supra* note 4, at 17.

shows how human dignity is a substantive element of justice understood as equity.[37]

With this in mind, the rights-protecting judicial practice that has developed in our system through the *acción de tutela*[38] makes great sense. In this mechanism, the foundations of the state are continuously tested against the most singular, diverse, and significant cases, precisely because these cases seek to ensure the effective realization of persons' fundamental rights.

F. Critical-Historical *(Prohistórico)* Character

In each new historical context, the content of equality and freedom inherent in human dignity presents an equally new horizon of demands for its effective realization, which materialize in new rights that respond to emerging circumstances.[39] Thus, it is likely that the full realization of human dignity will always remain in the realm of utopia, continuously presenting an imperative horizon for the future, from which human dignity serves as both the fundamental critical reference and the principal guiding principle of human progress.[40]

The critical-historical (*prohistórico*) character and the concrete realization of human dignity show us that no effort at codification can exhaust its ever-new and changing demands. Consequently, human rights cannot be limited to the list of those expressly recognized in national legislation and in IHRL; they also extend to all rights that, even if not codified, are inherent to the person or necessary for the effective realization of their dignity. As our Political Constitution of Colombia recognizes in Article 94: "The enumeration of the rights and guarantees contained in the Constitution and in the international treaties in force

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[37] JOHN RAWLS, TEORÍA DE LA JUSTICIA 28-35 (1993).

[38] "Acción de tutela" translates to "writ of protection" in English and refers to a legal action used in some Latin American countries, particularly Colombia, to protect fundamental constitutional rights that are being violated or threatened.

[39] HABERMAS, *supra* note 4, at 17-18.

[40] FERNÁNDEZ, TEORIA DE LA JUSTICIA Y DERECHOS HUMANOS 103-104 (1983).

shall not be understood as a denial of others that, being inherent to the human person, are not expressly included therein."[41]

G. Interdependence

In exercising their freedom, persons may come into conflict due to the infinite diversity of interests and life projects, which are precisely expressions of each person's autonomy. This indicates that the effective realization of human dignity depends on the mutual—though not reciprocal—recognition, respect, and promotion by each person of the equal worth and freedom of others.[42] Thus, the problem is not the conflict itself, which is inherent to equal freedom and to coexistence, but rather the failure to resolve it in a reasonable and equitable manner.[43]

For all these reasons, the interdependent nature of the person is precisely the foundation of the practical demand for solidarity: a person who acts in solidarity recognizes the equal dignity of others and, accordingly, not only refrains from violating it but is also willing to cooperate in its effective realization. In this way, solidarity becomes the condition for the reasonable exercise of freedom. This interplay of freedoms and mutual recognition of equality, made possible through solidarity, is what enables coexistence—understood as the space in which individuals can fully realize their dignity because they act in solidarity, and each has assumed the commitment to recognize, respect, and promote the equal freedom of others.[44]

V. Human Dignity as a Constitutional Foundation

Although the eighteenth-century declarations of rights, the earliest expressions of constitutionalism, do not explicitly refer to human dignity, they are grounded in its essential content: the equal worth and

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[41] CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P] art. 94 (1991).
[42] PRIETO, *supra* note 7, at 525.
[43] BARROSO, *supra* note 2, at 159, 162.
[44] MARIANO GRONDONA, LOS PENSADORES DE LA LIBERTAD 75 (1994).

equal freedom of every person.[45] Strictly speaking, human dignity is invoked expressly for the first time in the work of Kant, and it becomes concretized after the Second World War in constitutional developments and in international human rights declarations, which give rise to the emergence of IHRL.[46]

In this regard, the 1991 Colombian Political Constitution (CPC) was strongly influenced by constitutions adopted after the Second World War, such as those of Germany and Spain, which recognize human dignity as the foundation of the social, legal, and political order.[47] Following this same orientation, Article 1 of the CPC enshrines respect for human dignity as the foundation of the State: "Colombia is a Social State under the Rule of Law, organized in the form of a unitary republic . . . founded on respect for human dignity . . . ."[48] In furtherance of this provision, the second paragraph of Article 2 establishes that "The authorities of the Republic are instituted to protect all persons residing in Colombia, in their life, honor, property, beliefs, and other rights and freedoms . . . ."[49] Likewise, Article 5 recognizes as a foundation of the State, and "without any discrimination, the primacy of the inalienable rights of the person . . . ."[50] Similarly, Article 94 of the Constitution provides that the State's obligation to respect and guarantee human dignity and the rights that flow from it is not limited to those expressly recognized in the Constitution or in other catalogues contained in international human rights treaties in force for Colombia. Rather, it extends to all those rights that, even if not expressly recognized, are "inherent to the human person."[51]

In the same vein, although within the more specific field of constitutional regulation of states of exception, the first paragraph of

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[45] IVÁN VILA CASADO, FUNDAMENTOS DEL DERECHO CONSTITUCIONAL CONTEMPORÁNEO 13-14 (2nd ed. 2012).
[46] BERND MARQUARDT, DERECHOS HUMANOS Y FUNDAMENTALES. UNA HISTORIA DEL DERECHO 137-139 (2015).
[47] JOSÉ MERINO, ET AL., LECCIONES DE DERECHO CONSTITUCIONAL 187 (1995).
[48] CONSTITUCIÓN POLÍTICA DE COLOMBIA[C.P] art. 1 (1991).
[49] CONSTITUCIÓN POLÍTICA DE COLOMBIA[C.P] art. 2 (1991).
[50] CONSTITUCIÓN POLÍTICA DE COLOMBIA[C.P] art. 5 (1991).
[51] CONSTITUCIÓN POLÍTICA DE COLOMBIA[C.P] art. 94 (1991).

Article 93 of the Constitution incorporates into the text the concept of *intangible* or *non-derogable human rights* (which we will examine in the following section), a concept originating in IHRL, by giving "international treaties and conventions that recognize human rights and prohibit their limitation during states of exception" precedence in the domestic legal order.[52] In line with this same principle, the Constitution establishes in Article 214, paragraph 2, that: "Human rights and fundamental freedoms may not be suspended. In all cases, the rules of IHL shall be respected . . . ."[53]

Likewise, in the first three chapters of Title II of the CPC there appears an extensive catalogue of rights, organized into three chapters: Chapter 1, Fundamental Rights, from Article 11 to 41; Chapter 2, Social, Economic, and Cultural Rights, from Article 42 to 77; and Chapter 3, Collective and Environmental Rights, from Article 78 to 82.[54] However, this extensive and detailed constitutional catalogue of human rights, in line with Article 94, is not intended to be exhaustive. It may instead be interpreted as the textual expression of the fundamental commitment of all organs of the Colombian State—by virtue of its status as a constitutional state under the rule of law—to the effective respect and protection of human dignity and, therefore, to the guarantee of the rights that give concrete expression to that dignity.[55]

This has been especially relevant when determining, through jurisprudence, which rights are fundamental and therefore eligible for protection through the *acción de tutela*.[56] The Constitutional Court has been consistent in clarifying that the list of fundamental rights contained in the corresponding chapter of Title II of the Constitution is not exhaustive; on the contrary, in the interest of the fullest possible

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[52] CONSTITUCIÓN POLÍTICA DE COLOMBIA[C.P] art. 93 (1991).
[53] CONSTITUCIÓN POLÍTICA DE COLOMBIA[C.P] art. 214 (1991).
[54] CONSTITUCIÓN POLÍTICA DE COLOMBIA[C.P] art. 42-77, 78-82 (1991).
[55] Corte Constitucional [C.C][Constitutional Court], julio 30, 2002, Sentencia C-578/02 (Colom.).
[56] Corte Constitucional [C.C][Constitutional Court], enero 15, 1992, Sentencia T-002/92 (Colom.).

protection of human dignity, in our constitutional system the category of fundamental rights must be interpreted expansively.[57]

The Constitutional Court, on a case-by-case basis, has continued to refine the doctrinal scope of human dignity. Thus, in Judgment T-881 of 2002, authored by M.P. Eduardo Montealegre Lynett, the Court characterized the "areas of protection" of human dignity as: individual autonomy, the material conditions of existence, and physical and moral integrity.[58] This concept was further developed in a 2017 judgment, in which, in addition to the "areas of protection," the Court also clarified the scope of human dignity based on its "normative functionality."[59]

VI. Defining Human Dignity in International Human Rights Law

IHRL can be defined as the branch of public international law that mandates and regulates the State obligations to respect, protect, and fulfill human rights. The purpose of IHRL is precisely to provide legal protection for human dignity, through public international law, across all areas of social, political, economic, and cultural life in an integrated and comprehensive manner. In this framework, the obligation to respect "means that States are required to refrain from interfering with the enjoyment of rights"; the obligation to protect requires States to shield individuals from "abuses by non-State actors, foreign State agents, or State agents acting outside of their official capacity"; and the obligation to guarantee or "fulfill" means that States must "create 'the

[57] CATALINA BOTERO MARINO, LA ACCIÓN DE TUTELA EN EL ORDENAMIENTO CONSTITUCIONAL COLOMBIANO 23 (2009) https://escuelajudicial.ramajudicial.gov.co/sites/default/files/biblioteca/m7-18.pdf.
[58] Corte Constitucional [C.C][Constitutional Court], octubre 17, 2002, Sentencia T-881/02 (Colom.).
[59] *Id*.

legal, institutional and procedural conditions that rights holders need in order to realize and enjoy their rights in full.'"[60]

IHRL developed after World War II, at the end of the first half of the twentieth century. More specifically, it emerged with the adoption of the U.N. Charter in 1945 and its concretization in instruments such as the Universal Declaration of Human Rights.[61] Nonetheless, it should be noted that important doctrinal[62] and normative[63] antecedents to IHRL already existed, but there was no broad and comprehensive normative system of protection.

The development of IHRL emerged from some of the harshest lessons left by the tragedies of the First and especially the Second World War. These events showed that constitutional protection of rights alone is not sufficient, because in moments of profound social, political, or economic crisis—such as that experienced by interwar Germany—even under a highly democratic, constitutional regime like the Weimar Constitution, the population can become more receptive to populist or demagogic political options. These movements do not appeal to reason, but rather exploit people's fears and emotions. In this way, political movements opposed to the foundations of democracy and respect for human dignity have managed to access political power through democratic procedures, but once in power, they often implement what typically becomes a painful process of dismantling democratic guarantees and the rule of law, and with them, the constitutional principles requiring respect for and protection of human rights. The rise and criminal aftermath of the German Nazi Party, as well as more recent authoritarian consolidation in Venezuela under the Chavista regime, illustrate this tragic pattern.

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[60] OFF. OF THE U. N. HIGH COMM'R FOR HUM. RIGHTS [OHCHR] & INTER-PARLIAMENTARY UNION, HUMAN RIGHTS: HANDBOOK FOR PARLIAMENTARIANS N° 26 32-33 (2016).

[61] G.A. Res. 217 (III) (Dec. 10, 1948).

[62] MANUEL KANT, LA PAZ PERPETUA 15, 27, 30 (1991).

[63] THOMAS BUERGENTHAL ET AL., MANUAL DE DERECHO INTERNACIONAL PÚBLICO 96-97 (1994).

In this way, IHRL establishes the internationalization of the legal protection of human rights. This marks a substantial shift from the classical system of public international law—where only states possessed international legal personality and national sovereignty was held as an absolute principle, to the point that individuals' rights "fell within the exclusive domestic jurisdiction of each State"—to a contemporary system of international law in which individuals are recognized as rights-bearing subjects, entitled to human rights regardless of nationality or other discriminatory factors.[64] In this contemporary framework, the principle of national sovereignty does not disappear but is redefined: sovereignty no longer merely grants states authority, but instead imposes obligations on them to respect, protect, and fulfill the rights of all persons within their territory.[65]

Precisely, much of the development of IHRL has consisted of creating and establishing, through international treaties, international bodies with quasi-judicial functions—such as the Inter-American Commission on Human Rights or the United Nations Human Rights Committees—which monitor States' compliance with their obligations toward their populations under international law; as well as judicial bodies, such as the Inter-American and European Courts of Human Rights, before which States may incur international legal responsibility for violating or failing to protect human rights, and thus be tried and condemned.

Thus, without fear of error, it can be stated that in IHRL, all the principles and rules contained in its treaties and other sources are aimed at international legal protection of human dignity. In fact, Valencia defines it as "the branch of public international law, or the law of nations, that is concerned with protecting human dignity and the

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[64] *Id*. at 103.

[65] Antoni Pigrau, *Introducción al Derecho Internacional de los Derechos Humanos*, *in* MANUEL OLLÉ SESÉ, ET AL., DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS 30 (2009).

fundamental freedoms derived from it, through international or regional instruments, bodies, and procedures."[66]

As a summary, some texts from international human rights law are cited in which human dignity is most clearly affirmed. The *American Declaration of the Rights and Duties of Man*, approved by the Ninth International American Conference held in Bogotá from March 30 to May 2, 1948, states that "the American peoples have acknowledged the dignity of the individual," and for this reason, their national constitutions recognize that legal and political institutions "have as their principal aim the protection of the essential rights of man."[67] Similarly, the preamble affirms that "all men are born free and equal, in dignity and rights, and, being endowed as they are with reason and conscience, they should conduct themselves as brothers one to another."[68]

The preamble of the Universal Declaration of Human Rights states "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[69] In the common preamble to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, both adopted on December 16, 1966, the earlier declaration is reiterated, emphasizing that human rights "derive from the inherent dignity of the human person."[70]Similarly, the preamble to the American Convention on Human Rights or Pact of San José, Costa Rica, of November 22, 1969, recognizes that "the essential rights of man are not derived from one's being a national of a certain State, but are based upon the attributes of the human personality."[71]

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[66] HERNANDO VALENCIA, DICCIONARIO ESPASA DERECHOS HUMANOS 122 (2003).
[67] *American Declaration of the Rights and Duties of Man*, 43 AM. J. INT'L L. SUPP. 133 (1949).
[68] *Id*. at pmbl.
[69] G.A. Res. 217 (III), pmbl. (Dec. 10, 1948).
[70] G.A. Res. 2200A (XXI), pmbl. (Dec. 16, 1966).
[71] Organization of American States, American Convention on Human Rights, pmbl., Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

VII. The Concept of Non-Derogable Rights

In accordance with this core principle of IHRL, the authority of States to limit or suspend human rights during emergencies or states of exception is seriously restricted with respect to certain rights. These are human rights considered especially valuable and fundamental, enjoying enhanced protection even in states of exception. The international treaties governing this area, within the framework of the different systems for the international protection of human rights, incorporate lists of non-derogable rights, with only minor variations among them. To illustrate this point, this chapter examines the catalog of non-derogable rights established by the ICCPR (United Nations) and the American Convention on Human Rights (Organization of American States), namely:

The ICCPR, approved by the National Congress through Law 74 of 1968, ratified on October 29, 1969, and in force (both generally and for Colombia) since March 23, 1976, enumerates certain non-derogable rights in states of emergency in Article 4, paragraph 2, as follows:

> The preceding provision does not authorize any suspension of articles 6 (right to life), 7 (prohibition of torture), 8 paragraphs 1 and 2 (prohibition of slavery and servitude), 11 (prohibition of imprisonment for debt), 15 (principle of favorability of criminal norms), 16 (right to recognition of legal personality) and 18 (right to religious and ideological freedom).[72]

The American Convention on Human Rights or Pact of San José, Costa Rica, incorporated into our legal system by Law 16 of 1972, ratified on May 28, 1973 and in force (generally and for Colombia) since July 18, 1978; in its article 27, paragraph 2, establishes in this regard:

> The preceding provision does not authorize the following articles: "3 (Right to Juridical Personality), 4

[72] International Covenant on Civil and Political Rights, art. 4(2) Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force fully on Mar. 23, 1976 and ratified by Colombia Oct. 29, 1969; enumerating certain inalienable rights in states of emergency).

> (Right to Life), 5 (Right to Humane Treatment), 6 (Freedom from Slavery), 9 (Freedom from *Ex Post Facto* Laws), 12 (Freedom of conscience and Religion), 17 (Rights of the Family), 18 (Right to a Name), 19 (Rights of the Child), 20 (Right to Nationality), and 23 (Right to Participate in Government), or of the judicial guarantees indispensable for the protection of such rights.[73]

In this enumeration, it is also important to consider the fundamental rights protected under IHL for "protected persons" in the context of an armed conflict, as these correspond to the aforementioned non derogable rights.[74] A more detailed explanation is provided in the following section.

Article 2 of the Code of Conduct for Law Enforcement Officials, adopted by the General Assembly in Resolution 34/169 of December 17, 1979, establishes that: "In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons."[75]

VIII. Human Dignity in International Humanitarian Law

IHL can be defined, following the doctrine of the International Committee of the Red Cross (ICRC), as a branch of public international law composed of conventional and customary norms applicable to both international and non-international armed conflicts. Its purpose is to regulate and limit the methods and means of warfare employed by the parties to the conflict, as well as to provide protection to persons who do not take a direct part in hostilities, to combatants who for any reason are hors de combat, and to objects essential to the survival, well-being, and cultural heritage of the civilian population.[76]

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[73] Organization of American States, American Convention on Human Rights, pmbl., Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.
[74] *Id*.
[75] G.A. Res. 34/169, art. 2 (Dec. 17, 1979).
[76] INT'L COMM. RED CROSS, INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION 17 (2022).

IHL began to develop as treaty law in the mid-nineteenth century. Its initial purpose was to establish international rules that would provide guarantees for soldiers wounded on the battlefield to receive timely assistance, as well as humane treatment for soldiers taken as prisoners of war. However, after the horrific experience of the world wars of the twentieth century—especially after the Second World War—it became necessary to develop new international treaties that would also protect, without discrimination, the civilian population and, more generally, all persons who do not take a direct part in hostilities.

This purpose shaped much of the content of the 1949 Geneva Conventions, particularly Convention IV, concerning the protection of civilians in times of war. In the same vein, but with a much broader and general scope, Common Article 3 was adopted across the four conventions, establishing a minimum normative framework binding on the parties to any armed conflict. In this way, it extended the scope of IHL from international armed conflicts (IACs)—that is, conflicts between the armed forces of two or more states—to non-international armed conflicts (NIACs), defined as prolonged confrontations between a state's armed forces and organized armed groups, or between such groups themselves.[77] Subsequently, the 1977 Additional Protocols I and II complement this framework. Article 1.4 of Protocol I extends the regime applicable to international armed conflicts to include struggles by peoples against colonial domination, foreign occupation, or racist regimes, exercising their right to self-determination. Meanwhile, Protocol II, as stated in Article 1.1, "develops and supplements" Common Article 3, further specifying humanitarian protections for armed conflicts between state armed forces and dissident armed forces or other organized armed groups.

The different levels of regulation—whether those applicable to international armed conflicts, the minimum general scope established in Common Article 3, or its extension to non-international armed conflicts under Protocol II—reflect the varying capacity of the parties to comply with IHL rules. However, none of these levels imply a lesser

[77] *Id*. at 54.

degree of protection for individuals.[78] For example, the status of prisoner of war applies only to regular combatants captured by the adversary in international armed conflicts. Similarly, for non-international armed conflicts, Protocol II provides that individuals deprived of their liberty for reasons related to the armed conflict, even if the prisoner-of-war status does not apply, must be treated humanely in all circumstances.

Thus, IHL seeks to protect the dignity of individuals and their fundamental rights within the pressing circumstances of an armed conflict.[79] For this reason, it is not surprising that the fundamental guarantees of IHL coincide with the rights we mentioned earlier—those classified under IHRL as non-*derogable* or *untouchable*, precisely because they cannot be limited by the State, even in states of emergency. In IHL, these fundamental guarantees are mainly found in Common Article 3 of the four Geneva Conventions of 1949. In the Colombian context, particular attention must also be given to Protocol II to the Geneva Conventions of 1977, which was developed based on Common Article 3 specifically to regulate the protection of victims of non-international armed conflicts. The Geneva Conventions were incorporated into Colombian law through Law 5 of 1960, ratified on November 8, 1961, and have been in force for Colombia since May 8, 1962. Protocol II was incorporated into Colombian law through Law 71 of 1994. Common Article 3 enshrines the minimum rules that must be observed by the parties to an armed conflict of any kind. Protocol II, as an addition to the Geneva Conventions, establishes the "Fundamental Guarantees" in Title II, Articles 4, 5, and 6.

If we were to provide a very general summary of these fundamental guarantees or rights that IHL norms protect for protected persons, they would be: the right to life, the right to personal integrity, the right to

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[78] Int'l Comm. Red Cross, *¿Cuál es la Definición de "Conflicto Armado" Según del Derecho Internacional Humanitario?* (2008), https://www.icrc.org/sites/default/files/external/doc/es/assets/files/other/opinion-paper-armed-conflict-es.pdf.

[79] BERNARDO CARVAJAL, LA DIGNIDAD HUMANA COMO NORMA DE DERECHO FUNDAMENTAL 59 (2020).

personal liberty, the right to honor, the right to due process, and the rights of children.

As in the previous section, part of the content of some of these IHL norms is included here as an example of provisions aimed at protecting human dignity. The first part of Common Article 3 of the Geneva Conventions of 1949, "Intended to protect victims of war," states that:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[80]

The so-called *Martens Clause*, contained in Article 1, "General Principles and Scope of Application," paragraph 2 of Protocol I of 1977, additional to the Geneva Conventions of 1949 "Relating to the Protection of Victims of International Armed Conflicts," provides that:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[81]

The Martens Clause was first introduced in the preamble of the (II) Hague Convention on the Laws and Customs of Land Warfare of 1899, at the initiative of the Russian jurist and diplomat Friedrich Fromhold Martens, with the purpose of providing armed conflict law with a minimum and necessary normative framework in the absence of more complete and specific regulation.

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[80] Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[81] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(2), June 8, 1977, 1125 U.N.T.S. 3.

As a general statement of some of the *fundamental guarantees* contained in Protocol II of 1977, additional to the Geneva Conventions of 1949, "Relating to the Protection of Victims of Non-International Armed Conflicts," we can cite its Article 4.1:

> All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.[82]

IX. Human Dignity in Operational Law

Hernández defines operational law in Colombia as the normative framework that integrates both domestic and international law rules applicable to the regulation of public force operations, particularly regarding the use of force.[83] In this way, it incorporates provisions from constitutional law, administrative law, criminal and disciplinary law, as well as from IHRL, IHL, and, where relevant, international criminal law. In a more recent research study, Chíquiza and Gil propose a broader definition, according to which:

> Operational law (DOPER) is a specialized public legal framework with political influence, composed of a set of conventional, constitutional, legal, and regulatory norms that govern the actions of the Military Forces and the National Police at all times, whether in armed conflicts or in peacetime scenarios.[84]

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[82] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(1), June 8, 1977, 1125 U.N.T.S. 609.

[83] M. Hernández, *Derecho Operacional. ¿Qué es el Derecho Operacional o de las Operaciones?* (2008).

[84] Francisco Chíquiza & Juan Gil, *El Derecho Operacional Como una Categoría Dentro de la Taxonomía del Derecho*, 68 VNIVERSITAS 139, 13 (2019).

Hernández explains that the Chilean Army was likely the first in the region to develop its own criteria to define operational law, as a foundation for the Army's doctrinal bodies, "represented by the set of legal norms drawn from the applicable national and international legal framework that regulate military operations."[85] Other countries have also developed significant doctrines on the subject, such as the United States, with the various annual versions and adaptations of its *Operational Law Handbook*[86]; examples can also be found in Switzerland,[87] and more recently, studies and developments have begun in Mexico.[88]

To study the projection of human dignity within Colombia's operational law, we will start from a more refined approach—specifically, the one established by the *Operational Law Manual*, based on Article 4 of Decree 124 of 2014. In this decree, operational law is defined as "the integration of the international treaties ratified by Colombia, national legislation, and jurisprudence regarding human rights and IHL into the planning, execution, and oversight of operations, missions, and procedures of the public security forces."[89]

This definition clearly establishes a substantive link between operational law and the respect for and protection of human dignity, since it is precisely built upon elements from the two branches of public international law that, on the one hand, impose on States the obligations to respect, protect, and guarantee human rights at all times and in all places, as IHRL does, and, on the other hand, require the respect and protection of the most fundamental rights under the demanding and adverse conditions produced by armed conflict, as provided by IHL.

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[85] Hernández *supra* note 83, at 2.
[86] JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCHOOL, OPERATIONAL LAW HANDBOOK 8 (2022).
[87] Pierremarco Zen-Ruffinen, *Le Droit des Opérations ou le Droit Opérationnel au Sein de L'armée*
Suisse, 149 REVUE MILITAIRE SUISSE 27, 27-32 (2008).
[88] Renato Bermúdez, *Derecho Operacional*, *in* ALEJANDRO ESPINOSA, DERECHO OPERACIONAL 155
(2017).
[89] Decreto 124 de 2014, enero 28, 2014, Diario Oficial [D.O.] No. 49047, 4 (Colom.).

This substantive link between the value of human dignity and operational law is clearly established in the *Operational Law Manual* for the Military Forces, which outlines and explains the content of national security and defense under the responsibility of the Military Forces:

> National security and defense are directed toward the interests pursued by the Colombian State; the Political Constitution of Colombia clearly defines the higher interests pursued by the Colombian people, in their capacity as sovereign, as a social rule-of-law State, organized as a unitary republic, decentralized, with autonomous territorial entities, democratic, participatory, and pluralistic, founded on respect for human dignity, the labor and solidarity of the people who comprise it, and the primacy of the general interest.[90]

However, this definition presents a significant conceptual challenge, since one of the most important legal issues in the realms of IHRL and IHL is determining the correct way to coordinate the application of the two bodies of law—particularly in states experiencing non-international armed conflicts, such as Colombia. In this regard, various approaches have been proposed and implemented: some advocate for their exclusive application, others for a complementary application, and more recently, for an integrated application.[91]

The exclusive application approach is based on the rule of *lex specialis*, meaning that in the context of an armed conflict, only IHL norms would apply, as it is the body of law that specifically governs the subject matter. Consequently, IHRL norms would not apply. This approach assumes the existence of substantial and irreconcilable differences between IHRL and IHL—for example, while IHRL establishes the inviolability of life, IHL, in contrast, allows operations

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[90] COMANDO GENERAL DE LAS FUERZAS MILITARES, MANUAL DE DERECHO OPERACIONAL PARA LAS FUERZAS MILITARES 14 (2015)

[91] GERD OBERLEITNER, HUMAN RIGHTS IN ARMED CONFLICT: LAW, PRACTICE, POLICY 148-175 (2015). *See also* UNITED NATIONS, LEGAL PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICT 32-101 (2011) https://acrobat.adobe.com/id/urn:aaid:sc:US:e3bb1d50-8f68-4814-ba74-05808d6f0ba0.

that may involve the use of lethal force. Undoubtedly, this illustrates the complexity of the issue, but it does not provide a valid or plausible solution, as it would entail disregarding the binding force of human rights norms in armed conflict contexts.

The complementary application approach also follows the *lex specialis* rule but seeks to articulate the two bodies of law. For example, the scope of the right to life, protected under IHRL, in the context of an armed conflict would be determined by compliance with IHL norms; thus, a combat death resulting from an operation conducted in accordance with IHL rules would not constitute a violation of the right to life. Similarly, in a non-international armed conflict, if the armed forces capture a member of an organized armed group, the applicable rules would be those in domestic law implementing due process in criminal matters, in accordance with IHRL. Clearly, this approach is more appropriate and reasonable; however, there would still be cases in which human rights norms would not fully apply in a strict sense.

Finally, there is the integrated application approach, which is the most demanding. It starts from the recognition that IHRL norms must always be applied, in all circumstances, even in the context of armed conflict. For these purposes, however, they must be applied in an integrated manner with IHL norms, as if they constituted a single, unified legal system. As noted earlier, this is precisely the approach prescribed by the Operational Law Manual. This approach likely seeks to reinterpret IHL in light of human rights norms. Clearly, it is the most legally sound method, but it also requires the greatest effort in terms of understanding and mastering the entire body of law.

In this sense, within the framework of operational law, IHRL and IHL must be integrated, always with the aim that the operations of the public security forces—consistent with the rule of law—are conducted based on respect for, and in pursuit of the effective protection of human dignity and, consequently, the human rights of all individuals.

X. Conclusion

In conclusion, this section provides a synthesis of the concepts examined, the proposed interpretations of these concepts, and the specific findings that emerge from analyzing their reflection in positive law.

A concept of human dignity, rooted in Kantian thought, begins with recognizing the value of the person as the ethical—and, correspondingly, legal and political—foundation of the rule of law and the paradigm of a democratic society. In this sense, human dignity can be defined as the value by which each person must be recognized as an end in themselves and, consequently, as equally worthy and free. The eighteenth-century declarations of rights, which constituted the first expressions of constitutionalism, do not explicitly refer to human dignity, but they are grounded in its essential content: the equal worth and equal freedom of every person. Human dignity is first invoked explicitly in the work of Kant and is subsequently realized after the Second World War in constitutional developments as well as in international human rights declarations that gave rise to IHRL.

The CPC was strongly influenced by European constitutions enacted after the Second World War, which recognize human dignity as the foundation of social, legal, and political order. Following this same approach, Article 1 of the CPC enshrines respect for human dignity as a fundamental principle of the State. Colombian constitutional doctrine has developed and refined the concept of human dignity as the foundation of the State, of human rights, and, consequently, of the entire legal system. It also identifies the *spheres of protection* of human dignity as including individual autonomy, material conditions of existence, and physical and moral integrity.

Respect for and protection of human dignity must guide all actions of the State. Public officials are obliged to treat every person, without distinction, in accordance with their intrinsic worth. The integrity of the human being constitutes the *raison d'être*, the guiding principle, and the ultimate purpose of state organization.

IHRL can be defined as the branch of public international law that imposes and regulates on States the obligations to respect, protect, and fulfill human rights. IHRL aims to provide comprehensive legal protection for the dignity of individuals through public international law across all areas of social, political, economic, and cultural life. The development of IHRL stems from one of the harshest lessons left by the tragedies of the First and, especially, the Second World War: the realization that constitutional protection of rights alone is not sufficient. With IHRL, the legal protection of human rights becomes internationalized, producing a substantial shift in the very conception of public international law—from a classical model to a contemporary one. Based on the principle of the *non-derogability of rights*, which is inherent to IHRL, the power of States to limit or suspend human rights during states of emergency or exception is significantly restricted with respect to certain human rights that are considered especially valuable and fundamental, and that enjoy reinforced protection even in times of emergency.

IHL seeks to protect the dignity of persons and their fundamental rights in situations of armed conflict. The original purpose of IHL was to establish international rules that would ensure that soldiers wounded on the battlefield received timely assistance, as well as humane treatment for soldiers captured as prisoners of war. However, after the Second World War, it became necessary to develop new international treaties that would also protect, without discrimination, the civilian population and, more generally, all persons who do not take a direct part in hostilities. Initially, IHL focused on regulating international armed conflicts. After the Second World War, its scope expanded to include non-international armed conflicts as well.

The different levels of regulation within IHL—whether those applicable to international armed conflicts, the minimum standards of general application set out in Common Article 3, or the more detailed rules for non-international armed conflicts contained in Protocol II—respond to the varying capacities of the parties to a conflict to comply

with IHL norms. However, none of these regulations implies a lower degree of protection for individuals.

In Colombia, operational law can be defined as the normative framework that integrates both domestic and international law rules applicable to the regulation of public force operations, particularly regarding the use of force. In this way, operational law incorporates provisions from constitutional law, administrative law, criminal and disciplinary law, as well as from IHRL, IHL, and, where relevant, international criminal law. Within the framework of operational law, IHRL and IHL must always be integrated with the aim that the operations of the public security forces—consistent with the rule of law—are conducted based on respect for, and in pursuit of the effective protection of human dignity and, consequently, the human rights of all individuals.

Concluding Remarks

Shirley Magniez-Pouget and John M. B. Balouziyeh

Considering the current state of armed conflict worldwide, with more than one hundred conflicts under way, this volume is exceptionally timely. It offers a rigorous reflection on the legal and ethical dimensions of warfare, allowing the reader to delve into the critical questions that shape international law and ethics in armed conflict. From the Martens Clause and the principle of humanity to the complexities of the crime of aggression and the law of targeting, each chapter deepens our understanding of the challenges and responsibilities faced by states. The volume gives sustained attention to accountability for war crimes and to the various approaches used to engage armed groups in order to secure humanitarian access and protection.

Throughout this volume, the authors, who hail from diverse backgrounds but all have in common expertise in international law and a shared commitment to international human rights, pose solutions to address increasing violations of the core legal framework designed to mitigate the impact of armed conflict on civilians. They write as practitioners and scholars, as military officers and humanitarian professionals, as advocates and jurists. They do not speak with a single voice, nor should they. What unites them is a conviction that the law of armed conflict remains capable of meeting the demands placed upon it, and that the task before the international community is less to reinvent that law than to insist upon its faithful application. The chapters that compose this collection each advance that task from a distinct vantage point, and it is worth recalling briefly what each contributes.

In the opening chapter, *The Continuum of Prevention: Germany's Obligations Under the Genocide Convention and the Ethics of Yazidi Deportation*, Naomi Prodeau and Marissa Kardon Weber examine the duty to prevent genocide as a continuing legal obligation rather than a moment that passes once the killing stops. Taking the plight of the Yazidi community as its focus, the chapter challenges the tendency of national courts to demand proof of a "current danger" before recognising protection obligations, arguing instead that genocide is a process whose risks endure long after the initial atrocities end. It offers an ethics-based framework to operationalize the legal duty to prevent, tying accountability, the removal of root causes, and the protection of survivors into a single continuum of prevention.

In the second chapter, *Trials in Absentia: Understanding the Procedure for Ukraine and Beyond*, Dr. Mark Ellis turns to a question made urgent by the war in Ukraine: whether, and how, those most responsible for international crimes may be tried when they refuse to appear. Surveying the practice of international tribunals—from the ad hoc tribunals for the former Yugoslavia and Rwanda to the Special Tribunal for Lebanon and the International Criminal Court—the chapter identifies the safeguards that make trials in absentia compatible with the rights of the accused, and it maps what those precedents mean for the pursuit of accountability against Russian aggression.

In *Forcible Transfer and Deportation of Children in Armed Conflict: From Law to Action*, Baroness Helena Kennedy LT KC and Eleonora Scala confront one of the gravest and most long-standing harms of modern conflict: the removal of children from their families and communities. The chapter sets out the tripartite framework of international humanitarian law, international criminal law, and international human rights law that prohibits such conduct, and then presses beyond doctrine to the persistent gap between the law on the books and its enforcement, proposing concrete measures to translate protection from principle into practice.

In the fourth chapter, *The CNN Effect and Social Media Moderation in Taliban Afghanistan*, Sara Segneri explores how information now shapes

the conduct and perception of armed conflict. Revisiting the "CNN effect" in the age of social media, and taking post-2021 Afghanistan as its case study, her chapter examines the diplomatic and humanitarian consequences of content-moderation decisions— including decisions to designate groups as "dangerous organisations" —and asks how private platforms have come to exercise a form of power once reserved to states.

In *Reinforcing the Ban: Challenges and Opportunities for Accountability in Wars of Aggression*, Federica D'Alessandra traces the historical struggle to outlaw aggressive war, from its early legal origins to the crime of aggression at the International Criminal Court. The chapter confronts the jurisdictional obstacles that shield great-power perpetrators, weighs the prospects of a special tribunal for the aggression against Ukraine, and considers the additional remedies available to the international community when the principal avenues of accountability are blocked.

In the sixth chapter, *Legal Accountability in Gray Zone Conflicts: A Discussion*, Douglas K. Bryson addresses the ambiguous space between war and peace in which so much contemporary coercion now occurs. Cataloguing the tools of gray-zone warfare—information operations, lawfare and norm erosion, and the calibrated use of force below the threshold of armed attack—the chapter argues that existing legal paradigms, properly applied, can furnish accountability even for conduct designed to evade it.

In *Why the Gulf War Matters: The Promise of the U.N. Charter and the Vindication of Collective Security*, John D. Ford and Frank Lumpkin IV trace the idea that aggression may be answered by collective action, from its early roots in the just-war tradition and the Westphalian order to the legal milestones that gave it form: the Kellogg–Briand Pact, the Nuremberg trials, and the United Nations Charter. The 1991 response to Iraq's invasion of Kuwait emerges as a vindication of the Charter's promise of collective security—a reminder, at a moment of renewed great-power rivalry, of what the international order was built to prevent.

In the eighth chapter, *Henfield's Dilemma: Originalism, Customary International Law, and the American Warfighter*, M. Braxton Marcela situates the law of nations within the framework of the U.S. Constitution. Examining the Founders' understanding of the law of nations and the earliest decisions of the U.S. federal courts, the chapter asks whether an originalist reading of the U.S. Constitution requires American military personnel to obey customary international law—and what that answer means for the soldier in the field.

In *Limiting the Cumulative Impact of Conflict on Civilians through IHL Proportionality*, Sarah McIntosh reexamines the principle of proportionality that sits at the heart of the law of targeting. Parsing the meaning of military advantage and of incidental civilian harm, she contends that the law can and should account for the cumulative toll that repeated operations exact upon civilian populations, rather than assessing each attack in isolation—a reading that would give the principle of proportionality its fullest protective force.

The tenth chapter, *The Prospects for Prosecution: A Reply to "Limiting the Cumulative Impact of Conflict on Civilians through IHL Proportionality,"* is Ambassador Stephen Rapp's reply to Sarah McIntosh, building on her analysis to show how international criminal law can reinforce the protections that international humanitarian law affords civilians. Where McIntosh defines the content and protective function of the proportionality rule under international humanitarian law, Rapp turns to international criminal law, demonstrating how criminal justice and accountability measures can strengthen compliance with international humanitarian law and open avenues for civilians who have endured protracted conflict to seek repair, reconstruction, and healing. Focusing on grave breaches and other war crimes, he examines the duty to prosecute, the prohibition on retroactive punishment, the role of the International Criminal Court, and the promise of complementarity and universal jurisdiction, charting a realistic path toward accountability for cumulative civilian harm.

In the concluding chapter, *Respect for and Protection of Human Dignity: A Guiding Principle of Operational Law*, Professor Darío Luis Dangón Moisés closes the volume with the value underlying all of it. Drawing on philosophical and legal traditions alike, the chapter develops an account of human dignity and the qualities that follow from it, from autonomy and inviolability to universality and interdependence, and traces its place in constitutional and international law. Professor Dangón then shows how dignity must guide operational law: the rules that govern forces in the field, where principle meets practice and the protection of the human person is secured or lost.

Read together, these contributions resist easy optimism. They acknowledge that civilians are being deliberately targeted in many contemporary conflicts, that international humanitarian law is widely disregarded, that victims are dehumanised, and that misinformation spreads unchecked. They recognise, too, that most hostilities now unfold in densely populated areas, sharply increasing civilian vulnerability. Yet the authors do not conclude that the law has failed. Their common answer is that the framework endures, and that its promise is realised or betrayed in the choices of those who wield force and those who sit in judgment of it.

The April 2025 International Legal Symposium in Kuwait City, co-sponsored by Task Force Spartan, the International Bar Association, and Advocates Group Academy, which gave rise to this publication, made that point with unusual clarity. Speakers emphasised that the law of armed conflict saves lives when it is respected. The Geneva Conventions offer detailed, practical answers to nearly every circumstance encountered in armed conflict, and the principles of international humanitarian law define the limits of permissible force. Asked whether international humanitarian law has eroded, the speakers affirmed that it has not. The legal framework remains fully capable of protecting civilians. What has eroded, very often, is the willingness to apply these rules.

That distinction—between a framework that has failed and a will that has faltered—is the thread that binds the chapters of this volume.

If the law is sound but its observance is not, then the work of the international lawyer, the military commander, the humanitarian, and the judge is not to lament the law's inadequacy but to insist upon its fidelity. The solutions the contributors propose—sharpened doctrines of prevention and proportionality, credible avenues of prosecution, principled limits on gray-zone coercion, and an unwavering commitment to human dignity—are, in the end, solutions of application rather than invention.

Looking ahead, it remains imperative to sustain advocacy for the principles of proportionality, distinction, necessity, humanity, and honor, which underpin the legal and ethical framework designed to protect civilians in armed conflict. If this volume helps its readers to understand those principles more deeply, to defend them more resolutely, and to apply them more faithfully, it will have served the purpose for which its contributors wrote. The stakes are measured not in doctrine or debate but in human lives, and it is in the hope of safeguarding those lives that these concluding remarks, and the chapters that precede them, are offered.

Biographies

John M. B. Balouziyeh

John M. B. Balouziyeh is a New York-based Partner at the international law firm Curtis, Mallet-Prevost, Colt & Mosle LLP. Acting for sovereign states, the U.N., corporations, and individuals, he specializes in human rights, public international law, foreign investment, and international dispute resolution.

John previously served with the United Nations in Iraq as a Human Rights Officer, Legal Officer, International Consultant, and Legal Expert. In those roles, he trained Iraqi prosecutors and judges on international criminal law, drafted public reports, prepared case assessments, and conducted international criminal law investigations. He also monitored more than 40 war crimes trials before Iraq's anti-terrorism courts through a joint initiative of the UN Office of the High Commissioner for Human Rights and the Clooney Foundation for Justice.

He is a Senior Instructor in International Humanitarian Law with the American Red Cross and has served as a Judge Advocate in the U.S. military, holding a range of leadership and litigation roles, including Chief of International Law, Chief of National Security Law, Prosecutor (trial counsel), and Defense Counsel at the Guantánamo Bay war crimes tribunals.

John is the author of *Public International Law: Conventions, Cases and Commentary* (Kluwer Law International, 2025), which has been acclaimed as a "solidly researched and intensely readable exposition of international law," as well as more than a dozen other books written in Arabic, English, French, and Spanish.

He currently serves as Chair of the Disarmament Committee of the International Law Association, North America Branch and Co-Vice Chair of the IBA Human Rights Law Committee, and is admitted to practice law in New York, Washington, DC, Barcelona, and before the International Criminal Court.

Outside of the law, he is a cellist and artist whose paintings, drawings, and photography have been exhibited in New York, Paris, and Senegal.

Doug Bryson

Doug Bryson is an operational and international law attorney with the United States Air Force. His military service includes multiple deployments in support of joint operations, where he has served as an operations law attorney, providing counsel on a wide range of legal and operational issues.

He earned his Juris Doctor, *cum laude*, from the University of Minnesota Law School and holds a Master of Laws (LL.M.) in International & Comparative Law *with highest honors* from George Washington University. He also holds a master's degree in military operational art and science from Air University. His academic work focuses on the legal challenges of modern warfare, particularly in gray zone conflicts and exploring the intersectionality of international relations theory and international law to address accountability and legal gaps in ambiguous conflict scenarios.

Federica D'Alessandra

Federica D'Alessandra is a Nonresident Scholar and 2024 British Academy Global Innovation Fellow at the Carnegie Endowment for International Peace. Previously, she served as the Deputy Director of the Institute for Ethics, Law, and Armed Conflict (ELAC), and as founding Executive Director of the Oxford Programme on International

Peace and Security at the Blavatnik School of Government. She is also a member of the Steering Committee of the School's Alfred Landecker Programme, an Academic Affiliate of the Oxford Bonavero Institute of Human Rights, and on the Steering Committee of the Oxford Network of Peace Studies. Prior to joining Oxford, Federica held various appointments at Harvard University, including at the Harvard John F. Kennedy School of Government, and at the Harvard Law School, where she focused on mass atrocity response and prevention, transitional justice, national security, and human rights. Her current research spans a variety of pressing, contemporary issues on which she has published widely, including: international aggression; judicial accountability for mass atrocities; new institutional developments in international justice; States' legal duties in mass atrocities situations; the role of new actors and new technologies in atrocity crimes documentation; and the UN accountability turn, among others.

Olufemi Elias

Dr. Olufemi Elias is a judge ad hoc at the International Court of Justice and a member of the United Nations International Law Commission. He has served in senior legal positions in international organizations, including as the Registrar (United Nations Assistant Secretary-General) of the U.N. International Residual Mechanism for Criminal Tribunals and the Legal Adviser of the Organisation for the Prohibition of Chemical Weapons. He is the President of the Administrative Tribunal of the Organization of the Petroleum Exporting Countries Fund and the Chairman of the Administrative Tribunal of the Islamic Development Bank. He is a titular member of the Institut de Droit International and currently serves as its Third Vice-President.

Elias is a Visiting Professor in international law at Queen Mary University of London. He served previously as a lecturer in international law at King's College London and has taught

international law at other universities around the world. He has written and edited several books and articles on various aspects of international law. He received the 2018 Honorary Membership award from the American Society of International Law for distinguished service to international law.

A member of the Nigerian Bar since 1988, he holds the degrees of Bachelor of Arts in Jurisprudence from Oxford University, Master of Law in International Law from Cambridge University, and Doctor of Philosophy on International Law from University College London.

Mark Ellis

Dr. Mark Ellis (PhD Law, 2010) is an international criminal law expert, author, keynote speaker, and Executive Director of the International Bar Association (IBA). Originally from Washington D.C., Mark's career and passion for academia have taken him all over the world. Dr. Ellis began his studies in the United States with a Bachelor of Science in Economics and a Juris Doctor from Florida State University, before travelling to Brussels to complete his first research grant—exploring the law and institutions of the European Union. His second research grant took him to Dubrovnik where he focused on Yugoslav-American studies. Upon his return, Mark was awarded the first of two Fulbright scholarships to the former Yugoslavia. This is an area of interest Ellis would continue to develop throughout his career and he was recently appointed Chair of the Central and Eastern European Law Initiative Institute Management Board.

Dr. Ellis currently works as an adjunct professor at Florida State University of Law. He has been recognized by numerous associations for his exceptional work and was named one of the United Kingdom's top human rights lawyers by 'Lawyer Magazine.' His remarkable contribution to social justice, and extraordinary service to society are values he shares with alumni and members of our King's community across the world.

John D. Ford

Major John D. Ford is a member of the U.S. Army's Judge Advocate Generals Corps. He has performed active-duty assignments as the Special Prosecutor for the Incentives Task Force, the Command Judge Advocate for Area Support Group-Kuwait, and the Chief of Military Justice for U.S. Army Central Command. He is a member of the California National Guard and in his civilian career he advises Fortune 500 companies on matters of corporate strategy. He also published over fifty articles on geopolitics and international law in publications such as *The Huffington Post*, *War on the Rocks*, *The National Interest*, and *The Diplomat*.

Baroness Helena Kennedy

Baroness Helena Kennedy LT KC is one of Britain's most distinguished lawyers. She has spent her professional life giving voice to those who have least power within the system, championing civil liberties and promoting human rights. She has conducted many prominent cases of terrorism, official secrets and homicide. She is the founding force behind the establishment of the Bonavero Institute of Human Rights at the University of Oxford and was elevated to the House of Lords in 1997 as a Labour peer. She has published a number of books, including two on how the justice system is failing women, and has written and broadcasted on many issues over the years. Currently, she has taken on the role of Director to the International Bar Association's Human Rights Institute. She directs the Institute's work upholding the rule of law and human rights globally.

Frank Lumpkin IV

Frank Lumpkin IV is an attorney with Hall Booth Smith, PC in their Columbus, Georgia office. He focuses his practice on complex trial and appellate litigation, government relations, and economic development

matters. He is also a Captain and Judge Advocate in the United States Army Reserve.

From 2024 to 2025, Frank served on active duty as National Security Attorney for Operation Spartan Shield, advising senior military leaders on national security, operational, and international law matters across the U.S. Central Command area of responsibility. He currently continues his service as a judge advocate in the Army Reserve with the 213th Legal Operations Detachment at Fort Benning, Georgia.

Frank earned his Juris Doctor from the University of Georgia School of Law, where he served two consecutive terms as class president and as president of the Blue Key Honor Society. He also holds a Bachelor's degree in Finance, with an Entrepreneurship Certificate, from the University of Georgia.

Before entering private practice, Frank worked in public policy. He negotiated and drafted several legislative measures, including a provision later enacted as part of federal law. He interned with the Honorable Clay D. Land of the United States District Court for the Middle District of Georgia and served in the United States Congress.

An avid traveler and outdoorsman, Frank has visited every continent, seventy-five countries, and forty-one U.S. states. He holds certifications as a private pilot, navigation master, and rescue diver.

Shirley Magniez-Pouget

Shirley serves as Avocate à la Cour and Legal Director of Business and Human Rights at DLA Piper in Paris. She has over twenty years of experience advising clients on human rights matters and compliance with international and national frameworks, including the U.N. Guiding Principles on Business and Human Rights, OECD Guidelines and the French Vigilance law. Her practice focuses on assisting clients in strengthening local structures of governance and helping them create a rights-respecting culture within their operations. Shirley advises companies and non-for-profit organizations in the design of compliance

programs—from policy drafting, due diligence processes including stakeholder engagement, establishing grievance mechanisms to running trainings.

Over the past few years, she has developed a niche practice on the social and integrity risks associated with protection of biodiversity and the implementation of climate solutions. Shirley is currently advising the Ministry of Justice in Madagascar on their illegal wildlife trade legal framework and acts for a protected area in the Democratic Republic of Congo on the establishment of a human rights grievance mechanism.

Shirley regularly delivers seminars on international human rights law, business, human rights and climate for Masters students at the University of law of Aix-en-Provence.

M. Braxton Marcela

Captain M. Braxton Marcela (U.S. Army), originally from Mount Airy, North Carolina, joined the U.S. Army as a judge advocate in 2017. Throughout his Army career, he has specialized particularly in national security law, fiscal and contract law, and administrative law at the corps and division echelons, having advised commanders on national security law and operations in numerous high-level training exercises and two operational deployments to both eastern Europe and the Middle East respectively. He is licensed to practice law in North Carolina Bar. His prior academic publications primarily focus on U.S. constitutional law, civil rights, and administrative law. Marcela received his Juris Doctor from American University in 2017, and his Bachelors in Arts in Government and Spanish from Hampden-Sydney College in 2014. He is currently pursuing a Masters of National Security Policy from the Duke University Sanford School of Public Policy, with a projected completion in December 2026. He is currently assigned to First Theater Sustainment Command (U.S. Army) at Fort Knox, Kentucky, and resides in Louisville, Kentucky with his wife, Kristen. Marcela looks forward to continuing his academic studies in national security law and public policy, originalism and U.S. constitutional law, international law, and the law

of armed conflict. Marcela is particularly grateful for the opportunity to contribute to the 35th Infantry Division Office of the Staff Judge Advocate's publication and was honored to serve alongside its many attorneys during their rotation to Operation Spartan Shield and Operation Inherent Resolve.

Sarah McIntosh

Sarah McIntosh is a leading legal scholar and practitioner specializing in civilian harm mitigation, survivor-centered justice and redress, and atrocity prevention. She currently serves as a Senior Associate at Georgetown University Law Center's Center on National Security (CNS), where she directs the center's portfolio on the use of force, human security, and international justice. She is also an Adjunct Professor of Law at Georgetown, teaching advanced coursework on victim-centered justice for mass atrocities. She holds a Master of Laws (LL.M.) from Harvard Law School and a Bachelor of Laws (LL.B.) and International Studies with Honors from the University of New South Wales in Sydney, Australia. She is admitted to the Supreme Court of New South Wales.

Darío Dangón Moisés

Darío Dangón Moisés is a lawyer and graduate of Universidad Sergio Arboleda. He earned a Master's degree in Human Rights and Democratization from Universidad Externado de Colombia in partnership with Universidad Carlos III de Madrid, and completed postgraduate studies in Philosophy of Law and Legal Theory.

With more than twenty-eight years of academic experience, Professor Dangón has taught in undergraduate and postgraduate programs at several universities throughout Colombia. His academic leadership roles have included serving as General Vice-Dean of the Santa Marta campus of Universidad Sergio Arboleda, Head of the Basic Area and Head of the Socio-Humanistic Area within the Law

Faculty at Escuela Militar de Cadetes General José María Córdova, and Director of the Law Program at Universidad de Santander.

In addition to his teaching and administrative work, he has been actively involved in legal research, editorial production, and clinical legal education, including service as Director of the Consultorio Jurídico Radial at Unicervantes. He also served as vice president of an international non-governmental organization focused on youth political education, the promotion and protection of human rights, and democratic transition initiatives. Earlier in his career, he worked as a judicial clerk for the Constitutional Court of Colombia.

Professor Dangón currently serves as an Associate Professor at Universidad Militar Nueva Granada, where he teaches Public International Law in the International Relations and Political Studies Program, as well as Theory of Law and Legal Hermeneutics in the Faculty of Law. He is also an Associate Professor at the Escuela de Derechos Humanos, Derecho Internacional Humanitario y Asuntos Jurídicos del Ejército Nacional, where he teaches Foundations of Human Rights and International Human Rights Law within the Specialization in Human Rights, International Humanitarian Law, and Conflict Resolution. In addition, he serves as a postgraduate lecturer in the Human Rights and International Humanitarian Law specialization at Universidad Sergio Arboleda and teaches Human Rights, International Humanitarian Law, and International Law in the Law Program at Unicervantes.

Naomi Prodeau

Naomi is an international human rights lawyer and investigator. Her work focuses on accountability for atrocity crimes and serious human rights violations through field-based and open-source investigations, working alongside survivor communities affected by mass violence. Naomi has worked with international non-governmental organizations, U.N. mechanisms, and academic institutions, supporting strategic litigation and quasi-judicial investigations into genocide, crimes against humanity, and war crimes, including in relation to crimes committed by the Islamic State

in Iraq and the use of starvation of civilians as a method of warfare by Russian forces in Ukraine. She has also worked on legal documentation and advocacy initiatives relating to conflict and post-conflict contexts in Iraq, Ukraine, Yemen, the Central African Republic, and Jordan. Her practice is grounded in victim-centered, trauma-informed, and intersectional approaches to justice and accountability.

Stephen Rapp

Ambassador Stephen J. Rapp served as the U.S. Ambassador-at-Large for War Crimes Issues from 2009 to 2015, heading the Office of Global Criminal Justice in the U.S. Department of State. Appointed by President Obama, he was confirmed by the Senate, and assumed his duties on September 8, 2009. Prior to his appointment, he served as Prosecutor of the Special Court for Sierra Leone beginning in January 2007, leading the prosecutions of former Liberian President Charles Taylor and other persons alleged to bear the greatest responsibility for the atrocities committed during the civil war in Sierra Leone. During his tenure, his office achieved the first convictions in history for sexual slavery and forced marriage as crimes against humanity, and for attacks on peacekeepers and for recruitment and use of child soldiers as violations of international humanitarian law.

From 2001 to 2007, Mr. Rapp served as Senior Trial Attorney and Chief of Prosecutions at the International Criminal Tribunal for Rwanda, personally heading the trial team that achieved convictions of the principals of RTLM radio and Kangura newspaper—the first in history for leaders of the mass media for the crime of direct and public incitement to commit genocide.

Mr. Rapp was United States Attorney in the Northern District of Iowa from 1993 to 2001, where his office won historic convictions under the firearms provision of the Violence Against Women Act and the serious violent offender provision of the 1994 Crime Act. Prior to his tenure as U.S. Attorney, he worked as an attorney in private practice

and served as Staff Director of the U.S. Senate Judiciary Subcommittee on Juvenile Delinquency and as an elected member of the Iowa Legislature. He received his BA degree from Harvard College, and attended Columbia and Drake Law Schools and received his JD degree from Drake.

Eleonora Scala

Eleonora Scala is a human rights lawyer leading the International Bar Association's Human Rights Institute's (IBAHRI) work on the independence and protection of the legal profession and the judiciary. Her work also encompasses the protection of vulnerable groups, advancing accountability for international crimes, and upholding international humanitarian law. She drives IBAHRI's engagement with the Bring Kids Back Task Force, co-chaired by Baroness Kennedy and the Head of the Office of the President of Ukraine, providing legal and strategic advice to the Ukrainian Presidency on the development of a human rights-based mechanism for the return of Ukrainian children abducted by Russia, both during active hostilities and in the context of peace negotiations. A qualified lawyer in Italy, she previously practiced at a leading law firm in Milan and held legal roles at the United Nations in New York and Vienna.

Sara Segneri

Sara Segneri provides legal advisory and consulting for individuals, corporations, governments, and non-governmental associations. Her areas of focus include human rights, foreign affairs, sanctions, war crimes, cross border finance, national security, business and human rights due diligence, and anti-corruption.

Sara presently serves as the Vice-Chair of the International Bar Association’s War Crimes Committee. From 2019-2022, Sara served as the Middle East and North Africa Region liaison officer. Sara is a

certified financial crime specialist and certified global sanctions specialist.

Sara has published numerous articles in recent years on international law, sanctions, terrorism, human trafficking and free speech. Sara frequently speaks at international legal conferences and conducts trainings for legal professionals, corporations, financial institutions, government officials, military, and law enforcement regarding investigating and prosecuting war crimes, human rights, sanctions, compliance with international criminal law, national security, and counterterrorism, including efforts in Ukraine, Sudan, South Sudan, Yemen, Egypt, Iraq, and the Gulf Region. Her TEDx, "Women Are Not Weapons of War," is frequently used in trainings specifically focused on conflict-related sexual violence and human trafficking. In 2024, Sara was a co-author of the Defense Counsel Handbook, a manual for Ukrainian defense lawyers representing Russians and others accused of war crimes in Ukrainian court.

Sara was a founding member of the Dulles Justice Coalition, an organization of lawyers quickly mobilized to provide legal assistance in response to the Muslim Ban. Most recently, Sara was named as a senior board member for the Blue Tulip Human Rights Group and selected as an expert fellow for the Forum on the Arms Trade.

Sara holds a Bachelor of Arts in political science and economics, a Juris Doctorate with a focus on litigation and international law, an LLM with high honors in international human rights law from Northwestern Law School and a Master's Degree with Merit in International Conflict Studies from King's College London School of War and Security Studies.

Marissa Kardon Weber

Marissa is an international criminal and human rights lawyer. She specializes in strategic litigation on behalf of survivors of atrocity crimes and human rights violations, including dissidents, political

prisoners, and targeted communities. She maintains a dynamic pro bono practice advising NGOs and governments on atrocity and human rights investigations and prosecutions. She also serves as Co-Chair of the International Bar Association's Human Rights Law Committee and is admitted to the International Criminal Court's (ICC) List of Assistants to Counsel. Marissa has driven rule of law initiatives across global conflict settings, including in Ukraine, Russia, Iran, Iraq, Syria, Libya, Afghanistan, Myanmar, Bangladesh, and Seychelles. Previously, she led a truth commission's Reparations Unit and worked within the ICC's Office of the Prosecutor. Guided by victim-centered and trauma-informed practices, she zealously seeks justice and healing for survivors.

LAW, ETHICS, AND ARMED CONFLICT
An International Law Reader

Edited by Frank G. Lumpkin IV

Law, Ethics, and Armed Conflict: An International Law Reader arrives at a moment when more than one hundred armed conflicts are under way across the globe. In many theaters of war, civilians are increasingly being deliberately targeted. This volume brings together leading voices in international law—practitioners, scholars, military officers, and humanitarian professionals who share a common commitment to the protection of civilians in armed conflict.

Across eleven chapters, the contributors confront the most pressing legal and ethical questions of contemporary warfare. They examine states' ongoing duty to prevent genocide in conflict and post-conflict situations, the procedures for trials in absentia, and the forcible transfer of children during armed conflict. They probe accountability for the crime of aggression, the emerging legal framework for gray-zone and hybrid warfare, and the influence of social media on wartime diplomacy. They weigh the interplay between customary international law and U.S. constitutional law, the proportionality rule at the heart of the law of targeting, and the strengthening of international humanitarian law through universal jurisdiction. The volume closes with a meditation on human dignity as the guiding principle of international humanitarian and operational law.

The contributors do not speak with a single voice, nor do they claim to resolve every challenge modern warfare presents. Yet they share a conviction that the international humanitarian legal framework can mitigate human suffering; what has too often eroded is the will to apply it. This volume is an invitation to understand that framework more deeply and to defend it more resolutely.

Frank G. Lumpkin IV is an attorney with Hall Booth Smith, PC, in Columbus, Georgia, where he focuses on complex trial and appellate litigation. A Judge Advocate in the United States Army Reserve, he served as National Security Law Attorney for Operation Spartan Shield, advising senior commanders on international law in theaters across the Middle East.

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