

# Israel – Hamas 2023 Symposium – Attacking Hamas – Part I, The Context

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by [Michael N. Schmitt](#) | Dec 6, 2023



*Editor's Note: This post is the first in a two-part series that explores law of armed conflict targeting considerations. This first post examines operational and contextual considerations. The second post will review the legal requirements applicable to the context identified in the first post.*

On December 1, hostilities between Israel and Hamas resumed. They follow a series of cease-fires (also labeled truces) that allowed for the exchange of over 100 hostages seized by Hamas and other organized armed groups on October 7 for nearly three times as many Palestinians detained by Israel (roughly 140 hostages remain). Both sides blame the other for breaking the cease-fire, which was about to expire.

In anticipation of the resumption of the fighting and in light of widespread criticism (see, e.g., here) of the Israeli operations in Gaza (see, e.g., here), the United States has placed significant pressure on Israel to limit harm to civilians. As Secretary of State Blinken explained,

the way Israel defends itself matters. It's imperative that Israel act in accordance with international humanitarian law and the laws of war, even when confronting a terrorist group that respects neither.

In my meetings today with the prime minister and senior Israeli officials, I made clear that before Israel resumes major military operations, it must put in place humanitarian civilian protection plans that minimize further casualties of innocent Palestinians.

According to Blinken, the Israeli government agreed to take such measures, some of which are mentioned below (see also Secretary of Defense and Vice President comments).

Unfortunately, discussion of the application of international humanitarian law (IHL) in this conflict has sometimes been imprecise and often emotive. In this post, I try to clear a bit of the fog of law by providing a primer on targeting law. I begin by noting that targeting law is contextual. Accordingly, I first highlight key factors that underpin that contextuality. I then turn to the fundamental IHL rules of targeting law – lawful targets, precautions in attack, and proportionality. The piece concludes with my thoughts on assessing the IDF's attacks on Hamas.

Three points are necessary before beginning the discussion. First, for ease of reading, I use the term "Hamas" to denote both the fighting wing of the organization (al Qassam Brigades) and other organized armed groups like Islamic Jihad. Second, consensus is lacking regarding whether the conflict is international or non-international. Complicating matters, Israel is not a party to the key instrument addressing "conduct of hostilities" issues during the former, the 1977 Additional Protocol I (AP I) to the Geneva Conventions. Nevertheless, broad agreement exists that the bulk (not all) of IHL treaty rules regarding targeting reflect customary international law, and most apply in both forms of armed conflict. Therefore, I will treat them as generally doing so in the following discussion.

Finally, the discussion focuses on Israel Defense Forces (IDF) attacks during Operation Swords of Iron because it is around them that most controversy is swirling. Analysis of how IHL applies to Hamas's operations is less fraught; therefore, I do not address them head-on. After all, whatever one's perspective on the conflict, it is impossible to deny that Hamas's October 7 attacks violated IHL, as have the continuing rocket attacks into civilian population centers. Indeed, there is no indication that Hamas tries to comply with the IHL rules regarding distinction, precautions in attack, and proportionality that are examined below.

Targeting law is fundamentally contextual in application. What is lawful in one battlefield engagement may not be in another. Therefore, allow me to highlight several particularly important factors when assessing the lawfulness of the IDF's operations against Hamas and the criticism they have drawn. I begin with context before turning to the targeting rules themselves because only by grasping the context in which they operate can one render a fair assessment of compliance with them.

## One Size Does Not Fit All

Operational environments can bear upon whether a party to the conflict has violated IHL rules. The reason is simple. Targeting law is based on the “reasonableness” of battlefield legal determinations, for it is generally not a law of absolutes (except in the case of direct attacks against protected persons and objects). Instead, IHL requires commanders and others involved in an attack to act as a reasonable person performing their role would in similar circumstances. This allows for a wide margin of appreciation.

For instance, different *domains* of warfare present different opportunities and challenges concerning IHL’s application. Consider the process of identifying lawful targets during air and ground attacks. Air targeting is often based on intelligence, which usually permits greater opportunity to confirm targets as military objectives and assess possible collateral damage than ground targeting, which is more heavily reliant on situational awareness. Those evaluating IDF operations must understand that sound legal conclusions regarding reasonableness in one domain may not hold water in another.

Similarly, the *physical and human terrain* in which an attack occurs affects IHL’s application. The density of the physical infrastructure and the presence of civilians in Gaza’s urban terrain, which Hamas very effectively exploits, complicates the IDF’s ability to identify targets and assess and avoid likely civilian collateral damage. It also limits the IDF’s options for minimizing collateral damage to civilians and civilian objects. And it must be remembered that Hamas has spent 16 years preparing to fight in an urban environment by building hundreds of tunnels and embedding its operations in civilian infrastructure, including residential buildings, schools, hospitals, and mosques (as in the 2014 operations into Gaza).

The *temporal factor* also looms large. Given the small size of Gaza, Hamas’s “shoot and scoot” tactics that leverage dense groupings of buildings and an extensive tunnel network, and Hamas’s continuing rocket attacks against Israel’s civilian population, the timing of IDF attacks is highly compressed. It must often act very quickly, which hinders both target verification and accurate estimates of civilian collateral damage. And the longer this conflict lasts, the more reliant the IDF will be on “dynamic” (unplanned) targeting, as with “troops in contact” situations, instead of “deliberate” targeting (preplanned). The latter almost always allows for greater opportunity to avoid civilian harm.

## The Fog of War Is Thick

Uncertainty is ubiquitous in warfare; it can permeate every decision of legal consequence made on the battlefield. In a previous post, and an article with Lieutenant Colonel Mike Schauss, I examined the issue of the requisite degree of certainty for lawful identification of military objectives, assessment of likely collateral damage and military advantage *vis-à-vis* the rule of proportionality, and the determination of whether alternatives to a planned attack are feasible and likely to result in fewer civilian casualties or less civilian damage

(“precautions in attack”). As we observed, “Targets sometimes may be attacked despite the existence of some doubt. To hold otherwise would fly in the face of state practice stretching back to the crystallization of the principle of distinction” (p. 156). Of course, this raises the question of how much uncertainty is too much.

Consider a case in which the IDF is uncertain as to exactly how many civilians are in a building in which Hamas fighters are present. Whether it may strike the structure depends on an array of factors. They include, *inter alia*, the degree of uncertainty as to the number of civilians in the building, the likelihood of them being harmed, the degree of risk to any other civilians who might be in the area or to nearby civilian structures, the extent to which the IDF is sure Hamas fighters are present, the likelihood of successfully killing them, the impact of killing them on Hamas’s operations, and so forth. To take a simple example, the possibility of killing a senior Al Qassam leader when there is a likelihood of civilian collateral damage would justify accepting greater uncertainty as to his presence than would be the case with simple Hamas fighters. The point is that applying the targeting rules in the face of uncertainty is a highly circumstantial endeavor.

### **Foresight, Not Hindsight**

Assessments of whether an attacker has complied with an IHL targeting rule must be based on the information reasonably available at the time to those who planned, approved, and executed the attack, not on that which became available later or on the attack’s unexpected consequences. This truism applies across all targeting rules. For instance, the first step in targeting is determining if the place or person to be attacked is a lawful military objective or person subject to lawful attack. The adequacy of the attacker’s determination depends on what they knew or should have known *at the time*. To illustrate, if intelligence that a building contains Hamas fighters turns out to be wrong, but the IDF attack on the building would have been lawful had the intelligence been correct, there is no violation, at least so long as the IDF’s initial assessment was reasonable.

This before-the-fact point is especially significant for proportionality determinations (see below), which require an attacker to refrain from attack if collateral damage is expected to be excessive relative to the military effect the attacker anticipates achieving. Thus, resulting civilian casualties or damage to civilian objects cannot, standing alone, establish that an IDF attack was unlawful on the basis that the collateral damage proved excessive; what matters is the collateral damage the attacker expected, or should have expected. Similarly, the fact that an IDF attack was wholly unsuccessful does not mean it was unlawful to mount because it caused civilian casualties or damage. The question is whether those involved reasonably assessed the likely military advantage before planning, approving, or executing the attack.

Along the same lines, one cannot conclude that the IDF failed to take sufficient precautions to minimize civilian harm (see below) based solely on the fact that an attack caused civilian incidental casualties or damage. Instead, the assessment can only be made by considering

the information at the attacker's disposal and the feasible options for achieving the desired effect on Hamas that the attacker knew were available.

The point is that except in obvious cases like Hamas's October 7 direct attacks against civilians, it is difficult to offer reliable evaluations of individual attacks without a grasp of the situation as understood by the IDF at the time. Results alone are seldom sufficient to conclude that an IHL violation has occurred.

### **The Enemy Gets a Vote**

Israel is fighting an enemy that intentionally embeds itself among the civilian population as a form of asymmetrical warfare (see my [discussion](#)), uses human shields (see my [analysis](#)), and actively prevents the civilian population from seeking shelter (see [here](#) and [here](#)). Moreover, it fails to take feasible precautions to protect the civilian population from the effects of IDF attacks ("passive precautions"). All these actions and omissions violate IHL.

While Hamas's systematic and frequent IHL violations do not excuse the IDF from compliance with targeting rules, they affect the IDF's legal obligations, for they can increase uncertainty (see earlier discussion) and exacerbate the risk of collateral damage. Indeed, if Hamas can get enough civilians into a target area, it may even render an IDF attack legally prohibited as disproportionate. From a practical perspective, these tactics also may cause the IDF to hesitate to attack even if doing so is legal, lest it hand Hamas an opportunity to engage in "[lawfare](#)." Hamas nefariously realizes that Palestinian casualties, in several senses, benefit its cause. Simply put, Hamas can influence the IDF's legal obligations through violations of its own.

It also merits emphasis that harm suffered by the civilian population because of *Hamas's* operations does not factor into the legal assessment of *IDF* attacks, thereby necessitating caution when pointing the legal finger. This appears self-evident, but recall the purported October 17 Israel Defense Forces (IDF) attack on Al Ahli Hospital in Gaza that sparked immediate condemnation. Yet, it turned out that, as acknowledged by [Human Rights Watch](#), the explosion "resulted from an apparent rocket-propelled munition, such as those commonly used by Palestinian armed groups, that hit the hospital grounds," not from ongoing IDF operations. As this example illustrates, when observing civilian harm in Gaza from the perspective of IHL, one must be cautious about jumping to the conclusion that the IDF necessarily caused it.

### **War is Tragically Disruptive**

That the war has had devastating consequences for the civilian population of Gaza is undeniable. However, in the law of targeting, only those consequences that result in death or injury to civilians or damage to civilian objects factor into the two critical obligations that

serve to protect civilians and civilian objects, namely, the rule of proportionality and the requirement to take feasible precautions in attack to minimize civilian harm (see discussion below).

In particular, the notion of collateral damage in both rules does not include inconvenience, stress, or other intangible consequences. For instance, the fact that civilians had to flee from their homes in Gaza City is not, as a matter of law, considered to be collateral damage. Nor is the fear and distress they understandably suffer. That said, collateral damage can include indirect, foreseeable effects of an attack that result in the requisite consequences, so long as they are not too “remote” (on remote harm, see DoD, *Law of War Manual*, § 5.12.1.3). For example, the loss of civilian communications access in Gaza is not, as such, civilian collateral damage. Still, if the knock-on effect is to disable emergency response capabilities, the IDF would need to consider any foreseeable resultant physical harm to civilians in its proportionality and precautions in attack assessments.

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