

THE GAZA CONFLICT WITHIN INTERNATIONAL LAW

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Abstract: Israel came under brutal attack on October 7, 2023, culminated in a long festering all out conflict against the Hamas perpetrators in the Gaza Strip. All parties to conflict must act in accordance with international law. This article examines whether Israel's subsequent use of force to rescue and defend its nationals, abides by the right of self-defense under the UN Charter and is in accordance with the law of armed conflict and international humanitarian law.

Keywords: Gaza Conflict; Right of Self-Defense; Law of Armed Conflict; International Humanitarian Law

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Early October 7, 2023 Hamas terrorists breached the border between Israel and Gaza. They eliminated the security forces patrolling the area and made their way to the closest civilian communities and a music festival occurring nearby. They brutally shot and killed 1400 revelers and families and took 294 hostages, among them elderly women and children. Hamas continued raining rockets from their stronghold in Gaza to however far they could reach.

On October 8, 2023 Israel sealed Gaza's borders and cut off their electricity. Their demand that the hostages be released was flatly denied by Hamas leadership. Israeli military proceeded to deploy numerous airstrikes on Hamas strongholds that are deeply embedded and enmeshed in the densely populated civilian neighborhoods. On November 1, 2023 Israel began a ground invasion of Gaza. As a result of the onslaught, the death toll in Gaza exceeds over 8500.

As of the publication of this paper, the hostages have still not been released, and both Gaza and Israel continue to attack and battle with all the means at their disposal.

INTRODUCTION

War and conflict have always extracted a terrible toll on humanity, and the international community has attempted to establish an international order of law to curtail its occurrence and regulate and minimize its devastating effects. International Law is the lens that examines the conflict in Gaza, determines whether or not it is justified, and specifies the means with which it may and may not be conducted.

The legal regimes that are directly relevant to the Gaza conflict are International Law and International Humanitarian Law. International Law is based on international treaties, mainly the UN Charter, and determines whether or not a war is justified. International Humanitarian Law, based on the Geneva Conventions, applies to situations where hostilities rise to the level of international armed conflict, and defines a state's obligations in war.

International Law and International Humanitarian Law have evolved over time, with subsequent establishments building on previous agreements, and vary as to the number of states agreeing and adhering to them. The accumulated codified bodies of law establish a benchmark for states to adhere to on a diplomatic and humanitarian level.

I. INTERNATIONAL LAW

Contemporary International Law can be categorized into international treaties, customary international law, general legal principles and judicial decisions.¹ The law governing when states can use military force is known as "jus ad bellum," which refers to the law regulating the use of force internationally.

The law relating to the initiation of armed conflict, the determination as to whether or not a State can initiate or engage in war, is referred to as *jus ad bellum*. Nation states are prohibited in engaging in war unless there is a legitimate *causus bello*

¹ Statute of the International Court of Justice art. 38(1), Jun. 26, 1945, 59 S.T.A.T. 1055.

- a reason for war. This was codified in 1928 in the **Kellogg–Briand Pact**, which stated that conflicts should be settled through peaceful negotiations with the exception of self-defense.

A. UN Charter

This fundamental principle was re-affirmed in the **United Nations Charter of 1945** which codified the major principles of international relations. The UN Charter provides for “an almost absolute prohibition on the use of force”, with the exception of self-defense.

Article 2(4) of the UN Charter states that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”² The sole exception is self defense or use of force sanctioned by the UN Security Council.

Article 51 of the UN Charter states that self-defense is a legitimate exception to the prohibition against war and recognizes the inherent right of self defense for any member nation under attack. Article 51 states that, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” The principle of self defense is that a nation can take steps to terminate or eliminate an ongoing threat to its national security.

In addition, the rescue of hostages is well within the rights of self defense as the right and a duty of a nation. “An armed rescue action to save lives of nationals is not prohibited by Article 2(4) when the territorial government is unable or unwilling to protect them and the need for instant action is manifest.”³ As stated by Sir Derek Bowett: “Political theories of the social contract gave rise to the view that protection, as the duty of the state, afforded the consideration of the pactum subjection is, and that protection of the nationals of the state was, in effect, protection of the state itself.”⁴

B. Universal Declaration of Human Rights

The United Nations also established the UN Commission on Human Rights, which developed the **Universal Declaration of Human Rights in 1946** which established human rights standards, including the prohibition of torture.

C. Genocide Convention

² UN Charter.

³ Kristen E. Eichensehr, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues*, 48(2) VA. j. int. law 451, 451-484 (2008).

⁴ DEREK W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW*, Ch. 92, (1958).

The **Genocide Convention** was the first human rights treaty adopted by the General Assembly of the United Nations in 1948 and signified the international community's commitment to ensure that genocide would never be allowed to occur.

D. Vienna Convention on the Law of Treaties

The **Vienna Convention on the Law of Treaties** was adopted in 1969 and established the fundamental concept of *jus cogens* - peremptory norms, that require a state to respect certain rights. Enshrined in **Article 53 of the Vienna Convention on the Law of Treaties**, *jus cogens* prohibits internationally wrongful acts including waging aggressive war, war crimes, crimes against humanity, genocide, and torture.

E. ICJ Prohibition of Genocide

In 1970, the **International Court of Justice** issued a decision that mandated *erga omnes* obligations of "the international community as a whole", prohibiting genocide and the violation of human rights.⁵

To constitute genocide, there must be a proven intent on the part of perpetrators to physically destroy a national, ethnical, racial or religious group. Genocide comprises acts – including killing, causing serious bodily or mental harm, or forcibly transferring children – taken with intent to destroy, *in whole or in part*, a national, ethnical, racial or religious group. In this regard, the International Court of Justice observed that "the prohibition of genocide has the character of a peremptory norm [of international law] (*jus cogens*)," from which no derogation is permitted.⁶

F. International Humanitarian Law

International Humanitarian Law details *jus in bello* - the law during war. It seeks to limit the effects of armed conflict by protecting civilians not participating in hostilities and restricting the means and methods of warfare.

International Humanitarian Law is accepted as Customary International Law and is binding to all States. **Customary international law** refers to the legal obligations of States arising from established international norms by consistent practice and conviction, also referred to as *opinio juris*. The provisions of International

⁵ International Court of Justice's decision in the *Barcelona Traction* case [(*Belgium v Spain*) (Second Phase) ICJ Rep 1970 3 at paragraph 33]: "... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. [at 34] Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ... others are conferred by international instruments of a universal or quasi-universal character."

⁶ *Ibid.*

Humanitarian Law were established by the treaties of the **Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949 and its subsequent Protocols**.

G. Hague Conventions

The two **Hague Conventions of 1899 and 1907** placed restrictions on the conduct of war.

Article 27 of the Hague Regulations specifically refers to sieges, and sets out a limited obligation to ‘spare’ certain civilian objects when conducting attacks and demands that the military do their utmost to spare buildings devoted to religion, art, science, and hospitals.⁷ This obligation only applies as long as they are not being used for military purposes.

Article 50 of the Hague Regulations bars collective punishment, stating that “No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.”

According to Human Rights Watch, “in order to determine whether a pattern of closures, blockades, and curfews amounts to collective punishment, account must be taken of the timing, duration, and extent of the measures imposed, the reasons invoked by the occupying power for the restrictive measures, the proportionality of those measures to the reasons invoked, and the effect of the measures on the population affected.”⁸

H. Geneva Conventions

The four **Geneva Conventions of 1949** were organized by the International Committee of the Red Cross and set forth the rules governing the use of force in armed conflict. They codify contemporary International Humanitarian Law and bind nearly every State in the world.

The **First Geneva Convention** covers wounded and ill combatants, the **Second Geneva Convention** covers combatants at sea who are wounded, ill or shipwrecked, the **Third Geneva Convention** covers prisoners of war and the **Fourth Geneva Convention** deals with the treatment of civilians and their protection during wartime.

These conventions were supplemented with amended **Protocol I** (1977) relating to the Protection of Victims of International Armed Conflicts and amended **Protocol II** (1977) relating to the Protection of Victims of Non-International Armed Conflicts.

⁷ It does not prohibit the targeting of these civilian objects, but merely requires attacking forces to take necessary steps to ‘spare’ them unless they become military objectives. Following the extensive codification of the rules regulating the conduct of hostilities that has taken place since 1907, attacks directed against all civilian objects are now prohibited, including in sieges.

⁸ Human Right Watch, *The Obligations Of Israel And The Palestinian Authority Under International Law*, CENTER OF THE STORM, A CASE STUDY OF HUMAN RIGHTS ABUSES IN HEBRON DISTRICT (Feb. 8, 2024, 14:41), https://www.hrw.org/reports/2001/israel/hebron6-04.htm#P434_82818.

Article 3 common to all the Geneva Conventions prohibits murder, cruel treatment, torture, outrages against personal dignity, and degrading or humiliating treatment for civilians and for combatants who have been captured or wounded. It essentially requires humane treatment of civilians and noncombatants.

Article 5 of the Geneva Convention states that if “an area is in danger as a result of military operations or is liable to be subjected to intense bombing, the occupying power has the right and, subject to the provisions of Article 5, the duty of evacuating it partially or wholly, by placing the inhabitants in places of refuge.”

Protocol I - Article 51⁹ seeks to limit the damage caused by military operations and protects civilian populations in the conduct of hostilities and prohibits all suffering, injury, or destruction that is unnecessary to realizing legitimate military objectives. It seeks to limit the damage caused by military operations and covers the main principles of International Humanitarian Law which are the prohibition to attack civilians, the prohibition to inflict unnecessary suffering, the principle of necessity, distinction and proportionality.

The four basic principles International Humanitarian Law revolve around: *military necessity*, which limits attacks to strictly military objectives; *distinction*, which allows only combatants and military objects to be directly attacked and requires they be distinguished from civilians and civilian objects; *proportionality*, which prohibits attacks that would cause disproportionate or excessive losses to civilians or civilian objects compared to the anticipated military advantage of the attack; and *humanity*, which prohibits all suffering, injury, or destruction that is unnecessary to realizing legitimate military objectives.

The principle of **necessity** limits attacks to strictly military objectives. **Protocol I, Article 51(4)**, states that indiscriminate attacks, “those which are not directed against a military objective,” are prohibited. It mandates that military forces are not allowed to deliberately target civilians, and obligated to do everything feasible to mitigate the risk when attacking a legitimate target.

The principle of **distinction**¹⁰ requires that only combatants and military objects may be directly attacked, and that they be distinguished from civilians and civilian objects by clearly identifying themselves. Attacks that are “of a nature to strike military objectives and civilians or civilian objects without distinction,” are considered indiscriminate and are prohibited.

⁹ Proportionality is also discussed in Article art. 51(5)(b), 57(2)(a)(iii) and (b) Additional Protocol I) and in many other provisions of the 1949 Geneva Conventions (GCs) and the 1977 Additional Protocols (APs).

¹⁰ Article 51(5)(a) includes among the list of indiscriminate, and therefore prohibited, attacks: “an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.”

The doctrine of **proportionality**¹¹ prohibits attacks that would cause disproportionate or excessive losses to civilians or civilian objects compared to the anticipated military advantage of the attack. Indiscriminate attacks also consist of attacks that “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.” The rule of proportionality states that the harm to innocent civilians caused by collateral damage during combat operations must be proportionate to the military objective sought.

Protocol I - Article 54 (1)(2) prohibits acts whose specific purpose is the denial of sustenance for whatever reason, including starvation, forced displacement or anything else.

Protocol I - Article 57(1) states that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” Casualties that result when civilians are concealed within military installations, are considered “collateral damage”, and incidental to an attack on a military objective. However, combatants are required to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”

Protocol I - Article 57(2)(c) states that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”

Protocol I - Article 58 sets forth the treaty law requirement for passive precautions. A party in a conflict is equally required to take precautions to protect the civilian population *against* the effects of attacks. In its *Kupreškić* judgment, the ICTY found the requirement to be customary and therefore binding to all. Utilizing civilians as human shields directly violates this mandate.

Protocol I - Article 75(2c) specifically prohibits the taking of hostages. It requires that persons held by a combatant power shall be treated humanely in all circumstances and provides a detailed list of prohibited conduct.

Protocol I - Article 85(3)(b) reiterates the principle of proportionality and states that it is a war crime to launch “an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.”

Protocol II states that, “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.”

¹¹ Anaïs Maroonian, *proportionality in international humanitarian law: a principle and a rule*, LIEBER INSTITUTE FOR LAW & WARFARE AT WEST POINT (Feb. 8, 2024, 14:41), <https://lieber.westpoint.edu/proportionality-international-humanitarian-law-principle-rule>.

Protocol II - Article 4(2c) explicitly prohibits: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon dignity, in particular humiliating and degrading treatment.”

The **3rd Geneva Convention** discusses prisoner-of-war status.

The **4th Geneva Convention - Article 4** defines “Protected Persons” and applies to all civilians in a war or under occupation. It reads: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

Article 17 of the 4th Geneva Convention and numerous prior international law regulations refers to sieges¹². Sieges are not prohibited as such under either IHL or other areas of public international law. Under IHL, the besieging party is entitled to attack forces and other military objectives in besieged areas, and to limit supplies that reach them. However, in doing so it must comply with all relevant rules of IHL: the few that specifically refer to sieges, as well as the generally applicable rules that regulate the conduct of hostilities and afford civilians protections and safeguards.¹³

The laws of war permit siege warfare – otherwise known as “encirclement” – against enemy armed forces and other military objectives, but the laying of sieges must comply with all relevant rules in the Laws of Armed Conflict. To the extent that bombardment is used during a siege, it must comply with the relevant rules of IHL regulating the conduct of hostilities. Bombardments constitute an ‘attack’ as this term is defined in Additional Protocol I of 1977 to the Geneva Conventions of 1949 (AP I): ‘acts of violence against the adversary, whether in offence or in defence’.¹⁴ This means that bombardments must comply with a number of key rules: they must be directed exclusively against military objectives;¹⁵ they must not be indiscriminate;¹⁶ and they must comply with the rule of proportionality.¹⁷ Moreover, in the conduct of all military operations, belligerents must take constant care to spare the civilian population and civilian objects, and besieging and besieged forces must take a number of precautionary measures.¹⁸

¹² Article 27 Regulations concerning the Laws and Customs of War on Land annexed to 1907 Convention (IV) respecting the Laws and Customs of War on Land (1907 Hague Regulations); Article 15 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I); Article 18 1949 Geneva Convention For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II); and Article 17 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV).

¹³ <https://www.chathamhouse.org/2019/06/sieges-law-and-protecting-civilians-0/ii-what-siege-and-it-p-rohibited>

¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949 art. 49(1), and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, Jun. 08, 1977. (hereinafter AP I)

¹⁵ AP I, *supra* note 14, art. 51(2), 52(1).

¹⁶ AP I, *supra* note 14, art.51(4)

¹⁷ AP I, *supra* note 14, art. 51(5)(b)

¹⁸ AP I, *supra* note 14, art. 57, art. 58.

Siege is lawful unless deliberately aimed at starving a local population. Addressed in both Geneva and Hague conventions, the use of a siege is recognized as an effective tool for bringing a conflict to a rapid and successful end.

Article 33 specifically prohibits collective punishment: “No protected person may be punished for an offense he or she has not personally committed.” Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Even Human Rights Watch admits “Not every restriction or act of closure imposed by the Israeli authorities amounts to collective punishment. As an occupying power, Israel is entitled to impose some restrictions on the rights of the resident population if military necessity so demands.” In order to determine whether a pattern of closures, blockades, and curfews amounts to collective punishment, account must be taken of the timing, duration, and extent of the measures imposed, the reasons invoked by the occupying power for the restrictive measures, the proportionality of those measures to the reasons invoked, and the effect of the measures on the population affected.”¹⁹

Article 34 of the 2nd and 4th Geneva Conventions states that the taking of hostages is prohibited.

Article 50 requires Israel to “facilitate the proper working of all institutions devoted to the care and education of children;”

Article 53 prohibits “any destruction by the Occupying Power of real or personal property ... except where such destruction is rendered absolutely necessary by military operations;”

Article 55 requires Israel to ensure “the food and medical supplies of the population;” and that “medical personnel of all categories shall be allowed to carry out their duties.”

Article 56 (movement of medical transportation and public health facilities)

Article 72 (access to lawyers for persons charged)

Article 147 to the 4th Geneva Convention states that the taking of hostages is considered a grave breach.²⁰

¹⁹ Human Right Watch, *The Obligations Of Israel And The Palestinian Authority Under International Law*, CENTER OF THE STORM, A CASE STUDY OF HUMAN RIGHTS ABUSES IN HEBRON DISTRICT (Feb. 8, 2024, 14:41), https://www.hrw.org/reports/2001/israel/hebron6-04.htm#P434_82818.

²⁰ Article 147 - Penal sanctions II. Grave breaches - Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

I. Rules

The International Committee of the Red Cross compiled a list of rules that cover the scope of International Law.

Rules 15–24 ICRC CLS states that in the conduct of all military operations, belligerents must take constant care to spare the civilian population and civilian objects, and besieging and besieged forces must take a number of precautionary measures.

J. Reprisals

The **1984 UN Convention against Torture** mandated that the national courts of the contracting countries must prosecute these offenses where the perpetrator is on their territory or extradite them to any other interested state. The Convention absolutely prohibits torture and other acts of cruel, inhuman, or degrading treatment or punishment.

The **International Criminal Court** was established by the 1998 Rome Statute, is the first and only permanent international court to prosecute genocide, war crimes, crimes against humanity, and the crime of aggression. There are 123 state parties to the ICC although a number of states have declared their opposition to the court.

Articles 7 and 8 detail provisions on war crimes and crimes against humanity which reflect customary international law and apply to Hamas leaders and fighters.

Article 7(1) of the Rome Statute prohibits crimes against humanity, including murder²¹, extermination (mass murder)²², imprisonment²³, torture²⁴, and sexual violence.²⁵

Article 7(2)(a) of the Rome Statute determines that crimes against humanity must be committed in furtherance of a State or organizational policy to commit an attack. The plan or policy does not need to be explicitly stipulated or formally adopted and can, therefore, be inferred from the totality of the circumstances. In contrast with genocide, crimes against humanity do not need to target a specific group. Instead, the victim of the attack can be any civilian population, regardless of its affiliation or identity.

In **Article 8(20)(f)**, the ICC specifically prohibits “utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations” in international armed conflict. “at times civilians are forced to serve as “human shields” from attack upon a military target, and they are harmed as a result. In all those situations, and in other similar ones, the rule is that the harm to the innocent civilians must fulfill, *inter alia*, the requirements of the principle of proportionality.” In conducting an attack, commanders must take into account those

²¹ Rome Statute of the International Criminal Court art. 7(1)(a), Jul. 7, 2002. (hereinafter Rome Statute)

²² Rome Statute, *supra* note 21, art. 7(1)(b).

²³ Rome Statute, *supra* note 21, art. 7(1)(e).

²⁴ Rome Statute, *supra* note 21, art. 7(1)(f).

²⁵ Rome Statute, *supra* note 21, art. 7(1)(g).

civilians used as involuntary human shields both in the proportionality analysis and in the obligation to minimize harm to civilians.²⁶

Article 8(2)(b)(xxv) of the Rome Statute expressly prohibits the starvation of an enemy civilian population as a means of warfare. Civilians may not be the target, but a lockdown or siege may be used against a legitimate military objective.

Article 8(2)(c) of the Rome Statute prohibits lists additional war crimes, including the taking of hostages²⁷, rape and other forms of sexual violence²⁸, torture²⁹, and outrages upon personal dignity.³⁰

II. THE EVENTS OF OCTOBER 7, 2023 AND THE AFTERMATH

Hamas militants stormed from Gaza into southern Israel on October 7, 2023. They invaded a music festival where they raped and murdered over 300 revelers, as well as a number of bucolic communities in the vicinity. They killed about 1,200 people, mostly civilians. Many of the victims were tortured and brutalized before being killed in the most gruesome fashion. In addition, Hamas terrorists captured 229 hostages, among them women, children, and the elderly, and held them in Gaza.

In response, Israel laid siege to Gaza, home to 2.3 million people, and launched an air and ground campaign with the stated aim of annihilating Hamas, which runs the enclave.

Hamas' armed attack on October 7, 2023 and their capture and retention of hostages, triggered Israel's right to unleash military force in self-defense. That right is not limited to actions against conventional armed forces, but also extends to the military capabilities of the Hamas organized armed group so that the security of the state can be restored.

Nevertheless, Israel attempts to limit civilian damage as much as possible. Israel's practice of dropping leaflets, roof knocking³¹, issuing warning shots, and call outs³², warning civilians to flee before bombing raids on Hamas targets satisfies that requirement. Furthermore, the IDF regularly monitors the area to assess whether

²⁶ The Israeli High Court explained in 2009, "What is the law regarding civilians serving as a 'human shield' for terrorists taking a direct part in the hostilities? Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. They themselves are victims of terrorism.

²⁷ Rome Statute, *supra* note 21, art. 8(2)(c)(iii).

²⁸ Rome Statute, *supra* note 21, art. 8(2)(e)(vi).

²⁹ Rome Statute, *supra* note 21, art. 8(2)(c)(i).

³⁰ Rome Statute, *supra* note 21, art. 8(2)(c)(ii).

³¹ The technique involves employing munitions that impact one corner of the roof and detonate as 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.

³² Where ground forces yell to occupants in a building, warning them to leave before the IDF troops enter (also a common U.S. practice)

civilians have heeded the warnings, utilizing data from mobile phones in Gaza to assess where Gazans are located following its warning to evacuate the north.³³

Michael N. Schmitt of the United States Military Academy at West Point, has stated that “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 International Humanitarian Law.”

Israel has been encouraging and assisting civilian residents of Gaza in the line of fire to move South away from the hostilities or to neighboring Egypt. An occupying power has the legal right, and in certain circumstances a duty, to perform an evacuation for the safety of civilians. 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.³⁴

Israel is not prohibited from attacking if it anticipates collateral damage to civilians or civilian infrastructure. Proportionality does not require that there be no collateral damage from Israeli strikes on Hamas targets, nor does it require Israel to absorb the same proportion of casualties as Gaza. Nor is proportionality a prohibition against military targeting that would inevitably harm or kill civilians. Proportionality is also not a doctrine that limits offensive combat operations to the harm a nation has sustained from the enemy’s operations. To adhere to the principle of proportionality, Israel is required to balance of interests in the conduct of hostilities and requires that the anticipated incidental loss of human life and damage to civilian objects should not be excessive in relation *to* the concrete and direct military advantage expected from the destruction of a military objective.

In such a densely populated area such as Gaza, and with an opponent that routinely uses civilians and civilian buildings as human shields for terrorists and terrorist activity, such damage is inevitable. The principle of distinction requires combatants to wear uniforms and clearly identify themselves. The fact that numerous civilian lives are lost because Hamas command centers, weapons manufacturing shops and arsenals are located amid civilians are attributable to Hamas and not to Israel.

Israel is justified in destroying edifices used for military operations, despite their protected status, when they are used and designated as terrorist centers precisely for that reason. Hamas set up its command headquarters in caverns beneath Al Shifa hospital in northern Gaza, knowing that Israel is reluctant to attack a hospital.

Israel’s limitations on Gaza are an acceptable means of controlling the combatting forces. Whereas a conditions on siege warfare is the prohibition on

³³ Patrick Kingsley & Ronen Bergman, *Tracking Cellphone Data by Neighborhood, Israel Gauges Gaza Evacuation*, THE NEW YORK TIMES (Feb. 8, 2024, 14:41), <https://www.nytimes.com/2023/10/16/world/middleeast/gaza-invasion-israel-cellphone-data.html>.

³⁴ *Isayeva, Yusupova and Bazayeva v. Russia*, App. No. 57947/00; 57948/00; 57949/00, (Dec 19, 2002), <https://www.refworld.org/caselaw/echr/2002/en/29317>.

starvation of civilians, Israel only provide 8% of water to Gaza. Curtailing their supply does not violate the prohibition of starving enemy forces.

Senator Michael McCaul, chairman of the House Foreign Affairs Committee, stated, “‘ Hamas ’ actions were not just acts of ‘ terrorism ’ or ‘ terrorist attacks. ’ Rather, the assault was carried out by a genocidal organization and comprised nothing less than the full range of atrocity crimes under international law.”³⁵ Hamas committed acts of genocide, crimes against humanity, and war crimes against the Jewish people and the State of Israel.

Hamas’ explicit aim is to exorcise Israel completely, a far cry from the guerrilla freedom fighters it seeks to present itself as. The Covenant of the Islamic Resistance Movement, more commonly known as the Hamas Covenant was adopted on August 18, 1988. It calls for “the Jews . . . [to be] vanquished,” that “Moslems . . . [should] come and kill the Jew,” and that “Israel will exist . . . until Islam will obliterate it.”³⁶ The Covenant makes abundantly clear that Hamas is determined to obliterate the State of Israel and to ravage and kill the Jews living there.

In 2012 Abdel Aziz al-Rantisi, a co-founder of Hamas reiterated the organization’s non-negotiable genocidal intention³⁷. “By God,” he said, “we will not leave one Jew in Palestine. We will fight them with all the strength we have. This is our land, not the Jews’ . . .”³⁸

Destroying Hamas, an enemy combatant intent on Israel’s utter destruction, who continuously targets civilians is a legitimate military target, essential to ensuring the continued safety and security of Israel and its citizens.

III. LEGAL FRAMEWORK OF GAZA CONFLICT

International humanitarian law applies to armed conflict involving two States. It applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting. According to the decision of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between

³⁵ *McCaul Declares Hamas Committed Acts of Genocide, Crimes Against Humanity, War Crimes — Calls Upon State Department to Determine Same*, HOUSE FOREIGN AFFAIRS COMMITTEE GOP (Feb. 8, 2024, 14:41), <https://foreignaffairs.house.gov/press-release/mccaul-declares-hamas-committed-acts-of-genocide-crimes-against-humanity-war-crimes-calls-upon-state-department-to-determine-same/>

³⁶ Replete with antisemitic tropes, the Covenant asserts as a premise that “Israel, Judaism, and Jews challenge Islam and the Moslem people.” Quoting from the Quran, it warns “those who believe not, Ye shall be overcome, and thrown together into hell.” The 2017 Hamas Document of General Principles & Policies also confirms that Hamas’ conflict is with the Zionist project, that “the Zionist movement must disappear from Palestine,” and that “[r]esisting . . . with all means and methods is a legitimate right . . . [especially] armed resistance.” “Israel will exist and will continue to exist until Islam will obliterate it.”

³⁷ *Hamas in Their Own Words*, ANTI-DEFAMATION LEAGUE (Feb. 8, 2024, 14:45), <https://www.adl.org/resources/news/hamas-their-own-words>

³⁸ Hamas leaders have reiterated this repeatedly over the years. “Palestine is Islamic, and not an Islamic emirate, from the river to the sea, that unites the Palestinians,” declared Khalil al-Hayya, a member of Hamas’ politburo, in 2010. “Jews have no right in it, with the exception of those who lived on the land of Palestine before World War I.”

governmental authorities and organized armed groups or between such groups within a State.”

Generally, international law recognizes two kinds of armed conflicts: “international armed conflict” and “non-international armed conflict.” Whereas International Armed Conflict is a declared war or any other armed conflict between two or more States, a Non-International Armed Conflict is an armed conflict involving a non-State organized, armed groups. Each has its own rules, although many of the basic provisions are common to both. When the criteria of international armed conflict have been met, the full protections of the Conventions are considered to apply.

It is not yet settled which regime applies to cross-border military confrontations between a sovereign State and a non-State terrorist armed group operating from a separate territory.³⁹ Hamas is a highly organized and well-armed group that uses armed force against Israel, and, indeed, considers such armed struggle to be its primary mission. By any measure, the conflict between Israel and Hamas has been protracted, spanning many years and intensifying in recent years as Hamas tightened its unlawful grip on Gaza.

IV. OBLIGATIONS

The prohibitions against war and genocide have been considered as norms of customary international law and therefore, binding on all States, regardless of ratification. Uses of force in self-defense and with it right to rescue, are also within the purview of customary international law.⁴⁰

Every State in the world has ratified the Geneva Conventions of 1949, including Israel and Palestine.⁴¹ The Conventions apply to all cases of armed conflict between two or more signatory nations. This language was added in 1949 to accommodate situations that have all the characteristics of war held to be violators of international peace and order.

Israel ratified the Geneva Conventions on July 6, 1951. Israel has not signed or ratified the 1907 Hague Regulations, but the Israeli High Court has found that the 1907 Hague Regulations are part of customary international law, and thus binding on all states, including those not party to the treaty. Israel is not a party to Protocol I, but the provisions prohibiting indiscriminate warfare are considered to be norms of customary international law, binding on all parties to a conflict, regardless of whether it is an international or internal armed conflict.

Palestine has ratified all three protocols, so as a state party, it is undeniably bound to their terms. There is dispute as to whether Palestine is considered a State. A state is defined under Article 1 of the Montevideo Convention on the Rights and Duties

³⁹ Article 1 of Protocol I states that armed conflict against colonial domination and foreign occupation qualifies as an international conflict.

⁴⁰ Kristen E. Eichensehr, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues*, 48(2) *VA. j. int. law* 451, 451-484 (2008).

⁴¹ While some may dispute if or when exactly Palestine became a State for those purposes, the ICRC includes Palestine’s accession to the 1949 Geneva Conventions as well as other LOAC treaties.

of States by having a permanent population, a defined territory, government and capacity to enter relations with other states. Whether Hamas is a part of that State depends on whether sufficient ties exist between the State and Hamas such that the State wields overall control over Hamas, by equipping, financing, and coordinating military activity. Hamas, as a de facto governing authority in Palestine with control over its own militant forces, is obligated as part of the state, to comply with the Geneva Conventions and its three protocols.

Due to Palestine's accession to the Rome Statute in 2015, the International Criminal Court has jurisdiction over any crimes either perpetrated by Palestinian nationals⁴² or occurring in whole or in part on Palestinian territory⁴³. Gaza is Palestinian territory in this respect.⁴⁴ The court has the jurisdiction to hold Hamas leaders and personnel accountable for committing genocide, crimes against humanity, and war crimes on Israeli territory or in Gaza.

ICC prosecutor Karim Khan has stated unequivocally, "If there is evidence that Palestinians, whether they're Hamas or Al Quds Brigades or the armed wing of Hamas or any other person or any other national of any other state party, has committed crimes. Yes, we have jurisdiction wherever they're committed, including on the territory of Israel." In addition, he noted, "One cannot deliberately target civilians or civilian objects. One can't rape, kill, mutilate, or dismember. Willful killing, hostage taking are grave breaches of the Geneva Convention and one has to comply with the law."

Israel, like the United States, is not a state party of the Rome Statute, but as Gaza is the territory of a state party, it's actions can still be scrutinized by the ICC.⁴⁵

Under international humanitarian law, intentional attacks on civilians are prohibited under all circumstances. Israel's settlements in the West Bank and Gaza are populated by civilians, including children, who are entitled to the civilian protections contained in the Geneva Conventions. The status under international law of the settlements does not negate the rights of the civilians populating those settlements who are considered noncombatants. As such, under international law, violence to their "life and person, in particular murder of all kinds, mutilation, cruel treatment and torture," is "prohibited at any time and in any place whatsoever."

V. ANALYSIS COMP TO WORLD

With the actions on October 6, 2023 that it proudly took responsibility for Hamas mirrors the murderous, macabre playbook of ISIS, which perfected "the

⁴² Rome Statute, supra note 21, art. 12(2)(b)

⁴³ Rome Statute, supra note 21, art. 12(2)(a)

⁴⁴ International Criminal Court [ICC], *Situation in the State of Palestine*, paras. 114-131 (2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF

⁴⁵ The ICC top prosecutor Karim Khan has stated unequivocally in regard to Hamas' actions on October 7, "One cannot deliberately target civilians or civilian objects. One can't rape or kill, or mutilate or dismember," he said. "Willful killing, hostage taking are grave breaches of the Geneva Convention and one has to comply with the law."

pornography of violence,” reveling in their gruesome actions, and filming and disseminating the barbaric beheadings, torture and murder of civilians.

The War on Terror demonstrates that the laws of war do not prevent a nation from destroying a terrorist army in self-defense. Despite their adherence to laws of war, the United States and allied Iraqi forces killed up to 11,000 civilians in the city of Mosul in the course of removing the deeply embedded ISIS terrorists. Despite employing the most advanced precision weapons, Mosul suffered widespread destruction. Furthermore, Israel’s military objectives are far more urgent than the United States. Unlike the proximity of Israel to Gaza, ISIS was thousands of miles from the United States, and while ISIS had beheaded a number of US citizens working in Iraq, the quantity of victims do not approach the number of fatalities slaughtered by Hamas.

Likewise, in WWII, in order to save over half a million lives of US servicemen, President Truman made the agonizing decision to drop the nuclear bomb on Hiroshima and Nagasaki.

According to a report by the James W. Foley Legacy Foundation, “there has been a significant rise in the number of wrongful detentions.”⁴⁶ Terrorist organizations have a robust history of taking hostages for leverage. The Rand Corporation reported that hostage-takers gain even when their demands are not met because “terrorists derived benefits from kidnappings, including publicity, alarm, and throwing governments into crisis.”⁴⁷

During the Hostage Crisis in 1980, the United States attempted to forcibly rescue its hostages in Iran, but when that proved unsuccessful, ultimately traded arms for hostages. Since 1979, almost 100 Americans have been seized in Iran, with dozens of others taken by Iran’s proxy militias elsewhere in the region, and the United States has responded with the full strength of its might.

In May 1980, gunmen overran the **Iranian Embassy in London** and took 21 **hostages**. When the occupying terrorists executed two of the hostages following Iran’s refusal to release political prisoners, commandos from Britain’s 22nd Special Air Service stormed the embassy and rescued the 19 of the remaining 21 hostages. In 2007, Iran seized two British boats, and captured 15 Royal Navy Personnel. The British government suffered criticism for not acting more forcefully to secure the release of its nationals from the Iranian regime.

Israel’s actions are well within the scope of what any country would do, and is entitled to do, when faced with a violation and threat of this magnitude.

CONCLUSION

⁴⁶ Caitlin Yilek, *Number of U.S. nationals wrongfully held overseas fell in 2022 for the first time in 10 years, report finds*, CBS NEWS (Feb. 8, 2024, 14:45), <https://www.cbsnews.com/news/wrongfully-detained-americans-report-james-foley-foundation/>

⁴⁷ Brian Michael Jenkins, *Why the U.S. Swaps Prisoners but Doesn't Pay Ransom*, THE RAND BLOG (Feb. 8, 2024, 14:45), <https://www.rand.org/blog/2014/09/why-the-us-swaps-prisoners-but-doesnt-pay-ransom.html>.

Jus ad bellum refers to “the conditions under which States may resort to war or to the use of armed force in general.” *Jus in bello* encompasses international humanitarian law that governs the behavior of parties in an armed conflict and regulates the way in which warfare is conducted.

The limitations of international humanitarian law are designed to protect civilians not taking direct part in the hostilities and civilian objects, while taking into account the military necessities and the exigencies of the situation. The fact of civilian casualties in an armed conflict, even in significant numbers, does not in and of itself establish any violation of international law. In fact, the doctrine of “proportionality operates in scenarios in which incidental injury and collateral damage are the foreseeable, albeit undesired, result of attack on a legitimate target.”

The determination of the legality of an attack is whether the attacking forces sought to observe the rules of the Law of Armed Conflict.

When individual attacks are legitimate, “the mere cumulation” of such instances, all of which are deemed to have been lawful, “cannot *ipso facto* be said to amount to a crime.”

The laws of war, writes Andrew McCarthy, the lead prosecutor of those responsible for the first World Trade Center bombing, “are not a straitjacket that makes military objectives unattainable, and they do not insulate monsters who meld into civilian populations centers and stash their arsenals in schools, mosques, and hospitals from counterattack.”

Israel is in a just defensive war, and it is permitted and mandated by the laws of war to pursue its objectives until they are achieved.