What does the ICJ's Advisory Opinion on "the Occupation" really mean?

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On July 19, 2024, the International Court of Justice (the ICJ) issued its Advisory Opinion on *the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* ("the Occupation Advisory Opinion"). Unsurprisingly, the ICJ held that Israel's continued presence in Judea and Samaria was contrary to international law and called upon Israel to end its occupation of Palestinian territory "as rapidly as possible". The Court called upon third-party states not to recognize changes or actions flowing from the Israeli presence in Judea and Samaria, nor to render aid or assistance to maintaining the current situation. Significantly, the Court noted that "all States must co-operate with the United Nations to put those modalities [required by the General Assembly and the Security Council to ensure an end to Israel's presence in Judea and Samaria and realization of Palestinian self-determination] into effect."[1]

Anti-Israel activists have already seized upon the Advisory Opinion, misstating its legal status and claiming that international law mandates that other states take specific punitive actions against Israel, such as economic sanctions and arms embargoes.[2] On September 18, 2024, UN Special rapporteurs, many known for their extreme bias against Israel, urged states to review all interactions with Israel, ban goods from Judea and Samaria, and impose a full arms embargo on Israel, among other measures.[3] Due to these distortions, clarifying the Advisory Opinion's status and implications under international law is necessary.

1 ICJ, *the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. Par. 275*

2 See "Law for Palestine Gathers Experts to Unpack the ICJ Advisory Opinion on the Illegality of the Israeli Occupation and Address Potential Next Steps." Law for Palestine, 22 Aug. 2024, https://law4palestine.org/law-for-palestine-gathers-experts-to-unpack-the-icj-advisory-opinion-on-the-illegality-of-the-israeli-occupation-and-address-potential-next-steps/. Accessed 6 Oct. 2024.

3 United Nations Human Rights Office of the High Commissioner. "UN Experts Warn International Order on Knife's Edge, Urge States to Comply with ICJ Advisory Opinion on Israeli Occupation." *OHCHR, 18 Sept. 2024,* www.ohchr.org/en/statements/2024/09/un-experts-warn-international-order-knifes-edge-urge-states-comply-icj-advisory. Accessed 8 Oct. 2024.

1 | The Advisory Opinion is not Legally Binding

Under international law, it is axiomatic that "a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent".[4] In the Occupation Advisory Opinion, the Court justified its violation of the principle of state consent by referencing the "particular interest and concern" that the Israeli-Palestinian conflict holds for the United Nations, going back to the League of Nations.[5] However, the particular interest that the United Nations may have in Israel is no excuse for violating a tenet of international law and applying a "made for Israel only" standard. As Judge Sebutinde, in her dissenting opinion, noted, the Israeli-Palestinian conflict is essentially a bilateral one, to which the parties have subscribed to international negotiations as a means of dispute resolution.[6] As such, the Advisory Opinion serves backhandedly to bring the conflict before the Court without Israel's consent, disregarding a cardinal rule of state sovereignty.

Advisory Opinions are not "decisions" as per Article 59 of the ICJ Statute and have no binding status.[7] An advisory opinion's authority rests on the persuasiveness of its legal analysis alone. The Advisory Opinion completely omits, ignores, or minimizes several vital issues, such as Israel's historical claims to the territory, the acute threats to Israeli security, and the bilateral negotiations framework set out in Security Resolution 242 and the Oslo Accords. All of these are treated at length in Judge Sebutinde's dissenting opinion. Therefore, the Advisory Opinion cannot be accepted as the authoritative or comprehensive pronouncement on Israel's presence in Judea and Samaria.[8]

2 | The United Nations' Systematic Anti-Israel Bias

As an organ of the United Nations, the ICJ acts in symbiosis with the UN and its bodies. The Advisory Opinion is itself the progeny of a prejudiced commission of inquiry whose members have long held Israel guilty of the supposed crimes that they were asked to investigate. On December 30, 2022, the UN General Assembly adopted resolution 77/247, titled Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian

4 Western Sahara ,advisory opinion 16 ,Oct ,1975 .ICJ Rep 1975 .at p) 25 .para ;(33 .Interpretation of Peace Treaties with Bulgaria, Hungary and Romania ,First Phase ,advisory opinion 30 ,Mar ,1950 .ICJ Rep 1950 .at p ;71 .Status of Eastern Carelia ,Advisory Opinion ,1923 ,P.C.I.J ,.Series B ,No ,5 .p.27 .

5 ICJ ,*the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory ,including East Jerusalem. Par. 35*

6 Dissenting opinion of Judge Sebutinde, par. 47

7 https://www.icj-cij.org/advisory-jurisdiction

8 See Pomson, Ori. "Authoritatively Stating International Law: The ICJ and Israeli Withdrawal from the OPT." *Lieber Institute West Point, 23 July 2024,* https://lieber.westpoint.edu/authoritatively-stating-international-law-icj-israeli-withdrawal-opt/. Accessed 6 Oct. 2024.

Territory, including East Jerusalem. The Israeli practices resolution included a request for an ICJ advisory opinion on the "legal consequences" and "legal status" of Israel's "prolonged occupation." The language of the resolution begs the question of Israel's predetermined guilt. This was based on a recommendation of the September 2022 report to the General Assembly by the United National Human Rights Council (UNHRC) Commission on Inquiry (COI) on Israel headed by Navi Pillay.[9]

The COI, created in May 2021, is unprecedented in its anti-Israel mandate, even by the standards of the UNHRC. Unlike previous commissions designed to examine specific Israeli-Palestinian outbreaks, the COI is open-ended, mandated to investigate pre-1967 Israel as well, and relies on a flawed definition of apartheid designed to convict Israel.[10] Its three commissioners, Miloon Kothari, Navi Pillay, and Chris Sidoti, each have a long public record of anti-Israel and antisemitic statements. Kothari accused the "Jewish lobby" and its ability to "throw" around "a lot of money" of trying to discredit him. In the years before her appointment, Pillay called for sanctions against "apartheid" Israel. At official UNHRC proceedings, Sidoti accused Jews of gratuitously throwing around charges of antisemitism "like rice at a wedding," thereby "defil[ing] the memory of the 6 million victims of the [Holocaust]."[11] Given the well-established prejudices of the commissioners, it is clear that the COI did not investigate Israel in good faith or an open mind.

The ICJ is currently chaired by a Lebanese judge with longstanding hostility towards Israel. The ICJ's newly appointed chief justice is Nawaf Salam, a Lebanese judge who, since joining the court in 2018, has twice been considered a candidate for the Lebanese premiership. According to Article 16(1) of the Statute of the ICJ: "No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature." Salam also served as Lebanon's ambassador to the United Nations, where he repeatedly cast votes against Israeli conduct in Judea and Samaria. His previous ambassadorship similarly violates Article 17(2) of the Statute: "No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties…" Salam also has a history of anti-Israel statements on social media.[12] It should be underscored that Lebanon and Israel are in a state of war. According to Lebanese law, it is a criminal offense to "normalize" with Israelis, including having a simple

9 Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel. 14 September 2022. Par. 92

10 Dershowitz, Toby, and Orde Kittrie. "Biden Can Reset the UN's Discriminatory Approach to Israel." *The National Interest, 18 Feb. 2022, https://nationalinterest.org/feature/biden-can-reset-un's-discriminatory-approach-israel-200629. Accessed 6 Oct. 2024.*

11 Kittrie, Orde, and Bruce Rashkow. "The Time Is Now to Reform the UN Human Rights Apparatus." *Foundation for Defense of Democracies,* 24 Aug. 2022, https://www.fdd.org/analysis/2022/08/24/the-time-is-now-to-reform-the-un-human-rights-apparatus/. Accessed 6 Oct. 2024.

12 See Kittrie, Ordre F. "The ICJ's New Chief Judge Has a History of Bias Against Israel" Wall Street Journal, www.wsj.com/articles/icjs-new-chief-judge-has-a-history-of-bias-against-israel-lebanon-hague-96889d53. Accessed 21 July 2024.

conversation.[13] Salam's presidency raises serious questions about the Court's impartiality towards Israel.

The UN's systematic anti-Israel bias has not escaped notice by professional tribunals worldwide. In recent proceedings challenging German arms exports to Israel before the Frankfurt administrative court, the court dismissed reliance on UN statements condemning Israel, stating that these "cannot be used as a basis for allegations of violation of international law in the context of expedited proceedings without further intensive examinations, as the United Nations and its sub-organizations have shown a not uncontroversial approach in dealing with the Middle East conflict in the past." The court then pointed to the systematic bias, double standards, and blatant antisemitism inherent in the UN and its organs.[14]

3 | State Practice Does Not Support the Calls for Sanctions

The Occupation Advisory Opinion calls on Israel to end its occupation "as rapidly as possible", using the same legal vocabulary as the Court did in its Chagos Opinion, in which it instructed the UK to withdraw "rapidly" from the Chagos Archipelago. As such, the UK's reaction in the aftermath of the ICJ's Chagos Opinion is instructive. It demonstrates that states do not consider advisory opinions binding and tend to reject judicial interference in matters of territorial integrity and national security. For five years after the Opinion, British governments variously pursued and withdrew from negotiations with Mauritius over Chagos' future. At no point did third-party states or civil society impose sanctions or embargos against the UK.

Upon issue of the Chagos Opinion, the British government and parliament affirmed the UK's sovereignty over the Chagos Islands. On February 26, 2019, Sir Alan Duncan, Minister of State for Europe and the Americas, responded to a parliamentary query: "*yesterday's hearing provided an advisory opinion, not a judgment. We will of course consider the detail of the opinion carefully, but this is a bilateral dispute, and for the General Assembly to seek an advisory opinion by the ICJ was therefore a misuse of powers that sets a dangerous precedent for other bilateral disputes.*"

The UK's official position was set out in a statement to the House on April 30, 2019, reaffirming its sovereignty over the Chagos Islands:

13 Koteich, Nadim, et al. "Anti-Normalization Laws: A Powerful Weapon in the Fight against Peace." The Washington Institute, www.washingtoninstitute.org/policy-analysis/anti-normalization-laws-powerful-weapon-fight-against-peace. Accessed 21 July 2024.

14 VG Frankfurt 5th, 5 L 2333/24.F. https://www.rv.hessenrecht.hessen.de/bshe/document/LARE240001082. English translation by DeepL.

"We were disappointed that this matter was referred to the International Court of Justice, contrary to the principle that the Court should not consider bilateral disputes without the consent of both states concerned. Nevertheless, the United Kingdom respects the ICJ and participated fully in the ICJ process at every stage and in good faith. An advisory opinion is advice provided to the United Nations General Assembly at its request; it is not a legally binding judgment. The Government have considered the content of the opinion carefully, however we do not share the Court's approach.

As outlined in the previous written ministerial statement, we have no doubt about our sovereignty over the Chagos archipelago, which has been under continuous British sovereignty since 1814. Mauritius has never held sovereignty over the archipelago and we do not recognise its claim. We have, however, made a long-standing commitment since 1965 to cede sovereignty of the territory to Mauritius when it is no longer required for defence purposes. We stand by that commitment."[15]

In October 2024, the Labour government announced it would surrender sovereignty over the islands to Mauritius. However, both Conservative and Labour governments did not consider themselves required to withdraw from the island per the Advisory Opinion. Despite diplomatic pressure, such as a United Nations General Assembly resolution condemning the British occupation and endorsing the Opinion, the UK was not subject to embargos or sanctions over its rejection of the Court's opinion, neither did third states consider themselves mandated to sanction the UK.

4 | Economic Activities in Occupied or Disputed Territories are Legal

Some have argued that the duty of non-recognition requires third-party states to ban economic or trade activities in Judea and Samaria.[16] However, the universal state practice of economic activities in occupied or disputed territories undermines any claim of illegality. Trade continues unabated with Moroccan-occupied Western Sahara and Turkish-occupied Northern Cyprus. International and national tribunals have neither labeled such economic activities contrary to international law nor called for sanctions against the Occupying Powers.

15 Zhu, Yuan Yi, Tom Grant, and Richard Ekins. *Sovereignty and Security in the Indian Ocean: Why the UK Should Not Cede the Chagos Islands to Mauritius. Foreword by Admiral the Lord West of Spithead, GCB, DSC, PC, Policy Exchange, 2023. P.34*

16 Al Tamimi, Yussef. "Implications of the ICJ Advisory Opinion for the EU-Israel Association Agreement." *EJIL: Talk!, 30 July 2024,* https://www.ejiltalk.org/implications-of-the-icj-advisory-opinion-for-the-eu-israel-association-agreement/. Accessed 6 Oct. 2024.

In October 2024, the European Court of Justice issued its final decision on applying the 2019 EU-Morocco trade agreement regarding fisheries and agricultural products to Western Sahara. Morocco has occupied western Sahara since the 1970s.[17] The European Court of Justice ruled that the trade deal did not apply to Western Sahara as the people of Western Sahara did not consent to the treaty. The Court affirmed that the consent need not necessarily be explicit but may be presumed. By implication, there is no prohibition *per se* of commercial activity in occupied territory. Instead, trade agreements must protect the interests of the people under occupation.[18] All the more so, there is no basis to assert that the international community must sanction Morocco to pressure it to end its presence in Western Sahara.

Many of the world's largest firms operate in Western Sahara. In 2023, French company ENGIE constructed windmill infrastructure in the Dakhla desalination plant in Western Sahara.[19] Other companies involved in the electricity sector include Siemens Gamesa, Enel and General Electric. French company Sogestran is engaged in transporting petroleum to Western Sahara; German HeidelbergCement and ThyssenKrupp and Swiss company Holcim have constructed and operate cement factories in the territory.[20] This is consistent with the legal advice provided by national governments. Both the Conservative and Labour governments in the UK have affirmed the legality of carrying out business in Western Sahara in 2023 and 2024, respectively.[21] The Dutch Government states, in a business advisory for Morocco, that "Economic activities in Western Sahara are not by definition contrary to international law."[22]

In June 1974, Turkey invaded the northern third of Cyprus, expelling nearly 230,000 Greek Cypriots. In 1983, Turkey declared the independence of the "Turkish Republic of Northern Cyprus" (TRNC) in the area that it had occupied. The TRNC is not recognized by any country besides Turkey. The United Nations Security Council has repeatedly called for the non-recognition of TRNC and an end to the occupation.[23] Nevertheless, this has not prevented the European Commission from directly investing in programs intended to strengthen the economic development of the Turkish settler community.[24] Large firms such as Ford Motor

17 See GA Res. 34/37, UN Doc A/RES/34/37, (Nov. 21, 1979). Saul, Ben. "The status of Western Sahara as occupied territory under international humanitarian law and the exploitation of natural resources." *Western Sahara. Routledge, 2018. 59-80.*

18 Judgments of the Court in Joined Cases C-778/21 P and C-798/21 P | Commission and Council v Front Polisario and in Joined Cases C-779/21 P and C-799/21 P | Commission and Council v Front Polisario

19 https://wsrw.org/en/news/engie-consistent-in-ignoring-international-law

20 https://wsrw.org/en/news/infrastructure

21 Guidance Overseas business risk: Morocco, Updated 6 September 2023, https://www.gov.uk/government/publications/overseas-business-risk-morocco/overseas-business-risk-morocco#western-sahara;
Written question for Foreign, Commonwealth and Development Office, Morocco, Overseas Trade. Asked 26 July 2024 by MP Ben Lake. Answered on 5 August 2024 by Hamish Falconer. UIN 1977. https://members.parliament.uk/member/4630/writtenquestions?page=2#expand-1723812

22 "Westelijke Sahara." *The Netherlands Enterprise Agency,* www.rvo.nl/westelijke-sahara. Accessed 7 Oct. 2023.

23 S.C. Res. 541, U.N. Doc S/RES/541 (Nov. 18, 1983); S.C. Res. 550, 3, U.N. Doc. S/RES/550 (May 11, 1984)

24 COMMISSION IMPLEMENTING DECISION of 12.9.2023 on adopting an Action Programme for the Turkish Cypriot community for the year 2023

Company, Danske Bank and Re/Max operate in northern Cyprus, often with direct links to the occupying powers.[25] Finally, several countries have issued guidance about doing business in northern Cyprus, warning that some transactions may be illegal under the municipal law of the Republic of Cyprus, with no assertion of illegality under international law.[26]

Finally, the legality of trade, specifically with Israeli-controlled Judea and Samaria, has been upheld by several domestic courts. In 2014, the UK Supreme Court unanimously rejected assertions that the Ahava company's sale of Israeli Dead Sea products was illegal due to its ties with Israeli companies located in Judea and Samaria.[27] In 2013, the French Court of Appeal in Versailles dismissed a lawsuit filed by the PLO and French pro-Palestinian organizations against Alstom and Veolia, two French companies involved in the construction of the Jerusalem light rail project, which is located beyond the 1949 Armistice Lines in disputed territories. The Court held that' rather than prohibiting business activity, "The Occupying Power may, and is even obliged to reestablish normal public activity in the occupied country and to carry out all of the administrative measures regarding activities generally carried out by state authorities…". According to the Court, public international law conventions did not apply to private companies.[28]

5 | An Arms Embargo is not Mandated and Violates Israel's Right to Self-Defense

The primary international instrument regulating the arms trade is the Arms Trade Treaty (ATT), adopted by 115 states. Among the principles upon which the treaty is based is "*the inherent right of all States to individual or collective self-defence as recognized in Article 51 of the Charter of the United Nations.*"[29] The imposition of an arms embargo on Israel would effectively deny its right to self-defense. Israel is currently involved in a multi-front war against Iran and its proxies in Gaza, Judea and Samaria, Lebanon, Yemen and Iraq. According to a recent New York Times report, Iran is operating a massive covert smuggling route to deliver weapons to Palestinian groups in Judea and Samaria. "The goal, as described by three Iranian officials, is to foment unrest against Israel by flooding the enclave with as many weapons as it

25 See *Who Else Profits? The Scope of European and Multinational Business in the Occupied Territories. Who Profits,* https://www.whoelseprofits.org/. Accessed 6 Oct. 2024.

26 Irish Department of Foreign Affairs, Travel Advice: Cyprus. https://www.ireland.ie/en/dfa/overseas-travel/advice/cyprus/. Accessed 8 Oct. 2024.; Australia Smart Traveller, Cyprus: Local Laws, https://www.smartraveller.gov.au/destinations/europe/cyprus. Accessed 8 Oct. 2024; Government of Canada, Cyprus travel advice, https://travel.gc.ca/destinations/cyprus. Accessed 8 Oct. 2024

27 Richardson v. Director of Public Prosecutions, [2014] UKSC 8

28 Cour d'Appel [CA] [regional court of appeal] Versailles, Mar. 22, 2013, No. 11/05331 (Fr.)

29 Arms Trade Treaty, Principles

can."[30] The atrocities perpetrated by Hamas on October 7th, 2023, demonstrate the acute and severe threats that Palestinian terrorist groups pose to Israeli civilians.

On February 19, 2024, the British High Court refused an application for permission to apply judicial review to the UK Secretary of Business and Trade's (SST) decision to authorize military export to Israel. The SST's decision explicitly referenced the UK's obligations under the ATT.[31] The guiding British regulatory framework for the decision was the Strategic Export Licensing Criteria (SELC), which replaced but essentially replicated the Consolidated EU and National Arms Export Licensing Criteria.[32] As British standards largely mirror European Union criteria, the British case law on arms exports has significance far beyond the UK.

Criterion 2(b) instructs the government "not [to] grant a licence if it determines there is a clear risk that the items might be used to commit or facilitate a serious violation of international humanitarian law." The relevant principles of international humanitarian law (IHL) were identified in the Court of Appeal's Judgement: the principle of distinction; the principle of proportionality; the obligation to take all feasible precautions in attack; effective advance warning of attacks which may affect the civilian population; the protection of objects indispensable to civilian populations; the prohibition on indiscriminate attacks; prohibition on disproportionate attacks; the prohibition on attacks directed against civilian objects and/or civilian targets; the obligation to investigate and prosecute; (8) the obligation to make reparation.[33] The IHL principles refer to how hostilities are conducted – not the state's status as an occupying power. In short, an occupation and its legality are irrelevant for the arms exports. (It should be noted that in a recently published Policy Paper, the British government concluded that it could not substantiate claims that Israel conducted hostilities in Gaza in violation of IHL. It did note supposed violations of the right to humanitarian aid and mistreatment of detainees, which should be irrelevant based on the Court's criteria.) [34]

In its ICJ Application against German arms exports to Israel, Nicaragua argued that Germany "has failed to comply with its obligations under international humanitarian law, derived both from the Geneva Conventions of 1949 and its Protocols of 1977 and from the intransgressible principles of international humanitarian law, by not respecting its obligations to ensure

30 Fassihi, Farnaz, Ronen Bergman, and Eric Schmitt. "Iran Smuggling Weapons into West Bank as Israel's Crises Deepen." *The New York Times, 9 Apr. 2024,* www.nytimes.com/2024/04/09/world/middleeast/iran-west-bank-weapons-smuggling.html.

31 R (Al-Haq) v. Secretary of State for Business and Trade, AC-2023-LON-003634

32 Trade Policy Update, Statement made on 8 December 2021. https://questions-statements.parliament.uk/written-statements/detail/2021-12-08/HCWS449

33 Regina (Campaign against Arms Trade) v. Secretary of State for International Trade, [2023] EWHC 1343, p. 25

34 Policy paper, Summary of the IHL process, decision and the factors taken into account. Foreign, Commonwealth and Development Office. 2 September 2024. https://www.gov.uk/government/publications/summary-of-the-international-humanitarian-law-ihl-process-decision-and-the-factors-taken-into-account/summary-of-the-ihl-process-decision-and-the-factors-taken-into-account

respect for these fundamental norms in all circumstances".[35] According to Nicaragua, Common Article 1 of the Geneva Conventions requires all parties to encourage and enforce compliance of other parties to the Convention ("The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.") This interpretation finds some support in the International Committee of the Red Cross (ICRC) updated 2016 Commentary on the 1949 Geneva Convention I.[36]

As scholars Michael Schmitt and Sean Watts demonstrate, however, Common Article 1 was designed to place obligations on states concerning actions that can be directly attributed to them under the law of state responsibility or to individuals or entities under their control. No evidence of state practice or *opinio juris* demonstrates that states understand Common Article 1 to impose an external obligation. Leading states rejected such an interpretation at the diplomatic conference in which the Conventions were drafted and adopted. In short, Common Article 1 does not require states to coerce or impose punitive measures on Israel to bring it into conformity with supposed Convention requirements.[37]

Conclusion

The ICJ's Advisory Opinion is fundamentally flawed and cannot be considered the authoritative statement of international law regarding Israel's presence in Judea and Samaria. The anti-Israel bias was apparent in the Opinion's inception: it emerged from a predetermined COI whose commissioners had already decided on Israel's guilt; it was presided upon by a president known for his anti-Israel views and in violation of the ICJ's statute and it ignores Israel's legal and historical rights to the territory, as well as Israeli security concerns. Going full circle, the Advisory Opinion is being used for the purpose for which it was initially conceived – renewed pressure to sanction and punish Israel. However, as has been shown, there is no basis to claim that international law requires sanctioning Israel. Rather than an indictment of Israel, the Advisory Opinion demonstrates the abuse of international law and organizations in service of an anti-Israel agenda.

35 ICJ Nicaragua v. Germany, *(Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory). Par. 3*

36 ICRC, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016, Article 1 - Respect for the Convention. https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016?activeTab=undefined

37 Schmitt, Michael N., and Sean Watts. "Common Article 1 of the 1949 Geneva Conventions." *Lieber Institute West Point, 12 Apr. 2024, lieber.westpoint.edu/common-article-1-1949-geneva-conventions/.; Robson, Verity. "The Common Approach to Article 1: The Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions." Journal of Conflict and Security Law 25.1 (2020): 101-115.*