



The rules of war in Postmodernity. International Humanitarian Law eyeless in Palestine

Las reglas de la guerra en la posmodernidad. Derecho internacional humanitario ciego en Palestina

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Abstract

The Palestinian Israeli conflict is one of the most complex and long-standing conflicts in contemporary history, with profound political, social, and humanitarian consequences and implications. This paper analyzes the legal context of the Palestinian-Israeli conflict, based on the study of the various instruments used by the international legal community, especially resolutions with recognized international validity, such as those originating within the United Nations and other international organizations, and an exhaustive analysis of the main events and developments that have marked the conflict, such as the norms of international humanitarian law. The two catastrophes or Nakba suffered by the Palestinian people, the first in 1948, which saw the first forced displacement of people in accordance with the bloody war currently ravaging Palestine, have revealed the ineffectiveness of the law of war or International Humanitarian Law. This paper seeks to analyze the barriers to the effective implementation of these rules in the current situation we are witnessing in Palestine.

Key words: international legal community; Palestinian Israeli conflict; international humanitarian law; rules of war.

Resumen

El conflicto palestino-israelí es uno de los conflictos más complejos y prolongados de la historia contemporánea, con profundas consecuencias e implicaciones políticas, sociales y humanitarias. Este documento analiza el contexto jurídico del conflicto palestino-israelí, basándose en el estudio de los diversos instrumentos utilizados por la comunidad jurídica internacional, especialmente las resoluciones con validez internacional reconocida, como las que se originan en las Naciones Unidas y otras organizaciones internacionales, y en un análisis exhaustivo de los principales acontecimientos y acontecimientos que han marcado el conflicto, como las normas del derecho internacional humanitario. Las dos catástrofes o Nakba sufridas por el pueblo palestino, la primera en 1948, que supuso el primer desplazamiento forzoso de personas en el marco de la sangrienta guerra que actualmente asola Palestina, han puesto de manifiesto la ineficacia del derecho de la guerra o del derecho internacional humanitario. El presente documento pretende analizar los obstáculos que impiden la aplicación efectiva de estas normas en la situación actual que estamos presenciando en Palestina.

Palabras clave: comunidad jurídica internacional; conflicto palestino-israelí; derecho internacional humanitario; normas de la guerra.

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1. Introduction

The Palestinian-Israeli conflict is one of the most complex and long-standing conflicts in contemporary history, with profound political, social, and humanitarian consequences and implications.

This paper analyzes the legal context of the Palestinian Israeli conflict, based on the study of the various instruments used by the international legal community, with recognized international validity, such as those originating within the United Nations and other international organizations, and an exhaustive analysis of the main events and developments that have marked the conflict, such as the norms of International Humanitarian Law.

The two catastrophes or Nakba suffered by the Palestinian people, the first in 1948, which saw the first forced displacement of people in accordance with the bloody war currently ravaging Palestine, have revealed the ineffectiveness of the law of war or International Humanitarian Law (IHL).

The Palestinian Israeli conflict has been ongoing throughout the 20th and early 21st centuries. In the words of Noam Chomsky,(2015) it is a "conflict between two nations claiming the right to national self-determination in the same territory, which each considers its historic homeland"

Two years after the end of the 2nd World War, a UN General Assembly resolution (29 November 1947) partitioned Palestine in three segments: 56 % for a Jewish State, 43 % for Palestinian State and 1 % to be under international Status. The Zionists rejoiced: there were given what they did not possess. But in the territory proposed to constitute the Jewish State, there were some 498.000 Jews and 497.000 Palestinians. This demographic symmetry had to be upturned, as the Zionists wanted an "exclusively Jewish State "and not a bi-national one. (BICHARA, 2024)

Before the creation of Israel, on 14 May 1948, Zionist para-military organizations (Stern and

Irgun)-that the British considered terrorist organizations- engaged in a wave of terror. On 9 April 1948 (one month before the proclamation of the State of Israel) an Irgun commando massacred the population of Deir Yassin, a village only 5 kilometers from Jerusalem. It was followed by a series of other massacres destined to terrorize the population and expel the Palestinians from their ancestral land. By 1949, more than 500 Palestinian villages and nearly a dozen urban neighborhoods were emptied of their inhabitants and roughly two thirds of Palestinian population (750.000) were made refugees.

This well-planned policy of "ethnic cleansing" has been carried out with great celerity and has been largely documented by Israeli Historians as Ilan Pappé and Benny Morris. But while Ilan Pappé objects to the ethnic cleansing on moral ground, Benny Morris uses the rhetoric of "necessity" to justify Palestinians massacres and expulsions, "without which Israel could not have been created as majority-Jewish State".

New territories have been occupied and annexed: in 1949, Israel enlarged its territorial base occupying 78 % of historic Palestine. Undoubtedly, the logic of displacement and dispossession works in tandem with a logic of territorial expansion and structures settler colonialism." Until today, in 2025, Israel is the only country in the world with an ever-moving borders. (BICHARA, 2024)

2. Rules of war in Postmodernity

In the historical evolution of humanity around war, a series of norms have emerged that beyond prohibiting these inevitable phenomena, have focused on generating a regulation through two main branches that make up IHL.

There are norms focused on the protection of victims of armed conflicts categorized as Geneva Law, whose maximum expression is reached with the adoption of the four Geneva Conventions of 1949 and its two Additional Protocols of 1977, given that all the significant

stages of the development of that law took place in Geneva, it is customary to designate it with the name of Geneva law. (BUGNION, 2001)

In parallel, another branch of IHL was developed aimed at regulating the means and methods of waging war in the context of hostilities, categorized as Hague Law, under the fundamental principle of Limitation, which indicates to the parties the limited right to choose the means and methods that may cause superfluous harm and unnecessary suffering in the context of hostilities, whose main pillars were structured within the framework of the Hague Conventions of 1899 and 1907, which is why this branch is usually designated as Hague Law.

In the described area, Hague Law considers two fundamental regulatory components. Firstly, the means of waging war and, secondly, the methods of waging war. Regarding the former, the regulation is structured from the Regulations on the laws and customs of war on land, which states that "belligerents do not have an unlimited right to choose the means of harming the enemy" (International Committee of the Red Cross [ICRC], 1996, art. 22), and in this sense, they should be understood as prohibited means (OLVÁSULO, 2007)

Under the prohibitions that constitute war crimes within the framework of the Rome Statute, the use of certain types of weapons or ammunition that by their very nature cause superfluous damage or unnecessary suffering or produce indiscriminate effects, and under these characteristics, the specific prohibitions.

In other words, International Humanitarian Law is the body of international law designed to reduce the extent of violence that occurs during armed conflicts and to provide a certain level of protection to those not directly participating in hostilities. Its rules are contained in the 1949 Geneva Conventions and their 1977 Additional Protocols and are complemented by customary law.

We cannot explain IHL without mentioning the main principles inherent in most of the more detailed rules stemming from the Geneva Conventions or the Hague regulations, those are: Principle of military necessity that limits the use of force in the war field and the principle of humanity that forbids the infliction of suffering, injury or destruction which would be unnecessary to win the war. It is interesting to analyze the respect not only of these principles but also the rest of the rules of war stated by IHL, these principles also include distinction, proportionality, precautions and prohibition of unnecessary suffering.

Even if nearly every state in the world has signed and ratified the Geneva conventions and therefore they have become one of the most widely accepted international treaty bodies in the world, unfortunately, we are witnessing the systematic non-compliance with these principles in numerous conflicts in post-modernity, among which, due to its intensity and duration, the Palestinian Israeli conflict deserves special attention.

So IHL core principles seek to limit the warfare, taking in consideration that IHL it does not prohibit the use of violence, it cannot protect all those affected by an armed conflict, it makes no distinction based on the purpose of the conflict; it does not bar a party from overcoming the enemy and it presupposes that the parties to an armed conflict have rational aims and that those aims as such do not contradict IHL. The rule reflects the basic idea underlying IHL that any act of war must balance the concerns of humanity and military necessity.

Even if international humanitarian law were fully respected, many people, both combatants and civilians, would still die in conflicts. The aim of IHL is to minimize human suffering to the greatest extent possible.

3. International Humanitarian Law: Eyeless in Palestine?

Looking at Palestinian conflict, there are enough evidence to conclude that IHL is not

being sufficiently respected. IHL establishes fundamental rules for the protection of people who do not directly participate in hostilities and for limiting the means and methods of warfare. Its fundamental principles include the distinction between civilians and combatants, and between civilian objects and military objectives.

According to Article 50 of Additional Protocol I of 1977 to the Geneva Conventions of 1949, a civilian is defined as any person who does not belong to the armed forces of a party to the conflict. Therefore, in cases of doubt, every person must be considered a civilian.

Article 43 of the same Protocol establishes that combatants are members of the armed forces of a party to the conflict, with the exception of medical and religious personnel. Combatants have the right to take a direct part in hostilities but may also be legitimately attacked.

The protection of civilians implies that they should not be directly attacked, unless they take a direct part in hostilities (Article 51.3 of Protocol I), and then only for the duration of such participation.

Article 52 of Protocol I establishes that civilian objects are all objects that do not constitute military objectives. However, an object becomes a military objective if, by its nature, location, purpose, or use, it contributes effectively to military action and if its destruction offers a definite military advantage.

Typical examples of military objectives include military bases, arsenals, barracks, and lines of communication. Schools, hospitals, and homes are presumed to be civilian objects, and attacking them constitutes a clear violation of IHL. During the conflict in Palestine, multiple attacks against civilian infrastructure, including hospitals and refugee camps, have been reported, leading to allegations of possible war crimes.

In any case, even when a civilian object is militarily legitimate, the attack must comply with the principles of proportionality (not

causing excessive harm to civilians in relation to the anticipated military advantage) and precautions (taking all feasible measures to minimize collateral damage). Article 57 of Protocol I establishes the obligation of precaution, while the principle of proportionality is reflected in both Protocol I and customary law.

Humanitarian International Law must be applied regardless of who is right or wrong. Unfortunately, neither side does. Hamas indiscriminately attacks Israeli cities, kills, rapes, and takes hostages. Israel violates international humanitarian law when it establishes settlements in the West Bank, obstructs the International Committee of the Red Cross from visiting Palestinian prisoners, and carries out attacks on Gaza, which have already caused more than 51,000 Palestinian deaths, compared to the 1,200 Israelis who have died in the conflict, the disproportionality is staggering.

But what counts for international humanitarian law is that, in each attack, the impact on the civilian population is not excessive in relation to the expected military advantage, and the truth is that we often don't know how significant that advantage is.

According to international humanitarian law, there must be a proportional relationship between the military advantage gained by attacking a military objective and the risk it poses to the civilian population. Before carrying out an attack, it is necessary to confirm that the site is being used for military purposes, and the advantages of eliminating the target must be assessed against the costs.

We have sufficient information to confirm violations of international humanitarian law, it is striking how many times the Israelis have justified their attacks by claiming that the sites were being used for military operations.

Even if this were true, the question remains as to how important these targets were, all these times the targets were so important as to justify such many civilian casualties?

4. The role of the international criminal court: war crimes and genocide

In this context, the role of the International Criminal Court as an international criminal justice body and concepts such as war crimes and genocide take on relevance since the most serious violations of IHL can be considered war crimes, according to the Rome Statute, which established the International Criminal Court (ICC).

War crimes, according to the Rome Statute of the International Criminal Court (1998), encompass serious violations of the laws and customs applicable in armed conflict. These include deliberate attacks against civilians, the use of prohibited weapons, wanton destruction of civilian objects, and hostage-taking, among others. Genocide involves acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. These acts include murder, serious bodily harm, and intentional infliction of conditions of existence conducive to the physical destruction of the group.

The International Criminal Court (ICC) is a permanent international tribunal established to prosecute the most serious crimes of concern to the international community, such as genocide, crimes against humanity, war crimes, and, since 2018, the crime of aggression. It was established by the Rome Statute on July 17, 1998, and entered into force on July 1, 2002. The Court is based in The Hague, Netherlands, and its jurisdiction is complementary to that of national courts, meaning it only intervenes when national courts are unwilling or unable to do so. Its main objective is to contribute to the prevention of atrocity crimes by prosecuting and judging those responsible.

It is in this sense that Palestine, since 2009, with the submission of a declaration, under Article 12(3) of the Rome Statute, by the Palestinian National Authority, requests the jurisdiction of the International Criminal Court with respect to acts committed in Palestinian

territories since July 1, 2002. However, it was not until 2012 that the Prosecutor of the Court declined this possibility, arguing that Palestine could not be considered a State for the purposes of the Rome Statute itself.

The ICC, following Article 9 of the Rome Statute (1998), has further defined the Elements of Crimes under its jurisdiction. In the case of genocide, each of the five actions that fall under its definition are explicitly defined by referencing the three elements: physical, protected group targeted and the mental element of intent (International Criminal Court, 2013). Precisely intent as a key element for deciding whether an action is to be considered Genocidal in nature, the Court has established that the offender has to knowingly engage in a specific conduct seeking to cause specific consequences (Rome Statute of the International Criminal Court, 1998, Article 30).

The Elements of Crime document, however, also appear to introduce a common element to all genocide actions and that is that they must take "place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction." (International Criminal Court, 2013). This essentially means that there must be at least some level of systematic behavior for individual conducts to amount to genocide.

Regarding the existence of evidence pointing to the crime of genocide being committed in Palestine research has shown that there is indeed sufficient evidence. Concerning the physical element there are records presented by States, NGOs and international organizations detailing the horrors happening in Gaza on a daily basis. For the mental element of intent, there is also enough evidence to determine at least that there are reasonable grounds to believe some Israeli officials are operating with it. In fact, there is rarely a case in which intent is so easily inferred.

South Africa's December 29, 2023, complaint already shows reasonable evidence of the

commission of genocide. Subsequently, the presence of the material element has also been corroborated in numerous reports from various sources, particularly in the forms of killing of members of the group; serious injury to the physical or mental integrity of members of the group; and intentional subjection of the group to conditions of existence that are expected to bring about its physical destruction, in whole or in part.

The presence of the intent to destroy, in whole or in part, a national group, in this case the Palestinian group, is demonstrable, probably like no previous genocide, by the numerous public statements with explicit content by senior Israeli political and military officials and by the testimonies of Israeli civilians and military personnel participating in the hostilities, widely available on social media. On January 26, 2024, when the estimated death toll was 25,700 Palestinians dead, more than 63,000 injured, and 1.7 million displaced-much lower than the current figure-the International Court of Justice admitted the complaint filed by South Africa against Israel on December 29, alleging violation of the Genocide Convention. It has so far adopted three provisional measures decisions, on January 26, March 28, and May 24.

In all of them, the Court ruled that Israel must take all measures within its power to prevent the commission of acts of genocide, ensure that its armed forces do not commit them, and prevent and punish direct and public incitement to commit genocide. It must also halt attacks against the civilian population, respect international humanitarian law, and ensure the entry of humanitarian aid to the region. And Israel has failed to comply with all of these measures to this day.

Today, as the death toll has multiplied and continues to grow daily, all international human rights organizations agree on the extreme gravity of what Israel is doing and openly admit the possibility of genocide: the United Nations High Commissioner for Human Rights; the International Commission of

Inquiry on the Occupied Palestinian Territories; the Special Rapporteurs of the Human Rights Council, particularly the Special Rapporteur on the Occupied Palestinian Territory; and the Director-General of UNRWA, among others.

As well as NGOs such as Amnesty International, the International Federation for Human Rights, and Human Rights Watch. In the words of Francesca Albanese: Israel's genocidal conduct, hidden behind false Israeli narratives of a war waged in "self-defense," must be viewed within a broader context: it comprises numerous acts (the totality of conduct) collectively directed against Palestinians as such (the totality of a people) throughout the territory in which they reside (the totality of the land) in order to further Israel's political ambitions to exercise sovereignty over all of the formerly Mandatory Palestinian Territory.

Today, the genocide of Palestinians appears to be the means to an end: the complete expulsion or eradication of Palestinians from the land that is an essential part of their identity. The collective security system established by the United Nations Charter has shown its weakness in the face of numerous conflicts, each time one of the permanent members has blocked, often alone, the action of the Security Council within the framework, especially in the case of Israel, probably the one with the longest history, the Security Council has always shown its inability to fulfill the functions assigned to it by the UN Charter, but this inability takes on a particularly dramatic profile given the gravity of the events unfolding in Palestine since October 7, 2023. (PIGRAU, 2025)

5. The role of the UN: the security council resolutions relating to international peace and security

United Nations Security Council resolutions are decisions taken by this principal UN body regarding matters of international peace and security. The Security Council is composed of five members, five of whom are permanent

and ten of whom are elected for two-year terms by the General Assembly. These resolutions are binding on all UN Member States and must be complied with in accordance with the United Nations Charter. These resolutions may include measures such as sanctions, embargoes, authorization of military force, establishment of peacekeeping missions, among other actions, depending on the nature and severity of the situation at hand. It also states that "Under the Charter of the United Nations, the Security Council has primary responsibility for the maintenance of international peace and security.

Since 1948, the Council has addressed the situation in the Middle East and the Palestinian question on numerous occasions. When armed clashes have occurred, it has called for or ordered a cessation of hostilities." It has also sent military observers and deployed United Nations peacekeeping forces in the region (...).

The Council has repeatedly expressed concern about the situation on the ground, declared the nullity of the measures taken by the Government of Israel to change the status of Jerusalem, called for an end to Israeli settlement activities, determining that they are legally invalid, (...) the applicability of the Fourth Geneva Convention, and called for the return of deported Palestinians.

The Council has repeatedly called for the immediate resumption of negotiations within the framework of the ongoing Middle East peace process with the aim of achieving an early final settlement between the Israeli and Palestinian sides. The Council affirmed the vision of two States, Israel and Palestine, living side by side within secure and recognized borders (...)

There have been numerous UN Security Council resolutions in this regard, however, all of them have been systematically violated. Not even the first resolution, Resolution 181, adopted on November 29, 1947, has been complied with. This resolution divided the region into two states: one Arab and one Jewish. Today, a Palestinian state still does not

exist. Jews were assigned 54% of the territory, despite representing only 30% of Palestine's population at the time. Jerusalem, a key city for both cultures, was granted international status.

Resolution 194, adopted in December 1948, establishes that Palestinian refugees who were expelled from their territories after the creation of the State of Israel in May of that year had-and still have-the right to return to their homes. Another important resolution that has been ignored by Israel is Resolution 242, passed by the UN in November 1967, six months after the Six-Day War. Resolution 242 demands the withdrawal of the Israeli army from the occupied territories.

Adopted by the Security Council on March 22, 1979, Resolution 446 declares the establishment of settlements by Israel in the Palestinian territories occupied since 1967 illegal.

Resolution 478, of August 1980, was a UN response to the Israeli Parliament's passage of the Jerusalem Law, which proclaimed the "whole and unified" city as the capital of Israel. Through this resolution, the UN responded that the law passed by the Israeli Parliament was contrary to international law. In December 1992, UN Security Council Resolution 799 "strongly condemned the deportation of hundreds of Palestinian civilians by Israel" and demanded "the immediate and safe return of all deportees to the occupied territories."

In March 2002, Security Council Resolution 1397 was adopted. It supported "the concept of a region in which two States, Israel and Palestine, live side by side within secure and recognized borders." It also demanded "the immediate cessation of all acts of violence, including all acts of terrorism, provocation, incitement, and destruction."

Seeing that none of the resolutions were heeded by Israel, the Security Council reiterated its support in November 2003 with Resolution 1515. In this resolution, the Security Council recalled the validity of all

previous resolutions regarding the situation in the Middle East, and in particular, Resolutions 242, 338, and 1397.

Despite the reiteration of this message, Israel continues to ignore it. That's why the Security Council adopted resolution 2334 on December 23, 2016, to reaffirm that "the establishment of settlements by Israel in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity" and to express "grave concern that continued Israeli settlement activities are jeopardizing the viability of the two-State solution based on the 1967 borders." Something Israel will not do and never seems to be doing.

6. Conclusions

Considering the analysis of United Nations Security Council resolutions, the principles of International Humanitarian Law, International Human Rights Law, and the legal framework of the International Criminal Court, it is undeniable that the conflict between Israel and Palestine continues to be characterized by serious and persistent violations of international law.

The magnitude and systematic nature of these acts include indiscriminate attacks against the civilian population, forced displacement, disproportionate destruction of objects essential to survival, as well as possible acts of collective punishment demand an urgent and coherent response from the international community.

The disproportionate use of force, prolonged blockades, and the systematic denial of humanitarian assistance constitute war crimes under the Rome Statute, and in the case studied, they reach the threshold of the crime of genocide, as the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group appears to have been demonstrated.

Given the seriousness of these events, the inaction or insufficient response of States and the inactivity of international organizations not only weakens the international system for the protection of human rights but also

perpetuates a cycle of impunity that jeopardizes the very validity of the international legal order.

Urgent action is needed from the international community States, intergovernmental organizations, and international judicial bodies to act decisively, consistently, and in accordance with international law, demanding strict compliance with International Humanitarian Law and Human Rights International Law including respect for the principles of distinction, proportionality, and precaution in armed attacks, and ensuring the effective protection of the civilian population. It is necessary to end policies that favor impunity or double standards, adopting a consistent stance toward all violations, regardless of the perpetrator.

International silence or passivity in the face of possible war crimes, genocide or crimes against humanity not only represents a betrayal of the founding principles of the United Nations, but also an affront to the universal legal conscience.

The validity of international humanitarian law and human rights cannot be selective or subordinated to temporary political interests. Their defense requires courage, commitment, and concrete action.

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