

# Israel – Hamas 2023 Symposium – Siege Law and Military Necessity

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It is no surprise that the debate over the legality of Israeli measures directed against Hamas is already gaining momentum. Public discussion has focused, at least for now, on Israeli Defense Minister Gallant's [declaration](#) that, “no electricity, no food, no water, no fuel ...” would enter Gaza. Equally unsurprising is that the legality of siege tactics and cutting of resources for the civilian population have become the basis for assertions that Israel is committing a war crime.

From a strategic perspective, Israel's proclaimed siege of Gaza is undoubtedly intended to demonstrate resolve to respond to the Hamas attacks of 7 October. From a legal, moral, and operational perspective, this action resurrects the enduring—albeit sporadically dormant—relevance of siege operations to warfare. While there will be debates related to the legality of this tactic, one thing is clear: no matter how compelling the interest in signaling responsive resolve, the use of siege tactics must comply with the law of armed conflict. Or, to put it differently, there is no strategic necessity “override” to the legal limits on the execution of military operations.

But this also raises what we believe is another important aspect of a legality debate that will almost certainly gain substantial momentum as this operation continues: is the focus on legal complexities related to siege operations a recipe for missing the proverbial forest for the trees? These complexities are certainly important and worthy of analysis. Indeed, we will offer some of our own perspectives below.

However, we also believe that no matter where one comes out on the complicated issues associated with such analysis—issues such as the type of conflict and the applicability of specific treaty provisions, the anticipated military advantage motivating the use of siege tactics, the underlying intent for siege measures, and the impact of other measures implemented to facilitate humanitarian relief on the legality of a siege—a supplemental and productive question may be to ask whether the Israeli Defense Forces are complying with universally agreed upon aspects of the law of armed conflict including that of military necessity.

### **Is Siege Necessary?**

Siege—or encirclement as it is often known in modern military doctrine—remains a valuable tool in the conduct of hostilities regardless of the time, place, or character of conflict. Despite their ancient origins, archaic imagery, and often notorious effects, siege operations remain highly relevant to the conduct of warfare. Modern war is replete with resorts to siege. Recent conflicts in the [Balkans](#), [Iraq](#), [Syria](#), and [Ukraine](#), to name only a few, have featured intense and prolonged efforts to surround, isolate, and force into submission enemy forces.

Although there are many reasons to employ siege, the most common may be to avoid costly direct assaults into densely populated or built-up areas. No operation is more complicated, dangerous, and challenging than conducting combined arms maneuver in urban areas. Attack operations usually call for friendly-to-enemy force ratios of three or even five-to-one. In contrast, in the right circumstances, siege operations can be conducted on a one-to-one force ratio. In addition to requiring a commitment of fewer forces, sieges often spare friendly forces from the almost inevitable and hellish small-unit urban clearing operations that are so costly in terms of personnel, material, and time. And, ideally, siege may spare the civilian population from some of the inevitable consequences of close combat operations in the urban battle-space.

To achieve its intended effect, the military *sine qua non* of successful siege is isolation. To force an enemy into submission by resort to deprivation rather than by destruction or capture requires cutting them off from all forms of support: reinforcement, supply, sustenance, and ideally communications. Accordingly, for a siege to succeed, isolation of the enemy must be as complete as possible. In addition to the physical and moral isolation that successful siege has required, modern military doctrine calls for electronic isolation. Both ancient and modern experiences have shown that almost any compromise of these prescribed forms of isolation

compromises the tactical effect of siege operations. One need look no further than the complicated, well-resourced, and horrific Hamas attacks of 7 October to witness the results of incomplete isolation efforts.

Despite its tactical and operational advantages, siege is not always preferred. It has often signaled a failure of offensive operations or stalemate. Still, that Israel would resort to tactics aligned with the general concept of siege so soon after the Hamas attack is unsurprising. Encircling Gaza to isolate Hamas and deprive its armed operatives of all forms of external military and other support, for now, seems preferable to destroying that capability by way of combined arms maneuver operations in some of the world's most complex urban terrain. And at present, the Israel Defense Forces appear well structured and equipped to inflict military costs on Hamas during its isolation by remote means such as air attacks and indirect fires rather than by ground assault.

Notwithstanding its unequivocal political rhetoric, it is unclear whether Israel will be able to fully and effectively siege Gaza. Israel can no doubt greatly restrict the flow of support into Gaza. But it is doubtful it can impose the near absolute isolation so crucial for an effective siege. A significant portion of Gaza does not border Israel, most notably the southern border Gaza shares with Egypt. Cutting off or interdicting supplies of weapons, commerce, food, and water from territory or waters Israel controls will greatly reduce support to Gaza. But it is doubtful they can do so to the extent required to compel Hamas into submission. The undeniable reality that Hamas will prioritize provision of support to its personnel and operations from whatever limited resources do make their way into Gaza exacerbates the difficulty of a successful siege. Moreover, other States, including through regional arrangements, appear poised to continue to provide aid to Gaza notwithstanding the current security situation.

### **Siege Law**

One of us has previously outlined law of armed conflict considerations applicable to siege during international armed conflict. Does this law apply to the ongoing armed conflict between Israel and Hamas? This is a complex question. Obviously, Gaza is not a sovereign State and Hamas is not an organ of a State. However, some continue to assert the law of international armed conflict applies to this situation because Gaza is functionally occupied. We disagree with this position and find it perplexing how an area putatively subject to occupation is now on the verge of being "re-occupied."

But setting aside this debate, while the character of an armed conflict will have a controlling impact on specific treaty obligations applicable to operations, including siege operations, the *fundamental* assessment of siege legality is similar in both international and non-international armed conflicts. Does military necessity justify it? Is the intent of cutting off access to resources intended to weaken the enemy armed forces? Has the party imposing the siege

considered and implemented all operationally feasible measures to mitigate the adverse consequences on the civilian population? Does the anticipated military degradation of enemy capability outweigh the foreseeable adverse effects on the civilian population?

In this regard, the context of a siege does little to alter the operation of the general and relevant law of armed conflict. That body of law regulates targeting operations carried out during siege similarly to other contexts. For example, the obligation to distinguish combatants from civilians and military objectives from civilian objects, the requirement to implement all feasible precautions to mitigate civilian risk, and the duty to evaluate foreseeable civilian harm against anticipated military advantage apply in either their conventional or customary forms to all types of armed conflicts. And methods of war and weapons prohibited *per se* in other contexts of international armed conflict remain so during siege.

Yet the law applicable to international armed conflicts also includes select rules specific to siege or similar situations involving isolation and control. The 1907 Hague Regulations specifically mention siege when they require a besieging force to spare “as far as possible” certain buildings not used for military purposes. Notably, the same provision also requires a besieged belligerent “to indicate the presence of such buildings or places by distinctive visible signs.”

Though not exclusive to siege, law of armed conflict rules prohibiting starvation of the civilian population as a method of warfare assume special significance—and comparable interpretive difficulty—during siege. A widely ratified treaty provision codifies this rule and there appears to be broad agreement that measures implemented *for the purpose* of starving civilians are prohibited as a matter of universal custom as well. However, debate swirls whether and at what point incidental starvation—starvation designed and carried out to force enemy armed forces into submission but also inevitably and foreseeably starves civilians—is prohibited.

The operational effect of admitting such a prohibition is potentially enormous. While each view is legally defensible, siege, as understood and prescribed by military doctrine, would prove nearly impossible were the prohibition interpreted to include *all* incidental starvation or deprivation of other resources used by the civilian population. Furthermore, prohibiting siege *whenever* it would have such a foreseeable incidental impact on civilians would create a powerful incentive for a defending force to comingle its personnel and assets in the most densely populated civilian areas, a tactic that undermines the efficacy of implementing distinction and proportionality obligations by the attacking force and inevitably exacerbates civilian risk irrespective of whether there is a siege.

Ultimately, no matter the nature of the armed conflict, a military commander contemplating “laying siege” to the enemy must ensure any such measures account for the charge to take “constant care” to mitigate, as much as feasible, the suffering of the civilian population.

Operationally, this translates to a requirement to implement all operationally feasible measures to facilitate humanitarian relief without compromising the anticipated military advantage, and to loosen or terminate any siege when the harm to civilians is assessed as excessive in relation to the anticipated military advantage.

As a result, siege clearly implicates the issue of civilian access to humanitarian assistance. The Fourth Geneva Convention of 1949, applicable to international armed conflicts, includes obligations to “endeavor to” permit specified relief and humanitarian assistance to certain categories of civilians. In the context of belligerent occupation, in which a party enjoys effective control and exercises authority over territory and a population the Fourth Convention expands the obligation to provide or admit relief significantly. However, in situations of active hostilities when the area in need of humanitarian assistance is under the control of the enemy, the extent to which a party, especially as besieging commander, must allow relief to pass to the besieged area is fraught with legal and operational complexities. In some cases, deprivation of such access may be inconsistent with both military necessity and the notion of constant care. At the same time, allowing such access when it will impede combat operations or inevitably lend advantage to enemy forces is not required. But the line between these two extremes remains blurry and subject to debate; or, phrased differently, what amounts to unlawful denial of access is uncertain. By one view, a besieging force must not arbitrarily deny relief and must offer reasoned explanations for denials. By another view, the prerogative to admit or deny relief remains, at its heart, a matter of choice and a good faith determination for the besieging party. Still, there is common ground between these views; at minimum, there must be military necessity to deny such access in any situation.

Others have already outlined the case for a law of siege applicable to both international and non-international armed conflicts, although the legal methodology of some conclusions, particularly concerning emerging interpretive and customary international law claims are debatable. As noted above, we agree with the general view that many rules applicable to siege in international armed conflict also find life in international law applicable to non-international armed conflict. However, for now, we suggest that more fundamental and productive legal considerations can be undertaken with respect to the role of military necessity in regulating siege.

### **Military Necessity**

Whether in offensive, defensive, or siege operations, belligerents must assess whether *every* tactic employed is justified by military necessity. Although at times misused and even abused as a rationale for clearly unlawful conduct in war, correctly understood, military necessity remains the most fundamental legal restraint on military operations. Only those acts intended to bring about the enemy’s submission are justified in war. Acts that exceed what is anticipated to achieve enemy submission or bear no connection to achieving military

advantage are always illegitimate. Military necessity is, in this sense, a free-standing check on all operations. It is also an essential prism through which legal restraints on military operations, such as those we discussed above, can best be understood.

It is an article of faith that measures justified by military necessity must also be balanced against the principle of humanity. But we suggest that this inquiry is often of limited operational utility. First, the notion of humanity is arguably integrated into the notion of military necessity and the law of armed conflict rules that flow from it. Military necessity as a justification, and like all other justifications (self-defense, defense of others, general necessity) is based on a simple premise that any harm produced by a measure serves a “greater good.” In the military context, this “greater good” is bringing about the enemy’s submission. As a justification, military necessity renders legal what in other circumstances would be illegal: intentional killing and infliction of injury, the infliction of incidental civilian death or injury or destruction of civilian property, capture and deprivation of liberty, requisition of private property, etc. But infliction of such harm *without* the justification provided by military necessity is unjustified, and as a result inhumane.

Balancing military necessity against humanity also suffers from the fact that humanity is a concept that is both broad and vague at the same time. This is especially true in relation to the conduct of hostilities, at the heart of which is the use of combat power and other tactics, like siege, to weaken and defeat the enemy. It is often unclear what humanity, as a free-standing consideration, means and demands in this context. Translating it into operational and tactical measures is exceedingly complex and loaded with operational peril.

This is why we believe that a more helpful companion to military necessity, including with respect to evaluating siege operations, may be the notion of “constant care,” also adopted in the first paragraph of [Article 57](#) of Additional Protocol I. That article appears alongside law of armed conflict targeting precautions and has been increasingly (and distressingly) loaded with far greater doctrinal demands than likely intended by States. But it is noteworthy that its mandate is broad in scope, and it remains useful as a guiding concept. “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” This mandate covers every aspect of military operational planning and mission execution, not just conducting attacks. Furthermore, it is readily translatable into operational and tactical action. And finally, it genuinely complements military necessity.

How? First, it is premised on the expectation that whatever measures are being employed have been *prima facie* justified by military necessity. It then counsels identifying and implementing all feasible measures to mitigate civilian risk and suffering *that do not* compromise the need to take those measures. This approach to assessing operational and tactical measures, including during siege, should be demanded of all combat leaders, no matter how senior or junior in rank. They must do what is necessary to defeat the enemy and must also mitigate civilian risk and suffering.

Returning to the prospect of an Israeli siege of Gaza and its military necessity, evaluating the intent to “signal resolve” can be misleading. Although a show of resolve is no doubt useful to bolster domestic or even international support for a siege, military necessity is usually understood to require a more concrete operational justification than merely confirming a belligerent’s level of determination to win. When assessing legitimacy, military necessity inquiries require more precise assessments of the actual measures imposed, not just “siege” as a general concept. Isolating an enemy in order to facilitate attack or to compel capitulation is certainly justified by military necessity, as is depriving the enemy of essential resources like food, water, and electricity.

However, imposing such deprivations to inflict suffering or retribution on the civilian population is not. Nor would the justification of military necessity extend to inflicting that suffering as a foreseeable consequence of weakening the enemy when the impact on the enemy is anticipated as only minimal or nominal while the suffering inflicted on civilians is expected to be substantial.

In the current debate related to siege tactics, the value of such an approach seems obvious. No matter where one comes down on debates whether siege, as a general proposition or with respect to individual doctrinally prescribed measures, is legal, we should start by asking, what is the military necessity for the measures imposed? If there is no credible justification, the measure is invalid. If there is, the next question is whether there is anything feasible that can be implemented to mitigate the suffering of civilians that will result.

Consider two specific measures that have caught the international community’s attention: cutting of power to Gaza; and cutting off water. When an enemy relies on power for a wide array of capabilities, cutting it off, whether by attack or by a non-violent measure, is clearly justified by military necessity. Indeed, if Hamas relied on a power generation station in Gaza instead of in Israel, that station would almost certainly be a high value military objective. Nor would the justification of military necessity in most cases be negated by the incidental impact on civilians. Meanwhile, devoting constant care to the effects of cutting power on the civilian population may go a long way toward reducing harm.

Deprivation of water seems to us to be quite different. First, it is unclear how cutting off access to all water in Gaza is justified by military necessity. Assuming for argument’s sake that it is intended to deprive sustenance to Hamas fighters—an effect justified by military necessity—that impact seems highly speculative. Cutting off water into Gaza will not result in no water being available. There are certainly some existing resources. But those resources will almost certainly be prioritized for Hamas personnel, leaving the civilians to suffer. Furthermore, any hypothetical necessity is negated by the balance between the negligible and speculative military advantage the measure will produce and the widespread suffering to civilians it will inflict. As a result, even if military necessity is assessed as justifying this

measure, the certainty of the civilian suffering it will produce necessitates implementing measures to alleviate that suffering, to include working in good faith to facilitate provision of humanitarian assistance to the population.

Thus, no matter how this armed conflict is characterized, or no matter where one comes down on extension of rules adopted to regulate international armed conflict to the context of non-international armed conflict, a foundational approach to all aspects of military operations serves both humanitarian and operational interests. No measure is operationally justified absent military necessity, and when such measures produce a foreseeable adverse impact on civilians, the commander bears an obligation to consider and implement feasible measures to mitigate that risk. These core considerations are not suspended as the result of the “just cause” being prosecuted, or as the result of confronting an enemy whose forces systemically engage in blatant violations of the law. Instead, framing all operational decisions and interpreting applicable rules consistently with this equation remains the *sine qua non* of a truly professional force led by genuinely responsible commanders.

### **Concluding Thoughts**

Sieges are harsh and have produced some of warfare’s most dire and distressing military and humanitarian consequences. Correctly understood, siege law is perhaps comparably harsh and may even be out of touch with modern sensitivities and sensibilities. Although difficult to reconcile with the clear military imperative of siege operations, emerging views on the legality of incidental civilian starvation and other methods of isolating and weakening the enemy armed forces that seek to soften siege operations are entirely understandable from a humanitarian perspective. They may yet find traction in the slow, but still reactive process of law of armed conflict formation and development.

But without intending to displace or to marginalize clearly applicable rules of the law of armed conflict during siege, we have suggested that a productive approach to scrutinizing siege operations lies in considering the imperatives of military necessity and the constant care notion both as free-standing considerations and as a lens through which to interpret applicable rules. Applying these principles may lead to outcomes that are difficult to reconcile with the general appeals to prevent civilian suffering, appeals that may often lead to the strategic decision to forego what is legally permissible. And while aversion to civilian suffering must constantly influence decisions at every level of military operations, it is equally important not to lose sight of the fundamental goal of such operations: to bring the enemy armed forces into submission in the most efficient way possible. Whether and for how long Israeli commanders subject Gaza to siege tactics is yet to be seen, but the forces massing along the border will have a clear mission if they are ordered to enter Gaza, one that any veteran of combined arms operations will understand: close with and destroy your enemy by fire and maneuver. Weakening that enemy through isolation and deprivation unquestionably



contributes to accomplishing that mission, and we should be cautious about the law's balance so far to the side of civilian protection that it significantly undermines the ability to fight and win.

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