

Israel – Hamas 2023 Symposium – The IDF, Hamas, and the Duty to Warn

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October 27, 2023

by [Michael N. Schmitt](#) | Oct 27, 2023



On October 22, the leaders of Canada, France, Germany, Italy, the United Kingdom, and the United States issued a [joint statement](#) “reiterat[ing] their support for Israel and its right to defend itself against terrorism and call[ing] for adherence to international humanitarian law [IHL], including the protection of civilians.” Among the IHL obligations Israel and Hamas shoulder in this conflict is the requirement to, when feasible, warn civilians about impending attacks. The duty to warn has drawn attention in light of the number of civilian casualties in Gaza and Hamas’s unlawful [threat](#) to execute a civilian hostage each time Israel attacks a home without warning.

In this post, I drill down into the issue of warning, emphasizing the responsibilities of the Israel Defense Forces (IDF) and Hamas. I begin by outlining the treaty and customary rules, which are an aspect of the obligation to take [feasible precautions in attack](#). A discussion of how the IDF complies with the rules follows. Because the conflict is ongoing, it is impossible to get a comprehensive picture of the IDF’s efforts to warn. Therefore, I offer a snapshot of past practice, together with what is known about current IDF efforts. Armed with the law and

IDF practices, the discussion turns to nuances in the law that determine when and how warnings are to be conveyed. Finally, I address the obligation to take precautions against attack, assessing whether Hamas is complying with it.

Warnings in Attack Generally

The obligation to warn the civilian population of an imminent attack is of long lineage. In modern form, it first appeared in Article 19 of the 1863 Lieber Code. In terms resembling the rule that applies today, it provided,

Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

The requirement to warn when possible subsequently appeared in the non-binding 1874 Brussels Declaration (art. 16) and its progeny, the Institute of International Law's 1880 *Oxford Manual* (art. 33).

However, only with the 1899 and 1907 Hague Regulations (annexed to Conventions II and IV, respectively) was the obligation codified. Article 26 of the latter, which is nearly identical to the former, provides, "The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities" (see also Hague IX, art. 6, on naval bombardment).

Seven decades later, the requirement was included in Additional Protocol I to the 1949 Geneva Conventions, which binds the instrument's 174 parties (which do not include Israel or the United States) during international armed conflict. Its Article 57 requires an attacking State to take various "precautions in attack" ("active precautions") to avoid harming civilians and civilian objects. Among them is the requirement to give "effective advance warning . . . of attacks which may affect the civilian population, unless circumstances do not permit." Other precautions cited in the article include verifying the target, applying the rule of proportionality during the attack, and selecting tactics, weapons, and targets to minimize harm to civilians and civilian objects. Although often characterized as an aspect of proportionality (see U.S. Department of Defense (DoD) *Law of War Manual*, § 5.11), I see active precautions as a stand-alone requirement deriving from the principle of distinction, for it applies even when an attack would otherwise satisfy the proportionality rule.

The warning requirement has long been considered customary law. For instance, referring to the Hague Regulations, the International Military Tribunal at Nuremberg noted, "By 1939 these rules . . . were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war." The International Criminal Tribunal for the Far East came to the same conclusion. And in its 1996 *Nuclear Weapons* advisory opinion, the International Court of Justice emphasized that the rules expressed in the Regulations

(together with those in the 1949 Geneva Conventions) are “fundamental rules . . . to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law” (para. 79).

It is unsurprising, therefore, that the International Committee of the Red Cross (ICRC) included a rule reading “Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit” in its *Customary International Humanitarian Law* study (Rule 20). Although a few of the study’s rules have proven controversial, this one is not. Indeed, a customary duty to warn has consistently been included in expert manuals and studies dealing with targeting (see, e.g., *AMW Manual*, commentary to rule 37; *Tallinn Manual 2.0*, rule 120; ILA *Conduct of Hostilities* study, p. 384-388). Further confirming its customary character, military manuals of non-Additional Protocol I States include a warning requirement. For instance, the DoD *Law of War Manual* provides, “Unless circumstances do not permit, effective advance warning must be given of an attack that may affect the civilian population” (§ 5.11.5). Israel does not dispute the rule’s customary status.

A requirement to warn is likewise customary in non-international armed conflict. The ICRC’s *Customary IHL* study takes this position (rule 20), as did the International Group of Experts that drafted *Tallinn Manual 2.0* (rule 120, para. 2). The International Criminal Tribunal for the former Yugoslavia also found Articles 57 and 58 (see discussion below) of Additional Protocol I to reflect customary law (*Kupreškić*, para. 524).

In addition to the general requirement, a warning is expressly required for certain operations. In international armed conflict, for instance, Article 21 of Geneva Convention I provides that medical establishments and units lose their protection from attack if “used to commit, outside their humanitarian duties, acts harmful to the enemy.” However, a warning setting forth a reasonable time limit for remedying the misuse must have been ignored before an attack is permitted. The same rule applies to hospital ships (GC II, art. 34) and civil defense entities (AP I, art. 65). Of particular note in light of their use for military purposes by organized armed groups in Gaza, civilian medical facilities and transports enjoy this protection (GC IV, art. 19; AP I, art. 13). Additional Protocol II, Article 11, is to the same effect for medical units and transports during non-international armed conflict.

IDF Practice

For an attacker, warnings make sense from a legal perspective. After all, the fewer civilians there are in the target area, the less likely the proportionality rule is to prohibit attack and the less demanding the requirement to take precautions in attack. Warnings also serve to diminish the enemy’s opportunities to engage in lawfare.

Beyond legal concerns, they contribute to international and domestic support at the strategic level of warfare, while at the operational and tactical level, warnings make it easier to conduct operations, for the presence of civilians always complicates the battlespace. This is especially true in an urban environment during operations against an enemy that often wears civilian clothes, operates from within civilian structures and protected entities like hospitals, and uses human shields, as will be the case in Gaza City.

The IDF understands these realities and has accordingly long provided warnings before attacking targets in Gaza and elsewhere (see, e.g., [report](#) on 2008 Gaza operation, paras. 262-265; [Sharvit, Baruch, & Neuman](#), p. 367-72)). These practices have drawn a great deal of attention. For instance, an International Law Association (ILA) Study Group on the Conduct of Hostilities (of which I was a member) [observed](#) in 2017 that,

Israel's 2014 operations in Gaza, and the extensive efforts to provide such warnings, have elevated the discourse on this warnings precaution to unprecedented levels: some worry that the Israeli Defense Forces (IDF) created an unrealistically high bar on when and how to provide warnings; conversely, some condemn the IDF because the warnings did not produce their intended effects; finally, some suggest that the extent of warnings were the result of policy decisions, and not legal obligation.

What can be said with confidence is that the IDF regularly uses a wide variety of warnings, almost certainly more than any other military. Best known are phone calls to individuals within a building to be struck (and those nearby) in order to gather information about the number of people there and instruct them to evacuate. As I previously [explained](#) following a research trip to Israel with Colonel [John Merriam](#) at the invitation of the IDF (see his post on our findings [here](#)),

To conduct the phone warnings, the IDF employs a specialized team of trained personnel who run a "phone bank" with the sole purpose of contacting individuals who might be affected by a strike. The calls are in some cases extremely precise. For instance, the warning may be that a strike will occur at a specified time. Live operators make some phone warnings, while others consist of generic pre-recorded messages. The personnel in the warning cell speak Arabic fluently, have received cultural training on the civilian population in the target area, and whenever feasible, use all-source fused intelligence to focus on specific individuals who might be at risk. For example, understanding Palestinian culture and family structures, the warning cell may try to contact the male head of a family in a particular apartment building, knowing that he will effectively disseminate the warning to other family members. If a minor or a female answers the phone call, the warning cell attempts to speak to the head of the family. When several buildings in a particular area are targeted, the warning cell may also contact a local civilian official or an informal community leader who will be able to spread the warning effectively and insist on obedience.

The IDF conveys warnings by many other means, such as leaflets, social media, text messages, and radio and television broadcasts. And it regularly monitors the area to assess whether civilians have heeded the warnings. For instance, the IDF has been harvesting data from mobile phones in Gaza to give it a real-time picture of where Gazans are located following its warning to evacuate the north.

Beyond these communicative warnings, the IDF uses military actions designed to warn. In the ground environment, these include warning shots (perhaps with tracers to convey the risk better) and tactical “call-outs,” where ground forces yell to occupants in a building, warning them to leave before the IDF troops enter (also a common U.S. practice). A more controversial method is so-called “roof knocking.” As Colonel Merriam and I explained, “The technique involves employing . . . munitions that impact one corner of the roof and detonates a very small explosion that produces noise and concussion several minutes in advance of the strike. The civilians are hopefully frightened into dispersing. Once it has cleared the target area, the IDF launches the attack.”

Some commentators have sharply criticized roof knocking. For instance, Amnesty International has claimed, “There is no way that firing a missile at a civilian home can constitute an effective ‘warning.’” The UN’s 2009 Fact-Finding Mission on operations in Gaza (Goldstone Report) similarly labelled roof knocking ineffective because a warning “should not require civilians to guess the meaning of the warning” (for criticism of the report, see Laurie Blank).

Yet roof knocking is only employed when the building is a military objective, and other warnings have been ignored or are impracticable. Most importantly, the purpose of roof-knocking is not to harm the adversary but instead to avoid civilian casualties during the impending attack. An interpretation of targeting rules that would deny an attacking force a means to warn civilians, especially when other means may not be feasible or have failed, is inconsistent with IHL’s object and purpose.

Finally, the IDF provides general warnings, especially when specific ones are impractical. For example, the IDF broadly warns civilians to stay away from enemy forces and positions. Additionally, it issues regional warnings addressing areas where military operations are anticipated. The warning that residents of Gaza City should evacuate to the south where the risk will be lower exemplifies this type of warning (see my earlier discussion of the evacuation warning here). Indeed, Israel’s designation of evacuation routes comports with the European Court of Human Rights’ 2005 Isayeva judgment, which emphasized the importance of designated safe evacuation routes in the context of the armed conflict in Chechnya.

Nuance in Application of the Warning Requirement

The obligation to warn only applies when civilians might be affected; there is no obligation to warn before an attack that only risks harming civilian objects. Moreover, the duty does not extend to “inconveniences to civilians caused by, e.g., electrical blackouts or reduced mobility due to broken lines of communications” (*AMW Manual*). And for the obligation to attach, the harm to the civilians must be avoidable (or capable of being lessened) if civilians heed the warning. That said, as Pnina Shrivit Baruch and Noam Neuman have wisely suggested, “In a case of reasonable doubt, however, warnings should be given” (p. 375).

Warnings must be “effective.” This does not require that they prove successful. Instead, the term effective denotes a warning that will reach the affected civilians and, in the circumstances, can reasonably be expected to have the desired effect of reducing the risk to them. To illustrate, a warning to leave a building that does not give the occupants sufficient time to do so is not an effective warning. But the IDF’s warning to residents of northern Gaza to move south is effective, despite being ignored by some, for it has been conveyed to the residents, and up to a million people reportedly have heeded it. Of course, southern Gaza remains dangerous, for the IDF is striking Hamas and other organized armed groups present there, as it may lawfully do. Yet, as it is less dangerous than the north, the warning is effective as a matter of law.

When multiple types of warning are possible, there is no requirement that any particular method be employed, provided that the one selected meets the effectiveness threshold. Nor is there any requirement that all feasible means of warning civilians be employed, that redundant means be used to ensure notification, that civilians be re-warned in the event they ignore a warning, or that the attacker set forth the means of finding safety (e.g., by designating areas to which the civilians should move). And it must be emphasized that whether a warning is “effective” depends on the information available to the party issuing the warning at the time of issuance; its sufficiency is not an after the fact determination. Consider a case in which an attacker reasonably believed there were no occupants in a building to be attacked and, therefore, did not issue a warning. Even if it turns out there were civilians present, the obligation has not been breached.

Despite the presumption that an attacker must warn, it need not do so when not feasible. As the DoD *Law of War Manual* notes, “Circumstances not permitting the giving of advance warning include where giving a warning would be incompatible with legitimate military requirements” (§ 5.11.5.4). All the warning requirements described above are subject to this caveat, which reflects the balance between military necessity and humanitarian considerations that permeates IHL.

Whether circumstances permit is a fact-dependent determination. Consider an attack on a building. If the military objective is the building itself, as in the case of one that houses civilians but also is used for military purposes (a common practice in Gaza), there may be an opportunity to warn the civilian occupants to evacuate without forfeiting the opportunity to

achieve the desired military effect on the building. But if the intended target is someone in the building, providing advanced warning might allow them to escape. No warning may be required in such a case because surprise is essential.

The safety of one's own forces can also preclude warning. For example, dropping leaflets over Gaza may not have been possible if the organized armed groups operating there fielded effective air defenses. Similarly, once the IDF enters Gaza and is engaged in urban combat, warnings by the ground forces often will be impractical, if only because they might alert Hamas to their positions.

A key factor in assessing whether circumstances permit a warning is the nature of the operations in question. For instance, timing and intensity are critical factors in those the IDF is currently conducting. With a ground assault imminent, quickly striking as many targets as possible is necessary to optimally prepare the battlefield. As the ICRC notes, "[n]ecessary speed of response" bears on the "feasibility of warnings" (*Customary IHL* study, [rule 20 commentary](#)). Or consider the nature of the target. While warnings regarding attacks on fixed locations are sometimes operationally feasible, issuing them for strikes on moving targets, such as individuals in vehicles, is typically not.

When one means of warning is not viable, attackers must consider other means of warning the civilian population, as illustrated by the general IDF warnings mentioned above. The ICRC's 1987 *Commentary* to Additional Protocol I expressly acknowledges that "warnings may also have a general character (para. 2225). Indeed, as noted in the *AMW Manual*, "an imprecise warning issued well in advance of the attack may be more effective than a precise warning immediately preceding it." However, it cautions that warnings "ought not be vague but be as specific as circumstances permit to allow the civilian population to take relevant protective measures, like seeking shelter or staying away from particular locations" (rule 37 commentary).

A particular obstacle to warnings in Gaza is Hamas's practice of human shielding. In the past, there have been many instances where civilians have moved voluntarily to the vicinity of targets following IDF warnings. Even more egregious is the use of involuntary human shields. With Hamas holding 200 hostages, the potential for their movement to locations regarding which the IDF issues a specific warning is high. When a warning is likely to result in human shielding, the situation amounts to one in which a warning is not feasible.

Ultimately, a rule of reason must govern the determination of whether circumstances permit a warning, for there is often a risk of some effect on military operations when warnings are issued. I believe the [ILA Study Group](#) came to the proper conclusion in this regard,

Ultimately, assessing when it is appropriate to forego a warning is highly situational and depends on what an objective, reasonable commander would have decided under the given circumstances. The determination whether circumstances do not permit a warning is a

balancing exercise in which different considerations must be weighted rather than a simple yes or no answer (p. 387).

As has been illustrated in Gaza, civilians do not always heed warnings. This may be because they prefer to remain in place, lack the capacity to move, wish to demonstrate support for Hamas, or fear Hamas's retaliation if they leave. Their motivation is irrelevant; they remain civilians whom the IDF must factor into its proportionality calculations, as well as into its assessment of whether other precautions to minimize harm to them, such as the selection of a different weapon, are feasible.

In this regard, Amnesty International has charged that the IDF has dropped leaflets announcing that “anyone who chooses not to leave from the north of the [Gaza] Strip to south of Wadi Gaza may be determined an accomplice in a terrorist organization.” This does not accord with the copies of the leaflets the IDF has posted (see here). But whatever the facts, any warnings along these lines would be contrary to longstanding IDF practice, Israeli policy, and international law. As Pnina Sharvit Baruch and Noam Neuman, both of whom served as the IDF's senior international law adviser, have explained,

One of the concerns raised with regard to warnings is that after advising civilians to evacuate a certain area, military forces might consider anyone who did not evacuate as forfeiting civilian status and becoming a lawful attack objective. This, of course, is not the case and civilians who have not left the area must be taken into account in the proportionality analysis (p. 395).

Finally, not all forms of warning pass legal muster. For instance, in the 2005 Adalah (Early Warning) case, the Israeli Supreme Court found the IDF's use of local residents who volunteered to convey a warning before the IDF took action to be unlawful. Most importantly, an attacker may not use warnings to terrorize the civilian population. In this regard, Article 51(2) of Additional Protocol I prohibits “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population” (see also DoD Law of War Manual, § 5.4.6.3). Article 13(2) of Additional Protocol II echoes the prohibition for non-international armed conflict. The ICRC characterizes this prohibition as customary in all armed conflicts, and rightly so (*Customary IHL* study, rule 2).

Warnings Against Attack

Whereas the attacker is obliged to take active precautions to minimize civilian harm, the defender is equally required to take precautions to protect the civilian population *against* the effects of attacks. Article 58 of Additional Protocol I sets forth the treaty law requirement for these so-called “passive precautions.” In its *Kupreškić* judgment, the ICTY found the requirement to be customary in character. So too has the ICRC in its *Customary IHL* study (rule 22), correctly in my estimation.

Passive precautions include moving civilians from the vicinity of military objectives and avoiding placing military objectives within or near densely populated areas. Although Article 58 includes no reference to warnings, it does require a defender to “take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.” In my opinion, this requires it to warn of attacks when doing so is feasible. As the DoD *Law of War Manual* observes, “[v]oluntary removal of civilians may be accomplished through the use of warnings” (§ 5.14.2).

As we are witnessing, civilian casualties in Gaza, even when they amount to lawful collateral damage, benefit Hamas by undercutting support for Israel. Thus, it is no surprise that Hamas has violated its passive precautions obligations by failing to evacuate any civilians from northern Gaza and operating from civilian buildings, including those that are specially protected, like medical facilities. Equally, its failure to warn civilians away from areas where attacks are sure to take place violates IHL, as does urging them to ignore Israeli warnings.

Concluding Thoughts

Without more facts, it is too early to say whether the IDF has complied with the obligation to warn in every case. However, there is no question that the IDF’s warnings practice, in general, is the gold standard. Indeed, as a matter of policy, the IDF typically exceeds what the law requires. It is likewise clear that its warning to evacuate northern Gaza constitutes an “effective warning,” as that concept is understood in IHL.

This is in sharp contrast to Hamas’s failure to provide any warnings to the civilian population of Gaza and its efforts to neutralize the effectiveness of the IDF’s. That Hamas has violated its own warning obligation under IHL is simply indisputable.

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