

# Israel – Hamas 2024 Symposium – Ruminations on the Legal, Policy, and Moral Aspects of Proportionality

[lieber.westpoint.edu/ruminations-legal-policy-moral-aspects-proportionality](https://lieber.westpoint.edu/ruminations-legal-policy-moral-aspects-proportionality)

February 9, 2024

by [Peter C. Combe](#) | Feb 9, 2024



On October 7, 2023, Hamas militants executed a devastating surprise attack against Israel, catching many in the Israeli and U.S. intelligence communities off guard. In addition to the operational surprise achieved by Hamas, in relative terms the attack has also been a staggering tactical success for the Palestinian militant group, on par with or exceeding the 9/11 attacks against the United States. As a result, it should come as little surprise that Israel —after a predictable build in combat power—launched a combined arms offensive into Gaza. Within the first two weeks of the conflict’s “new phase,” the Hamas-controlled Gaza Health Ministry claimed as many as 11,000 Palestinian casualties from Israeli military operations.

Many have characterized Israeli military operations since late October as “indiscriminate” or “disproportionate.” This raises an intriguing question, especially if one compares and contrasts the extent of civilian harm caused by Israeli military operations with other conflicts, both counterterrorist (i.e., non-international armed conflict or NIAC) and State on State (i.e., international armed conflict or IAC). At the root of the issue is this: What really is the rule of proportionality, and how does one assess whether anticipated civilian harm is disproportionate in light of the expected military advantage to be gained?

## The Legal Dimensions

What has been missing from public discourse is a discussion of the legal relationship between the lawfulness of an Israeli response as a valid exercise of Article 51 self-defense, the lawfulness of Israel's response as a whole, and whether that remains the case even if certain specific actions or attacks may be disproportionate from an outside perspective.

### *Jus ad Bellum*

Hamas's surprise offensive was accompanied by widespread reports of criminal acts and atrocities, that have been recounted in detail in other venues. Both as a result of Hamas's armed attack, and likely in part as a result of these atrocities, the prospect of an Israeli response received early and broad international support.

Against this backdrop, an Israeli military response was hardly surprising, nor was there any indication that a response using military force in self-defense pursuant to Article 51 of the UN Charter would be a violation of the broader *jus ad bellum*. However, that does not relieve Israel of the obligation to conduct both the overall offensive, and individual operations therein in compliance with the law of armed conflict (LOAC). Israel has stated that it does not exercise effective control over the Gaza strip and has not since 2005. Israel also indicates that its response to Hamas's attack on October 7 is part of an ongoing armed conflict, and thus an Article 51 self-defense rationale does not apply (annex 2, para. 1). If this were the case, then Israel's view is that proportionality only need be assessed from a LOAC perspective; questions of proportionate response as part of a *jus ad bellum* self-defense analysis are not applicable.

However, the character of the overall Israeli response must be examined if applying a self-defense rationale. The U.S. position is that any use of force in self-defense must be both (1) necessary to address the threat, and (2) proportionate in nature to the threat posed. This position generally tracks with broader understandings of international law, even if at the margins the U.S. application varies. A use of force is "necessary" in self-defense if other options such as diplomatic measures are insufficient, and if there is a logical connection between the actions taken and the threat which one seeks to neutralize. The use of force must also be proportionate to the threat posed. In particular, the United States generally takes the view that a use of force in self-defense should be circumscribed and not in every case aimed at conquest or regime change.

The Israeli operations in Gaza provide an interesting case study for this test. Israel's stated intent is to destroy Hamas as an effective fighting force. Whether Israel's offensive can be described as "proportionate," in the sense of being circumscribed and focused on neutralizing the threat posed by Hamas is a more difficult question. Hamas consists of approximately 30,000 members according to some estimates. One could argue that the nature and scale of IDF operations, including civilian harm numbers as high as 20,000, and

widespread destruction of as much as 51% of civilian infrastructure, where as many as 60% of casualties are civilian, is disproportionate to the goal of neutralizing the threat posed by Hamas.

Thus, while Israel may avail itself of the legal right to use military force in self-defense, its overall operational design must be both necessary and proportionate to the threat posed by Hamas. While the necessity prong appears met, whether the overall operation has been proportionate in an *ad bellum* self-defense sense is a more difficult question. This *may* be why Israel has chosen to characterize the operation as part of an ongoing armed conflict, as opposed to a use of force in self-defense. The overall character of the conflict bears less importance when considering the compliance of individual attacks or actions with the rule of proportionality.

### *Jus in Bello*

Moving on to the character of individual attacks, words such as “indiscriminate” or “disproportionate” are indicative of obligations under LOAC. Although these obligations are somewhat undefined in their application, they still provide a framework for assessing the legality of military operations.

As it became increasingly clear that Israel intended to launch a full scale ground offensive into Gaza, concerns grew. Military operations—in particular implementation of the LOAC principles of distinction and proportionality—would be complicated by the physical and human terrain consisting of tunnels, schools, collocation of military and civilian objects, Hamas sympathizers and those who overtly support Hamas in a range of activities. These concerns appear to have been borne out as described above.

These facets of the conflict highlight the difficulty of any offensive military operation into an operational environment as complicated as the Gaza Strip. This factual complication brings legal complications as well. They played out almost immediately as the 17 October explosion at the Al-Ahli hospital in Gaza demonstrated the factual and legal complexity posed by fighting in and from population centers. At a macro-scale, within the first weeks there were allegations of as many as 10,000 or more civilian casualties in Gaza as a result of Israeli military operations; now as many as 24,000 killed and 61,000 injured in the span of just over three months.

### *Israeli Tolerance of Civilian Harm: Proportionality in Practice?*

There has been significant rebuke of Israel in light of casualty numbers that dwarf recent conflicts in both relative and absolute terms over such a short period. Israeli tolerance has been described as far above and beyond what the United States and/or the United Kingdom would have tolerated during two decades of counterterrorism operations in Afghanistan and Iraq. The juxtaposition of 20 years of U.S. counterterrorism operations as a model (or at least a more acceptably low tolerance) for civilian harm is intriguing given the history of those

saying that the U.S. is too tolerant of civilian harm. This comparison with U.S. operations continues with the discussion of Israeli use of “dumb bombs” as opposed to precision guided munitions (PGM) as the U.S. relied upon so heavily in Afghanistan and Iraq. There is—naturally—the allusion that use of PGMs is legally required by Israel (it isn’t).

The scale of civilian harm resulted in widespread international backlash against the Israeli offensive which culminated in a UN General Assembly call for a ceasefire. This General Assembly resolution was the result of a U.S. veto of a similarly worded Security Council resolution. Far from remaining silent on the matter, a number of U.S. officials have decried Israel’s targeting practices in Gaza, most prominently, National Security Council Spokesman John Kirby, Secretary of Defense Austin, and President Biden.

This resurrects the issue of proportionality. At its most basic level, the *in bello* rule of proportionality prohibits, “[l]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” As described in the Department of Defense (DoD) *Law of War Manual*, the rule is forward looking, requiring the commander to balance the civilian harm expected against the military advantage which is anticipated (§ 5.10). This balancing test is highly context dependent, and can vary depending on location, circumstance, time, or any of a number of other factors. Furthermore, Article 8.2(b)(iv) of the Rome Statute of the International Criminal Court clarifies that this the balancing test does not focus solely the discrete tactical advantage to be gained in the moment, but the “overall” military advantage to be gained.

Finally, this balancing test is one undertaken by the commander in the moment, with the information reasonably available at the time. The rule does not contemplate second guessing decisions based upon new information. There is no hard and fast ratio or mathematical formula to determine what is or is not “proportional.” The DoD *Law of War Manual* indicates simply that “the commander must be able to explain the expected military importance of the target and why the anticipated civilian collateral injury or damage is not expected to be excessive” (§ 5.10.2.2). It does not require the commander to articulate a specific degree of civilian harm that would be disproportionate. There is also not one answer agreed upon by all nations, all academics, or all parties to a particular conflict in any particular scenario. Belief in what is “proportional” exists on a spectrum, often informed by context.

All of this leads to a simple conclusion about proportionality. While the rule lends itself to a *post hoc* examination of results, that is not the obligation the rule imposes. Rather, the rule imposes an obligation of decision-making. A reasonable commander makes an assessment, based on an informed assessment of what the future ought to hold, based upon the information reasonably available.

### **What Can We Glean from Israel’s Offensive?**

But what reflective and prospective lessons can we take from the apparent disparity between Israeli and U.S. targeting practices and tolerance of civilian harm?

The U.S. military has long stated that we go to extraordinary measures to mitigate civilian harm. This is in some ways informed by both Executive Order and DoD policy; much of which remains in effect, even if there's less transparency surrounding public reporting of lethal operations resulting in civilian harm. These “extraordinary measures,” and lower tolerance of civilian harm are reflected not only in the widespread U.S. use of PGMs as previously discussed, but also in the results (even if that's not the obligation the rule imposes).

Even contrasted with other estimates the entire calendar year with the highest number of assessed civilian casualties resulting from U.S. operations in Iraq (2006) is less than twice the number of civilian casualties in 2 months of fighting in Gaza. This disparity in tolerance for civilian casualties can be measured not only temporally, but in relation to the total population of Iraq in 2006 in which total civilian deaths accounted for less than .1 percent of the total population; whereas assessed civilian deaths in Gaza are proportionally larger by an order of nearly ten. Even Russian targeting practices in Ukraine—which have been characterized as indiscriminate—have resulted in a lower rate of civilian deaths over a nineteen month period in both absolute and relative terms (if we take Ukrainian and Gazan officials' casualty estimates at face value).

The disparity becomes even more marked when contrasting U.S. targeting practices in other theaters such as Africa. This is indicative of a far lower U.S. tolerance for civilian casualties—and attendant extraordinary measures to avoid them—than current Israeli practice indicates. Yet, even these U.S. targeting practices have been the subject of scrutiny and scorn from non-governmental organizations (NGOs), academics, and reporters.

A truly reflective look should function as a degree of validation of U.S. claims and practices in the conduct of lethal operations. I will admit that we are not perfect, but this is not what the law requires. We can do better—and we within DoD, and the commands I've served with strive to do so every day. We have policy and moral imperatives to do so. In a NIAC or counterinsurgency, there is also a mission imperative to protect civilians to undermine popular support for the enemy. This is why U.S. policies and rules of engagement are often far more restrictive than required by law.

Perversely, approaches that are reflexively intolerant of civilian harm run the risk of extending conflicts indefinitely; especially in a NIAC. NIACs provide situations in which combatants can intermingle with civilians and collocate military equipment and munitions with objects; thereby increasing the likelihood of civilian harm. Attitudes that are reflexively intolerant of civilian harm would tend to forego attacks. Foregoing attacks limits the ability to address a determined enemy who—in the Israel / Hamas context— has the goal “to constantly remind Israelis they are in conflict with Palestinians, one moment engaging constructively with Israel,

and the next, pursuing violent means for political ends.” When faced with such an enemy, a “zero civilian casualty” mentality would render Israel unable to degrade Hamas combat power through military operations for fear of civilian harm.

We should also ask a series of questions.

First, what does proportionality really look like? U.S. practice is one thing, but we must look to other conflicts—past, present, and potentially future—to understand how to strike the balance, and what tolerance for civilian harm is within the bounds of the law. A potential State conflict between major powers will look very different. The expected military advantage to be gained is orders of magnitude larger when discussing a Chinese theater ballistic missile brigade, than an al Qaeda (or Hamas) rifleman or courier.

Second, who gets to make the call? It is not a call made by a judge advocate with the benefit of new information and time for examination or reflection. It is also not a call to be made by academics or NGOs with a different organizational imperative. This is not to denigrate the role that such academics and NGOs play in the development of operational law. A role that includes highlighting the humanitarian purposes of LOAC, in addition to demanding intellectual rigor and consistency in State legal positions. Rather, my intent is simply to ask, in the heat of the moment, when friendly force, enemy, and civilian lives are at stake, who is the decision-maker?

It is a call made by the commander, in a time constrained environment, with often incomplete or even contradictory information. But that’s the standard: sufficient for a reasonable commander to conclude, with the information reasonably available at the time, that the expected civilian harm is not disproportionate in light of the military advantage anticipated. Even more to the point is the difficulty faced by the decision maker who may be a platoon commander on a dusty alley in Raqqa or Gaza (see DoD *Law of War Manual* § 5.10.2.1).

Finally, what impact would we expect from a policy (or worse, legal) environment that contemplated no civilian casualties? A zero-tolerance policy for civilian casualties is apt to have a perverse effect. While as a legal matter, the obligation of distinction is one borne by both forces in the attack and in the defense, it is most frequently the force in the attack that bears the public brunt of civilian casualties. This will incentivize bad actors to defend from civilian areas and among the civilian population. From there, they will mass combat power to conduct operations. There is nothing new or novel about this concept, as it is effectively the Maoist “base area” from which a less powerful force conducts a “strategic defensive” from among a sympathetic population. Meanwhile, a force in the attack which seeks to implement such a zero-tolerance policy would effectively be stymied in attacking the enemy. Wars would continue interminably, and to the advantage of the defending force which has forgone the obligation of distinction.

## **Concluding Thoughts**

There is no legitimate question that Israel had an international legal justification to respond to Hamas's armed attack on October 7, 2023. Whether acting in self-defense, or as part of an ongoing NIAC, use of force by Israel against Hamas was legally justified. However, these legal justifications for response in the first instance can lead to differing conclusions regarding the overall scope and scale of Israel's offensive into Gaza.

While a use of force in self-defense must be both necessary and proportionate, offensive operations in the context of an ongoing armed conflict are not confined by the same limits. A use of force in self-defense must be necessary to address the threat: both necessary in the fact that lesser means have been or will be ineffective, and in the fact that the use of force must be directly related to neutralizing the threat. In addition, use of force in self-defense must be circumscribed, using no more force than that which is calculated to neutralize the threat. Assuming Israel's right to respond militarily; one can reach different conclusions as to the lawfulness of Israel's overall response and operational design depending on whether one views Israel's response as either part of an ongoing NIAC or as an exercise of Article 51 self-defense.

Even assuming the lawfulness of Israel's response overall, individual attacks must also comply with LOAC. The rule of proportionality in discrete attacks is one that is difficult to apply in practice. It is also a rule that poses difficulty if assessing in hindsight. With that in mind, even if individual Israeli attacks violate the rule of proportionality—or other provisions of LOAC—that does not render an otherwise lawful response, or operational design, illegal.

\*\*\*

*Lieutenant Colonel Peter C. Combe is the Branch Head, Community Plans, Judge Advocate Division, Headquarters Marine Corps. The views expressed herein represent those of the author, and do not represent the views of the U.S. Marine Corps, the Department of the Navy, or the Department of Defense.*

Photo credit: IDF Spokesperson's Unit

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

–

The Circle of Suffering and the Role of IHL

by Helen Durham, Ben Saul

October 19, 2023

–

Facts Matter: Assessing the Al-Ahli Hospital Incident

by Aurel Sari

October 19, 2023

–

Iran's Responsibility for the Attack on Israel

by Jennifer Maddocks

October 20, 2023

–

Inside IDF Targeting

by John Merriam

October 20, 2023

–

A Moment of Truth: International Humanitarian Law and the Gaza War

by Amichai Cohen

October 23, 2023

–

White Phosphorus and International Law

by Kevin S. Coble, John C. Tramazzo

October 25, 2023

–

After the Battlefield: Transnational Criminal Law, Hamas, and Seeking Justice – Part I

by Dan E. Stigall

October 26, 2023

–

The IDF, Hamas, and the Duty to Warn

by Michael N. Schmitt

October 27, 2023

–

After the Battlefield: Transnational Criminal Law, Hamas, and Seeking Justice – Part II

by Dan E. Stigall

October 30, 2023

–

Assessing the Conduct of Hostilities in Gaza – Difficulties and Possible Solutions

by Marco Sassòli

October 30, 2023

–

Participation in Hostilities during Belligerent Occupation

by Ioannis Bannios

November 3, 2023

–

What is and is not Human Shielding?

by Michael N. Schmitt

November 3, 2023

–

The Obligation to Allow and Facilitate Humanitarian Relief

by Ori Pomson

November 7, 2023

–

Attacks and Misuse of Ambulances during Armed Conflict

by Luke Moffett

November 8, 2023

–

Distinction and Humanitarian Aid in the Gaza Conflict

by Jeffrey Lovitky

November 13, 2023

–

Targeting Gaza's Tunnels

by David A. Wallace, Shane Reeves

November 14, 2023

–

Refugee Law

by Jane McAdam, Guy S. Goodwin-Gill

November 17, 2023

–

After the Conflict: A UN Transitional Administration in Gaza?

by [Rob McLaughlin](#)

November 17, 2023

–

[The Law of Truce](#)

by [Dan Maurer](#)

November 21, 2023

–

[International Law “Made in Israel” v. International Law “Made for Israel”](#)

by [Yuval Shany](#), [Amichai Cohen](#)

November 22, 2023

–

[Cyberspace – the Hidden Aspect of the Conflict](#)

by [Tal Mimran](#)

November 30, 2023

–

[Israel’s Right to Self-Defence against Hamas](#)

by [Nicholas Tsagourias](#)

December 1, 2023

–

[Time for the Arab League and EU to Step Up on Gaza Security](#)

by [Michael Kelly](#)

December 4, 2023

–

[Attacking Hamas – Part I, The Context](#)

by [Michael N. Schmitt](#)

December 6, 2023

–

Attacking Hamas – Part II, The Rules

by Michael N. Schmitt

December 7, 2023

–

Flooding Hamas Tunnels: A Legal Assessment

by Aurel Sari

December 12, 2023

–

Damage to UN Premises in Armed Conflict: IHL and Beyond

by Ori Pomson

December 12, 2023

–

Applicability of Article 23 of the Fourth Geneva Convention to Gaza

by Jeffrey Lovitky

December 13, 2023

–

Delivery of Humanitarian Aid from the Sea

by Martin Fink

December 13, 2023

–

The Question of Whether Gaza Is Occupied Territory

by Michael W. Meier

December 15, 2023

—

Sexual Violence on October 7

by Noëlle Quénivet

December 19, 2023

—

Hostage Rescue Operations and the Law of Armed Conflict

by Kevin S. Coble, John C. Tramazzo

December 20, 2023

—

Qassam Rockets, Weapon Reviews, and Collective Terror as a Targeting Strategy

by Arthur van Coller

January 17, 2024

—

A Gaza Ceasefire: The Intersection of War, Law, and Politics

by Marika Sosnowski

January 18, 2024

—

Information Warfare and the Protection of Civilians in the Gaza Conflict

by Tamer Morris

January 23, 2024

—

Algorithms of War: Military AI and the War in Gaza

by Omar Yousef Shehabi, Asaf Lubin

January 24, 2024

—

The Ibn Sina Hospital Raid and International Humanitarian Law

by Michael N. Schmitt

February 1, 2024

–

Beyond the Headlines: Combat Deployment of Military AI-Based Systems by the IDF

by Tal Mimran, Magdalena Pacholska, Gal Dahan, Lena Trabucco

February 2, 2024