

**REPORT OF THE LEGAL REVIEW PANEL ON THE AMNESTY
INTERNATIONAL PRESS RELEASE CONCERNING UKRAINIAN FIGHTING
TACTICS OF 4 AUGUST 2022**

I. Summary of Findings

1. This is the report of the legal panel (the Panel) established by Amnesty International (AI) to review its press release “Ukraine: Ukrainian fighting tactics endanger civilians” (the Press Release or PR), published on 4 August 2022. The Panel’s members are Emanuela-Chiara Gillard (University of Oxford); Kevin Jon Heller (University of Copenhagen); Eric Talbot Jensen (Brigham Young University); Marko Milanovic (University of Reading); and Marco Sassòli (University of Geneva). The report represents the unanimous position of the Panel members, each of whom has substantial expertise in both the theory and practice of international humanitarian law (IHL). AI reviewed a draft version of the report; this final version, dated 2 February 2023, has taken into account comments by AI to the extent the Panel deemed appropriate. The Panel’s findings are meant to feed into a broader independent critical incident review commissioned by AI.

2. The Panel’s conclusions can be summarized as follows:

- i. IHL applies equally to all sides to an international armed conflict, including the party that is clearly the victim of aggression. It is entirely appropriate for a human rights organization to criticize violations of IHL by a state that is a victim of aggression, provided that there is sufficient evidence of such violations.
- ii. The principal factual finding of the PR that, in the various locations surveyed, Ukrainian armed forces placed themselves in civilian objects in the proximity of civilians who remained in these areas, including hospitals and abandoned schools, is reasonably substantiated by the evidence presented to the Panel.
- iii. The principal legal finding of the PR was that Ukrainian forces failed to take precautions to the maximum extent feasible to protect civilians in their areas of operation. This legal conclusion was based on related factual findings, primarily that alternative locations existed in which Ukrainian forces could have lodged soldiers that were equally militarily beneficial but were not as proximate to civilians. In the Panel’s view, the conclusion that Ukrainian forces failed to take precautions to the maximum extent feasible to protect civilians in their areas of operation was made in overly emphatic and categorical terms, particularly in light of the absence of information from Ukrainian officials concerning the possible reasons for the presence of Ukrainian troops. On the basis of the evidence it collected, AI would have been justified in concluding that Ukrainian forces *could* or *might* have violated IHL, but the Panel considers that the conclusion that they *did* violate IHL was too categorical.
- iv. The Panel finds that AI could reasonably substantiate its findings that Ukraine did not take specific efforts to evacuate civilians in the areas proximate to the buildings where Ukrainian forces were located. The Panel notes that this is a different issue from whether Ukrainian authorities engaged in evacuation efforts more generally.

- v. The Panel considers that AI lacked sufficient information to categorically conclude that evacuations were feasible in the circumstances and thus that Ukraine had violated its obligations under IHL. Such a finding should have been made in more conditional terms, such as that Ukrainian forces *could* or *might* have violated IHL.
- vi. The Panel finds that AI researchers reasonably substantiated their finding that Ukrainian armed forces did not issue specific warnings to civilians in the areas proximate to the buildings where Ukrainian armed forces were located.
- vii. The Panel notes that the duty of a defender to issue warnings is not expressly provided for by Article 58 AP I, in contrast to the express duty in this regard imposed on the attacker by Article 57(2)(c) AP I. That said, the Panel understands that AI takes a progressive approach to Article 58 AP I, interpreting it to specifically include a duty to warn in the general obligation to take other necessary precautions. If this approach is taken, AI's conclusions could be reasonable, at least in those situations in which the civilian population was genuinely unaware that they had been exposed to an elevated risk of attack by the adversary because defending forces were located nearby. The PR, however, should have stated more clearly that it was adopting a progressive interpretation of IHL.
- viii. Because IHL does not specifically require defending belligerents to issue such warnings, and in view of the limited information at its disposal concerning the feasibility of the warnings, the Panel finds that AI's conclusion that the Ukrainian armed forces violated their obligation to take passive precautions by failing to issue warnings was not sufficiently substantiated.
- ix. Because assessing the Ukrainian military's analysis of the "feasibility" of positioning its forces in alternative locations was so central to establishing a violation of IHL, AI should have attempted to engage more rigorously with Ukrainian authorities to obtain the relevant information. The Panel believes that such an attempt should have been made even though there were indications that such efforts would not have been fruitful. The same applies to assessing the feasibility of evacuations and of issuing warnings to civilians in the affected areas. Without attempts at such engagement, the Panel concludes that making findings of IHL violations in such categorical terms is difficult to justify, although they could have been made in more conditional terms.
- x. The legal and factual analysis in the PR was not sufficiently detailed and reasoned. In particular, the PR should have set out the elements of the rules of IHL that it believed Ukraine had violated and explained more systematically how, in AI's view, the relevant facts established each constituent element of the violation.
- xi. Parts of the overarching narrative presented in the PR were written in language that was ambiguous, imprecise, and in some respects legally questionable. This is particularly the case with the opening paragraphs, which could be read as implying – even though this was not AI's intention – that, on a systemic or general level, Ukrainian forces were primarily or equally to blame for the death of civilians resulting from attacks by Russia.
- xii. Many of the problems that the Panel identified with regard to the PR stem from the format of the publication, its very limited word count, and the legal analysis being insufficiently developed. The legal and factual questions addressed were of such

complexity that a more developed, cautious, and legally comprehensive analysis was necessary.

- xiii. Having interviewed nearly all of the AI staff involved in the preparation and internal review of the PR, the Panel is convinced of the integrity and good faith of the individuals concerned. That said, the Panel notes that serious reservations about the PR's analysis and conclusions and the sufficiency of consultations with Ukrainian officials – which largely mirror the Panel's own concerns – were expressed by some staff members at various stages, including the final stages, of the internal review process. These reservations should have led to greater reflection and pause within AI before the PR was published

II. Mandate

3. The Terms of Reference (ToR) provided by AI asked the Panel to address two interrelated questions:

- i. Did the legal analysis in the Press Release fall within “an acceptable range of interpretation” of IHL?
- ii. Was the evidence underlying the Press Release “sufficient to support the legal conclusions” that AI reached?

4. The ToR expressly excluded two issues: whether the PR communicated AI's legal conclusions effectively; and whether AI had given the Government of Ukraine sufficient time to respond to AI's allegations. This Report nevertheless partially addresses both issues, but only to the extent that the Panel found that it could not effectively review the legal conclusions in the PR without doing so.

5. AI provided the Panel with extensive email correspondence between AI staff members involved in drafting and reviewing the PR. That correspondence included successive drafts of the PR, which permitted the Panel to trace its evolution over time. AI also provided the Panel with internal documents prepared specifically for the present legal review that set out the confidential evidence on which the PR was based.

6. In addition to reviewing documents, the Panel also conducted extensive Teams interviews with nearly all of the AI staff members involved in drafting and reviewing the PR. Some of those staff members were supportive of the PR; others were highly critical of it. An AI representative was present during each interview but did not impose any limits on or attempt to shape the Panel's questions. The Panel also asked some AI staff members to provide additional information or answer follow-up questions in writing, which they did, and reinterviewed certain staff members.

7. The Panel is generally satisfied with AI's efforts to facilitate its review of the PR. The Panel notes, however, that it cannot be certain it was provided all relevant email correspondence (although it has no reason to believe that AI was not fully forthcoming with relevant information); nor, importantly, can it assess the reliability of the evidence provided by AI in support of its conclusions. In other words, the Panel was not in the position to independently verify the facts established by AI researchers on the ground. Rather, the Panel assessed whether the evidence presented by AI researchers, such as photographs of buildings and ordinance

impact sites, including the researchers' testimony as to facts they had personally witnessed, could reasonably lead AI to the factual findings presented in the PR.

III. Relationship Between the Prohibition of the Use of Force in the UN Charter and IHL

8. In the Panel's assessment, much of the criticism of the PR among the general public in Ukraine, the rest of Europe, and North America was due not to doubts about the accuracy of the factual findings or their legal evaluation but instead arose because the PR criticized the conduct of Ukrainian forces who were defending their country. More subtly, the PR may have been perceived as denying Ukraine the ability to defend itself. The Panel, however, does not consider that the PR did so.

9. In the relevant phase of the international armed conflict, Ukrainian forces were not only "defenders" in the sense of implementing Ukraine's right to self-defence against an armed attack under the UN Charter. They were also "defenders" in the sense of IHL, in that they and the civilian population under their control were subject to offensive acts of violence by Russia. Those two meanings of "defender" do not always coincide. However, in the events covered by the PR, Ukrainian forces were defenders for the purpose of both bodies of law. The fact that even a defender in the sense of IHL has obligations to protect the civilian population under its control is the basis of the PR and will be explained and discussed below. Here we explain why even Ukraine, as a victim of an armed attack violating the UN Charter, has IHL obligations and may and must be criticized if it violates them.

10. The outcry against any criticism of Ukraine for violating IHL simply because it is the victim of an armed attack is legally and morally unjustified. Both Russia and Ukraine must comply with the same rules of IHL. This total separation between the law prohibiting the use of force in international relations, traditionally referred to as *jus ad bellum*, and IHL, which is part of what was traditionally referred to as *jus in bello*, the law applicable in war, is essential for the effectiveness of IHL. This is because all belligerents claim that they are fighting for a just cause and most of those who fight believe that their cause is just and their adversary's cause unjust.

11. While the Panel has no doubt in this case that Ukraine is the victim of Russian aggression, the application of IHL does not depend on such considerations even in the clearest of cases, if for no other reason than because most other cases are not as clear. If the rules governing the conduct of those fighting to defend their country against an armed attack were less restrictive, parties would never agree who must comply with which rules during an armed conflict, even though IHL is meant to have its protective effect precisely in such circumstances. Furthermore, humanitarian reasons for the separation of the two bodies of law are even more compelling. People affected by armed conflict, such as civilians and prisoners of war, need as much protection from the conduct of a party that has unlawfully resorted to armed force as from the party that is defending itself from such use of force. They are not responsible for the fact that "their" State has violated the UN Charter, and they require the same protection as well as assistance regardless of whether they are on the "right" or the "wrong" side of the conflict.

12. The total separation between the prohibition of the use of force and IHL applicable to any use of force has been recognized in judicial decisions since the Nuremberg trials and in the preamble to Additional Protocol I (AP I), and results in the equality of belligerents under IHL. This equal application of IHL to both belligerents may be particularly difficult to accept in the current situation, where Russia is the aggressor and thus responsible for all of the human suffering in Ukraine, whether or not that suffering results from violations of IHL and even

when it is directly caused by Ukraine, because none of that suffering would have occurred if Ukraine was not forced to defend itself against the Russian invasion. The principle of equal application of IHL, however, still remains valid. Were a Ukrainian soldier to deliberately kill a civilian or torture a prisoner of war, the violation of IHL would be no less legally and morally compelling than if the same conduct had been that of a Russian soldier.

13. The equal application of IHL to Russia and Ukraine means that a human rights organization like AI may and must criticise IHL violations by both sides impartially. It does not mean, however, that both sides may or must be criticized to the same degree if one commits more serious and systematic violations. Nor does it mean that AI had to address violations by both sides in each of its reports or public statements. Indeed, technically, it does not even mean that when dealing with a specific issue – in the case of the PR, co-location of military forces and civilians that endangered the latter – AI had to analyse violations of pertinent IHL rules by both sides in the same statement, although this might have been a good idea in terms of public perception.

14. Therefore, had AI assembled sufficient evidence of violations by Ukrainian forces of the duty under IHL to take precautions, AI would have been fully justified in publishing the PR despite the fact that Ukrainian forces were fighting to defend their country. The Panel nevertheless considers that AI did not adequately explain and justify the equal application of IHL to both parties. The PR only mentioned in that regard that “[b]eing in a defensive position does not exempt the Ukrainian military from respecting international humanitarian law.” This statement is correct but ambiguous, because it could refer either to the equal application of IHL to both sides, the aggressor and the victim of aggression, or to the fact that the “defender” in the IHL sense also has obligations concerning the protection of the civilian population under its control. In any case, the PR simply did not explain, to a lay audience, why there is and must be a wall of separation between IHL and the prohibition of the use of force between States.

15. The PR repeatedly mentions Russian violations. It also concludes that they cannot be justified by the Ukrainian violations it criticizes. AI has furthermore published several reports and press releases dealing exclusively with Russian violations in this armed conflict. Nevertheless, it might have been preferable to stress in this PR that the Russian violations were more serious and widespread than Ukrainian violations and to deal with instances of violations of the obligation to take passive precautions by both sides.

16. In conclusion, it was and remains proper for a human rights organization such as AI to look into Ukrainian violations of IHL, even if Ukraine is defending itself against an armed attack. This is an important message for the effectiveness of IHL. This should have been better explained, however, and for public perception reasons the more serious and widespread character of the violations of IHL by Russia should have been mentioned.

IV. Applicable Law

17. The conflict between Russia and Ukraine is international in nature. Consequently, as a matter of IHL, it is regulated by the rules applicable in international armed conflicts. Ukraine and Russia have both ratified the four Geneva Conventions of 1949 (GCs) and Additional Protocol I (AP I).

18. Two rules are of particular relevance to the issues addressed in the PR. The first and foremost concerns passive precautions – also referred to as precautions in defence. These are set out in Article 58 AP I, which provides:

The Parties to the conflict shall, to the maximum extent feasible:

(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;

(b) avoid locating military objectives within or near densely populated areas;

(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

19. The wording of Article 58 AP I clearly indicates that the obligations of defenders are less onerous than those of attackers set out in Article 57 AP I, which requires attackers to take “all feasible measures.” The measures set out in Article 58 must only be taken “to the maximum extent feasible,” and the defender is only required to “endeavour to remove” the civilian population and objects from the vicinity of military objectives. That said, in AI’s view, which the Panel considers reasonable, the overarching obligation in Article 57(1) AP I that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians, and civilian objects” applies to both the attacker and the defender.

20. The second relevant rule is the prohibition of the use of human shields. This is set out in Article 51(7) AP I in the following way:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

21. Intermingling combatants with civilians with the intent to avoid an attack directed against the former thus constitutes a use of human shields, which is absolutely prohibited by Article 51(7) AP I. By contrast, establishing a failure to take passive precautions to the maximum extent feasible does not require or imply the existence of any intent to engage in shielding.

V. Failure to Take Feasible Precautions: Co-Location

22. The PR begins by claiming that “Ukrainian forces have put civilians in harm’s way” and that “[s]uch tactics violate international humanitarian law.” Such strong claims can primarily be based on two potential legal provisions – the prohibition on the use of human shields, and the requirement for defending militaries to adopt precautions to the maximum extent feasible in protecting civilians and civilian objects under their control.

23. The PR does not allege that Ukraine intentionally used human shields in its operations. Rather the PR contends that the Ukrainian military did not sufficiently comply with its legal obligation as the defending force to adopt passive precautions for civilians and civilian objects.

24. This is made clear in the “launching strikes” section of the PR, where AI identifies the applicable legal standard, which is clearly based on Article 58 AP I, in the following way:

[i]nternational humanitarian law requires all parties to a conflict to avoid locating, to the maximum extent feasible, military objectives within or near densely populated areas. Other obligations to protect civilians from the effects of attacks include removing civilians from the vicinity of military objectives and giving effective warning of attacks that may affect the civilian population.

25. As noted by AI, the legal standard for passive precautions is “to the maximum extent feasible.” Therefore, the key legal question in assessing Ukrainian compliance with Article 58 AP I, and thus to assess the validity of AI’s claims that Ukraine was “violat[ing] international humanitarian law,” is whether the Ukrainian military took “feasible” precautions to segregate its operations from the civilians and civilian objects or, if unable to segregate, took other feasible precautions to protect the civilians and civilian objects intermixed with Ukrainian military forces.

26. It is clear from the information gathered by AI researchers on the ground that Ukraine located its military forces in the vicinity of Ukrainian civilians and civilian objects. The researchers documented at least 42 specific instances in 19 towns and villages where soldiers were operating in the vicinity of civilians, including 22 incidents involving schools, six involving hospitals, and the rest involving other types of civilian buildings. These incidents included a range of activities, from sleeping and eating to conducting command and control operations to firing weapons systems. In several of these cases, AI determined that attacks by Russian forces that appeared to be targeting the Ukrainian military resulted in death or injury to civilians and damage to civilian objects.

27. AI researchers also made the factual determination that there were alternate sites available to the military that would likely have presented less risk to civilians and civilian objects. In the words of the PR:

[m]ost residential areas where soldiers located themselves were kilometres away from front lines. Viable alternatives were available that would not endanger civilians – such as military bases or densely wooded areas nearby, or other structures further away from residential areas.

The fact that alternative sites were available in many of the situations reviewed was not contested even by those within AI who thought that the legal conclusion that feasible precautions had not been taken was insufficiently substantiated by the available evidence.

28. Even accepting that other locations existed from which Ukrainian forces could have operated, the Panel believes AI could still not *definitively* conclude that, as a matter of law, the Ukrainian military had failed to take precautions to the maximum extent feasible. While the PR and the supporting data reviewed by this Panel indicate that the researchers did consider feasibility in their work, the only evidence that Ukrainian forces could have located in other, equally beneficial places more removed from civilians is the opinion of the researchers

themselves. Amnesty did not have information from the Ukrainian military concerning why its forces located in the positions that they did. (See Part VI below.) Nor did the PR itself consider any potential justifications for the positioning of Ukrainian forces.

29. In the Panel's view, there are a number of potential military considerations that might have supported an assessment by Ukrainian forces that alternative positioning was not feasible. To be clear, the Panel does not know whether Ukrainian forces conducted any kind of feasibility assessment or, if they did, what factors they took (or did not take) into account. Rather, the Panel's view is that AI researchers could not have made definitive judgments about feasibility without attempting to obtain information from Ukrainian authorities. Such considerations might have included, *inter alia*, the need to position artillery in a specific location to facilitate a necessary angle of attack on Russian forces; establishing positions that facilitated line of sight connectivity for radar or other communication capabilities or for monitoring enemy positions or forces; or gaining access to certain infrastructure such as power or lines of communication necessary to facilitate military operations. Similarly, the operational needs of military units might have required them to billet in a sheltered place with electricity, access to sanitation and potable water, and easy access to roads. According to AI, its researchers did take at least some of these considerations into account. However, there is no reference to them in the PR or in any other piece of written analysis.

30. Without considering potential justifications for positioning of military forces, and without better understanding and knowledge of whether Ukrainian forces attempted to segregate and protect the civilians in the areas AI examined (as discussed below), it was not possible for AI to definitively conclude that the Ukrainian military failed to meet its Article 58 AP I obligations. Indeed, a number of AI staff involved in preparing and reviewing the PR made precisely this point to the Panel.

31. AI appears to have based its conclusion regarding feasible precautions on its determination that many of locations it analysed "were kilometres away from front lines" and were thus not locations of urban warfare. In other words, armed forces were not, in these specific localities, engaged in urban warfare attempting to gain control over particular individual buildings. Therefore, in AI's view, Ukrainian troops could move within each locality concerned to unoccupied buildings and military bases, separated from civilians. As explained by some researchers, there were typically multiple areas within each locality with unoccupied buildings. In the Panel's view, AI's determination failed to account for the actual context of the conflict, in which the "front lines" were often neither narrow nor static due to modern weapon systems with extended reach and high mobility.

32. For all these reasons, the Panel finds that the PR's insistence that Ukraine had violated its obligations to take passive precautions was too emphatic. Without input and insight from the Ukrainian military concerning whether its troops assessed the feasibility of locating elsewhere and if so, what its feasibility assessments were, AI's legal conclusions should have been caveated appropriately – a conclusion echoed by some AI staff prior to the publication of the PR. At the very least, given the lack of input from the Ukrainian military, AI should have used more cautious language in the PR, such as noting that Ukraine *could* or *might* have violated its obligations under Article 58 AP I and calling for greater scrutiny of the Ukrainian military's decisions concerning where to locate its forces.

VI. Failure to Take Feasible Precautions to the Maximum Extent Feasible: Evacuations and Warnings

33. As explained above, Article 58 AP I provides for two specific types of precautions in subparagraphs (a) and (b), as well as for a more general, open-ended obligation to take other “necessary precautions” to protect civilians and civilian objects against the dangers arising from military operations in sub-paragraph (c). All these precautions are to be taken “to the maximum extent feasible.”

34. In addition to concluding that Ukrainian forces failed to avoid locating military objectives within or near densely populated areas as required by Article 58(b) AP I, the PR also says that Ukraine failed to take two other possible precautionary measures – evacuations of civilians, specifically provided for in Article 58(a) AP I, and issuing warnings to civilians, which AI presumably thought were covered by the general duty in Article 58(c) AP I, coupled with the duty to take “constant care” under Article 57 AP I.

A. Evacuations

35. With regard to evacuations, the PR states that:

in the cases it documented, Amnesty International is not aware that the Ukrainian military who located themselves in civilian structures in residential areas asked or assisted civilians to evacuate nearby buildings – a failure to take all feasible precautions to protect civilians.

36. The PR makes a similar point when discussing the use of schools.

37. While it was appropriate to refer to the possibility of evacuations, the Panel believes that AI framed the nature of Ukraine’s obligations too categorically. Belligerents are not under an absolute obligation to evacuate civilians. Instead, they should “endeavour” to do so. Like other passive precautions, evacuations are to be undertaken “to the maximum extent feasible.”

38. In determining what is “feasible” in a particular situation, consideration must be given to what is practicable or practically possible, taking into account all of the circumstances existing at the time, including humanitarian and military considerations. Although the Panel acknowledges that some AI researchers believe they sufficiently considered feasibility, it nevertheless finds that AI did not sufficiently consider this aspect of the rule, particularly the relevance of input from the Ukrainian military.

39. As far as the facts are concerned, the PR states that AI was “not aware” of whether members of the Ukrainian armed forces asked or assisted civilians to evacuate. The Panel understands the reference in the PR to Ukraine’s alleged failure to evacuate civilians as encompassing only those civilians who remained in the vicinity of Ukrainian forces in the specific locations that AI had visited. Throughout the conflict Ukraine has engaged in numerous, well-documented efforts to evacuate parts of its civilian population to safer locations to protect them from Russian attacks, and this is not something contested by the PR. The PR claims, however, that in the specific locations visited by its researchers, where Ukrainian forces were present, sufficient evacuation measures had not been taken.

40. The materials made available to the Panel and the interviews it conducted indicate that AI could reasonably substantiate its findings that Ukraine did not take specific efforts to evacuate civilians in the areas proximate to the buildings where Ukrainian forces were located.

41. This said, from a legal perspective, absent engagement on this specific issue with the Ukrainian armed forces, AI could not have definitively concluded that evacuations would have been feasible from a military or, indeed, a humanitarian perspective. An exchange on this issue would have indicated whether evacuating civilians from the buildings in question could have been feasible from a military perspective in the circumstances ruling at the time. Moreover, and very significantly, evacuations might not have been feasible or advisable from a humanitarian perspective. There is no indication of what alternative arrangements for civilians existed or whether forcing them to leave their homes might not have put them in an even more vulnerable situation. There is also no indication in the record of what the specific civilians concerned actually wanted, in particular whether they wanted to leave their homes.

42. In view of the limited information at its disposal, the Panel finds that AI's conclusion that Ukrainian forces violated their obligation to take passive precautions by failing to evacuate civilians was not sufficiently substantiated. However, AI did collect sufficient information to warrant a more cautious conclusion that concerns existed concerning whether Ukraine was complying with its duty to take precautions to the maximum extent feasible.

B. Warnings

43. Article 57(2)(c) AP I on precautions in *attack* specifically requires belligerents to give effective warning of attacks that may affect the civilian population, unless circumstances do not permit.

44. Warnings are not, however, specifically referred to in Article 58 AP I on precautions in defence. There is no specific obligation to issue warnings. This said, warnings could clearly constitute one of the unspecified "other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations" referred to in Article 58(c) AP I.

45. With regard to warnings, the PR states that:

[i]nternational humanitarian law requires all parties to a conflict to avoid locating, to the maximum extent feasible, military objectives within or near densely populated areas. Other obligations to protect civilians from the effects of attacks include removing civilians from the vicinity of military objectives *and giving effective warning of attacks that may affect the civilian population* (emphasis added).

46. While warnings could be a valuable precaution in defence, defending belligerents are not specifically required to issue such warnings. In other words, there is no express duty on the defender to warn civilians under its control of possible future offensive actions by the attacker. Had AI intended to put forward a progressive interpretation of Article 58(c) AP I that *required* warnings to be issued in some circumstances, the PR should have stated this more clearly.

47. Furthermore, in the discussion of the presence of Ukrainian forces in educational establishments, the PR notes:

[i]nternational humanitarian law does not specifically ban parties to a conflict from basing themselves in schools that are not in session. However, militaries have an obligation to avoid using schools that are near houses or apartment buildings full of civilians, putting these lives at risk, unless there is a compelling military need. If they do so, they should warn civilians and, if necessary, help them evacuate. This did not appear to have happened in the cases examined by Amnesty International.

48. It is beyond dispute that Ukrainian authorities do generally warn civilians of impending attacks by the Russian armed forces, such as missile strikes. The PR claims, however, that in the particular locations visited, where Ukrainian forces operated close to civilians, Ukrainian forces had the precautionary duty to warn these specific civilians about their presence and operations in the area and that this might expose them to Russian attacks.

49. As explained above, such a duty is not expressly provided for by Article 58 AP I. That said, pursuant to a progressive interpretation of Article 58(c), a duty to warn could be implied in the general obligation to take other necessary precautions, and in the Panel's view AI's interpretation could be reasonable, at least for those situations in which the civilian population is genuinely unaware that they are exposed to an elevated risk of attack by the adversary because defending forces are nearby. Even if such a duty was appropriate in a specific context, though, it would still be subject to feasibility. There are many possible military reasons why such specific warnings could not feasibly be given, for example because the defending forces were concerned that civilians might deliberately or unwittingly disclose the location of the military forces and expose them to targeting by posting on (say) social media.

50. The materials made available to the Panel and the interviews it conducted indicate that AI researchers reasonably substantiated their finding that Ukrainian armed forces did not issue specific warnings to civilians in the areas proximate to the buildings where Ukrainian forces were located.

51. This said, the Panel notes that, as a matter of law, the PR did not include an assessment of whether Ukrainian forces failed to issue such warnings because doing so was not feasible in the circumstances. In evaluating the internal materials that it was provided and having conducted interviews with AI staff involved in the internal discussions on this issue, the Panel finds that AI did not sufficiently consider whether issuing such warnings was feasible in the specific circumstances, particularly in light of the military considerations that might have made such warnings not feasible. Because IHL does not specifically require defending belligerents to issue such warnings, and in view of the limited information at its disposal, AI's conclusion that the Ukrainian armed forces violated their obligation to take passive precautions by failing to issue warnings was not sufficiently substantiated.

VII. Hospitals and Schools

52. The PR singles out two categories of buildings among those in or near which Ukrainian soldiers were co-located with civilians: hospitals and schools.

A. Hospitals

53. A section of the PR is entitled "Military bases in hospitals." In this section, AI reports that its researchers witnessed Ukrainian forces using hospitals as "de facto military bases" in five

locations. In two towns, dozens of soldiers were resting, milling about, and eating meals in hospitals. In another town, soldiers were firing from near the hospital.

54. Four cases of soldiers and military material present in hospitals have indeed been well documented. According to the ICRC Commentaries to GC I and IV, merely sheltering able-bodied combatants constitutes an “act harmful to the enemy” that may lead to a loss of the special protection from which hospitals benefit under IHL. Such special protection implies, *inter alia*, that hospitals may be targeted only if they are used to commit hostile acts outside their humanitarian duties. Even in such cases, targeting is permissible only once a due warning giving a reasonable time limit for ending such conduct has been given and gone unheeded (Article 19 GC IV).

55. The Panel considers that, although particularly concerning from a humanitarian point of view, such co-location does not raise different legal problems under IHL than the other cases of co-location.

56. The special protection of hospitals and the rule on the consequences of using a hospital for acts harmful to the enemy concern the attacker; they do not explicitly prohibit such conduct by the defender. Concerning the obligations of the defender, which AI considers to be “clearly” violated, Article 12(4) AP I states: “Under no circumstances shall medical units be used in an attempt to shield military objectives from attack.” AI does not claim in the PR that Ukrainian forces had this intent necessary for shielding. Beyond this absolute prohibition, the prohibition of co-location of forces and medical establishments is subject to feasibility. Article 12(4) AP I goes on to require that “[w]henver possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.” The wording of Article 18(5) GC IV is even weaker: “In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.” Mere presence of members of the armed forces in medical establishments does not violate these rules.

57. Nevertheless, AI would have been justified in arguing that any co-location by the defender violates the obligation of all parties to protect medical units, foreseen in Article 18(1) GC IV, Article 12(1) AP I, and Rule 28 of the ICRC Customary Law Study. The commentary to Rule 28 states that “[s]ome military manuals stipulate that medical units may not be used for military purposes or to commit acts harmful to the enemy. Other manuals consider that the improper use of privileged buildings for military purposes is a war crime.” Such practice must also be taken into account in the interpretation of the treaty rules requiring parties to protect hospitals, which concern both enemy hospitals and a party’s own hospitals. It seems logical that if certain conduct may lead to the loss of protection of hospitals from attacks and a defending party has an obligation to protect hospitals, it may not engage in co-location itself.

58. AI’s interpretation that a defender violates IHL if it uses or endangers hospitals for military purposes is reasonable. However, the Panel believes that AI should have explained why the Ukrainian conduct “clearly” violated IHL and why the PR quotes its Secretary-General concluding so categorically that “the military should never use hospitals to engage in warfare.” This could refer to the intentional use of hospitals as shields to protect combatants and military objectives, but AI does not claim, let alone substantiate, that Ukrainian forces had this intent. Alternatively, AI should either have explained why it considered *any* presence of soldiers in or near hospitals to be unlawful or should simply have treated those cases in the same manner as other cases of co-location.

B. Schools

59. Another section of the PR is entitled “Military bases in schools.” The term “military base” is again used to cover any military presence, such as lodging and staging in or near schools. The PR asserts that Ukrainian forces “routinely” set up bases in schools in the Donbas and the Mykolaiv area. It mentions that 22 of the 29 schools visited by researchers were used by the military, although nothing indicates that the 29 were a representative sample of the presumably thousands of schools in the areas concerned. It must be presumed that AI researchers visited those schools situated in or near places destroyed by Russian attacks while they were researching Russian violations. In these circumstances the Panel considers it doubtful that the allegation of routine use of schools was justified.

60. IHL treaty law does not offer special protection to educational facilities, nor does it prohibit a defender from using school buildings for defence purposes. But if the defender does so, the buildings become military objectives. Moreover, Ukraine is among the 114 States that have accepted the Safe Schools Declaration, an inter-governmental political commitment to protect education during armed conflict. The Declaration includes Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict, which are not legally binding but are considered as a “guide to responsible practice.” Under Guideline 2, even abandoned schools

should not be used by the fighting forces of parties to armed conflict for any purpose in support of their military effort, except in extenuating circumstances when they are presented with no viable alternative, and only for as long as no choice is possible between such use of the school [...] and another feasible method for obtaining a similar military advantage. Other buildings should be regarded as better options and used in preference to school [...] buildings, even if they are not so conveniently placed or configured.

61. The PR mentions this Guideline, summarizing it reasonably as allowing “parties to make use of abandoned or evacuated schools only where there is no viable alternative.” Nevertheless, AI does not state – although the full PR can be perceived as implying – that Ukraine violated this Guideline or other parts of the Guidelines. Rather, the PR focuses on the military use of schools near houses and apartment buildings full of civilians, stating that militaries have an obligation to avoid such use “unless there is a compelling military need.” Although this language does not track Article 58 AP I, and arguably imposes a higher standard than the obligation to take precautions “to the maximum extent feasible,” the obligation referred to by AI can only be the one provided for in Article 58.

62. In conclusion, when criticizing violations by Ukraine, the PR does not treat schools differently than any other military use of objects situated in or near concentrations of civilians. It simply mentions non-binding rules providing further protection while not arguing that they were violated. The separate section of the PR on schools nevertheless gives the impression that the use of schools is a special case, which is legally incorrect for the conduct qualified by AI as IHL “violations” but might have been justified by the effect of destroying schools on the future right of education. The section of the PR dealing with schools is ambiguous on whether schools are a special case in any sense relevant to the PR. The Panel’s general conclusion about co-location and feasibility (Part V above) equally apply here.

VIII. Engagement with Ukrainian Authorities

63. The Panel considered AI's efforts to engage with Ukrainian authorities at two key junctures: during the researchers' fact-finding activities, and before the publication of the PR in the form of a "right to reply" to the findings.

64. The Panel finds that AI failed to meaningfully engage with Ukrainian authorities at both junctures, and especially at the fact-finding stage. This deprived it of the opportunity to gather information that would have provided a stronger basis for its findings. The Panel also finds that in view of the absence of information from the Ukrainian authorities on why members of the armed forces were positioned in civilian areas, the conclusion in the PR that the Ukrainian armed forces had categorically violated the obligation to take passive precautions is insufficiently substantiated. AI would, however, have been justified in concluding that Ukrainian forces could or might have violated IHL even without further potential input from Ukrainian authorities.

A. Engagement During Fact-Finding

65. The occurrence of certain kinds of IHL violations can be established solely by considering the effects of particular conduct, without any further information. This is the case, for example, for torture or the use of prohibited weapons. With regard to these types of violations, there is no need for a human rights organization such as AI to attempt to engage with the responsible party.

66. The position is different, however, with regard to a number of rules regulating the conduct of hostilities. The existence of harm or damage does not automatically mean that a violation of IHL has occurred. It is also necessary to understand why particular acts were carried out. For example, damage to a civilian building does not necessarily mean that it was attacked unlawfully. The building could have been used for military purposes and thus become a military objective. In the Panel's view, in order to determine whether a violation has occurred in such circumstances, attempts should be made to engage with the armed forces responsible for the damage to understand how they justify the attack. The position of the armed forces will not be conclusive, but in principle engaging with the armed forces is key to obtaining information necessary to adequately assess their compliance with IHL. Without information from the armed forces, it is impossible to categorically determine that a violation of the rules governing the conduct of hostilities has occurred unless there are other clear indications based on patterns of conduct or other circumstantial evidence.

67. The rules on passive precautions require similar engagement. As outlined above, they are not absolute obligations, but instead require belligerents to take precautions "to the maximum extent feasible." Feasibility is understood as referring to what is practicable or practically possible, taking into account all of the circumstances ruling at the time, including humanitarian and military considerations.

68. Human rights researchers can witness the presence of armed forces in civilian areas, but they are unlikely to know from their observations alone what military considerations underlay such presence. Civilians interviewed by the researchers will also not have the relevant information. Engaging with armed forces is thus crucial for understanding what particular military considerations led them to take a particular course of action. AI researchers informed the Panel that in some of the instances reported in the PR they had attempted to speak to the

members of the armed forces but were waved away, at times quite aggressively. On other occasions they did not consider it safe to attempt to engage. This is understandable.

69. Nevertheless, the Panel considers that other options existed for engaging with the armed forces. Rather than attempting to speak to the soldiers on the ground directly involved in the operations, more efforts should have been made to reach out to their hierarchy in the military at sub-regional, regional, or national level, or to engage in dialogue with the Ministry of Defence or other relevant civilian authorities while the PR was being elaborated. No such engagement was attempted; rather, engagement was solely confined to the right to reply process. In the Panel's assessment, in a situation like the one under review, it is appropriate for a human rights organization to attempt to have informal meetings or other types of exchanges of views with relevant state authorities, even if the organization assesses *ex ante* that it is unlikely that such forms of engagement will be fruitful.

70. The Panel is aware that it is not the general practice of AI or other human rights organizations to attempt such engagement with the armed forces when documenting violations of IHL in armed conflicts. But other organizations, such as the ICRC, do successfully engage with the armed forces directly, and that experience is instructive even if the nature of the organizations in question is very different. The Panel has no wish to be prescriptive and set out for AI or any other organization that assesses compliance with IHL conduct of hostilities rules how such engagement should take place. This will clearly vary greatly from context to context. The Panel only notes that such engagement cannot be confined solely to an adversarial "right of reply" procedure. In the absence of any further engagement with Ukraine, AI's assessment of whether precautions had been taken to the maximum extent feasible was based on incomplete information. It was inappropriate, therefore, for AI to conclude *categorically* that IHL had been violated, although as the Panel already noted above, the information gathered would have justified a conclusion in more cautious or caveated terms.

B. Right of Reply

71. The PR states that its findings were communicated to the Ukrainian Ministry of Defence on 27 July 2022 – eight days before its publication – but that no response was received.

72. The desk review of emails and interviews provided the Panel with more information on the precise events. The PR was shared on 27 July 2022, and the Ministry was asked to reply by 3 August 2022. On 3 August, the Director of the Ukrainian Section of AI was in contact with an individual who had acted as a liaison or informal advisor with the Ministry. As stated in the contemporaneous written communication from AI Ukraine reporting on this conversation, the Director was informed orally that the Ministry had "decided not to provide" AI with an answer "before tomorrow[']s] publication due to overwork with the Olenivka case and other issues." The decision was made to release the PR on the planned date.

73. Relevant AI staff explained to the Panel why AI did not give the Ukrainian Ministry of Defence more time to reply. In particular, AI did not expect a reply even if more time was given because states generally fail to reply. With regard to Ukraine more specifically, AI also noted that Ukraine had already failed to reply to a 6 May pre-publication right of reply communication from HRW on similar concerns, more than two months before HRW published its press release on 21 July. In view of this, AI concluded that it was unlikely Ukraine would reply even if given more time.

74. The Panel is not in a position to assess whether the Ministry of Defence would have replied had it been given more time. However, it finds that AI relied too much on HRW's experience in deciding not to grant more time, even if such reliance on the experience of other organizations in the field is reasonable in principle. A failure to respond to one human rights organization does not necessarily indicate a general unwillingness of a state to respond.

75. Interviewees also noted that there was no particular urgency in publishing the PR. On the key point of co-location of Ukrainian armed forces and civilians, the PR did not contain allegations that had not been made before. HRW had already made such determinations in its 21 July 2022 report, and some of the issues had also been reported in the media.

76. Recognising that there was no guarantee that the Ukraine Ministry of Defence would have responded, the Panel nonetheless considers that by issuing the PR without having made more efforts to obtain feedback, AI deprived itself of the possibility to obtain information on the military and other considerations that underlay the conduct of the Ukrainian armed forces it was criticising. Had feedback been provided, it could have been an opportunity to gather the information that AI researchers had not obtained during the fact-finding part of the exercise. The Panel was not asked to determine whether the Ukrainian government should have been given more time to respond to the right to reply communication. Nevertheless, the decision to not wait for the reply should have led AI to adopt more caveated and cautious language in its findings.

IX. Format of the Press Release

77. According to the Panel's interviews with the AI staff involved, it was decided fairly early on that the outcome of the research on Ukraine's failure to take passive precautions would be published in the format of an extended press release, rather than as a full report or a briefing paper. AI practice is that such press releases have a strict word count of 1700 words; this meant that in the quality-assurance process for finalisation any additions to the evolving draft required corresponding deletions of existing text. The word limit is designed to make press releases accessible to the general public and more easily digestible for the press.

78. In the specific case of the PR, the decision to publish an extended press release rather than a full report was made on the basis of the need to make a speedy impact, coupled with the fact that preparing a full report required a substantial amount of additional work at a time when the AI researchers involved already had other assignments. A further key consideration for AI, one that helps explain the lack of specific detail in the PR if not the format as such, was to avoid providing Russia with information that could be used against Ukrainian forces on the ground.

79. The Panel established that there was no confidential internal document or memorandum with a more detailed legal and factual analysis of Ukraine's alleged failure to take passive precautions that could have been used to draft the PR. The only piece of written analysis was the PR itself, whose evolving drafts were discussed in several email chains and meetings of AI staff involved. While a rough initial draft of the PR was prepared by AI field researchers, all subsequent drafts were written by a staff member tasked with communications, with very little input from the legal adviser. The Panel also noted that there was no existing internal reference document that laid out the legal definitions and standards for violations of Article 58 AP I, which could have helped the researchers conduct their research and analysis.

80. The Panel agrees that in some situations it is perfectly reasonable for AI to publish a press release only. This will especially be the case when the facts and the law regarding a particular issue are straightforward, or when the violation in question of IHL or human rights is part of a previously documented pattern of behaviour. For example, publishing AI's findings about the torture or summary executions of prisoners would generally not require an extensive document or an elaborate legal analysis.

81. The situation under review, however, was not one where either the facts or the law was straightforward. On the contrary, the legal and factual issues here were complex and required extensive analysis. This is especially the case because most organizations, including AI, have limited experience in analysing passive precautions in a conflict between two peer states with similar levels of capability and with massive ongoing military operations involving large numbers of troops over vast areas.

82. As published, the PR does not provide a satisfactory legal and factual analysis in several respects. It generally does not cite specific provisions of the relevant treaties or other sources of IHL, although this is not something that can generally be expected in a press release as opposed to a more detailed report. On several occasions it articulates various rules of IHL without citing the source and without interpreting and explaining the constituent elements of the relevant rule. The PR frequently employs loose, varying, non-technical, and non-legal language open to misunderstanding ("de facto military bases," "turn civilian objects into military targets," "retaliatory fire," "compelling military need," "Russia had committed war crimes" (as opposed to individual members of Russian armed forces committing war crimes).

83. Most problematically, the PR does not contain sufficient detail about the specific episodes being discussed. While, as explained above, the PR documents the co-location of Ukrainian forces with civilians in a number of instances, this is in and of itself insufficient to establish Ukraine's failure to take passive precautions to the maximum extent feasible. In particular, the PR does not contain an in-depth analysis of even a select few illustrative examples that would demonstrate how Ukrainian forces had at their disposal alternative locations that would have been equally beneficial while not as proximate to civilians. A more detailed presentation of the context in which the armed forces operated and the appropriateness of specific alternatives AI researchers believed were feasible would have greatly strengthened the PR's overall argument. According to AI staff interviewed by the Panel, the lack of detail in the PR was due to the need to avoid providing information about Ukrainian forces that Russia could subsequently use, for example for targeting purposes. The Panel did not find that explanation to be entirely persuasive. In particular, it was certainly possible to provide more substantiation of the feasibility of precautions without divulging information compromising to Ukraine, such as the GPS coordinates of specific buildings.

85. The Panel also finds that the internal legal review of the PR was insufficiently rigorous. The final product, largely drafted by an AI staff member tasked with communications and with input from other staff, was written in a tone and style that maximized public attention and impact at the cost of legal and factual precision.

X. Issues with the Overarching Narrative

86. The Panel also considers the overarching narrative developed in the initial paragraphs of the PR to be problematic:

Such tactics violate international humanitarian law and endanger civilians, as they turn civilian objects into military targets. The ensuing Russian strikes in populated areas have killed civilians and destroyed civilian infrastructure.

We have documented a pattern of Ukrainian forces putting civilians at risk and violating the laws of war when they operate in populated areas...

Not every Russian attack documented by Amnesty International followed this pattern, however. In certain other locations in which Amnesty International concluded that Russia had committed war crimes, including in some areas of the city of Kharkiv, the organization did not find evidence of Ukrainian forces located in the civilian areas unlawfully targeted by the Russian military.

87. The overarching narrative that a reasonable reader could draw from these paragraphs is that *generally*, in the war in Ukraine taken as a whole, Ukraine placed its armed forces in the vicinity of civilians, and that *generally* Russia struck these Ukrainian military objectives and only *incidentally* harmed Ukrainian civilians and civilian objects *because* of their co-location with Ukrainian forces. This implication partly stems from the use of the word “pattern” – first to describe Ukraine’s endangerment of civilians through co-location, and second to describe ensuing Russian fire against co-located Ukrainian forces. Noting that “not every Russian attack documented by Amnesty International” followed this pattern implies that a great many – even most – Russian attacks *did* follow this pattern, and that, accordingly, many or most of the civilian victims of the war died as a *result* of Ukraine’s decision to locate its forces in the vicinity of civilians.

88. The Panel’s interviews with the AI field researchers showed that, in the situations they had examined, it was likely that Russia had specifically attacked certain targets proximate to civilians because of Ukrainian military presence there, and that some civilians had died or suffered injury as a result. But on the basis of the evidence that AI had gathered it was simply impossible to assert that *generally*, in the war taken as a whole, Ukrainian civilians died in substantial numbers due to their co-location with Ukrainian armed forces in violation of Ukraine’s duty to take precautions to the maximum extent feasible. The Panel notes that the PR did *not* make such a conclusion, but it believes that the imprudent language used in the opening paragraphs of the PR could be read as implying that conclusion, which is not what AI intended.

89. Moreover, the degree of endangerment of civilians as a consequence of decisions taken by Ukraine, as opposed to as a consequence of Russia’s willingness to target civilians or civilian objects deliberately or indiscriminately, is an empirical question that cannot be answered reliably on the basis of the evidence that AI had gathered for the purpose of preparing the PR. In the Panel’s view, the PR should not have used imprudent language that could reasonably be interpreted as drawing such conclusions, and it should have avoided the word “pattern” in particular.