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International Law in extremis

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International Law *in extremis*

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In its 2024 Challenges report, the International Committee of the Red Cross explores the latest challenges to international humanitarian law in contemporary conflicts. Alongside the obvious concerns with deliberate non-compliance and carelessness in targeting decisions, it also noted 'a more corrosive tendency at work diminishing IHL's ability to save lives': the growing phenomenon of 'expedient interpretations of IHL – often proposed at the height of armed conflict in order to preserve states' leeway to kill and detain – [that] have compounded to undermine its protective force.' This article explores this phenomenon with reference to Israel's practices during its post-October 2023 war in Gaza. It focuses on two issues: the government's renewed reliance on its 2002 Incarceration of Unlawful Combatants Law, and the under-explored issue of the legal (ir)relevance of overall civilian harm and destruction that accumulates across a conflict. In respect of each, it is shown how previous interpretive positions by certain States in relation to these issues have undermined the law's restraining role and widened the margin of appreciation within which others can make claims to legality. The article concludes with a tentative proposal for how we might understand and critique such interpretations.

INTRODUCTION

In September 2024, the International Committee of the Red Cross (ICRC) released its sixth *Challenges* report, a periodic publication that explores the latest challenges posed to international humanitarian law (IHL) in contemporary armed conflicts.[1] In the introduction to that report, the

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ICRC set out its views on why the very people that IHL is designed to protect (civilians, medical personnel, journalists) are too often caught up in the line of fire. Alongside obvious causes, such as deliberate non-compliance with the law and carelessness in targeting, it also notes 'a more corrosive tendency at work diminishing IHL's ability to save lives':

> Over several decades now, expedient interpretations of IHL – often proposed at the height of armed conflict in order to preserve states' leeway to kill and detain – have compounded to undermine its protective force. In one conflict after another, some states have sought an increasingly expansive vision of what is permissible, and a contracted notion of what is considered prohibited … If parties continue to exert downward pressure on the protective requirements of IHL, and if they are content with simply skirting the limits of compliance, IHL will be turned on its head: it will become a justification for violence rather than a shield for humanity. States will increasingly rely on the fact that they have not broken the law to legitimize their military operations, and IHL will have assumed the function of an affirmative defence against otherwise unethical conduct.[2]

A similar point was made by the Assistant UN Secretary-General for Humanitarian Affairs at a May 2024 meeting of the UN Security Council regarding civilian protection in armed conflict. Referring to the considerable impact on the civilian population of recent conflicts in Sudan, Ukraine and Gaza, the Assistant Secretary-General noted that 'the reality is that much of the civilian harm we see in today's conflicts is occurring even when parties claim to be acting in compliance with the law'.[3]

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[1] ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (ICRC, Geneva, September 2024).

[2] ibid, 7–8.

[3] UN Security Council (UNSC), S/PV.9632, 7.

The recognition that States adopt self-serving, permissive interpretations of their international obligations (including, but not limited to, IHL) is hardly novel.[4] Indeed, for some, IHL has always been about legitimising military operations.[5] The ICRC alluded to this same tendency in its 2019 *Challenges* report,[6] but its 2024 report contains its most explicit acknowledgment of this strategy. And it comes at a time of unprecedented vulnerability for civilians in armed conflict. In his May 2024 report, the UN Secretary-General referred to the position of civilians in contemporary conflicts as 'resoundingly grim', noting that 2023 reflected a 72% increase on the previous year in conflict-related civilian fatalities.[7] Taking a longer-term view, the latest data from the Uppsala Conflict Data Program (UCDP) confirmed that the three deadliest years since the UCDP began collecting data on conflict-related deaths in 1989 have all been in the last five years.[8]

When the *Institut de droit international* was drafting a resolution on the effect of war on treaties in 1985, Krystyna Marek, the Polish-Swiss international lawyer and member of the *Institut,* referred to the goal of 'salvag[ing] the reasonably possible maximum of the fabric of law *in*

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[4] See, e.g. Adam Roberts, 'The Laws of War in the 1990-91 Gulf Conflict' (1994) 18 *International Security* 134; Zoltan Búzás, 'Is the Good News about Law Compliance Good News about Norm Compliance? The Case of Racial Equality' (2018) 72 *International Organizations* 351 (on permissive interpretations of the Convention on the Elimination of Racial Discrimination).

[5] See, e.g. Nathaniel Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43 *Columbia Journal of Transnational Law* 1. See further below at n 190.

[6] ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (ICRC, Geneva, October 2019) 11, 59.

[7] UNSC, Protection of Civilians in Armed Conflict: Report of the Secretary-General, 14 May 2024, S/2024/385, [3]–[6].

[8] Shawn Davies *et al*, 'Organized Violence 1989–2023, and the Prevalence of Organized Crime Groups' (2024) 61 *Journal of Peace Research* 673, 674 (the relevant figures relate to armed conflicts (defined non-legally) where at least one party is a government).

extremis'.[9] We can think of IHL, and international law's regulation of war more generally, in similar terms. And yet this phenomenon of permissive interpretations and claims to legality by States, alongside worsening civilian protection in recent years, paints a worrying picture of the capacity of international law to regulate conflict and reduce suffering in war.

It is precisely these two trends that we see in Gaza, since Israel launched its assault following the Hamas-led attacks of 7 October 2023 and the continued detention of Israeli civilians as hostages. Notwithstanding consistent claims by the government of Israel to be acting in conformity with international law,[10] the considerable impact on the civilian population of its assault has been well documented.[11] Indeed, the two reports cited above from the UN Secretary-General and the UCDP both singled out the conflict in Gaza for the number of people killed and the impact on civilian infrastructure.[12]

It is on this phenomenon that the current article focuses. In particular, it examines the Israeli government's approach to international law when justifying its post-October 2023 conduct in Gaza and the impact this has on the law's protective potential. Moreover, it considers to what extent Israel's own legal interpretations find support from similar interpretive manoeuvres by other States in previous conflicts. As the ICRC has cautioned, permissive interpretations of the law are

[9] IDI, '*Annuaire*, Vol 61, Tome I: *Travaux Préparatoires*' (Session d'Helsinki, 1985) (Pedone, Paris 1985) 11.

[10] UNSC, S/PV.9596, 21 ('Israel abides strictly by the laws of war, and the Israel Defence Forces have implemented more precautions to mitigate civilian harm than any other military in history'); Ministry of Foreign Affairs (MFA), 'Hamas-Israel Conflict 2023: Frequently Asked Questions' (updated 8 December 2023), 13; Tom Dannenbaum and Janina Dill, 'International Law in Gaza: Belligerent Intent and Provisional Measures' (2024) 118 AJIL 659, 660.

[11] See below at text to nn 90–95.

[12] UNSC (n 7) para 6; Davies et al (n 8) 674.

destabilising precisely because they create precedents on which other States may subsequently rely.[13]

It must be emphasised at this point that the purpose of this article is not to suggest that the law is entirely malleable. Indeed, throughout the article I highlight where Israel's and other States' permissive interpretations are clearly *contra legem*. And, of course, there is very significant evidence of serious violations of international law being committed in Gaza.[14] Nonetheless, the aim here is to step back from such accounts and consider how international law is invoked by the Israeli government (and other States). Only then can we start to understand fully what role the law plays in war.

To explore this, the article examines the Israeli government's reliance on international law in two particular areas. It first considers the renewed use of administrative detention, or internment, of Gazans since October 2023 under its 2002 Incarceration of Unlawful Combatants Law (and the recent amendments thereof). It then moves on to an exploration of the Israeli government's stance on the under-explored issue of the legal relevance (or irrelevance) of overall civilian harm and overall destruction of civilian infrastructure accumulated across a conflict. In relation to each, it will be shown how Israel has relied on permissive interpretations of international law that significantly undermine the protective potential of the law and that nonetheless find (varying degrees of) support from the practice of other States. The risks pointed to by the ICRC, therefore, appear to have been realised. The final substantive section then asks what this all means for international law's capacity to regulate conflict, drawing on scholarship from international

[13] ICRC, *Challenges 2024* (n 1) 38.

[14] See below at text to nn 86–88. See discussion in Raphaël van Steenberghe, 'The Armed Conflict in Gaza, and its Complexity under International Law: *Jus ad Bellum, Jus in Bello,* and International Justice' (2024) 37 LJIL 983.

relations, and the ethics of war, to offer a way of understanding and critiquing these interpretive manoeuvres.

ADMINISTRATIVE DETENTION

Since October 2023, Israel has detained thousands of Palestinians across the Gaza Strip, the West Bank, and Israel itself on preventive, security grounds ('administrative detention' or 'internment'). Precise figures are not available, in part because Israel has not released the numbers held by the military, though it has acknowledged that many are initially detained by the military.[15] By July 2024, it was reported that Israel had arrested more than 14,000 Palestinians across Gaza and the West Bank (with further detentions of Palestinians in Israel).[16] Those detentions have generally been carried out under two different legal regimes that pre-date the latest conflict. The focus here is on detentions in relation to Gaza.[17]

[15] *Abu Musa v IDF* et al, HCJ 2254/24, Respondents' Preliminary Response (26 March 2024), [10]; Diakonia, 'Unlawful Incarceration: An International Law Based Assessment of the Legality of the Military Detention Regime that Israel Applies to Palestinians' (Diakonia IHL Centre, Jerusalem, August 2024) 3 (fn 1) ('[t]he exact number of Palestinians held by the Israeli military is not known; it is estimated to be in the thousands')

[16] UNGA, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, A/79/232, 11 September 2024, 10; hamoked.org (showing the April 2025 figures of current administrative detainees held by the Israeli Prison Service as 5245 (including 1747 held as 'unlawful combatants'), but omitting those detained by the military).

[17] In the West Bank, administrative detention is based on the Order Regarding Security Directives [Consolidated Version] (Judea and Samaria) (No. 1651), 2009, s 285.

Israeli officials have confirmed that all non-criminal forms of detention of Gazans since October 2023 have been based on the 2002 Incarceration of Unlawful Combatants Law.[18] The 2002 Law was introduced to provide for administrative detention of members of transnational non-State armed groups, for which existing Israeli laws were considered ill-suited.[19] It authorises the Chief of the General Staff to order the internment of those reasonably considered to be 'unlawful combatants' *and* whose release would harm state security.[20] The Law defines 'unlawful combatant' as 'a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel' and is not entitled to prisoner of war status under Article 4 of the Third Geneva Convention.[21] The Law does not set a maximum length for internment, except that detainees held by virtue of their membership of a hostile force must be released once those hostilities end.[22]

The 2002 Law was introduced at a time when these same questions regarding detention of members of transnational armed groups were being discussed in the United States. A brief foray into that history is necessary to understand Israel's interpretations of international law both at the time the 2002 Law was adopted and regarding its recent amendments.

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[18] UN Office of the High Commissioner for Human Rights (OHCHR), 'Thematic Report: Detention in the Context of the Escalation of Hostilities in Gaza (October 2023 – June 2024)' (31 July 2024), 3; *Association for Civil Rights in Israel v Government of Israel*, HCJ 1537/24, Update Notice from the Respondents (6 May 2024), para 6.

[19] Dvir Saar and Ben Wahlhaus, 'Preventive Detention for National Security Purposes in Israel' (2018) 9 *Journal of National Security Law and Policy* 413, 432–3.

[20] Incarceration of Unlawful Combatants Law, 5762-2002 (amended 2008), s 3(b).

[21] ibid, s 2. Article 4 of the Third Geneva Convention lists the categories of persons entitled to POW status in international armed conflicts, the two principal being members of the enemy State's armed forces (art 4A(1)) and members of other (irregular) groups 'belonging' to the enemy State where they meet certain criteria (such as the wearing of a fixed distinctive insignia) (art 4A(2)).

[22] *A and B v State of Israel*, CrimA 6659/06, 1757/07, 8228/07, 3261/08 (2008) [46].

The notion of 'unlawful combatants' originated in a 1942 US Supreme Court judgment that recognised the domestic authority of the president to establish a military commission to prosecute eight saboteurs sent by Germany to the US with explosive devices.[23] The shortcomings with that judgment, including the Court's assessment of international law, have been well explored (and, of course, it pre-dates the four 1949 Geneva Conventions).[24] Nonetheless, the notion of 'unlawful combatant' was revived by the Bush Administration for a rather different purpose when the question arose of the status of detainees captured in the early days of the 2001 invasion of Afghanistan.[25]

In that more recent context, the US Supreme Court relied on its 1942 judgment as authority for the proposition that '[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war."'[26] On this basis, the majority held that a 2001 joint congressional resolution (the Authorization for Use of Military Force), in authorising 'necessary and appropriate force', must have been intended to authorise administrative detention of those associated with the 9/11 attacks.[27]

This was, of course, essential to the Bush Administration's legal manoeuvres in the early days of its 'global war on terror'. On the day of the first arrivals at Guantanamo Bay in January 2002, the US Secretary of Defence announced that they were 'unlawful combatants', subject to

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[23] *Ex parte Quirin et al,* 317 US (1942) 1, 30–1 ('[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful').

[24] For a contemporaneous critique, see, e.g., Richard R Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs' (1951) 287 BYIL 323, 339–40.

[25] Andrew Clapham, *War* (Oxford: OUP, 2021) 213–19.

[26] *Hamdi et al v Rumsfeld, Secretary of Defense et al*, 542 US 507 (2004), 518.

[27] Authorization for Use of Military Force, PL 107-40, 107th Congress, 115 Stat 224, s 2(a).

indefinite detention yet not entitled to protection under IHL.[28] The claim was that such persons, by participating in hostilities without being entitled to do so (e.g. because they did not belong to a State's armed forces), were entitled to protection under neither the Third Geneva Convention as prisoners of war (POWs) nor the Fourth Geneva Convention as 'civilians'.[29] And yet, according to the government they could be preventively detained by virtue of their association with hostile armed groups until hostilities with those groups had ended (similar to the position of POWs under the Third Geneva Convention); this was said to be 'based on long standing law-of-war principles'.[30] Thus, though the protective rules of IHL fell away, its permissive core endured. The scope of this claim is illustrated well by the Bush Administration's endorsement of the view that '[u]nlawful combatants … though they are a legitimate target for *any* belligerent action, are not, if captured, entitled to any prisoner of war status'.[31]

The idea of a category of persons with no (or almost no) protections under IHL found support at the time amongst certain prominent scholars.[32] But it has been heavily criticised by

[28] Luisa Vierucci, 'Prisoners of War or Protected Persons *qua* Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are Entitled' (2003) 1 JICJ 284, 285.

[29] White House (Office of the Press Secretary), Fact Sheet: Status of Detainees at Guantanamo, 7 February 2002; 'Response of the United States to the Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba [15 April 2002]' (2002) 41 ILM 1015.

[30] *Hamdi* (n 26) 521. The Bush Administration argued that such persons could be detained '*at least* for the duration of hostilities': 'Response of the United States' (n 29) 1018.

[31] 'Response of the United States' (n 29) 1018 (quoting Ingrid Detter; emphasis added).

[32] See, though to varying degrees, Yoram Dinstein, 'Unlawful Combatancy' (2002) 32 *Israel Yearbook of Human Rights* 247, 249; George H Aldrich, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants' (2002) 96 AJIL 891; Jiri Toman, 'The Status of Al Qaeda/Taliban Detainees under the Geneva Conventions' (2002) 32 *Israel Yearbook of Human Rights* 271 (acknowledging the applicability of the Fourth Geneva Convention but taking an expansive view of the art 5 derogation clause).

others for its misrepresentation of positive law,[33] and it seems to have been largely rejected in State practice.[34] It is noteworthy, however, that even though the US now recognises the applicability of the Fourth Geneva Convention to such persons (albeit subject to derogation from particular rights under Article 5),[35] it continues to view 'unlawful/unprivileged belligerents' as a distinct category of persons with limited protections but subject to targeting and detention on similar grounds to lawful combatants.[36]

The notion of a third, minimally protected category of person under IHL has played a prominent role in Israeli practice. In propounding this idea, the Israeli government has explicitly relied on the US practice noted above. Pnina Baruch was deputy head of the international law department in the Israel Defence Forces (IDF) at the time that the 2002 Law was being prepared and was directly involved in its drafting. Baruch has stated that the government drew on scholarship and practice to support its reliance on the claim that 'unlawful combatants' constituted a distinct legal category, referring to the US Supreme Court's *Quirin* judgment as providing an important reference point for the government.[37] Indeed, when defending the 2002 Law in a later Supreme Court challenge to its legality (*A and B v Israel*), the government explicitly relied the *Quirin*

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[33] Laura M Olson, 'Status and Treatment of Those Who do Not Fulfil the Conditions for Status as Prisoners of War' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford: OUP, 2015) 919–924; Knut Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85 IRRC 45; Marco Sassòli, 'Query: Is There a Status of "Unlawful Combatant?"' (2006) 80 *International Law Studies* 57, 60–61.

[34] Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (Oxford: OUP, 2010) 60.

[35] US Department of Defence (DoD), *Law of War Manual* (Office of General Counsel, updated July 2023) 163.

[36] ibid, 103–4.

[37] Pnina Baruch, 'The Israeli Law on the Incarceration of Unlawful Combatants Turns 20 – An Appraisal' (2022) 52 *Israel Yearbook on Human Rights* 247, 251.

judgment and contemporary US practice in the global war on terror that supported an independent legal right indefinitely to detain those considered 'unlawful combatants'.[38]

The appellants' core international law argument in *A and B v Israel* focused on the 2002 Law's authorisation of internment not only for *individuals* who themselves participate in hostile acts, but also for *members* of groups that commit such acts. This membership approach under the 2002 Law was explicitly based on the status-based approach to internment provided for in the Third Geneva Convention, which permits automatic internment of enemy armed forces as POWs for the duration of hostilities.[39] The Fourth Geneva Convention, by contrast, permits internment of civilians only where, and for so long as, the *individual's conduct* renders it necessary for security.[40]

The Israeli Supreme Court pushed back against the government's claim of a third category of unprotected persons under IHL. Building on its earlier case law in the context of targeting,[41] the Supreme Court held in *A and B v Israel* that 'unlawful combatants' under the 2002 Law are

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[38] *Anon v State of Israel*, CA [criminal appeal] 6659/06, 1757/07, State's legal department response to the appeals (1 March 2007) [252], [255]–[256], [263].

[39] Baruch (n 39) 250 ('[t]he underlying idea of the proposed bill was to draw an analogy between the internment of POWs and that of members of an OAG [organized armed group] who are unlawful combatants'); *Anon v State of Israel* (n 38) [335] ('the authority to detain unlawful combatants is self-evident and parallel to the authority that exists with respect to the imprisonment of lawful combatants'); ibid, [365].

[40] *Prosecutor v Zejnil Delalić et al* (Trial Judgment) ICTY-96-21 (16 November 1998) [578]. On the regimes under the Third and Fourth Geneva Conventions, see Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford: OUP, 2016) 39–51.

[41] *Public Committee Against Torture in Israel* et al *v Government of Israel* et al, HCJ 769/02 (2006), [27]–[28]. Though the Court referred positively to the US Supreme Court's *Quirin* judgment for the proposition that unlawful combatants are not to be treated as lawful combatants (at [25]), it did not follow the Bush Administration's contemporaneous invocation of *Quirin* to support the existence of a third category.

simply a 'sub-group of the category of "civilian"'.[42] The consequence is that they are detainable only in accordance with the Fourth Geneva Convention.[43]

Nonetheless, the Court upheld the 2002 Law as it determined that it met the individual, conduct-based standard under the Fourth Geneva Convention. According to the Court, where internment is based on membership, although 'it is not necessary for that person to take a direct or indirect part in the hostilities themselves … his connection and contribution to the organization will [need to] be expressed in other ways that suffice to include him in the cycle of hostilities in its broad sense'.[44] One's role within the organisation, and thus one's own conduct, was, on this view, a part of the enquiry into whether a person was an unlawful combatant.

This might suggest that the core of the idea of a distinct category of 'unlawful combatants' was entirely stripped away by the Court. There are reasons for caution, however. First, the Supreme Court's requirement that the individual's particular role within the group 'include[s] him in the cycle of hostilities in the broad sense' is not one that necessarily speaks to *ongoing* (as opposed to past) security threat, which is the test under the Fourth Geneva Convention.[45] Second, the test is also potentially very broad, and subsequent *habeas* reviews have classified members of the civilian wing of Hamas as unlawful combatants.[46]

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[42] *A and B* (n 22) [12].

[43] ibid, [16]. The Court has consistently applied the Fourth Geneva Convention to Israel's extraterritorial conflicts with armed groups: ibid, [9].

[44] *A and B* (n 22) [21].

[45] Ben Saul, Communication to Israeli Minister of Foreign Affairs from the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, OL ISR 12/2024, 24 May 2024, 5.

[46] See, e.g., *Sofi v State of Israel*, ADA 2595/09 (2009) (unpublished) [9]–[11] (Judge Rubenstein).

These concerns are partly answered by the second criterion under the 2002 Law that the individual's release would harm state security.[47] However, there appears to have been some willingness to make inferences of an individual threat from membership even of the civilian wing of the group.[48] Moreover, section 7 of the 2002 Law provides a rebuttable presumption that release would harm State security for members of groups against which hostilities continue. The Supreme Court in *A and B v Israel* did not review the legality of this provision as the government had not relied on it,[49] nor had it apparently done so in any *habeas* reviews to 2022.[50] This presumption, however, would certainly transgress the Fourth Geneva Convention's requirement of an individual security threat.

A third reason for caution relates to the Supreme Court's rejection of the appellants' claim that the potentially unlimited nature of detention under the 2002 Law rendered it unlawful. The Court relied here in part on the US Supreme Court's argument in *Hamdi* that 'detention of members of forces hostile to the United States and operating against it in Afghanistan *until the end of the specific dispute that led to their arrest* is consistent with basic and fundamental principles of the laws of war'.[51] Detention that is presumed to continue until hostilities cease is the hallmark of the internment regime under the Third Geneva Convention for POWs, whereas civilian internment under the Fourth Geneva Convention must cease as soon as the individual reasons justifying internment cease to exist.[52] It is true, as the Court noted, that section 5 of the 2002 Law provides

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[47] ibid, [13] (noting that association with the organization is not sufficient to meet this second criterion).

[48] ibid, [14]–[16]. Though Judge Rubenstein eventually referred to evidence of 'the appellant's direct personal involvement in an activity that crosses and greatly blurs any alleged "separation lines" between civilian and military activity', he did cite positively other cases conflating dangerousness and membership in a broad sense: ibid, [17].

[49] *A and B* (n 22) [25].

[50] Baruch (n 37) 285.

[51] *A and B* (n 22) [46] (emphasis added).

[52] Convention IV Relative to the Protection of Civilians 1949 (GCIV), art 132 GCIV.

periodic, six-monthly judicial review,[53] which mirrors a similar requirement under the Fourth Geneva Convention.[54] However, given the apparent conflation of membership and dangerousness noted above, there is a clear risk that the necessity of detention could be presumed to continue until hostilities cease. Indeed, the government explicitly defended the legality of such a presumption in its pleadings before the Court.[55] Moreover, rebutting the government's evidence in practice can be impossible where it is privileged for security reasons.[56]

These risks notwithstanding, there was, until recently, limited reliance by the government on the 2002 Law. Indeed, Baruch noted in 2022 that in its first twenty years, only around 60 internment orders had been made under the Law, and all but 15 of these involved detention for less than a year.[57] This led Baruch to conclude that the 2002 Law 'did not fulfil the idea it began with, of creating a status of 'quasi-POWs' for those fighting on behalf of OAGs [organized armed groups]'.[58]

The heavy reliance that the Israeli government has placed on the 2002 Law since October 2023, however, together with the two amendments made to the Law during this period, require us to revisit this conclusion.[59] These amendments (introduced in December 2023 and July 2024) have significantly broadened the scope of the government's detention authority in ways that appear,

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[53] s 5(c) ('if the court finds that his release would not harm the security of the state or that special reasons exist that justify his release, it shall revoke the detention order').

[54] Arts 43 and 78 GCIV.

[55] *Anon v State of Israel* (n 38) [266].

[56] Shiri Krebs, 'Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court' (2012) 45 *Vanderbilt Journal of Transnational Law* 639.

[57] Baruch (n 37) 272.

[58] Baruch (n 37) 286-7.

[59] Already by May 2024, there had reportedly been 4,000 temporary internment orders, 2,000 permanent orders, and 1,500 detainees released under the 2002 Law: OHCHR (n 18) 5.

covertly, to resurrect the notion of 'unlawful combatant' as a distinct legal category of person subject to automatic detention.[60] Two aspects of the amendments demonstrate this.

First, the period of 'initial detention' was increased from an original 96 hours to 45 days in December 2023 (reduced to 30 days in July 2024).[61] Initial detention was not provided for in the original Law but introduced in a 2008 amendment.[62] It provides a period of time that a person may be detained by a more junior officer before an internment order is made (by the Chief of the General Staff) simply on the basis of 'reasonable grounds' to believe they are an unlawful combatant.[63] The second criterion of individual dangerousness does not apply, and there is no right either to challenge this initial detention or to be told of the reasons for one's detention.[64]

This extended period of initial detention appears to re-create a system of temporary, fully status-based internment without the need for any review or reasons to be given. This clearly goes beyond the strictly individual, conduct-based grounds for civilian internment under the Fourth Geneva Convention.[65] In its submissions to the Israeli Supreme Court in a constitutional challenge to the amendments, the government has stated that, consistent with the conditions set out in *A and B v Israel* for qualifying as an 'unlawful combatant', even initial internment requires evidence of

[60] Incarceration of Unlawful Combatants Law (Amendment 4 and Temporary Provision – Iron Swords), 5784-2023 (December 2023); Incarceration of Unlawful Combatants Law (Amendment 4 and Temporary Provision – Iron Swords) (Amendment 2), 5784-2024 (July 2024).

[61] Diakonia (n 15) 15.

[62] Saar and Wahlhaus (n 19) 441

[63] 2002 Law, s 3(a).

[64] On the giving of reasons, see s 3(2) (reasons are required only when the official internment order is made, 'without prejudice to the needs of state security').

[65] See above at text to n 40.

individual dangerousness.[66] However, as shown above, precisely what evidence of individual dangerousness is required is unclear, and case law has sometimes taken a broad view of this. The absence of any obligation to give reasons for initial detention also violates the requirement under IHL that detainees be informed 'promptly' of the reasons.[67]

Second, whilst the original Law required judicial review of detention within 14 days of a detention order being issued,[68] this was extended in December 2023 to 75 days (reduced in July 2024 to 45 days).[69] Access to a lawyer was also restricted, with the December 2023 amendment permitting delays of up to 30 days of detention, which could be extended to 75 days by a designated official and 180 days by a court (the latter reduced in April 2024 to 90 days) (the July 2024 amendment reduced these to 21, 45 and 75 days respectively).[70]

These long delays before which judicial review and access to a lawyer are granted again appear to create at least a temporary system of unreviewable internment, akin to that applicable to POWs under the Third Geneva Convention. These clearly violate the requirement in the Fourth Geneva Convention of review 'as soon as possible' or 'with the least possible delay'.[71] Indeed, an earlier Israeli Supreme Court decision determined that delays in judicial review of 12 and 18 days under temporary detention Orders during Operation Defensive Shield in early 2002 were

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[66] *PCATI* et al *v Knesset* et al, HCJ 1414/24, Preliminary Response on behalf of the State, 20 May 2024, paras 44 and 77.

[67] Protocol I Additional to the 1949 Geneva Conventions 1977 (API), art 75. The Israeli government itself acknowledged in its submissions to the Court in *A and B v Israel* that the law requires reasons to be given 'immediately': *Anon v State of Israel* (n 38) para 321.

[68] 2002 Law, s 5(a).

[69] Diakonia (n 15) 16.

[70] ibid, 17. Section 6 of the original Law set these delays at 7, 10 and 21 days, respectively.

[71] Arts 43 and 78 GCIV.

unlawful.[72] The Court referred to a range of domestic and international law sources, including the Fourth Geneva Convention, which it saw as setting down a general standard of 'prompt' review and which it considered the Orders to breach.[73] This was in the context of sweeping detention operations in which 7000 individuals were detained over the course of two months.[74]

The government has not offered a detailed defence of these latest amendments under IHL. In the pending Supreme Court constitutionality review of the amendments, however, the government acknowledged in its pleadings that section 1 of the 2002 Law itself requires its application in 'conformity with … international humanitarian law'.[75] The government also asserted that the amendments comply with prior jurisprudence, including *A and B v Israel*, which, as noted, considered unlawful combatants to be protected by the Fourth Geneva Convention.[76] Tellingly, however, one of the few provisions of international law cited by the government in its pleadings was Article 4 of the International Covenant on Civil and Political Rights as a basis for derogating from the right to liberty in public emergencies.[77] No explicit mention was made of the protections to which detainees are entitled under the Fourth Geneva Convention, which are considered to set the minimum content of the right to liberty in the most extreme circumstance of public emergency.[78]

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[72] *Mar'ab* et al *v IDF Commander in the West Bank* et al, HCJ 3239/02 (2003) [34]–[36].

[73] ibid, [27]–[30].

[74] ibid, [1].

[75] *PCATI* et al (n 66) [18].

[76] *PCATI* et al (n 66) [44].

[77] *PCATI* et al (n 66) [80].

[78] Human Rights Committee, General Comment No 35: Article 9 (liberty and security of the person), CCPR/C/GC/35, 16 December 2014, [64]–[66].

In defending the amendments under domestic law, the government maintained that they reflected a proportionate interference with the right to liberty.[79] To support this argument, the government repeatedly emphasised that they are necessary in light of the 'unprecedented' number of detainees captured, which, it argued, makes it impossible to comply with the original time limits in the 2002 Law.[80] This same argument was invoked by the government to justify earlier amendments, all of which weakened the Law's protections in light of particular conflicts.[81] *In extremis,* in other words, legal protections must yield to the State's security needs. Yet it was precisely such situations for which the 2002 Law, with its various safeguards, was designed.[82] The dangers of such contingent rights protection are well known and were pointed to in the ICRC's *Challenges* report.[83] Importantly, the Supreme Court itself has previously rejected necessity-based arguments as grounds for extended delays in judicial review.[84]

To conclude, these recent amendments to the 2002 Law thus extend the period of initial detention and permit much longer delays before which the various procedural safeguards apply.[85] In so doing, they appear to revive, albeit in a more covert and limited way, the original idea that underpinned Israel's support for a category of 'unlawful combatant' under IHL, i.e. to exclude such persons from IHL's protective regimes. As shown above, that original idea underpinning the

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[79] *PCATI* et al (n 66) [11], [66].

[80] *PCATI* et al (n 66) [6]–[7], [46]–[48].

[81] Saar and Wahlhaus (n 19) 441–2.

[82] Saul (n 45) 4.

[83] See above at text to n 2.

[84] See, e.g., *Mar'ab* (n 72) 34–6.

[85] It must be noted that even the more limited safeguards have allegedly not been complied with. In interviews with released detainees, many state that they were never told of the reasons for their detention, given access to a lawyer, nor brought before a court, and some allege severe mistreatment: OHCHR (n 18) 5; A Cuddy, 'Chemical burns, assaults, electric shocks – Gazans tell BBC of torture in Israeli detention, *BBC News*, 7 April 2025.

2002 Law leaned heavily on similar practice by the United States. Whilst State practice generally has rejected the claim of a distinct legal category of 'unlawful combatants', US military doctrine continues to support this idea in some form. Permissive interpretations of the law, even by just a few States, can thus endure notwithstanding their broader rejection by the international community.

The next section will consider a second example of Israeli practice that challenges the protective potential of the law whilst making claims to legality. The focus there will be on Israeli interpretations concerning the legal relevance of overall civilian harm and destruction. It will be shown that the challenges posed there are of a different nature altogether than in the case of detention. Most importantly, the challenge to the law does not arise from an interpretation or practice in relation to a specific rule that is rejected by most other States, as in the case of the claim of a separate category of 'unlawful combatant'. Instead, the challenge arises from multiple, combined interpretations of different international legal obligations, a number of which claim support from the practice of *many* other States.

THE LEGAL (IR)RELEVANCE OF OVERALL CIVILIAN HARM

Concerns with the conduct of the IDF during the latest Gaza conflict have been well documented from the outset. Many of these concerns relate to alleged non-compliance with the fundamental principle of distinction between combatants/military objectives and civilians/civilian objects.[86] Indeed, the Pre-Trial Chamber of the International Criminal Court considered there to be sufficient evidence to issue arrest warrants against Benjamin Netanyahu and Yoav Gallant as co-

[86] See, e.g. OHCHR, 'Thematic Report: Indiscriminate and Disproportionate Attacks During the Conflict in Gaza (October – December 2023)', 19 June 2024, 10–12.

perpetrators for the war crime of intentionally directing attacks against the civilian population, alongside its charge of using starvation as a method of war.[87]

Others have raised concerns that, even where there may have been a legitimate military objective, particular attacks have caused disproportionate harm to civilians. As Mark Lattimer, executive director of the Ceasefire Centre for Civilian Rights, wrote in relation to the October 2023 IDF airstrike within the Jabalia refugee camp in northern Gaza:

> … the IDF appears to have accepted a level of expected civilian casualties that was not just larger but several times larger than that used by the U.S. and the U.K. in any of the operations during the war against ISIS and other counterterrorism campaigns.[88]

This section steps back from analysing the legality of specific attacks and instead focuses on a significantly under-explored aspect of targeting that is considered a particular 'blind spot' in the regulation of armed conflict,[89] that is, the extent to which the law accounts for overall civilian harm and destruction that accumulates over the course of a conflict. The focus again concerns how Israel has invoked the law in relation to this issue and how this relates to the interpretive positions adopted previously by other States.

The overall impact of the conflict on Gaza and its population has been profound. At the time of writing, the latest data compiled by the UN Office for the Coordination of Humanitarian Affairs, sets the known *direct* fatality count amongst Gazans at almost 53,000 (or 2.4% of the entire

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[87] https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges.

[88] Mark Lattimer, 'Assessing Israel's Approach to Proportionality in the Conduct of Hostilities in Gaza', *Lawfare*, 16 November 2023. This has been raised by counsel for South Africa in the ongoing ICJ proceedings: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, 16 May 2024, CR 2024/27 (Oral Pleadings on Provisional Measures) (Blinne Ní Ghrálaigh KC at [9]).

[89] SBE-UKRI, 'Cumulative Civilian Harm in War: Addressing the Hidden Human Toll of the Law's Blind Spot' (Project ref ES/X01097X/1, 2023-26, PI: Noam Lubell).

pre-war population), with almost 120,000 persons injured.[90] (Independent studies have suggested that those figures, from the Gaza Ministry of Health, represent a significant undercount.[91]) The proportion of buildings destroyed or damaged across Gaza is estimated at 69%, including 92% of homes.[92] 88% of school buildings are reported as requiring full or major reconstruction, whilst only 61% of hospitals and 48% of primary care facilities remain partially functional.[93] The UN Environment Programme has estimated that it could take 21 years to clear the debris and explosive remnants of war across Gaza, whilst the UN Commission on Trade and Development predicts that, based on the rate of economic growth in Gaza since 2007 under Israel's restrictions, it could take 350 years to rebuild the economy to its 2022 level.[94] Indeed, just three months into the war, the UN Under-Secretary General for Humanitarian Affairs observed that 'Gaza has simply become uninhabitable'.[95]

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[90] OCHA, Reported Impact Snapshot: Gaza Strip (14 May 2025). Those figures do not differentiate between Hamas fighters and civilians, though only 42% of the confirmed casualties are reported as adult, non-elderly men: WHO OPT Health Cluster, Unified Health Dashboard v 2.0 <https://app.powerbi.com/view?r=eyJrIjoiODAxNTYzMDYtMjQ3YS00OTMzLTkxMWQtOTU1NWEwMzE5NTMwIiwidCI6ImY2MTBjMGI3LWJkMjQtNGIzOS04MTBiLTNkYzI4MGFmYjU5MCIsImMiOjh9>.

[91] Zeina Jamaluddine *et al*, 'Traumatic Injury Mortality in the Gaza Strip from Oct 7, 2023, to June 20, 2024: A Capture-Recapture Analysis' (2025) 405 *Lancet* 469 (estimating 64,260 fatalities (95% CI 55,298–78,525) to 30 June 2024 (at which point the Gaza MoH reported 37,877 fatalities)).

[92] OCHA (n 90); UNITAR/UNOSAT, Gaza Strip Comprehensive Damage Assessment, 13 December 2024 <https://unosat.org/products/4047>.

[93] OCHA (n 90).

[94] 'Gaza Strip in Maps: How 15 Months of War Have Drastically Changed Life in the Territory', *BBC News*, 16 January 2025.

[95] OCHA, UN Relief Chief: The War in Gaza Must End, 5 January 2024, <https://www.unocha.org/news/un-relief-chief-war-gaza-must-end>.

To what extent does international law take account of this cumulative impact of war on a territory and its population? The following sections consider the approach of Israel and other States in relation to this question, first, under IHL, and second under the rules governing inter-State use of force (the *ius ad bellum*).[96]

International humanitarian law

Civilian harm during armed conflict is most directly factored into the proportionality rule in IHL. This requires weighing the expected impact on civilians (and civilian objects) of an intended attack against the military advantage anticipated from that attack.[97] Given its attack-specific and *ex ante* focus, IHL proportionality does not obviously appear to take account of the overall harm to the civilian population and infrastructure that accumulates as a conflict progresses. Nonetheless, relying on the Martens Clause,[98] the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), has held that cumulative civilian harm could, in certain circumstances, render a series of attacks unlawful under IHL even if the individual attacks themselves are not unambiguously so:

> … it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul per se of the [rules on precautions in attack and proportionality] … However, in case of repeated attacks, all or most of them falling

[96] This is without prejudice to other areas of international law for which overall harm might also be relevant, including international human rights law, the right to self-determination, and the prohibition of genocide.

[97] See, e.g., art 57(2)(a)(iii) API.

[98] Art 1(2) API ('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').

> within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.[99]

Some have argued that this interpretation represents an exercise in progressive development and does not reflect existing law.[100] Indeed, several months after the Trial Chamber's judgment, a committee established by the Prosecutor of the ICTY to investigate the NATO aerial campaign against the Federal Republic of Yugoslavia disagreed with this interpretation. In its report, the committee stated 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'.[101]

These criticisms of the Trial Chamber assume that the Chamber sought to incorporate considerations of cumulative harm into the IHL proportionality analysis. In truth, this is far from clear, and the Trial Chamber did not explain precisely what positive rule of IHL cumulative harm

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[99] *Prosecutor v Zoran Kupreškić*, Trial Judgment, IT-95-16-T, 14 January 2000 [526].

[100] Andreas Zimmerman, 'The Second Lebanon War: *Jus ad Bellum, Jus in* Bello and the Issue of Proportionality' (2007) 11 *Max Planck Yearbook of UN Law* 99, 136–7; Ben Clarke, 'Proportionality in Armed Conflicts: A Principle in Need of Clarification?' (2012) 3 *Journal of International Humanitarian Legal Studies* 73, 121; Emanuela-Chiara Gillard, 'Proportionality in the Conduct of Hostilities: the Incidental Harm Side of the Assessment' (Chatham House Research Paper, 2018) 10.

[101] ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (8 June 2000) (2000) 39 ILM 1257, [51]–[52].

might engage. At the same time, those supportive of the Trial Chamber's interpretation have noted it only in passing with little elaboration as to its legal basis.[102]

There are some circumstances where the cumulative effect of past attacks must be factored into the proportionality analysis of the next attack. For example, where a hospital is misused to commit 'acts harmful to the enemy', it may lose its default protection from attack.[103] However, as part of the proportionality analysis for determining whether a specific attack would be lawful, it would be necessary to take account of the impact such an attack would have at least on the immediate availability of medical care (particularly emergency medical care) for the local population, which itself will be affected by any previous attacks on other (nearby) hospitals.[104] The cumulative effect of such attacks might, therefore, render the latest planned attack disproportionate.

Moreover, though the targeting of objects indispensable to the survival of the civilian population (including water supplies, foodstuffs and livestock) is permitted where such objects are

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[102] See, e.g., Paolo Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (2001) 12 EJIL 503, 517–18; Rebecca J Barber, 'The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan' (2010) 15 JCSL 467, 480–1; Oona Hathaway *et al*, 'The Dangerous Rise of "Dual-Use" Objects in War', *Duke Law School Public Law & Legal Theory Series* (No 2024-56), 88–95.

[103] Art 13(1) API.

[104] There is increasing support for taking account of reasonably foreseeable longer-term (reverberating) harm in the proportionality analysis: Gillard (n 100); Jeroen van den Boogaard, *Proportionality in International Humanitarian Law: Refocusing the Balance in Practice* (Cambridge: CUP, 2023) 147–150; Danish Ministry of Defence, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (Defence Command Denmark, September 2016) 311–12; 2022 Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas, s 3.4 (endorsed by 88 States as of January 2025). For a more restrictive view, see US DoD (n 35) 270.

used by the adversary in direct support of military action, such targeting becomes unlawful if it may be expected to leave the population with inadequate food or water.[105] This rule therefore also requires consideration of the cumulative effects of prior attacks.

Finally, widespread civilian harm and destruction may play an evidential role in relation to certain obligations.[106] It may act as persuasive evidence of the indiscriminate nature of individual attacks,[107] or of non-compliance with the obligations to take 'constant care … to spare the civilian population' and to 'take all feasible precautions' to minimise incidental civilian harm.[108] Extensive destruction may also be evidence of a violation of the prohibition of collective punishment or unnecessary destruction of State-owned and civilian property.[109] Indeed, a number of States, and the UN Secretary-General, have condemned the widespread harm caused in Gaza since October 2023 as an example of prohibited collective punishment.[110]

Notwithstanding these various ways in which cumulative harm may be captured by IHL, the Israeli Ministry of Foreign Affairs (MFA) has made clear its view that overall civilian harm is not legally relevant. When discussing the issue of civilian casualties in Gaza, the MFA argued that

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[105] Art 54(3)(b) API; UK Ministry of Defence (MOD), *Manual on the Law of Armed Conflict* (Oxford: OUP, 2004) 65.

[106] This has been the basis of a number of criticisms of Israel's post-October 2023 conduct in Gaza: UNSC, S/PV.9781, 2–3 (UN Assistant Secretary-General for Human Rights); UNSC, S/PV.9852, 6 (Norwegian Refugee Council); UNSC, S/PV.9819, 16 (Switzerland); UNGA, A/78/PV.61, 15 (San Marino); UNSC, S/PV.9669 (Resumption 1), 32 (South Africa); UNGA, A/78/PV.52, 2–3 (Kenya).

[107] Arts 51(4) and (5) API. See, e.g., Human Rights Council, Report of the Independent International Commission of Inquiry on Syria (IICIS), A/HRC/39/65, 9 August 2018, 18.

[108] Arts 57(1) and 57(2)(a)(ii) API; Gillard (n 100) 10.

[109] Art 33 GCIV; Art 53 GCIV.

[110] UNSC, S/PV.9830, 9–10 (Algeria); UNSC, S/PV.9819, 18 (Russia); UNSC, S/PV.9534 (Resumption 1), 7 (Portugal); UNSC, S/PV.9534, 25 (Malta); UNSC, S/PV.9744, 18 (Mozambique); UNSC, S/PV.9883, 5 (UN Secretary-General).

civilian harm is only relevant as part of the IHL proportionality analysis in relation to specific attacks:

> … under the law of armed conflict … the principle of proportionality in attacks requires an individual proportionality assessment for every individual attack. An overall casualty figure does not on its own indicate unlawfulness … Proportionality requires that an assessment of compliance rests not on the outcome of an attack but rather on the commander's judgement at the time of the attack based on the information available to him/her at the time … Thus, the principle of proportionality in attacks is to be applied to each and every attack independently, and it does not relate to the overall use of military force.[111]

As with its previous reliance on the concept of unlawful combatant, Israel is not alone in placing little to no weight on cumulative civilian harm as part of its IHL analysis. Nowhere is such overall harm mentioned in the military manuals of the US, UK, Australia and Denmark, for example (States with significant involvement in overseas military operations), all of which speak only of incidental harm to civilians and damage to civilian objects in the context of specific attacks.[112] Although some military doctrine refers to a prohibition of 'general devastation' of the enemy's territory, this is said to be unlawful only where not militarily necessary.[113]

Ius ad bellum

[111] Israel MFA (n 10) 4, 12. Similarly, see State of Israel, 'The 2014 Gaza Conflict (7 July – 26 August 2014): Factual and Legal Aspects' (May 2015), ch VI (taking the same approach regarding its 2014 Gaza conflict).

[112] US DoD (n 35) 249–278; UK MOD (n 105) ch 5; Australia Defence Force, *Publication 06.4: Law of Armed Conflict* (Defence Publishing Service, June 2006) [5.38]–[5.39]; Danish MOD (n 4) 309–10.

[113] US DoD (n 35) 294; UK MOD (n 105) 305.

Some have suggested that overall civilian harm and destruction are better factored into the *ius ad bellum* analysis, that is, the rules on the use force between States, and specifically the principle of proportionality as a condition for the lawful exercise of self-defence.[114] Indeed, the UK's *Manual on the Law of Armed Conflict* acknowledges that the *ius ad bellum*, by operating at a higher level of abstraction than IHL, 'may impose additional constraints' on force used during an armed conflict.[115] Importantly, State practice provides support for the view that cumulative civilian harm and destruction is a relevant factor in determining whether action is taken in lawful self-defence,[116] though it is often unclear what weight is ascribed to this.[117] In relation to Israel's post-October 2023 war in Gaza, States have similarly condemned the overall harm suffered by Palestinian civilians as *ad bellum* disproportionate, though again often without elaboration.[118] As shown below, what meaning we ascribe to proportionality here significantly affects the legal relevance of overall harm.

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[114] Noam Lubell and Amichai Cohen, 'Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts' (2020) 96 *International Law Studies* 159, 161; Adil Haque, 'Enough: Self-Defence and Proportionality in the Israel-Hamas Conflict', *Just Security,* 6 November 2023.

[115] UK MOD (n 105) 26.

[116] Chris O'Meara, *Necessity and Proportionality and the Right of Self-Defence in International Law* (Oxford: OUP, 2021) 139–46; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart, 2010) 488–9.

[117] Practice often refers to this in the context of *ad bellum* proportionality, but with little elaboration: see, e.g., UNSC, S/PV.2900, 14–15 (Finland criticising the US invasion of Panama); UNSC, S/PV.5961, 6 (France condemning Russian action in the 2008 Georgian war); UNSC, S/PV.5493 (Resumption 1), 4, 11, 21–22, 25, 33 (Peru, France, Algeria, Indonesia, New Zealand, in relation to the 2006 Lebanon war).

[118] UNSC, S/PV.9893, 16 (Pakistan); UNSC, S/PV.9608 (Resumption 2), 3 (Malaysia); UNSC, S/PV.9608, 28 (Brazil); UNSC, S/PV.9534 (Resumption 1), 11 (Ireland); UNSC, S/PV.9715, 10–11 (Guyana); UNSC, S/PV.9744, 18 (Mozambique).

It must be noted at the outset that the added value of the *ad bellum* rules here is limited by their scope of application. Importantly, the inapplicability of the *ius ad bellum* to intra-State force and non-State actors limits the potential of these rules to account for cumulative harm in non-international armed conflicts, which are by far the most common type of conflict today.[119] This is also the case for third States intervening in internal conflicts on the basis of consent of the government (e.g. Russia's intervention in Syria), to which the *ius ad bellum* would not apply.

There is controversy whether the *ius ad bellum* applies at all to Israeli conduct in Gaza. Some argue that, since the *ad bellum* rules apply only in the inter-State context, their applicability in Gaza is contingent on Palestine's statehood.[120] It was on this basis that Israel rejected any regulatory role of the *ius ad bellum* during the 2014 Gaza conflict, for example.[121] Others, keen to avoid any claim by Israel of a *right* to self-defence in the current conflict, have argued against the application of the rules on self-defence in occupied territory.[122]

Nonetheless, cogent arguments have been made in favour of the application of the *ius ad bellum* here, including the rules on self-defence.[123] The ICJ in its 2024 advisory opinion on the Israeli occupation assumed the applicability of the *ius ad bellum* to Gaza, and some judges in their separate opinions recognised the applicability of the law of self-defence.[124] Even accepting in principle its application to Gaza, however, the interpretive positions that have been adopted by

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[119] Lubell and Cohen (n 114) 177–179.

[120] See, e.g., Marko Milanovic, 'Does Israel have the Right to Defend Itself?', *EJIL:Talk!* Blog, 14 November 2023.

[121] State of Israel (n 111) 29 (fn 97).

[122] See, e.g. UNSC, S/PV.9696, 15 (Palestine); ibid, 17 (Syria); ibid, 19 (Lebanon); UNSC, S/PV.9540, 23–24 (South Africa).

[123] Terry D Gill, 'The *Jus ad Bellum* and the War in Gaza' (2024) 27 *Journal of International Peacekeeping* 249.

[124] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem,* Advisory Opinion (19 July 2024) [251], [253]; ibid, Separate Opinion of Judge Yusuf, [13]–[17]; ibid, Declaration of Judge Charlesworth, [20]–[28] (though noting contestation).

Israel in relation to this *ad bellum* framework significantly undermine the extent to which that framework can limit harm and destruction during conflict.

The most fundamental of these interpretive positions relates to the temporal scope of the *ius ad bellum*. There is a minority view in scholarship that the *ius ad bellum* (including the rules regulating self-defence actions) apply only to a State's initial resort to force and cease to apply once an armed conflict exists.[125] The established view (supported by State practice), however, is that these rules continue to regulate ongoing armed conflicts alongside IHL.[126] Nonetheless, Israel has taken the minority view that its post-October 2023 conduct in Gaza cannot be judged against the *ius ad bellum* as it is merely the latest escalation in an ongoing conflict:

> … there have been some suggestions that the law governing the initial right to resort to the use of force (*jus ad bellum*) is relevant to the current hostilities. This is incorrect since, as noted, Israel has been engaged in an ongoing armed conflict with Hamas and other armed groups in Gaza for many years, as well as for other reasons.[127]

This same interpretation has been adopted by Israel in relation to some of its previous incursions into Gaza.[128] Whilst other States have not tended explicitly to take this view, their interpretations

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[125] Lubell and Cohen (n 114) 170–3; Marco Longobardo, *The Use of Armed Force in Occupied Territory* (Cambridge: CUP, 2018) 126–133; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: CUP, 6th edn, 2017) 282–283.

[126] O'Meara (n 116) 166–170 (analysing State practice); ICJ (n 124) para 253; ibid, Declaration of Judge Charlesworth, [15], [17]; Eliav Lieblich, 'On the Continuous and Concurrent Application of *Ad Bellum* and *In Bello* Proportionality' in Claus Kress and Robert Lawless (eds), *Necessity and Proportionality in International Peace and Security Law* (Oxford: OUP, 2020); Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: CUP, 2004) 156; Christopher J Greenwood, 'The Relationship between *Ius Ad Bellum* and *Ius in Bello*' (1983) 9 *Review of International Studies* 221.

[127] Israel MFA (n 10) 12–13. As a secondary argument, however, Israel claims compliance with the law of self-defence: ibid, 13.

[128] State of Israel (n 111) 28–29.

of other aspects of the law on the use of force, which are shared by Israel, amount in effect to the same sidelining of these rules during ongoing conflicts.

The first concerns the meaning of proportionality in this context. The customary status of the necessity and proportionality principles as limiting factors on a State's right to use force in self-defence is widely accepted.[129] Yet the actual content of these requirements, and particularly that of proportionality, remains highly contested.[130] Many see *ad bellum* proportionality as the other side of the coin to necessity (i.e. force used in self-defence must be both necessary *and no more than is necessary* to achieve the legitimate aim of defensive actions).[131] This appears to reflect the dominant interpretation in State practice (and not merely western State practice).[132] Israel, too, has adopted this interpretation of *ad bellum* proportionality in its earlier conflicts.[133]

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[129] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, [41]; Dinstein (n 125) 249; O'Meara (n 116) 1.

[130] O'Meara (n 116) 2; Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defence' (2017) 107 AJIL 563, 566; David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus ad Bellum*' (2013) 24 EJIL 235, 237.

[131] Corten (n 116) 488–489; Chatham House, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 ICLQ 963, 968–969; Michael Schmitt, 'Counter-Terrorism and the Use of Force in International Law' (2003) 79 *International Law Studies* 7, 28–30; *Nuclear Weapons* (n 129), Dissenting Opinion of Judge Higgins, [5]; ILC, 'Addendum to the eight report on State responsibility, by Mr Roberto Ago', A/CN.4/318/Add 5-7 [1980] YILC, Vol II, Part One, 69 [121].

[132] O'Meara (n 116) 122. See, e.g., US DoD (n 35), 41; UK MOD (n 105) 26; Attorney-General of Australia (G Brandis QC), 'The Right of Self-Defence Against Imminent Armed Attack in International Law', Public Lecture at the T C Beirne School of Law, University of Queensland, *EJIL:Talk!*, 25 May 2017; *Legal Consequences of the Construction of Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, Written Statement Submitted by the Government of the Republic of Indonesia, 30 January 2004, [5]; ibid, Written Statement of Malaysia, 30 January 2004, [151].

[133] State of Israel (n 111) [69]; Israel MFA, 'Responding to Hezbollah attacks from Lebanon: Issues of proportionality', 25 July 2006.

In contrast, some see *ad bellum* proportionality as akin to proportionality in just war theory (or proportionality *stricto sensu* in constitutional rights-adjudication), thereby requiring an actual balancing of the benefits and costs of taking defensive action.[134] It has been doubted, however, whether State practice supports such a narrow sense of *ad bellum* proportionality.[135] Finally, others view it as requiring a more straightforward commensurability between the harm caused by the initial (or imminent) attack and the defensive force used in response,[136] though this view is generally rejected in doctrine.[137]

The legal relevance of cumulative harm and overall destruction under the *ius ad bellum* is contingent on one's view of the meaning of proportionality in this context. The strongest basis for a normative role for cumulative harm in *ad bellum* proportionality is under the second reading above (proportionality *stricto sensu*), as there an enquiry into the actual benefits of taking defensive action and a comparison with the cumulative impact of that action would fall to be assessed. As a conflict progresses, and harm accumulates, the defensive action would become harder to justify. Amongst just war theorists, some take the view that continued proportionality assessments during war need be forward-looking only (treating past harms akin to 'sunk costs').[138] The better view, however, is

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[134] See, e.g. ILA (Sydney Conference), Use of Force Committee: Final Report on Aggression and the Use of Force (2018), 12; Adil Haque, 'Necessity and Proportionality in International Law' in Larry May (ed), *Cambridge Handbook of the Just War* (Cambridge: CUP, 2018) 259–261; Enzo Cannizzaro, 'Contextualising Proportionality: *Jus ad Bellum* and *Jus in Bello* in the Lebanese War' (2006) 88 IRRC 779.

[135] Akande and Liefländer (n 130) 567; Lieblich (n 126) 70–71.

[136] O'Meara (n 116) 107–111. See also James Green, *The International Court of Justice and Self-Defence in International Law* (Oxford: Hart, 2009) 86–96 (on ICJ judgments implying this).

[137] O'Meara (n 116) 102; Sina Etezazian, 'The Nature of the Self-Defence Proportionality Requirement' (2016) 3 JUFIL 260, 265–268.

[138] David Rodin, 'Two Emerging Issues of *Jus Post Bellum*: War Termination and the Liability of Soldiers for Crimes of Aggression' in Carsten Stahn and Jann K Kleffner (eds), Jus Post Bellum: *Towards a Law of Transition from Conflict to Peace* (The Hague: Asser, 2008).

that actual, accumulated harm is morally important and thus ought to be part of the proportionality assessment.[139] Nonetheless, as argued below, even this conception of proportionality may not sufficiently limit overall harm.[140]

In any case, as noted, that narrow understanding of *ad bellum* proportionality does not have widespread support, and the dominant understanding simply requires that defensive force is limited to what is necessary for achieving the defensive purpose. Overall harm and destruction can still be relevant under this reading, but only in an evidential sense, i.e. as an indication that the response has gone beyond any defensive purpose and has become punitive. Indeed, where States elaborate on their condemnation of others' self-defence operations in light of the civilian harm and destruction caused, it often appears to be in this sense that they do so.[141] This is true for many States condemning Israel's post-October 2023 war in Gaza.[142]

On this interpretation, it remains open to the defending State to justify the destruction it causes, extensive though it may be, as necessary for its defensive goals.[143] As Chris O'Meara notes, relying in part on the ICJ's acknowledgment of the potential legality of nuclear weapons in defence

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[139] Darrel Moellendorf, 'Two Doctrines of *Jus ex Bello*' (2015) 125 *Ethics* 653.

[140] See below at text to nn 178–181.

[141] See, e.g, UNSC debates on the 2006 Lebanon War: UNSC, S/PV.5493 (Resumption 1) 2 (Russia); ibid, 28 (Turkey); ibid, 32 (Djibouti); ibid, 41 (Guatemala); UNSC, S/PV.5493, 14 (Qatar); UNSC, S/PV.5489, 9 (Argentina); ibid, 13–14 (Tanzania). On the 2008 Georgian war: UNSC, S/PV.5961, 9 (US); ibid, 10 (UK); Independent International Fact-Finding Mission on the Conflict in Georgia, Report: Volume II (September 2009) 271–273.

[142] UNSC, S/PV.9696, 13 (Iran); UNSC, S/PV.9696, 4 (Algeria); UNSC, S.PV/9819, 13 (Ecuador); UNSC, S.PV.9819, 18 (Russia); UNSC, S/PV.9588, 18 (Slovenia); UNGA, A/78/PV.66, 10 (Saudi Arabia, on behalf of the Arab Group); UNSC, S/PV.9687 (Resumption 1), 3–4 (Iraq); UNSC, S/PV.9794, 10 (Guyana).

[143] Such unrestrained consequentialism is what proportionality *stricto sensu* in constitutional rights-adjudication is meant to avoid: Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: CUP, 2012) 364–365.

against existential threats,[144] '*in extremis*, one might envisage the complete destruction of the attacker'.[145] This is precisely the kind of response frequently offered by States that are accused of causing excessive civilian harm. This was the reply, for example, of the UK in response to criticisms of allies' conduct during the Gulf War,[146] the US in response to criticisms of its April 1986 bombings in Libya,[147] and Russia in response to criticisms of its conduct during the 2008 Georgian war.[148] One of the most stark illustrations of what self-defence is alleged to permit on this interpretation was the US' continued reliance on self-defence to justify its 20-year campaign in Afghanistan, including regime change.[149]

We have seen the same resort to the necessity of self-defence by Israel when justifying the overall impact of its operations on Gaza's population:

> In light of Hamas's heinous attacks on October 7, its incessant attacks on Israel since then, and its stated aim to pursue the destruction of Israel and death of its citizens … Israel has been compelled to set as its goals both the release of hostages and the dismantling of Hamas's military capabilities … As a result, and in light of the extent of Hamas's control and presence throughout Gaza, the IDF is forced to operate much more extensively than in previous hostilities … Under these circumstances … the overall impact on the civilian population in Gaza – including the number of casualties – will inevitably and tragically be larger than in past hostilities, even though the IDF is

[144] *Nuclear Weapons* (n 129) [96]–[97].

[145] O'Meara (n 116) 139.

[146] UNSC, S/PV.2977 (Part II)(closed) 73.

[147] UNSC, S/PV.2674, 13–15.

[148] UNSC, S/PV.5953, 8.

[149] Devika Hovell and Michelle Hughes, 'Self-Defence and its Dangerous Variants: Afghanistan and International Law' (2022) 2(3) *LSE Public Policy Review* 4; Michael Byers, 'The Intervention in Afghanistan – 2001' in Tom Ruys et al (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford: OUP, 2018) 635.

committed to upholding the law and these casualties are neither the intent nor the wish of the IDF.[150]

Extensive civilian and infrastructural harm are thus justified by recourse to what is necessary for achieving the defensive goals; such harm and destruction, so the argument goes, complies with *ad bellum* proportionality.

Yet the quote above points to another interpretive position that exacerbates even further this legal side-lining of cumulative harm: the goals pursued in self-defence actions. The orthodoxy is that the only legitimate goal of self-defence is to halt or repel the armed attack(s) (or imminent attacks) necessitating it.[151] However, this important limitation on self-defence is placed under immense strain in the practice of certain States. This has especially been the case with respect to force used in self-defence against terrorist groups, where States including the United States, Israel and Turkey have referred to the goals of their ostensibly defensive actions as including prevention of future, non-imminent attacks, deterrence, and a more general weakening (or even destruction) of the enemy.[152]

A recent example of this can be seen in the justifications by the US and UK for their January 2024 strikes against Houthi targets in Yemen in response to attacks against commercial and State ships in the Red Sea. The US stated in its letter to the UN Security Council that such strikes were:

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[150] Israel MFA (n 10) 4. Similarly, see UNSC, S/PV.9596, 21; UNSC, S/PV.9896, 20–21.

[151] Christine Gray, *International Law and the Use of Force* (Oxford: OUP, 4th edn, 2018) 159; Gardam (n 126) 156–159; ILC (n 131) [121].

[152] Christian J Tams, 'The Necessity and Proportionality of Anti-Terrorist Self-Defence' in Larissa van den Herik and Nico Schrijver (eds), *Counter-terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge: CUP, 2013) 399–401. See also US DoD (n 35) 41 (referring, rather vaguely, to the goal of 'restor[ing] the security of the party attacked').

> … conducted to degrade and disrupt the ongoing pattern of attacks threatening the United States and deter the Houthi militants from conducting further attacks threatening merchant and commercial vessels transiting the Red Sea. These military responses will preserve navigational rights and freedoms, both for naval ships and for commercial vessels, in this important maritime passageway.[153]

It is notable that this justification includes not only deterrence, but deterrence of attacks against commercial shipping, as amongst the goals of the defensive response. The UK Prime Minister similarly emphasised its goal in this operation of protecting 'freedom of navigation and the free flow of trade'.[154] Such broad claims regarding the legitimate aims of defensive action can easily be challenged in positive law, for their inconsistency with the object and purpose of the Charter rules or their rendering of the principles of necessity and proportionality as without effect.[155] Importantly, a significant number of States have pushed back against attempts to broaden the scope of the right to self-defence.[156] Nonetheless, this practice suggests that certain States, and notably those frequently using military force abroad, continue to take a broad view of the legitimate aims of self-defence.

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[153] UNSC, 'Letter Dated 12 January 2024 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council' (15 January 2024) UN Doc S/2024/56.

[154] The Rt Hon Rishi Sunak MP, 'PM Statement on Strikes against Houthi Military Targets' (12 January 2024).

[155] For critique, see Christian Henderson, 'US and UK Military Strikes in Yemen and the *Jus ad Bellum*' (2024) 73 ICLQ 767, 786–788.

[156] Identical letters dated 10 January 2025 from the Chargé d'affaires a.i. of the Permanent Mission of Mexico to the United Nations addressed to the Secretary-General and the President of the Security Council, A/79/719–S/2025/26, 13 January 2025; Letter dated 1 August 2014 from the Chargé d'affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General (on behalf of the Non-Aligned Movement), A/68/966–S/2014/573, 19 August 2014, [25].

As seen in the quote above, Israel has similarly invoked a very wide aim as its defensive goal in Gaza, referring to 'the dismantling of Hamas' military capabilities'. Where defensive goals are set not against repelling a particular attack, but more broadly against the destruction of the enemy's military, the principle of *ad bellum* proportionality, interpreted as prohibiting only that which is unnecessary for achieving such a goal, effectively loses all restraining force.[157]

Conclusions on cumulative harm

The combined effect of these interpretive positions is that overall civilian harm and destruction are rendered legally irrelevant under IHL and the *ius ad bellum*. Many of Israel's interpretations that have led to this result have featured in the practice of multiple other States. These interpretations are therefore of a different nature to claims of a separate category of 'unlawful combatant', which is largely rejected in State practice. In the case of overall harm and destruction, there is greater precedent for belligerents to respond to criticisms with claims about *ex ante* determinations of proportionality in individual operations and the necessity of their defensive war. This moves our focus away from actual overall harm towards (apparently) subjective legal standards of foreseeability and necessity.

The point is not to lend legal credibility to such interpretations. As shown, there are various ways in which IHL does take account of cumulative harm, and State practice supports the relevance of actual overall harm to *ad bellum* legality, even if the weight accorded to it is unclear. The point instead is to shed light on how States invoke international law.

This side-lining of actual overall harm and destruction is of particular concern in Gaza and other recent conflicts that reflect a perfect storm of explosive, heavy weapons and urbanised, high

[157] Though see HL Deb vol 833 col 562 24 October 2023 (Lord Verdirame KC, in support of such a defensive aim).

population density warfare.[158] In these respects, the Gaza conflict is similar to the campaigns against Islamic State by the US-led coalition (from 2014) and Russia (and Iran) (from 2015).[159] Those campaigns, and the overlapping civil war in Syria, saw numerous urban battles that resulted in significant civilian loss and widespread destruction.[160] The legal basis of those campaigns varied, as did the legal character of the corresponding armed conflicts.[161] However, the US-led coalition's battle to retake Raqqa between June and October 2017 might be compared to aspects of Israel's campaign in Gaza given its urbanised setting and basis in self-defence.

The question of civilian fatalities attributable to the coalition's operations in Raqqa is controversial. An April 2019 Airwars/Amnesty investigation set the minimum figure at 1,600 (said to be conservative), 10 times higher than the coalition's estimate at the time.[162] Indeed, a 2021 *New York Times* investigation found significant under-counting of civilian fatalities generally in US

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[158] Laurent Gisel *et al*, 'Urban warfare: an age-old problem in need of new solutions', *Humanitarian Law & Policy* (ICRC blog), 27 April 2021.

[159] Though note the charge that Russia's campaign focused almost exclusively on anti-government Syrian rebels: Florence Gaub, 'Russia's Non-War on Daesh' in Nicu Popescu and Stanislav Sacrieru (eds), *Russia's Return to the Middle East: Building Sandcastles?* (EU Institute for Security Studies, Chaillot Paper No 146, July 2018) 57.

[160] See, e.g., Roos Boer, Laurie Treffers and Chris Woods, 'Seeing Through the Rubble: the Civilian Impact of the Use of Explosive Weapons in the Fight Against ISIS', Airwars/PAX Report (2020) 16–24 (on the impact, including 9,000 to 12,000 civilian fatalities, of the US-led coalition's battle to retake Mosul between 2016 and 2017); Human Rights Council, Report of the IICIS, A/HRC/34/64, 2 February 2017 (documenting evidence of IHL violations by Russia, Syria and rebel groups during the campaign to retake Aleppo in late 2016).

[161] Olivier Corten, 'The Military Operations Against the "Islamic State" (ISIL or Da'esh)—2014' in Tom Ruys et al (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford: OUP, 2018).

[162] Airwars, 'At least 1,600 civilians died in US-led Coalition actions in Raqqa, major new study finds', *Airwars News*, 25 April 2019; Boer *et al* (n 160) 28.

operations against Islamic State.[163] Certain coalition partners, including the UK, refused to accept that any civilians were killed in their Raqqa operations, even where the coalition accepted this.[164] The infrastructure damage throughout Raqqa was substantial, with 11,000 buildings destroyed.[165] A RAND report commissioned by the US DoD noted that 'Raqqa incurred the most damage density of any city in Syria during the civil war', with local organisations estimating 65% of homes were destroyed.[166] The UN Office for the Coordination of Humanitarian Affairs considered 80% of the city to be 'uninhabitable'.[167] Islamic State was less active in Raqqa than in Mosul, suggesting most of this destruction was attributable to the coalition.[168]

Few States criticised the coalition for this.[169] At an April 2018 meeting of the UN Security Council, the Under-Secretary-General for Humanitarian Affairs reported on a recent visit to Raqqa, which had revealed 'the high levels of unexploded ordnance and improvised explosive device contamination, widespread and severe infrastructural damage, and a lack of basic services. An estimated 70 to 80 per cent of all buildings inside Raqqa city [were] destroyed or damaged.'[170]

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[163] Azmat Khan, 'Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes', *New York Times,* 18 December 2021; Azmat Khan, 'The Human Toll of America's Air Wars', *New York Times,* 19 December 2021.

[164] Boer *et al* (n 160) 20; HC Deb vol 630 col 1377 7 November 2017 (Foreign Secretary).

[165] Boer *et al* (n 160) 29; Human Rights Council, Report of the IICIS, A/HRC/37/72, 1 February 2018, 9.

[166] MJ McNerney et al, 'Understanding Civilian Harm in Raqqa and its Implications for Future Conflicts' (RAND Corporation Research Report, 2022) 38–40.

[167] OCHA, 'Syria Crisis: Northeast Syria Situation Report No. 16 (1–30 September 2017)', 30 September 2017 <https://www.unocha.org/publications/report/syrian-arab-republic/syria-crisis-northeast-syria-situation-report-no-16-1-30-september-2017>.

[168] McNerney *et al* (n 166) 40.

[169] Unsurprisingly, Russia and Syria were the key critics: UNSC, A/72/PV.37, 25 (Syria); UNSC, S/PV.8117, 8 (Russia).

[170] UNSC, S/PV.8236, 2.

Whilst some States responded with concern at the devastation of Raqqa,[171] few went so far as to criticise the coalition.[172] Indeed, some even took this opportunity to emphasise their support for the campaign.[173]

Similar to Israel regarding its post-October 2023 Gaza war, the response of the coalition States to these concerns was to claim formal compliance with IHL, in a way that largely ignored the overall civilian impact of its operations. The United States, for example, replied to the report from the Under-Secretary-General by stating that '[t]he Coalition's operations were carried out in scrupulous regard for the laws of war and to minimize civilian casualties.'[174] Similarly, in response to a question on aggregate assessments of civilian harm raised during a 2021 *New York Times* investigation, a military spokesperson emphasised that 'the lawfulness of a military strike is judged upon the information reasonably available to the striking forces at the time of the decision to strike.'[175]

The focus, again, is shifted from the cumulative impact actually felt on the ground to subjective legal standards of foreseeability at the time of a specific attack. There is no indication that actual overall harm and destruction are considered relevant to certain IHL rules, nor that the

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[171] ibid, 11 (Kazakhstan); ibid, 12 (Equatorial Guinea); ibid, 16 (Ethiopia).

[172] ibid, 17–18 (Syria).

[173] ibid, 14 (Netherlands).

[174] UNSC, S/PV.8236, 7. Cf Human Rights Council (n 107) 18 ('[t]he Commission is concerned that the widespread destruction wrought upon Raqqah city included indiscriminate attacks and other serious violations of international humanitarian law').

[175] 'Military Responses to Questions about U.S. Airstrikes, *New York Times,* 18 December 2021 <https://www.nytimes.com/interactive/2021/us/military-responses.html>. Similarly, see the monthly civilian casualty reports: e.g. Combined Joint Task Force–Operation Inherent Resolve, Monthly Civilian Casualty Report, 2 June 2017 <https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1201013/combined-joint-task-force-operation-inherent-resolve-monthly-civilian-casualty/>.

ius ad bellum might further constrain the coalition. The UK government gave a similar response to criticisms of its campaigns.[176] Whilst it assured that civilian harm is monitored and investigated, these processes have been criticised for being unsystematic and failing properly to account for cumulative harm.[177]

In one of the few analyses of this issue, Noam Lubell and Amichai Cohen offer a thoughtful proposal for taking greater legal account of cumulative harm.[178] Their proposal effectively embraces the narrow conception of *ad bellum* proportionality noted above. Yet there are several reasons why this alone is unlikely to guarantee the legal relevance of cumulative harm. First, even that narrow conception of proportionality will struggle effectively to regulate belligerents' conduct where they claim a very broad defensive aim (and thus a broad pool of benefits to be weighed against harms). Second, there are well-known conceptual difficulties with proportionality *stricto sensu*, including epistemic challenges regarding benefit and harm, and problems of incommensurability.[179] Finally, though Lubell and Cohen suggest their proposal fits with existing practice and is thus likely to be effective, the discussion above suggests otherwise. In particular, whilst they rely on the practice of States condemning others' self-defence operations as disproportionate due to overall resulting harm,[180] it was shown above that much of this practice actually supports the more limited, conventional sense of *ad bellum* proportionality.[181]

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[176] HC Deb vol 662 col 43WH 18 June 2019 (Minister for Asia and the Pacific).

[177] Elizabeth Stubbins Bates, 'Strengthening UK Military Investigations into Civilian Harm: Towards Compliance, Mitigation and Accountability' (Ceasefire Centre for Civilian Rights, November 2024) 31.

[178] Lubell and Cohen (n 114).

[179] Lieblich (n 126) 68. Similarly, see Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 493 (for analogous concerns with proportionality *stricto sensu* in constitutional rights-adjudication).

[180] Lubell and Cohen (n 114) 190.

[181] See above at text to nn 141–142.

Some recent policy developments do indicate growing recognition of the need for greater account of civilian harm in conflict. The most detailed example is the US DoD's 2022 Civilian Harm Mitigation and Response (CHMR) Action Plan, elaborated in December 2023.[182] This has the potential generally to reduce overall civilian harm. For example, it states that *ex ante* civilian harm assessments *may* include longer-term harm across multiple operations,[183] and that commanders should take additional protective measures not required by IHL (e.g. more precise weapons) 'as they deem appropriate'.[184] 'Civilian harm' is also defined, '[a]s a matter of DoD policy', to include indirect, reverberating effects of operations 'to the extent practicable'.[185] It is emphasised, nonetheless, that these reflect policy, as opposed to legal, developments, leaving intact the US' previous interpretive positions regarding the content of the law.[186] The Trump Administration has also indicated its intent to undo this initiative.[187]

As I have argued, there are circumstances in which IHL and the *ius ad bellum* already require account to be taken of overall civilian harm and destruction, albeit in a very imperfect way. This is in contrast to Lubell and Cohen, who take as their starting point the silence of IHL here and the inapplicability of the *ius ad bellum* to ongoing conflicts. This suggests that the core problem is not as such an absence of specific legal rules, but rather the more general problem of permissive interpretations of existing law. In this respect, the ICRC's warning that permissive interpretations by States risk 'establishing regrettable legal precedents and enabling future actors to inflict harm

[182] US DoD, CHMR Action Plan, 25 August 2022; US DoD, Instruction 3000.17 (CHMR), 21 December 2023.

[183] US DoD, Instruction 3000.17, ibid, 29.

[184] ibid, 25.

[185] ibid, 48.

[186] ibid, 7.

[187] Elizabeth Stubbins Bates and Mae Thompson, 'Harnessing Military Investigations as a Tool for Civilian Protection in an "Era of Rearmament"', *EJIL:Talk!,* 11 April 2025.

beyond what is militarily necessary or tolerable to humanity' seems to have been realised.[188] Where we go from here is the focus of the final part.

WHAT ROLE FOR INTERNATIONAL LAW *IN EXTREMIS*?

The preceding sections have examined Israeli interpretations of international law in relation to two areas of prominence in its post-October 2023 war in Gaza. With respect to detention, it was argued that Israel has reverted, in effect, to its earlier view that unlawful combatants need not be treated according to the ordinary protective rules of IHL, at least temporarily. Regarding overall civilian harm, it was shown how Israel's interpretive manoeuvres regarding its IHL and *ad bellum* obligations render the actual impact of its operations on Gaza's population legally irrelevant. Crucially, these interpretations were shown to find some support in precedents from other States. But what does this tell us about the state of international law and its capacity to regulate conflict?

We might see this all as unremarkable, expected even. As noted at the outset, it is hardly unusual for States to adopt self-serving interpretations of the law, and to do so in ways that seek to enhance the legitimacy of their conduct. Determining how far such interpretations remain within the bounds of reasonableness is the task of the international lawyer. At times, we can identify conduct that, even if accompanied by a veneer of legality, can confidently be said to violate positive law. This is a fair assessment of the use by Israel and the US of the notion of 'unlawful combatant', at least insofar as that notion is invoked normatively to exclude certain persons from the protected categories that IHL prescribes. Our confidence in making such an assessment comes both from the objective means of treaty interpretation and from the absence of supportive State practice.[189]

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[188] ICRC, *Challenges 2019* (n 6) 11.

[189] See above at text to nn 33–34.

Yet it is hard to be as resolute when assessing Israel's legal side-lining of the overall impact of its war on the civilian population. Certain of Israel's interpretations that lead to that outcome, for example its claim that the *ad bellum* rules do not regulate ongoing conflicts, can similarly be seen as straightforwardly *contra legem*, given their lack of support in practice. However, the same cannot so readily be concluded where extensive civilian harm is a consequence of broadly accepted interpretations, such as the essentially forward-looking and attack-specific nature of IHL proportionality or claims of necessity in achieving one's defensive aims.

We might be led to view this as further evidence of the law's deeper apologetic, enabling function, well documented both in international law scholarship generally, and in IHL scholarship specifically.[190] But this does not really take us any further in the sense we need. Viewing these interpretations in this light does not leave much room for considering what *particular* challenges to the law they might pose. The ICRC, after all, considers this phenomenon to be one of the law's key contemporary challenges. Nor does such a critical frame, important as that can be, help us to critique the *particular* interpretive manoeuvres discussed above.[191]

It is submitted that practices and interpretations such as those above—that promote, in the ICRC's words, 'an increasingly expansive vision of what is permissible, and a contracted notion of what is considered prohibited'—do indeed pose *particular* challenges to the law. One of those challenges concerns the notion of change in international law. Due to the decentralised nature of

[190] See, e.g. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: CUP, 2006); Chris Jones, *The War Lawyers* (Oxford: OUP, 2020); Eyal Benvenisti and Doreen Lustig, 'Monopolizing the Laws of War: Codifying the Laws of War to Reassert Governmental Authority, 1856-1874' (2020) 31 EJIL 127; Berman (n 5); Chris Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 *Harvard International Law Journal* 49.

[191] Other non-formalist accounts do not help here for the same reason: e.g. Monica Hakimi and Jacob Katz Cogan, 'The Two Codes on the Use of Force' (2016) 27 EJIL 257.

international law-making, individual instances of State practice have the potential to define (and even effect change in) the content of the law. As the International Court of Justice has stated, '[r]eliance by a State on a novel right or an unprecedented exception … might, if shared in principle by other States, tend towards a modification of customary international law.'[192] The same can be true of treaty law.[193] What is initially a dubious interpretation of a rule, or a straightforward breach, might subsequently redefine the rule should other States follow suit.

This is a particular risk in those areas of international law, such as IHL or the *ius ad bellum*, where there is no mechanism of institutional oversight or review. But it is especially problematic in IHL for another reason. It is an important feature of IHL that its rules are specifically developed to regulate an armed conflict (the archetypical state of emergency), and this explains why arguments based on a claimed state of necessity cannot operate so as to displace the law or preclude State responsibility (in the absence of specific limitation or derogation clauses).[194] Claims of so-called *kriegsraison geht vor kriegsmanier* have long been unavailable as defences to violations of the laws of war.[195] Yet opening up rules of IHL through interpretations that push (or straightforwardly transcend) the bounds of reasonableness, particularly in the midst of conflict, risks circumventing this important structural feature of IHL.

How then do we determine when an interpretation pushes the limits of reasonableness? It is, again, straightforward where an interpretation is clearly *contra legem* due to its divergence from

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[192] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, [207].

[193] Irina Buga, *Modification of Treaties by Subsequent Practice* (Oxford: OUP, 2018).

[194] Lawrence Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 *Israel Law Review* 225; Federica Paddeu and Kimberley Trapp, 'Defences to State Responsibility and International Humanitarian Law' (2022) 25 *Yearbook of International Humanitarian Law* 71, 92–94.

[195] William Gerald Downey Jr, 'The Law of War and Military Necessity' (1953) 47 AJIL 251.

treaty law and practice, e.g. the invocation of a category of 'unlawful combatant'. We can say the same at least about blanket denials of the legal relevance of cumulative harm, which were shown above to ignore important rules in IHL. But how do we respond to the defence that the overall harm caused is the result of multiple military operations that individually complied with IHL and cumulatively did not go beyond what was necessary to repel ongoing attacks? How, in other words, should we approach those interpretations that are shared by many States and yet that have the potential to lead to outcomes that seem entirely at odds with the project of regulating war?

It is here where a second, credibility-based challenge that such interpretations pose to international law can shed some light. The extract from the ICRC's *Challenges* report quoted at the outset reflects the need to look beyond overt instances of non-compliance in considering the current state of the law. International relations scholars working on the effectiveness of IHL have also recognised this. An important co-authored study published in 2017 argued that the greatest threat to IHL comes not from non-compliance but recent State practice that challenges what the authors identify as the law's 'original bargain', undermining the legitimacy and 'binding quality' of IHL.[196]

Whilst pointing in the right direction, I would diagnose this challenge slightly differently, as not one arising from practice that undermines some 'original bargain', but rather practice or interpretations that augment the law's permissive aspects and exacerbate its deviation from

[196] Ian Clark et al, 'Crisis in the Laws of War? Beyond Compliance and Effectiveness' (2017) 24 *European Journal of International Relations* 319. The original bargain is said to be 'a consensus among the parties about the nature of the governance domain – what constitutes war, and how it differs from other forms of violence' (ibid, 331).

ordinary morality.[197] To illustrate this, we can look to scholarship from those working at the interface of law, international relations and the ethics of war.

In a study on the influence of international law on US targeting practices, Janina Dill argues that the law's effectiveness in regulating war depends on its behavioural relevance and normative success: '[t]he kind of difference law makes should lead to behaviour that is normatively acceptable or perceived as legitimate.'[198] And these, in turn, are said to depend on IHL's ability to balance considerations of military pragmatism and humanitarianism.[199] This balance has long been recognised as being at the heart of IHL.[200] Indeed, it reflects the similar tension between concreteness (apology) and normativity (utopia) in Koskenniemi's more general account of international legal argument.[201] Whilst it goes too far to suggest that this balance constitutes the object and purpose of every IHL rule, such that it must guide formal legal interpretation,[202] it offers a useful reference for critiquing the appropriateness of particular interpretations. Though it does

[197] As made clear in the ICRC quote at the outset, it is also wrong to think of this as a new phenomenon: Helen M Kinsella and Giovanni Mantilla, 'Contestation before Compliance: History, Politics, and Power in International Humanitarian Law' (2020) 64 *International Studies Quarterly* 649.

[198] Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (Cambridge: CUP, 2014) 57.

[199] ibid, 82.

[200] St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight 1868, preamble.

[201] Koskenniemi (n 190) 17–23.

[202] On this, see Lawrence Hill-Cawthorne, 'Common Article 1 of the Geneva Conventions and the Method of Treaty Interpretation' (2023) 72 ICLQ 869, 878–879.

not quite map onto the *ius ad bellum*,[203] we can still draw on Koskenniemi's related account to critique particular *ad bellum* interpretations.[204]

The interpretations of the law adopted by Israel and other States in the areas explored above raise two key problems in this respect. First, they lean heavily towards military pragmatism. The justifications put forward by the government of Israel for its original 2002 Law and the recent amendments, as necessary for national security, reflect this clearly. This is also true for its justification of extensive civilian harm as necessary in light of its broader defensive aims. By leaning heavily towards military pragmatism and away from humanitarian considerations, such interpretations exaggerate the law's apologetic, or 'facilitative' function,[205] and thus reduce (even eliminate) any potential normative function.

Two features of these practices that were noted above further exacerbate this. The first is that some have been adopted in the midst of conflict, such as Israel's amendments to its 2002 Law. This only serves to emphasise the short-term, instrumentalising nature of the practice. The other exacerbating feature concerns the justifications for cumulative harm, which reduce objective accounts of actual overall harm and destruction to subjective legal tests of foreseeability and necessity. The capacity for third parties to critique belligerents' conduct is thus undermined, further challenging the law's normativity.

The second problem raised by these interpretations for the credibility of the law is that they render more stark international law's divergence from ordinary morality. Even if one considers that the law has been followed in a particular conflict (for example, through individual strikes that comply with IHL), where the cumulative result is considerable civilian harm and

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[203] David Hughes and Yahli Shereshevsky, 'Something is Not Always Better than Nothing: Problematizing Emerging Forms of *Jus Ad Bellum* Argument' (2020) 53 *Vanderbilt Journal of Transnational Law* 1585.

[204] Conscious, of course, of falling into the very trap of which Koskenniemi warns.

[205] Eliav Lieblich, 'The Facilitative Function of *Jus in Bello*' (2019) 30 EJIL 321.

destruction, the law cannot be considered to have succeeded in generating outcomes that are 'normatively acceptable'. That IHL fails to reflect ordinary moral standards of individual liability is at the heart of revisionist just war theory.[206] Many nonetheless argue that IHL cannot, realistically, reflect an individual rights-based morality and that some divergence between the two is inevitable if the law is to be followed and suffering reduced in war.[207] The credibility of the international regime regulating armed conflict is threatened, however, by those interpretations that create a *stark* divergence from ordinary morality, e.g. by seeking to justify extensive civilian harm.

The ICRC is, in this sense, right to view these kinds of interpretations as key challenges to IHL (and the *ius ad bellum*), alongside overt non-compliance. This section has argued that the distinctive challenges they pose are two-fold: first, their circumvention through interpretation of the core structural feature of IHL that denies necessity-based defences to violations; second, their discrediting of the law by taking to the extreme the law's apologetic, facilitative role and its stark departure from ordinary (individual liability) standards of morality. Importantly, however, these challenges also offer us a way of critiquing such practices. Thus, even where particular practices or interpretations appear grounded in positive law or supported in practice, it is vital to confront the pressure they exert on the law's effectiveness, normativity and overall credibility in the sense of these two sets of challenges.

CONCLUDING REMARKS

[206] See, e.g., Jeff McMahan, *Killing in War* (Oxford: OUP, 2009); Helen Frowe, *Defensive Killing* (Oxford: OUP, 2014).

[207] Janina Dill & Henry Shue, 'Limiting the Killing in War: Military Necessity and the St Petersburg Assumption' (2012) 26 *Ethics & International Affairs* 311. Cf Adil Haque, *Law and Morality at War* (Oxford: OUP, 2017) (offering an alternative account of IHL's 'deep morality').

This article opened with a quote from the ICRC's recent *Challenges* report, which put the spotlight on a long-standing problem in IHL, and international law more generally, i.e. permissive interpretations and strategic instrumentalisation. The added focus on this challenge in recent years is no doubt partly in response to the general upward trend in conflict-related civilian fatalities, particularly over the last 15 years.

This article draws on Israel's conduct in its post-October 2023 conflict in Gaza as a case study of this phenomenon. It shows, with reference to two areas, how Israel has relied on the law in a permissive way to legitimise its conduct. What is more, in neither case is Israel alone in its particular interpretations of the law. Rather, other States have, in their own practice, set precedents on which Israel can rely when it makes claims to legality.

It is hard to cling to the idea that international law can add something meaningful to our understanding of and response to war when faced with such an apparent impasse. But for many the law remains an essential frame of war. Organisations such as the ICRC rely on the law daily in the name of constraining belligerents. Victims seeking redress, or even just to emphasise the degree of their plight, turn to international law for substantive legal and (sometimes) institutional support. Given this, I attempted in the final section to avoid a nihilist conclusion. I argued there that permissive interpretations of the law in wartime pose a number of particular challenges. First, they re-open the very rules designed to regulate international relations *in extremis* to necessity-based arguments. Second, they discredit international law as a whole by exposing its apologetic role and driving a wedge between what the law requires and what our ordinary moral code expects. When faced with interpretations such as these, we may be able straightforwardly to reject them on formalist *contra legem* grounds. When that is not so easily done, it is to these challenges that we must point as a reminder that international law's credibility as a whole depends on its good faith application.