Targeting Hamas's Ismail Haniyeh and Hezbollah's Faud Shukr

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On Wednesday morning, Israel killed the Chief of Hamas's Political Bureau, Ismail Haniyeh, while he was in Tehran to attend the inauguration of Iranian President Masoud Pezeshkian. To do so, it reportedly used a bomb that had been smuggled two months earlier into the guesthouse where Haniyeh was staying. Haniyeh, who is based in Qatar, led Hamas's negotiating team in the ongoing hostages and cease-fire talks.

The operation followed on the heels of an Israel Defense Force (IDF) strike into Beirut the previous day that killed Fuad Shukr, a Hezbollah senior military commander. That operation was a response to the Hezbollah rocket strike that resulted in the deaths of twelve children in the Golan Heights on July 27. The practice of killing individuals who have participated in or overseen attacks against Israelis or Israeli interests stretches back decades.

Condemnation of the Israeli operations followed. For instance, during an emergency UN Security Council meeting, Russia, China, and Algeria denounced Haniyeh's killing, while Iran's representative announced that Iran "reserves its inherent right to self-defence in accordance with international law to respond decisively to this terrorist and criminal act when

it deems necessary and appropriate." In response, the United States, United Kingdom, and France pointed to Iran's support for groups that are destabilizing the region. Concerning the killing of Shukr, the U.S. representative asserted that "Israel has a right to defend itself from attacks against Hezbollah and other terrorists. That is precisely what it did on July 30th." Regarding the operation targeting Haniyeh, the representative simply noted that the United States was not involved in, or even aware of, the operation. Retaliatory attacks by Hezbollah and Hamas are widely expected.

In this post, I offer my legal analysis of the two operations. I first address the applicable law and then ask whether it applied in Lebanon and Iran at the time of the Israeli operations. I then turn to the separate issue of whether Shukr and Haniyeh qualified as lawful targets under the law of armed conflict (LOAC). With respect to some of the issues, the absence of clear facts precludes definitive conclusions. Moreover, the Israeli operations implicate various unsettled aspects of international law. Some are so complex that it is only possible to address them with a broad brush; all merit further examination by States and the wider LOAC community.

The Applicable Law

In my view, Israel is involved in ongoing non-international armed conflicts with both Hezbollah and Hamas. The conditions precedent to a non-international armed conflict are that the non-State group or groups involved be well-organized and that the hostilities are at a high level of intensity (see, e.g., International Criminal Tribunal for the former Yugoslavia (ICTY), *Tadić Decision on Defence Motion*, para. 70; International Criminal Tribunal for Rwanda, *Akayesu Judgment*, para. 619; Rome Statute, art. 8(2)(f)).

It is self-evident that both cases satisfy these conditions. Moreover, neither conflict has been "internationalized." Irrespective of whether Palestine enjoys the status of a State, Hamas is not acting under its "overall control," the threshold for internationalizing a conflict (ICTY, *Tadić, Appeals Judgment*, para. 120). On the contrary, despite some recent indications of reconciliation, Hamas and the Palestinian Authority have been at odds, at least since Hamas drove Fatah out of Gaza in 2007. It is equally clear that Lebanon does not exercise overall control over Hezbollah (despite its presence in the Lebanese government), a fact perhaps best illustrated by Lebanon's inability to comply with the terms of Security Council Resolution 1701 of 2006. That resolution required the Lebanese armed forces to take control of southern Lebanon, which is today still under the control of Hezbollah. And although Iran's support for Hezbollah is substantial, it does not exercise a level of control sufficient to internationalize Israel's hostilities with the group.

Note that it is sometimes asserted, wrongly in my view, that one or both conflicts are international in character standing alone. That was essentially the conclusion of the Israeli Supreme Court in the so-called "Targeted Killings" case (*Public Committee against Torture*, 2006). I beg to differ. Yet, even if the conflicts were international, the law governing targeting

in international and non-international armed conflicts is nearly identical. That said, the distinction does matter with regard to where the Israeli operations took place. Therefore, it is necessary to examine the law governing the reach of LOAC during a non-international armed conflict.

Geographical Application of the Law

One possible objection to the applicability of LOAC rules is that both operations unfolded beyond the territory in which hostilities were underway. There are three views concerning the geographical scope of LOAC's applicability during a non-international armed conflict (see my extended analysis here). By the first, applicability is limited to the territory of the State that is a party to the conflict. Although based on a strict textual reading of Common Article 3 of the 1949 Geneva Conventions, this approach has fallen into widespread disfavor. A second approach championed by the International Committee of the Red Cross (ICRC) holds that LOAC applies to areas in neighboring States where hostilities have spilled over during a non-international armed conflict. This view would undoubtedly encompass southern Lebanon, but extension of LOAC to Beirut on this basis would be questionable, and applicability to Tehran would almost certainly be a bridge too far. Consequently, "status-based" targeting under the LOAC rules governing attack would be supplanted by international human rights law, which generally permits targeting only based on the threat posed (see my discussion here with Eric Widmar). I caution that the extraterritorial application of human rights law is itself a controversial topic.

Although I find this approach reasonable, in my estimation, the correct position is that embraced by the United States (U.S. Department of Defense (DoD) *Law of War Manual*, § 3.3.1; *Annotated Commander's Handbook*, p. 5-13 – 5-14). By it, LOAC applies to *any* operation with a nexus to the non-international armed conflict; these two attacks clearly qualify. The legal issue in cross-border operations is instead whether they breach any obligation owed to the State in which they are conducted, such as respect for sovereignty or the obligation to refrain from the use of force, and, if so, whether international law provides for any "circumstance precluding the wrongfulness" of that breach, such as self-defense (UN Charter, art. 51; Articles on State Responsibility, art. 21).

This implicates the so-called "unwilling or unable" approach to the law of self-defense that the United States has adopted to justify non-consensual operations into States that are not responsible for the armed attacks to which they respond. The approach is controversial. For instance, it remains unsettled whether the law of self-defense applies to armed attacks by non-State actors such as Hamas and Hezbollah. Even if it does, experts and States remain divided over whether the veil of sovereignty can be pierced at all based on the law of self-defense.

I have long advocated for the unwilling or unable approach (with stringent limitations) and have argued that the law of self-defense extends to armed attacks by non-State actors. In my view, and that of the United States, these positions fairly balance the interests of territorial States with those of States that need to defend themselves. However, I concede that the matter is far from settled.

The strike in Lebanon fits neatly into the unwilling or unable approach. Lebanon is self-evidently unable, and perhaps unwilling, to put an end to the Hezbollah attacks from its territory that Shukr commanded. However, the unwilling or unable approach does not apply as easily to the targeting of Haniyeh in Tehran, for he was only temporarily in the country, not operating from there.

There are two possible understandings. By the first, the unwilling or unable approach is a limited doctrine that constitutes an exception that swallows the rule of sovereignty if applicable in any State through which the individual concerned passes or during stays for short periods. This is especially the case if the individual concerned is doing nothing from there that contributes to the ongoing or imminent armed attack to which the defensive action corresponds.

But by the second, the duration of stay should not matter so long as the attack complies with the self-defense requirements of necessity and proportionality, the territorial State is aware of the individual's presence, and that State is idle. Although the application of the doctrine is always context-dependent, I lean toward the first understanding because the second would be highly destabilizing and, therefore, inconsistent with the object and purpose of the law of self-defense and its various conditions.

Assuming solely for the sake of analysis that the "unwilling and unable" approach does not justify the Israeli killing of Haniyeh in Tehran, the best legal justification for it is that, at the time, Iran and Israel were engaged in an international armed conflict. Recall that on 13 April, Iran conducted Operation True Promise, a massive missile and drone attack on Israel that undeniably triggered an international armed conflict; Israel mounted a very surgical response on April 19. Indeed, some would make the case that the conflict began even earlier, for instance, when Israel killed Iranian Revolutionary Guard General Mohammed Reza Zahedi, who was at the Iranian consulate in Damascus on 1 August, or based on purported Iranian "overall control" of certain organized armed groups that have mounted operations against Israel. Whatever the rationale, by April, an international armed conflict was underway between Israel and Iran.

But was an international armed conflict still ongoing last Wednesday? It could be argued that the armed conflict had ended after the Israeli response because neither party intended to conduct further operations. Although a reasonable position, the better view is that given the hostility between the two States, the period between the April exchanges and the Haniyeh killing is best characterized as a tactical pause during which the international armed conflict

continued. Otherwise, this and other such situations would be treated as a revolving door during which LOAC rules are repeatedly switched on and off. The fact that an Iranian response is highly anticipated adds to the weight of the view that the international armed conflict was ongoing.

If Israel and Iran were involved in an armed conflict, neither of those States would be obligated to respect the sovereignty of its adversary. Indeed, hostilities typically involve the penetration of the territory of at least one belligerent by the other. It might be countered that the Israeli attack was against a Hamas leader, not an Iranian target. On its face, this is a weak argument. But even if hostilities between belligerents can be disassociated from unrelated penetrations of territory in the abstract, in this case, Hamas, Hezbollah, and Iran are conducting related operations against Israel during the same general conflagration. The nexus between their operations is very close.

Finally, allow me to briefly address the geographical factor if one or both conflicts are international in character, which I believe they are not. Such a characterization would implicate the law of neutrality. Assume only for the sake of discussion that the armed conflict with Hezbollah is international. In such a case, the question posed by the Israeli strike would be whether Lebanon is also party to that conflict, perhaps because of the relationship between the government and Hezbollah. If so, Israeli operations into Lebanon obviously would be lawful as they would be conducted on belligerent territory. If not, Lebanon would be a neutral State. Operations against Hezbollah then would be permissible based on Lebanon's failure to comply with its obligation under the law of neutrality to prevent belligerents from being present on and conducting operations from its territory (DoD *Law of War Manual,* § 15.4.2). In other words, limited forcible self-help measures would be allowed.

Turning to Iran, the question is whether Iran would qualify as neutral in a purported international armed conflict between Israel and Hamas, especially if Iran is engaged in its own international armed conflict with Israel. If there is an armed conflict between Iran and Israel, striking a leader of a "co-belligerent" in Iran would be permissible. If not, the penetration of neutral Iranian territory would have to be based (as with Lebanon) on Iran's failure to put an end to the presence of a Hamas leader on its territory. In any event, I find these fascinating scenarios irrelevant in the case of Israel's non-international armed conflicts with Hamas and Hezbollah.

To summarize, the applicable legal regime is, in my opinion, LOAC applicable in a non-international armed conflict. It applied during both operations despite the fact that they occurred at a significant distance from the battlefield. This leaves the issue of whether Shakr and Haniyeh were lawful targets under that body of law.

Lawful Targets?

Many in the media and some pundits have labeled the Israeli operations “assassinations.” Under the law of armed conflict, they are not. As I explained in a previous *Articles of War* post, “Assassination during wartime denotes (1) the treacherous, (2) wounding or killing, of (3) individual adversaries, in other words, perfidious attacks.” In neither case does it appear that the Israelis feigned protected status to conduct the operations.

The lawfulness under LOAC of both attacks depends on the status of Shukr and Haniyeh as either members of an “organized armed group” or as “direct participants in the hostilities.” As noted by the ICRC in its *Interpretive Guidance on the Notion of Direct Participation,* “For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities” (see also DoD *Law of War Manual,* § 4.18). Note that the ICRC asserts that organized armed groups “consist only of individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’)” (CCF). The United States, *inter alia*, rejects the criterion of continuous combat function, and rightly so (DoD *Law of War Manual,* § 5.8.2.1). In its view, all members of an organized armed group, like all members of the armed forces, may be targeted at all times under LOAC, absent some specific prohibition (e.g., those who are *hors de combat*).

The clear-cut case is that of Shukr. He served as a senior commander in Hezbollah and is believed to have been responsible for the July 27 attack into the Golan Heights. He was also implicated in the 1983 attack in Beirut that killed approximately 300 U.S. and French military personnel supporting the Multinational Force in Lebanon peacekeeping mission. More to the point, Shukr also had a long history of conducting, participating in, or overseeing attacks against Israel. Given that the military wing of Hezbollah is a paradigmatic example of an organized armed group, and in light of the fact that Shukr’s primary responsibility was to command military operations, there is no question that he was a lawful target as a member of an organized armed group, even by the ICRC’s restrictive standard. As the DoD’s *Law of War Manual* observes, “leaders of non-State armed groups are also subject to attack on the same basis as other members of the group” (§ 5.7.4).

The status of Haniyeh is more complicated, for as noted, his primary responsibility in Hamas was to serve in a political role. Moreover, unlike Suhkr, he appears not to have been in the operational chain of command of Hamas’s military wing, the al-Qassam Brigades. Although some experts suggest all of Hamas qualifies as an organized armed group, especially after the launch of the most recent rounds of hostilities, there are still elements of Hamas that perform some civilian functions. This being so, and given that he formally led Hamas’s Political Bureau, I find it difficult to characterize Haniyeh as a member of an organized armed group. He certainly would not be by the ICRC’s CCF criterion.

However, civilians who "directly participate" in hostilities during a non-international armed conflict lose their protection from attack "for such time" as they do so. This rule is codified in Article 13(3) of Additional Protocol II for parties; it constitutes customary international law for all States (see, e.g., discussion and practice accompanying *Customary International Humanitarian Law* study, rule 6). The DoD *Law of War Manual* appropriately emphasizes that this rule applies to political leaders: "Leaders who are not members of an armed force or armed group (including heads of State, civilian officials, and political leaders) may be made the object of attack if their responsibilities include the operational command or control of the armed forces (§ 5.7.4). As an aside, note that the same standard applies in international armed conflict. (Additional Protocol I, art, 51(3); *Customary International Humanitarian Law* study, rule 6).

In assessing whether Haniyeh could legally be attacked, it is first necessary to determine whether he was directly participating in the hostilities. According to the ICRC, direct participation occurs upon the satisfaction of three "constitutive elements":

> 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), and
>
> 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).

I concur with the ICRC that these elements reflect the requirements of direct participation, although I sometimes differ with their application in particular cases.

The challenge in Haniyeh's case is that there are insufficient facts in open sources to offer a definitive conclusion as to whether he was directly participating in the hostilities with Israel. Nevertheless, the decision of International Criminal Court (ICC) Prosecutor Karim Khan to apply for an arrest warrant for him (and two other Hamas leaders) is telling. Khan alleges that Haniyeh bore responsibility for war crimes and crimes against humanity committed during the October 7th assault on Israel. He has explained that "these individuals planned and instigated the commission of crimes on 7 October 2023" and that they "could not have been committed without their actions."

A Panel of Experts provided Khan with its views before he decided to seek the arrest warrants. The panel found,

> that there are reasonable grounds to believe that the three suspects had a common plan that necessarily involved the commission of war crimes and crimes against humanity. The systematic and coordinated nature of the crimes, their scale, statements by the suspects supporting the commission of such crimes, evidence of the sophisticated planning of the attacks and the ideology and past practices of Hamas all support the finding that the common plan was criminal in character.

It concluded that all three individuals (two of whom have since been killed by Israel) "made essential contributions to this plan and that they have through their own words and actions admitted to their responsibility."

These statements must be considered cautiously. The applicable standard of proof for the issuance of an arrest warrant is "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court," not beyond a reasonable doubt (Rome Statute, art. 58). Additionally, individual criminal law responsibility does not always transpose tidily onto direct participation under LOAC. For instance, under the doctrine of command/superior responsibility, an individual can be criminally responsible for failing to take "reasonable measures within his or her power to prevent or repress" a crime and for failing "to submit the matter to the competent authorities for investigation and prosecution" (Rome Statute, art. 28). However, those omissions do not necessarily amount to direct participation. Nevertheless, the actions of the ICC prosecutor and the views of the panel advising him are compelling with respect to whether Haniyeh has directly participated in the conflict.

Assuming for the sake of analysis that Haniyeh participated directly in the hostilities that took place on October 7th, the question remains as to whether he was doing so at the time of the Israeli operation. As noted above, individuals are only subject to attack "for such time as" they directly participate. From open sources, it is difficult to conclude, one way or the other, that Haniyeh was doing so at the time of the attack. This is especially the case given that he had the same position on October 7th (when he was likely directly participating) that he had at the time of his death.

It appears that Haniyeh's activities in Tehran were primarily political and diplomatic in character. This raises a long-standing debate over situations in which an individual does not participate *continuously* in the hostilities but does so on a *recurring* basis. According to the ICRC's *Interpretive Guidance*, "As the concept of direct participation in hostilities refers to specific hostile acts, [international humanitarian law] restores the civilian's protection against direct attack each time his or her engagement in a hostile act ends." In my view, and that of many other experts and States, this "revolving door" approach is unworkable operationally (DoD *Law of War Manual,* § 5.8.4). The more sensible view is that an individual who regularly engages in acts of direct participation without being a member of an organized armed group is targetable throughout that period of participation.

Accordingly, the question is whether Haniyeh had engaged in any other acts of direct participation after October 7th, and if so, with what regularity? If he did not, his status would be that of a civilian who continued to enjoy LOAC protections. If he did, there is a colorable argument (depending on the facts) that he was a direct participant at the time the attack occurred.

Conclusion

In my estimation, it is relatively straightforward that the Israeli strike into Beirut to kill Hamas military leader Fuad Shukr was lawful. However, the operation in Tehran that killed Ismail Haniyeh is less clear-cut in legal terms. The fact that it occurred on the territory of Iran raises a number of questions, although I am of the view that the operation was lawful in that regard. The more legally problematic issue is whether Haniyeh was targetable, particularly whether he qualified as a direct participant at the time of the attack. Qualification as such depends on his activities following October 7th.

Finally, two caveats are necessary vis-à-vis evaluating the operations. First, it must be emphasized that, as I noted in a previous *Articles of War* post, "international law has no place for responses based on retaliation, retribution, or punishment. This is so no matter how condemnable the conduct to which they reply."

Second, I want to emphasize that I am only addressing the two operations from the perspective of international law. Whether they were rational from a strategic point of view is an entirely different question. It is clear that they risked an escalation of hostilities and may have impeded the search for an agreement that would end the hostilities and bring home the hostages. It is essential to remember that lawfulness does not always denote operational and strategic sensibility, or even legitimacy.

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