



Israel and the occupied territories: how international humanitarian law applies

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Since the 7th of October, the world has witnessed a new and unimaginable wave of tragedy unfold across Israel and the occupied territories. As we pass the two-month mark of the intensification of this armed conflict, the armed violence continues to impact civilians minute by minute.

As our colleagues on the ground engage in an exceedingly challenging humanitarian context, faced with many challenges and obstacles, podcast host Elizabeth Rushing sat down with Cordula Droege, ICRC's Chief Legal Officer to discuss how recent developments of this armed conflict are governed by international humanitarian law (IHL).

Humanity in War - Episode 16: Israel and the occupied territories: how international humanitarian law applies

We have received many questions from our audience, especially those online, regarding the application of IHL. Could you start us off today by providing an outline of the main bodies of IHL that are relevant to the current situation?

International humanitarian law (IHL), sometimes called the “laws of war”, is the set of international rules that regulates the behavior of parties to armed conflicts. Perhaps two important remarks by way of introduction.

The first one is that IHL is separate and independent of the rules of international law that regulate whether the resort to force between states is lawful or not. That’s regulated by the United Nations (UN) Charter and other bodies of law. The separation is because IHL is meant to protect the victims of all armed conflicts, whichever side they are on. It regulates that the ends of a conflict do not justify any means – the means with which you can carry out military operations are limited by IHL. And second, by way of introduction, IHL applies to all parties to an armed conflict, whether they be states or non-state armed groups.

Having said this, broadly speaking, IHL does two things. It sets the limits to how military operations can be carried out. This is what we call the rules on the conduct of hostilities, which are these cardinal principles of distinction, proportionality, and precaution, which I’m sure many of the listeners have heard and it also restricts the type of weapons that can be used.

Second, it regulates the treatment of people who are in the hands of the control of the adversary. For instance, if they’re under occupation or if they are detained by an adverse party. At all times, the basic rule of that is that people have to be treated humanely. Within these two broad categories, there are two issues that are regulated in IHL and of particular importance in many conflicts, including this conflict in Israel and the occupied territories. One is there is a very comprehensive set of rules that protect the wounded and sick in health care. And second, there’s a very important set of rules that regulates humanitarian relief operations.

We’ve received a lot of questions on that first category, on the rules on the conduct of hostilities. You briefly mentioned the principle of distinction. Can you please outline what that means?

The principle of distinction means that an attacker must always distinguish between combatants and civilians, and between military objectives and civilian objects: homes, civilian infrastructure, and the environment. It can only ever direct its attacks against combatants and fighters and not against civilians, and it can only target military objectives and not civilian objects.

So, at all times, the principle of distinction requires the party to take constant care, to spare the civilian population and civilian objects from the effects of military operations. A specific consequence of that is the prohibition of what we call indiscriminate attacks. Indiscriminate attacks are attacks that are not directed at specific military objectives as required, that cannot be directed at specific military objectives, or whose effects cannot be contained as required by international humanitarian law.

Please walk us through this step by step. So first, who counts as a combatant, and who is determined to be a fighter? And what are the differences between those two?

Combatants are the members of the armed forces of a party to a conflict, except for religious and medical personnel. You can have medical personnel of the armed forces, but they’re not combatants and they’re protected.

The armed forces of a state party consist of the regular armed forces of the party, but also of all the organized armed forces or groups of units that are under a command that’s responsible to that party. For non-state armed groups, combatants are those whose continuous combat function is to take part in hostilities. Simply said, they’re the armed wing of a non-state party to a conflict.

Lastly, I think we should also add that sometimes civilians also take a direct part in hostilities, and they do lose their protection against attack if they do so, but only for the time that they do so.

What is considered a military objective as opposed to civilian objects? And to follow up, can you explain what happens when civilian objects, such as hospitals, are used for military purposes?

The definition of military objectives is a little bit cumbersome. It says it’s limited to those objects, which by their nature or location or purpose or use, make an effective contribution to military action, and whose partial or total destruction or capture or neutralization, in the circumstances ruling at the time, offers a definitive military advantage. In simple terms, typical military objects by nature will be things like military weapons or tanks, for instance. But civilian objects can exceptionally also turn into military objectives if they are concretely designated for military action.

For instance, let’s say you have a civilian building that’s used as a weapons depot, that building will turn into a military objective because it’s used for military action. When a part of an object is used, let’s say, of a large building or of a compound of buildings, it doesn’t yet mean that you can then attack the entire building because you always have to take all feasible precautions to avoid or at least minimize the loss of civilian homes and civilian lives. This is the case even if the building is empty of people because destroying the entire building still means that civilians will lose these homes and livelihoods.

Can you take a few moments to illustrate the other cardinal principles in addition to the principle of distinction – the principle of proportionality, and the principle of precaution?

Under the principle of proportionality, attacks are prohibited if they are expected to cause incidental loss of civilian life or injury to civilians or damage to civilian objects, as we mentioned, which would be excessive in relation to the concrete and direct military advantage anticipated.

Let's unpack that a little bit. So, the civilian harm that you have to take into account in the principle of proportionality is the death of a civilian or injury of civilians or damage or destruction of civilian homes or civilian infrastructure, and you have to take into account all the civilian harm that can be expected, which means that was that can be foreseen. The harm that can be foreseen from a military operation is not only the immediate effect – people who will immediately die or be injured, but also the second and third-tier effects.

For instance, it's entirely foreseeable that if you destroy or damage an electricity line, it's not just a matter of that line being damaged. It's entirely foreseeable that the effect will also be that hospitals, water pumping systems, or sewage systems will be affected and that this can lead to further death and injury. And so, this civilian harm, if it is foreseeable, must also be taken into account.

Of course, the more we know about civilians in urban settings, the more we can foresee the expected cumulative effects of incidental harm, particularly civilian infrastructure, and essential services, because most essential services that will be damaged, such as electricity, water, etc. you have usually an in-built redundancy so that the first electricity line that's damaged will create harm, but the last electricity line that is damaged will create much more severe civilian consequences because there's no more redundancy to catch it.

On the proportionality principle, we can also unpack the military advantage. You still often hear that this or that civilian harm might be justified to defeat the enemy or to win the war. That is actually not a permissible ground, because if the equation is about winning the war, then, of course, you're completely undermining the principle of proportionality. So, you have to be careful as well about looking at the concrete and direct military advantage as required by humanitarian law.

Now, in terms of precautions, precautions are all the measures that a party must take if it is feasible for it to avoid or at least minimize harm to civilians and civilian objects. So, it's a very practical principle. It's the principle of how states and parties to countries can actually respect the obligations of distinction and proportionality.

For instance, precautions can be to warn the civilian population if an attack is imminent, if that's feasible, or to choose the types and munitions in a way to minimize civilian harm or to choose the timing of the attack in such a way. It also requires parties to constantly verify if they are still targeting a legitimate target and possibly aborting an attack if that's not the case anymore, or if they realize that the incidental harm will be excessive.

It's also about, for instance, taking into account the movement of people and where they are fleeing to, to constantly monitor, where they move and where they are present in order to adjust your attacks. It's also about the choice of objects that you attack. So, if you have a choice between several military objectives, you have to choose the one that will cause the least danger to civilians and civilian objects. Even within a larger target, the party must aim for the lesser part, if that's feasible, in order to avoid or minimize civilian harm. So it's all these concrete measures that parties have to take in order to avoid and minimize harm.

In densely populated urban environments, such as in Gaza but also in Ukraine or Sudan, how can the rules that you've outlined be respected when civilians and fighters are intermingled in which military objectives are located close to civilian objects?

Yes, I think the first thing to do is to remember that cities are first and foremost civilian places. They are full of civilians; they are full of civilian homes and hospitals and schools and administrative offices and restaurants. When there's a doubt whether a civilian home or a civilian building is used for military action, it should be presumed to be civilian.

We know at the outset, from direct observation, that the use of explosive weapons with wide area effects in these populated areas continues to be a major cause of civilian harm, injury, and death, but also damage to infrastructure. Even when services that are indispensable for sustaining civilian life that we just mentioned – hospital infrastructure, sewage system, water systems – are not directly targeted, they are disrupted as an indirect result of these attacks with explosive weapons with wide area effects, and they become more and more degraded over time.

Effects of explosive weapons with wide area impact can continue once the fighting stops. We have a lot of unexploded ordnance, we have a lot of weapon contamination, and we have degraded or sometimes entire lack of essential services that also prevent many people who have been displaced by such fighting from returning to their homes.

So while there is no general prohibition under IHL against using such heavy explosive weapons, their use must still comply with the principles of the prohibitions against indiscriminate attacks and the prohibition of disproportionate attacks that we just mentioned, and also the principles of precaution. But because of their low accuracy, because of their lack of precision, and their large destructive radius, there's a real question about being able to abide by these principles in such urban settings.

Over the past decades, we at the International Committee of the Red Cross (ICRC), but also the movement of the Red Cross and Red Crescent, have called on states and parties to armed conflict to avoid using such heavy explosive weapons in urban settings because of the significant likelihood of indiscriminate attacks, and despite the absence of an express legal prohibition for specific types of weapons.

Now, there's recently been, in 2022, an adoption of a political declaration recognizing that the use of these explosive weapons in populated areas is a major cause of civilian harm. Eighty-three states have adopted this political declaration, and we hope that more states will join the declaration and set a clear

political signal that the human cost of these weapons, as they are used today and as we can witness, is unacceptable and must change.

With that in mind, turning now to a common question that we often receive from our audiences who are seeing the violations of these rules time and time again: why do we still look to IHL, when we do see these violations being committed in so many conflicts?

We look to IHL first of all, because despite what we see on our TV screens every day which is unacceptable, IHL has actually saved countless lives over the past century and a half.

Every time a wounded person, including an enemy soldier or fighter, is being collected and cared for, or every time an ambulance passes through a checkpoint, or humanitarian relief reaches civilians, every time detainees are treated humanely and provided with food, water, and medical care – all this also happens in armed conflict situations, and this due to IHL norms that didn't always exist and not being respected. Over the years, IHL treaties have also banned certain weapons such as chemical weapons, biological weapons, but also anti-personnel mines, and cluster munitions – and that too has saved countless lives.

Secondly, I think on a more, if you will, principled level, even if we're facing this uphill struggle to make IHL respected, it's simply the right thing to do. I think these rules are how parties should behave and our role should be to enforce them. That said, of course, we have to be outraged at the widespread disrespect that we see all over the world. And we also have to be outraged at the widespread impunity for violations.

My takeaway from this is: do we think the prohibition of ill-treatment is wrong because people continue to be ill-treated? Do we think the prohibition of indiscriminate attacks is wrong because parties to conflicts continue to carry out such attacks? Do we think the wounded and sick should just be left without medical care? If we don't think so, if we think that these rules are right, then I think our only option is to turn our outrage into action and work towards better implementation and respect.

What are the requirements from states when it comes to humanitarian relief to civilians in need? And what can some of those actions look like?

It doesn't start with humanitarian relief in the sense that it's first and foremost, of course, for the parties to the conflict, to provide for the basic needs of populations under their control.

If populations are not provided with the basics, with the goods essential for their survival, water, food, medical care, etc., then the parties to the conflict and all states must allow and facilitate humanitarian relief that is impartial in nature and is meant for the civilians in need exclusively. Humanitarian relief is of course subject to the consent of states, which is clearly stated in IHL. But of course, if people are left without goods essential for their survival, then states cannot unlawfully deny that humanitarian relief because of course the consequence would be unlawful.

Once they have given consent and the humanitarian relief schemes are carried out, they are also subject to what's called the right of control of the parties to the conflict, meaning that parties to the conflicts can impose such controls that make sure that the relief really reaches the civilians and is not diverted for military purposes. So they can prescribe specific routes, they can check the consignments, etc., so they can impose these measures of control. But again, they have to impose them in good faith. And measures of control cannot be such that in practice they completely undermine or delay indefinitely a humanitarian relief that can then not reach the civilians in need.

How has misinformation, disinformation, and hate speech (MDH) impacted our humanitarian operations and people already affected by armed conflict?

Yes, that's a trend that we've seen growing exponentially around the globe with very inflammatory rhetoric taking over an information dimension of armed conflicts, that is something that many of us are grappling with.

For instance, you see misleading information about what behavior is lawful during armed conflict or not. You see dehumanizing narratives and the spread of hate speech that fuel hatred and glorify violence. You see disinformation and harmful narratives relating also to the denial of humanitarian action and humanitarian service delivery and all this can have a serious impact on the safety and dignity of the affected populations, but also on humanitarian organizations like the ICRC and others.

Now, just very briefly, what I will say is that IHL also sets limits to what people are allowed to do in armed conflict situations. And it also imposes obligations on states to set limits in their jurisdictions. For instance, it's prohibited to incite violations of IHL. It's also prohibited to make threats of violence or to spread terror among the civilian population.

States have obligations and responsibilities in this respect. First, they can be legally responsible for misinformation, disinformation, or hate speech, if it's carried out under their instruction, direction, or control. They must also not encourage civilians or groups to act in violation of IHL. They also have a due diligence obligation to prevent international humanitarian violations on or from their territory. And so, they have this obligation to enforce IHL by adopting measures in their jurisdictions to prevent violations, but also to prosecute serious violations.

How important, in your words, is the ICRC's neutrality in this situation and why is it crucial for actors to recognize, understand, and respect that principle?

The International Red Cross and Red Crescent movement and the ICRC carry out their humanitarian work according to the principles of the movement and in particular, of course, the principle of humanity, but also the principles of neutrality, of impartiality, and independence. And neutrality here is an operating principle, which means that we do not take sides between parties through conflicts and we provide assistance based solely on the humanitarian need. That requires us to talk to all sides to highlight the importance of respecting IHL, allowing us to provide relief.

For us, neutrality is our way, our method to talk to parties, to build trust, whether governments or armed groups. Without this trust, we can't continue to carry out these lifesaving operations, we can't continue to respond to the needs of the affected communities, of detainees, of families, of missing persons, of wounded or injured people. It allows us to have a role of what we call a "neutral intermediary", which is a way to access both the victims of the violence, but also the actors involved. It also helps us to ensure the safety of our staff and thus carry out these activities in sometimes very precarious situations.

For instance, in this conflict in Israel and the occupied territories, it has allowed us to function as a neutral intermediary and have a useful role for the parties and particularly for the families in the release of hostages and detainees on both sides.

So, neutrality is really essential for us to carry out our work. It doesn't mean to say that everyone should be neutral in the face of a conflict, but there's a space for different modes of action in armed conflict. Different actors have different roles, and there's certainly, in our view, a role for a neutral organization action that seeks to do the particular work that we are doing.

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