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Approval of Terrorist Actions

Have the Danish Courts Given Due Consideration to all Applicable Aspects in Cases Linked to the Israel-Hamas Conflict?

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Abstract

The relationship between national and international criminal law has grown increasingly closer over time. However, are national courts providing enough consideration to international law in national criminal cases? In cases concerning Danish terrorism legislation and the approval of terrorism, it appears that the answer may be in the negative. The latest development in the conflict between Israel and Hamas has led to several national Danish indictments and convictions under § 136 (2) of the Danish Penal Code for approving the actions committed by Hamas against Israel on 7 October 2023. The article concludes that in such cases, the Danish national courts have not been conducting the required assessments linking national law to EU and international humanitarian law.

Keywords

Israel-Hamas conflict; Terrorism; Approval of Terrorism; Denmark; Danish Penal Code; EU Framework Decision; International Humanitarian Law.

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1. Introduction

On 7 October 2023, in a coordinated attack, more than 1,000 members of Hamas' (Harakat al-Muqawama al-Islamiya/Islamic Resistance Movement) military wing (Qassam Brigades), and other Palestinian armed groups, accompanied by Palestinian civilians, launched an attack against Israeli civilians and military objects in southern Israel, near the border with Gaza.[1] In addition to launching rockets, this attack involved Hamas dispatching its fighters from the Gaza Strip into southern Israel, attacking military targets, briefly taking control of some Israeli settlements, killing and injuring Israeli civilians and soldiers, taking Israeli civilians hostage and capturing Israeli soldiers.[2] Israel responded militarily and at the time of writing, the Israel-Hamas war rages on.[3]

The attack by Hamas and Palestinian armed groups against Israel on 7 October 2023 and Israel's subsequent actions in Gaza and the West Bank has given rise to heated debates in Denmark. As a result, on 9 November 2023, the Danish Prime Minister, Mette Frederiksen, requested the Ministry of Justice to undertake a review of the police and Public Prosecution Service's use of the criminal provisions regarding approval of terrorism in § (paragraph) 136 (2) in the Danish Penal Code (DPC).[4] This increased focus has led to preliminary charges being filed and has also recently led to convictions for explicitly approving Hamas' actions carried out on 7 October 2023.[5] Two of these convictions will be analysed in the article in order to examine, if there were grounds for the acquittal of the two individuals.

According to § 136 (2) of the DPC, approving Hamas' actions is only punishable, if the actions can be categorised as 'terrorist actions' within the meaning of § 114. This may not be difficult to prove, since Hamas, during the attack, wounded, killed and

1 A/HRC/56/26 para. 8.

2 Sen (2023).

3 Associated Press (2024).

4 Legal Affairs Committee (2023-2024).

5 As of 23 September 2024, there have been five cases before the Danish courts regarding the approval of Hamas' actions on 7 October 2023. This has resulted in one acquittal and four convictions. During an open consultation regarding charges for approving terroristic actions on 8 February 2024, Attorney General Peter Hummelgaard stated that as at 31 January 2024, there were 67 cases concerning incitement or explicitly approving terrorism (§ 136 (1) and (2)), hereunder 4 indictments and 11 cases, that had been terminated. See also Ørbæk (2024).

took multiple civilians hostage - all of which are considered to be 'terrorist actions' as defined in the DPC.[6] Moreover, Hamas is included in the European Union's (EU) terror list.[7]

However, according to para. 11 of the Preamble to the EU Council Framework Decision on Combating Terrorism (FD),[8] which led to the insertion of § 114 into the DPC, actions carried out by armed forces during an armed conflict within international humanitarian law (IHL), will not constitute terrorism within the scope of § 114 (or the provisions concerning aiding and abetting terrorism, pursuant to §§ 114 b-e). Therefore, if the Preamble is applicable in relation to Hamas' actions perpetrated in October 2023, the determination should be made that § 114 is not applicable and that consequently, § 136 (2) too is inapplicable. If a particular instance relates to a violation of IHL, then such actions would have to be prosecuted domestically in Denmark as an international crime, through utilising a third state's judicial architecture pursuant to the application of universal jurisdiction, or by an international criminal justice institution such as the International Criminal Court (ICC).[9] Therefore, it is crucial that the Danish courts, in their assessment of cases concerning the approval of terrorist actions under § 136 (2), take the Preamble of the FD into consideration.

Using the 7 October 2023 Hamas attacks against Israel as a case study, this article seeks to examine whether it is possible to conclude that the conditions outlined in the Preamble are fulfilled, and whether the Danish courts in recent case law relating to § 136 (2) regarding individuals approving Hamas' actions on 7 October, consider the Preamble. To examine this, the sections below will first, examine the relationship between IHL, related aspects of public international law, Danish terrorism legislation, and § 114 and § 136 (2) of the DPC. Second, the article will examine whether under IHL, Hamas' actions towards Israel can be deemed actions by armed forces during an armed conflict. Finally, the article will examine how the Danish courts interpret and apply the Preamble in cases regarding terrorism under § 114 and approving such actions pursuant to § 136 (2).

6 Lovbekendtgørelse nr. 434 (2024) based on The Danish Penal Code (DPC) from 15 April 1930 with later changes.

7 Several terror lists exist within the EU. With regard to Hamas, see Annex II, nr. 9 on Council Decision (CFSP) 2024/332 of 16 January 2024 updating the list of persons, groups and entities covered by Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2023/1514.

8 2002/475/JHA, which was later replaced by Directive (EU) 2017/541.

9 Justitsministeriet (2024).

2. The connection between Danish terrorism legislation and IHL

2.1 The relevance of the Preamble to the FD when interpreting § 114 of the DPC

Shortly after the attacks on the World Trade Center in the United States of America (US) on 11 September 2001, the European Commission drafted a proposal for a new Framework Decision on Combating Terrorism.[10] On 13 June 2002, the FD was adopted. Art. 1 of the FD indicated a consensus among the EU member states on a definition of terrorist offences. In addition to agreeing on what *should* be considered a terrorist action, the member states also agreed on what *should not* be considered terrorist actions. One exception to the scope of the FD was included in para. 11 of the Preamble:

> *Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision*.[11]

In line with the above, in order to establish if certain actions fall within the scope of the FD, it is crucial first to assess if the actions were carried out during an armed conflict, and if so, by armed forces, as these concepts are understood in IHL.[12] Council Statement 109/02 (construed in Denmark as applying to situations of 'occupation' and 'freedom fighters'), may act as a further exception to the FD.[13] As this article specifically focuses on § 136 (2) and § 114 of the DPC, the Council Statement and the second exception will not be further analysed.[14]

Given the focus of this article, the relevant question for the present case study is therefore: Is there an armed conflict between Hamas and Israel and if so, can Hamas be considered an armed force? These questions will be answered in the subsequent sections of this article. As a starting point, it should be noted that para. 11 of the Preamble puts forward two scenarios: namely, actions committed: 1) during an armed conflict, and 2) during peacetime. 'Armed forces of a State' is explicitly mentioned in relation to the latter, while only 'armed forces' are mentioned with regards to actions during an armed conflict. Commentators such as Kessing opine that this strongly indicates that the concept of 'armed forces' during an armed conflict consists of both state and non-state armed groups.[15]

10 COM(2001) 521 final 2001/0217 (CNS).

11 Preamble to 2002/475/JHA.

12 See also Kessing (2009) p. 154, Verbruggen (2004) p. 325, Husabø and Bruce (2009) p. 370.

13 Council Statement 109/02 (2002) p. 19, U 2009.1458 H.

14 See instead Grønning-Madsen (2023) p. 106, Husabø and Bruce (2009) p. 388.

15 Kessing (2009) pp. 154-155.

The FD was implemented in Denmark by the insertion of § 114 into the DPC in December 2002.[16] Simultaneously, special provisions on aiding and abetting terrorism were also inserted into the DPC in order to domestically implement the International Convention for the Suppression of the Financing of Terrorism and UN resolution 1373.[17] In order to secure a complete implementation of the FD, the wording § 114 was drawn from and almost completely mirrors the wording of Art. 1 of the FD.[18] Section 114 of the DPC provides a definition of actions constituting terrorism. According to the provision, terrorism is understood to be 'ordinary' crimes such as murder, aggravated violence and deprivation committed with 'terrorist intent'. Here, the intent requirement (i.e. 'terrorist intent') entails the intent to seriously intimidate a population, or unduly compel a government or international organisation to perform or abstain from performing any act, or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation. In addition, due to its character or the context in which it is committed, the actions should be able to seriously damage a country or an international organisation.[19]

When deciding in a concrete case regarding § 114, a claim cannot be based solely on the Preamble. However, preambles within EU-law have a high degree of functional similarity with Danish preparatory works,[20] and its content can be important to the understanding and interpretation of the purpose of a rule.[21] Moreover, when looking at the preparatory works in relation to § 114, the former Attorney General stated during the drafting of § 114, that the provision should be interpreted in light of the EU FD and specifically mentioned the Preamble.[22] The Danish Supreme Court (DSC) has also previously considered the Preamble in relation to § 114.[23] Therefore, when interpreting § 114 of the DPC, para. 11 of the Preamble must be considered given the practical consequence that actions carried out by armed forces during an armed conflict shall be excluded from the scope of § 114.

16 Danish Bill, L35. Section 114 was inserted into the DPC by the enactment of law number 378 of 6 June 2002.

17 These provisions are currently placed in §§ 114 b-e of the DPC, UN Convention for the Suppression of Financing Terrorism, 9 December 1999. Denmark signed the convention on 25 September 2001. S/RES/1373.

18 The Attorney General's answer to question number 131 from the Legal Affairs Committee regarding bill L35.

19 For more on the understanding and interpretation of the content in § 114, see Grønning-Madsen (2023).

20 Neergaard and Nielsen (2024) p. 136, Blume (2020) p. 277.

21 Daniel and Hamer (2020) p. 147, Varnø and Nielsen (2021) p. 141, Fenger (2014), Blume (2020) p. 277.

22 The Attorney General's answer to question number 27 from the Legal Affairs Committee regarding L35.

23 U 2009.1458 H p. 41.

2.2 Link between § 114 and § 136 (2) of the DPC

As previously stated, § 136 (2) of the DPC prohibits public and explicit approval of certain crimes. The criminal offences, the approval of which are expressly prohibited under Danish law, are crimes appearing in chapters 12 and 13 of the DPC. These chapters contain the most serious offences that can be perpetrated against the Danish state. Chapter 13 primarily criminalises terrorism in different forms committed both towards Danish and foreign authorities and international organisations.[24] As for § 136 (2), in practice, 'public' approval means statements appearing in the written press, on the internet, radio and television.[25] The decisive element in this connection is whether or not the statement has been made available to a larger or indefinite number of people.[26] For the statement to constitute an explicit approval, it must be of such a nature that it can help to legitimise the type of criminal offence to which the statement relates.[27]

Turning to Hamas' actions on 7 October 2023, due to the character and seriousness of the actions, the relevant rule to consider in chapter 13 of the DPC is § 114. Consequently, for a person to be convicted of explicitly approving Hamas' actions towards Israel on 7 October, pursuant to § 136 (2), Hamas' actions must fall within the scope of § 114. On the other hand, if Hamas' actions are exempted from the scope of § 114, for instance, due to the application of para. 11 of the Preamble to the FD, a person's approval of Hamas' actions is not punishable in accordance with § 136 (2).

The above shows that the wording of the Preamble to the FD entails a connection between IHL and Danish terrorism legislation. If Hamas' actions on 7 October 2023 can be considered to fall within the scope of IHL – due to Hamas being considered an armed force engaged in an armed conflict – their actions cannot be defined as terrorism within the Danish definition in § 114. This will automatically imply that a person cannot be convicted for a violation of § 136 (2) due to a public and explicit approval of these actions.

3. Is there an armed conflict between Israel and Hamas?

While it is widely accepted that Israel is currently engaged in an armed conflict, opinions vary regarding how this armed conflict should be classified and especially regarding what type of armed conflict it is engaged in with Hamas.[28] For the purposes of IHL, an international armed conflict (IAC) exists when armed force is used by at least two states against each other (even if one of the states does not recognize that it

24 L35 and Straffelovsrådet betænkning om det strafferetlige værn mod terrorisme, 1474/2006.

25 Elholm *et al.* (2022) p. 171.

26 U 2020.1003 H p. 4.

27 Elholm *et al.* (2022) p. 173.

28 Malik (2023), de Hemptinne (2023), Tignino and Kebebew (2023).

is at war), or if the situation constitutes an instance of partial or total occupation of territory (even if the occupation meets no armed resistance).[29] A non-international armed conflict (NIAC) on the other hand involves the use of armed force between governmental authorities and organised armed groups, or between such organised armed groups within a State (however, excluding situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature).[30] Some commentators opine that the ongoing conflict between Israel and Hamas can be classified as belonging to one of four categories under IHL. Namely a: (1) NIAC; (2) IAC and a simultaneous NIAC; (3) Occupation (and therefore, an IAC); or (4) Occupation (and therefore, an IAC) and a parallel NIAC.[31]

Pursuant to the first category, the conflict between Israel and Hamas constitutes a single NIAC to the exclusion of all other categories.[32] This is due to the fact that Hamas is a non-state actor and its actions cannot be attributed to a state.[33] This reasoning considers the Gaza strip to not be occupied after Israeli disengagement in 2005 as Israel is not in 'effective control' of the area (pursuant to Art. 42 of the Hague Regulations 1907).[34] As per Art. 42 of the Hague Regulations:

> *Territory is considered occupied when it is actually placed under the authority of the hostile army.*
>
> *The occupation extends only to the territory where such authority has been established and can be exercised.*[35]

As for the second category, it considers a simultaneous NIAC as existing between Israel and Hamas together with an IAC.[36] According to Malik, the latter classification may be applicable as the conflict takes place,

29 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Art. 2, Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea Art. 2, Convention relative to the Treatment of Prisoners of War Art. 2, Convention relative to the Protection of Civilian Persons in Time of War, ICRC (2024b) pp. 10-11.

30 Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of Non-International Armed Conflicts Art. 1, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Art. 3, Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea Art. 3, Convention relative to the Treatment of Prisoners of War Art. 3, Convention relative to the Protection of Civilian Persons in Time of War, European Parliament (2023).

31 Malik (2023), Shereshevsky (2024), de Hemptinne (2023).

32 Schmitt (2023), Malik (2023).

33 Malik (2023).

34 *Ibid.*, Convention respecting the Laws and Customs of War on Land and its annex Art. 42.

35 Convention respecting the Laws and Customs of War on Land and its annex Art. 42.

36 Malik (2023).

> *outside the territory of Israel and therefore also requires the application of IAC law. This is because the Gaza strip is Palestinian territory or at the very least not territory for which Israel has sovereign title. As force is being used outside its territory, Israel must apply IAC law with regards to any attacks against the Palestinian population and Palestinian infrastructure/territory, but NIAC law applies between Israel and Hamas.*[37]

The third category considers Israel as occupying the Gaza strip.[38] Should this third category apply, then the second exception linked to situations of occupation mentioned in section 2.1 would be triggered. Such a situation would constitute an IAC.[39] While the concept of occupation is not defined in the 1949 Geneva Conventions, guidance can be found in Art. 42 of the Hague Regulations, annexed to the Hague IV Convention of 1907.[40] As stated above, as per Art. 42 of the Hague Regulations, 'territory is considered occupied when it is actually placed under the authority of the hostile army'.[41] Also according to this provision, importantly, occupation only extends 'to the territory where such authority has been established and can be exercised'.[42]

In its recent advisory opinion (*Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*), the ICJ opined that despite Israel's withdrawal of its military presence from Gaza Strip in 2005, this 'has not entirely released … [Israel] of its obligations under the law of occupation', thus considering the Gaza Strip – as well as the West Bank and East Jerusalem – as still being occupied by Israel.[43] Moreover, the International Committee of the Red Cross (ICRC), considers Israel as occupying Palestine 'on the basis that Israel still exercises key elements of authority over the strip, including over its borders (airspace, sea and land - at the exception of the border with Egypt). Even though Israel no longer maintains a permanent presence inside the Gaza Strip, it continues to be bound by certain obligations under the law of occupation that are commensurate with the degree to which it exercises control over it'.[44] Following the above reasoning, one might be able to conclude that Gaza is occupied and thus, the conflict can be classified as an IAC between Israel as an occupying force and Palestine as occupied territory.

37 *Ibid.*

38 *Ibid.*

39 ICRC (2024b) pp. 10-11.

40 Convention respecting the Laws and Customs of War on Land and its annex Art. 42.

41 *Ibid.*

42 *Ibid.*

43 ICJ (2024a) paras 86-94 and 104, ICJ (2024b) p. 8.

44 ICRC (2024a), ICRC (2024c).

The fourth category considers there to be a parallel NIAC and occupation (and due to the latter, an IAC) in existence.[45] The ICC prosecutor's request for arrest warrants stemming from the situation in Palestine and the supporting expert report both classify the conflict as a NIAC between Israel and Hamas and an IAC between Israel and Palestine running in parallel.[46] Here, the expert panel deems Hamas to be 'a highly organized non-State armed group' and a NIAC as existing between Israel and Hamas, which 'began, at the latest, on 7 October 2023'.[47] The Panel views the IAC to have begun 'at the latest on 7 October 2023, when Israel first started responding to the Hamas attack on its territory by using force on the territory of Palestine without the latter's consent'.[48] Its argumentation on the existence of an IAC between Israel and Palestine however is less concrete, with the Panel premising its determination on three bases but not erring on the side of either of them as the most dominant reasoning. The Panel thus determines that an IAC exists between Israel and Palestine on the basis either that:

> *a) Palestine is a State in accordance with criteria set out in international law, for which there is a sufficiently strong argument for the purpose of an application to the Court for an arrest warrant, and an international armed conflict arises if a State uses force against a non-state actor on the territory of another State without the latter's consent; or*
>
> *b) Palestine and Israel are both High Contracting Parties to the 1949 Geneva Conventions, and that pursuant to the text of Common Article 2 of the Conventions, an armed conflict between two High Contracting Parties is international in character; or*
>
> *c) There is a belligerent occupation by Israel of at least some Palestinian territory.*[49]

Extraterritorial conflicts between states and non-state armed groups can be hard to classify in a concrete manner. The above, and especially the politically charged context surrounding the armed conflict in question, makes such a determination particularly complex. Moreover, 'Hamas' may not be able to be read as being synonymous with 'Palestine'. As Yahli Shereshevsky explicates (albeit in the context of international criminal law), '[t]hese conflicts do not fit easily into the definitions of international armed conflict (IAC) and non-international armed conflict (NIAC) under common articles 2 and 3 of the Geneva Conventions'.[50] As per Shereshevsky, initially the tendency was to classify such conflicts as NIACs, with the main exception being the

45 Malik (2023).

46 ICC (2024b), ICC Expert Report (2024) para. 13, Shereshevsky (2024).

47 ICC Expert Report (2024) para. 13.

48 *Ibid.*, para. 14.

49 *Ibid.*, para. 13.3

50 Shereshevsky (2024).

abovementioned Israeli Supreme Court decision in *Public Committee against Torture in Israel v. Government of Israel*, making the move of attributing an IAC classification to such conflicts.[51] Yet, a tendency to move towards a conflict classification as mixed conflicts (i.e. a NIAC between the State and the non-State armed group and an IAC between the two States), as also indicated in the previous discussions in this article, has gained momentum.[52] Regardless, it is evident that especially when considering the current conflict, conflict classification is a matter that appears to be especially complex. Applying the reasoning above, akin to the ICC prosecutor and the Panel of Experts, the determination may be reached that a NIAC exists between Israel and Hamas simultaneously with an IAC exists between Israel and Palestine. However, it is important to note that Pre-Trial Chamber I of the ICC recently pointed out that Gaza, and the West Bank (including East Jerusalem) remain territories occupied by Israel since 1967.[53] While the Pre-Trial Chamber was not explicit in concluding which type of armed conflict exists between the parties, the above indicates the existence of an IAC on the basis of occupation. What is important to note is that for the purposes of the Danish legislation and the application of the Preamble, the aspect to be met is the existence of an 'armed conflict' between Israel and Hamas, regardless of the type and exact classification of that armed conflict. If the conclusion on the existence of a NIAC between Israel and Hamas can be agreed upon, then this requirement of an armed conflict existing between Israel and Hamas would be met.

4. Is Hamas an 'armed force'?

4.1 Conflict classification

For the purposes of this article however, where conflict classification becomes especially relevant is when one moves on to the next consideration regarding the status of Hamas and whether it can be described as 'armed forces'. This will be elucidated below. This is an issue that is once again shrouded in layers of complexity. As conflict classification largely relies on an exploration of the relationship between the parties to a specific conflict, the identification of the parties and their status as a state, state armed forces, or other party to the conflict and the status of that party, is of vital importance for the purposes of IHL. Such status is in turn closely linked to the proper application of IHL rules as the application of these differ based on conflict classification as well as the status of individuals engaged in hostilities.

51 *Ibid*, *Public Committee against Torture in Israel v. Government of Israel* para. 18.

52 Shereshevsky (2024).

53 ICC (2024a) para. 3, ICC (2021)While the ICC PTC I does not elucidate the reasons for this statement, it is in line with the ICJ's findings in its recent advisory opinion in ICJ (2024a) paras 86-94 and 104, ICJ (2024b) p. 8.

In answering the question as to whether Hamas constitutes 'armed forces' one must first explore how the term 'armed forces' is defined in IHL. The wording of Art. 4 of the Convention relative to the Treatment of Prisoners of War (Geneva Convention III),[54] Art. 43 of Additional Protocol I to the 1949 Geneva Conventions (AP I)[55], Arts 1 and 3 of the Hague Regulations 1907[56], and Art. 1(1) of Additional Protocol II to the 1949 Geneva Conventions (AP II) are instructive to the matter and aspects of these would be discussed in subsequent paragraphs. Art. 4 of Geneva Convention III, which speaks of prisoners of war, states:

> *A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:*
>
> *1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.*
>
> *2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:…*
>
> *3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.*
>
> *4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.*
>
> *5) Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.*

54 Convention relative to the Treatment of Prisoners of War Art. 4.

55 Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts Art. 43.

56 Convention respecting the Laws and Customs of War on Land and its annex Arts. 1 and 3. Hague Regulations Art. 3 state, 'The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war'.

6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, PRISONERS OF WAR 93 where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.[57]

According to the above, armed forces appears to have a strong link to its association to one of the high contracting parties (i.e. state parties) to the Geneva Conventions of 1949 and its additional protocols. Hence, who belongs to 'armed forces' is determined in connection to an entity's affiliation with a state party to the Geneva Conventions of 1949 and its additional protocols.

Art. 1 of the Hague Regulations 1907 states:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

57 Convention relative to the Treatment of Prisoners of War Art. 4.

> *1. To be commanded by a person responsible for his subordinates;*
>
> *2. To have a fixed distinctive emblem recognizable at a distance;*
>
> *3. To carry arms openly; and*
>
> *4. To conduct their operations in accordance with the laws and customs of war.*
>
> *In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army".*[58]

Arts 1 of the Hague Regulations thus, complement Art. 4 of Geneva Convention III by highlighting that IHL applies to militia and voluntary corps fulfilling certain conditions and by highlighting that in some states, militia and voluntary corps may be regarded as the 'army'. The provision however, once again highlights the importance of the relationship of the entity with a state.

Article 1(1) of AP II which is applicable to situations of NIACs states:

> *This Protocol, … shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, … which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*[59]

Hence, in IHL a distinction is also present between a state's 'armed forces', 'dissident armed forces' and 'other organised armed groups'.[60] Art. 43 of Additional Protocol 1 (AP I) addresses the concept of 'armed forces'. In accordance with Art. 43(1),

> *The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, ' inter alia ', shall enforce compliance with the rules of international law applicable in armed conflict.*[61]

58 Convention respecting the Laws and Customs of War on Land and its annex Art.1.

59 Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Art. 1(1).

60 *Ibid.*

61 Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) Art. 43(1).

Art. 43(2) further states that,

> *Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.*[62]

Given the above, 'armed forces' is afforded a legal definition that is substantially broad yet comprehensive.[63] This broad definition encompasses 'all organized armed forces, groups, and units which are under a command responsible to that Party for the conduct of its subordinates'.[64] As AP I applies in the context of IACs involving inter-state warfare, the nexus between the state and an entity that is to be deemed its 'armed forces' becomes pivotal. As AP I appears to refer to 'state' armed forces, the logical next question to pose in determining whether Hamas constitutes armed forces is to follow the line of reasoning where one inquires whether Palestine constitutes a state and if so, whether Hamas can be its 'armed forces'? This is due to the fact that under international law, international legal personality is reserved for entities that can be classified as 'states' and such subjects of international law can only act through its own organs.[65] The question of whether Palestine is a state and if therefore, Hamas can be considered its 'armed forces' is discussed in detail in section 4.2 below.

Rule 4 of the ICRC's customary international law study defines 'armed forces' as 'The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates'.[66] This definition of armed forces is restricted to state armed forces. As elucidated in the ICRC study, state practice has established the above rule as a norm of customary international law applicable in IACs.[67] Hence, to be considered 'armed forces' in this context, once again, the link or connection to a state becomes a vital aspect.[68]

As previously outlined, in IHL, one notices the existence of two phases containing slightly different wording. The first is 'armed forces' and the second is 'dissident armed forces' (with the latter phrase only being used in the context of NIAC).[69] As indicated previously, Art. 1(1) of AP II defines non-state armed groups as 'dissident armed

62 Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) Art. 43(2).

63 Ispen (2013).

64 *Ibid.*

65 *Ibid.*

66 ICRC (*Rule 4*).

67 *Ibid.*

68 See section 4.2 for more.

69 Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of Non-International Armed Conflicts Art. 1(1).

forces or other organized armed groups', who fight regular armed forces or against each other on the territory of one or several States'.[70]

Importantly, according to the ICRC, '[t]he term organized armed group refers exclusively to the armed or military wing of a non-state party to a NIAC. It does not include those segments of the civilian population that are supportive of the non-state party such as its political wing'.[71] In applying this line of reasoning, in the context of a NIAC, the term 'organized armed group' would then only apply to Hamas' armed or military wing (i.e. the Qassam Brigades), and would not apply to segments of the civilian population supporting its political wing. A further question may be posed whether Hamas' military wing, which can be considered an organised armed group, can be considered to be 'armed forces' in the context of IHL. As mentioned previously, the report by the ICC Panel of Experts describes Hamas as 'a highly organized non-State armed group' (i.e. organized armed group).[72] While this is not a judicial determination with authoritative value, it indicates that at least in the eyes of some experts, Hamas is not considered a 'state armed force' and that its actions cannot be attributed to a particular state (i.e. by extension to a potential state of Palestine). This will be addressed further in sections 4.1 and 4.2 below in connection with Palestinian statehood.

As for 'dissident armed forces', AP II does not provide further explanation of the definition of the term. However, the ICRC explains the terms as referring to 'for example, breakaway parts of state armed forces'.[73] Viewed through this lens, where Israel is concerned, Hamas cannot be taken to constitute 'dissident armed forces' as such an entity would have to be made up of Israeli nationals, which members of Hamas probably are not. If Palestine were to be considered a state however, and the conflict was between a hypothetical 'Palestinian armed force' and Hamas (and not between a hypothetical 'Palestinian armed force' and Israel), Hamas might then potentially constitute 'dissident armed forces' in such a NIAC. This is not the case in the present case study.

4.2 Is Palestine a state?

Adding to the slew of complexities surrounding this analysis, the question of Palestinian statehood too is one that is complicated, and opinions differ. Within the modern international legal system, the Treaty of Westphalia, is generally credited

70 *Ibid.*

71 ICRC (*Armed groups).*

72 ICC Expert Report (2024) para. 13.

73 *Ibid.*

with establishing the modern state system.[74] The predominant stance in Western international legal circles appears to be that Palestine is not a state according to international law.[75]

The most widely accepted source setting out the criteria for defining a state is Art. 1 of the Montevideo Convention of 1933.[76] The Montevideo criteria for statehood requires the (a) existence of a permanent population, (b) a defined territory, (c) a government, and (d) the capacity to enter into relations with other states.[77] As the former prosecutor of the ICC and legal scholars have aptly pointed out, the application of these criteria with regard to Palestine unveils multiple issues. For instance,

> *Palestine does not have full control over the Occupied Palestinian Territory and its borders are disputed. The West Bank and Gaza are occupied and East Jerusalem has been annexed by Israel. The Palestinian Authority does not govern Gaza. Moreover, the question of Palestine's Statehood under international law does not appear to have been definitively resolved.*[78]

Palestine is considered to have a permanent population of roughly 5 - 5.5 million individuals, thus satisfying criteria (a) of the Montevideo Convention.[79] As for criteria (d), while the Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords), which laid the foundation for a Palestinian Interim Self-Government in the West Bank and Gaza for a transitional period, prohibits the Palestinian Authority (PA) from conducting foreign relations, as some commentators point out, over 138 States have recognised Palestine as a state with some establishing diplomatic relations.[80] Palestine also continues to be an ICC member state and a full member to other international organisations, holds observer status at the UN, and is a party to a large number of international treaties.[81] Hence, the conclusion may be reached that Palestine has the capacity to enter into relations with other states.[82] Thus, the main obstacles here in terms of satisfying the Montevideo criteria for Palestinian statehood appear to be criteria (b) and (c) mentioned above.[83]

74 Warbrick (2006) p. 221.

75 Gurmendi (2023).

76 Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, Grant (1998-1999) p. 403.

77 Warbrick (2006) p. 231, Shaw (2020).

78 ICC (2020) para. 5, Shaw (2020).

79 Robinson (2024), US Department of State (2021).

80 UN (1993), Sabel (2022) p. 369.

81 Sabel (2022) p. 396.

82 *Ibid.*

83 *Ibid.* p. 394-396.

In light of the varying opinions regarding Palestinian statehood by different states, another avenue to consider is its recognition as a state within the United Nations (UN) system. At present, Palestine remains a 'permanent observer state' at the UN.[84] This does not mean that Palestine has attained full legal status as a state under international law, at least if one is to consider formal UN recognition as a state as giving rise to statehood. In order for this to occur, Palestine needs to be formally admitted as a member of the United Nations 'by way of co-optation'.[85]

Art. 4 of the UN Charter addresses the issue of UN membership and states:

1. *Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.*

2. *The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.*[86]

The process for such recognition is that Palestine should apply for UN membership through the UN Secretary General, who then forwards that request to the UN Security Council (UNSC) and UN General Assembly (UNGA).[87] Subsequent agreement between the UNGA and UNSC is then required for any new UN member state to be admitted.[88] It is the UNSC that decides whether or not to recommend the admission to the UNGA after the UNSC's Committee on Admission of New Members has deliberated on the matter.[89]

On 2 April 2024, pursuant to a request sent to the UN Secretary-General by Palestine to reconsider its original request for UN membership, which was earlier submitted in 2011,[90] the UNSC took up the issue on 8 April 2024.[91] On 18 April 2024, the UNSC blocked Palestine's bid to become a full member of the UN due to the US casting a negative vote against the draft resolution that recommended granting Palestine UN member status.[92] Hence, Palestine's status within the UN system remains unchanged

84 UN (2024b).

85 Hillgruber (1998) p. 492.

86 Charter of the United Nations amendments in 557 UNTS 143, 638 UNTS 308 and 892 UNTS 119.

87 UN (2024a), Rule 135, Rules of Procedure of the General Assembly (2022) Rule 135, Provisional Rules of Procedure (1982) Rule 59.

88 UN (2024a).

89 *Ibid.*

90 SecGen note A/66/371|S/2011/592, UN (2011).

91 UN (2024a).

92 UN (2024b).

and it remains a UN observer state as opposed to a full UN member state. As elucidated above, whether Palestine satisfies all the Montevideo criteria for statehood continues to be debated. Hence, at present, the status of Palestinian statehood remains uncertain.

4.3 If Palestine is a state, is Hamas its armed forces?

The hypothetical question could still be posed that if Palestine was in fact a state, whether Hamas would then constitute its 'armed forces'? Here, once again a definite legal determination remains elusive. Given the delimitations of this article, the question of whether Hamas constitutes a Palestinian resistance movement will not be examined.[93] However, on the available facts, it is doubtful whether it can be argued that even if Palestine was a state, Hamas would constitute its state armed forces. If Palestine did have 'state armed forces', an important starting point in determining what that state armed force is would be in relation to who can be said to be the national government of Palestine under whom such armed forces continue to serve. After June 1967, the Palestinian Liberation Organisation (PLO) declared itself the representative of all Palestinians.[94] In 1988, the Palestine National Council declared the establishment of the State of Palestine, though this is viewed by some commentators as constituting 'more of a symbolic claim to statehood rather than an act establishing an actual State'.[95] According to the Oslo Accords, the PA was entrusted with governing the populated areas in the occupied territories while a Palestinian police force was envisioned as the entity in charge of security.[96] While officially, the PLO is seen as representing Palestinians worldwide at international fora, for the purposes of the Oslo Accords, the Palestinian Authority (PA), which is a newer institution led by the PLO faction, Fatah, is viewed as governing most of the West Bank and the Gaza Strip, thus overshadowing the PLO.[97] The institutions of the PA are said to be equated by some to the 'government of Palestine'.[98] In reality however, power in the Palestinian territories has been distributed among three entities: (a) the PA, (b) Hamas, and (c) Israel. The PA appears to be the semi-autonomous government in charge of part of the West Bank and as mentioned previously, Hamas has continued to govern the Gaza Strip since 2007.[99] The European Union (EU) recognises the PA as being 'the governing body of the Palestinian autonomous regions of the West Bank and Gaza Strip, established in 1994 as part of the Oslo Accords peace agreement between

93 See for instance discussion on whether Hamas belongs to Palestine as a resistance movement in Sassòli (2023).

94 Sabel (2022) p. 392.

95 *Ibid.*

96 UN (1993).

97 Robinson (2024).

98 European Council on Foreign Relations.

99 Transparency International (2020).

Israel and the … PLO'.[100] In addition, at the time of writing, the Permanent Observer Mission of the State of Palestine to the United Nations Office and other international organizations in Geneva consists of members of the PA.[101] The current Palestinian ambassador to the UN Riyad H. Mansour was appointed to the post by the president of the PA.[102] Moreover, the PA is said to style itself as the State of Palestine.[103] This indicates that while an exact determination may be elusive, the PA might bear the closest semblance to the government of a potential Palestinian state.

Additionally, according to the US Department of State, six PA security forces agencies are said to have operated in parts of the West Bank with several of these falling under Palestinian Authority Ministry of Interior's operational control and following the prime minister's guidance.[104] In the Gaza Strip, the security apparatus of Hamas has been viewed as largely mirroring that in the West Bank.[105] While Palestine has no military of its own in the traditional sense, as Transparency International states, 'despite the existence of two parallel security regimes in the West Bank and Gaza, Palestine's security forces are largely formalised and institutionalised, with the National Security Force (NSF) considered to be the "army-in-waiting"'.[106] Given the prominence afforded to the PA and PLO especially in foreign and diplomatic relations at fora such as the UN and EU, the indication is that it is the security forces connected to these entities that will be deemed the state armed forces of Palestine as these entities appear to bear the closest resemblance to the government of a possible Palestinian state. Following this line of reasoning, though a concrete evaluation as such may not be possible, it is likely that Hamas would not be seen as constituting the Government of the state of Palestine nor its armed forces. Thus, it is unlikely that Hamas can be considered as being the armed forces of a potential state of Palestine.

5. Danish Courts' use and interpretation of the Preamble in cases concerning § 114 and § 136 (2)

5.1 Steps for argumentation

As stated earlier in section 2.1, due to its wording, para. 11 of the Preamble acts as an exception to the scope of the FD, which is linked to § 114 of the DPC. As elucidated above, this requires a thorough analysis of both the classification of the conflict between Hamas and Israel and the status of Hamas to determine whether the

100 European Parliament (2023).

101 UN (*Permanent Observer Mission of the State of Palestine to the United Nations Office and other international organizations in Geneva*).

102 CNN (2024).

103 Sabel (2022) p. 396.

104 US Department of State (2021).

105 *Ibid.*

106 Transparency International (2020).

conflict falls within the scope of IHL. Hence, in the absence of such an examination, it cannot be determined whether § 114 is applicable to Hamas' actions on 7 October 2023. If the actions fall outside of the scope of § 114, an approval of such actions will automatically also fall outside the scope of § 136 (2), even if the approval is public and explicit.[107] Therefore, this analysis of whether the Preamble is applicable is of significance in national criminal cases regarding § 136 (2).

5.2 The Supreme Court's use and interpretation of para. 11 of the Preamble

The exception as mentioned in para. 11 of the Preamble to the FD has rarely been discussed in Danish jurisprudence. Only twice has it been argued to be an exception to § 114. First, it was raised in a Copenhagen City Court (CCC) decision dated 6 December 2019 on aiding and abetting terrorism actions committed by the Islamic State of Iraq and Syria (ISIS). The counsel for one of the defendants argued that ISIS's actions must be equated with actions carried out during an armed conflict as defined under IHL, and therefore exempted from § 114 and § 114 e.[108] This argument was rejected by the court without any justification.[109]

Second, para. 11 of the Preamble was presented as a ground for acquittal in a DSC case regarding terrorism. In a ruling handed down on 25 March 2009, the DSC found six members of the group Fighters and Lovers guilty of attempting to economically support terrorism according to § 114 b of the DPC. The group had collected – but never sent – money to the Popular Front for the Liberation of Palestine (PFLP) and to the Revolutionary Armed Forces of Colombia (FARC).[110] One of the arguments presented by the six defendants was that the actions committed by PFLP and FARC should be assessed according to the regulation on war crimes and not terrorism, since the two groups must be equated with state actors or similar, as the same rules must apply to all parties in an armed conflict.[111] The DSC ruled against the defendants and stated that there were no grounds for equating FARC and PFLP's actions with a state's use of power, pursuant to para. 11 of the Preamble to the FD. From the DSC's argumentation, it can be inferred that the scope of § 114 is narrowed by the content of the Preamble. It can also be inferred that the DSC does not reject FARC and PFLP's status as parties to an armed conflict. However, in the Court's view, their actions cannot constitute war crimes as they are non-state groups.[112]

107 See wording of § 136 (2) DPC.

108 Copenhagen City Court (CCC), 6 December 2019, case number: SS 1896-2019, p. 248.

109 *Ibid.*

110 U 2009.1458 H, p. 21 ff.

111 *Ibid.* p. 2.

112 Kessing (2009) p. 154.

As mentioned earlier, the formulation of para. 11 indicates that the concept 'armed forces' during an armed conflict should be understood in accordance with IHL and consists of both state and non-state armed groups.[113] By only focusing on the state's use of power in its interpretation of armed forces, the DSC appears to have erroneously limited 'armed forces' to state actors.[114] Hence, the DSC should have examined whether or not FARC and PFLP could be categorised as an 'armed force' under IHL.

5.3 Is the Preamble considered in Danish cases concerning § 136 (2)?

In each case regarding a public and explicit approval of possible terrorist acts, there is a direct link between a breach of § 114 (and §§ 114 b-e) and a breach of § 136 (2). In other words, if the approved actions do not constitute a breach of § 114, the approving person cannot be convicted of a breach of § 136 (2). Consequently, the interpretation of § 114, hereunder the use of possible exceptions such as the Preamble to the FD, is of significance to cases regarding § 136 (2).

There are several published rulings regarding § 136 (2), but only a few of them are of relevance to this analysis of the courts using the Preamble when interpreting § 114.[115] The two relevant rulings emanate from the CCC dated 22 February 2024 and 6 August 2024. The first case concerns a statement about Hamas' actions at a music festival in Israel on 7 October 2023.[116] In this ruling, the CCC argues that Hamas carried out the actions on 7 October with terrorist intent, that falls within the scope of § 114 (1), and that these actions were able to seriously damage a country or an international organisation. The reasoning incorporated the fact that Hamas is on the EU's list of terror organisations, the nature of the attack, and the killing of civilians. Therefore, it was argued that the attack constituted terrorism within the meaning of § 114. The Court then states that based on the nature of the attack, this applies even if Hamas' attack was directed at an occupying power – as argued by the defendant.[117] The second case also concerns a statement regarding Hamas' actions on 7 October but was uttered at a public demonstration arranged by Hizb ut Tahrir in the centre

113 Art. 4A (2) in the third Geneva Convention and Art. 43 in Additional Protocol I as well as ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities, ICRC, May 2009 pp. 23-24. See also Kessing (2009) p.154.

114 Also see Kessing (2009) p.154.

115 The irrelevant rulings are *e.g.* U 2020.1003 H, U 2018.769 H, U 2018.393 Ø and U 2017.1743 Ø. The similarity between these rulings is that terror actions clearly have been committed in peacetime and not during an armed conflict.

116 CCC, 22 February 2024, case number: SS 1-29997/2023. This case can be found on the Danish Rulings Database under number 146/24.

117 *Ibid.* p. 2 f. The ruling was appealed, and the Eastern High Court made a ruling on 1 July 2024. However, the case only concerned sentencing and is therefore not of relevance to this article.

of Copenhagen. The statement was recorded and published on the organisation's YouTube-channel. In this second case, the Court determined yet again that Hamas' actions fall within the scope of § 114, even if they targeted an occupying power.[118]

It is not surprising that Hamas' actions on 7 October are considered by the Court in the two cases above as falling within the scope of § 114 (1). However, it is surprising that the Court does not even have a fleeting glance at the Preamble as a possible exception. Denmark is a civil law state. Therefore, in the Danish criminal procedural system the court is required to find the truth in the case and not just assess the parties' arguments. Consequently, the Danish courts are required to *ex officio* clarify every aspect of a criminal case, which is necessary to determine the defendant's guilt or innocence.[119] On that basis, the Court should have considered whether Hamas' actions should be assessed under IHL instead of Danish criminal law.

It is of course possible that the court did in fact consider this without writing it in the rulings. If this is the case, it must however be critiqued. First, the Preamble was considered by the DSC in the abovementioned Fighters and Lovers-case, which factually has a high degree of similarity to the mentioned cases regarding § 136 (2). Second, it cannot be rejected without a thorough analysis that the conflict between Hamas and Israel fulfils the requirements set forth in the Preamble. Therefore, the Court should have made it clear whether they had taken the Preamble into consideration.

Consequently, the CCC's assessment of the scope of § 114 in the above cases appears incomplete and leaves doubt as to whether the convictions for the explicit approval of these actions, cfr. § 136 (2), are in fact correct. Here, two aspects should be highlighted. First, it is clear from the DSC ruling in the 'Fighters and Lovers' case, that the Preamble should be considered when determining whether certain actions fall within the scope of § 114. However, it is also evident that the DSC failed to provide an exact interpretation of the concept of 'armed forces' under IHL, as it was wrongfully limited to state actors. Second, the abovementioned CCC rulings demonstrate that the Preamble is not included as a part of the assessment of the scope of § 114, which based on the relationship between § 136 (2) and § 114, as well as the 'Fighters and Lovers' ruling, must be viewed as being erroneous.

6. Conclusion

This article posed the question whether the Danish convictions pursuant to § 136 (2) of the DPC for approving Hamas' actions against Israel on 7 October 2023 were correct. As an extension of this question, while Hamas' actions may constitute terrorism in accordance with the wording of § 114, this piece further explored

118 CCC, 6 August 2024, case number: SS 2-1861/2024.

119 Kistrup *et al.* (2023) p. 28 f.

whether the actions could be excluded from the scope of § 114 due to the application of IHL considerations. This is the case if, according to the Preamble to the FD, which shall be considered when interpreting § 114, Hamas can be considered an armed force and the conflict between Hamas and Israel can be classified as an armed conflict under IHL. The analysis of the conflict between Hamas and Israel has shown that the conflict can at the least be classified as a NIAC. Hence, Hamas and Israel can be said to be involved in an armed conflict under IHL. The analysis shows that it is doubtful whether Hamas can be classified as an armed force under IHL. Based on this analysis, it appears that the Preamble's two-tier test isn't met. Consequently, at present, Hamas' actions do not qualify for the exception to the application of § 114.

Thus, this analysis lends itself to the conclusion that the current Danish convictions for § 136 (2) should stand. However, while the determination of the CCC may be correct, the Court's reasoning leaves much to be desired. A country's judicial system is ultimately the final stop before a potential conviction of an individual. This makes it crucial that the ruling is correct, but also that the person on trial comprehends why s/he has been convicted. In Danish criminal cases, the courts have an obligation to leave no stone unturned in unearthing the material truth in a case. However, in the examined cases, there is no indication of the Court evaluating or even taking a fleeting glance at the exception as laid out in the Preamble. Due to the reasons elucidated in this article, it is vital that the Danish courts undertake such an evaluation.

There will undoubtedly be more cases concerning § 136 (2) and the approval of Hamas' action on 7 October 2023 in the future. It is also evident that the conflict between Hamas and Israel remains complex. Therefore, the possibility exists that the findings made in this article concerning Hamas' status and the conflict's classification may change over time. Consequently, in future cases regarding § 136 (2), the Danish courts have an obligation to assess the application of the Preamble in each case taking its specific circumstances into consideration.

Reference list

Public documents

Betænkning om det strafferetlige værn mod terrorisme (2006), nr. 1474. Straffelovrådet.

Betænkning om visse internationale forbrydelser (2024), nr. 1583. Justitsministeriet.

Commission's proposal for a Council Framework Decision on combating terrorism. COM(2001) 521 final 2001/0217 (CNS).

Council Decision (CFSP) 2024/332 (2024) updating the list of persons, groups and entities covered by Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2023/1514.

Council Framework Decision (2002) on combating terrorism (2002/475/JHA). Later replaced by Directive (EU) 2017/541 of the European Parliament and of the Council (2017) on combating terrorism.

Council of The European Union: Council Statement 109/02 in council doc. 11532/02. 22 August 2002.

ICC Expert Report (2024) Panel of Experts in International Law Convened by the Prosecutor of the International Criminal Court. Available from: (URL). Accessed on 2 August 2024.

L35: Forslag til lov om ændring af straffeloven, retsplejeloven, lov om konkurrence- og forbrugerforhold på telemarkedet, våbenloven, udleveringsloven samt lov om udlevering af lovovertrædere til Finland, Island, Norge og Sverige. (Gennemførelse af FN-konventionen til bekæmpelse af finansiering af terrorisme, gennemførelse af FN's Sikkerhedsråds resolution nr. 1373 (2001) samt øvrige initiativer til bekæmpelse af terrorisme m.v.). Justitsministeriet (2001).

Legal Affairs Committee (2023-2024), REU alm.del, annex 43 (2023).

Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel (2024) A/HRC/56/26. Available from: (URL). Accessed on 31 July 2024.

UN (1993) Declaration of Principles on Interim Self-Government Arrangements. Available from: (URL). Accessed on 8 August 2024.

UN Palestine's letter of application for UN membership/Declaration of President Abbas, SecGen note. Available from: (URL). Accessed on 12 July 2024.

UN Security Council Resolution 1373 (2001). S/RES/1373.

Legislation

Charter of the United Nations (24 October 1945), XV UNCIO 335, amendments in 557 UNTS 143, 638 UNTS 308 and 892 UNTS 119.

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31.

Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85.

Convention on Rights and Duties of States adopted by the Seventh International Conference of American States 1933.

Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.

Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277.

Lovbekendtgørelse nr. 434 from 25 April 2024 based on The Danish Penal Code from 15 April 1930 with later changes (Straffeloven).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

Provisional Rules of Procedure (1982) United Nations Security Council, S/96/Rev.7.

Rules of Procedure of the General Assembly (2022) United Nations, A/520/Rev.20.

UN Convention for the Suppression of Financing Terrorism (1999).

Case law

Copenhagen City Court *SS 1896-2019.* 6 December 2019.

Copenhagen City Court *SS 1-29997/2023.* 22 February 2024.

Copenhagen City Court *SS 2-1861/2024.* 6 August 2024.

Copenhagen City Court *SS 2-1862/2024*. 8 August 2024.

Copenhagen City Court *SS 1-6268/2024*. 21 August 2024.

Copenhagen City Court *SS 3-1863/2024*. 22 August 2024.

ICC (2024a) Decision on Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute, 21 November 2024, *ICC-01/18*.

ICC (2021) Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', 5 February 2021, *ICC-01/18-143*.

ICC (2020) Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, *ICC-01/18*.

ICJ (2024a) Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem 19 July 2024. Available from: (URL). Accessed on 22 September 2024.

ICJ (2024b) Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem: Summary of the Advisory Opinion of 19 July 2024, 19 July 2024, Summary 2024/8, Available from: (URL). Accessed on 22 September 2024.

Supreme Court of Israel, Public Committee against Torture in Israel v. Government of Israel, 13 December 2006, *Case No. HCJ 769/02*.

U 2009.1458 H.

U 2017.1743 Ø.

U 2018.769 H.

U 2018.393 Ø.

U 2020.1003 H.

Literature

Blume P (2020) *Retssystemet og juridisk metode*. 4. Ed. Jurist- og Økonomforbundets forlag.

Daniel B T and Hamer C R (2020) Juridisk metode når EU-retten er på spil, in eds. Hamer C R and Schaumburg-Müller S *Juraens Verden - metoder, retskilder og discipliner.* Djøf Forlag.

de Hemptinne J (2023) Classifying the Gaza Conflict Under International Humanitarian Law, a Complicated Matter. *EJIL:Talk!* Available from: (URL). Accessed on 1 August 2024.

Elholm T *et al.* (2022) *Kommenteret straffelov, speciel del*. 12. Ed. Jurist- og Økonomforbundets Forlag.

Fenger N (2014) Forarbejdernes retskildeværdi i EU-retten. *U 2014B.293*.

Grant T D (1998-1999) Defining Statehood: The Montevideo Convention and its Discontents. *Colum. J. Transnat'l L* 37, 403.

Grønning-Madsen N (2023) *Terrorismeforsættet – En analyse af straffelovens § 114*. Karnov Group.

Gurmendi A (2023) "If Palestine is a State": the Two-State Solution and Palestine's Position in the Westphalian Myth. *Opinio Juris*. Available from: (URL). Accessed on 31 July 2024.

Hillgruber C (1998) The Admission of New States to the International Community. *Eur J Int Law* 9, 491-509.

Husabø E J and Bruce I (2009) *Fighting Terrorism through Multilevel Criminal Legislation; Security Council Resolution 1373, the EU Framework Decision on Combating Terrorism and their Implementation in Nordic, Dutch and German Criminal Law*. Martinus Nijhoff Publishers.

Ispen K (2013) Combatants and Non-Combatants in ed. Fleck D *The Handbook of International Humanitarian Law* 3rd edn, Oxford University Press, 79-114.

Kessing P V (2009) Økonomisk støtte til terrorvirksomhed. *Juristen* 5/6.

Kistrup M *et al.* *(2023) Straffeprocessen*. 4. Ed. Karnov Group.

Malik A (2023) Classification of the Israel-Palestine Conflict under the Laws of War. *Opinio Juris*. Available from: (URL). Accessed on 1 August 2024.

Neergaard U and Nielsen R (2024) *EU-ret*. 9. Ed. Karnov Group.

Sabel R (2022) *International Law and the Arab-Israeli Conflict*. Cambridge University Press.

Sassòli M (2023) Assessing the Conduct of Hostilities in Gaza – Difficulties and Possible Solutions. *Lieber Institute West Point: Articles of War*. Available from: (URL). Accessed on 28 May 2024.

Schmitt M N (2023) Israel – Hamas 2023 Symposium – The Legal Context of Operations Al-Aqsa Flood and Swords of Iron. *Lieber Institute West Point*. Available from: (URL). Accessed on 7 August 2024.

Shaw M N (2020) A State is a State is a State? Some Thoughts on the Prosecutor's Response to Amici Briefs on Territorial Jurisdiction – Part II. *EJIL:Talk!*. Available from: (URL). Accessed on 28 May 2024.

Shereshevsky Y (2024) Armed Conflict Classification in the ICC Prosecutor's Request for Arrest Warrants – Between International Humanitarian Law and International Criminal Law. *Just Security*. Available from: (URL). Accessed on 8 August 2024.

Tignino M and Kebebew T (2023) How does the classification of armed conflict impact the protection of freshwater in Gaza? *EJIL:Talk!*. Available from: (URL). Accessed on 1 August 2024.

Tvarnø C D and Nielsen R (2021) *Retskilder og retsteorier*. 6 Rev. Ed. Djøf Forlag.

Verbruggen F (2004) Bull's-eye? Two remarkable EU Framework Decisions in the Fight against Terrorism, in eds . Fijnaut C and Naert F *Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue*. Martinus Nijhoff Publisher.

Warbrick C (2006) States and Recognition in International Law, in ed. Evans M D *International Law* 2nd ed. Oxford University Press.

Other

Associated Press (2024) War rages on multiple fronts as Israel marks a year since Hamas' Oct. 7 attack. Available from: (URL). Accessed on 31 October 2024.

CNN (2024) Palestinian Observer to the UN Riyad Mansour. Available from: (URL). Accessed on 8 August 2024.

Diakonia International Humanitarian Law Centre When does IHL apply? Available from: (URL). Accessed on 8 August 2024.

European Council on Foreign Relations Mapping Palestinian Politics. Available from: (URL). Accessed on 8 August 2024.

European Parliament (2023a) Armed conflict: A glossary of terms. Available from: (URL). Accessed on 1 August 2024.

European Parliament (2023b) EU relations with the Palestinian Authority. Available from: (URL). Accessed on 8 August 2024.

ICC (2024b) *S*tatement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine. Available from: (URL). Accessed on 2 August 2024.

ICRC Armed groups. Available from: (URL). Accessed on 8 August 2024.

ICRC (2024a) Frequently asked questions on ICRC's work in Israel and the occupied territories. Available from: (URL). Accessed on 8 August 2024.

ICRC (2024b) How Is The Term Armed Conflict Defined in International Humanitarian Law?: International Committee of the Red Cross Opinion Paper 2024 Available from: (URL). Accessed on 8 August 2024.

ICRC Rule 4. Definition of Armed Forces. Available from: (URL). Accessed on 25 July 2024.

ICRC (2024c) What does the law say about the responsibilities of the Occupying Power in the occupied Palestinian territory? Available from: (URL). Accessed on 7 August 2024.

Robinson K (2024) Who Governs the Palestinians? *Council on Foreign Relations*. Available from: (URL). Accessed on 1 August 2024.

Sen S (2023) There is nothing surprising about Hamas's operation. *Al Jazeera*. Available from: (URL). Accessed on 28 May 2024.

Transparency International (2020) *Transparency International: Defence and Security*. Country Brief: Palestine 2020. Available from: (URL). Accessed on 1 August 2024.

UN (2011) Ban sends Palestinian application for UN membership to Security Council. Available from: (URL). Accessed on 12 July 2024.

UN (2024a) Palestine's current status. Available from: (URL). Accessed on 12 July 2024.

UN Permanent Observer Mission of the State of Palestine to the United Nations Office and other international organizations in Geneva. Available from: (URL). Accessed on 8 August 2024.

UN (2024b) Security Council Fails to Recommend Full United Nations Membership for State of Palestine, Owing to Veto Cast by United States. Available from: (URL). Accessed on 12 July 2024.

US Department of State (2021) Israel, West Bank and Gaza: West Bank and Gaza. Available from: (URL). Accessed on 8 August 2024.

Ørbæk K S (2024) Danish influencer found guilty of approving terror. *TV2.dk*. Available from: (URL). Accessed on 1 December 2024.