

Israel – Hamas 2023 Symposium – International Law “Made in Israel” v. International Law “Made for Israel”

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International lawyers inside and outside Israel have long been critical of Israel’s tendency to rely on very specific and problematic interpretations of international law to justify certain military acts and foreign policies (see e.g., [here](#), [here](#), and [here](#)). Such tendentious interpretations include a claim in favor of annexation of territory captured in a defensive war (in relation to the [Golan Heights](#)), in favor of the [non-application of the Fourth Geneva Convention](#) to the territories Israel occupied in 1967, and in favor of a [narrow reading of the prohibition on the transfer of populations](#) into occupied territory (in relation to the settlements). They also include a [claim](#) that international humanitarian law (IHL) displaces completely the application of international human rights law (IHRL) to armed conflict situations (in relation to the applicability of IHRL in the West Bank) and that the application of military force against demonstrations and riots on the Israel-Gaza border [is governed by the law enforcement provisions](#) of IHL—whose precise contents remain unclear—and not IHRL.

These interpretations were not only consistently criticized by academics and non-governmental organizations (NGOs), they were also rejected by international bodies, reviewing different aspects of the Israeli-Palestinian conflict, including the [International Court](#)

of Justice (ICJ), the UN Security Council, the International Criminal Court and the Human Rights Committee. What is striking about these “made in Israel” interpretations of international law is not only their clear tendentious features, which go against standard canons of legal interpretation and norm-identification. It is also their insistence on the *sui generis* features of the situation, which effectively excludes the application of general international law, and their failure to engage with mainstream international law positions on the same issues. The result is that “made in Israel” versions of international law have little professional credibility and influence on the manner in which the international community approaches the Israeli-Palestinian conflict. They could not, and do not, serve as an acceptable baseline for professional discussions on the legal situation in Israel/Palestine.

The tendency to manufacture tendentious versions of international law is, however, not unique to Israel. Many other States have also adopted implausible interpretations of key international law instruments to mask the illegality of their national security and foreign policy actions (see for example [here](#) and [here](#)). Furthermore, we are increasingly seeing in the Israeli-Palestinian context attempts by States, intergovernmental organizations, NGOs, and commentators to generate versions of international law that deviate from pre-existing mainstream views and standard canons of interpretation and law-identification about the contents of international law. Such attempts appear to apply new legal interpretations uniquely to Israel, sometimes on the basis of a claim that the Israeli-Palestinian situation is *sui generis*.

Such international law “made for Israel” has been invoked with increasing frequency in the current Israel-Hamas war. Like its intellectual sibling—international law “made in Israel”—international law “made for Israel” cannot offer a common legal basis upon which international relations, including those relating to armed conflict situations, can be successfully conducted. As a result, international law risks losing both its credibility in the eyes of States and other stakeholders, and its effectiveness as a regulatory framework.

Many examples of international law “made for Israel” can be discussed. Given the current context of the Israel-Hamas war, we will focus on three war-related examples: the application of the law of occupation to Gaza; the debate over advance warnings in northern Gaza; and Israel’s right to self-defense. Other prominent examples of tendentious interpretations of international law and their application to Israeli practices, such as the remarkably loose interpretations of the international crimes of apartheid and genocide, will have to be discussed some other time.

The Occupation of Gaza

The question of whether Gaza remained occupied after Israel withdrew all of its troops from the territory in 2005, while remaining in control of most border crossings in and out of the Gaza Strip, the air and sea space, and some essential utilities and databases, has been ongoing almost from the time of the actual withdrawal. It is interesting to note in this

connection that Israel decided to remove its troops from the Gaza/Egypt border (the Philadelphia route), despite its critical military significance, based on the view that the removal of all “boots on the ground” would be necessary in order to legally end of the occupation. This approach, in turn, was premised on a traditional understanding of the Hague Regulations’ conditions for the beginning and end of belligerent occupation, namely, the actual presence of a hostile army in a foreign territory, entailing the capacity to substitute the governance authority of the lawful sovereign (see e.g., U.S. Army Field Manual 27–10, §§ 356, 361)

In fact, in 2005, the same year in which the withdrawal (or “disengagement”) took place, the ICJ expressed itself clearly on the conditions for belligerent occupation in the Congo v. Uganda case:

In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an “occupying Power” in the meaning of the term as understood in the jus in bello, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the [Democratic Republic of the Congo] were *not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government*. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied (emphasis added).

Holding that Uganda did not exercise any governmental authority outside the Ituri region in Congo, the Court held that other regions of the country, including one in which Ugandan troops were physically stationed in an airport, were unoccupied.

Nevertheless, when it came to evaluating the legal effects of the Israeli withdrawal, the concomitant dismantling of the Israel Defense Forces’ (IDF) Gaza military governance apparatus and the assumption of control over Gaza by the Palestinian Authority, a different standard has been applied by a number of international actors, including organizations such as the International Committee of the Red Cross (ICRC). This new standard effectively waived the traditional requirements of physical presence (or its substitute—the ability to make authority present within a reasonable time) and substitution of governance capacity.

A 2012 article by an ICRC lawyer, which appears to reflect some of the legal thinking in the ICRC on the matter provided,

In principle, this test applies equally for the beginning and the end of occupation. In fact, the criteria to be met in order to establish the end of occupation should generally mirror the ones used to determine its beginning. In other words, the criteria should be the same as for the

beginning of occupation, but in reverse. Therefore, the *physical presence of foreign forces*, their ability to enforce authority over the territory concerned in lieu of the existing local governmental authority, and the continued absence of the local governmental authority's consent to the foreign forces' presence, cumulatively, should be scrutinized when assessing the termination of occupation. If any of these conditions ceases to exist, the occupation should be considered to have ended (emphasis added).

Still an exception to the rule was proposed:

However, in some specific and exceptional cases – in particular when foreign forces withdraw from occupied territory (or parts thereof) while retaining key elements of authority or other important governmental functions therein which are typical of those usually taken on by an Occupying Power – it is proposed here that occupation law might continue to apply within the territorial and functional limits of those competences.

While this proposal was presented as specific and exceptional, tentative (“might continue”) and unclear in its implications (“apply within the territorial and functional limits of those competences”), the timing in which it was raised and the specific conditions it enumerated leave little doubt that it was formulated against the backdrop of the Gaza withdrawal, and the ensuing legal uncertainty concerning the applicability of IHL to that situation. In any event, this proposal became the basis for claims directed only against one State—Israel (see here)—to continue and assume the obligations found under the laws of belligerent occupation *vis-à-vis* a region after the complete withdrawal of all military presence from that territory.

Consequently, it was maintained by several international actors, including UN Bodies, and scholars that Israel continues to occupy Gaza, although it was no longer in a position to fulfill the very basic obligations that the law of occupation imposes (e.g., through Article 43 of the Hague Regulations), and exercised no effective control over the area (as is illustrated by Hamas's massive military buildup in the same area). Such claims ignored the deviation of this position from mainstream positions on the applicability of the laws of occupation, the text of the Hague Regulations, the ICJ *Congo v. Uganda* decision and the logic of applying the laws of belligerent occupation only to situations involving a governance vacuum due to the substitution of one government authority by another. Such claims also ignore the availability of other, more suitable, legal frameworks such as the law governing armed conflict, including its provisions on siege and blockade, and IHRL. The insistence on an expansive and distorted interpretation of the law of occupation is thus, in our eyes, a paradigmatic example of international law “made for Israel.”

In recent weeks, we are seeing an even more distorted view of the application of the law of occupation towards Israel. Whereas the ICRC position on Israel's relationship with the Gaza strip suggests a *partial* application of the law of occupation, on a functional basis, reflecting the reality in which Israel no longer controls many aspects of life inside the Gaza strip, some commentators seem now to suggest the full application of the law of occupation on the

morning on Oct. 7. Thus, for example, it was suggested that since Israel is still the occupying force in Gaza it had no right of self-defense toward the Gaza strip. Denying that Israel has the right of self-defense against Hamas from the Gaza strip by virtue of its alleged occupied status clearly flies in the face of the reality of Israel's actual lack of control over the Gaza strip, from where it was attacked by Hamas in full force.

Advance Warning in North Gaza

Whereas the applicability of the law of belligerent occupation provides an important legal context to the application of IHL and IHRL to the Israel-Hamas war, two particularly noteworthy claims that were raised during the war, appear also to meet the same “made for Israel” pattern. These are the claim regarding the illegality of providing advance warning to the Palestinian residents in north Gaza to leave and the claim that Israel's right to self-defense is limited by the overall extent of humanitarian harm it entails.

The duty to provide early warnings is described in IHL in Article 57(2)(c) of the First Additional Protocol, which reads that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.” Although Israel is not a party to the Protocol, it considers the duty to provide advance warning to be part of customary international law. The ICRC Commentary to Article 57(2)(c) provides,

There have been many examples of such warnings in the past; towns subject to attack were frequently declared open cities; in other cases, the population was evacuated Warnings may also have a general character. A belligerent could, for example, give notice by radio that he will attack certain types of installations or factories. A warning could also contain a list of the objectives that will be attacked.

Prior to its ground maneuver into Gaza, the Israeli authorities issued a general warning to the civilian population in north Gaza advising them to head south in order to extricate themselves from areas in which heavy fighting was anticipated. Later warnings also specified what safe routes should be taken at which precise hours. The IDF provided security to such evacuation corridors against alleged attempts by Hamas to harm civilians evacuating south.

Whereas one could question whether the *duty* provided in Article 57(2) applies only to warnings connected to specific attacks as claimed by Sassoli, it appears quite clear—as explained by Professor Michael Schmitt and confirmed by an ICRC commentary to the Additional Protocol—that such an advance warning is a good practice, which is not only permitted under IHL, but which contributes greatly to the aim of minimizing civilian harm. It is therefore compatible with Israel's constant care obligation under IHL (see also here).

Still, the IDF's warnings have been heavily criticized by a number of observers and stakeholders, not only due to certain aspects which, if proven accurate, are legitimate concerns under existing IHL (the safety of the roads leading out of northern Gaza, conditions

in the “safe areas” and the retention of civilian status by those who stay behind), but also by reason of claims suggesting that the very “order” or “instruction” to evacuate northern Gaza constitutes an unlawful act of forced displacement.

One of the first statements on the legality of the advance warning was issued by the ICRC on Oct. 13. It observed,

The instructions issued by the Israeli authorities for the population of Gaza City to immediately leave their homes, coupled with the complete siege explicitly denying them food, water, and electricity, are not compatible with international humanitarian law.

As far as the ICRC’s position was meant to convey that the warning was not effective due to the harsh humanitarian conditions throughout the Gaza Strip, it represents an awkward, but perhaps still plausible interpretation of existing IHL. Still, we are of the view that even were the “complete siege” policy implemented throughout the Gaza Strip (in fact, it wasn’t implemented in southern Gaza) there would still be good reasons to try to get civilians out of active fighting zones. In any event, for the purpose of this post, our main concern relates to the characterization by the ICRC of the warnings as “instructions.” This rhetoric was later escalated by international actors, NGOs and academics, who described the warning as a “forced displacement *order*.”

It is less than clear to us what features render a lawful warning (or, alternatively, a lawful displacement for civilian security or imperative military reasons pursuant to Rule 129 of the ICRC Customary Law Study) legally impermissible. One criticism offered appears to suggest —*inter alia* on the basis of international criminal law jurisprudence (see here and here) that dealt with displacements not justified by military or humanitarian considerations—that in order for the evacuation to be legal it should ensure that the choice to move to the south is fully voluntary. The general warning by the IDF, coupled with limits on access to humanitarian provisions, arguably make this movement an involuntary choice.

This seems to us, however, to be an unrealistic understanding of the voluntary nature of the choice to stay or leave in the face of advance warnings. It ignores the fact that every advance warning, by definition, contains a very real choice-constraining effect on potentially impacted civilians, since the warning will only be issued if an attack is imminent. We are not aware of any international jurisprudence or State practice which negates the legality of otherwise lawful advance warnings on this basis. It is also not clear to us how this case is different from the case of humanitarian evacuations from defended cities under siege, in which the measures taken to enforce the siege could also be seen as a form of pressure on civilians.

By contrast, some of the “illegal forced displacement order” claims appear to rest on an unstated factual assumption that the true purpose of the Israeli ground operation is not to fight Hamas but rather to ethnically cleanse parts of Gaza. These factual claims were

negated by clear IDF statements that Palestinians will not be prevented from returning to the north. We are aware, of course, of some statements issued by politicians in Israel that call for resettlement arrangements not involving the return of Palestinians to Gaza City.

Critics of Israel have been seizing on such outrageous statements to create the perception that they represent a governmental policy and advocate claims, verging on the conspiratorial, that the evacuation was never meant to protect civilian lives, but rather initiated for the purpose of forced displacement. As we explained elsewhere, these calls are largely made by political “left outs” who have no real power in Israel’s current decision-making apparatus. In any event, we see no reason to doubt the very real life-saving potential of the general warning, a point underscored by the very heavy fighting taking place in the last three weeks in northern Gaza.

The new standard that is being advocated—which as far as we know has only been raised in connection to Israel—seems to suggest that armies involved in large scale urban warfare cannot lawfully warn the entire population found inside the theatre of hostilities and encourage it to leave, because that might be construed as an illegal forced displacement order. An application of this standard might either prevent militaries from effectively fighting terrorist or guerilla groups due to the anticipated collateral harm, or, worse still, result in widescale and unnecessary collateral harm.

Both outcomes are incompatible with traditional readings of the duty to provide advance warning and/or the constant care requirements as balancing tools between military necessity and humanitarian concerns, through which parties to an armed conflict strive to give effect to the object and purpose of IHL treaties. The tension between the claims made and traditional understandings of IHL underscore for us their politically motivated character. At least some of them appear to be aimed at creating legal conditions under which Israel would be castigated as an IHL violator if it continues with its military operation in northern Gaza, whether civilians stay in place or leave to the south.

Use of Force

The final area in which “made for Israel” claims appear to be raised is *jus ad bellum* claims relating to the very legality of the Israeli use of force in Gaza in response to the attack and massacre of 7 October. Some of the claims which deal with the very applicability of the right to self-defense to the situation are actually not new and not wholly unique to Israel, but raise broad questions about the applicability of the UN Charter to use of force involving non-State actors and occupied territories. These claims have been effectively refuted by Professor Marko Milanovic and we have little to add, except to note the Israeli official position that the armed conflict against Gaza has been ongoing. This effectively suggests that an earlier moment in time to 2023 should be looked at in to evaluate the availability of Israel’s right to use force.

One interesting claim in this regard (see [here](#) and [here](#)) suggests that the principle of proportionality, which limits the scope of the right of self-defense, applies not only to the relationship between the legitimate goals of the defensive military action and the overall extent of force used, but also between the former and the overall humanitarian harm caused by the defensive use of force. The assertion that this position reflects, at best, *lex ferenda* and not *lex lata* has already been made (see [here](#) and [here](#)).

We agree with that assertion. The alternative claim is based on one expert [report](#) which cites no State practice or judicial authority in support of its underlying conclusion (it cites, however, one [article](#) that proposes that there may be an emerging standard found in State practice relating to Israeli practices *vis-à-vis* Lebanon and Gaza). The claim also raises some State practice, all of which comprises statements made in UN settings during debates around Israeli practices relating to use of force in Gaza and Lebanon—actually underscoring our point that this is another case of international law “made for Israel.” It is quite striking that no similar statements can be found, as far as we know, in Security Council debates relating to other use of force campaigns, including the recent campaigns against ISIS and Libya, the war in Yemen, etc.

Given the fact that the cited statements hardly represent general and consistent State practice, and that they do not clarify whether they base themselves on a traditional or new *jus ad bellum* proportionality analysis, *jus in bello* proportionality, or on extra-legal moral-political proportionality considerations, it is difficult to see a case made for a new *lex lata* on proportionality. The attempt to hold Israel, and only Israel, to this standard, is thus legally suspicious.

We would add that we also doubt the practicality of applying an overall humanitarian harm test under the *jus ad bellum*. If taken seriously, such an evaluation should, at the least take into account all future harms that Hamas may inflict upon Israel (and on Palestinians likely to be harmed by future defensive actions), especially given the former’s genocidal intent to destroy the latter. The harm caused by the displacement of Israelis evacuated from their homes (hundreds of thousands were evacuated in the current conflict), as well as the displacement of Palestinians in this and future conflicts should also be taken into consideration. This complex analysis should also evaluate the effectiveness of other alternative reactions, many of which were tested, tried, and failed over the years. We are skeptical whether such macro-level, multi-factored and speculative analysis can generate clear legal results.

Furthermore, a harms-based *jus ad bellum* proportionality test might, if applied imprudently, reward aggressive parties to the conflict who deliberately violate the laws of war and put both their own civilians and enemy civilians in harm’s way, thus deliberately restricting the self-defending party’s right to defend itself. It appears to suggest that States should refrain from defending themselves due to the fact that the enemy forces they are fighting operate in ways that would allow defeating them only at a very high humanitarian cost. This would mean that

States confronting an enemy, be it a State or a non-State actor which locates strategic targets in dense population centers, denies civilians the possibility to leave the theatre of hostilities and prevents them from building bomb shelters (all of these conditions appear to exist in the Gaza Strip) would be legally denied the possibility to effectively mount a self-defense campaign.

Questions whether or not there is a duty to self-sacrifice and refrain from exercising self-defense in view of significant harm to the aggressor or passersby are thorny even in philosophical debates around the ethics of war. Transposing such debates into legal obligations, which would prevent States from effectively defending themselves against aggressors, appears difficult, perhaps hopelessly so. What is clear to us, is that this debate is still at a very nascent stage. The idea, proposed by some scholars, that there is already settled international law on this issue, which binds Israel, seems to us unconvincing, to put it mildly.

Conclusion

We should make our position clear in two respects. First, we believe in the gradual development of international law, and we are on record for supporting developments in areas such as assessing the cumulative damage to civilians from military campaigns. Such developments should be made gradually and cautiously, however, with clarity and transparency about the current state of the law. Such developments should also be aimed at introducing universally applicable standards, and not standards that would realistically apply only to one specific case. Otherwise, such developments would not enjoy any international legitimacy, and would be doomed to fail.

Second, we are of the view that there is plenty of room to criticize and seriously discuss Israel's international practice, and its conduct in the current conflict in particular. Mark Lattimer's recent piece, evaluating Israel's proportionality analysis based on the Jabaliya strike seems to us to be an excellent example of such a method of criticism, comparing Israeli practice with U.S. and UK practices, and refraining from resorting to international law "made for Israel."

Given the high emotions surrounding the long and bloody Israeli-Palestinian conflict, it is not surprising that parties on both sides of the conflict and their supporters have been making tendentious "made in Israel" or "made for Israel" claims. The continuation of such practice generates much cynicism towards international law and international law considerations. It also obfuscates the terms of debate that should surround, in our view, the serious questions of interpretation and application of international law arising in the Israel-Hamas War. These include questions concerning Israel's targeting decisions and proportionality calculus, its north Gaza siege policy, how to respond to the extensive abuse of military facilities by Hamas, and how to obtain the criminal prosecution of the architects of the October 7 massacre and hostage-taking operation.

To serve its purpose of guiding the conduct of States and other international actors towards more fair and just international conditions, international law must retain a high degree of legitimacy (or be equipped with a strong enforcement machinery) and serve as a common legal language. Legal claims that are viewed as doubtful by nature, applied selectively and based on dubious law-interpretation and law-identification methodology, are unlikely to succeed in changing State practice. Furthermore, they also undermine the credibility of international law as a legal system, and thus adversely affect compliance with other, less controversial, international law claims.

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