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DO CIVILIANS STILL EXIST?

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"I'm so scared. Please come. Please call someone to come and take me."[1]

These are some of the last words of Hind Rajab, 6 years old, on the phone to the Red Crescent on January 29th, from the car hit by a tank in which her relatives have already died. Her body was found on February 9th. Two paramedics who were sent to rescue her were killed in the ambulance.

Four months before, there was the 'Al-Aqsa Flood,' which resulted in 1,200 deaths, including many civilians and 33 children, hundreds of prisoners and, among other things, "conflict-related sexual violence […], including rape and gang-rape in at least three locations" (UN, 2024). Since then, it has been months of horror. In Gaza, there have been dozen of thousands deaths, two-thirds of whom are women and children, with dozens certified as having died from starvation. Medical personnel, journalists, intellectuals have been affected. The vast majority of homes, hospitals, schools, universities, mosques, and churches have been destroyed or affected. Particularly shocking events include newborns without incubators, surgeries without anesthesia, the 'flour massacre' on February 29, and the hundreds of deaths during food distribution in the following days, and the torture of doctors.

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[1] https://twitter.com/PalestineRCS/status/1752635889446953464.

The indistinction between military and civilians was declared from the beginning by Israeli leaders, including President Isaac Herzog ("It's an entire nation out there that is responsible. It's not true this rhetoric about civilians not aware not involved"), Defense Minister Yoav Gallant, National Security Minister Itamar Ben-Gvir ("To be clear, when we say that Hamas should be destroyed, it also means those who celebrate, those who support, and those who hand out candy — they're all terrorists, and they should also be destroyed"), and Minister of Energy and Infrastructure Israel Katz (ICJ, 2023, p. 63-65). The killing of seven World Central Kitchen workers on April 7 appears to be a paradigmatic case of the impotence of law in limiting war. It was an intentional attack on non-combatants, which constituted a violation of the immunity of humanitarian workers. An attack that can be included in a starvation strategy and carried out using drones—technologies that escape the traditional categories of war. Furthermore, the outrage over the six deaths of Australians, Europeans, and Americans seemed to replicate the double standard syndrome when compared to the reaction to the dozens of thousands of Palestinian deaths, which did not provoke the recall of ambassadors.

Yet, according to the tradition of just war theory, the basic principle of warfare is the discrimination between unjust enemies and "innocent" combatants. Francisco de Vitoria argued that the killing of innocents is not legitimate *per se et ex intentione*, but only *per accidens*, when "it would otherwise be impossible to wage war against the guilty," (Vitoria, 1991, p. 315).

Since then, the *ius in bello* has evolved through customary practice and was codified in a series of treaties signed in Geneva and the Hague, concluding in the Additional Protocols of 1977. The use of certain weapons was prohibited, the obligations of occupying powers and the rights of occupied peoples were defined, and the intentional killing of non-combatants was prohibited, starvation, collective punishments, and attacks on healthcare personnel and hospitals were prohibited. The principle of proportionality between the military advantages of actions and the "collateral damage" —including killings and destruction — that may result was affirmed.

However, the difficulty of applying the principles of discrimination and proportionality was evident early on. Bartolomé de Las Casas noted that in war, the risk of killing innocents is constant (Las Casas, 1989-1999, 9, p. 368-70), and identifying them can be very difficult, as the parable of the weeds warns (Las Casas, pp. 398-400, 406; Mt, 13.25-30, 36-40). Distinguishing the wheat from the weeds has become increasingly difficult with technological development. Even during World War I, gases affected the civilian population, and this happened intentionally during Italy's war of aggression against Ethiopia. During World War II, genocide and extermination characterized the actions

of Nazi Germany and its allies. Sadly, it is well known that terrorist carpet bombings, intentionally carried out on civilian populations, have been integral to the strategies of the United Kingdom and the USA, from Hamburg to Tokyo, from Dresden to Nagasaki.

All of this continued into the Cold War era. With the post-1989 season, the 'surgical war' —the declared strategy of minimizing civilian casualties through the use of new weapon systems—resulted in a partial reversal of the principle of discrimination. Conscious of the Vietnam War and the effect of the tens of thousands of deaths among young American conscripts on public opinion, strategies and tactics aimed at reducing casualties among Western soldiers were used. The paradigm is perhaps best represented by NATO's war against Yugoslavia in 1999, which was conducted exclusively from the sky, beyond 15,000 feet. But this pattern reemerged when troops were on the ground in 'humanitarian interventions': the imperative has been to limit "our" casualties and reduce risks, at the expense of protecting non-combatant civilians.

All this is exacerbated by the widespread use of various types of drones. Pioneered by Israel, then widely used by the United States during the Obama administration, and now more democratically available to various parties, drones overturn the logic of the *jus in bello*. The operator, often thousands of kilometers away from the theater of war, is unable to distinguish combatants and non-combatants. Immunity is reserved for the former: "for whoever uses such a weapon, it becomes a priori impossible to die as one kills" (Chamayou, 2015, p. 13), thus canceling the Clausewitzian image of war as a duel.

Cyberwarfare opens the way to even more disturbing scenarios, such as autonomous weapon systems that entrust the selection of targets and the decision to engage them entirely to machines. It has now been demonstrated that in Gaza, the use of artificial intelligence has reduced human decision-making, committed to junior officers, to the twenty seconds needed to determine whether the target is male or female.[2]

The massive use of private companies of mercenaries, or contractors, points out the (partial) privatization of war. Hybrid forms of warfare include cyberattacks and terrorism in a gray zone that makes the very distinction between war and peace difficult. The distinction between combatants and non-combatants is totally erased in nuclear war (Bobbio, 1979 , p. 60). Yet, today it is once again invoked by political decision-makers and considered plausible by military analysts.

On the other hand, international humanitarian law seems to be burdened by an original sin. According to IHL, war is in principle legitimate if it adheres to the norms of *ius ad bellum*. The 'privilege' of conducting it, that is, of killing other combatants, is

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[2] https://www.972mag.com/lavender-ai-israeli-army-gaza/

reserved for the combatants. In short, war as an institution aimed at inhibiting the taboo on intraspecific killing is not questioned. Then there are other specific sins, recurring in the clauses of last resort and in the principle of proportionality itself, which open the way to the justification of attacks on civilians. Indiscriminate attacks are prohibited and are considered “an 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” (I Additional Protocol to the Geneva Convention, 1977, art. 51). Moreover “It is prohibited to employ weapons, projectiles, and material and methods of warfare of a nature to cause *superfluous* injury or *unnecessary* suffering” (art. 35) [the italics are mine]. In the absence of clear distinguishing criteria in what constitutes ‘unnecessary’ suffering and ‘superfluous’ injury, the rule requires a balance between considerations of military necessity and humanity. Among other things, the International Court of Justice did not declare the use of nuclear weapons absolutely illegitimate: “it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake” (ICJ, 1996, par. 97).

International law is an European product. It was born as the law regulating relations among ‘us’ —Christians, *humaniores*, civilized, developed—excluding infidels, barbarians, uncivilized, underdeveloped. For Vitoria, discrimination between combatants and ‘innocents’ falls “in wars against the infidel, from whom peace can never be hoped for on any terms” (Vitoria, 1991, p. 321). For the nineteenth-century founding fathers of international law, it expressed “the legal conscience of the civilized world”: a product of European civilization and cannot be automatically applied beyond its own sphere (Koskenniemi, 2001, p. 41).

According to Carl Schmitt, the limitation of war was only possible within the European Christian States, precisely because they defined their space by excluding the rest of the world. Europe was the “sphere of peace and order ruled by European public law” (Schmitt 2003, p. 97), beyond it, "force could be used freely and ruthlessly” (Schmitt, p. 94). This, he underlines, “was an enormous *exoneration* of the internal European problematic” (Schmitt, p. 94). In short: the limitation of the war within Europe was possible because the unbridled violence beyond European borders had taken on this relief function. Schmitt adds a disturbing example: the war of occupation of Ethiopia by Fascist Italy, which was an aggression by one League of Nations member state against another. But the sanctions imposed by the League were ineffective, and shortly thereafter, the annexation was recognized. “Perhaps [...] Africa was considered to be colonial ter-

ritory" (Schmitt, p. 243), outside international legal order, he comments. One wonders whether this unconscious discrimination continues to apply today. Western States have rightly condemned the atrocities committed by Palestinian militiamen in the October 7 attacks, but reminders of Israeli's obligation to respect international law have been generally weak, and we have not seen the possible actions to stop the perpetration of war crimes. Palestinian civilians are not doing much better than the Ethiopians in Areri and Amba Aradam, who were gassed by the Regia Aeronautica, or the patients and staff of the hospitals in Malca Dida and Quodam.

Crimes committed in the occupied Palestinian territories have been reported to the International Criminal Court since 2009, yet double standards seem to persist. Prosecutors have stalled while awaiting clarification on Palestine's status. The current one, Karim Khan, described the Rafah crossing used for the Palestinians with expressions like 'war crimes,' "ongoing violations of international humanitarian law," and 'unlawfully,' while for Israeli's obligations to respect International law the formulations remained doubtful or optative. And then there is the issue of international law: the absence of a third party and the lack of a higher power capable of sanctioning violations. Attempts have been made to prevent or legally limit the use of war since the Treaties of Westphalia. After World War II, the right of veto has almost always paralyzed the UN Security Council.

The Hobbesian problem of the 'third' has been taken very seriously by what has been called 'juridical pacifism' or 'institutional pacifism' since Kant's project of a *Friedensbund*. Today this approach has been radicalized. Luigi Ferrajoli (2022) has drafted a *Constitution of the Earth* attributing the legal monopoly of force to an Earth Federation. Beyond the doubts about the actual possibility of achieving it, it is not difficult to imagine the risks of such an enormous concentration of power. In fact, even if weapons of mass destruction were banned as 'illicit goods,' the know-how for their production could not be forgotten. Faced with the risk that entities such as terrorist or criminal organizations, a State dissenting from the Earth Federation, or even a multinational corporation would end up appropriating them, the global police force would not be able to give up possessing these weapons, including nuclear ones. Nevertheless, there have been General Assembly decisions condemning Russian aggression on Ukraine and calling for a ceasefire in Gaza; appeals to the Security Council, ICC, and ICJ from relevant actors and third countries such as South Africa; the ICJ decisions on 26 January and 28 March; and Security Council Resolution 2728. But perhaps even more emblematic are the hardly credible declarations of the parties involved. On 24 February 2022, the President of the Russian Federation Vladimir Putin declared that "The people's republics

of Donbass have asked Russia for help. In this context, in accordance with Article 51 (Chapter VII) of the UN Charter, […] I made a decision to carry out a special military operation" (Putin 2022).

On January 21, 2024, the Hamas press office issued a statement saying, among other things: "the Palestinian fighters only targeted the occupation soldiers and those who carried weapons against our people. In the meantime, the Palestinian fighters were keen to avoid harming civilians"[3] (Hamas, 2024). On February 14, the Israeli embassy to the Holy See replied to a declaration by Secretary of State, Cardinal Pietro Parolin, that Israeli armed forces "are operating in full compliance with international law." In any case, they are less bloody than those conducted in the past by NATO and Western countries in Syria, Iraq, and Afghanistan, where for every 'terrorist' killed 'nine or ten civilians' were exterminated, while in Gaza "for every Hamas militant killed, three civilians lost their lives".[4]

Iran's ambassador to the United Nations made a statement regarding the attack on Israel on the night of April 13-14, 2024. "This action was in exercise of Iran's inherent right to self-defense as outlined in Article 51 of the Charter of the United Nations," while Israel attacking Iran's Embassy in Syria violated Article 2.[5]

International law is invoked by parties to a conflict to justify their actions, even when they *prima facie* violate it. This is the ideological use of legal reasoning and recognized norms to justify aggressions and massacres, well known throughout the history of European imperialism and an integral element of the discriminatory feature of international law. But is it merely this?

Marti Koskenniemi, far from being indulgent in describing the aporias of international law, emphasized that it still refers to a "formal ideal" which allows the "lack" implicit in particular identities to be expressed. "The ability to articulate this lack, and to do this in universal terms, is what the culture of formalism provides," which gives the particular the "horizon of possibility" to express itself in general terms (Koskenniemi, 2001, p. 506), and "to give voice to those who are otherwise routinely excluded" (Koskenniemi, p. 517; cp. D'Attorre 2023, p. 155).

International law allows disputes to be given shape and creates a space for negotiations and compromises. It opens and structures a field of struggle. A sort of delirium of omnipotence is a recurrent pathology of legal pacifism; conversely, it is necessary to ad-

[3] https://www.palestinechronicle.com/wp-content/uploads/2024/01/PDF.pdf
[4] https://twitter.com/IsraelinHolySee/status/1757772849383694727?s=20
[5] https://www.tehrantimes.com/news/497174/Iran-has-legitimate-right-to-self-defense-against-Israeli-regime

dress the economic, social, cultural, and anthropological roots of war. But, given plurality of interpretations of principles—even universal ones—only a communicative process that takes place within a legal framework can be successful (Habermas, 1998, p. 212).

How can the potential of international law be activated? A few years ago, Richard Falk argued that Israel's policy toward the Palestinians is the demonstration of the failure of the responsibility to protect principle, which was solemnly assumed in the 2005 UN World Summit, and should be applied in the presence of apartheid, ethnic cleansing, and collective punishments. So “The only path to ending current patterns of criminal victimization is by a combination of Palestinian national resistance and global solidarity initiatives, which as suggested above could benefit from an invocation of the R2P ethos” (Falk, 2019). The suggestion is that even in the international context, processes of ‘jurisgenesis’ can be activated, which involve movements and processes within society, judicial courts, legislative institutions in a virtuous circle (Michelman, 1988).

In the classical tradition, war was seen as an inevitable destiny of the *polis*, a gym for heroism and virtue, and social conflict as a pathology of the body politic, a slippery slope that leads to *stasis*. The relationships between domestic conflicts and war have interacted in different ways in modernity. There can also be a virtuous intertwining: the *tumulti*, which for Niccolò Machiavelli could lead to “laws that are made in favor of liberty” (Machiavelli 1958, p. 202-03), might have similar effects on the international dimension. In the awareness that international law is something even more elusive than ‘domestic’ law, it cannot be denied that the history of peace and rights movements is not just a history of defeats. International mobilization played a role against the Vietnam war, the deployment of medium-range nuclear missiles in Europe, and the abolition of Apartheid. After all, the flawed and impotent international institutions have a merit: they give us the image of a vaster world than the one we Westerners imagine. A world that no longer tolerates double standards and seeks to apply the principles we have developed to ourselves as well.

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