

Israel – Hamas 2023 Symposium – The Evacuation of Northern Gaza: Practical and Legal Aspects

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by [Michael N. Schmitt](#) | Oct 15, 2023



Late in the evening of October 12th, the Israel Defense Forces (IDF) began warning residents of Gaza to evacuate to the south in anticipation of large-scale IDF operations. The text of one of the warnings, posted on the IDF website, reads,

The IDF calls for the evacuation of all civilians of Gaza City from their homes southwards for their own safety and protection and move to the area south of the Wadi Gaza, as shown on the map.

The Hamas terrorist organization waged a war against the State of Israel and Gaza City is an area where military operations take place. This evacuation is for your own safety. You will be able to return to Gaza City only when another announcement permitting it is made. Do not approach the area of the security fence with the State of Israel.

Hamas terrorists are hiding in Gaza City inside tunnels underneath houses and inside buildings populated with innocent Gazan civilians.

Civilians of Gaza City, evacuate south for your own safety and the safety of your families and distance yourself from Hamas terrorists who are using you as human shields.

In the following days, the IDF will continue to operate significantly in Gaza City and make extensive efforts to avoid harming civilians.

Among the means used to ensure the civilian population received the warning, the IDF dropped leaflets (example). Then, on 14 October, the IDF announced a six-hour window in which it would refrain from conducting strikes along two routes to facilitate the movement of residents to the south.

The warnings provoked a firestorm of condemnation. The UN Special Rapporteur on the human rights of internally displaced persons demanded the “order” be rescinded and labeled the Israeli action “as a crime against humanity and a blatant violation of international humanitarian law” (IHL). Amnesty International alleged that the “Israeli army’s order to people in northern Gaza and Gaza city to ‘evacuate’ to the south of the Gaza Strip, cannot be considered an effective warning and may amount to forced displacement of the civilian population, a violation of international humanitarian law.”

Even the International Committee of the Red Cross (ICRC) questioned the legality of Israel’s action.

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.

When military powers order people to leave their homes, all possible measures must be taken to ensure the population has access to basic necessities like food and water and that members of the same family are not separated.

Gaza is a closed area of limited size and resources. People have nowhere safe to go and many, including the disabled, elderly, and sick, will not be able to leave their homes. International humanitarian law protects all civilians, including those who remain. Today, it is impossible for Gazans to know which areas will next face attack.

The ICRC’s statement was especially significant because the organization’s primary approach to addressing possible IHL violations is through confidential dialogue with the parties. It usually refrains from making public statements that could be perceived as taking sides. However, in exceptional cases where the ICRC believes that confidential dialogue has failed and widespread or grave violations of IHL are occurring, it sometimes issues public statements, as it has done in this case.

Hamas reacted to the Israeli warnings by telling the residents of Gaza City to “remain steadfast in your homes and to stand firm in the face of this disgusting psychological war waged by the occupation.”

In this post, I take issue with these assertions based on the facts on the ground and the law. They ignore the reality of what is about to occur (or perhaps has by the time of publication) and turn well-established IHL rules on their head. I will not take on the more legally and morally complex issue of the so-called siege, which has been, and will continue to be, dealt with elsewhere (see, e.g., [here](#) and [here](#)).

The Reality of the Situation

It is beyond dispute that civilians moving out of Gaza City and northern Gaza will face great hardship, especially considering the lack of access to food, medicine, and other essential supplies. The situation is tragic, and measures must be taken to provide humanitarian assistance in southern Gaza, where the population is heading (especially from across the border with Egypt). This is essential, for once the IDF moves into Gaza City and the surrounding area, delivery of humanitarian aid through the battle zone will be operationally impossible for some time.

But that Israel may lawfully defend itself against Hamas’s attacks by moving against the organization into the Gaza Strip, especially Gaza City, is equally clear (see [here](#)). It must do so for valid operational reasons to effectively defend against Hamas, especially in light of the continuing rocket attacks and Hamas’s remaining military capability (and the long lineage of Hamas’s attacks on Israeli civilians). In that regard, a reality that seems to have been missed by many is that the longer the IDF waits to move into Gaza, the more difficult the fight will be, placing the civilian population at greater risk. After all, Hamas is undoubtedly using the opportunity to strengthen its defenses and otherwise prepare for the Israeli assault. This explains the short suspense on the evacuation. I would also note that the ICRC’s suggestion that “it is impossible for Gazans to know which areas will next face attack” is unfounded. The IDF has unambiguously indicated the penetration of the Gaza Strip will be in the north; informed observers will have already come to that conclusion, for that is where Hamas is dug in.

Reduced to basics, an assessment of Israel’s warnings to evacuate requires a comparison of two alternatives: an urban assault into an area full of civilians; and evacuation into a place that is not fully prepared to accommodate them. Undoubtedly, residents of Gaza City and other concentrations of civilians in the north will be at a greater risk of harm staying in place than moving away from the combat zone. Moreover, once the operation starts, fleeing the hostilities will become extraordinarily dangerous, and access to humanitarian assistance will become impossible for those remaining behind. Regardless of the lawfulness of Israel’s

siege-like actions, the simple fact is that civilians who head south will be safer. Moreover, warning the civilian population makes good sense not only because it protects civilians but also militarily, as U.S. forces learned in Fallujah and Mosul.

Given this reality, it is bewildering that humanitarian organizations are not encouraging the civilian population to move away from what will be a destructive and deadly urban battle, in which telling the difference between fighters and civilians is particularly difficult, especially considering Hamas's past tactics of operating near civilians, engaging in perfidy, and failing to distinguish themselves from civilians.

Along the same lines, it is mystifying that humanitarian organizations are not condemning Hamas's efforts to keep the civilians in place. Obviously, this is an attempt to exploit the civilians as human shields to complicate Israel's operations, for the more civilians in the area, the more complicated Israeli targeting and clearance operations become. And, sadly, the more civilians who tragically will become "collateral damage."

The Law

Although Israel is within its rights to conduct operations into Gaza, those operations are subject to IHL. Unfortunately, the precise parameters of the legal rules are vague. This is partly because disagreements exist over whether the conflict is international or non-international and whether the Gaza Strip is under Israeli occupation (my view is that it is non-international and not occupied). Complicating matters is the fact that many of the potentially applicable rules are found in customary law. The fact that they are unwritten makes them ambiguous by nature, especially in non-international armed conflict, where customary law is the primary source of IHL. Finally, for reasons beyond the scope of this post, the only undeniably applicable treaty rule is Common Article 3 to the 1949 Geneva Conventions:

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.

Given the uncertainty regarding the character of the conflict, I will focus on rules applicable in non-international armed conflict because they all have equivalents in the law of international armed conflict (see references and collection of State practice in the ICRC Customary IHL study). To give the critical comments cited above the benefit of the doubt, I rely heavily upon the ICRC's own Customary International Humanitarian Law study's rules. Although I do not believe that all the study's rules accurately reflect customary international law, these generally do. Moreover, it is telling to assess criticism of the Israeli warnings against the law that its critics find applicable.

Turning to that law, let us start with the basics. The Israeli action is not an “order,” as Israel has no authority to “order” the residents of Gaza to do anything. Hamas controls the area *de facto* and could (and should) issue and enforce such an order (see below).

Instead, Israel’s action qualifies as a “warning” in IHL, a form of “precautions in attack.” As the ICRC notes in Rule 15 of its *Customary International Humanitarian Law* study, “In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.” The organization suggests that this customary rule applies in both international and non-international armed conflict, a position taken by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić* (paras. 111-12) and in the International Institute for Humanitarian Law’s *Manual on the Law of Non-international Armed Conflict* (*NIAC Manual*, § 2.1.2). I agree. As one means of effectuating the requirement to take precautions in attack, Rule 20, with which I also agree, provides, “Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit” (but see Dinstein, suggesting that advance warnings are not in evidence in general State practice relating to non-international armed conflicts, para. 813).

As an aside, Amnesty International’s claim that the Israeli action is not an “effective” warning misstates the law. A warning is “effective” when it can be received by the civilian population, as has unquestionably happened in Gaza. It is not a requirement that the population heed a warning. Indeed, there is no requirement to tell the civilian population what to do to avoid harm from the attack, as the IDF has done, only that it be warned that an attack is forthcoming. In any event, these warnings are, legal technicalities aside, proving effective to a degree, for many residents of north Gaza are heading south.

I struggle to see how warnings that Gaza City is about to be attacked and civilians should leave can be characterized as anything other than actions designed to minimize loss of life and injury. There will indeed be extreme hardship in the area to which they are moving, but the risks there are dwarfed by those they would face amid high-intensity combat. Relatedly, some pundits have observed that it will be impossible to evacuate all the residents of the northern Gaza Strip. That is true, given the operational reality that the longer the IDF waits, the harder the fight will be. Time is of the essence. But at least those who have been able to move out of the combat zone will be safer than they otherwise would be.

Moreover, I cannot understand why Hamas is not being condemned for urging the civilian population to remain in place in the face of a near certainty of battle. Doing so violates its obligation to take “precautions against attack.” Recall that Rule 20 applies to *both* parties to the conflict.

Even more to the point, Hamas is legally obligated to evacuate the civilian population. Rule 22 of the *Customary IHL* study restates the customary rule applicable in both forms of conflict: “The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.” Among the ways a party complies with this obligation is to, “to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives” (Rule 24; see also Additional Protocol I, art. 58(a); Additional Protocol II, art. 13(1); ICTY, *Dragomir Milošević*, para. 949; ICTY, *Galić*, para. 61)).

The commentary to Rule 24 observes that “[t]he obligation . . . is particularly relevant where military objectives cannot feasibly be separated from densely populated areas.” It would seem clear, therefore, that Hamas should be evacuating the civilian population since their operations and facilities are located throughout Gaza City and due to the difficulty of separating them quickly from the civilian population. At the very least, Hamas should be encouraging the civilians’ departure, not urging against it.

That it is not doing so is consistent with a long-standing Hamas tactic, human shielding. In this regard, IHL does not forbid fighting from populated areas. Yet, it does prohibit the use of human shields. As noted in the *NIAC Manual*, “The use of civilians (as well as captured enemy personnel) to shield a military objective or operation is forbidden. It is also forbidden to use them to obstruct an adversary’s operations” (§ 2.3.8). The *Customary IHL* study, Rule 97, is in accord. Both sources look to Article 51(7) of Additional Protocol I as an accurate reflection of the customary rule: “The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.” There can be no reason other than shielding for Hamas to urge the civilian population to remain in place, knowing that a brutal battle is imminent.

As noted, the UN Special Rapporteur alleges that Israel’s action amounts to “forced displacement.” Rule 129 of the ICRC *Customary IHL* study provides that “Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.” Forced displacement is a war crime in international and non-international armed conflict, “unless the security of the civilians involved or imperative military reasons so demand” (see, e.g., Rome Statute, arts. 8(2)(b)(vii) and 8(2)(e)(viii)).

As explained, Israel has not “ordered” the population to move; it has warned them to do so. Critics of the Israeli action might respond that, as noted in the commentary to Rule 129, “State practice . . . underlines the duty of parties to a conflict to prevent displacement caused by their own acts, at least those acts which are prohibited in and of themselves (e.g., terrorizing the civilian population or carrying out indiscriminate attacks).” But however one

characterizes the Israeli strikes and other operations (legal or not), they were *not* displacing the civilian population to a significant degree. That is the very reason Israel has urged the residents to head south and delayed its entry into Gaza.

More to the point, the commentary emphasizes that forced displacement must be distinguished from evacuation of the civilian population.

In both international and non-international armed conflicts, State practice establishes an exception to the prohibition of displacement in cases where the security of the civilians involved or imperative military reasons (such as clearing a combat zone) require the evacuation for as long as the conditions warranting it exist. This exception is contained in the Fourth Geneva Convention and Additional Protocol II. The possibility of evacuation is also provided for in numerous military manuals. It is contained in the legislation of many States.

The Guiding Principles on Internal Displacement prohibit the “arbitrary” displacement of persons, which is defined as including displacement in situations of armed conflict, “unless the security of civilians involved or imperative military reasons so demand”. The exception of “imperative military reasons” can never cover cases of removal of the civilian population in order to persecute it.

Notably, the ICRC commentary on Rule 24, which requires parties to remove civilians from the vicinity of military objectives (see above), highlights the relationship between that rule and Rule 129, noting the former “specifies that evacuation must be undertaken to the extent feasible.” Taken together, the two restate the customary law rule that it is not only permissible to move civilians when their safety can be enhanced but also a requirement when feasible in the circumstances.

Again, Israel is not moving the residents of northern Gaza or ordering them to move. But even if Israel were affirmatively forcing them to move, the fact doing so will lessen the risk of their being caught up in an urban battle would make the prohibition on forced displacement inapplicable. Furthermore, imperative military necessity would also justify the Israeli actions, for fighting in a battlespace where civilians and fighters are co-located dramatically complicates military operations; as the ICRC notes, evacuation to clear a combat zone is lawful.

Concluding Thoughts

The situation is tragic from every angle. I admire the work of the organizations mentioned; their personnel in the field are humanitarian heroes. But the fact remains that Israel has a right to defend itself against Hamas, entitling it to take the fight to the group in northern Gaza. That operation will inevitably place civilians remaining there at great risk. It is just as certain that the population will face hardship if it heeds the Israeli warnings by moving south. But doing so is undoubtedly less risky than remaining in place.

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