

,Steadfast and Unreserved‘

Khaled El Mahmoud

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On 24 November 2023, the [Barcelona City Council](#) passed a resolution, suspending diplomatic ties with Israel, until a permanent ceasefire is established. While this may not reflect the stance of the Spanish government, it has nevertheless condemned ‘[the indiscriminate killing of innocent civilians](#)’. As more EU States (such as [Belgium](#), [France](#), and [Ireland](#)) have raised their concerns regarding Israel’s military operations in Gaza, Germany has remained steadfast in its ‘unwavering’ and ‘unreserved’ support for Israel. To the extent that Israel has failed to comply with international humanitarian law (IHL), Germany’s position might amount to a breach of its obligation under common Article 1 (CA1) of the 1949 Geneva Conventions (GC) to ‘ensure respect’ for IHL. While this obligation is incumbent on all States parties to the GC, this post focuses on Germany due to its particularly affirmative position with respect to Israel’s conduct.

Israel’s Response to the Terrorist Attacks

On 7 October 2023, Hamas launched an [estimated 3,000 to 5,000 rockets](#) and unprecedented terrorist attacks in several locations in Israel. In wake of these appalling acts of terror, Prime Minister Benjamin Netanyahu [declared a state of war](#). Subsequently, [a complete siege was imposed on the Gaza Strip](#), cutting off 2,3 million people from all essential supplies. The incessant bombardment of the Gaza Strip by the Israeli Defense Forces has caused a significant number of casualties, [with over 11,000 estimated dead, and over 28,000 injured](#). These staggering tolls are particularly distressing given that [children make up almost half of Gaza’s population](#). An [evacuation order issued by the IDF](#) required more than 1 million people to leave northern Gaza within 24 hours. Subsequently, [over 1,5 million people have been internally displaced](#). Moreover, significant damage has been caused to residential buildings and vital civilian infrastructure, resulting in [rendering extensive areas uninhabitable](#).

Germany’s Position

In a [public statement on 26 October 2023](#), Chancellor Scholz asserted Germany’s position by saying that:

‘Israel is a democratic State with humanitarian principles that guide it and therefore you can be sure that the Israeli army will observe the rules arising from international law in its conduct. I have no doubt about that.’

Germany has repeatedly demonstrated its ‘[unwavering](#)’ and ‘[unreserved](#)’ support [for Israel](#). In this regard, an official spokesperson for the government of Germany stated at a [press conference on 30 October 2023](#) that ‘Germany has always made

it clear that [it] stand[s] by Israel's side without any ifs or buts.' The topic of whether Israel is acting in accordance with IHL was discussed on multiple occasions during press conferences held on [1 November](#), [6 November](#), and [15 November 2023](#). While the responses recognised Israel's legitimate right to self-defense, the German government was unwilling to address Israel's potential breaches of IHL. In a more recent [press release on 18 November 2023](#), Scholz reiterated Germany's full solidarity with Israel, stressing that 'Germany stands unwaveringly by Israel's side.'

While States, by virtue of their sovereignty, are *prima facie* free to conduct their foreign policy as they see fit, this freedom is not absolute, but subject to constraints imposed by international law. Such a restriction may arise from Common Article 1 of the Geneva Conventions which states:

'The High Contracting Parties *undertake* to respect and to ensure respect for the present Convention in all circumstances.'

The Positive and External Element of CA1

Some believe CA1 to simply amount to a broad commitment with no substantial legal significance, which lacks both a *positive* and *external* element [[here](#) and [here](#)]. Yet, it was highlighted by the ICJ that '[\[t\]he ordinary meaning of the word "undertake" is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. \[...\] It is not merely hortatory or purposive](#)' [para. 162]. The ICRC comments accompanying the draft introducing the relevant language stated that it was intended to '[stress that if the system of protection of the Convention is to be effective](#)', States parties '[must also do everything in their power to ensure that the humanitarian principles \[...\] \[are\] universally applied](#)' [p. 5]. These observations clearly indicate that CA1 contains a *positive* obligation. However, it is equally clear that, at the time of its drafting, the primary *rationale* for the inclusion of the phrase 'to ensure respect' was to reaffirm the commitment of States parties to guarantee compliance with the Geneva Conventions not only by their armed forces but also by their populations. Against this historical background, it appears that the phrase 'to ensure respect' was originally intended to emphasise a broad internal compliance rather than encourage enforcement of *external compliance*.

While the phrasing of CA1 is inconclusive as to whether the obligation to ensure respect has an external dimension, Article 31(3)(b) VCLT permits subsequent practice to be taken into account to determine a norm's meaning. There is ample evidence of practice that supports attributing an external dimension to the obligation under CA1. For one, the UNSC endorsed the idea that CA1 encompasses an 'external compliance dimension' in [Resolution 681 \(1990\)](#), 'calling upon the High Contracting Parties [...] to ensure respect by Israel [...] for its obligations under the Convention in accordance with article 1 thereof'. The UNGA has adopted a number of [resolutions](#) to the same effect. The external element of CA1 was also acknowledged by the [UN Human Rights Council](#) and other regional organisations, notably the [Council of Europe](#), the [Organisation of African Unity](#), and the [Organisation of American States](#). While [resolutions adopted by international](#)

[organisations do not constitute subsequent practice within the meaning of Article 31 VCLT *per se*](#), their contents may nevertheless provide an authentic interpretation of CA1 to the extent that they reflect an agreed subsequent practice of States parties [p. 40, para. 14].

Moreover, the ICRC has also [appealed in the past to the international community to guarantee IHL compliance by States accused of violations](#), without any criticism. [Customary law Rule 144 of the ICRC's study on customary international humanitarian law \(CIHL study\)](#), which establishes that CA1 'is *not limited to behavior by parties to a conflict*, but includes that States do all in their power to ensure that [IHL] is respected universally.' While some rules specified in the CIHL study faced [significant opposition from particular States](#), Rule 144 has not yet been objected to. The interpretative guidance set out by the ICRC in the CIHL study is '[the result of an expert process based on an analysis of State treaty and customary practice](#)' and may therefore reflect subsequent practice [p. 41, para. 15].

The [CIHL database](#) offers substantial further evidence of State practice with regards to CA1's external compliance dimension and can be referred to for this purpose.

Crucially, the ICJ has also found that [there is an external compliance dimension to the obligation to prevent genocide](#) [para. 430] arising from [Article I of the Genocide Convention](#). The latter bears structural resemblance to CA1. Therefore, it is unsurprising that the ICJ also recognised the external compliance dimension of CA1, notably in its 1986 judgment of the [Nicaragua case](#) [paras. 220, 255-6] and its 2004 advisory opinion on the [Israeli Wall](#) [paras. 158-9]. In the latter, it emphasised that:

'It follows from that provision [i.e., CA1] that every State party to that Convention [i.e., GC IV], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with. All the States parties to the Geneva Convention [...] are under an obligation, while respecting the UN Charter and international law, to ensure compliance by Israel with international humanitarian law'.

The ICJ's position was further confirmed by the ICTY in its judgments in the 1998 [Furundžija case](#) [para. 151] and in the 2000 [Kupreški# case](#) [paras. 517-9].

Taken together, there is little or no doubt that CA1 today encompasses an external compliance dimension.

Is Germany obliged under CA1?

The obligation under CA1 applies to [international and non-international armed conflicts](#) [para. 125]. The application to the latter is reinforced by Article 1(1) of the Additional Protocol II to the GC (AP II) of 1977 which asserts that the '[Protocol \[...\] develops and supplements Article 3](#)'. The classification of the Israeli-Palestinian conflict as an international or non-international conflict is irrelevant, since both fall under the purview of CA1. Neither does the status of Gaza matter, for CA1 also

applies to a [state of occupation](#) [para. 125]. Thus, any breach of the GC by another State activates the obligation under CA1.

Scholars have convincingly argued elsewhere that certain military actions taken by Israel constitute violations of IHL, triggering the obligation under CA1. For instance, the complete siege of Gaza has been recognised as the infliction of starvation as a method of warfare [\[here\]](#) and [\[here\]](#). The Jabaliya bombardments, on 31 October and 1 November 2023, have also been classified as indiscriminate attacks, thus violating the principle of proportionality [\[here\]](#).

Therefore, it is incumbent upon Germany to undertake positive steps to induce Israel to respect IHL.

Some Possible Measures

With respect to the structurally related obligation of due diligence in preventing genocide, the ICJ has stated that it is the duty of States '[to employ all means reasonably available to them](#)' [para. 430]. Consequently, the obligation to ensure respect is an [obligation of conduct](#) and must also be fulfilled with a standard of [due diligence](#) [paras. 166]. In principle, Germany can choose from a range of measures, as long as they are [deemed appropriate to enforce compliance](#) [para. 165]. The [specific circumstances determine the precise substance of the obligation](#), taking into account the gravity of the violations, the means reasonably available to Germany, and the degree of influence it has over Israel [para. 165].

Germany is Israel's [primary economic partner in the EU](#) and one of its [significant supplier of arms](#). By the beginning of November 2023, Germany had approved considerably more arms exports to Israel than in the previous year, [with an increase in value from 32 to 303 million euros](#). Against this backdrop, Germany's potential influence on Israel must be fully factored in to determine the necessary measures to be taken.

The ICRC provides an [overview of possible measures](#) to ensure respect [para. 181]. In the event of persistent violations of IHL, Germany should exert diplomatic pressure by publicly condemning Israel's strategy of warfare and demanding an immediate end to its transgressions. It may further pursue accountability for perpetrators of serious violations of IHL both through the [ICC in its ongoing investigation into the situation in Palestine](#), and the [universal jurisdiction mechanism](#). In the event of persistent non-compliance, Germany will have to take stronger measures to fulfil its duty of due diligence.

By way of comparison, in response to Russia's aggression towards Ukraine and [non-compliance with IHL](#), Germany enforced a series of diplomatic, economic, and political sanctions. These measures form part of an [EU-led response](#) to the ongoing war, with the objective of '[damaging Russia's industrial and economic ability to wage war](#)'. To be sure, they are likely less appropriate in the case of Israel, given the different nature of the conflict. In particular, contrary to Russia, Israel is exercising its [legitimate right to self-defense](#). However, in case of enduring non-compliance

with the norms of IHL, nuanced sanctions remain an option to exert pressure on Israel. Moreover, Germany also has the option of conditioning its arms transfers on compliance with IHL and restrict them accordingly.

Germany's International Responsibility

On 16 November 2023, a statement was released by UN experts expressing that they are '[profoundly concerned about the support of certain governments for Israel's strategy of warfare against the besieged population of Gaza](#)'. There is little doubt that this statement implicitly pertains to the German government. Is its current stance the right one?

After World War II, Germany took considerable time to regain faith and confidence in the idea that it could be a member of the world community, which respects international law. At present, however, it appears to be in breach of its obligation arising from CA1. Considering Germany's historical responsibility for the Holocaust, it remains imperative that it provide support to Israel amid the appalling terrorist attacks. However, Germany's commitment to Israel's security may not exceed the bounds of international law. Going forward, Germany must give due consideration to its international obligations in its support for Israel.

