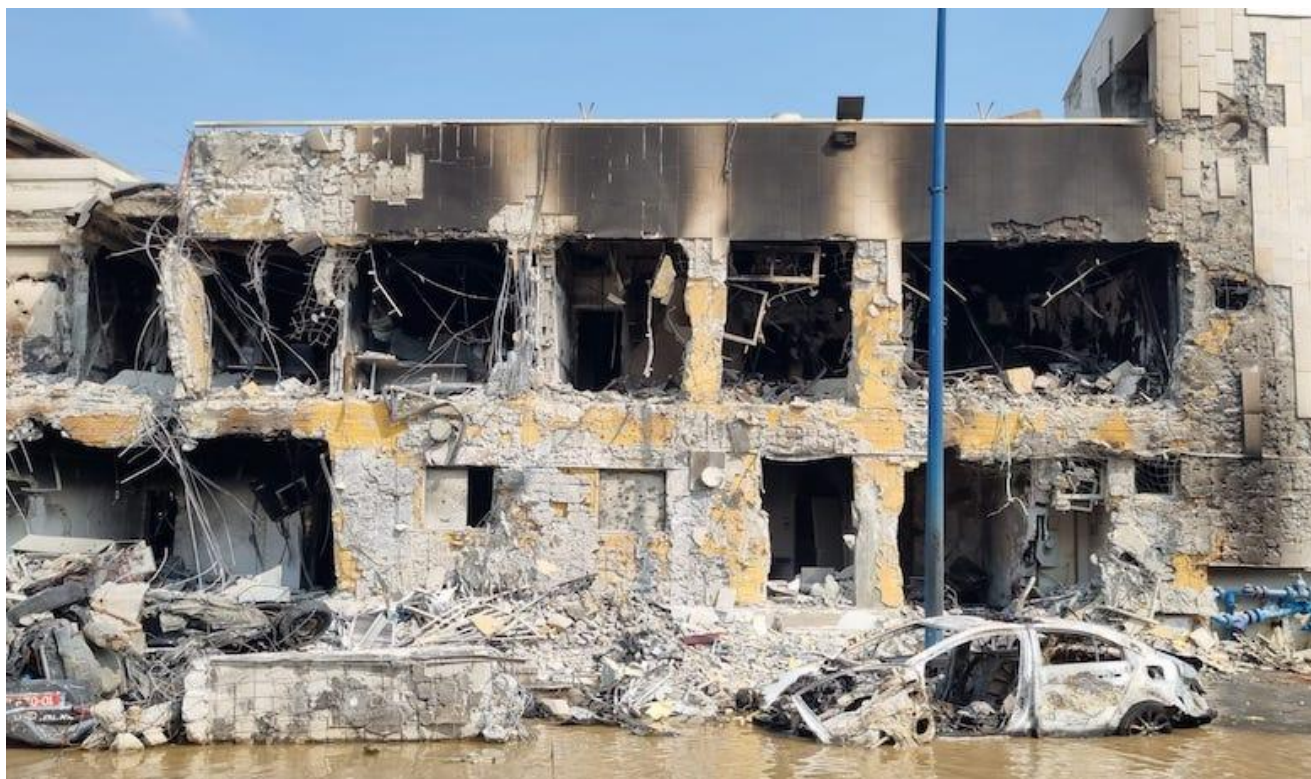


Israel – Hamas 2023 Symposium – The Circle of Suffering and the Role of IHL

lieber.westpoint.edu/circle-suffering-role-of-ihl

October 19, 2023

by [Helen Durham](#), [Ben Saul](#) | Oct 19, 2023



Great suffering is the cause and consequence of armed conflict. International humanitarian law (IHL) sets a minimum base line of humanity at times when tensions and emotions run at unbearably high levels. By finding a balance between military necessity and the principle of humanity, IHL gives decision makers (from governments and authorities to military commanders) a strategic framework to move beyond the natural discourse of public outrage and grief and make tactical decisions that sit within that balanced equation. It is a tough ask and the amplification of anger, fury, and fear with fast paced global communications means pressures are heavy.

Many rules relating to the conduct of hostilities reflect customary IHL and do not depend on controversies over the classification of the armed conflict as international (IAC) or non-international (NIAC). This post aims to provide a range of the legal obligations, irrespective of classification, to be taken into account by all those involved in the current situation in Israel and Gaza.

IHL Breaches and War Crimes

Hamas's recent attacks in Israel are unacceptable and illegal. The UN Office of the High Commissioner for Human Rights has stated that more than 1,200 Israelis and foreign nationals were reported to have been killed, 3,000 wounded, with more than 100 individuals taken hostage. IHL unequivocally prohibits attacks on civilians, murder, hostage taking, arbitrary detention, use of human shields, torture and other ill-treatment of captives, mutilation, and sexual violence. And Hamas may have committed perfidy to trick civilians into emerging from "safe rooms." The firing of thousands of inaccurate rockets into Israel is prohibited either as deliberately attacking civilians, or indiscriminate attacks which fail to distinguish between military objectives and civilians.

All of the above could further be evidence of Hamas's intention to deliberately spread terror amongst a civilian population. The mass killings of Israeli civilians could constitute the international crime of genocide if specifically intended to destroy part of the Israeli and/or Jewish people as such. They could also be crimes against humanity such as murder, extermination, persecution, imprisonment, enforced disappearance, or inhumane treatment, being part of a widespread or systematic attack on a civilian population.

Hamas should be held accountable for its war crimes, whether in Israeli or foreign courts, or at the International Criminal Court. As the Secretary General of Amnesty International, Agnes Callamard, stated "Massacring civilians is a war crime and there can be no justification for these reprehensible attacks All civilians who were abducted, including children, must be released immediately. These crimes must be investigated as part of the International Criminal Court's ongoing investigation"

IHL applicable to Israel's military operation in Gaza is clear. Israel must take constant care to spare civilians and civilian objects. It must take all feasible precautions to verify targets are military objectives and avoid and minimise incidental civilian casualties, including when choosing means and methods of warfare. In a densely populated area under total siege, preceded by 16 years of stringent blockage and earlier almost four decades of occupation, Israel must take heightened care in targeting given the precarity of civilian survival in Gaza.

While Hamas moves and hides amongst civilians in densely populated cities, this does not absolve Israel of its duties. Nor does the failure of Hamas to fulfil its own obligations to protect civilians from the effects of attacks, avoid locating military objectives in densely populated areas, and remove civilians from the vicinity of military objectives.

Israel must also warn civilians of impending attacks unless the circumstances do not permit. Israel has given fewer specific warnings than in previous conflicts. Not warning inevitably risks higher civilian casualties. Israel has more generally warned 1.1 million people in northern Gaza to move to the south within 24 hours, ahead of an impending ground invasion.

However, warnings must be “effective,” allowing sufficient time for safe evacuation. The challenge involves a fast-tempo situation of bombardment in a city under siege to provide an adequate timeframe that is realistic to allow for an evacuation. The International Committee of the Red Cross has expressed its concern and the UN Secretary-General condemned the evacuation as ‘extremely dangerous’ and potentially impossible. Recently, Israel bombed one of the roads it declared “safe” for evacuees, killing 70.

The problems with the evacuation are exacerbated by Israel’s “complete siege” of Gaza, with “no electricity, no food, no water, no fuel.” Siege can be lawful to degrade an adversary. But it must comply with IHL rules on the protection of civilians.

Total siege violates Israel’s obligation to allow and facilitate rapid and unimpeded passage of impartial, non-discriminatory humanitarian relief for civilians in need. This includes operations to provide food, water, medical supplies, clothing, bedding, shelter, heating fuel, and other supplies and related services essential for the survival of a civilian population. While Israel has a right to control the entry of such assistance to meet legitimate security needs, it cannot shut it off. The starvation of the civilian population is prohibited and is a war crime. The siege could also be unlawful collective punishment if it aims to retaliate against all Gazans for Hamas’s sins. Under present conditions southern Gaza cannot sustain an extra 1.1 million people on top of the number already there.

Related humanitarian rules that should be emphasised are that humanitarian relief personnel and objects must be protected and respected, and the freedom of movement of such personnel ensured. Also protected are medical personnel, units, and transports.

Civilians must be permitted to voluntarily leave areas under siege. Israel has urged civilians to leave Gaza altogether, but has closed its own borders and bombed the sole crossing into Egypt. International human rights law guarantees that no civilian may be rejected at a border when fleeing arbitrary threats to their life, including from illegal siege or other violations of IHL.

Concluding Thoughts

Legality aside, the scale of the devastation is a human tragedy. In a week, Israeli air strikes have killed 1,100 Palestinians and injured 5,300. Civilian infrastructure has been damaged, including hospitals, schools, Red Crescent centres, hundreds of buildings, and water and sanitation facilities supplying 400,000 people. Meanwhile, Israeli families desperately wait for news of the fate of their loved ones. A ground invasion promises more suffering.

Civilians in Israel and Gaza are suffering in terrible ways. As a joint statement from the International Red Cross and Red Crescent Movement stated, “under IHL . . . there is no hierarchy in pain and suffering.” If the rules created to preserve the minimum of humanity are put aside at the very time they were created to apply, the circle and enviable consequences of suffering continues unabated.

Dr Helen Durham is a global expert in international humanitarian law, humanitarian action and diplomacy.

Professor Ben Saul is Challis Chair of International Law at the University of Sydney and the United Nations Special Rapporteur on human rights and counter-terrorism (from November 2023).

Photo credit: Yoav Keren via Wikimedia Commons

SUBSCRIBE

RELATED POSTS

The Legal Context of Operations Al-Aqsa Flood and Swords of Iron

by Michael N. Schmitt

October 10, 2023

—

Hostage-Taking and the Law of Armed Conflict

by John C. Tramazzo, Kevin S. Coble, Michael N. Schmitt

October 12, 2023

—

Siege Law and Military Necessity

by Geoff Corn, Sean Watts

October 13, 2023

—

The Evacuation of Northern Gaza: Practical and Legal Aspects

by Michael N. Schmitt

October 15, 2023

—

A “Complete Siege” of Gaza in Accordance with International Humanitarian Law

by Rosa-Lena Lauterbach

October 16, 2023

–

The ICRC’s Statement on the Israel-Hamas Hostilities and Violence: Discerning the Legal Intricacies

by Ori Pomson

October 16, 2023

–

Beyond the Pale: IHRL and the Hamas Attack on Israel

by Yuval Shany, Amichai Cohen, Tamar Hostovsky Brandes

October 17, 2023

–

Strategy and Self-Defence: Israel and its War with Iran

by Ken Watkin

October 18, 2023