

# Israel – Hamas 2023 Symposium – Hostage-Taking and the Law of Armed Conflict

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In the early morning of October 7, the Jewish holiday of Simchat Torah, the militant Palestinian group Hamas launched Operation Al-Aqsa Flood, a surprise attack against Israel. Its military wing, the [Al-Qassam Brigades](#), fired thousands of [rockets](#) from the Gaza Strip into Israeli towns and cities, killing and injuring hundreds. As the barrage was underway, its fighters crossed into southern Israel by [land](#), [air](#), and [sea](#). They seized control of several border towns, including Sderot, Be’eri, and Ofakim, and breached military bases near the Erez border crossing and in Nahal Oz. The Israel Defense Forces (IDF) responded to Hamas’s attacks by launching Operation Swords of Iron, consisting in great part thus far of an air campaign.

In addition to brutally massacring many of those they encountered, the Hamas fighters seized scores of civilian residents of the area and members of the Israeli security forces stationed there. They did the same during a horrific attack on over three thousand concertgoers attending the Tribe of Nova [music festival](#) near the border. Hamas transported all of those captured back to the Gaza Strip.

It is estimated that Hamas captured approximately 150 civilians and military personnel. The hostages come from numerous countries, including the United States. Some are elderly or disabled. Others are children, even babies. Hamas claims to have moved them into an underground network of tunnels, which the IDF describes as a “city beneath the city” in one of the most densely populated places on earth. On Monday, Hamas threatened to execute a hostage every time an airstrike hits a home in Gaza “without warning.”

This post examines the taking of hostages under international law. We begin by explaining how the law of armed conflict understands the term “hostage-taking.” A discussion of the prohibitions on hostage-taking during non-international and international armed conflicts follows. Finally, we turn to the criminalization of such actions under international criminal law. Our conclusion is that, despite media reports mislabeling those Hamas has seized as “prisoners of war,” they are “hostages” as a matter of law. The acts that qualify them as hostages violate treaty and customary international law, and persons involved in the hostage-taking have committed war crimes.

## **Hostage-Taking**

Hostage-taking during armed conflict is universally condemned. For instance, on Monday, the UN Commission of Inquiry on the Occupied Palestinian Territory observed, “[t]he taking of hostages is a violation of international law and constitutes an international crime. Persons deprived of liberty are protected against murder, torture, and cruel, inhuman or degrading treatment and sexual violence.” Similarly, the UN High Commissioner for Human Rights “call[ed] on Palestinian armed groups to immediately and unconditionally release all civilians who were captured and are still being held.” He emphasized that “[t]he taking of hostages is prohibited by international law.”

The International Committee of the Red Cross (ICRC) accurately defines hostage-taking as “the seizure, detention or otherwise holding of a person (the hostage) accompanied by the threat to kill, injure or continue to detain that person in order to compel a third party to do or to abstain from doing any act as an explicit or implicit condition for the release, safety or well-being of the hostage” (*Commentary* to Geneva Convention III, para. 686). More than mere detention, it requires an intent to force another person or entity to engage in or refrain from particular acts because of a threat to harm or continue to harm the person being held. The term “hostages” must be interpreted broadly; it can include even soldiers, provided that the hostage-takers have taken them for the purpose of exploiting their detention.

## **The Law of Armed Conflict**

### *Non-International Armed Conflict*

The parameters of the law of armed conflict depend on how a conflict is classified. As one of us (Schmitt) and Human Rights Watch have observed, the ongoing conflict between Israel and Hamas is best characterized as *non-international* in character. Thus, the applicable

treaty law in this situation is Common Article 3 of the four 1949 Geneva Conventions, which governs such conflicts:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

. . .

(b) Taking of hostages . . .

Of particular note is the reference to members of the armed forces who are “hors de combat,” which includes soldiers detained by the enemy. This makes it clear that the prohibition extends to captured members of the IDF.

As a party to the 1949 Geneva Conventions, Israel is bound by Common Article 3. But so too is Hamas, for, as Jelena Pejic has noted in her excellent piece on Common Article 3, “The very language used also makes clear that it binds the non-state party, as it lists obligations incumbent on ‘each party to the conflict’” (p. 9).

A further prohibition on hostage-taking applicable in non-international armed conflict also appears in Article 4 of the 1977 Additional Protocol II to the Geneva Conventions:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices . . . .

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

. . .

(c) taking of hostages . . . .

Although Israel (is not a party to the instrument (neither is the United States), that is of no practical significance because it substantively mirrors Common Article 3, which binds both sides of the conflict.

The prohibition on hostage-taking during non-international armed conflict is unquestionably also a rule of customary international law. Paradoxically, the best evidence of this is its appearance in Common Article 3 itself, for it is universally understood to reflect *customary* law (with one exception, see Pejic, p. 11-13). For instance, the International Court of Justice referred to the article as an “elementary consideration of humanity” in its 1986 *Paramilitary Activities* judgment (para. 218), using phraseology that it had coined in its first case, *Corfu Channel* (p. 22). Later, international tribunals came to the same conclusion regarding its customary character (e.g., ICTY, *Tadic*, Decision on the Defence Motion for Interlocutory Appeal, para. 98; ICTR, *Akayesu* Judgment, paras. 608-09).

The ICRC’s *Customary International Humanitarian Law* study reached an identical conclusion about the prohibition’s customary character. Rule 96, which it characterizes as applicable in both non-international and international armed conflict, is to the point: “The taking of hostages is prohibited.” This accords with the Institute of International Humanitarian Law’s *Manual on the Law of Non-International Armed Conflict*, co-authored by one of us (Schmitt) with Charles Garraway and Yoram Dinstein. It treats hostage-taking as an example of inhumane treatment prohibited in all circumstances (para. 1.2.4). There is no doubt that hostage-taking violates the law of armed conflict during non-international armed conflict.

This brings us to Hamas’s actions. To begin with, merely seizing individuals during a non-international armed conflict does not violate the law of armed conflict. Indeed, there is sometimes a legal basis for temporarily detaining even civilians (see Pejic on internment/administrative detention). Moreover, even if a detention is unlawful because it is arbitrary (see ICRC *Customary International Humanitarian Law* Study, Rule 99), it does not necessarily trigger the hostage-taking prohibition.

But in this case, Hamas has threatened to execute a hostage for every Israeli airstrike. Recalling the definition above, this is a “threat to kill . . . [a] person in order to compel a third party to . . . abstain from doing any act as an explicit . . . condition for the . . . well-being of the hostages.” Additionally, an implicit reason for bringing the hostages into Gaza was almost certainly to frustrate Israeli operations there. And given Hamas’s past practices, it is highly probable that the civilians and even the IDF personnel were captured in preparation for future prisoner exchanges (see, e.g., the Gilad Shalit incident).

### *International Armed Conflict*

An identical prohibition applies in *international* armed conflict. For instance, Article 34 of the Fourth Geneva Convention, which governs such conflicts, prohibits taking civilian hostages. The 1958 ICRC *Commentary* to the article defines hostages as “nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces.” Article 75 of Additional Protocol I likewise prohibits taking “persons who are in the power of a Party to the conflict and who do not benefit from more favourable

treatment under the Conventions or under this Protocol” hostage. Neither the United States nor Israel is party to the instrument. Still, at least the United States treats it as reflecting customary international law with regard to “any individual it detains in an international armed conflict” (DoD *Law of War Manual*, § 8.1.4.2).

Like its non-international armed conflict counterpart, the international armed conflict prohibition is undoubtedly customary. For instance, the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia (ICTY) expressly found Common Article 3 to reflect customary law in *all* armed conflicts, not just the non-international armed conflicts that the article was initially intended to govern (*Paramilitary Activities* Judgment, para. 218; *Tadic*, Decision on the Defence Motion for Interlocutory Appeal, para. 98). As the former found,

Because the minimum rules applicable to international and to noninternational conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character (para. 219).

And, as noted, the ICRC *Customary International Humanitarian Law* study characterized Rule 96 as extending to both forms of armed conflict, quite rightly in our estimation. In this regard, recall that when Iraqi forces took civilian hostages, including children, to shield against anticipated Coalition air attacks in response to its 1990 invasion of Kuwait, the UN Security Council adopted a resolution condemning “the actions by the Iraqi authorities and occupying forces to take third-State nationals hostage.” The Council demanded that Iraq “cease and desist” from taking third-State nationals hostage [and] mistreating and oppressing Kuwaiti and third-State nationals” (UN S.C. Res. 674). No member of the Security Council voted against the resolution.

### **Hostage Taking Prohibited by International Criminal Law**

According to the ICRC, the prohibition on hostage-taking is now “firmly entrenched in customary international law and is considered a war crime.” We agree. In this regard, the Rome Statute of the International Criminal Court (ICC), which codifies key customary war crimes, provides that hostage-taking is a war crime in international and non-international armed conflict (art. 8(2)(a)(viii) and art. 8(2)(c)(iii), respectively). The elements of the offense in international armed conflict are:

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.

3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
4. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The sole differences in the non-international armed conflict context are that the text of Element 4 is replaced with “Such person or persons were either hors de combat, or were civilians, medical personnel or religious personnel taking no active part in the hostilities” and Element 6 refers to non-international armed conflict.

This prohibition is only of mid-20<sup>th</sup> Century vintage. As Leslie Green noted in his classic *The Contemporary Law of Armed Conflict*,

until the end of World War II, it was . . . common for a belligerent to take hostages, especially from the civilian population in occupied territory, with the threat that they would be killed or exposed to danger from the military operations of their own side, unless the adverse party behaved in accordance with the law of war or the civilians in that territory ceased from attacks on the occupant’s forces or property. Occasionally, hostages were also taken as a preventive measure to forestall military actions by the adverse party, including those of a lawful character directed against military objectives . . . (p. 311).

However, following the war, hostage-taking quickly began to be seen as unlawful. The 1945 Charter of the International Military Tribunal (IMT) established at Nuremberg included the “killing of hostages” as a war crime in Article 6(b), as did Article II(1)(b) of the 1945 Control Council Law No. 10, which was designed to ensure uniformity in the Occupying Powers’ prosecutions of war criminals other than those dealt with by the IMT. And Article 147 of the 1949 Geneva Convention IV identifies hostage-taking as a “grave breach,” a status that imposes obligations to provide effective penal sanctions for the offense and to search for and prosecute offenders (Article 146).

The International Law Commission (ILC), which the United Nations established in 1946 to support the development and codification of international law, has dealt with hostage-taking in numerous instruments. In its 1950 Principles of International Law Recognized in the

Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, the ILC confirmed the killing of hostages as a war crime (Principle VI). Further, according to the Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind, the "taking of hostages" is a war crime qualifying as a "crime against the peace and security of mankind when committed in a systematic manner or on a large scale." This is so, according to the ILC, in both international and non-international armed conflict (arts. 20(a)(vii) and 20(f)(iii), respectively).

The prohibition on hostage-taking also appears in the constitutive instruments of the numerous international war crimes tribunals that began to be established in the 1990s. For instance, the 1993 Statute of the ICTY authorizes prosecution for "grave breaches" of the 1949 Geneva Conventions, including "taking civilians as hostages" [art. 2(h)]. Note that the ICC Statute does not limit the offense to civilians. A similar prohibition appears in Article 4(c) of the 1994 Statute of the International Criminal Tribunal for Rwanda. Hybrid domestic/international courts likewise typically enjoy jurisdiction over hostage-taking (see, e.g., Sierra Leone, art. 3(c); Cambodia, art. 9).

International criminal tribunals have conducted numerous cases in which defendants were charged with taking hostages. Prominent examples include the ICTY's *Karadžić and Mladić* case involving the seizure of nearly 300 UN peacekeepers to shield against NATO air attack, and the 2000 *Blaškić* and 2001 *Kordić and Čerkez* cases that resulted in convictions for the taking of civilian hostages.

There is simply no question, as the ICRC observed in its 2020 ICRC Commentary to Geneva Convention III, that "the principle of individual criminal responsibility for war crimes in non-international armed conflicts is part of customary international law" and that "serious violations of common Article 3 amount to war crimes" (paras. 914 and 920). As a war crime, the offense is subject to universal jurisdiction, allowing any State, even those with no connection to the hostage-taking, to prosecute offenders. Many States have accordingly criminalized the offense in their penal codes (see the practice section of the *Customary International Humanitarian Law* study's Rule 96).

## **Concluding Thoughts**

Shockingly, hostage-taking was a central feature of Hamas' opening salvo in its conflict in Israel. Israel and many other nations, including the United States, are now struggling to address this horrific situation. Unfortunately, hostage rescue operations present some of the most challenging tactical scenarios for armed forces, especially in an environment like Gaza. But Hamas has violated the law of armed conflict without the slightest doubt. It is equally clear that those involved are subject to worldwide prosecution as war criminals under international criminal law.

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