



'Even War Has Rules'

A Broken Promise to Humanity



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“We are enemies of no one. We are enemies only of those who are enemies of humanity.” -Mustafa Kemal Atatürk

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Introduction

Humanity: A word that the world ought to have grasped the meaning of a long time ago, yet a word which is often forgotten and ignored for the sake of political and economic interests. It can therefore be difficult to maintain or, in some cases, to restore something that everyone is so prepared to kill in the first place. At the same time, giving up the one thing that makes us who we are as humans is just as difficult.

In the face of endless wars and atrocities, precisely for the above-mentioned reasons, the rules of war, *jus in bello*, also formally known as International Humanitarian Law (IHL), appeared on the international scene to regulate the conduct and responsibilities of parties to armed conflicts towards each other and, most importantly, towards protected persons (Maiese, 2023). To put it more succinctly, there is a clear intention to ensure a certain level of protection of humanity, minimise suffering, and save lives during armed conflicts by obliging States at the international level to comply with the laws of war (ICRC, 2016).

Amidst the ongoing conflict between Israel and Hamas, many crucial questions relating to IHL are being raised. These rules of war are being constantly referenced, but what do they actually mean? To what extent does IHL protect non-combatants and civilian objects in contemporary conflicts, such as in the war between Israel and Hamas?

Rules of War : Defining, understanding and learning

The rules of war, or IHL, set out what can or cannot be done during an armed conflict, aiming to protect **civilians, aid workers, and medical personnel**, all of whom are **non-combatants** (ICRC, 2021). The scope of protection here extends to everyone who is not taking an active part in hostilities, including those who are no longer able to take part in hostilities, such as **wounded and sick soldiers or prisoners**. That is to say, even when war cannot be avoided despite all efforts, it is not chaos that will prevail, but rules derived from international treaties, humanitarian law, and customary international law, i.e. common practices accepted as law through either the general practice of States or through what States have accepted as law.

These are the principal instruments that have shaped and developed today's rules of war:

- Hague Convention, 1899, relating to the laws and customs of war on land
- Hague Convention, 1907, a revision and extension of the 1899 Convention
- First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1864, 1906, 1929, and 1949
- Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949
- Third Geneva Convention relative to the Treatment of Prisoners of War, 1929
- Fourth Geneva Convention relative to Protection of Civilian Persons, 1949 (GCIV)
- Additional Protocol I, 1977 relating to the Protection of Victims of International Armed Conflicts (API)
- Additional Protocol II, 1977 relating to the Protection of Victims of Non-International Armed Conflicts (APII)

The rules of war do not take into account political motives or occupations (Peel, 2023). These are rules that affect **all** parties to all armed conflicts. Rooted in the Geneva Conventions, they seek to curb the brutality of war and its consequences for protected persons as well as civilian objects such as hospitals, homes, and schools. Furthermore, being signed by 196 countries, the Geneva Conventions are universally applied around the world (ICRC, 2021), and customary IHL rules are applicable in both international and non-international armed conflicts.

These rules regulate a wide range of humanitarian issues which arise in times of conflict. Importantly, according to the Rule 9 of customary IHL, all non-military objectives are to be recognised as civilian objects (IHL Databases, n.d). Meanwhile, Rule 10 also recalls that civilian objects are protected from attack “unless and for such time as they are military objectives.” Under IHL, there should also be no impediment to the delivery of humanitarian aid to conflict zones or to the freedom of movement of

humanitarian workers. It is thus forbidden to prevent relief organisations from delivering supplies to civilian populations suffering extreme hardship due to lack of adequate food and medical supplies, whether caused by conflict in general (API Art. 70, APII Art. 18; Rule 55), or by the presence of civilians in occupied or besieged territory (GCIV Arts. 59, 17 and 23) (Medecins Sans Frontieres n.d). For example, civilians should be able to pass safely through the centre of conflict unhindered and have access to vital humanitarian assistance, so ambulances seeking to evacuate the wounded and sick must never be blocked. These are some of the critical obligations imposed on States by the rules of war to preserve humanity against atrocities.

1.1. International obligation to ensure and respect IHL

International humanitarian law is a tool to ensure a balance between humanity and military necessity. Strict application of the rules of war by States is therefore crucial to preserve and maintain order and humanity, as well as to alleviate the suffering of victims. Common Article 1 of the Geneva Conventions reiterates on this particular matter the obligation of States to ensure and respect IHL in all circumstances (Dörmann&Serralvo, 2015). This provision is a consequence of the general legal obligation of States to honour their treaty commitments, also known in international law as *pacta sunt servanda*.

Furthermore, many scholars stress the existence of an internal and an external component of the above-mentioned article. This is to say that while the internal aspect implies the obligation of States to respect the Geneva Conventions themselves, particularly in times of conflict, the external dimension underscores the responsibility and duty of third party States to take measures to maintain the respect of the Geneva Conventions by parties to armed conflicts, whether international or non-international (Dörmann&Serralvo, 2015).

An attack upon humanity: Targeting hospitals under IHL

Under Rule 35 of the customary IHL, there is a clear obligation to refrain from attacking places where protected persons seek refuge, such as hospitals, safety zones, and neutralised zones (IHL Databases, n.d). In other words, as the United Nations General Assembly stated in its Resolution adopted in 1970 on the basic principles for the protection of civilian populations in armed conflicts, “places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations” (Henckaerts&Doswald-Beck, 2012). Therefore, under Rule 7 of customary IHL, combatants must distinguish between civilian and military objects and thus take measures to avoid hitting hospitals and other civilian structures (Medecins Sans Frontieres n.d). Under Rule 8,

military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage (IHL Database, n.d).

However, even for a military target, the parties must take into account the lives of civilians and thereby take measures to limit damages or avoid dire consequences, giving utmost respect to the doctrine of precaution.

IHL also dictates that health workers, medical vehicles, and hospitals dedicated to humanitarian work cannot be attacked by parties to an international or non-international armed conflict. Even purely military medical units run by a party to the conflict providing care to wounded and sick combatants are protected (OHCHR, 2016). Intentionally directing attacks against hospitals and places where the sick and wounded are collected is therefore prohibited under international humanitarian law, provided they are not military objectives. Any such deliberate attack would be deemed a war crime. On this urgent issue, in 2016 the United Nations Security Council unanimously adopted Resolution 2286 which strongly condemns attacks on medical facilities and personnel in conflict situations (UN, 2016). Before this, in 2011, the Security Council had adopted Resolution 1998, authorising the United Nations to identify and list armed forces and groups attacking schools or hospitals, or protected persons in relation to schools and hospitals (UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, n.d). Additionally, in 2012, the World Health Assembly adopted Resolution 65.20 requesting the World Health Organisation to collect and report cases of attacks on health facilities, workers, transport vehicles and patients in complex humanitarian emergencies (WHO, n.d).

Finally, as set out in the Geneva Conventions and Additional Protocols, before an attack can be launched against a medical unit used to commit acts which are harmful to the enemy, a warning must be given that sets a reasonable time limit to desist (OHCHR, 2016). Only after such a warning has remained unheeded can an attack be launched. This is linked to the attacking party’s obligation to respect the doctrine of precaution, which continues to apply regardless of the loss of the medical unit’s protected status.

The crux of the matter : Respecting IHL, War Crimes, & the ICC

3.1. What constitutes a war crime ?

War crimes constitute a category of international crimes prosecuted by the International Criminal Court under the Rome Statute. These crimes are the consequences of violations of IHL (treaty or customary law) that give rise to individual criminal responsibility under international law. However, unlike crimes against humanity and genocide, war crimes are always committed in the context of an armed conflict, either international or non-international (UN, n.d).

According to the Article 8 of the Rome Statute, followings are categories of war crimes (UN, n.d):

- Grave breaches of the 1949 Geneva Conventions related to international armed conflict;
- Other serious violations of the laws and customs applicable in international armed conflict;
- Serious violations of Article 3 common to the four 1949 Geneva Conventions, related to armed conflict not of an international character;
- Other serious violations of the laws and customs applicable in armed conflict not of an international character.

Moreover, it is possible to divide war crimes into 5 categories as follows (UN, n.d):

- War crimes against persons requiring particular protection;
- War crimes against those providing humanitarian assistance and peacekeeping operations;
- War crimes against property and other rights;
- Prohibited methods of warfare;
- Prohibited means of warfare.

Therefore, deliberate attacks on the civilian population or on buildings which serve religious, educational, artistic, scientific or charitable purposes, historical monuments, or hospitals constitute war crimes. That is, **attacking protected objects that are not military targets, such as hospitals or places where the sick and wounded gather, is a clear violation of the rights of protected objects, and therefore of IHL** (IHL Database, n.d).

For a crime to be charged as a war crime, the criminal act must first satisfy the contextual element, that it was committed during an armed conflict; and there must have been the required *mens rea*, the intention to commit the act, as well as knowledge of the individual act and of the contextual element (UN, n.d). However, while these two elements are essential to preserve the international criminal justice system, some situations may be overlooked if one party declares that the hitting of a hospital was “mistaken”, thereby eliminating the *mens rea* aspect of the crime. Some parties may also accuse the other party to the armed conflict of committing the act in order to avoid facing legal charges. To give a concrete example, in 2015, the Médecins Sans Frontières (MSF) hospital in Kunduz, Afghanistan,

was subjected to US airstrikes, killing at least 42 people, including 24 patients, 14 staff and 4 nurses, and injuring 37 people (Blank, 2015). This attack occurred in the middle of the night, while patients were asleep in their beds. Nevertheless, due to the apparent lack of intent on the part of the US, no war crimes were found, finding instead that it was due to human “error” and system and equipment failures (Mundasad, 2016).

3.2. Prosecuting War Crimes of the Israel-Hamas conflict: ‘Questions and Challenges’?

3.2.1. Possible prosecution of Hamas and Israel at the International Criminal Court

Alleged war crimes committed during the armed conflict by Hamas and its militants in Israel and Israelis in the Gaza Strip may be investigated by the ICC. Even though Israel is not a State Party to the ICC Statute, Palestinian authorities have been since 2015 (Human Rights Watch, 2023), and thus, the ICC has jurisdiction over the ongoing war between Hamas and Israel.

Moreover, when evidence of war crimes is present and the state parties or the UN Security Council make a referral, the ICC Office of the Prosecutor then may exercise its jurisdiction through different triggers and initiate an investigation into the alleged atrocities. Although Israel may not be a member state, the ICC has already been investigating alleged atrocities since 2021, thus making it unnecessary to discuss whether it can exercise jurisdiction in today’s war (McBrien, 2023).

3.2.2. Nature of the conflict : International vs. non-international

First of all, many humanitarian law experts consider the Israel-Hamas armed conflict to be classified as “non-international”, which would be categorised in the same way as a civil war pitting the armed forces of a state against a non-state armed actor, rather than an international conflict between two or more sovereign states (Goldman, 2023). However, this would raise a further question as to the extent to which the law of war is applicable. That is, rather than being governed by the entirety of the four Geneva Conventions and API, Common Article 3 of the Geneva Conventions, APII, and numerous customary law rules would instead be applicable (Goldman, 2023). In this context, Common Article 3 applies to civilians and those who are *hors de combat*, or no longer fighting.

On the other hand, the UN classifies the conflict as international, since under Common Article 2 to the Geneva Conventions, the Conventions apply in situations of partial or total occupation, which is the case here, as Israel de facto occupies Gaza, controlling its borders and airspace, and providing most of Gaza’s electricity. Some scholars also argue that Gaza has not been occupied by Israel since 2005, when Israel withdrew its troops and settlers (Peel, 2023). However, one must not forget that since Hamas came to power by expelling the Palestinian Authority in 2007, Israel has continued to keep its eyes and power on the territory through the aforementioned means (Goldman, 2023).

Furthermore, the UN Human Rights Council’s Commission of Inquiry (CoI) on Israel and the Occupied Palestinian Territory (OPT), including East Jerusalem, concluded in June 2022 that the continued occupation and discrimination against Palestinians are the main causes of the recurring instability and prolonged conflict in the region (Global Centre For the Responsibility to Protect, 2023). More recently, since the beginning of 2023, over 170 Palestinians have been killed in the West Bank and Gaza Strip. For instance, on July 3rd and 4th, 2023, Israel forces conducted a large-scale air and ground operation in the Jenin Refugee Camp and its surroundings, killing at least 12 Palestinians (OCHA, 2023). The attack possibly constitutes a war crime, as the airstrikes and ground operations forced thousands to

flee and caused extensive damage to civilian infrastructure and homes. Additionally, in the period of June 13th to July 4th, 2023, according to an OCHA report 1,310 Palestinians, including at least 103 children were injured by Israeli forces across the West Bank, including 105 people who were shot with live ammunition (OCHA, 2023).

Possible war crimes committed in the context of the Israel-Hamas conflict

On October 7th, 2023, after Hamas, a terrorist organisation, killed over 1,400 people and took hostages in a surprise cross-border attack from Gaza, armed conflict once again erupted between Israel and Hamas, resulting in thousands of deaths, especially those of children (Peel, 2023). We will therefore analyse step by step the violations of IHL committed by both sides, which probably amount to war crimes.

4.1. Taking of hostages by Hamas

Hostage-taking is prohibited under the Rule 96 of customary IHL which binds all parties to an armed conflict, whether international or non-international (IHL Database, n.d). On this critical issue, in the 2000 Blaškić case, for instance, the International Criminal Tribunal for the former Yugoslavia found the Accused guilty of taking hostages as a violation of the laws and customs of war (IHL Database, n.d). Thus, hostage-taking is a war crime, and is included in the Rome Statute of the International Criminal Court (ICC).

However, following the October 7th attack, Hamas and its groups have taken at least 200 Israelis and foreigners hostage and released video footage of them to the world as a heinous act (Willsher, 2023). Among them was Mia Schem, a 21-year-old French-Israeli woman who travelled to Israel for a festival party just before the war broke out. While she still hasn't been released and returned to her family, French President Emmanuel Macron described the video showing her capture as "an odious act" (Willsher, 2023). Moreover, according to the Israeli Hostages and Missing Families Forum, some hostages are suffering deeply from amputated limbs and severe injuries from rape (ABC News, 2023).

4.2. Blame game over the hospital 'massacre': Who did it?

As discussed above, under no circumstances may a party to an international or non-international armed conflict deliberately attack a hospital, a civilian object protected by IHL. The act itself would undoubtedly constitute a war crime if it was deliberate, was not targeting a military objective and where no effective warning was given before the attack was launched.

Nevertheless, in spite of existing laws and rules, the Al-Ahli Arab Hospital in Gaza City was struck on October 17th, killing over 500 Palestinians and leading to the deadliest attack on a hospital in decades. However, from the moment the news of the blast spread, a blame game began between Israel and Hamas began. Even in the face of such a monstrous attack on humanity, the world was still focusing on who they could "blame", instead of focusing on the victims and survivors and ensuring that this atrocity does not happen again. A clear example of this is US President Biden's statement in his meeting with Prime Minister Benjamin Netanyahu on October 18th; "Based on what I have seen, it appears that the other team did it, not you", indicating that he was more interested in who carried out the attack, especially in turning such an atrocity into a team fight, rather than the consequences for the victims (Ngendakumana, 2023). Moreover, although some world leaders have openly condemned the attack, stating that Israel bears responsibility, many have limited themselves to condemning the heinous act carried out in the hospital (Aljazeera, 2023).

As the UN called for an independent investigation into what happened at the hospital on October 20th, many journalists and others on social media have pointed out that the attack did indeed come from Israel, as proven by tweets posted immediately after the massacre but later deleted. Moreover, on October 17th, Israel's Minister of National Security, Itamar Ben-Gvir, also threatened in a tweet that "as long as Hamas does not release the hostages in its hands - the only thing that needs to enter Gaza are hundreds of tons of explosives from the Air Force, not an ounce of humanitarian aid" (Lodhi, 2023). According to an investigation by Al Jazeera's Sanad verification team, Israeli statements thus have misinterpreted the evidence for their own benefit (Al Jazeera's Staff, 2023). However, until the investigation is brought to a conclusion, the nature of the crater left behind by the explosion remains one of the most critical pieces of evidence (Brown&Cheetham&Seddon&Palumbo, 2023).

Although the world is still unable to reach a consensus on who is responsible for this barbaric massacre, it neither lessens the gravity of the act nor changes the fact that it constitutes a war crime.

4.3. Eye for an Eye : An ideology at odds with IHL

There are three main principles that govern the rules of war. These are the principles of proportionality, distinction, and precaution (ICRC Blog, 2017). However, in the context of the war between Israel and Hamas, there are many examples in which these principles, in particular proportionality, have been violated by both parties to the conflict.

International humanitarian law prohibits the ancient ideology of an eye for an eye and instead implements the need to respect the law even if one of the parties to the conflict has committed crimes. In other words, the mere fact of being attacked by one party does not allow the other party to retaliate in the same illegal way (Peel, 2023). Regardless of the provocation, the rules of war must be respected and the attack must always be proportional. Thus, rather than collectively punishing a larger group for casualties, the emphasis should be on the military defeat of its armed opponents in accordance with international humanitarian law (Peel, 2023). In such cases, collective punishment will constitute a war crime, as it is strictly prohibited under international humanitarian law, more specifically by Article 33 of the Fourth Geneva Convention and Article 75.2.d of the API (IHL Database, n.d). This act can take the form of imposing sanctions on civilians for actions that they have not personally committed, for instance.

However, since the beginning of the war, from October 7th onwards, Israeli forces have carried out retaliatory attacks against Hamas' heinous and deadly attacks, without respecting the principles of proportionality and distinction. These indiscriminate attacks and collective punishments against civilians in Gaza have resulted in war crimes on both sides. On the one hand, Hamas and its terrorist groups indiscriminately fired over 5,000 rockets into Israel, reportedly killing more than 1,400 Israelis and foreign nationals, mostly civilians, and injuring over 3,000 people (OHCHR, 2023). Meanwhile, Israel's disproportionate and indiscriminate air and land attacks on Gaza have killed at least 3,793 Palestinians, including the elderly and more than 1,500 children, as well as leaving 12,500 people injured, according to the Palestinian Ministry of Health in Gaza (Amnesty International, 2023). It also appeared that Israel's attack targeted densely populated civilian areas, including markets and two hospitals, destroying residential buildings and damaging 20 United Nations Relief and Works Agency (UNRWA) facilities, including schools sheltering displaced civilians (OHCHR, 2023). Although the Israeli army claims to have only attacked military targets, based on the information obtained so far by Amnesty International, no fighters or military objectives were present at the time of the attacks (Amnesty International, 2023). Consequently, if the Israeli army was indeed aware that only civilians

were present at the time of the attack, for instance in the residential building in the al-Zaytoun neighbourhood of Gaza which it struck on October 7th, this would constitute a direct attack against civilians and civilian objectives, and thus constitute a war crime.

4.4. Cutting the vital needs of civilians and forced displacement by Israel

Gaza, which has been sandwiched between the two sides of the conflict for decades, is once again besieged and isolated by Israeli forces in retaliation for Hamas attacks since October 9th, 2023 (Alouf&Slow, 2023). The city will be on the brink of a new humanitarian crisis if Israel continues to block vital items such as water, food, medicine, fuel, and other necessities. Sadly but optimistically, the first limited aid convoy has entered into Gaza via the Rafah border crossing with Egypt on October 21st. While it is deeply saddening that the first 20 aid trucks have entered Gaza since the start of the war, it is nevertheless hopeful to see progress being made in getting aid to the hundreds of thousands of civilians trapped in the city (UN News, 2023). According to the UN, 1.6 million civilians are in critical need of humanitarian aid, with children making up almost half of the population (UN News, 2023).

Under international humanitarian law, Israel is obliged to adequately provide for the needs of all persons, including by accepting and facilitating assistance programmes, as well as protecting them from harm. However, the only action that came from Israel was to indiscriminately, disproportionately, and without warning rain bombs upon Gaza and cut off Palestinians from vital necessities for their survival. They also forced the displacement of millions of Palestinians, saying that anyone who would not leave northern Gaza and move south would be recognised by them as a “terrorist” (Al-Mughrabi, 2023). The forced relocation of protected persons without their needs being met and without any guarantee of safe passage or safe return is again a clear violation of IHL, and therefore constitutes a war crime (Norwegian Refugee Council, 2023).

Furthermore, while first aid was sent to Gaza, Cindy McCain, executive director of the U.N.’s World Food Program, expressed her utmost concern at the current Israeli blockade of vital necessities, describing the situation as a “catastrophe” and adding that “these people are going to starve to death unless we can get in” (Brzezinski&Dettmer, 2023). A resident of northern Gaza who fled to Rafah with his wife and seven children also spoke to AFP, saying that “we haven’t showered in days. Even going to the toilet requires waiting your turn in a line”. Another resident added that “I feel humiliation and embarrassment. I’m looking for refuge. We don’t have a lot of clothes and most of them are dirty now, with no water to wash them” (France24, 2023). Starving the civilian population is another prohibited method of warfare under IHL and, more specifically, under Rule 53 of customary IHL (IHL Database, n.d). While the law does not prohibit siege as a method of warfare per se, it does prohibit its use to starve an entire civilian population rather than to achieve a military objective (Gillard, 2019). Consequently, in doing so it must comply with all relevant rules of IHL. One must equally not forget that, in accordance with the Article 55 of customary IHL, “the parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control” (IHL Database, n.d). It therefore constitutes an obligation upon the besieging party.

Moreover, regarding this crucial issue, the Fourth Geneva Convention also requires States to “allow the free passage of all consignments of medical and hospital stores” intended only for civilians and “the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases” (IHL Database, n.d). API broadens this obligation to cover the “rapid and unimpeded passage of all relief consignments, equipment and personnel”.

Meaning, consequently, under Article 14 API, that

[i]t is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works (OHCHR, 1977).

Conclusion

The world is yet again bearing witness to atrocities and appalling attacks on humanity, this time, or rather once again, in the war between Israel and Hamas. Hence, continued violations of the rules of war by both sides are paving the way for a climate of utter inhumanity and endangering the international order established after the Second World War. While many NGOs and the international community are denouncing the indiscriminate and disproportionate attacks and bombardments in Gaza, civilians are suffering, being injured and killed day after day as a result of the inaction of both parties.

This comes at a time when, as a so-called modern society, we are supposed to maintain our humanity even in the worst of times. Despite existing treaties, customary law and international jurisdiction, State parties to armed conflict still have the audacity to circumvent and bend them for their own political ends. In other words, the laws of war should neither be used as a deception for the benefit of others, nor hypocritically in favour of one or other State party. These rules apply equally to every party to an armed conflict, under all circumstances, and that failure to honour them may result in severe consequences. The system must therefore not forget what happened today if it is to prevent another catastrophe in the future.

As Mustafa Kemal Atatürk, founder of the Turkish Republic and its first president, said, “We are the enemies of no one. We are the enemies only of those who are the enemies of humanity”.

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