

Masked Palestinian militants from the Popular Resistance Committees with Kassam rockets on the outskirts of Gaza City, Dec. 24, 2008.



Accountability of Hamas under International Humanitarian Law

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Introduction

The laws of war have historically developed in two separate normative frameworks. The first is known as *jus ad bellum*, and refers to the legality of the resort to war. This area is governed by the UN Charter, as well as international customary law. The second normative framework is called *jus in bello*, also known as International Humanitarian Law (IHL). This area regulates the manner in which the fighting is conducted, once the warring parties have entered into an armed conflict. IHL applies in situations of armed conflict, whether international or non-international in nature. Its main goal is to protect civilians and other categories of persons who do not participate in the hostilities, as well as certain objects, from harm inflicted during armed conflicts.¹ To achieve this goal, IHL treaties and customary norms define which acts are legitimate and which are prohibited during armed conflicts. IHL applies equally to all parties to an armed conflict, regardless of whether they were justified in resorting to war in the first place.

The most important IHL treaties are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.² The provisions in these treaties define the categories of persons and objects which are protected from attacks during armed conflicts. They also restrict the means and methods of warfare, in conformity with the principles of distinction, proportionality, military necessity and humanity. It is noteworthy that acts of “terrorism” are explicitly prohibited by these treaties,³ as are “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”⁴ Many of the rules in these treaties have become customary IHL norms, such as the prohibition on targeting civilians.

This essay will briefly describe how IHL developed to apply to non-state actors. It will then ascertain which IHL norms are binding on Hamas in connection with its conflict with Israel. Finally, it will identify the IHL norms which were violated by Hamas and refer to available enforcement measures. Areas where normative or institutional developments are thought to be desirable will be highlighted.

Applicability of IHL Norms to Non-State Actors

Historically, as with other areas of international law, only states were subjects of IHL.⁵ After the Second World War, the focus of IHL shifted from regulating inter-state relations to protecting civilians, as reflected by the terminological transformation of “laws of war” into “international humanitarian law.” To reinforce this shift in focus from a normative perspective, existing IHL treaties which regulated international armed conflicts were supplemented or replaced by the four Geneva Conventions of 1949 and the First Additional Protocol of 1977.⁶ Another significant change was that, while wars were traditionally fought between states, most armed conflicts after 1945 were internal (such as civil wars) and involved non-state armed groups. Against this background, rules that bind parties to non-international armed conflicts, including non-state actors, were codified in Article 3 common to the Geneva Conventions of 1949 (Common Article 3) and in the Second Additional Protocol of 1977.⁷ Some of these rules have become customary IHL norms, such as those contained in Common Article 3.⁸ Moreover, additional customary IHL norms applicable to non-international armed conflicts developed over the years.⁹

Under international law, non-state actors are bound by customary IHL norms when they become a party to an armed conflict. Thus, the Appeals Chamber of the Special Court for Sierra Leone held as follows: “it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties.”¹⁰

A comprehensive study published in 2005 by the International Committee of the Red Cross (ICRC) identifies all existing customary IHL norms, and specifies in which type of armed conflict they apply.¹¹ Interestingly, a large number of the customary norms identified in the study are applicable in both international and non-international armed conflicts.¹² Some scholars maintain that the gap between the norms which govern international armed conflicts, and those which govern non-international armed conflicts, is narrowing down as a result of human rights considerations which call for increased protection for victims of armed conflicts (regardless of the type of conflict in which they find themselves).¹³ But at the same time, there still remain significant differences between these two distinct sets of rules, mainly due to the reluctance of states to restrict their authority over non-state actors with which they may want to deal under their domestic law. For example, according to the First Additional Protocol, members of the armed forces of each party to an international armed conflict have “the right to participate directly in hostilities.”¹⁴ By contrast, the provisions of the Second Additional Protocol (or Common Article 3) do not explicitly grant fighters of a non-state armed group the right to take up arms against the state.¹⁵

Another distinction between the two sets of rules revolves around the concept of prisoner-of-war status. Thus, in international armed conflicts, each party’s combatants may be apprehended and detained by the opposite party until the cessation of hostilities, but the captured combatants must be granted prisoner-of-war status and cannot be prosecuted for their combat activities.¹⁶ By contrast, in non-international conflicts, the state may capture and prosecute the fighters of

the non-state actor for targeting its soldiers and military objects, or take other measures against them which are necessary to “defend itself and to reestablish law and order.”¹⁷ Still, the state has to observe, in relation to the captured fighters, the minimum standards of humanity provided in Common Article 3, but this does not amount to granting them a prisoner-of-war status.¹⁸

The Nature of the Israel-Hamas Conflict

To determine *whether* IHL applies in a given conflict, that conflict must amount to an “armed conflict” under IHL. Once the existence of an armed conflict is established, to determine *which* IHL norms bind the warring parties, as demonstrated above, the conflict must be classified as either an international armed conflict (traditionally fought between states) or a non-international armed conflict (traditionally fought within a state).

The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in the *Tadić* case, defined the meaning of armed conflict as follows: “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹⁹

Because Hamas is involved in an armed conflict with Israel, it is obligated to observe certain norms of international humanitarian law.

This definition of armed conflict is increasingly applied by institutions and commentators. For a conflict between governmental authorities and non-state armed groups to amount to an “armed conflict,” the *Tadić* case set two additional requirements: that the non-state actors be sufficiently organized and the conflict sufficiently intense. Without meeting these conditions, explained the ICTY, the violence will merely amount to “banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”²⁰ In the *Boškoski* case, the ICTY considered crimes committed in connection with a conflict in Macedonia, between government forces and the Albanian National Liberation Army (NLA). Referring to the test established in the *Tadić* case, the defendants argued that since the acts of NLA were of a terrorist nature, there was no armed conflict.²¹ The ICTY rejected their argument, finding that the intense and protracted nature of the violence, and the level of organization of the NLA, rendered the conflict an (internal) armed conflict.²² The Tribunal explained that “what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities. It is immaterial whether the acts of violence perpetrated may or may not be characterized as terrorist in nature.”²³

Hamas does not amount to a legitimate government of a recognized state, and is therefore considered a non-state actor.²⁴ However, it has a high level of organization, with a structured military force, political and social components, and de facto control over a defined territory, Gaza. During Operation Cast Lead, the fighting was undoubtedly sufficiently intense to amount to an armed conflict under IHL, considering the serious clashes between Israeli and Hamas armed forces. Even in the months (and perhaps years) leading to the operation, the fighting was quite intense, given the thousands of rockets launched by Hamas fighters towards Israeli towns, terrorizing and jeopardizing the lives of thousands of Israelis. This extended time-frame clearly

renders the armed violence “protracted,” although even the three-week period of Operation Cast Lead is sufficiently long to be considered an armed conflict under IHL.²⁵ In this light, the conflict between Israel and Hamas, in particular since the commencement of Operation Cast Lead but possibly since an earlier date, qualifies as an armed conflict which entails the application of IHL. In fact, the Israeli Supreme Court considers that Israel has been in a state of armed conflict with Palestinian terrorist organizations, including Hamas, since the outbreak of the Second Intifada in September 2000.²⁶

Hamas fighters who daily targeted Israeli civilians with rockets, as well as suicide bombers, violated the Geneva Conventions which prohibit violence towards life and body of anyone who is not taking part in the hostilities.

Because Hamas is involved in an armed conflict with Israel, it is obligated to observe certain IHL norms. In order to identify the IHL norms which apply to Hamas, its armed conflict with Israel must be classified as international or non-international in nature. The Israeli Supreme Court characterizes the conflict between Israel and Palestinian terrorist organizations, including Hamas, as international in nature.²⁷ In 2005, the Court based this finding mainly on the theory that any armed conflict fought in the context of situations of belligerent occupation qualifies as international in nature.²⁸ Until that year, all Palestinian terrorist organizations operated from areas occupied by Israel, including the West Bank and Gaza.²⁹ But the Court also suggested that an armed conflict which “crosses the borders of the state” should be considered international, regardless of its connection to a situation of belligerent occupation.³⁰ Based on this point of view, in 2008, although the Court found that Gaza was no longer occupied by Israel,³¹ it continued to regard the armed conflict between Israel and Palestinian terrorist organizations based in Gaza as international.³²

Furthermore, one of the reasons that some IHL norms are not binding in non-international armed conflicts (e.g., granting prisoner-of-war status to captured combatants) is to allow the state to “defend itself and to reestablish law and order” by handling non-state armed groups under its domestic law.³³ This rationale does not apply in the context of the Israel-Hamas conflict, mainly because Israel has no effective or overall control in Gaza and therefore cannot employ law enforcement measures such as physically apprehending the fighters. This is another argument in favor of regarding the Israel-Hamas armed conflict as international.³⁴

However, many scholars consider that since Hamas is a non-state actor, the Israel-Hamas conflict should be considered a non-international armed conflict, regardless of its cross-border nature.³⁵ Moreover, according to most commentators, the position of the U.S. Supreme Court in the *Hamdan* judgment is that the conflict between the U.S. and al-Qaeda is a non-international armed conflict, in contrast to the Israeli Supreme Court’s view that any cross-border armed conflict is international in nature.³⁶ This is also the view of the U.S. administration.³⁷

IHL Norms Violated by Hamas

As noted above, there is no consensus on whether the Israel-Hamas armed conflict is international or non-international in nature, and the law is unsettled in relation to this issue. Therefore, this essay will consider which IHL norms that apply in *both* international and non-international armed conflict may have been violated by Hamas and its members.³⁸ It is noted that the same IHL norms which apply to Hamas, in connection with the Israel-Hamas conflict, also apply to Israel.

Although Common Article 3 explicitly states that it applies to “armed conflicts not of an international character,” its provisions are considered to amount to customary IHL norms which are applicable in both non-international and international armed conflict. The International Court of Justice (ICJ) explained that these provisions amount to “elementary considerations of humanity” which apply to any armed conflict.³⁹ The ICTY, in adopting this ruling, held that they reflect “minimum mandatory rules” with respect to which “the character of the conflict is irrelevant.”⁴⁰ Paragraph 1 (a) of Common Article 3 prohibits violence towards life and body of anyone who is not taking part in the hostilities.⁴¹ In this light, it can be safely argued that Hamas fighters, who daily targeted Israeli civilians by launching Qassam and Grad rockets, violated the provisions of Common Article 3. If we consider that the armed conflict between Israel and Hamas started before Operation Cast Lead, in line with the Israeli Supreme Court’s position,⁴² then suicide bombings and other attacks by Hamas members against civilians also violated Common Article 3.

Furthermore, as mentioned above, many additional customary IHL norms were identified in the ICRC study as applicable in *both* international and non-international armed conflicts.⁴³ Based on publically available reports,⁴⁴ consideration may be required as to whether the following customary IHL norms were violated by Hamas and its members:

1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.⁴⁵
2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.⁴⁶
3. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.⁴⁷
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are those: (a) which are not directed at a specific military objective; (b) which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.⁴⁸
5. The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.⁴⁹
6. The improper use of the distinctive emblems of the Geneva Conventions is prohibited.⁵⁰
7. The use of weapons which are by nature indiscriminate is prohibited.⁵¹
8. Civilians and persons *hors de combat* (out of action) must be treated humanely.⁵²

9. The use of human shields is prohibited.⁵³

10. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.⁵⁴

In the ICRC study, some of the norms which were found to apply in international armed conflict were labeled as “arguably” applicable in non-international armed conflict. The ICRC labeled them in this manner “because practice generally pointed in that direction but was less extensive.”⁵⁵ The following are such customary IHL norms, the violation of which may be attributable to Hamas and its militants:

1. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas.⁵⁶
2. Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives.⁵⁷

Enforcement Measures at the Level of the Organization

There are measures which can induce compliance with IHL such as providing general education to all warring parties on IHL, or advising them with regard to the legality of specific acts in times of armed conflict.⁵⁸ However, given the nature of armed conflict, it is difficult to prevent violations of IHL during its course. Thus, most measures employed to enforce IHL are punitive rather than preventive in nature. Such measures can be applied at the level of the organization which amounts to a party to the armed conflict (whether a state or non-state actor), and in some cases at the level of the individual who violates IHL norms.

At the level of the organization (a state or non-state party to an armed conflict), enforcement measures can be diplomatic or judicial. Available diplomatic measures include, for example, condemnations by states or UN organs, international pressure on the violating entity to compensate the victims, and economic sanctions against the violating entity. Judicial measures may include civil reparation claims before national courts, or, in relation to states, commencement of ICJ proceedings or setting up an International Fact-Finding Commission under the First Additional Protocol to the Geneva Conventions.⁵⁹

To employ enforcement measures at the level of the organization, responsibility for the IHL violations must be attributed to the organization, whether a state or non-state actor. The responsibility of states for violations of international law is regulated by the “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” prepared in 2001 by the International Law Commission (ILC Draft Articles).⁶⁰ In the case of a non-state actor like Hamas, some of the provisions of the ILC Draft Articles may be relevant in that they clarify that internationally wrongful acts can be attributed, in certain circumstances, to non-state actors. Thus, Article 10 of the ILC Draft Articles addresses the responsibility of “an insurrectional or other movement,” providing that when such a movement becomes the “new Government of a State,” or “succeeds in establishing a new State,” the violations it committed while it was still a movement will be considered an act of that (new or existing) State. Commentary 16 to Article 10 states:

A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful

insurrectional or other movements, however, falls outside the scope of the present articles, which are concerned only with the responsibility of States.⁶¹

The above stipulation suggests that responsibility for IHL violations can be attributed to non-state actors, but falls outside the subject-matter of the ILC Draft Articles. Indeed, regional institutions, such as the Inter-American Commission on Human Rights, often attribute responsibility to non-state armed groups (for example, with respect to the Colombian guerrilla group FARC). Furthermore, UN resolutions often refer to the responsibility under IHL of non-state actors, such as the Sudan People's Liberation Army, Taliban, Hizbullah and others.

Hamas can be held responsible for violations of international humanitarian law. Individuals can be charged with criminal responsibility for serious IHL violations, referred to as war crimes.

Accordingly, Hamas can be held responsible for the above IHL violations, and the following enforcement measures can be employed in relation to Hamas as an organization:

- » condemnations of Hamas by states or UN organs;
- » diplomatic pressure on Hamas to compensate the victims;
- » economic sanctions against Hamas;
- » civil reparation claims before national courts against Hamas.

It may be difficult to employ international judicial enforcement measures, such as bringing a claim against Hamas before the ICJ, as only states can be subject to such proceedings. Hence, this area may require further development at the normative and institutional levels in light of the nature of contemporary armed conflicts.⁶²

Individual Criminal Responsibility of Hamas Members

As mentioned above, IHL enforcement measures can be employed at the level of the individual. This is done through imposing criminal responsibility on individuals for serious IHL violations. The field which deals with individual criminal responsibility under international law is called International Criminal Law (ICL). Aside from violations of IHL norms, referred to as war crimes, violations that are criminalized under ICL include genocide and crimes against humanity, which can be committed during international or non-international armed conflicts, or in times of peace.

The criminalization of IHL was influenced by the need to find a more effective way to enforce IHL norms. It started with the creation of the Nuremberg and Tokyo International Military Tribunals, which established the individual criminal responsibility of the main perpetrators of the atrocities committed during the Second World War. In the words of the Nuremberg Tribunal: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁶³

This process of criminalizing IHL violations continued with the inclusion of provisions in the Geneva Conventions of 1949 which impose criminal responsibility on individuals who commit certain acts in violation of the Conventions (grave breaches).⁶⁴ Also the Genocide Convention of 1948 and the Convention Against Torture of 1984 impose individual criminal responsibility for violations of international law. Finally, violations of certain IHL norms are criminalized by the Rome Statute of 1998, which will be addressed in further detail below.

The criminalized violations, also called “international crimes,” can be enforced by national courts asserting jurisdiction based on a link to the crimes, the perpetrators or the victims, or based on the principle of universality (also called universal jurisdiction).⁶⁵ In addition, international crimes can be prosecuted by international courts. The trend of establishing international criminal tribunals to prosecute individuals for IHL violations, which started in Nuremberg, continued in the mid-1990s with the creation by the UN Security Council of the two ad hoc tribunals – the ICTY and the International Criminal Tribunal for Rwanda, as well as several UN-backed courts of a mixed international-national nature. This process peaked with the establishment in The Hague of the International Criminal Court (ICC), which recently began hearing its first cases. The ICC was created by the Rome Statute of 1998, a multilateral treaty which 108 states have joined so far. International criminal courts and tribunals contribute to general and specific deterrence as well as to the prevention of certain IHL violations. They also contribute to the development of IHL norms, through interpreting and applying these norms in individual cases.

The ICC has jurisdiction over war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”⁶⁶ The Rome Statute criminalizes violations of Common Article 3 by listing acts which constitute war crimes when “committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.”⁶⁷ One of these listed acts is “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.”⁶⁸ Thus, the use by Hamas members of Qassam and Grad rockets in connection with the armed conflict may amount to a war crime under the Rome Statute. Accordingly, these acts may entail the individual criminal responsibility of Hamas fighters who committed, ordered or assisted them, or otherwise contributed to their commission.⁶⁹ These acts may also entail the individual criminal responsibility of Hamas military commanders and political leaders, under the principle of superior responsibility.⁷⁰

The following is a list of additional war crimes under the Rome Statute which may have been committed by Hamas members, and in which case may entail the individual criminal responsibility of these persons, as well as their military commanders and political leaders:⁷¹

- » Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;⁷²
- » Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;⁷³
- » Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;⁷⁴

- » Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.⁷⁵

The use of rockets and suicide bombings to attack civilians may amount to genocide and/or crimes against humanity.

As mentioned above, the Rome Statute also criminalizes genocide and crimes against humanity, regardless of whether they were committed in connection with an armed conflict.⁷⁶ Thus, the use of Qassam and Grad rockets, as well as other acts by Hamas members which were not committed in connection with Operation Cast Lead, such as suicide bombings and other attacks against civilians, may amount to genocide and/or crimes against humanity. For these acts to qualify as crimes against humanity, it must be established that they were “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁷⁷ If this requirement is met, the above acts may qualify as the crime against humanity of murder,⁷⁸ the crime against humanity of other inhumane acts,⁷⁹ and possibly the crime against humanity of extermination.⁸⁰ For these acts to amount to genocide, it must be established that they were committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”⁸¹ Genocide and crimes against humanity, as in the case of war crimes, may entail the individual criminal responsibility of Hamas members, and their military and political leaders.⁸²

The ICC may assert jurisdiction over a crime if the state where the crime occurred (territorial state) or the state of nationality of the perpetrator is a party to the Rome Statute,⁸³ or has accepted the ICC’s jurisdiction on an ad hoc basis by submitting a declaration under Rome Statute Article 12 (3). It is noted that in such cases, it is the “situation” and not specific acts by specific perpetrators that is brought under the jurisdiction of the ICC. In addition, a situation may be referred to the ICC by the UN Security Council.⁸⁴ In relation to crimes committed by Hamas members in connection with the Israel-Hamas conflict, it is difficult to identify the territorial state of the crimes. Should Israel be considered the territorial state, even though it no longer controls Gaza? Or perhaps the Palestinian National Authority (PNA), which is not a state, should be considered for this purpose as the territorial state?

Regarding Israel as the territorial state makes sense, especially since the Qassam and Grad rockets were fired at Israeli towns and hit Israeli victims and property. This argument is even more valid with relation to other acts of Hamas such as suicide bombings and other attacks against Israeli civilians, which were committed on Israeli soil.⁸⁵ However, Israel is not a state party to the Rome Statute. Even if it joined the Rome Statute now, the ICC will only have jurisdiction over events which occurred in its territory after Israel joined the Rome Statute.⁸⁶ Nonetheless, Israel could accept the ICC’s jurisdiction on an ad hoc basis by submitting a declaration under Rome Statute Article 12 (3). It is noted that if the ICC Prosecutor asserts jurisdiction over the situation in Gaza, he may decide to examine the legality under the Rome Statute of conduct by Israeli forces.

The argument that the PNA should be regarded as the “territorial state” is problematic in light of the plain reading of the Rome Statute which refers to “states” in connection with jurisdictional considerations. Nonetheless, and despite the reality that it is not a state, the PNA has recently

lodged a declaration under Rome Statute Article 12 (3), accepting the ICC's ad hoc jurisdiction. The ICC Prosecutor has indicated that the question of whether this declaration meets statutory requirements is currently under consideration.⁸⁷ Thus, it is up to the ICC to determine the PNA's "statehood" for the purpose of asserting jurisdiction over the situation in Gaza, which will enable it to exercise jurisdiction over crimes committed by Hamas members. Finally, it is recalled that the UN Security Council may refer the situation to the ICC. Such referral is sufficient for the ICC to acquire jurisdiction over the Gaza situation, without Israel or the PNA accepting its jurisdiction.

International crimes, as noted above, can also be prosecuted at the national level. Thus, the individual criminal responsibility of Hamas members for war crimes, crimes against humanity, or genocide can be established by national courts. Since it is unlikely that the courts of the PNA will assume such a task, it is left to Israeli or third state courts to prosecute Hamas members for international crimes, based on either a link to the crimes or universal jurisdiction. However, it would be difficult to obtain physical custody of the suspects. This could also be an obstacle which the ICC may face if it eventually asserts jurisdiction over the situation in Gaza.

Conclusion: The Need for Future Developments

As explained above, in order to best protect civilians and other individuals not taking part in the hostilities, IHL imposes obligations not only on states but also on non-state actors, such as individuals and organized armed groups. But it is hard to identify the IHL obligations which bind Hamas because of the difficulties involved in classifying the Israel-Hamas armed conflict as international or non-international. Some normative development may be needed to clarify the state of the law in this respect. In addition, contemporary means and methods of warfare may require further normative and institutional developments in order to better achieve the goals of IHL.

Establishing the individual criminal responsibility of Hamas members for their participation in international crimes also has its challenges. Thus, for example, it may be difficult to find a forum which will prosecute them, and which can also guarantee their physical presence during trial. Another difficulty may be to isolate political considerations from judicial processes, in order to guarantee both an objective decision to initiate criminal proceedings and a fair process. Accordingly, also in this area normative and institutional developments are desirable.

Notes

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1 Another goal of IHL is reducing unnecessary suffering of combatants, e.g., by regulating the use of certain weapons.

2 The Geneva Conventions of 1949 consist of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at

Sea (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV). The Additional Protocols of 1977 include Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I); and Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II). Another important IHL treaty is the Hague Convention and Regulations Respecting the Laws and Customs of War on Land of 18 October 1907 (Hague Convention IV), which, among other things, regulates situations of belligerent occupation. In addition, there are IHL treaties which regulate means of warfare, such as the 1980 UN Convention on Conventional Weapons.

- 3 Article 33 (1) of Geneva Convention IV; Article 4 (2) (d) of Additional Protocol II.
- 4 Article 51 (2) of Additional Protocol I; Article 13 (2) of Additional Protocol II.
- 5 This state-centric international order was rooted in the 1648 Treaty of Westphalia. However, non-state actors are increasingly becoming subjects of international law, with recognized international rights and obligations.
- 6 Some of the IHL treaties which existed before 1949 are: Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864; Additional Articles relating to the Condition of the Wounded in War, 20 October 1868; Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, 29 July 1899; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906; Convention for the Adaptation of the Principles of the Geneva Convention to Maritime War, 18 October 1907; Hague Convention (IV) of 18 October 1907; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929.
- 7 Until 1949, norms applicable to international armed conflicts were applied to intra-state wars only when they reached a certain threshold of violence and where the non-state party was recognized as a “belligerent.”
- 8 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Judgment, 1986 ICJ Rep. 14 (Nicaragua Judgment), at 114; *Prosecutor v. Tadić*, ICTY Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995 (*Tadić* Jurisdiction Decision), para. 102. It is noted that both the ICJ and ICTY held not only that the provisions of Common Article 3 have become customary IHL norms, but also that they apply in both international and non-international armed conflict (see discussion below).
- 9 The Rome Statute of the International Court of 17 July 1998 (Rome Statute) codified some of these customary IHL norms. The Rome Statute, which criminalizes certain violations of international law, will be addressed below.
- 10 *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 22.
- 11 The study was published in two volumes in *Customary International Humanitarian Law*, eds., Jean-Marie Henckaerts and Louise Doswald-Beck (ICRC and Cambridge University Press, 2005) (ICRC Study on Customary IHL). Conveniently, a list of the norms identified in the study is included in Jean-Marie Henckaerts, “Study on Customary International Humanitarian Law - Annex: List of Customary Rules of International Humanitarian Law,” 87 *Int’l Rev. Red Cross* (2005), 198 (Annex to ICRC Study on Customary IHL). The ICRC, an organization based in Geneva, is considered the “guardian” of IHL. The four 1949 Geneva Conventions and their two 1977 Additional Protocols grant the ICRC the right to carry out activities such as bringing relief to wounded, sick or shipwrecked military personnel, visiting prisoners of war, re-establishing contact between members of families separated by conflict, aiding civilians, and ensuring that those protected by humanitarian law are treated accordingly. The ICRC was responsible for the initial drafting of the four 1949 Geneva Conventions and their two 1977 Additional Protocols.
- 12 It is also noted that the Rome Statute illustrates that most of the important IHL norms applicable to international armed conflicts are also applicable to non-international armed conflicts. The Rome Statute distinguishes between war crimes (serious IHL violations) committed during international armed conflicts

and those committed during non-international armed conflicts. A comparison between these sets of crimes shows few substantial differences.

- 13 Theodor Meron, "The Humanization of Humanitarian Law," 94 *Am. J. Int'l L.* (2000), 239.
- 14 Article 43 (2) of Additional Protocol I.
- 15 Still, it can be argued that consistent with the principle of distinction, customary IHL norms do not prohibit the targeting of state forces by members of a non-state actor which is engaged in an armed conflict with the state.
- 16 Under Geneva Convention III, the immunity of prisoners-of-war from prosecution covers combatant activities (i.e., lawful acts of war such as targeting military personnel and objects) but does not cover war crimes (i.e., violations of IHL norms), for which prisoners-of-war can be prosecuted.
- 17 Article 3 of Additional Protocol II.
- 18 The relevant text of Common Article 3 is included in note 41 below. It is also noted that Additional Protocol II, in Article 6 (5), encourages the state to release such detainees at the end of hostilities without prosecuting them for their combat activity. On the argument that IHL protections accorded to detainees who deserve prisoner-of-war status are essentially similar to the protections accorded to detainees who do not deserve such status, see Derek Jinks, "The Declining Significance of POW Status," 45 *Harv. Int'l L.J.* 367 (2004).
- 19 *Tadić* Jurisdiction Decision, note 8 above, at para. 70.
- 20 *Prosecutor v. Tadić*, ICTY Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997, para. 562. Compare with Rome Statute Article 8(2)(d), relating to serious violations of Common Article 3, which "applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."
- 21 *Prosecutor v. Boškoski et al*, ICTY Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 184.
- 22 *Ibid.*, para. 292.
- 23 *Ibid.*, para. 185.
- 24 E.g., "Israel and Hamas: Villain-and-Hero Narrative and the t-Word," by Prof. Brigitte Nacos, 11 January 2009 ("Hamas is also a political party that won the 2006 elections in the Palestinian territories but that does not make the organization a state actor. There is no Palestinian state"), available at <http://www.reflectivepundit.com/reflectivepundit/2009/01/israel-and-hamas-villain-and-hero-narrative-and-the-t-word.html> (last visited on 13 June 2009). Additional statements explicitly referring to Hamas as a non-state actor can be found in "Gaza Is Not Lebanon - Why Israel's campaign against Hamas may succeed," by Thomas Donnelly & Danielle Pletka, *The Weekly Standard*, 5 January 2009, available at http://www.weeklystandard.com/Content/Public/Articles/000/000/015/975_wlwfj.asp (last visited on 13 June 2009); and "Dealing with Hamas - Efforts to contain Hamas successful so far, but what's the next step?" by Ephraim Halevy, *YnetNews*, 8 March 2007, available at <http://www.ynetnews.com/articles/0,7340,L-3432848,00.html> (last visited on 13 June 2009).
- 25 Even much shorter conflicts, if intense enough, have been recognized as non-international armed conflicts. Thus, the Inter-American Commission on Human Rights found a 30-hour battle between the Argentine military and a group of 42 armed attackers who invaded a military barracks to amount to a non-international armed conflict. See *Juan Carlos Abella v. Argentina*, Case 11.137, Report N° 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997).
- 26 *Mara'abe v. The Prime Minister of Israel*, Supreme Court of Israel, HCJ 7957/04, 15 September 2005, para. 1.
- 27 *Public Committee against Torture in Israel v. Government of Israel*, Supreme Court of Israel, HCJ 769/02, 11 December 2005 ("Targeted Killings Judgment"); *A v. the State of Israel*, Supreme Court of Israel, CrimA 6659/06, 1757/07, 8228/07, 3261/08, 11 June 2008 ("Unlawful Combatants Judgment"). For a judgment

in which the Israeli Supreme Court applies the laws of international armed conflict to Operation Cast Lead see *Physicians for Human Rights v. The Prime Minister of Israel*, Supreme Court of Israel, HCJ 201/2009, 19 January 2009, para. 14.

- 28 The Israeli Supreme Court relied in part on Professor Cassese, who in his textbook on international law wrote that “[a]n armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict.” (See Antonio Cassese, *International Law*, 2nd ed. (Oxford: University Press, 2005), p. 420, as cited in the *Targeted Killings Judgment*, para. 18). It is noted that some scholars maintain that an armed conflict between a state and a non-state actor is non-international in nature, even if the non-state actor operates from an area occupied by the state.
- 29 Five months before the *Targeted Killings Judgment* was rendered, Israel pulled its military forces and civilian population out of Gaza. However, the judgment’s point of departure was that Gaza is occupied by Israel. This can perhaps be explained by the fact that the petition under consideration was filed in 2002 and the judgment was completed many months before its publication.
- 30 *Targeted Killings Judgment*, para. 18 (“international law regarding international armed conflict [...] applies in any case of an armed conflict of international character - in other words, one that crosses the borders of the state - whether or not the place in which the armed conflict occurs is subject to belligerent occupation”). For a reading of the *Targeted Killings Judgment* as characterizing any cross-border armed conflict as international in nature, and a critique of this issue in the judgment, see Roy S. Schöndorf, “The *Targeted Killings Judgment* - A Preliminary Assessment,” 5 *J. Int’l Crim. Just.* (2007), 301.
- 31 *Unlawful Combatants Judgment*, para. 11. Also see *Gaber Al-Bassiouni v. Prime Minister*, Supreme Court of Israel, HCJ 9132/07, 30 January 2008, para. 12.
- 32 *Unlawful Combatants Judgment*, para. 9 (“The premise in this context is that an international armed conflict prevails between the State of Israel and the terrorist organizations that operate outside Israel”). The Court relied on the *Targeted Killings Judgment* without referring to the fact that Gaza was, in that judgment, considered occupied by Israel, a matter which provided the basis in that judgment for regarding the conflict as international. It is noted that there are commentators who maintain that Gaza is still occupied by Israel today.
- 33 However, the state would still have to adhere to Common Article 3 standards.
- 34 For an in-depth discussion of the problems associated with the traditional classification of conflicts into either international or non-international, see Roy S. Schöndorf, “Extra-state armed conflicts: is there a need for a new legal regime,” 37 *NYU J. Int’l L. & Pol.* (2005). Dr. Schöndorf proposes to define any “ongoing hostilities between a state and a non-state actor that take place, at least in part, outside the territory of the state,” as “extra-state hostilities” (p. 3).
- 35 E.g., Anthony Dworkin, “Are Israel and Hamas Committing War Crimes in Gaza?” 7 January 2009 (“Since the conflict in Gaza pits the state of Israel against a non-state organization, Hamas, the applicable rules are those that govern ‘non-international conflict’”), available at <http://www.crimesofwar.org/onnews/news-gaza3.html> (last visited on 12 June 2009). Also see Marko Milanovic, “Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli *Targeted Killings* case,” 89 *Int’l Rev. Red Cross* (2007), 384 (“the single defining characteristic of international armed conflicts has not been their cross-border, but their interstate, nature”). Compare Derek Jinks, “The Applicability of the Geneva Conventions to the ‘Global War on Terrorism,’” 46 *Va. J. Int’l L.* (2005), 165 (arguing that the conflict between the U.S. and al-Qaeda should be regarded as a non-international armed conflict). As mentioned above, some scholars maintain that an armed conflict between a state and a non-state actor is non-international in nature, even if it is linked to a belligerent occupation. However, some of those who claim that Israel is still occupying Gaza may claim on this basis that the armed conflict between Israel and Hamas is international, in line with Cassese’s view (see note 27 above).
- 36 *Hamdan v. Rumsfeld*, United States Supreme Court, 548 U.S. (2006), 126 S. Ct. 2749, available at <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf> (last visited on 12 June 2009). For a survey of the literature which interprets the *Hamdan* judgment as expressing the view that the conflict between the

- U.S. and al-Qaeda is a non-international armed conflict, see, e.g., Eran Shamir-Borer, "Revisiting Hamdan v. Rumsfeld's Analysis of the Laws of Armed Conflict," 21 *Emory Int'l L. Rev.* (2007), 601 (Revisiting Hamdan). Also see George P. Fletcher, "The Hamdan case and conspiracy as a war crime," 4 *J. Int'l Crim. Just.* (2006), 444.
- 37 For references to the U.S. Administration's reading of the *Hamdan* judgment as expressing the view that the conflict between the U.S. and al-Qaeda is non-international, see Shamir-Borer, "Revisiting Hamdan," *ibid.*, at 603-604.
- 38 A similar approach was adopted by the four UN Human Rights reporters who examined the violations of IHL and human rights law during the conflict between Israel and Hizbullah in Lebanon in 2006. See UN Doc. A/HRC/2/7, 2 October 2006, para. 23 ("While the qualification of the conflict as international or non-international is complex, this report is mainly based on international customary law applicable in both forms of conflict").
- 39 ICJ, *Nicaragua* Judgment, note 8 above, at 114.
- 40 *Tadić* Jurisdiction Decision, note 8 above, at para. 102.
- 41 Common Article 3, in paragraph 1, provides as follows: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."
- 42 As explained in note 26 above and the attached text, the Israeli Supreme Court's position is that the armed conflict between Israel and the Palestinian terrorist organizations started when the Second Intifada broke out in September 2000.
- 43 ICRC Study on Customary IHL, note 11 above.
- 44 E.g., Israel Ministry of Foreign Affairs, " Hamas Exploitation of Civilians as Human Shields," 8 January 2009, available at http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Terror+Groups/Hamas_Exploitation_Civilians_Human_Shields.htm (last visited on 14 June 2009); Israel Ministry of Foreign Affairs, " Hamas's Illegal Attacks on Civilians and Other Unlawful Methods of War - Legal Aspects," 7 January 2009, http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/Legal_aspects_of_Hamas_methods_7_Jan_2009.htm (last visited on 14 June 2009); Rory McCarthy, " Hamas accused of war crimes in Gaza," *guardian.co.uk*, 23 March 2009 (referring to reports by NGOs including Human Rights Watch and Amnesty International regarding Hamas violations of IHL), available at <http://www.guardian.co.uk/world/2009/mar/23/gaza-war-crimes-hamas> (last visited on 14 June 2009); Report of the Independent Fact Finding Committee on Gaza, Submitted to the League of Arab States on 30 April 2009 (referring to both Israeli and Hamas violations of IHL), available at http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf (last visited on 15 June 2009).
- 45 ICRC Study on Customary IHL, note 11 above, Rule 1.
- 46 *Ibid.*, Rule 2.
- 47 *Ibid.*, Rule 7.
- 48 *Ibid.*, Rules 11-12.
- 49 *Ibid.*, Rule 22.
- 50 *Ibid.*, Rule 59.
- 51 *Ibid.*, Rule 71.

- 52 *Ibid.*, Rule 87.
- 53 *Ibid.*, Rule 97.
- 54 *Ibid.*, Rule 139.
- 55 Henckaerts, Annex to ICRC Study on Customary IHL, note 11 above, at 198.
- 56 ICRC Study on Customary IHL, note 11 above, Rule 23.
- 57 *Ibid.*, Rule 24.
- 58 Common Article 3, in paragraph 2, provides: “An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.” It is also noted that non-governmental organizations such as Geneva Call are engaging with non-state actors to monitor their commitments under IHL. See <http://www.genevacall.org/home.htm> (last visited on 15 June 2009).
- 59 Article 90 of Additional Protocol I.
- 60 Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, *Int’l Law Comm’n*, 53d Sess., pt. I, ch. 1, U.N. Doc. A/CN.4/L.602/Rev.1 (2001) (ILC Draft Articles).
- 61 Commentaries to Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Report of the International Law Commission on the work of its 53rd session* (A/56/10), *Y.B. Int’l Law Comm’n*, 2001, vol. II, pt. II.
- 62 It should be added that the ICJ has another capacity besides hearing contentious cases between states: it can provide legal advice to UN organs. Thus the UN General Assembly or the Security Council can seek an advisory opinion from the ICJ on the legality of Hamas’ acts.
- 63 Judgment of the Nuremberg International Military Tribunal (30 Sept. 1946), in 22 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946 (1948) 411, at 466. As explained by Prof. Schabas, the Nuremberg Tribunal made this statement in response to the claim by Nazi leaders that they were not responsible for war crimes because they were acting on behalf of the German State. See William A. Schabas, “State Policy as an Element of International Crimes,” 98 *J. Crim. L. & Criminology* (2008), 953.
- 64 Grave breaches include the following acts when directed against people protected under the 1949 Geneva Conventions: wilful killing, torture or inhuman treatment (including medical experiments); wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or civilian to serve in the forces of the hostile power; wilfully depriving a prisoner of war or protected civilian of the rights of a fair and regular trial; unlawful deportation or transfer of a protected civilian; unlawful confinement of a protected civilian; and taking of hostages. See Articles 49-50 of Geneva Convention I; Articles 50-51 of Geneva Convention II; Articles 129-130 of Geneva Convention III; Articles 146-147 of Geneva Convention IV.
- 65 The basis for the jurisdiction of the Israeli courts in the Eichmann case was the principle of universality, which allows any state to assert jurisdiction over international crimes based on the gravity of the crimes. Today, there are some commentators who seek to limit the application of universal jurisdiction by states, to prevent its political use.
- 66 Rome Statute Article 8 (1).
- 67 Rome Statute Article 8 (2) (c).
- 68 Rome Statute Article 8 (2) (c) (i). This provision applies to non-international armed conflict. However, even if the Israel-Hamas conflict is viewed as an international armed conflict, the above acts will amount to war crimes under Article 8 (2) (a), which applies to international armed conflicts and criminalizes grave breaches, namely, “any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wilful killing; ... (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

69 Rome Statute Article 25.

70 Rome Statute Article 28.

71 The following acts are considered war crimes when committed in connection with a non-international armed conflict. However, even if the Israel-Hamas conflict is viewed as an international armed conflict, the acts below will amount to war crimes under Article 8 (2) (b), which applies to international armed conflicts.

72 Rome Statute Article 8 (2) (e) (i).

73 Rome Statute Article 8 (2) (e) (ii).

74 Rome Statute Article 8 (2) (e) (iii).

75 Rome Statute Article 8 (2) (e) (iv).

76 Rome Statute Articles 6 and 7, respectively.

77 Rome Statute Article 7.

78 Rome Statute Article 7 (a).

79 Rome Statute Article 7 (k).

80 Rome Statute Article 7 (b).

81 Rome Statute Article 6.

82 Rome Statute Articles 25 and 28, respectively.

83 Rome Statute Article 12 (2).

84 Rome Statute Article 13 (b).

85 Those who claim that Israel is still occupying Gaza may argue on this basis that it is clear that Israel is the territorial state of all crimes committed in Gaza.

86 Rome Statute Article 11 (2).

87 <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279787/QARegistryArticle14.pdf> (last visited on 14 June 2009).