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Humanitarian International Law and WMD Attacks on Israel

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EXECUTIVE SUMMARY: In the years ahead, Israel could face the growing prospect of WMD terrorism – i.e., attacks involving chemical, biological, or even nuclear weapons. In this connection, it is vital that Israeli officials do their utmost to prevent perfidious enemy manipulations of humanitarian international law. This is especially urgent with regard to enemy use of "human shields," an illegal form of military deception that could be used to deter Israeli retaliation. Perfidy can originate with both state and sub-state foes, and could conceivably involve primitive nuclear devices such as "dirty bombs" (weapons that do not involve genuine chain reactions, but instead attach conventional explosives to fissile materials).

Under authoritative international law, the practice of moving civilians into designated military areas, or, vice versa, of moving military assets into civilian towns or villages, violates the law of war (*aka* the law of armed conflict or humanitarian international law). This violation is generally regarded as a species of "perfidy," but informally, it is more often referred to as the problem of "human shields." Whatever one might prefer to call such barbarous behavior, Israel's senior military planners must ensure that it will never get in the way of essential counterterrorism.

This obligation would be especially critical in circumstances involving terror attacks using weapons of mass destruction (WMDs). The most obvious current source of concern would be a terrorist force such as Hezbollah planning a WMD attack against Israel from somewhere in Lebanon or Syria or even the Golan Heights. It would seek to protect its preparations from Israeli preemption by (1) secreting pertinent military assets among vulnerable civilian populations,

and/or (2) placing portions of vulnerable civilian populations in designated military areas.

From Israel's point of view, preemptive measures would be justified, *inter alia*, by the history of prior violations of humanitarian international law by Hezbollah and its state sponsors. It would also qualify as a permissible expression of "anticipatory self-defense." This would stem unambiguously from Hezbollah's antecedent commission of perfidy. Further, legal liabilities for civilian casualties caused by Israeli preemption would lie not with Jerusalem but with Hezbollah.

In the main, the pertinent jurisprudence is plain and unconcealed. Perfidy and perfidy-like behavior always represent an "egregious" violation of the law of war. During Israel's several Gaza wars, perfidy was used with some tactical success by Hamas, but – perhaps more importantly – with still greater propagandistic benefit.

When it is expressed as the law of armed conflict, international law requires that every use of force meet the test of "proportionality." Drawn from the core legal precept that "the means that can be used to injure an enemy are not unlimited," proportionality stipulates (*inter alia*) that every resort to armed force be limited to what is absolutely necessary for meeting appropriate military objectives. This peremptory or *jus cogens* principle of both codified and customary jurisprudence applies to all judgments of military advantage, and to all planned reprisals or retaliations.

It does *not* mean that each side to a conflict must agree to suffer symmetrical or equivalent harm.

Unless there is greater understanding that perfidious behavior by terrorists places the legal responsibility for resulting harm directly on that insurgency and not on the victimized state, sub-state foes could decide to escalate their levels of violence. For Israel, such escalations could eventually include mega-terror assaults, up to and including the use of nuclear weapons.

Perfidy is not about deception as such. Under humanitarian international law, deception is not *prima facie* impermissible. Rather, certain forms of deception are permitted to states and possibly also to lawful insurgents. The practice of using human shields, however, is always illegal.

In coming years, perfidious violations of the laws of war by Middle East terror groups could involve calculated placement of chemical, biological, or (ultimately) crude nuclear weapons in populated Arab/Islamic towns and cities. This practice could deter necessary Israeli acts of anticipatory self-defense. Terror group

perfidy could also expose Israel to increasingly large-scale levels of homeland destruction.

Sooner or later, some of Israel's Arab/Islamic enemies, under cover of perfidy, will likely begin to magnify their terrorist goals and operations. These enemies can be expected to strive to exploit the particular forms of harm offered by WMD violence. A terrorist nuclear threat would almost certainly be limited to a "dirty bomb" attack, but it can already extend (at least in principle) to conventional assaults upon Israel's nuclear reactor at Dimona.

It is also possible that the selection of WMD terror would be detached from any rationally considered calculations of presumed geopolitical advantage.

Israel must communicate to its most dedicated insurgent foes that Jerusalem will always remain prepared to dominate escalation, and no contemplated terrorist excursion into higher-order destructiveness will ever elicit Israeli capitulation. It is vital that Israel's terrorist enemies see no foreseeable advantages in launching "perfidious" assaults upon the Jewish State.

"Just wars," as we may learn from Hugo Grotius in *The Law of War and Peace* (1625), "arise from our love of the innocent." International law is immutably oriented towards the protection of all states and peoples from extraordinary harm.

Above all, it is never a suicide pact.

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