

# Year Ahead – International Humanitarian Law at Risk

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I leave 2023 behind, dismayed about the state of international humanitarian law (IHL) and concerned that its effectiveness on the battlefield is at risk. In this year-ahead post, I highlight five threats as particularly corrosive and urge greater sensitivity to them by academics and practitioners in the IHL community.

## 1. An Eroding Commitment to IHL

Two large-scale armed conflicts are occupying the attention of our community: Hamas-Israel and Russia-Ukraine. The first threat I see is that one of the parties to each has embraced IHL violations (and their corresponding war crimes) as a tactic that it believes will yield strategic gains.

That Russia has done so is especially concerning because States still largely control IHL's development and interpretation. And Russia is not just any State. It is a major military power that wields a veto in the UN Security Council, the body having "primary responsibility for the maintenance of international peace and security" (UN Charter, [art. 24](#)). My concern is that

condemnation of its blatant disregard for the rules of war appears to have little effect on Russia's conduct, which ranges from deporting children to targeting cities . . . and everything in between.

Hamas has also openly adopted the tactic of violating IHL as a means to achieve its desired strategic objective, the end of Israel (1988  Hamas Covenant, pmb.). It is an aim the group has long embraced through acts such as firing rockets into populated areas, human shielding, and misuse of objects protected by IHL, like medical facilities and transports. But on October 7, it took that tactic to a new level when it massacred over 1000 civilians, including children and the elderly, and engaged in rape, mutilation, torture, and hostage-taking. What concerns me most is that an organization with *de facto* responsibility for governing part of a territory that many believe is, or should be, a State seems to have concluded that IHL may be ignored as a matter of strategic choice.

This does not mean that their opponents have not themselves violated IHL. I am sure they have, for in high-intensity warfare, even the most disciplined armed forces, at some point, cross the line. However, the shock to IHL's central nervous system is that Russia and Hamas have adopted IHL violation as a core operational concept. I fear the approach becoming contagious . . . or at least acceptable.

## **2. IHL Attention Deficit Disorder**

The second threat is the inability of the international community to stay focused on armed conflicts and the continuing IHL violations occurring in them. For instance, the continuing conflicts in Afghanistan and Libya, which were once front-page news worldwide, have largely been forgotten. More recently, the war in Ukraine, which continues to see clear-cut violations like rocket and missile attacks on cities, has been hemorrhaging global attention and concern.

Two factors play a prominent role in this tendency. The first is the "bright shiny object" phenomenon, according to which attention shifts quickly to the newest conflict, especially controversial ones like Hamas-Israel. A second factor is "outrage fatigue." In much the same way that school shootings no longer occupy our attention for more than a few days in the United States because they have become commonplace, over time we can become numb to IHL violations. Recall that when Russia first began targeting Ukrainian cities, the IHL community expressed near-universal indignation. But over time, the attention paid to violations has withered, except when there is a significant spike, as with Russia's recent air attacks on Ukrainian cities. Similarly, Hamas's continuing (albeit declining as their forces are attrited) rocket attacks against populated areas in Israel are largely ignored beyond that nation's borders.

The threat seems clear. The more IHL violations (and war crimes) are overlooked, the less the rules will deter the behavior they prohibit. Bad actors will increasingly act with impunity.

### 3. (Mis)application of IHL

A third threat is the misapplication of IHL. I see this occurring in three ways.

First, parties to a conflict sometimes treat IHL rules as the level at which they ought to conduct their operations. In other words, military operations should take advantage of all that IHL permits. But what is lawful on the battlefield is not necessarily what parties should do. On the contrary, the counterinsurgency and stability operations in Afghanistan exemplify the operational reality that the bar sometimes needs to be set far higher than IHL rules would permit. IHL is but the floor for lawful conduct.

The tendency to treat IHL rules as defining the optimal level of play rather than the minimum threshold for conduct is particularly acute when emotions are running hot at the beginning of a conflict. We experienced this in the immediate aftermath of the 9/11 attacks, as did Israel in the days immediately following October 7. Of course, there are situations in which operating to the limits of the law makes sense. However, doing so must be a conscious decision that is sensitive to the fact that policy and operational (and moral) concerns may augur toward a more restrained approach.

The flip side of this phenomenon is a tendency to move the purported legal bar up to accommodate results that the individual, entity, or State is seeking. This involves asserting that there is an applicable IHL rule or accepted legal interpretation when there is not. As an example, the Israel Defense Forces' (IDF) warning to Gaza City residents to move south was widely decried even though it was a classic precaution in attack. Similarly, Israel's legal obligations with respect to humanitarian assistance were exaggerated early in the conflict. There is nothing wrong with arguing that the bar for *acceptable* conduct should be raised for humanitarian or moral reasons; that will often be the case. However, members of our community need to be cautious about wrapping *lex ferenda* in the cloak of *lex lata*.

Lastly, the IHL community needs to better understand the weapons, tactics, operational constraints, and feasible opportunities of warfare. Especially during the Hamas-Israel conflict, there have been numerous instances in which legal characterizations have been based on a faulty understanding of warfare. Examples include misunderstanding the precision capabilities of so-called "dumb bombs," a failure to grasp the type of weapons and tactics necessary to counter tunnel warfare, and the difficulty of operating in the fog of urban warfare.

Similarly, there were repeated instances in which the IDF was criticized for failing to take precautions in attack, even though the critic could offer no viable alternative course of action at its disposal. And from an operational perspective, comparing conflicts to assess what is possible on a particular battlefield, as some have done, often makes little sense. For example, to look at casualty counts during urban operations in Iraq and draw conclusions as

to whether strikes into Gaza are proportionate and reflect compliance with the obligation to take precautions is rather naïve. So many operational variables exist that assertions based on such comparisons will often be questionable.

The problem with misapplying the law is simple. States have fashioned consensus rules of the game based on a delicate balancing of humanitarian and military considerations. Misapplication skews that balance, thereby detracting from IHL's effectiveness, especially the respect that effectiveness relies upon.

#### **4. “Ready, Shoot, Aim”**

A fourth threat is the tendency to characterize incidents as unlawful before the facts are in. Perhaps the best-known example is the alleged October 17 IDF attack on al-Ahli Hospital, in which Gaza's Ministry of Health reported nearly 500 civilian deaths. However, Human Rights Watch soon concluded that “the count, which is significantly higher than other estimates, displays an unusually high killed-to-injured ratio and appears out of proportion with the damage visible on site.” It also confirmed that the explosion “resulted from an apparent rocket-propelled munition, such as those commonly used by Palestinian armed groups, that hit the hospital grounds.” Similarly, the *Washington Post* ran a critical story on the so-called “assault” on al-Shifa hospital, but two weeks later, it had to run a follow-up noting that the U.S. intelligence community expressed confidence in the Israeli claims based on classified intelligence. In other words, here's the rest of the story.

The problem is that once critics level a charge of unlawfulness, it is hard to walk back. Few members of the IHL community who accuse a party of violating IHL subsequently correct themselves when the “facts” on which they based their assessment turn out to be mistaken. Even if they do, a retraction is seldom adequate to unring the bell. Being unfairly accused of violating IHL understandably engenders disrespect for the law.

#### **5. Picking Sides**

The last threat to IHL is perhaps the greatest: picking sides, either consciously or unconsciously.

There are many reasons members of the IHL community pick sides (or, in the case of government legal advisers, have it picked for them). To begin with, sometimes there really is a “bad guy” and a “good guy” in *jus ad bellum* terms. The paradigmatic example is Russia's unlawful use of force against Ukraine and the latter's right to exercise self-defense under the UN Charter and customary law. In the case of Hamas-Israel, I know of no sound basis for arguing that the group had a right to attack Israel or that Israel lacked a right to respond.

Past history can also cause one to pick sides. Well before the 2014 occupation of Crimea, Putin had Russia heading down the path of destabilizing Europe by bullying its neighbors. As to the Hamas-Israel conflict, Hamas had engaged in terrorism for years before the assault of

October 7, and Israel's policies regarding the Palestinians have increasingly lost it sympathy. So, observers may be biased even before the first shot is fired.

Beyond the good-bad guy reality, there is a tendency to root for the underdog in an asymmetrical conflict. Hamas and Ukraine are outgunned in a big way. Sometimes, there is a tendency to look the other way when the weaker party violates the law because, after all, it is not a so-called "fair fight."

And then there is simple racism. Antisemitism and Islamophobia are sadly alive and well, as are anti-Russian sentiments, especially in Eastern Europe. It is evident that these views have influenced some members of our community.

So, members of our community are taking sides. And once sides are taken, the risk of confirmation bias (the "tendency to search for, interpret, favor, and recall information in a way that confirms or supports one's prior beliefs or values") looms large. Discussion of the Gaza hospital incidents exemplifies the tendency, with those who lean toward the Palestinian side focusing on harm to the hospitals and patients, while those leaning the other way emphasize the misuse of them by Hamas and other organized armed groups. In fact, both groups of facts are legally relevant.

But these tendencies have nothing to do with IHL. It doesn't matter who the good and bad guys are or how the parties have conducted themselves before the outbreak of hostilities. Nor is the underdog relieved of any IHL obligations. By the principle of equal application, IHL binds both sides to a conflict in the same manner and degree, irrespective of their enemy's misconduct. When bias (often accompanied by confirmation bias) creeps into the discussion, it undermines the application of the law in the current conflict and beyond.

## **Concluding Thoughts**

While none of the threats to IHL outlined above are new, their confluence in two major conflicts, which risk bleeding into their respective regions, is especially worrisome. This reality suggests the old adage, "Problems I got, solutions I need."

Frankly, I don't have a solution. Nevertheless, I believe a genuine commitment to IHL always demands self-awareness. Are we actively disseminating the law to counter those who ignore it? Are we fairly balancing humanitarian and military considerations when applying IHL in concrete situations? Are we honest with ourselves and others regarding what is *lex lata* and what is not? Do we possess the expertise to understand the context in which IHL applies? Do we wait until the facts are reasonably clear before proffering definitive conclusions about compliance? Do our biases impede objective analysis of how IHL applies?

I admit to failing on several counts, as I have been occasionally reminded by friends I deeply respect. But I'll bet many readers have failed at times, too. So, as I look ahead to 2024, I urge members of the IHL community to commit to greater *self-awareness* in the pursuit of the

*objective* understanding of a body of law that is literally a matter of life and death.

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