

Israel – Hamas 2023 Symposium – Beyond the Pale: IHRL and the Hamas Attack on Israel

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The October 7, 2023 attack by armed Hamas militants against Israel and the long string of atrocities committed by them against Israeli civilians and military personnel has already been the subject of legal analysis on *Articles of War* (see [here](#), [here](#) and [here](#)). Beyond the clear violation of basic rules and principles of international humanitarian law (IHL), it has already been noted in some of the aforementioned posts that the IHL violations committed by Hamas operatives also amounted to international crimes, including the prohibition on the taking of hostages and various war crimes.

In this contribution, we wish to explore the applicability of international human rights law (IHRL) to the atrocities committed. Such an analysis is important to fill in gaps in IHL and to establish the jurisdiction of IHRL mechanisms over the violations committed. Furthermore, given the close connections between extreme violations of IHRL and international criminal law, the establishment of the former violations may assist in establishing the commission of crimes falling under the latter body of law.

Applicability

A preliminary question that is raised in an analysis of the October 7 attack involves the applicability of IHRL to the attack. This question can be divided into three parts: extra-territoriality; parallel applicability with IHL; and applicability of IHRL to non-State actors.

Extra-territoriality

Most of the atrocities reported in the media were committed inside Israeli territory. This does not, however, present a serious legal difficulty as there is broad agreement in contemporary IHRL that human rights obligations apply in certain conditions to conduct taking place or having effects outside the sovereign territory of the State in question. To the extent that Hamas incurs State-like IHRL obligations (see below), they would apply to areas under its effective control, to individuals in its custody, and to individuals whose rights it impacted in a direct and reasonably foreseeable way or through isolated acts of violence undertaken from close proximity.

Killing, wounding, raping, torturing, kidnapping, and terrorizing families and individuals in their own homes, inside the military bases Hamas overtook, in street drive-by shootings and in a raid on a music festival—which involved hundreds of summary executions—would meet most if not all conditions for the extra-territorial application of IHRL. The same would also arguably apply to the deliberate targeting of civilians and civilian objects inside Israel by rockets fired from Gaza (see *Ukraine and Netherlands v. Russia*, paras. 570, 700). Note that certain IHRL violations which occurred inside the Gaza Strip—e.g., the continued detention and mistreatment of the 200 or so Israeli hostages—do not raise questions regarding the extra-territorial application of IHRL.

Parallel Applicability

Since the 1996 Advisory Opinion on *Nuclear Weapons*, it is well-accepted in international law doctrine that IHRL continues to apply in times of armed conflict, even though specific rules of IHL may enjoy interpretative dominance and control the interpretation of more general IHRL norms. As a result, the fact that the Hamas attack occurred during an ongoing armed conflict between Israel and Hamas (which has been in place at least since 2007, when Hamas violently took control over the Gaza Strip) does not bar the application of IHRL. In fact, many of the violations of IHL committed by Hamas—such as violence to the life and person of civilians and *hors de combat*—would also constitute violations of IHRL norms, such as the right to life and the prohibition against torture and cruel, inhuman, and degrading treatment.

One may mention in this regard that the European Court of Human Rights has linked, in the *Georgia v. Russia (II)* case, jurisdiction through effective control over an area or person to whether or not there exists a “context of chaos” resulting from armed confrontations between enemy forces (see paras. 126, 137). The Court clarified, however, that this carved-out exception from jurisdiction would not apply to “isolated and specific acts involving an element of proximity.” It further clarified in *Ukraine and Netherlands v. Russia* that the exception to

effective control-based jurisdiction applies only to high intensity confrontations and to “fog of war” conditions (paras. 703-704). This is certainly not the case with respect to the vast majority of Palestinian acts inside Israel directed against unarmed civilians and soldiers rendered *hors de combat*, and to the continued detention of the Israeli hostages.

Applicability to Non-State Actors

This is by far the weightiest of the preliminary questions before us, since IHRL was created, historically, to curb State power. Still, although IHRL treaties oblige only States, there is an increasing body of opinion and international practice that suggests that the basic rules and principles of IHRL would also apply to non-State actors (NSAs), especially those exercising governmental authority over a specific territory. Professor Clapham has written in this regard already in 2006 that,

With regard to human rights obligations we have seen that these are currently presumed by the United Nations to apply when they are being flagrantly denied by a faction, party to a conflict, or armed opposition group. For Dieter Fleck it is simply ‘logical’ that if the insurgents can have obligations under humanitarian law they should also be able to bear human rights obligations. From here it is a small step to suggest that such international human rights obligations apply at all times to all armed opposition groups

Since then, there have been many more cases in which international bodies, including the UN Security Council, the General Assembly, the Human Rights Council, and Office of the High Commissioner for Human Rights have addressed human rights *abuses* (as opposed to “violations” – a term reserved for States) committed by NSAs, such as ISIS, Boko Haram, al-Shabaab and armed groups in Myanmar. While the scope of the application of IHRL to NSAs may differ, possibly in proportion to the extent of territorial control and governmental authority exercised by the NSA in question, there is a clear trend to apply basic rules and principles of IHRL to them. Hamas—who since 2007 have been the *de facto* government of the Gaza Strip—is on the far end of the spectrum of human rights responsibilities, and has already been the subject of international decisions alluding to its responsibilities in this regard under IHRL (see e.g., Goldstone Report, para. 1955).

Key IHRL Abuses

It is clear beyond doubt that Hamas has violated key IHRL rules and principles. More than 1,000 civilians have been killed, in violation of their right to life. There is also copious documented evidence of violations of the prohibition against torture and cruel, inhuman and degrading treatment, including sexual and gender-based crimes committed on a large scale. Hamas abducted about 200 individuals and held them in Gaza, in violation of the prohibition against arbitrary detention.

These prohibitions constitute part of customary international law (see e.g., UN Human Rights Committee, General Comment 24, para. 8). According to the principle of systemic integration, these key rules and principles should be construed in accordance with other applicable norms of international law that apply to NSAs, including IHL norms relevant to IAC or NIAC (the conflict in Gaza has been addressed in the past under both classifications).

Three legal concepts appear to be particularly relevant for discussing the illegality of the Hamas attack under international law, including IHRL.

The Prohibition against Genocide

First, the Hamas attacks can be qualified as *genocidal* in nature (see also Ohlin). The prohibition against genocide exists as an obligation both for States and individual perpetrators (see Bosnian Genocide, para 160-179). Note, however, that the crime of genocide has not been defined as a State crime, i.e., requiring the involvement of a State apparatus (see Rodenhäuser; OHCHR Report on ISIS). The prohibition against genocide is also a norm of IHRL—the Genocide Convention being considered the first ever human rights treaty. And, given its *jus cogens* nature, there is every reason to maintain that it would be included in any list of customary IHRL norms applicable to NSAs.

Whereas the Hamas attack, which was directed against thousands of Israeli civilians, clearly met the *actus reus* underlying the international law prohibition against genocide—especially, killing group members and causing them serious bodily and mental harm—the application of the special mental element (*dolus specialis*)—intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such—is more controversial. To our minds, the Hamas Charter of 1988, which includes virulent antisemitic statements and calls for a violent Jihad against all Jews and Zionists, as well as countless statements by the Hamas leadership over the years, leaves little doubt regarding the genocidal purpose of the October 7 attack by Hamas. (This is notwithstanding the updating of the Charter in 2017 and the introduction of a more moderate version, a semi-formal revision which Israel always considered as merely a public relations stunt). Furthermore, the principal targets of violence, identified by Hamas itself in the aforementioned documents and statements as Jews and Zionists, would qualify as either a protected national or religious group or part of a group under the definition of genocide (the incidental harm afflicted to non-Jews/non-Israelis does not affect this characterization).

The scope of the October 7 attack—against dozens of towns and villages located in close proximity to the Gaza Strip—appears compatible with an intent to cleanse the area from the presence of Jews, by killing many and terrorizing the rest, i.e., an intent to destroy in part a protected group (see Bosnian Genocide, para. 190). Of course, if and when individual Hamas operatives are charged with the crime of genocide, their individual *actus reus* and *mens rea* would have to be ascertained on a case-by-case basis.

Enforced Disappearances

The abduction of about 200 individuals—mostly Israeli civilians, but also some foreign nationals and Israel Defense Forces military personnel—would be assessed principally against the IHRL norm against enforced disappearances, found in the 1992 Declaration and 2010 Convention against Enforced Disappearance. The Declaration defines enforced disappearance in its preamble in the following manner,

[E]nforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.

The Convention uses a similar definition in article 2,

For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

The key legal question that arises in the context of the Hamas attack is whether the IHRL prohibition against the enforced disappearance of abductees whose fate and whereabouts are concealed applies to non-State actors, like Hamas, despite the State-centric orientation of the definitions (especially that found in the Convention). The fundamental nature of human rights covered by the prohibition on enforced disappearance would support its application to NSAs—especially those who operate as territorial authorities—thus potentially coming under the scope of the Declaration’s definition of a “Government.” Indeed, the Human Rights Council Working Group on Enforced and Involuntary Disappearances has interpreted its mandate as covering also cases of enforced disappearance committed by NSAs, which are tantamount to State-directed enforced disappearances. It may be further noted in this connection that the Working Group has issued in the past an urgent appeal to Hamas relating to the fate and whereabouts of four Israelis—two civilians and two soldiers—who disappeared in Gaza in 2014-2015. Additionally, the Committee on the Rights of Persons with Disabilities has held in the past, in connection with the aforementioned two civilians, that their enforced disappearances also implicates the legal responsibility of the Palestinian Authority under IHRL, including the obligation to do whatever is within its power to investigate the fate and whereabouts of the disappeared individuals.

Counter-Terrorism

The attack committed by Hamas also violates a number of counter-terrorism conventions, including the Hostages Convention and the Terrorist Bombing Convention. Hamas is of course not a party to these conventions (Israel is a party only to the second one). Still, these treaties do inform customary international law that applies in this field (see UN Security Council Res. 1566, 2133) and such law would, as a result, influence the interpretation of the IHRL obligations applicable to Hamas (which is designated as a terror organization by a number of States). Specifically, counter-terrorism norms against hostage taking would help to qualify the deprivation of liberty of Israeli citizens and service-members as “bargaining chips” as a violation of the prohibition against arbitrary deprivation of liberty and as a form of cruel, inhuman and degrading treatment.

Concluding Remarks

Although IHRL is not the principal legal framework governing the Hamas attacks (as well as the reaction by Israel to these attacks, which is not discussed in this contribution), it is a relevant legal framework that could fill certain gaps existing in IHL. It could also open up a host of legal remedies for the victims of the attacks—especially before UN special procedures (special rapporteurs and working groups)—and pave the way for the application of international criminal law—crimes against humanity, genocide, torture, terrorism—in connection with the most serious IHRL violations that occurred in the context of the October 7 attack. Furthermore, the refusal by Hamas to abide by IHRL and the most elementary considerations of humanity underscore the illegitimacy of its governance, and put wind in the sails of Israel’s war aim of removing Hamas from power. Such extreme violations may also explain the broad international support enjoyed by Israel, at least for the time being.

At the multilateral level, violations of IHRL of the scale that Hamas committed probably trigger certain international obligations for States. The victims of the attack come from different nations. Although most of them are Israelis, some have dual nationality, and some are foreign nationals. States such as the United States, the United Kingdom, Germany, Nepal, Thailand, and others, whose citizens were targeted or harmed by the attack, have a right to exercise diplomatic protection over them and to demand a remedy on their behalf. In addition, given the *erga omnes* nature of the IHRL norms that were breached by Hamas, States are under a legal duty to refrain from aiding or assisting ongoing IHRL abuses, such as the continued holding of the hostages (see International Court of Justice, Wall Advisory Opinion, para. 159). The fact that Qatar hosts in its territory leaders of Hamas, who appear to take a direct part in decisions relating to the hostage situation, raises in this connection questions regarding the contribution of Qatar itself to the violations. Moreover, the magnitude of the IHRL abuses committed might trigger States to consider further action needed to address them, including aiding and assisting Israel in its diplomatic and military efforts to

release the hostages. Finally, some abuses are clearly violations of international criminal Law, and States could open criminal investigations against the perpetrators of the crimes based on universal jurisdiction or other forms of extraterritorial criminal jurisdiction.

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