

# Israel – Hamas 2023 Symposium – The ICRC’s Statement on the Israel-Hamas Hostilities and Violence: Discerning the Legal Intricacies

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by [Ori Pomson](#) | Oct 16, 2023



On October 13, 2023, the International Committee of the Red Cross (ICRC) released an extraordinary statement, which among other things called for the release of Israeli hostages, condemned Israel’s “limitless destruction of Gaza,” and termed Israel’s calls to evacuate northern Gaza a violation of international humanitarian law (IHL). The statement has rightly been termed “rare.” Indeed, as the ICRC has had to remind observers and victims time and again throughout the Russian-Ukraine War, its effectiveness in achieving humanitarian goals is realized through its confidentiality and neutrality. Condemning actions and classifying these as violations of IHL undermines this neutrality and the confidentiality of its representations. Only when strict conditions are met, laid out in its own guidelines, does the ICRC publicly make statements on violations of IHL, conditions regarding which there is very little indication they have been met in the present circumstances.

Putting issues of confidentiality and neutrality aside, what is lacking in the ICRC's statement is legal reasoning for its pronouncements. Of course, a point often lost on international lawyers is that classifying actions in legalistic language is not a priority when addressing the broader public; non-(international) lawyers get lost in legal intricacies, just like lawyers get lost when trying to decipher their blood test results. Hence, this observation should not be seen as criticism of the ICRC's lack of legalese, as such, in its statement. However, on closer examination, several aspects of the ICRC's statement are not legally obvious, and in fact paper over controversial positions the ICRC has adopted over the years.

The purpose of this post is to scrutinise the ICRC's statement and consider its three main pronouncements on legal issues. It will first consider its statement on the release of hostages, followed by analysis of its condemnation of Israel's airstrikes, and finally consider its pronouncements on evacuation.

### **The Call to Release Hostages**

In its opening paragraph, the ICRC states, "Our hearts go out to people who lost family members or are worried sick about loved ones taken hostage. We reiterate our call for their immediate release and stand ready to conduct humanitarian visits." The issue of hostage-taking was exhaustively analysed by John C. Tramazzo, Kevin S. Coble and Michael N. Schmitt in their [recent post](#), and hence will not be rehashed here. I shall merely recall that that hostage-taking is prohibited under [Common Article 3 of the Geneva Conventions](#), which [applies in all armed conflicts](#), regardless of their character.

### **Condemnation of Israeli Air Strikes**

The ICRC statement continues by remarking that Hamas's acts against Israeli civilians "cannot in turn justify the limitless destruction of Gaza. The parties must not neglect their legal obligations regarding the methods and means used to wage war." It is not clear whether the first of the two sentences quoted is based on legal considerations, though the fact that it is followed by a sentence which explicitly recalls the parties' obligations under IHL would infer that it is.

Before addressing what I believe is most likely the essence of the claim, it is important to recall a few basic rules which govern the conduct of hostilities. First, under the rules governing distinction in IHL, it is unlawful to attack civilians and civilian objects. Since the ICRC's statement referring to "destruction" appears to be concerned with objects, I shall focus thereon. Civilian objects are objects which are not military objectives. [Article 52\(2\)](#) of the First Additional Protocol to the Geneva Conventions (AP I) defines military objectives:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Thus, for example, if a building or part thereof is used by Hamas as storage space for rockets, the building will most likely constitute a military objective; therefore, an air strike on that building is not *ipso facto* prohibited under IHL.

Second, what may render an attack on a military objective unlawful is the rule concerning proportionality, which is enshrined in Articles 51(5)(b) and 57(2)(a)(iii),(b) of AP I and reflects customary international law. Under this rule, a party must “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

The ICRC’s position is that the loss of civilian use of a so-called dual-use object—an object which serves both military and civilian functions—must be incorporated into a proportionality assessment. While the manuals of two armed forces adopt this position, another has explicitly rejected this position, and it appears that the IDF also rejects this position. Academic opinion is also divided. In my personal opinion, as I argue elsewhere, the ICRC’s position is doctrinally unsustainable, both as a matter of interpretation of AP I and under customary international law. Indeed, under both treaty and customary international law, a party is only obligated to consider damage to “civilian objects.” If a so-called dual-use object constitutes a military objective, it is difficult to understand how it can simultaneously be considered a civilian object.

Yet, regardless of the ICRC’s opinion on the issue of proportionality and so-called dual-use objects, it does not appear the ICRC’s October 13 statement aims to address such issues. Indeed, it appears to concern the extent of incidental damage as a whole; not the weighing of such damage against anticipated military advantage. The ICRC’s position appears to resurrect an interesting passage in its 1987 *Commentary* to AP I. In its commentary to Article 51(5)(b), the ICRC argues:

The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 (*Basic rule*) and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.

The assertion that “extensive” damage contravenes Articles 48 and 51(1),(2) is intriguing, since those provisions do not address the issue. Rather, Article 48 lays out the principle of distinction, which is implemented by operative provisions in AP I which follow; Article 51(1) is essentially preambular in nature to the paragraphs of Article 51 which follow; and Article 51(2) requires that attacks be against military objectives and prohibits “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population.”

The quoted passage from the ICRC's 1987 *Commentary* has also been criticised by scholars. Thus, for example, Christopher Greenwood explained that “[t]here is no justification for the attempt in the ICRC *Commentary* to introduce an absolute ceiling beyond which civilian casualties can never be justified,” adding that “[h]owever attractive the view may be from a humanitarian viewpoint, it does not accurately reflect the text of Additional Protocol I or the underlying principle of customary law.”

To summarise this part, it is entirely understandable why the ICRC is concerned with the damage to Gaza, although its use of the term “limitless” is unfortunate. However, to the extent its condemnation is based on legal considerations, the ICRC's position is dubious.

### **Evacuation of Civilians in Northern Gaza**

Much of the ICRC's statement is dedicated to Israel's calling upon civilians from northern Gaza to evacuate. The key passages in the statement on the subject provide:

The instructions issued by the Israeli authorities for the population of Gaza City to immediately leave their homes, coupled with the complete siege explicitly denying them food, water, and electricity, are not compatible with international humanitarian law.

When military powers order people to leave their homes, all possible measures must be taken to ensure the population has access to basic necessities like food and water and that members of the same family are not separated.

Unlike its point on “limitless destruction,” this point explicitly invokes IHL. Hence, there is all the more reason to analyse its legal accuracy.

Evacuation does not receive much attention in the law governing the conduct of hostilities. AP I, which is the most extensive treaty on the conduct of hostilities, only dedicates one article to issues of evacuation, and it is concerned with evacuation of children to a foreign country. It hence seems that evacuation is not *ipso facto* prohibited. On the contrary, there are two significant provisions which govern the protection of civilians from the dangers of military operations. First, Article 57(1) stipulates that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” The precise interpretation of this provision is controversial, as well as the extent to which it reflects customary international law. Thus, the Department of Defence *Law of War Manual* is non-committal towards Article 57(1) as necessarily reflecting customary international law. Instead, it notes that “[t]he standard for what precautions must be taken is one of due regard or diligence, not an absolute requirement to do everything possible. A wanton disregard for civilian casualties or harm to other protected persons and objects is clearly prohibited.” Similarly, in laying out legal positions concerning cyber operations, Israel has stated that “[i]t is widely accepted today that parties to conflicts cannot blatantly disregard such harmful effects [i.e. dangers] to the civilian population in their military operations.” Regardless of how one interprets the obligation of “constant care” under AP I, or identifies a parallel obligation

under customary international law, surely the evacuation of civilians from an area where extensive military operations will occur—a phenomenon not unique to Gaza—is in furtherance of such obligations.

The second significant provision in AP I is Article 58. What is unique about Article 58 is that it imposes obligations on the party to the armed conflict under the control of which the civilian population is situated. Article 58 stipulates,

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.

The extent to which this provision reflects customary international law is controversial. Moreover, to the extent it does reflect applicable law, it refers to obligations on Hamas. However, it does indicate that evacuation is a legitimate means of protecting the civilian population.

Rather, it appears that the ICRC's condemnation of Israel's call to evacuate northern Gaza is based on Article 49 of the Fourth Geneva Convention (GC IV). The relevant paragraphs of Article 49 provide,

2. ...[T]he Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

3. The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

Article 49 is only applicable when there is a belligerent occupation. It is indeed the ICRC's position that Israel is occupying Gaza. However, as Michael Schmitt has recently explained, this position is controversial. Indeed, no territory has ever been recognised as occupied without physical presence in the territory—or some puppet regime—let alone in instances where the governing entity in the territory succeeded in launching such a violent operation

against the purportedly occupying power's civilian population. This all renders the ICRC's position doubtful as a matter of customary international law, thereby putting into doubt the very applicability of Article 49 of GC IV.

Yet, even assuming Article 49 of GC IV is applicable, the obligation to provide basic necessities to protected persons is not absolute. It is rather qualified by the statement that the obligation extends to "the greatest practicable extent." As Jean-Marie Henckaerts observed, "[t]he ICRC had proposed this provision as an absolute obligation, but at the diplomatic conference this proposal was watered down by inserting the words 'to the greatest practicable extent.'" Indeed, without physical presence on the ground, Israel's capacity to ensure that the civilian population obtains the basic necessitates laid down in paragraph 3 is limited.

## **Conclusion**

The situation in the south of Israel and Gaza is tragic. Innocent civilians have once again been caught up in a deadly conflict, with no end in sight. The human suffering on both sides is unbearable. It is precisely for such situations that IHL was devised and developed. Therefore, it is important to address the difficult questions and determine what is, and what is not, prohibited under IHL. This was the purpose of this post, in the very particular context of the ICRC's extraordinary statement from October 13, 2023.

While the ICRC's concern for adherence to IHL is understandable—indeed, expected and demanded therefrom—we should question whether its statement on October 13 was accurate and wise. Regarding accuracy, I have argued that on two main points—on the extent of destruction and on the evacuation of the civilian population—the ICRC has erred. Regarding its wisdom, it is unlikely the ICRC's statement, based on positions which it is presumably aware are very controversial, will do well for the confidence Israeli officials and society as a whole have in the organisation, confidence coloured by history and recent experience.

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