

Israel – Hamas 2024 Symposium – Reflections on the Invocation of Common Article 1

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by [Tal Mimran](#) | Mar 13, 2024



The *South Africa v. Israel* case at the International Court of Justice (ICJ) concerning alleged violations of the Genocide Convention during the Israel-Hamas war has broader implications than the core question at the heart of that proceeding. One consequence became evident after the ICJ granted provisional measures on January 26, 2024. The decision ignited a trend that seeks to limit the ability of Israel to equip itself. Evidence of this move includes the decision of Itochu Corporation in early February 2024 to stop its cooperation with the Israeli company Elbit and the decision of the Walloon Parliament in Belgium, on February 5, 2024, to suspend licenses for gunpowder exports to Israel.

Several significant developments have taken place since. First, on February 12, 2024, the Hague Court of Appeals ordered the Dutch government to halt the export of F-35 parts to Israel. Then, on February 23, 2024, a declaration by numerous Special Rapporteurs called for an arms embargo against Israel. A week later, Nicaragua initiated new ICJ proceedings for alleged violations by Germany of its obligations under the Genocide Convention and other international norms, based upon Germany's assistance to Israel in its war against Hamas (*Nicaragua v. Germany*).

Taken together, these developments form the beginning of a legal wave that might, in the long run, lead to an international call for limits, or even a full-fledged embargo, on arms exports to Israel. The initiators of these developments all rely on common [Article 1](#) of the Geneva Conventions, which requires States “to respect and to ensure respect” for international humanitarian law (IHL), and serves as a rule that promotes compliance and accountability. It should be noted that there is a parallel obligation, based on the [Genocide Convention](#), that requires States to take reasonable means available to them to prevent genocide in another State. Still, the developments at hand focus on the duty under common Article 1.

Against this backdrop, this post provides thoughts regarding the growing use of common Article 1 in the context of the Israel-Hamas war. It begins by presenting the duty to ensure respect for IHL under the article. Then, it examines three developments: the Court of Appeal ruling; the Special Rapporteurs’ declaration; and *Nicaragua v. Germany*. It evaluates how this important rule of international law meets reality in the context of the Israel-Hamas War.

As I will show, the developments at hand demonstrate that common Article 1 proves an effective tool for lawfare (see [here](#) for the various definitions prescribed for this term). At the same time, there are worrying signs concerning the standard being set for the requisite factual basis of violation and of a causal link between the export of arms and the alleged violation. This concern, which has no answer in the law at this stage, invites more prudence toward invoking common Article 1, to avoid its misuse.

The Requirement to Ensure Respect for IHL

Common Article 1 of the Geneva Conventions [states](#), “The High Contracting Parties undertake *to respect and to ensure respect* for the present Convention in all circumstances” (emphasis added). It serves as a basis for promoting compliance and accountability among parties to armed conflicts. In the past, the ICJ has noted that the obligation under common Article 1 is a general principle of international law of customary status (*Paramilitary Activities*, para. 220). Some have described the article as “quasi-constitutional” (see [here](#), p. 85).

The requirement in common Article 1 *to respect and to ensure respect* can be interpreted restrictively or expansively. Leading scholars including [Michael Schmitt](#), and [Sean Watts](#), and [Verity Robson](#), advocate for a restrictive approach, which I also find appealing. According to that interpretation, States are only obliged to implement requisite measures to guarantee adherence to IHL within *their territory*. By contrast, other scholars (e.g. [Carlo Focarelli](#) and [Marco Sassòli](#)) discern an expansive interpretation, according to which States are also required to take measures to uphold compliance with IHL *vis-à-vis* other States.

While States like the United States and Norway also opted for the restrictive view during the Diplomatic Conference leading to the adoption of the Geneva Conventions in 1949 (see [here](#), p. 53), the International Committee of the Red Cross (ICRC) urged the expansive

reading of common Article 1 in its 2016 Commentary to the first Geneva Convention. The ICRC concludes that the obligation also entails a need to verify respect for IHL by other States. According to the *Commentary*, this rule obliges States to refrain from transferring weapons if there is an *expectation*, based on *facts* or *knowledge*, that such weapons would be used to violate IHL. The ICJ offered this view as well, in its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

The question remains, still, as to the required level of expectation, or knowledge, of the actual existence of a violation. Similarly, it is unclear if there is a need to demonstrate a causal link between a possible export and an alleged violation and the required standard of knowledge for deciding to stop the assistance. The ICRC did not answer this question. Its *Commentary* indicates only that “common Article 1 does not tolerate that a State would *knowingly* contribute to violations of the Conventions by a Party to a conflict, *whatever* its *intentions* may be” (emphases added). This does not explain what level of knowledge is needed and evades addressing the hard question of the intent or awareness required (unequivocal intent, recklessness, negligence?).

Finally, the obligation under common Article 1 should be differentiated from the general obligation not to aid or facilitate violations of international law, codified in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA, art. 16). As noted by Professor Sassòli, the requirement under ARSIWA sets a high standard, under which States should not provide *ongoing* assistance *with a view to facilitating* violations of international law, while Common Article 1 sets the lower demand that a State will not provide aid with the knowledge that it will serve violations of IHL.

The Decision of the Hague Court of Appeal

On February 12, 2024, the Hague Court of Appeal ordered cessation of shipments of F-35 fighter jet components to Israel (see [here](#)). The court cited a risk that serious violations of IHL would be committed (para. 1.5). In reaching its conclusion, the court noted extensive civilian casualties in Gaza, the destruction of civilian homes and damage to hospitals, water and food supplies, schools and religious buildings, and problems with the ability to warn civilians of attacks. In establishing its factual basis, the Hague Court relied on newspaper reports, UN declarations (not fact-finding mission reports), and views presented by special rapporteurs. All are relevant sources, but nevertheless none is conclusive nor based on evidentiary investigations, particularly given the fog of war in this ongoing conflict.

A main part of the court’s reasoning derives from the State’s duty to ensure respect for IHL under common Article 1. While the non-governmental organizations that appealed to the court asserted that the export should also be halted given the duty to prevent genocide, the Hague Court ultimately decided to focus on the duty to prevent violations of IHL under common Article 1. The court characterized this duty as one of “best-efforts,” similar to due diligence, that a State should pursue actions that are reasonably attainable in the

circumstances at hand. Verity Robson previously suggested that adopting this view would mean that a State's responsibility would grow in correlation with its international influence, and in a way that might create a chilling effect on multilateralism and encourage an isolationist approach. Yet, the Hague Court opined that when a State becomes aware of another State's involvement in breaches of IHL that are *facilitated* by arms supplied by the former, it is *prevented* from further supplying such arms to the latter State. The extent of the obligation is shaped, in the Court's view, in correlation with the severity of the breach.

The Special Rapporteurs' Declaration

On February 23, 2024, tens of Special Rapporteurs issued a declaration, stating that the transfer of weapons or ammunition to Israel that will be used in Gaza might violate IHL. Accordingly, the Special Rapporteurs asserted that States must refrain from transferring weapons or ammunition expected to violate IHL. While the Special Rapporteurs mention that the Genocide Convention also requires the use of all means reasonably available to prevent genocide, the declaration focused on common Article 1 and the duty to prevent violations of IHL.

The Special Rapporteurs stressed that the duty under common Article 1 requires all States to do everything reasonably in their power to prevent and stop violations of IHL by Israel, including by avoiding the transfer of weapons or ammunition. In terms of a factual basis, this statement was based, *inter alia*, on the decision of the Hague Court and the ICJ's provisional measures ruling on January 26, 2024.

The declaration named two of the main military exporters to Israel, Germany and the United States and presented possible steps that States could take to meet their obligations under common Article 1 of the Geneva Conventions. One of those steps is to refer their plea to the ICJ. As can be seen, each step in this chain of events feeds another, a phenomenon particularly true in relation to the next development at hand, Nicaragua's case against Germany.

Nicaragua v. Germany

On March 1, 2024, Nicaragua instituted proceedings against Germany at the ICJ for alleged violations of the latter's obligations under the Genocide Convention (related to the *South Africa v. Israel* proceedings), the Geneva Conventions, and other alleged violations of other peremptory norms of general international law. Essentially, Nicaragua argues that Germany failed to perform its duty to ensure respect for IHL, as well as its duty to prevent genocide, and to not aid or assist a genocide. Nicaragua asserts that after the publication of the ICJ provisional measures ruling in *South Africa v. Israel*, Germany can no longer "deny knowledge of the serious illegality of the conduct of Israel" (para. 12). Nicaragua also claims that Germany's political, financial, and military assistance was made with knowledge that it is enabling Israel to commit atrocities which might result in violations of both IHL and the

Genocide Convention (para. 13). It argues further that, under the best efforts' standard, Germany should invoke its special relations with Israel to halt the alleged violations (paras. 17-18, 38).

The factual basis Nicaragua relies on is that presented in the ICJ provisional measures ruling, accompanied by media reports and UN declarations. It should be emphasized, as noted by Judge Nolte and others, that the ICJ decision itself relied on circumstantial evidence (UN reports, press releases etc.) that did not include any concrete or meaningful factual investigation (see para. 13 of the decision of Judge Nolte; and also Shany and Cohen). As noted by Judge Nolte, "The evidence provided by South Africa regarding the Israeli military operation differs fundamentally from that contained in the reports by the United Nations fact-finding mission on Myanmar's so-called 'clearance operation' in 2016 and 2017 which led the Court to adopt its Order of 23 January 2020 in *The Gambia v. Myanmar*."

Discussion

There is significant room to question whether any of the preceding efforts to quash exports to Israel offers a persuasive reading of the duty to ensure respect for IHL.

First, the factual assessment of the Hague Court relies solely on circumstantial evidence that may be sufficient to grant provisional measures before the ICJ, but not a final decision with such a broad impact in reality. The effect of the ruling goes beyond exports and may impact trade between Israel and the Netherlands at a broader level (and the ability of the Netherlands to participate in multilateral supply chains). It should be mentioned that only last year, Israel and the Netherlands signed a \$305 million export deal for artillery rocket systems from Israel's Elbit Systems.

Second, the Hague ruling does not require any proof of a causal link between the export and the alleged IHL violation. Such a low bar might lead others to interpret common Article 1 as if it requires the imposition of an arms embargo in the face of alleged violations of IHL, as well as decisions to limit particular exports to Israel (notably, pressure on governments to consider halting supply of arms to Israel has already begun in France, Spain and the United Kingdom).

The declaration of the Special Rapporteurs suffers similar weakness. It uses absolute language and at times it seems conclusory, without providing any new factual basis nor new analysis on the actual impact of particular products on the facilitation of a specific infringement (for example, a certain munition that can facilitate the commission of a concrete violation of IHL). In the absence of the ability either to demonstrate the violation or the existence of a causal link between the export and its commission, the invocation of common Article 1 appears more like a tool of lawfare than an instrument for the promotion of the rule of law.

By comparison, previous instances in which States have invoked common Article 1 to limit aid to States that were in breach of IHL were well documented conflicts, where there was clear evidence of IHL violations (e.g. Sudan in 2008, Libya in 2011, and Syria in 2012). Each of those cases also concerned domestic conflicts in which civilians were left unprotected against their very own government, or conflicts in which non-State groups endangered civilians in the absence of a rule of law.

Finally, in relation to the initiation of proceedings by Nicaragua, it seems that the willingness of the ICJ to entertain South Africa's request for provisional measures sparked a domino effect that has spread far beyond that case. This spread is problematic given that the provisional measures decision was made based on a low legal standard, that of plausibility of rights, and notwithstanding the lack of strong evidentiary proof for South Africa's claims, which the ICJ did not explicitly declare plausible.

Conclusion

The impact of common Article 1 is vast and meaningful. On one hand, it is warranted to invoke the article to fulfil the promise of the rule, namely, to promote both IHL compliance and accountability for violations therein. At the same time, it is hard to ignore the fact that all three developments considered above rely on circumstantial evidence that need only be determined to be *plausible*.

These developments demonstrate a tension between the real need to promote adherence with IHL norms through legal actions and the need to avoid inhibiting a State's ability to invoke its right to defend itself. This is made obvious after the massacre on October 7, which led to the death of more than 1,200 persons (including children, women and the elderly), and the abduction of 240 more. That attack involved extreme methods of violence, some of which were filmed by the perpetrators themselves and uploaded to social networks. All of these actions constitute, in themselves, grave violations of IHL.

Common Article 1 should continue to serve as an important tool. But the factual bar should not be lowered to allow its misuse. The ICRC *Commentary* indicated that common Article 1 is a living instrument, and as such its content should be further concretized and operationalized. Hence, States should take the lead in clarifying the extent of knowledge required to invoke it to limit military export or other types of aid. While doing so, I believe that a prudent approach is appropriate to avoid misuse of the article.

Dr Tal Mimran is an Associate Professor at the Zefat Academic College and an Adjunct Lecturer at the Hebrew University of Jerusalem.

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