

# Israel – Hamas 2023 Symposium – Assessing the Conduct of Hostilities in Gaza – Difficulties and Possible Solutions

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by [Marco Sassòli](#) | Oct 30, 2023



The current armed conflict affecting Israel and the Gaza Strip raises many international humanitarian law (IHL) questions. Many answers depend on whether Palestine is a State, whether Hamas belongs to that State (at least, as it claims, as a resistance movement) and whether the Gaza Strip is still an occupied territory, either fully or for the purpose of some rules.

Whatever the answers to those questions, on some issues there are clear violations of IHL: the Israeli settlement policy in the West Bank (which greatly contributed to the general atmosphere leading to the new outbreak of the conflict, also offering Hamas a pretext for its initial attack); the ill-treatment, summary executions and taking of hostages by Hamas in Israeli villages near the Gaza Strip; the Hamas rocket attacks on Israeli towns which even Hamas itself does not claim to be directed at military objectives; or the Israeli announcement to cut all supplies to the Gaza Strip (which we still may hope not to be fully implemented).

In my view, in particular if the Gaza Strip is, as Israel argues, no longer occupied, the “order” by Israel to one million inhabitants of the Northern Gaza Strip to move away from their homes cannot possibly constitute a warning required (unless circumstances do not permit) by IHL, because such warning must concern an attack directed at a determined military objective and the entire northern Gaza Strip cannot possibly constitute a military objective. None of those violations by one side can justify those committed by the other side.

### **Difficulties Assessing Targeting**

However, when it comes to Israeli attacks against targets in the Gaza Strip, which have already claimed too many civilian victims, and even more so in case Israel fully implements its threat to invade the entire Gaza Strip by a major ground operation, it is much more difficult to determine whether IHL is violated. This difficulty is not due to controversies over the law. Whether IHL of international armed conflicts or IHL of non-international armed conflicts applies, whether Gaza is or is not considered an occupied territory, the rules are clear. Only lawful weapons may be used, only military objectives and Hamas fighters may be targeted, even if this is the case, the proportionality rule protects to a certain extent civilians incidentally affected by such attacks, and both the attacker and the defender must take feasible measures to avoid, and in any event minimize, incidental civilian losses.

What makes the determination in this case difficult is rather the difficulty to establish the facts. As the examples given above show, it is much easier to establish violations of rules protecting persons in the power of a party, traditionally designated as “Geneva Law” (for example, whether a prisoner has been tortured, a person has been raped, or a house in an occupied territory has been destroyed) than it is to determine violations of the rules on the conduct of hostilities, traditionally called “Hague Law” (for instance, whether a person killed or a school destroyed by an air, missile, or artillery bombardment constituted a violation of IHL). What counts for the Hague Law is not what was destroyed or who was killed or injured but what and who was *targeted*. To target civilians or civilian objects violates IHL. Whether an attack is lawful under Hague Law does not depend on the results of the attack but rather an *ex ante* evaluation by the attacking party.

As the aforementioned example of the Hamas rocket attacks demonstrates, it is not always impossible to make such an evaluation. In most cases, including in the case of the Israeli attacks on the Gaza Strip, but also for most Russian attacks in Ukraine, establishing whether an attack violated Hague Law requires a complex analysis of several legal factors. They include: the status of the targeted person or object; whether such person or object was the actual target; the actual or intended use of the targeted object by the adverse party; the military value of the targeted person or object for the attacker compared to the extent of expected incidental effects upon civilians; and whether the attacker took all feasible precautionary measures in attack to avoid or minimize incidental effects upon civilians.

### **Factual Assessments of Targeting**

Assessing these legal factors necessarily requires knowledge not only of what actually happened (which is already difficult in the fog of war, propaganda, and fake news), but also of the military plans of both parties. To evaluate whether the proportionality rule was respected, one should for example know how important the intended target was for the military plans of the attacker and the intelligence the attacker had on expected incidental effects. Parties, however, do not make such information public and they do not have an obligation to do so. Fact-finding bodies and the media therefore either neglect the fundamentals of the law or can come only to very tentative conclusions concerning the legality of a given attack. In the case of individual attacks, except based upon declarations of the attacker, one can at best evaluate whether the respect or a violation of IHL is more plausible. In most cases, when apparently civilian buildings are destroyed and/or civilians are killed or injured by the impact of artillery, rockets, and aerial bombs, fact-finders, the media, and the public, including the undersigned, have either insufficient evidence that those buildings were the target or whether those buildings were defended by Hamas and therefore military objectives.

Alternatively, certain patterns can be observed which lead to the conclusion that a party probably did not observe IHL. For example, while it may be that one hospital was used by the defender for military purposes or destroyed by mistake, it is hardly possible that this is the case when 50 hospitals are destroyed. Such conclusions too are, however, tentative.

The first Organization for Security Cooperation in Europe Moscow Mechanism mission of enquiry into violations of IHL and human rights law in Ukraine between 24 February and 1 April 2022, in which the author of these lines participated, concluded for example:

A detailed assessment of most allegations of .... IHL ... violations concerning particular incidents has not been possible. Nevertheless, the mission found clear patterns of IHL violations by the Russian forces in their conduct of hostilities. If they had respected their IHL obligations in terms of distinction, proportionality and precautions in attack and concerning specially protected objects such as hospitals, the number of civilians killed or injured would have remained much lower. Similarly, considerably fewer houses, hospitals, cultural properties, schools, multi-store residential buildings, water stations and electricity systems would have been damaged or destroyed.

Of course, criminal tribunals do not even have this option, which may explain the limited number of convictions for violations of the Hague law.

## **Transparency**

The lack of any obligation for a party to an armed conflict conducting hostilities to reveal what it targeted, what was its plan, and what precautionary measures it took is a serious shortcoming of IHL. It undermines the credibility of conduct of hostilities rules, makes it very difficult to find violations, and is a playground for “lawfare” through false accusations.

Although it is not the existing law in IHL—contrary to what international human rights law requires in many respects—the only solution is to require transparency. It is probably unrealistic to expect immediate transparency during the conflict. On the other hand, *ex post* monitoring that could perhaps achieve some preventive effect would be possible if belligerents kept records of factual bases for their targeting decisions.

Such records should be made public after a certain period of time (without necessarily revealing the sources for their information). Subsequent disclosure would also allow belligerents to counter false accusations and avoid the impression among the public that IHL is most often violated, at least by the party the respective public considers as the enemy. Lack of transparency and its consequences can only increase hate and accelerate the circle of violence and violations, which make the inevitable search for peaceful solutions more difficult.

### **A First Step: Investigations**

Before transparency on the conduct of hostilities by a party can be achieved, and independently of such a postulate, a party must itself know the facts. Even beyond criminal prosecutions, investigations into suspected violations of IHL are a crucial factor for obtaining compliance. The structures and procedures needed for this purpose are equally important for the military to maintain discipline and collect information for operational lessons learned.

Beyond the obligation to search for persons “alleged to have committed, or to have ordered to be committed, . . . grave breaches,” there is no detailed international standard clarifying when a State must start an investigation and therefore no benchmark against which one can measure whether a State should have investigated an incident, or how such investigation should have been conducted. The International Committee of the Red Cross (ICRC) and the Geneva Academy of International Humanitarian Law and Human Rights, in response to this lack of clear standards, co-released in 2019 Guidelines on this matter, based upon research into the practice of States and international organizations as well as scholarly writings, combined with a five-year expert process which consulted a range of senior government and military lawyers as well as non-governmental organization, UN and academic experts.

According to those Guidelines, the starting point of any investigation is an “incident” which is, any event, situation, or set of circumstances that . . . raises concern about a possible violation of international humanitarian law . . . . An incident may be internally brought to attention through or by the military chain of command or via other State institutions, or may be brought to attention by means of an external allegation.

The opening of an investigation into an incident equally presupposes the recording of military operations. The approach taken in the Guidelines reminds us of the distinction made between a preliminary inquiry (also called a “fact-finding assessment”) and a formal criminal investigation. The former is as important as the latter.

According to an Israeli national commission of enquiry (the Turkel Commission) a fact-finding assessment must take place in any case in which there have been, or appear to have been, civilian casualties that were not anticipated when the attack was planned (paras. 102-103). We can only hope that this is currently implemented concerning attacks in the Gaza Strip, including when civilian victims are expected but doubts exist whether they are excessive compared with the military advantage sought.

## **Concluding Thoughts**

Even if domestic enquiries are undertaken and their result is made public, the adverse party and its sympathizers will not trust its results. This is the main reason why a subsequent international enquiry is needed. However, because of the difficulties mentioned above to determine whether IHL on the conduct of hostilities was violated, in this field of Hague Law, such an international enquiry cannot seriously do its work and draw convincing conclusions unless parties are transparent or, which is perhaps more realistic, if it can limit itself to assess whether and how a national assessment was conducted, with the considerable benefit of access to military plans and information. In such a case, an international assessment of how the domestic investigation was conducted may indeed be possible, even concerning the conduct of hostilities.

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