

# Israel – Hamas 2023 Symposium – Attacking Hamas – Part II, The Rules

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*Editor’s Note: This post is the second in a two-part series that explores law of armed conflict targeting considerations inspired by the Israeli-Hamas conflict. The [first post](#) examined operational and contextual considerations. This second post reviews the legal requirements applicable to the context identified in the first post.*

Although the conduct of hostility rules that govern targeting are the subject of voluminous scholarship of great complexity, their framework is relatively straightforward. Reduced to basics, the IDF may only shoot at certain objects and persons and must consider the impact of the attack on civilians and civilian objects.

## **Targetable Persons and Military Objectives**

Attacks (AP I, [art. 49](#)) may only be directed at targetable persons or objects that qualify as military objectives. Attacking anyone or anything else is strictly forbidden (in the discussion that follows, see generally [AP I](#), arts. 51 and 52; International Committee of the Red Cross

(ICRC), *Customary IHL* study, rules 1-10; DoD, *Law of War Manual*, §§ 5.5 – 5.8; *NIAC Manual*, §§ 1.2.2. and 2.1.1.1).

As to the persons, a party to the conflict may attack members of the armed forces and other combatants, members of organized armed groups, and those directly participating in the hostilities. During an international armed conflict, the category of combatants includes members of the regular armed forces, militias or volunteer corps forming part of the armed forces, and members of other militias and volunteer corps, including resistance movements, that are under responsible command, distinguish themselves from the civilian population, bear arms openly, and conduct operations in accordance with IHL (Geneva Convention III, art. 4A). Thus, even if the armed conflict between Hamas and Israel is international, Hamas's systematic IHL violations alone preclude it from enjoying combatant status, which applies only in such conflicts.

Instead, and whether the conflict is international or non-international, individuals of Hamas's fighting wing (al Qassam Brigades) and any other Hamas officials in the operational chain of command are members of an organized armed group targetable based on that status alone (so-called "status-based" targeting).

It must be cautioned that the ICRC, some States, and numerous international law experts believe that only members of an organized armed group with a "continuous combat function" may be attacked based on that status alone (ICRC, *Interpretive Guidance*, p. 32-36). The United States and Israel reject this view, as do many international law specialists, including myself. In my estimation, it is legally and logically insupportable to argue that members of an organized armed group like Hamas's fighting wing who do not have a function involving regular involvement in the hostilities (e.g., those responsible for logistics) enjoy greater legal protection from attack than members of the IDF who perform comparable duties and who may be attacked solely based on their membership in the regular armed forces.

Other individuals lose their protection from direct attack for so long as they "directly participate in hostilities" ("conduct-based" targeting), a rule applicable in international and non-international armed conflict. Attacking the IDF in any way is unambiguously direct participation, as was the involvement of non-Hamas Palestinian civilians in the murders and hostage-taking of October 7.

However, direct participation does not necessitate involvement in combat. Instead, individuals who perform any activities that contribute in a relatively direct way to Hamas's military capability or hinder IDF operations are direct participants in hostilities who may be attacked while so participating. For instance, civilians who warn Hamas of the advance of IDF soldiers or who otherwise provide valuable military information qualify as direct participants. Similarly, civilians who interfere with ongoing IDF military operations, as well as those who transport weapons and ammunition to Hamas fighters, are direct participants. But

civilians who sympathize with Hamas, or even with conducting attacks on Israeli civilians, are not directly participating in the hostilities; they retain full protection as civilians. This is a complicated matter with many nuances (see the collection of articles [here](#)).

One controversial issue is the characterization of civilians who voluntarily shield Hamas fighters and operations, a topic I have examined in an earlier [post](#) (and [here](#)). I believe they are directly participating in the hostilities, a view shared by Israel, the United States, and many experts. The ICRC and other experts disagree.

Great attention has been paid to the widespread physical destruction in Gaza. Buildings and other objects are subject to attack when they: 1) “by their nature, location, purpose or use make an effective contribution to military action;” and 2) their “total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage” (AP I, [art. 52\(2\)](#)). In the Gaza context, tunnels devoted exclusively to use by Hamas’s armed wing (as distinct from use for other purposes like smuggling) qualify as military objectives by “nature.” The buildings and other objects the IDF targets can also amount to military objectives on the basis that Hamas is using them for military purposes (e.g., for command and control, billeting, and weapons storage) at the time of attack (“use” criterion) or because they will be so used in the future (“purpose” criterion). Objects may also qualify by “location,” as in the case of needing to prevent Hamas’s use of a building to ambush IDF soldiers who will maneuver down a road in front of it.

Importantly, *any* use for military purposes renders an otherwise civilian object, like a school, a military objective. The only significant debate in this regard deals with entities composed of distinguishable parts. If they are clearly separate, as in two adjacent buildings joined by a walkway, only that building being used is a military objective. But consider an apartment building with many apartments, one of which Hamas uses for military purposes. The prevailing view, shared by the United States and Israel, is that the entire building is a military objective, such that harm to the apartments not being used does not factor into the proportionality and precautions assessments (see below). A minority view, which I [support](#), indicates that if the apartment can be targeted individually (which depends on an array of factors such as weapons system capability and availability and risk to the attacking forces), damage to the remainder of the building is collateral damage in the proportionality and precautions assessment. In an intense fight, this is hard to do.

Some persons, objects, and activities enjoy “special protection” under IHL. Of note in this conflict are medical facilities, a topic I will address in a forthcoming post. A hospital that is being used by Hamas for military purposes, like shielding tunnels, hiding hostages, or storing weapons, becomes a military objective (AP I, [art. 12](#); ICRC, [Customary IHL](#) study, [rule 28](#); DoD, [Law of War Manual](#), [§ 7.10](#); [NIAC Manual](#), [§ 4.2.1](#)). However, except when the situation does not allow, as when immediately needing to defend against fire from the facility, a warning to cease its misuse and an opportunity to do so must be provided before the IDF

may mount an attack against it. Of course, medical personnel, patients, and other civilians present retain their civilian protections and factor into proportionality and precautions determinations.

Certain cultural objects and places of worship, such as mosques, are also subject to special protection (AP I, art. 53; ICRC, *Customary IHL* study, rules 11-13; DoD, *Law of War Manual*, § 5.18; *NIAC Manual*, § 4.2.2). Like medical facilities, they lose their protection from attack and damage to them does not count as civilian collateral damage in the IDF's proportionality and precautions assessments if Hamas uses them in support of its military effort, which is sadly frequent in Gaza.

### **Indiscriminate Attack Tactics**

IHL prohibits certain types of attacks, such as those that are perfidious because they involve feigning protected status under the law to attack the enemy (ICRC, *Customary IHL* study, rule 65). There is no evidence that Israel has engaged in such conduct, a sharp contrast with Hamas. Much more relevant to IDF operations is the prohibition on indiscriminate attacks, of which there are multiple forms (AP I, art. 51(4) and (5); ICRC, *Customary IHL* study, rules 11-13; *NIAC Manual*, § 2.1.1.3)). Two are of particular significance.

The first occurs when an attack is not directed at a military objective. In these “shot in the dark” attacks, the attacker makes little effort to “aim” at a military objective or targetable persons. It is distinguishable from cases in which the attacker fires “at” protected persons or objects, as in the case of Hamas rocket attacks into Israeli villages where there are few military objectives. In the case of Gaza, which is full of military objectives and targetable persons on the one hand and civilians and civilian objects on the other, an unaimed IDF attack fired into Gaza, even in the hope of maybe hitting a Hamas target, would be indiscriminate.

The second form of indiscriminate attack of relevance in the current conflict is one that “treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects” (AP I, art. 51(5)(a)). To amount to this form of indiscriminate attack, the attacker must have been able to identify individual military objectives in the area and strike them discretely in the circumstances. Absent either capability, area targeting is permissible subject to the rules of proportionality and the requirement to take precautions in attack. For instance, if the IDF knows Hamas fighters are in three buildings and can surgically strike all three, it may not simply destroy the general area in which they are located, even if doing so would satisfy the proportionality rule. Such an attack would be both indiscriminate and violate the requirement to take precautions in attack.

Despite claims that Israel has engaged in indiscriminate targeting, establishing either form of violation would require knowing, or at least being able to draw reasonable and granular conclusions as to, the intelligence that was reasonably available to the IDF, the military objectives in the target area, the capabilities of the IDF at the time (in other words, situationally, not in general), operational alternatives, and what was in the minds of those involved at the time the attack was planned, approved, and executed. Without such context, any characterizations of an attack(s) as indiscriminate is speculative.

## **Precautions in Attack**

Even when conducting an attack against a military objective or targetable persons in a lawful manner, “constant care” must be taken by those who plan, approve, or execute attacks to “spare” the civilian population and civilian objects (AP I, art. 57(1)). This duty includes taking “precautions in attack” to minimize damage or destruction of civilian objects or injury or death of civilians (AP I, art. 57; ICRC, *Customary IHL* study, ch. 5; DoD, *Law of War Manual*, § 5.11; *NIAC Manual*, § 2.1.2). In legal terms, taking precautions is an obligation of conduct, not result.

These “active precautions” require doing everything feasible to verify that the target is a military objective or a lawfully targetable person. The attacker must also consider attack options, especially regarding the weapon system (e.g., precision capability, blast effect), target selected, and tactic used (e.g., timing of attack, angle of attack). If it appears during the attack that the target has been misidentified or may result in excessive collateral damage (see below), the attacker must terminate the strike. Finally, civilians likely to be affected must be warned of the attack “unless circumstances do not permit” (see below).

The verification requirement obliges the IDF to employ reasonably available means to identify the target as a military objective or targetable person. This obligation is not absolute. For instance, getting “eyes on the target” by ground forces may be too risky, or airborne verification assets such as drones may be needed elsewhere. The point is that the information on which the target is verified is that which is reasonably available in the circumstances. And verification does not mean achieving absolute certainty about the target’s identity. In that regard, the discussion in [Part I](#) of this post on uncertainty applies.

Similarly, the alternatives an attacker considers need only include those “feasible” in the situation. A feasible option is one that “is practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations” (DoD, *Law of War Manual*, § 5.2.3.2; *AMW Manual*, p. 26; [Declarations by States upon Ratification of AP I](#); 1996 [Amended Protocol II](#) to the CCW, art. 3(10)).

In other words, feasible options are operationally viable, make good operational sense, and are likely to avoid harm to civilians and civilian objects. For instance, an alternative is not feasible if it places the attacker at greater risk or involves using a weapon system that might

be better employed elsewhere or later in the conflict. Moreover, if an alternative lessens the likelihood of achieving the desired effect of the attack, it need not be taken. Consider IDF attacks against the Hamas tunnel system. There has been criticism that large weapons, such as 2,000-pound bombs, have been dropped. However, unless less destructive bombs could achieve the same effect (collapse of the tunnel) with less risk of civilian injury or death, the active precautions requirement would not require their use. This being so, the issue concerning the tunnel attacks would not be precautions in attack but instead proportionality.

A further active precautions requirement is to provide “effective advance warning” of attacks “which may affect the civilian population, unless circumstances do not permit.” I have previously discussed this requirement at length, as well as Hamas’s requirement to do what it can to protect the civilian population from the effects of IDF attacks (as in evacuating them or at least not actively discouraging their departure). The key takeaways were that effectiveness means the warning is conveyed by a means that will reach the civilian population, even if the warning is not heeded, and that a specific warning need not be given if it would sacrifice mission accomplishment (as in causing a targetable person to flee).

The IDF has provided unprecedented warnings throughout the conflict. They include text messages, social media posts, radio and TV announcements, leaflets warning residents to relocate through safe corridors, warnings passed through international organizations, and individual phone calls. For instance, soon after the commencement of the fighting, the IDF urged the civilian population to flee south, where they would be safer from the Israeli attacks. It also established evacuation corridors and periodically paused operations to facilitate evacuation of the north. Many misinterpreted this as forced displacement; it was not (see my analysis here).

Warnings need not direct individuals to a specific location but only warn them of attack. Thus, the IDF warnings exceeded what the law required. Moreover, criticism that IDF attacks were occurring in southern Gaza misses the point that it was safer in the south. Only if the warnings had directed the population to a more dangerous location would they have run afoul of IHL.

As its operations move south, the IDF has established a “red alert” system (see also here) involving an interactive map allowing for precise attack warnings and instructions for evacuation. Criticism exists that the warnings are hindered, for instance, by the impact of IDF operations on Internet availability in Gaza. However, in this regard, an attacker is not required to sacrifice military advantage to warn. Moreover, the IDF has created a redundant system of notifications to account for such obstacles.

The bottom line is that the precautions in attack rule cannot be violated in the absence of a feasible alternative means of verifying the target, attacking it, or effectively warning the civilian population. Accordingly, those accusing the IDF of precautions violations should be prepared to cite the feasible option they believe the IDF wrongfully failed to select.

Finally, note that Secretary Blinken outlined several measures Israel could take to protect civilians. These include “clearly and precisely designating areas and places in southern and central Gaza where they can be safe and out of the line of fire,” “avoiding further significant displacement of civilians inside of Gaza,” “avoiding damage to life-critical infrastructure, like hospitals, like power stations, like water facilities,” and “giving civilians who’ve been displaced to southern Gaza the choice to return to the north as soon as conditions permit.” Although each of these makes sense morally and perhaps even operationally, they are not, strictly speaking, IHL requirements, at least not in their entirety (except for attempting to avoid damage to civilian objects).

## **Proportionality**

Lastly, even when an attack is against a military objective or targetable person, it does not employ an indiscriminate tactic, and all that is feasible to minimize civilian harm without sacrificing military advantage has been done, the attack may not “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” (AP I, arts. 51 and 57; Customary IHL study, rule 14; DoD Law of War Manual, § 5.12; NIAC Manual, § 2.1.1.4). It is a rule that acknowledges that sometimes civilian casualties are unavoidable but justified by the need to fight effectively, while accepting that at other times, militarily necessary gains may not be pursued because the civilian cost is too high.

There have been repeated claims that the IDF attacks are disproportionate. In this regard, several points must be made. As noted earlier, determining whether an attack is disproportionate depends on the facts understood by those who plan, approve, or execute an attack, not on its results. This caveat applies to both expected collateral damage and anticipated military advantage.

To take a simple example, a strike against a Hamas facility that is storing ammunition may result in secondary explosions that kill civilians. If the IDF knew the ammunition was there, it was obliged to factor the risk to civilians into the proportionality assessment. But if Hamas used the facility for other military purposes, and the IDF was unaware of (and had no reason to suspect) the presence of the ammunition, harm caused by the secondary explosions would not bear on the lawfulness of the strike. Similarly, consider a case where the IDF possessed seemingly reliable intelligence that a Hamas leader was in a particular building. Suppose, in fact, that leader had moved without the IDF having any reason to know of his departure. The appropriate military advantage to consider in evaluating the strike after the fact would still be the effect of killing the leader.

The military advantage factored into the proportionality determination must be “concrete and direct.” In other words, it cannot be hopeful or speculative. A close cause-and-effect relationship between the attack and the military effect sought must exist. It must also be

military in nature. Undercutting the morale of the civilian population of Gaza or its support for Hamas would not qualify on this basis. Instead, concrete and direct advantage means a realistic impact on Hamas at the tactical or operational levels of war, that is, the ongoing fighting and the overall campaign, respectively.

Moreover, the standard for breach of the rule is “excessiveness.” Excessiveness does not admit of mathematical calculation. As the Harvard *Manual on International Law Applicable to Air and Missile Warfare* notes, an attack is excessive “when there is a significant imbalance between the military advantage anticipated on the one hand and the expected collateral damage to civilians and civilian objects, on the other.” It explains,

The fact that collateral damage is extensive does not necessarily render it excessive. The concept of excessiveness is not an absolute one. Excessiveness is always measured in light of the military advantage that the attacker anticipates to attain through the attack. If the military advantage anticipated is marginal, the collateral damage expected need not be substantial in order to be excessive. Conversely, extensive collateral damage may be legally justified by the military value of the target struck because of the high military advantage anticipated by the attack (p. 98).

Finally, the proportionality assessment is made attack-by-attack. In other words, as a matter of law, a *campaign* is not “excessive,” although *individual* attacks comprising the campaign may be. Thus, with respect to the IHL rule of proportionality, it is inappropriate to consider the *total* number of civilians killed or wounded in light of the *total* number of IDF airstrikes (now over 20,000). Instead, a case-by-case assessment of individual strikes (or closely related ones) must be made.

### **Concluding Thoughts**

It was not my intention in this series to offer a judgment as to whether the IDF’s Operation Swords of Iron has complied, in whole or in part, with the IHL rules governing targeting. Instead, my goal is to illustrate the complexity and contextuality of those rules. In my estimation, insufficient facts are currently available to render definitive conclusions. This is because we cannot yet know what information and options were available to the IDF soldiers, sailors, or airmen who planned, approved, and executed individual strikes. Condemnation of Israeli targeting based on international humanitarian law, therefore, strikes me as premature.

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