

# Israel – Hamas 2023 Symposium – Hostage Rescue Operations and the Law of Armed Conflict

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Last month, during a week-long ceasefire in the Gaza Strip, Hamas released 110 hostages in exchange for 240 Palestinian prisoners. Hamas and the Palestinian Islamic Jihad (PIJ) group are still holding at least 112 living hostages from multiple countries in the enclave, where humanitarian conditions are worsening “by the hour.” Now that fighting has resumed, mediators from Qatar observed that Israel and Hamas are less willing to negotiate than they were in previous weeks. U.S. officials also expressed pessimism about the prospects of additional hostage releases.

Worse yet, Hamas renewed its threats to kill the hostages unless Israel meets various political demands. Reports that Hamas fighters sexually assaulted hostages have “added to the tensions” and infuriated Israel’s most senior leaders. In our view, the deterioration of political talks increases the likelihood that the Israel Defense Forces (IDF) (or other militaries) will forcibly attempt to rescue their nationals. Indeed, on December 8, Israeli special forces raided a Hamas site in an unsuccessful attempt to rescue a 25-year-old Israeli soldier.

Hostage rescue operations pose complicated tactical dilemmas for military forces, particularly in dense, urban environments. The predicament in Gaza is exacerbated by the fact that Hamas is holding many hostages within an extensive tunnel system. According to Daphné Richemond-Barak, a senior fellow at the Lieber Institute for Law and Warfare and expert in underground military operations, the tunnels beneath Gaza are a “dark, terrifying, claustrophobic environment where you never know what’s around the corner.”

Despite high risks and daunting odds of success, hostage rescue operations are not futile. On October 30, special operators from the IDF and members of the Israeli Security Agency (ISA) rescued Private Ori Megidish, a 19-year-old soldier, from Hamas captivity in a nighttime operation. The IDF will presumably continue to plan for and execute rescue attempts, and the U.S. military will continue to provide intelligence and planning support. As the President of the United States said during his last trip to Israel, “there is no higher priority than the release and safe return of all these hostages.”

In this post, we review key aspects of the law of armed conflict (LOAC) applicable to some of the tactics, techniques, and procedures (TTPs) that militaries employ during hostage rescue operations. We do not analyze the lawfulness of forcible hostage rescues under *jus ad bellum* principles (for that, see [here](#), [here](#), [here](#), or [here](#)). We do explain the legal rules governing riot control agents, expanding bullets, and the wear of non-standard uniforms before and during hostage rescue missions in armed conflict. While we include examples from peacetime hostage rescue operations to illustrate the utility of certain TTPs, this post analyzes their legality during armed conflict only. We conclude by acknowledging the difficulties associated with rescuing hostages and the need for careful legal interpretations in this most challenging tactical realm.

## **The Tactics of Hostage Rescue Operations**

The specialized units that train for and execute hostage rescue missions must grapple with two fundamentally competing interests. On the one hand, the primary purpose of any hostage rescue mission is to save lives. However, to succeed in achieving the principal goal, special operators may need to employ lethal force against the hostage-takers or their sentinels. When hostage-taking occurs during armed conflict, the hostage-takers may be attacked under LOAC’s rules regarding combatants, organized armed groups, or civilians directly participating in hostilities. However, hostage-takers are often co-located with their hostages, which significantly complicates the tactical operation and demands unique TTPs. As a result, rescuers seek to maintain an element of surprise, separate hostage-takers from their hostages, and protect the hostages from the effects of violence.

## **Riot Control Agents**

One technique that hostage rescuers may employ to separate the hostage-takers from their hostages is the use of riot control agents (RCA). This term is defined by Article II(7) of the Chemical Weapons Convention (CWC) as:

[a]ny chemical . . . which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time.

Classic examples of RCAs include tear gas and pepper spray, which can cause “irritation to the eyes, mouth, throat, lungs, and skin.” Other RCAs include the chemical agent chloropicrin (PS), which induces “severe vomiting and excessive tear formation.” In the past, militaries and specialized police units have used RCAs to separate hostage-takers from hostages (i.e., to enable the distinction between lawful targets and civilians), to temporarily incapacitate hostage-takers, or to flush hostage-takers out from enclosed areas and tunnel systems.

The use of RCAs in domestic hostage rescue operations demonstrates their value. For example, Swedish police used tear gas during a successful hostage rescue mission at a Stockholm bank in 1973. The National Police of Peru used tear gas to rescue hostages held in the Japanese embassy in Lima in 1996. There are also examples of its effective use by military forces during armed conflict. During Operation STOMP in 1965, two companies of U.S. Marines landed by helicopter in Qui Nhon Bay, Vietnam and cut off Viet Cong avenues of retreat. When the Viet Cong fighters escaped into a complex of underground tunnels, they took hundreds of local villagers with them. The Marines used tear gas grenades to flush seventeen Viet Cong fighters out of the tunnels, as well as more than 300 women, children, and elderly men, who all lived.

When used in this manner, RCAs do not violate LOAC. Due to their temporary effects, the United States does not consider RCAs to be “chemical weapons” banned by the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, to which both the United States and Israel are a party (see also, International Committee of the Red Cross (ICRC), *Customary International Law Study*, rule 75). However, Article I(5) of Chemical Weapons Convention (CWC), which is applicable in both international and non-international armed conflicts, prohibits the “use [of] riot control agents *as a method of warfare*” (emphasis added). The ICRC considers Article I(5) to be customary international law, applicable in both international and non-international armed conflicts (hereafter, IAC and NIAC, respectively). The phrase “as a method of warfare” means that military forces may use RCAs outside of an armed conflict (e.g., during peacekeeping or law enforcement operations).

However, it is not entirely clear how the CWC’s phrase “as a method of warfare” operates with regard to the use of RCAs in armed conflict (see the Department of Defense (DoD) *Law of War Manual*, § 5.1.1). The CWC does not define the term. As a result, some States have developed policy positions like the one found in Executive Order 11850, an American

presidential order that prohibits the “first use of riot control agents in war *except in defensive military modes to save lives*” (emphasis added). When authorized by a proper authority, U.S. military personnel may use RCAs in situations where “civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided” and during “rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners” (DoD *Law of War Manual*, § 6.16.2). Other States have adopted similar views regarding the use of RCAs in “defensive modes,” for “law enforcement purposes,” or to “save lives” (e.g., [Australia](#), [Canada](#)). Still, some scholars have suggested that the CWC prohibits the use of tear gas in Gaza’s tunnels, a generalized interpretation with which we disagree.

Hostage rescue operations are fundamentally about saving lives. Thus, in our view, militaries may lawfully use RCAs to separate hostages from hostage-takers within a building that has been transformed into a defensive stronghold, to physically disable hostage-takers, or to flush hostage-takers from a building in which hostages are isolated, restrained, or unable to escape. While the use of tear gas or pepper spray in an underground tunnel, like those beneath Gaza, might incapacitate everyone within them, including hostages, it would not kill or permanently injure them. In other words, RCAs are used during hostage rescue operations to increase the chances that hostages survive, not as a method of warfare.

Of course, not all RCAs are the same, nor are they a tactical panacea. For example, in 2002, prior to a Russian Spetsnaz raid to rescue hostages in the Dubrovka Theater in Moscow, soldiers sprayed an aerosolized chemical into the theater to incapacitate Chechen terrorists and hostages alike. At least 125 hostages died from complications related to exposure to the chemical agent, which U.S. diplomats later described as an “opiate-based mist.” Even though the use of RCAs in armed conflict may be lawful in certain circumstances, this domestic example illustrates that rescuers should always evaluate whether their use is necessary to achieve the military objective (i.e., saving the hostages) and the potential collateral effects caused by the RCA’s use.

### **Use of Expanding Bullets**

Another potential TTP unique to hostage rescue operations in armed conflict is the use of expanding ammunition. Hostage rescue operations typically involve close quarters and short ranges, as they often occur within a confined space. As a result, hostage rescuers may use expanding bullets to mitigate the risk that a fired round may strike, and then pass through, a hostage-taker, travel through a wall or ricochet, and hit or kill a hostage or fellow rescuer. As Professor Yoram Dinstein accurately noted in the *The Conduct of Hostilities under the Law of International Armed Conflict* (p. 91), in the context of a hostage rescue operation,

The use of [expanding] bullets maximizes the chances that the hostage-taker will be instantly put out of action (preventing him from injuring the hostages); and it also minimizes the risk that a bullet would pass through his body and strike a hostage.

Unlike standard, jacketed bullets, like the United States' M855A1 round (which “increase[s] penetration of armor and hard targets”), expanding bullets flatten upon impact. This flattening effect increases the bullet’s stopping power by maximizing its surface area upon initial impact but decreases the bullet’s ability to continue to penetrate the object.

Regardless, the ICRC takes the position that customary international law prohibits the use of “expanding bullets” in both IACs and NIACs (ICRC, *Customary International Law Study*, rule 77). This prohibition derives from the 1899 Hague Declaration concerning Expanding Bullets (neither the United States nor Israel are party), which, by its terms, only applies to “war” between the contracting parties. The 1899 Hague Declaration states,

The Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

Similarly, Article 8(2)(b)(xix) (applicable to IACs) and Article 8(2)(e)(xv) (applicable to NIACs) of the Rome Statute of the International Criminal Court makes their use a war crime. However, a required element of those offenses is that “[t]he perpetrator was aware that the nature of the bullets was such that *their employment would uselessly aggravate suffering or the wounding effect*” (emphasis added) (see Elements of Crimes Article 8(2)(b)(xix) and Article 8(2)(e)(xv)).

The U.S. government disagrees that the 1899 Hague Declaration reflects customary international law in either IACs or NIACs (see also, DoD *Law of War Manual*, § 19.7.1). Instead, since 1899 the United States has maintained the position that expanding bullets, like all other munitions, are “only prohibited if they are calculated to cause superfluous injury” (DoD *Law of War Manual*, § 6.5.4.4). We believe this position is consistent with the customary international law prohibition regarding superfluous injury and unnecessary suffering (ICRC, *Customary International Law Study*, rule 70) and the United States’ corresponding treaty obligations under Article 23(e) of the 1907 Hague Regulations (Hague IV), which prohibits parties from “employ[ing] arms, projectiles, or material *calculated to cause unnecessary suffering*” (emphasis added) (see here for more detailed discussion on the principle of unnecessary suffering).

Importantly, as the late Hays Parks noted in a 1990 legal opinion for U.S. Special Operations Command, “the fact that a weapon causes suffering does not lead to the conclusion that the weapon causes unnecessary suffering, or is illegal *per se*” (p. 87). Rather, the Article 23(e) “calculated to cause” standard requires an analysis of the design intent of the munition or weapon. In the case of expanding bullets, they were specifically designed to increase stopping power and decrease penetration to limit collateral damage. This design characteristic makes expanding bullets particularly effective during hostage rescue missions,

where forces must quickly neutralize a threat while minimizing the chances the bullet will over-penetrate the target or structure. As a result, expanding bullets are not “calculated to cause unnecessary suffering,” nor would their use for these purposes be unlawful.

Domestic law enforcement agencies around the world use expanding bullets to quickly disable threats and decrease the chances that a police officer’s bullet will inadvertently strike an innocent bystander. The DoD *Law of War Manual* notes that the widely accepted use of expanding bullets by domestic law enforcement for these purposes “supports the conclusion that States do not regard such bullets are inherently inhumane or needlessly cruel.” To illustrate this point, the *Manual* cites (fn. 81, at 386) an example from Nils Melzer’s book *Targeted Killings in International Law*, in which he writes,

A model example in this respect is the case of Ewald K., which occurred in Chur, Switzerland, in 2000. In this case, although there was no risk to innocent bystanders, Swiss Police snipers deliberately used expanding rifle bullets in order to ensure that Ewald K. had no opportunity to return fire, but would be killed instantly . . . . This motivation was accepted by the Cantonal Court as sufficient to justify the use of expanding rifle bullets [under Swiss domestic law] (p. 417, n. 103).

Again, in our view, during a hostage rescue mission in armed conflict, militaries may lawfully use expanding ammunition so long as this is not used for the purpose of causing unnecessary suffering. In situations like the current hostage crisis in Gaza, there are “humanitarian concerns for [the] protection of innocent civilians taken hostage or otherwise placed at risk, the members of the rescue force, or the civilian population in the surrounding area” (Opinion of the Judge Advocate General in *The Army Lawyer* 46 (November 1985)).

### **Wearing Non-Standard Uniforms**

Finally, surprise is an essential element of hostage rescue. According to Tomer Israeli, who served in both “Shin Bet” (Israeli Secret Service) and the Israeli Army Special Forces unit Sayeret Matkal, “surprise is the key.” Similarly, U.S. Army doctrine recognizes surprise as a critical element of a successful raid, explaining “the unit overcomes any enemy forces at or near the objective in a violently executed surprise attack using all available firepower for shock effect.”

To preserve the element of surprise, history reveals that hostage rescuers have worn both non-standard uniforms and civilian clothes when conducting hostage rescue operations. For example, in 1977, the German counterterrorist unit GSG-9 der Bundespolizei, formerly Grenzschutzgruppe 9 and British Special Air Service (SAS) soldiers wore civilian clothing during the successful hostage rescue of Lufthansa flight 181 in Mogadishu, Somalia. Members of the SAS wore non-standard uniforms again in 1980 during a hostage rescue operation in the Iranian Embassy in London. The American commandos involved in the aborted Operation EAGLE CLAW (i.e., the 1980 failed attempt to rescue American hostages

in Tehran) wore non-standard uniforms approved by the Joint Chiefs of Staff and the President. While most of these examples are of domestic hostage rescue operations, during an international armed conflict military members must distinguish themselves from the civilian population if they wish to retain prisoner of war (POW) status and combatant immunity. As a result, the TTP of wearing of non-standard uniforms or civilian attire during a hostage rescue operation in an armed conflict, such as the situation in Gaza, requires additional analysis.

The law of armed conflict does not obligate members of an armed force to wear uniforms. However, Article 4A(2) of the third Geneva Convention Relative to the Treatment of Prisoners of War is often misconstrued as necessitating the wearing of uniforms during armed conflict. As Hays Parks explained in his seminal article on the topic, Article 4A(2) contains “no language requiring military personnel to wear a uniform, nor prohibiting them from fighting in something other than a full, standard uniform. Nor does it make it a war crime not to wear a uniform.” Other scholars have discussed this issue at length in previous *Articles of War* posts.

During armed conflict, military members may lawfully wear non-standard uniforms (i.e., attire that has a distinctive insignia, includes military equipment (such as body armor), or otherwise distinguishes the wearer from the civilian population). In most cases, a non-standard uniform would also comply with Article 4A(2)’s conditions, allowing the wearer to maintain POW status and combatant immunity. While international law does not prohibit military members from wearing civilian attire to collect intelligence or conduct acts of sabotage, they would not be entitled to POW status or combatant immunity if captured during an IAC (see, e.g., 1907 Hague IV Regulations, art. 31; Additional Protocol I (AP I), Art. 46(1)). In sum, hostage rescuers conducting operations in an armed conflict may lawfully wear standard uniforms, non-standard uniforms, or even civilian attire in certain circumstances.

But what if the hostage rescuers wore civilian clothes and concealed their weapons until the last possible moment before launching a surprise attack against the hostage-takers? Article 37(1)(c) of AP I prohibits the “kill[ing], injur[ing] or captur[ing] an adversary by resort to perfidy.” Perfidy is defined as,

Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, *with intent to betray* that confidence . . . [which includes] the feigning of civilian, non-combatant status (emphasis added).

As Professor Dinstein explained, “[t]he act of feigning civilian status becomes unlawful perfidy—and a war crime—if (and only if) there is an intentional betrayal of confidence by inviting the enemy to believe that a person is a civilian and then, e.g., pulling a hidden weapon and opening fire” (p. 308).

While neither Israel nor the United States is party to AP I, they each acknowledge that its provisions in this regard reflect customary international law applicable to both IACs and NIACs. Further, as the ICRC has noted, the “rule [prohibiting perfidy] is supported by official statements and other practice pertaining to non-international armed conflicts.” Thus, while hostage rescuers can certainly conduct reconnaissance of an objective area in civilian clothing, they must distinguish themselves from the civilian population during the actual hostage rescue, despite the vital importance of surprise. This can be accomplished during armed conflict by simply wearing a distinctive insignia, load-bearing equipment, or body armor and carrying arms openly, which, practically speaking, would likely occur anyway.

## Concluding Thoughts

Hostage rescue operations are some of the most tactically difficult operations for militaries to conduct. They demand creativity and audacity and unique TTPs. The expansive tunnel networks and dense urban terrain in the Gaza Strip, coupled with the large number of hostages that Hamas has likely spread throughout the enclave, present grave complications for rescuing forces. While we have only reviewed a few of the tactical and legal issues that hostage rescue operations present, the examples highlight the need for careful legal analysis, especially in exceptional circumstances.

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