

MASTER LEVEL, JUS 5730 – Guidance

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NB. Please note that students have had access to their textbook and a few select legal sources, including API, APII, ICC Statute, the Treaty on Banning Nuclear Weapons, and a list of the ICRC 2005 CIHL Rules. The main emphasis for them has been on using some of the key legal sources and good argumentation and structure.

PLEASE KEEP IN MIND THIS IS A 4H EXAM.

Respond to **all three** questions below. Each question counts for a third of the total grade.

Question 1

When is a civilian considered as taking a direct part in hostilities? What are the main legal consequences of such participation?

Answer

The concept of direct participation in hostilities (DPH)

In IHL the concept of “direct participation in hostilities” refers to conduct which, if carried out by a civilian, suspends his or her protection against the dangers arising from military operations. Most notably, for the duration of their DPH, civilians may be directly attacked as if they were combatants. IHL does not define DPH and some clarity was needed. Hence, in 2009, the ICRC issued its Interpretive Guidance which provides recommendations concerning the interpretation of IHL as it relates to the concept of direct participation. The recommendations in the Interpretive Guidance reflect the ICRC’s institutional position as to how existing IHL should be interpreted in light of the circumstances prevailing in contemporary armed conflicts.

Criteria for direct participation in hostilities (DPH)

The Interpretive Guidance states that direct participation in hostilities consists of specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. In order to qualify as direct participation in hostilities, a specific act must meet the following three cumulative criteria:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (**threshold of harm**);
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (**direct causation**); and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (**belligerent nexus**).

Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act. In a NIAC, an individual whose continuous function involves the preparation, execution or command of operations amounting to DPH on behalf of an organized armed group is considered a member of that group (“continuous combat function”) and loses his or her protection against the dangers arising from military operations for the duration of that membership.

Consequences for a civilian directly participating in hostilities

The consequences for a civilian directly participating in hostilities are that the person loses its immunity from attack for such period of involvement and can thus be targeted and killed. The person can also be detained and can be prosecuted under domestic law for what otherwise would be lawful acts of war.

Question 2

On 7 October 2023, the Hamas militant group based in the Gaza strip launched a series of indiscriminate attacks resulting in about 1,400 Israelis killed and since then in over 5,5 thousand wounded. On the same day, it also forcefully abducted about 240 persons back to Gaza, keeping them as hostages, releasing only 4 since then. In response, Israel’s military has conducted several attacks on the Gaza strip, besides subjecting its 2,3 million population for over a month to a near blockade of electricity, food and water, and medicines. After a month of hostilities, more than 10,000 Palestinians have been killed and more than 25 thousand have been wounded. On 26 October 2023, convened in an emergency session, the UN General Assembly adopted a resolution condemning the killing of Israeli and Palestinian civilians and asking for a humanitarian truce leading to a ceasefire. Among its military operations, the Israeli military conducted an attack on the Jabalia refugee camp in Gaza on 31 October 2023. Satellite imagery showed that an area of at least 2,500 square meters was “completely flattened” in the aerial strikes. The Gaza’s Health Ministry estimated the number of casualties at about 200 persons killed and about 800 wounded. The Israeli army spokesperson confirmed that Israeli fighter jets attacked the refugee camp, and stated that the attack killed a Hamas commander who led the 7 October attacks, some Hamas fighters, and destroyed Hamas tunnels. Despite growing calls by the international community for a humanitarian truce or a ceasefire, that has yet to materialize more than a month after the start of hostilities. In analyzing this scenario based on the facts given here, please respond to the following three questions:

- 1. Are refugee camps such as the Jabalia camp considered legitimate military targets?**
- 2. Discuss the principles of distinction, proportionality, and necessity and apply these principles to the bombing of the Jabalia refugee camp.**
- 3. In the event of serious violations of IHL by Hamas and the Israeli armed forces, what steps can the international community take to seek individual criminal responsibility under IHL? What would be the main war crimes under the Statute of the International Criminal Court?**

Note: For purposes of this scenario, the warring parties are bound by all relevant international humanitarian law treaties and the Statute of the International Criminal Court.

Answer

Classification of the armed conflict

There is a big debate on whether this conflict between Hamas and Israeli armed forces is an IAC or a NIAC. The type of the armed conflict conditions to some extent the applicable law and the rights and obligations of the parties to the armed conflict. That said, independent of the classification, most rules on targeting are part of CIHL and applicable to both types of armed conflict. For purposes of this conflict, the legal analysis will be based on the 2005 CIHL Rules and relevant API provisions, widely considered as a codification of CIHL, and on the ICCSt.

Are refugee camps such as the Jabalia camp considered legitimate military targets?

Under IHL, a refugee camp is a civilian object and cannot be considered a lawful military target. IHL aims to protect civilians, including refugees and internally displaced persons, during armed conflicts. Targeting civilian objects such as refugee camps would be a violation of this legal framework. While a civilian object might lose its protection if used for military purposes, such as to hide Hamas fighters or stock weapons, targeting them is subject to strict conditions. Rules 15-21 of the 2005 ICRC CIHL Study address precautions in attack and apply to both IACs and NIACs (arguably also Rule 21).

Discuss the principles of distinction, proportionality, and necessity and apply these principles to the bombing of the Jabalia refugee camp

The general IHL principles that apply in these situations include that of humanity, distinction, proportionality, and military necessity.

- **Distinction:** Parties to a conflict must distinguish between civilian objects and military objectives at all times (Rule 1; Arts. 48 and 52(2), AP I). They should direct their attacks only against military objectives while taking all feasible precautions to avoid or minimize incidental harm to civilians, including refugees.

In principle, refugee camps, including Jabalia, are civilian objects and protected against attack. Even if they temporarily lose their protection, other principles of IHL (and treaty provisions and CIHL rules) impose limits on military operations that can be taken against them.

- **Proportionality:** Parties to a conflict must assess whether the anticipated military advantage from an attack on a legitimate target is excessive compared to the potential harm to civilians and civilian objects, including refugee camps (Rule 14; Arts. 51(5)(b) and 57(2)(b), AP I).

From the facts of the case we learn that satellite imagery showed that an area of at least 2,500 square meters was “completely flattened” in the aerial strikes. Alongside Rule 14 which provides the general rule on proportionality in attack, Rule 17 speaks about the choice of means and methods of warfare

with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects. The impact of the attack resulting in the flattening of such a large area (which is densely populated) does not seem to satisfy the proportionality requirement. One could even plausibly argue this as an instance of “carpet bombing”.

From the facts of the case we also learn that “The Gaza’s Health Ministry estimated the number of casualties at about 200 persons killed and about 800 wounded. The Israeli army spokesperson confirmed that Israeli fighter jets attacked the refugee camp, and stated that the attack killed a Hamas commander who led the 7 October attacks, some Hamas fighters, and destroyed Hamas tunnels.” The numbers of Hamas fighters killed and the killed and wounded Palestinian civilians show that the attack does not respect the proportionality requirement under Rule 14 of the 2005 ICRC CIHL Study and Article 57 API. While it might be difficult to gauge exactly the “concrete and direct military advantage anticipated” vis-à-vis the incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, the flattening of an area of 2500 m², with 200 persons killed and 800 injured, seems clearly disproportional to the killing of a handful of Hamas fighters, and destruction of some tunnels, without more information as to the importance of these tunnels or of the Hamas fighters killed.

- **Precautions in attack:** Parties to a conflict must take all feasible precautions to avoid and minimize harm to civilians, including those in refugee camps. They are obligated to give warnings when possible and adapt their operations to protect civilian populations (Rules 17-21; Article 57).

It is important to note that deliberately targeting a refugee camp or knowingly causing excessive harm to civilians, even if there is a perceived military advantage, would likely constitute a serious violation of international humanitarian law and possibly amount to war crimes.

- **Military necessity and humanity**

Although in rare and specific instances, the principle of military necessity allows the military for reasons of imperative military necessity to destroy or seize the property of an adversary. However, the principle of humanity operates as a counterweight to military necessity, to avoid to the maximum extent possible losses of civilian lives and damage to public and private property.

The international community and individual criminal responsibility for the conflict

It is quite clear from the facts of the case that war crimes have been committed by Hamas and the Israeli military. Some of these crimes have been widely reported in the media. The international community can seek individual criminal responsibility through international and domestic prosecution of war crimes. The situation of Palestine is pending before the Court since 2015 and the ICC Prosecutor can investigate and bring charges against specific perpetrators, both from the Hamas and the Israeli political and military leadership. Besides the ICC, under the grave breaches system and under CIHL – Rule 158, States must investigate war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. [IAC/NIAC]

Some of the main war crimes under the Statute of the International Criminal Court

The ICC Statute separates war crimes in those committed in IACs and NIACs, in Article 8 ICCSt. Rules 151-155 cover individual responsibility for war crimes. Depending on how the ICC will classify the conflict, individuals from the Hamas militant group or their leaders could be charged with several crimes.

IAC crimes:

- Article 8(2)(a)(i) – willful killing;
- Article 8(2)(a)(iii) – great suffering or injury to body or health;
- Article 8(2)(a)(viii) – taking of hostages;

NIAC crimes:

- Article 8(2)(c)(i): Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Article 8(2)(c)(iii) Taking of hostages.
- Article 8(2)(e)(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

Based on the facts in the scenario, members of the Israeli military forces or their civilian leaders could be charged before the ICC with several crimes.

IAC crimes:

- Article 8(2)(b)(iv) - Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- Article 8(2)(b)(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.

NIAC crimes:

- Article 8(2)(e)(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (iv) 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;
- (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (x) Declaring that no quarter will be given;
- (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

Question 3

In the course of a fierce battle behind enemy lines between your small military unit and enemy forces you manage to surround them. Three enemy soldiers, including a top military commander, drop their weapons and declare that they are surrendering. Another soldier who is badly wounded also surrenders. You have reliable information that this unit in particular was directly responsible for carrying out a massacre on civilians only a few days ago. You are, however, deep into enemy lines and know that other enemy units that have listened to the exchange of fire are quickly approaching. You radio your military commander, who says, “You need to get your unit safely back to our lines now! We do not have time or resources to deal with prisoners. Get rid of them.”

How do you understand this order? What are your next steps, as commander of this unit, and how do you justify them under international humanitarian law? Is there place for individual criminal responsibility for anyone involved in this scenario, under the Statute of the International Criminal Court?

Note: For purposes of this scenario, the warring parties are bound by all relevant international humanitarian law treaties and the Statute of the International Criminal Court.

Answer

Classification of the armed conflict and applicable law

This is an IAC, based on the language used to describe it: ‘behind enemy lines’, ‘soldiers’, ‘enemy forces’, ‘prisoners’, etc. The scenario provides that the warring parties are bound by all relevant international humanitarian law treaties and the Statute of the International Criminal Court. Hence, the four 1949 GCs, API, CIHL, and general principles of IHL apply. Here we would primarily apply GCIII on POWs and API, especially concerning treatment of POWs and the system of grave breaches, and the ICCSt. concerning individual criminal responsibility.

How do you understand this order?

The order can be understood in two ways. The first, and correct one under IHL is to understand it as an order to release the POWs and return back to own lines. The second, is to understand it as an order to kill the POWs. Complying with such an order would be a grave breach of GCIII and API.

Next steps as military commander

The next correct step under IHL is releasing the POWs and moving back to one’s own lines. Killing POWs is a war crime, under Article 8(2)(b)(vi) of the ICCSt and a grave breach under the GCIII Article 130 and API articles 85 and 44.

Is there place for individual criminal responsibility for anyone involved in this scenario, under the Statute of the International Criminal Court?

Under Article 25 of the ICCSt there is individual criminal responsibility for those who commit crimes under the ICCSt, including war crimes. War crimes can be committed in various forms, including

through directly committing (ICCSt. art. 25(3)(a)), or ordering them (ICCSt. art. 25(3)(b)). Article 28 ICCSt. addresses the responsibility of commanders and other superiors. Article 33 ICCSt. addresses superior orders and prescription of law. Although under Article 33(2) orders to commit genocide or crimes against humanity are manifestly unlawful, killing POWs fall under the grave breaches of the GCs and API.

For our purposes, killing POWs is a crime under Article 8(2)(b)(vi). Superior orders are not a defence, as explained under Article 33 ICCSt. Hence, if the order was interpreted as to kill the POWs, there would have been responsibility on the part of those carrying out the crime. And potentially also for the military commander, albeit the order can be interpreted both ways. This example highlights the need to ask for specific instructions and not to comply with manifestly unlawful orders, lest one subjects oneself to individual criminal responsibility at the international or domestic level.