

Israel – Hamas 2023 Symposium – The Legal Context of Operations Al-Aqsa Flood and Swords of Iron

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by [Michael N. Schmitt](#) | Oct 10, 2023



On Saturday morning, the armed wing of Hamas, the [Izz ad-Din al-Qassam Brigades](#), launched Operation Al-Aqsa Flood, a brutal surprise attack into Israel that included a barrage of over 3,000 missiles and the air, sea, and land penetration of Israeli territory. This was the most intense operation by Hamas since it forcibly seized control of Gaza and removed Fatah officials in 2007. The attacks targeted civilian locations, including residential areas, and resulted in well over a hundred Israeli soldiers and civilians being taken [hostage](#). The militants even attacked an open-air music festival, [massacring](#) at least 260. As of October 9, over [900 Israelis](#) had been killed. Eleven [Americans](#) also died.

The Israeli response, Operation Swords of Iron, proved robust. [Declaring](#) “We are at war,” Prime Minister Netanyahu announced [three objectives](#): “clear out hostile forces;” “reinforce other fronts so that nobody should mistakenly join this war;” and “exact an immense price from the enemy within the Gaza Strip.” The government ordered a mobilization of reserve troops and launched a significant air campaign against Hamas targets in Gaza. By the

morning of October 9, it had struck 653 Hamas targets. Nearly 700 Palestinians reportedly have died, many of whom are civilians. There are no reliable reports that the Israel Defense Forces (IDF) have intentionally targeted civilians.

Tensions had been exceptionally high, with recurring violence between Israel and Palestinians in Gaza and the West Bank for some time. The timing of the attacks is significant. They came the day after the 50th anniversary of Egypt's surprise attack on Israel, which led to the 19-day Yom Kippur War in 1973. Saturday was the Sabbath in Israel and Simchat Torah, a Jewish high holiday. Mohammed Deif, who commands the Al-Qassam Brigades, pointed to incidents at the al-Aqsa Mosque (see, e.g., here and here) as triggering the conflict. According to Deif, "The Israeli occupation forces have escalated their raids into the al-Aqsa Mosque, desecrating the Muslim sacred sites and repeatedly attacking worshippers, particularly women, children and elderly people."

The international community was broadly and immediately condemnatory, appropriately so, of Hamas's attacks. Secretary of State Blinken announced that "[t]he United States unequivocally condemns the appalling attacks by Hamas terrorists against Israel, including civilians and civilian communities. There is never any justification for terrorism The United States supports Israel's right to defend itself." European Commission President von der Leyen "unequivocally condem[ed] the attack carried out by Hamas terrorists" and emphasized that "Israel has the right to defend itself against such heinous attacks." A NATO spokesperson stated that the organization "strongly condemn[s] today's terrorist attacks by Hamas against NATO partner Israel Terrorism is a fundamental threat to free societies, and Israel has the right to defend itself." Similar comments from governments around the world continue to flow in.

A few States have a different perspective. For instance, Saudi Arabia and Qatar have pointed to prior Israeli actions as indicating that Israel had itself to blame for the attacks. And in an exercise of *schadenfreude*, Iran's Foreign Ministry spokesperson proclaimed, "Iran considers that the Zionist occupier regime and its well-known supporters are responsible . . . for the violence and killing against Palestinians and calls on Islamic countries to support . . . the rights of the Palestinian people." Meanwhile, an adviser to Supreme Leader Ali Khamenei congratulated Palestinian fighters: "We will stand by the Palestinian fighters until the liberation of Palestine and Jerusalem." Palestinian Authority President Mahmoud Abbas stated that the Palestinian people have a right to defend themselves against the "terrorism of settlers and occupation troops."

In this post, I survey the legal context in which Hamas's attacks and Israel's response are taking place. Three facets of that context are of particular significance: the law governing the use of force; the classification of the conflict; and the law of belligerent occupation. Readers are cautioned that these are complex issues to which hundreds of articles and many books have been devoted; they can only be touched on here.

The Resort to Force (*jus ad bellum*)

The resort to force is prohibited by Article 2(4) of the UN Charter and customary international law. It is a prohibition limited to *interstate* uses of force unless the forcible actions are legally attributable to a State (as described in the International Law Commission's Articles on State Responsibility). In that Hamas is neither a State nor are its attacks likely attributable to a State, it has not violated this prohibition. Neither has Israel, for it is directing its operations against a non-State group.

Yet, even if Hamas's action were attributable to a State (Iran or Palestine, for those who consider the latter a State), Israel's response would nevertheless be lawful by reference to the customary international law right of self-defense enshrined in UN Charter Article 51. Many States (including the United States) and scholars (see Gill) are of the view that at least since the attacks of 9/11, self-defense is permissible against a non-State group even if the group's "armed attack" was not "on behalf of a State . . . or [with] its substantial involvement therein" (the International Court of Justice's Paramilitary Activities standard, para. 195). I agree. In such a case, the State taking action is subject to the conditions of necessity and proportionality, which limit defensive force to that required to defeat the armed attack and likely follow-on attacks. An argument can even be made that Hamas's attacks are but the latest blow in a *campaign* against Israel that qualifies as an ongoing armed attack. This is a complex issue beyond the scope of this post. However, Israel certainly enjoyed the right of self-defense when it launched Operation Swords of Iron. (For an example of this approach's application in the context of Israel's 2006 Operation Cast Lead, see here).

Given Gaza's proximity to Israel and the fighting wherewithal and commitment of the al-Qassam Brigades, this would allow for substantial IDF operations. I believe it permits Israel to eradicate Hamas's military capability, not just interrupt Hamas' immediate attacks. This is because if it does not do so, Hamas will continue its armed operations against Israel, as it always has following past exchanges. After all, Hamas is engaged in a campaign against Israel, of which Operation Al-Aqsa Flood is but a battle. Of course, Israel is not obliged to take this step, merely entitled to do so. And, of course, its operations are subject to the rules of international humanitarian law (IHL) and, as applicable, international human rights law (IHRL).

This approach is not universally supported (see Haque's survey and Hakimi's discussion) and has been questioned by the International Court of Justice twice (Wall Advisory Opinion, para. 139, and Armed Activities Judgment, para. 146). Even if the former approach is flawed, it would be absurd to suggest that a State has no legal right to respond forcibly to imminent or ongoing violence by a non-State group like Hamas. The difference is a matter of scale, with self-defense allowing for uses of force to generate longer-term consequences than repulsing the group's immediate attack. But, to be clear, in my estimation, it would make no sense to treat a non-State group that launches thousands of rockets, kills hundreds, and seizes territory differently from a State that mounts the same type of armed attack.

This begs the question whether Hamas's actions are justified as self-defense, as some supporters claim. They are not. To begin with, it is well accepted that the right of self-defense is limited to States. Even if that were not the case, self-defense is subject to a condition of necessity (*Nuclear Weapons Advisory Opinion*, para. 41; *Armed Activities Judgment*, para. 147). Necessity has a temporal component that limits forcible defensive actions to those responding to an armed attack that is either underway or imminent.

The criterion of imminency is subject to various interpretations by States and scholars. I have long advocated a relatively liberal interpretation that permits forcible defensive actions when the potential victim State finds itself in the "last window of opportunity" to defend effectively against an imminent attack. But even by this liberal interpretation (assuming solely for the sake of illustration that non-State groups enjoy the right of self-defense), there is no indication that Israel was about to conduct any forcible action at the "armed attack" level against Hamas or other Palestinian entities.

Finally, it is sometimes claimed that non-State groups may use force to secure their right to self-determination. Typically, supporters point to Article 7 of General Assembly Resolution 3314 (1974) on the Definition of Aggression.

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom, and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

However, this nuanced provision only acknowledges the right of certain peoples to *resist* and *struggle*, not necessarily to do so *forcibly*. The better view is that there is no "right" on the part of a non-State group or individuals to do so except when *unlawful* violence is being used against them directly and immediately, as in a specific case of acts of ethnic cleansing that are underway. At the time of Hamas's attack, Israel was not employing unlawful violence directly against any individual in Gaza. Nor were Hamas' actions crafted to directly defend against any particular unlawful acts of violence.

Finally, even if Hamas enjoyed a right to launch the operations (which it did not), there is no conceivable argument that it is entitled to effectuate that right by targeting the civilian population or taking hostages, unequivocal IHL violations and war crimes. It is very simple. Hamas had no right to mount Operation Al-Aqsa Flood under international law, and Israel has every right to respond forcibly, as it is doing in Operation Swords of Iron.

Classification of Conflict (*jus in bello*)

Israel has formally declared war. With respect to the classification of armed conflicts under IHL, the only time such declarations matter *as such* is when they occur in conflicts between States (see Geneva Conventions I-IV, common art. 2). Even if Palestine qualifies as a State (see below), there is no suggestion that Israel has declared war on it. Instead, the declaration serves domestic law purposes because it allows for the call-up of significant reserves and the conduct of robust military operations. Internationally, its sole significance is to emphasize the commitment of Israel to the fight.

Instead, conflict classification depends on the attendant facts. There are competing views on whether Israel's armed conflict with Hamas over the years has been international or non-international in character. As noted in a report by the Israeli Ministry of Foreign Affairs regarding Operation Cast Lead (Dec. 2008-Jan. 2009), the situation is complicated.

[T]he Gaza Strip is neither a State nor a territory occupied or controlled by Israel. In these *sui generis* circumstances, Israel as a matter of policy applies to its military operations in Gaza the rules of armed conflict governing both international and non-international armed conflicts. At the end of the day, classification of the armed conflict between Hamas and Israel as international or non-international in the current context is largely of theoretical concern, as many similar norms and principles govern both types of conflicts.

The Israeli Supreme Court found the conflict to be international in the “Targeted Killings” case (*Public Committee against Torture*, 2006). It observed, quoting the late Antonio Cassese, that “[a]n armed conflict which takes place between an Occupying Power and rebel or insurgent groups—whether or not they are terrorist in character—in an occupied territory, amounts to an international armed conflict.” Additionally, the court suggested that a conflict “that crosses the borders of the state . . . whether or not the place in which the armed conflict occurs is subject to belligerent occupation, is subject to the international law of armed conflict” (para. 18). These comments have proven relatively unconvincing, even among Israeli observers in and out of government, and rightfully so.

Whether Gaza is occupied will be addressed below. But the court overstated its case in any event, for it is well-recognized that international and non-international armed conflicts may co-exist in the same area, so-called “horizontal conflicts” (see Dinstein, p. 41). Thus, even if there was an occupation at the time of the Hamas attacks, that would not necessarily mean the armed conflict was international. The better argument would be that Hamas is conducting its own campaign in a non-international armed conflict (NIAC) against Israel, especially after it forcibly expelled Fatah from Gaza in 2007 (Fatah is the most significant political/military element of the Palestinian Authority, which represents the Palestinian people in fora like the United Nations).

And it is not the case that merely crossing a border internationalizes a conflict. For instance, the international community has treated the armed conflicts with al-Qaida, Islamic State, and other organized armed groups as non-international. The questions *vis-a-vis* their

classification as non-international surround how to treat relationships between the various groups (one NIAC or more?) and the legal consequence of the variable intensity of hostilities (repeatedly moving above and below the threshold).

Instead, the classification of armed conflict depends on the *parties*. International armed conflicts are between States or between a State and an organized armed group under the “overall” control of a State. Common Article 3 to the Geneva Conventions defines NIACs in the negative as those that are “not of an international character.” The International Criminal Tribunal for the former Yugoslavia further developed the notion in *Tadić*, where it described such conflicts as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State” (*Tadić Decision on Defence Motion*, para. 70). Accordingly, two criteria must be satisfied for a conflict to qualify as a NIAC: 1) participation by an organized armed group and 2) hostilities of significant intensity. All international tribunals are in accord [see, e.g., ICTR, *Akayesu Judgment*, para. 619; Rome Statute, art. 8(2)(f)].

Regarding the current hostilities, it is true that the Palestinians declared independence in 1988 and that 138 countries recognize Palestine as a State. The United States is not among them and, in my view, correctly so as a matter of law. But even if Palestine did enjoy Statehood, there is no indication that Hamas acted in collaboration with or under the direction of the Palestinian Authority. Similarly, although Iran has been supportive of Hamas, it does not appear to enjoy a level of control over the organization in this situation that would satisfy the overall control test, which requires “going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations” (*Tadić Appeals Chamber Judgment*, para. 145).

As to the *Tadić* criteria, Hamas is very well-organized, a fact illustrated by its ability to mount a complex surprise attack against a militarily powerful State with extensive intelligence capabilities. And the level of hostilities in the current round of fighting far exceeds any conceivable intensity threshold for NIAC. Indeed, it can be argued that the armed conflict with Hamas has been ongoing for many years. The group has been responsible for terrorist attacks against Israel since 1997 and there have been repeated rounds of very high-intensity operations since 2008 (see here).

This poses the question of whether the non-international armed conflict between Hamas and Israel has been underway throughout this period, with occasional ceasefires and other lulls in the fighting, or whether the major exchanges constitute separate conflicts. I favor the former view, but whatever the correct position as a matter of law, the conflict underway is non-international in character and as a matter of law subject only to the IHL rules applicable in such conflicts. Israel is, of course, free to apply as a matter of policy any protective IHL rules that govern international armed conflict; it has long done so in many cases, for instance, concerning occupation (even before the Supreme Court required it). Further, in many cases, the treaty and customary law rules governing the two forms of conflict are similar. This is

especially the case with conflict of hostilities rules, like qualification as a military objective, the rule of proportionality, and, in large part, the requirement to take precautions in attack. Finally, having co-conducted an on-the-ground review of Israeli targeting practices (and the Military Advocate General's Corp role in them), I can attest that the IDF's rules of engagement sometimes exceed even the requirements of the IHL applicable in international armed conflict.

Occupation

Whether Israel is occupying Gaza remains a contentious question, one with which the Israeli Supreme Court and the International Court of Justice have struggled (Benvenisti, p. 205-09). The accepted definition of occupation appears in Article 42 of the Regulations annexed to the 1907 Hague Convention IV: "A territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Thus, to be occupied, the territory must be under the opposing belligerent's "effective control" (Ferraro, p. 139-155). This is the nub of the issue.

Whatever the correct characterization of the situation in Gaza before 2005 (a somewhat contentious issue), the facts on the ground changed dramatically that year when Israel unilaterally withdrew from the area. It retained access control along the Israeli border and by sea and air, while Egypt controlled (and continues to control) its border with Sinai. The question is whether Israel remained in effective control of the area. If not, it was no longer an occupying power regardless of whether occupation law applies in a non-international armed conflict or the status of Palestine as a State (see below).

Reasonable minds differ. Yoram Dinstein has argued that "although effective control cannot initially be established by air or sea alone, when an Occupying Power withdraws its land forces from part of an occupied territory but retains control over the airspace and the maritime areas, effective control need not automatically be looked upon as relinquished" (p. 301-02). He further adds that some of the control lost by Israel was "due to the consensual transfer by Israel to the Palestinians of specific government functions" (p. 302).

Others disagree (see., e.g., Milanovic and Shany). While I accept Professor Dinstein's general premise that the degree of control necessary to establish a state of occupation is not necessarily the exact degree required to maintain it, I find the contention that Israel has not been in occupation of Gaza since it withdrew to be more convincing. To begin with, effective control suggests some degree of power over the daily governance of the area in question. In Gaza, however, Hamas often governs in a manner that is contrary to Israel's interests and desires. Moreover, when an area is used regularly as a base of significant military operations against a party to the conflict, the latter cannot be said to control the territory effectively. Since the departure of Israeli forces from Gaza, there have been regular armed exchanges between Hamas (and other organized armed groups) and Israel, sometimes lasting for an

extended period and with hundreds of casualties. The scale of the most recent attacks alone demonstrates a lack of *effective* control over Gaza. This is not to say that Israel bore no obligations to the people of Gaza, a point beyond the scope of this post that the Israeli Supreme Court considered in its 2005 *Al-Bassiouni* case (see also Shany).

This begs the question of whether reentry into Gaza by the IDF would establish an occupation. Merely conducting boots-on-the-ground operations in Gaza against Hamas would not. As noted by the International Criminal Tribunal for the former Yugoslavia, each case must be evaluated on its merits considering such guidelines as (*Naletilic Judgment* para. 217):

The occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;

The enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;

The occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;

A temporary administration has been established over the territory; [and]

The occupying power has issued and enforced directions to the civilian population.

Therefore, only if Israel enters the territory and stays for a period not necessitated by immediate combat operations should it be considered as occupying Gaza. Simply put, a State is not in effective control if it must fight its way into the territory concerned at high cost. But if it does stay and exert its authority, Israel will be seen as occupying the area. Although this begs the question of whether occupation can even exist in a non-international armed conflict in the first place, Israeli courts applied occupation law to Gaza before the withdrawal of its forces despite early attempts by the government to avoid its *de jure* applicability (see Kretzmer, p. 210; Dinstein, p. 27). They, and much of the international community, would likely do so again.

Concluding Thoughts

I believe that Hamas had no international law right to launch Operation Al-Aqsa Flood, while Israel was entirely within its rights to mount Operation Swords of Iron. The hostilities that have resulted are best classified as a non-international armed conflict. At the time of the attack, Israel was not occupying Gaza but may qualify as an occupying power if it moves into that area and controls it effectively. Each of these conclusions, however, is subject to reasonable disagreement or qualification. Sadly, much of the commentary on the conflict, especially on social media, has been far from reasonable and often inflammatory.

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