

# IHL RULES ON ATTACKS, DETENTION, THE DEAD, COLLECTIVE PUNISHMENT, AND REPRISALS

In the wake of initial reports about the hostilities that have been unfolding around Gaza and southern Israel since 7 October 2023, grave humanitarian concerns have arisen with respect to the attacks perpetrated, detention of persons, treatment of persons detained or killed, and retaliatory attacks. The following is a short review of some international humanitarian law (IHL) rules relevant to these concerns.

## A. Attacking civilians, civilian objects, and persons *hors de combat*

Pursuant to the principle of distinction, which is a cornerstone of IHL,<sup>1</sup> and the related rule that the civilian population and individual civilians enjoy protection against dangers arising from military operations,<sup>2</sup> military operations must not be directed at civilians<sup>3</sup> or civilian objects.<sup>4</sup> Accordingly, the act of intentionally shooting at civilians or civilian objects or otherwise making them the target of an attack is a serious violation of IHL. Indeed, such acts may constitute war crimes.<sup>5</sup> Similarly, attacks which are of a nature to strike military objectives and civilians or civilian objects without distinction are prohibited.<sup>6</sup>

IHL prohibits attacking a person recognized as *hors de combat* in combat situations and imposes a duty on parties to the conflict to grant quarter.<sup>7</sup> The lives of those who are manifestly unable to defend themselves or who have clearly expressed their intention to surrender—including those of captured soldiers—must be spared. Killing such persons may amount to an act of wilful killing, which is a grave breach of the Geneva Conventions and a war crime.<sup>8</sup> Ordering that there shall be no survivors, threatening

the adversary therewith, or conducting hostilities on this basis is also a serious violation of IHL constituting a war crime.<sup>9</sup>

## B. Targeting of specially protected objects

Under the rules of IHL, certain civilian objects are specially protected. This is due to the importance of these objects to the victims of armed conflict, or to the civilian population and humanity in general, or because of their vulnerability to attacks during hostilities. These objects include medical units and transports as well as cultural property.

The intentional targeting of medical facilities<sup>10</sup> and transports<sup>11</sup> is prohibited.<sup>12</sup> However, the protection of these objects could exceptionally cease when they are used to harm the enemy outside of their humanitarian functions. Even in such circumstances, protection ceases only after due warning has been given, and after such warning has gone unheeded.<sup>13</sup> Any attack on such objects must additionally correspond with the principles of distinction, proportionality, and precautions in attack. The targeting of hospitals and

<sup>1</sup> Art. 48, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I); Rules 1 and 7, ICRC, IHL Database – Customary IHL (CIHL).

<sup>2</sup> Art. 51(1), AP I; Rule 15, CIHL.

<sup>3</sup> Art. 51(2), AP I; Rule 1, CIHL.

<sup>4</sup> Art. 52(1), AP I; Rule 7, CIHL.

<sup>5</sup> The most relevant war crimes are specified in Arts. 8(2)(a)(1), 8(2)(b)(i), 8(2)(b)(ii), and 8(2)(c)(i), Rome Statute of the International Criminal Court (1998) (ICC Statute).

<sup>6</sup> Art. 51(4) AP I; Rules 11 and 12, CIHL.

<sup>7</sup> Art. 23(d), Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land; Arts. 40–41, AP I; Rules 46 and 47, CIHL.

<sup>8</sup> Arts. 8(2)(a)(1) and 8(2)(c)(i) ICC Statute.

<sup>9</sup> Arts. 8(2)(b)(xii) and 8(2)(e)(x), ICC Statute.

<sup>10</sup> Definition of medical units according to Article 8(e), AP I: establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment—including first-aid treatment—of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary.

<sup>11</sup> Definition of medical transports according to Article 8(g), API: any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict.

<sup>12</sup> Arts. 18, 19, and 21, GC IV; Art. 21, AP I; Rules 28 and 29, CIHL.

<sup>13</sup> Art. 19, GC IV; Art. 13 AP I.

places where the sick and wounded are collected may constitute a war crime.<sup>14</sup>

Cultural property is also a specially protected object under IHL. This includes buildings that are dedicated to religion, such as places of worship, as well as those dedicated to art, science, and education, and charitable and historic monuments.<sup>15</sup> Such civilian objects may not be intentionally targeted unless a waiver of “imperative military necessity” is invoked. Such waiver of protection may only be invoked if “[t]he cultural property has, by its function, been made into a military objective; and there is no feasible alternative to obtain a similar military advantage to that offered by directing an act of hostility against that objective”,<sup>16</sup> and only for the time that “no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage”.<sup>17</sup> The intentional targeting of objects regarded as cultural property that are not military objectives is a war crime.<sup>18</sup>

### C. Detention and hostage-taking

Arbitrarily depriving a person of liberty is prohibited at all times, including in the context of armed conflict.<sup>19</sup> Whereas States engaged in an international armed conflict may legitimately detain civilians and soldiers under certain circumstances, detention by non-State armed groups and generally in the context of a non-international armed conflict is not expressly authorized under IHL.<sup>20</sup> This notwithstanding, it has been contended that “both treaty and customary IHL contain an inherent power to intern and may thus be said to provide a legal basis for internment by all Parties”.<sup>21</sup> Accordingly, under certain conditions detention by non-State armed groups may not

necessarily be in breach of IHL. However, this would only be the case where there are valid grounds for detention, such as imperative reasons of security.<sup>22</sup> If there are no such grounds, the deprivation of liberty would violate the principle of legality and amount to arbitrary detention.<sup>23</sup>

While deprivation of liberty, including by a non-State armed group, may be lawful when the requisite conditions are met, the act of hostage-taking is prohibited by IHL in all circumstances.<sup>24</sup> Hostage-taking is understood to refer to the seizure or detention of any person, together with the threat to kill, injure, or continue to detain the hostage in order to compel a third party to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage.<sup>25</sup> It is this specific intent that distinguishes hostage-taking from other forms of deprivation of liberty for reasons related to an armed conflict.<sup>26</sup> The prohibition of hostage-taking is not limited to cases where the seized or detained persons are civilians, and applies to any case where the defining elements of hostage-taking exist irrespective of the status under IHL of the detained persons concerned.<sup>27</sup> Hostage-taking may constitute a war crime both in international and non-international armed conflict.<sup>28</sup>

Additionally, IHL and international human rights law (IHRL) establish obligations to take all feasible measures to ensure special protection and care of children who are affected by an armed conflict.<sup>29</sup> The Convention on the Rights of the Child further stipulates that children can be detained only as a measure of last resort and for the shortest appropriate period of time,<sup>30</sup> a rule which applies to all children at all times, including in the context of armed conflict.<sup>31</sup>

<sup>14</sup> Arts. 8(2)(b)(ix) and 8(2)(e)(iv), ICC Statute.

<sup>15</sup> Art. 53, AP I; Rule 38, CIHL.

<sup>16</sup> Art. 6(a), Second Protocol to the Hague Convention for the Protection of Cultural Property (1999).

<sup>17</sup> Art. 6(b), Second Protocol to the Hague Convention for the Protection of Cultural Property (1999).

<sup>18</sup> Arts. 8(2)(b)(ix), 8(2)(e)(iv), ICC Statute.

<sup>19</sup> Rule 99, CIHL.

<sup>20</sup> Contentions exist around the classification of the situation, with opposing views as to whether hostilities between Israel and Hamas (and other armed groups) should be classified as (a) forming part of the international armed conflict between Israel and Palestine, or (b) if there may be one (or several) non-international armed conflict(s) between Israel and Hamas (and other armed groups). This has consequence for protections depending on which rules are applicable.

<sup>21</sup> ‘In the ICRC’s view, both treaty and customary IHL recognize an inherent power to intern and may thus be said to provide a legal basis for internment in NIAC.’ See Jelena Pejic, ‘The protective scope of Common

Article 3: more than meets the eye’, in *International Review of the Red Cross*, Vol. 93, No. 881, 2011, p.19.

<sup>22</sup> ‘Report of the expert meeting on procedural safeguards for security detention in non-international armed conflict’ in *International Review of the Red Cross*, Vol. 91, No. 876, 2009, p.862-866.

<sup>23</sup> Rule 99, CIHL.

<sup>24</sup> Rule 96, CIHL.

<sup>25</sup> Art.1(1), International Convention against the Taking of Hostages (1979).

<sup>26</sup> Rule 96, CIHL.

<sup>27</sup> *Ibid.*

<sup>28</sup> Arts. 8(2)(a)(viii) and 8(2)(c)(iii), ICC Statute.

<sup>29</sup> Arts. 24, 50, 76, and 89, GC IV; Art. 70(1), AP I; Art. 4(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II); Art.38(4), Convention on the Rights of the Child (CRC).

<sup>30</sup> Art.37(b), CRC.

<sup>31</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, paras. 103-106.

## D. Treatment of detainees

IHL rules protect both the physical and mental integrity and well-being of those deprived of liberty in the context of armed conflict and regulate the material conditions of the detention. IHL provides for certain fundamental guarantees such as humane treatment, and protections against violence to life and person, including torture, cruel or inhuman treatment, and outrages upon personal dignity.<sup>32</sup> The rules regulating treatment include:

- **Provision of basic necessities:** Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter, and medical attention;<sup>33</sup>
- **Location and conditions:** Persons deprived of their liberty must be held in premises removed from the combat zone for their safety, in healthy and hygienic conditions;<sup>34</sup>
- **Separate accommodation:** Women must be held in separate accommodation from men, except where families are accommodated as family units;<sup>35</sup>
- **Correspondence:** Subject to reasonable conditions, persons deprived of their liberty must be allowed to correspond with their families,<sup>36</sup> who have a right to know of their fate;
- **Prohibition of exposure to public curiosity:** Persons deprived of their liberty should not be exposed to public curiosity in order to preserve their dignity and to protect them from (further) harm. Acts that manifest exposure to public curiosity include the parading of those deprived of liberty in the streets, and distribution of their images, or other footage or personal information (including on online platforms). Their position of inherent vulnerability also means that consent by the individual to such acts is not valid and cannot be used to renounce their protections.

Children affected by armed conflict are entitled to special respect and protection in all circumstances,<sup>37</sup> which, at a minimum, should include:<sup>38</sup>

- Protection against all forms of sexual violence;
- Separation from adults when deprived of liberty, unless they are members of the same family;<sup>39</sup>
- Access to education, food, and health care;
- Evacuation from areas of combat for safety reasons;
- Reunification of unaccompanied children with their families.

## E. Treatment of the dead

IHL requires that the parties to the conflict respect the person and honour of all individuals, and accordingly prohibits any outrages upon personal dignity.<sup>40</sup> This prohibition is understood to include any such mistreatment of the dead as well.<sup>41</sup> Accordingly, all parties to the conflict must treat the dead with respect. It is prohibited to mutilate or otherwise mistreat dead bodies,<sup>42</sup> and further, the commission of these acts may constitute a war crime.<sup>43</sup> Mistreatment of the dead, for example parading the body of the deceased, may also amount to a violation of the prohibition of torture or other ill-treatment, due to the mental pain and suffering inflicted on their relatives or members of their community.<sup>44</sup>

Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request by their families.<sup>45</sup> This obligation is unconditional; the return of the dead cannot be used as a bargaining chip to coerce the family or the party to which the deceased belonged to do or refrain from doing something.

<sup>32</sup> Art. 27, GC IV; Rules 87, 89, and 90, CIHL.

<sup>33</sup> Arts. 89, 90, and 91, GC IV; Rule 118, CIHL.

<sup>34</sup> Arts. 83 and 85, GC IV; Rule 121, CIHL.

<sup>35</sup> Rule 119, CIHL.

<sup>36</sup> Art. 107, GC IV; Rule 125, CIHL.

<sup>37</sup> Arts. 24, 50, 76, and 89, GC IV; Art. 70(1), AP I; Art. 4(3), AP II.

<sup>38</sup> Rule 135, CIHL.

<sup>39</sup> As specified in the previous section, as a rule detention of children should be altogether avoided save as a last resort in exceptional circumstances and is otherwise unlawful.

<sup>40</sup> Art. 75(1), AP I; Common Art. 3(1)(c); Rule 90, CIHL.

<sup>41</sup> Commentary of 2020 to GC III, Common Art. 3, para. 704.

<sup>42</sup> Rules 90 and 113, CIHL; Common Art. 3(1)(c); Commentary of 2020 to GC III, Common Art. 3, para. 647.

<sup>43</sup> Arts. 8(2)(b)(xxi) and 8(2)(c)(ii), ICC Statute and Elements of Crimes.

<sup>44</sup> Commentary of 2020 to GC III, Common Art. 3, para. 675.

<sup>45</sup> Rule 114, CIHL.

## F. Collective punishment and reprisals against civilians

**Collective punishment** of civilians and persons *hors de combat* is prohibited under IHL.<sup>46</sup> This prohibition emanates from the fundamental principle of law that the imposition of any form of punishment must be individual, and that no one shall be held accountable for the conduct of another person to which they are not connected.

The prohibition does not just apply to the infliction of criminal sanctions but includes “penalties of any kind inflicted on persons or entire groups of persons ... for acts that these persons have not committed”.<sup>47</sup> In other words, it “covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise”.<sup>48</sup>

In case of doubt as to whether a particular measure constitutes collective punishment, the intention of the inflicting party should be analyzed in order to ascertain if it has been taken only for purposes of deterrence and retribution vis-à-vis uninvolved persons, which would fall within the ambit of the prohibition.<sup>49</sup>

**Reprisals** are acts that would normally constitute a violation of IHL but are exceptionally considered lawful if taken in response to a preceding violation of IHL by the opposing party to achieve a cessation of this violation.<sup>50</sup>

Reprisals against persons protected under the Geneva Conventions, including civilians, are prohibited.<sup>51</sup> This prohibition “is absolute and mandatory in character and thus cannot be interpreted as containing tacit reservations with regard to military necessity”.<sup>52</sup>

Furthermore, AP I prohibits attacks “against the civilian population or civilians by way of reprisals”<sup>53</sup> during the conduct of hostilities. Given statements to this effect from as early as 1970<sup>54</sup> and widespread corresponding State practice, there is at least a tendency towards such a prohibition under customary international law as well.<sup>55</sup>

*This note is part of a series. As the situation continues to evolve, further analysis will be made available as relevant.*

Jerusalem, 8 October 2023

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<sup>46</sup> Art. 87(3), GC III; Art. 33(1), GC IV; Art. 75(2)(d), AP I; Rule 103, CIHL.

<sup>47</sup> ICRC Commentary of 1958 to Art. 33(1), GC IV. See Eliav Lieblich and Eyal Benvenisti, *Occupation in International Law* (Oxford University Press, 2022), 157.

<sup>48</sup> ICRC Commentary of 1987 to AP I, para. 3055. See Lieblich and Benvenisti (n 45), 157.

<sup>49</sup> Lieblich and Benvenisti (n 45), 158 and the references cited therein.

<sup>50</sup> ‘Reprisals’, ICRC Casebook <[https://casebook.icrc.org/a\\_to\\_z/glossary/reprisals](https://casebook.icrc.org/a_to_z/glossary/reprisals)> accessed 8 October 2023.

<sup>51</sup> Art. 46, GC I; Art. 47, GC II; Art. 13(3), GC III; Art. 33(3), GC IV; Art. 20, AP I; Rule 146, CIHL.

<sup>52</sup> ICRC Commentary of 1958 to Art. 33(3), GC IV.

<sup>53</sup> Art. 51(6), AP I.

<sup>54</sup> UN General Assembly Resolution 2675 (XXV) Basic principles for the protection of civilian populations in armed conflicts (1970) <<https://digitallibrary.un.org/record/201888?ln=en#record-files-collapse-header>> accessed 8 October 2023, para. 7.

<sup>55</sup> Rule 146, CIHL.

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