



The Israel-Hamas Conflict in Gaza 2023

MEDITERRANEAN PROGRAMME

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Summary

- The Hamas attacks on Israel and Israel's response.
- Israel's legal justification for the use of force is not the right of self-defence under Article 51 UN Charter but the law of armed conflict (conduct of hostilities).
- Gaza is widely recognized to be an occupied territory.
- Israel insists that it is acting in conformity with international humanitarian law.
- Israel's interpretation of the rules of humanitarian law are the object of contentious debate.

Introduction

The conflict that has been in progress in Gaza since 7/10/2023 is the latest episode of major violence in the long Arab-Israeli conflict.¹ On 7/10/2023 the armed Palestinian organizations Hamas and Islamic Jihad launched an estimated 3,000-5,000 rockets against Israeli border towns and against Tel Aviv 70 km to the north of Gaza. At the same time, more than 1,000 Hamas militants breached the security barrier between Israel and Gaza at several points and attacked a number of Israeli towns and kibbutzim killing 1,400 and abducting 247 Israeli citizens, mostly civilians.² This was the heaviest loss of civilian life in the 75-year history of Israel as a State.³

In response, the Israel Defence Force (IDF) launched *Operation Iron Swords*, which involved the heavy air and land bombardment of northern Gaza initially, and eventually the entire Gaza Strip. The Israeli military operation began by neutralizing all the Hamas militants that carried out the attack, and apparently eliminated most of the rocket launchers operated by Hamas. Subsequently, the IDF has been engaging in intense fighting with the aim of denying 'Hamas and other terrorist groups in Gaza the capacity to continue attacking its citizens and territory.'⁴ As a result of the IDF operation, an estimated 17,000 Palestinian inhabitants of Gaza have been killed, 7,000 of whom were children.⁵ Moreover, 1.9 million Palestinians (85% of the population of Gaza) and 500,000 Israelis have been displaced as a result of the conflict. The hostilities are being enacted in a very small and narrow but overpopulated piece of land – Gaza is 47 km long and 12-16 km wide and has a population of 2.1 million.

The conflict in Gaza gives rise to challenging issues pertaining to the law on the use of force and the international humanitarian law of armed conflict. In particular, the conflict raises the following questions: (1) Does Israel have the right of self-defence against Hamas? (2) Is Gaza still an occupied territory, in spite of the IDF's withdrawal from Gaza in 2005? (3) Is the conduct of hostilities by the IDF in Gaza in compliance with the law of armed conflict? I shall deal with these questions in the subsequent sections.

The right of self-defence against the Hamas assault of 7 October 2023

In a letter dated 7/10/2023 from Israel's Permanent Representative to the UN addressed to the Secretary General and the President of the Security Council (SC), the Council was notified of the use of force by Hamas against Israel in these terms: 'This is an attack initiated by terrorist organizations led by Hamas, and this horrendous attack proves once more that Hamas has no interest in the safety and well-being of the residents of the Gaza Strip. Hamas is a murderous Islamist terrorist organization which follows the same Jihadist genocidal ideology of ISIS and whose only purpose is to destroy the State of Israel and its people. The terrorist organization is directed by the Ayatollah regime in Iran, which proactively promotes terrorist activity in Israel and against Israeli and Jewish targets all over the world. Iran supports and finances Hamas and other terrorist organizations in Gaza, providing various weapons to the terrorist organization, which were brutally turned against innocent Israeli civilians today. Hamas operates knowingly and deliberately from within densely populated

¹ The conflict originates in the era immediately preceding the establishment of the State of Israel at the time of the withdrawal of the UK administration from Palestine in 1947-48. The UK had administered Palestine under a League of Nations Mandate since 1920.

² 'Hamas-Israel Conflict 2023: Key Legal Aspects, State of Israel, Ministry of Foreign Affairs, November 2, 2023, 1 <https://www.gov.il/en/Departments/news/hamas-israel-conflict2023-key-legal-aspects>

³ According to the Ministry of Foreign Affairs of the State of Israel: 'This was the largest massacre of Jews in a single day since the Holocaust'. Ibid. 6.

⁴ Ibid. 1

⁵ <https://www.washingtonpost.com/world/2023/12/08/israel-hamas-war-news-gaza-update-palestine/>

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areas and adjacent to humanitarian buildings and institutions to make a cynical use of them, committing murderous war crimes – indiscriminately shooting at civilians while using its people as human shields. Hamas holds the sole responsibility and will bear the results of these events. ... The state of Israel will act in any way necessary to protect its citizens and sovereignty from the ongoing terrorist attacks originating from the Gaza Strip and carried out by Hamas and other terrorist organizations.⁶

Many States have expressed the view that Israel has been the victim of an armed attack and, consequently, has the right of self-defence under Article 51 UN Charter. As the use of force against Israel has been perpetrated by Hamas, a non-State actor, the implication appears to be that it is lawful to invoke the right of self-defence to repel a use of force by non-State actors. [...] State and UN practice do not appear to conclusively uphold this position.

Many States have expressed the view in debates at the UN Security Council⁷ that Israel has been the victim of an armed attack and, consequently, has the right of self-defence under Article 51 UN Charter. As the use of force against Israel has been perpetrated by Hamas, a non-State actor, the implication appears to be that it is lawful to invoke the right of self-defence to repel a use of force by non-State actors, irrespective of another State's involvement in their forcible action. This is a very controversial position that has not been confirmed by the ICJ⁸; the Court insists on another State's involvement and determines on the basis of specific acts of support whether the use of force by armed bands constitutes an armed attack or simply a breach of the rule of the non-use of force short of an armed attack.⁹ The right of a victim State to use force in self-defence against armed groups as autonomous actors violating the prohibition on the use of force is supported by individual Judges of the ICJ¹⁰ and a number of writers.¹¹ However, State and UN practice do not appear to conclusively uphold this position. The UN has expressly recognized and affirmed the right of self-defence against the use of force by armed groups on only one instance: SC Resolutions 1368 (2001) and 1373 (2001), which were adopted in relation to the Al-Qaida terrorist strike against the USA on 11 September 2001. Moreover, a small number of States always seek a relationship of some sort between an armed group and another State, even one that is extremely remote or rudimentary. Thus, they identify a breach of the duty of due diligence as a breach of the duty not to use force by maintaining that a State is 'unable or unwilling' to curb the activities of an armed group if it fails to prevent it from launching military operations from its territory. This is a justification for resorting to force in self-defence invoked by Israel since the 1950s in relation to those of its neighbouring States that allow their territories to be used by armed groups to use force against it; by the USA in relation to air strikes against ISIS in Syria; by Turkey in relation to air strikes against the Kurdish PKK in northern Iraq. It is also adopted as a claim by Canada and Australia in relation to strikes against ISIS. But it has been met by general opposition from both the target-States and third States.¹²

In relation to the current situation in Gaza, it becomes clear that Israel has judged itself the victim of a use of force perpetrated by a terrorist organization that acted under the direction of another State (Iran), which had also provided it with weapons and funds. Thus, it appears that Israel has articulated a justification consonant with the ICJ approach on the use of force

⁶ Letter dated 7 October 2023 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2023/742.

⁷ See, for instance, S/PV.9439, 4 (USA), (UK), 5 (Malta), 8 (France); S/PV.9442, 5 (USA), (Malta), 8 (Gabon).

⁸ *Armed Activities in the Territory of the Congo (DRC v. Uganda) (Merits)*, ICJ Rep. 2005, 168, at 223 para 147.

⁹ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) (Merits)*, ICJ Rep. 1986, 14, at 103 para 195; *ibid* at 101, 110, 127 paras 191, 210, 211, 249.

¹⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, ICJ Rep. 2004, 136, at 215 paras 33-34 (Judge Higgins, Separate Opinion), 229-230 para 35 (Judge Kooijmans, Separate Opinion); *Armed Activities on the Territory of the Congo (DRC v. Uganda) (Merits)*, ICJ Rep. 2005, 168, at 313-315 paras 26, 28-32 (Judge Kooijmans, Separate Opinion), 337 paras 11-12 (Judge Simma, Separate Opinion).

¹¹ Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, Oxford: Oxford University Press 2011; Russell Buchan and Nicholas Tsagourias, *Regulating the Use of Force in International Law. Stability and Change*, Cheltenham: Edward Elgar 2021, 53 *et seq.*

¹² Christine Gray, *International Law and the Use of Force*, 4th edn. Oxford: Oxford University Press 2018, 209 *et seq.*; Tom Ruys, 'Armed Attack' and Article 51 of the UN Charter, Cambridge: Cambridge University Press 2010, 419 *et seq.*; Olivier Corten, *The Law Against War*, 2nd edn. Oxford: Hart Publishing 2021, 137 *et seq.*

Israel has identified 'the law of armed conflict, also referred to as international humanitarian law, as the applicable legal framework'.

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by armed bands: namely, that it constitutes a breach of Article 2 (4) UN Charter if another State provides them with weapons, logistical support, training and intelligence. However, what is remarkable is that Israel was not satisfied with this justification, which makes the *jus ad bellum* the sole legal basis for its action, because it has simultaneously placed its defensive action in the context of *jus in bello*, by asserting the existence of an ongoing armed conflict between Israel and Hamas. Thus, Israel has identified 'the law of armed conflict, also referred to as international humanitarian law, as the applicable legal framework'; in particular, Israel has claimed that the 'heinous attacks launched by Hamas and Islamic Jihad against Israel on October 7, 2023 ... took place in the context of an ongoing armed conflict between Israel and Hamas and other terrorist organizations in Gaza. For this reason, in particular, legally speaking, these attacks do not necessitate an analysis of the conditions under which Israel may resort to the use of armed force (the *jus ad bellum*).'¹³ Therefore, the use of force by Israel in response to the use of force by Hamas on October 7, 2023 has been launched and takes place not under Article 51 UN Charter, but under the *jus in bello*. This means that the IDF's military action would not be restricted by the strategic aim of repelling the militants' attack and to the firing of rockets required by the rule of proportionality of self-defence; it could now be broadened into a series of military objectives aimed at achieving Israel's stated war aim in the context of a wider ongoing conflict: denying Hamas the capacity to continue launching attacks on Israel's citizens and territory.¹⁴

That said, it appears that Israel wished to avoid the controversies surrounding self-defence, and in particular whether it can be exercised against non-State actors or from a territory that is widely determined to be under belligerent occupation. In relation to defensive action against non-State actors, it appears that Israel considers it an unsafe basis for a lawful resort to force, and that the reference in the preambles to SC Resolutions 1368 (2001) and 1373 (2001) is insufficient to generate a rule of customary law. Indeed, this is made clear by Israel's insistence that any draft resolution should expressly affirm its right to defend itself against Hamas,¹⁵ and by the USA eventually exercising its veto¹⁶ on a draft resolution submitted by Brazil¹⁷ which would call for a ceasefire, on the grounds that it did not include this affirmation. In relation to the second issue, Israel seems to be trying to avoid the ICJ ruling in the *Palestine Wall Advisory Opinion* that it is impossible for a State to invoke the right of self-defence to repel an attack that is not imputable to a State, especially when the attack is launched from a territory under its own belligerent occupation.¹⁸

Is Gaza an Occupied Territory?

The Gaza Strip was occupied by Israel as a result of the Six Day War of June 1967. In 2005, the IDF withdrew from Gaza and all Israeli settlements were dismantled. However, Gaza has remained totally blockaded and isolated from the rest of the world by both Israel and Egypt. Israel, in particular, has asserted complete control over the movement of persons and goods in and out of Gaza and over the provision of public amenities (water and electricity), with electricity provided for only four hours a day; it also has the effective capacity to send its armed forces into Gaza to carry out military operations. For its part, Israel strongly refutes the applicability of the law of belligerent occupation outside the legal framework of Article

¹³ 'Hamas-Israel Conflict 2023: Key Legal Aspects, State of Israel, Ministry of Foreign Affairs, November 2, 2023, 1, 7 <https://www.gov.il/en/Departments/news/hamas-israel-conflict2023-key-legal-aspects>

¹⁴ Ibid. 1

¹⁵ S/PV.9439 of 16-10-2023, 3 (USA), 11 (Israel).

¹⁶ S/PV.9442 of 18-10-2023, 3, 5 (USA).

¹⁷ UN Doc. S/2023/773.

¹⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, ICJ Rep. 2004, 136 at 194 para 139. S/PV.9439, 12 (Jordan).

42 Hague Regulations 1907. In relation to the current military operation in Gaza, Israel has emphasized that, due to its disengagement from Gaza in 2005, it no longer exercises effective control over it and thus the legal framework governing its operation is the law relating to the conduct of hostilities and not the legal framework governing occupation.

... it is accepted by both the UN and a substantial number of States and writers that Gaza continues to be under belligerent occupation.

Nonetheless, and despite the rule in Article 42 Regulations, Hague Convention IV (1907) that belligerent occupation requires the physical presence of the occupant's troops¹⁹, it is accepted by both the UN and a substantial number of States and writers that Gaza continues to be under belligerent occupation²⁰. In other words, it appears that the rule in the Hague Regulations does not constitute the only legal framework for the existence of belligerent occupation. It is now also accepted that belligerent occupation continues to exist even without the continuous presence of the occupant's troops, provided that the hitherto physically present occupant retains effective control over the territory and has the capacity to reintroduce its troops into the territory at any time.²¹ Moreover, whereas the outbreak of hostilities within an occupied territory constitutes a possibility requiring the application of the relevant rules on the conduct of hostilities²², the occupant remains bound by rules under both International Humanitarian Law and Human Rights regulations vis-à-vis the inhabitants of the occupied territory and, in particular, vis-à-vis rules requiring a restrictive interpretation and application of human rights standards in relation to the adoption of measures to protect the security of the occupant's forces.²³

The Conduct of Hostilities

...there are aspects of the IDF's conduct of hostilities in the particular context of the narrow and overpopulated territory of Gaza that have given rise to concern.

Israel responded to the Hamas attacks of October 7, 2023 with a massive and large-scale use of force. In this context, it has repeatedly stressed its commitment to international humanitarian law, a commitment made manifest through its inclusion in the training of Israeli troops and by the oversight of compliance exercised by both the Attorney General and the Supreme Court of Israel.²⁴ In particular, Israel strongly claims that it is acting in accordance with the principles of distinction between combatants and civilians and between military objectives and civilian objects, proportionality, precautions in attack, and humanitarian assistance. Be that as it may, there are aspects of the IDF's conduct of hostilities in the particular context of the narrow and overpopulated territory of Gaza that have given rise to concern:

(a) The principle of distinction seems to be considerably conditioned by having as its starting point the forlorn position that Hamas' systematic embedding of its fighters and assets in densely populated areas renders civilians and civilian objects 'ostensible' and 'seeming', thus

¹⁹ This is also a rule of customary law and the ICJ has upheld it the *Armed Activities Case*, ICJ Rep. 2005, 168 at 229-230 paras 172-173

²⁰ Yoram Dinstein, *The International Law of Belligerent Occupation*, 2nd edn. Cambridge: Cambridge University Press 2019, 296 *et seq.*; Saffaa Sadi Jaber and Ilias Bantekas, *The Status of Gaza as Occupied Territory under International Law*, (2023) 72 ICLQ, 1069-1088. *Contra* Yuval Shany and Amichai Cohen, *International Law "Made in Israel" v. International Law "Made for Israel"*, Israel-Hamas 2023 Symposium, *Articles of War*, November 22, 2023, Lieber Institute, West Point <https://lieber.westpoint.edu/international-law-made-in-israel-international-law-made-for-israel/>

²¹ ICTY, *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, Judgement of 31 March 2003, para. 217; Human Rights Council, *Report of the Detailed Findings of the Independent Commission of Inquiry established pursuant to Human Rights Council resolution S-21/1*, Doc. A/HRC/29/CRP.4, 24 June 2015, 8-9, paras 26-30; Human Rights Council, *Report of the Special Rapporteur on the situation of Human Rights in the Palestinian Territories occupied since 1967*, Francesca Albanese, Doc. A/HRC/53/59, 4 para 16.

²² Ioannis Bamnios, *Participation in Hostilities during Belligerent Occupation*, Israel-Hamas 2023 Symposium, *Articles of War*, November 3, 2023, Lieber Institute, West Point <https://lieber.westpoint.edu/participation-hostilities-during-belligerent-occupation/>

²³ Article 5 (3) Geneva Convention IV 1949.

²⁴ 'Hamas-Israel Conflict 2023: Key Legal Aspects', State of Israel, Ministry of Foreign Affairs, November 2, 2023, 2 <https://www.gov.il/en/Departments/news/hamas-israel-conflict2023-key-legal-aspects>

making them liable in principle to attack.²⁵ However, this is contrary in principle to rules and the spirit of International Humanitarian Law, where the presumption is in favour of a protected status, unless this is specifically proven not to be the case. The IDF has repeatedly targeted hospitals and medical staff, arguing that the former were being used for military purposes as command-and-control centres, or that they constituted strategic junctions in the underground tunnel network used by Hamas, or that the latter were Hamas fighters in disguise.²⁶ However, the evidence provided has not been persuasive and no advance warning was given so the improper use of the hospitals could cease.²⁷

... this position makes very subtle use of proportionality to conceal a situation in which proportionality is misplaced and inapplicable: namely, an indiscriminate attack.

(b) The principle of proportionality seeks to prevent excessive incidental casualties among civilians or the destruction of civilian objects in relation to the concrete and direct military advantage anticipated from the attack in the circumstances prevailing at the time. According to the official Israeli position, the military advantage foreseen from the IDF operation as a whole (namely, rescuing the Israeli hostages and removing Hamas' capability to attack Israel and its citizens) is the standard that should be used to assess proportionality, rather than each military engagement separately. Israel also argues that proportionality is ultimately something that can only be decided on by each individual commander, that the result is 'conduct-oriented and not result-oriented', and that 'as a matter of law civilian casualties or damage to civilian objects, while tragic, do not of themselves allow for a conclusion in regard to proportionality without an informed assessment of both the expected civilian harm and the military advantage anticipated at the time of the attack.'²⁸ It is submitted that this position makes very subtle use of proportionality to conceal a situation in which proportionality is misplaced and inapplicable: namely, an indiscriminate attack. Because in this case, the attack is prohibited *ab initio* and there is therefore no basis on which to assess the excessiveness of the civilian casualties. It is thus plain to see that the IDF's use of 2,000lb ordnance constitutes an indiscriminate attack.²⁹

...the IDF's use of 2,000lb ordnance constitutes an indiscriminate attack.

(c) Taking precautions in attack is an obligation introduced by Article 57 Additional Protocol I 1977 which seeks to further protect civilians. One such precaution is providing civilians with advance warning that an attack is to take place that could affect them, and giving them the opportunity to leave, 'unless the circumstances do not permit'. That the IDF provided such a warning to the civilians of north Gaza implies that circumstances did permit, but requesting 1.1 million people to leave the area and move to the south of Gaza within 24 hours is considered unrealistic and likely to lead to a humanitarian crisis. However, IDF operations are currently in progress along the full length of the Gaza strip, as a result of which a humanitarian crisis appears to be in progress.³⁰ This situation makes it urgent to allow humanitarian assistance in the form of foodstuffs, medicine and fuel to reach the civilian population of Gaza. Israel has agreed that such consignments may cross into Gaza via the Raffa border crossing in Egyptian territory, but has expressed concerns that this humanitarian assistance is likely to be diverted by Hamas and withheld from the civilian

²⁵ Ibid.

²⁶ The IDF bombed the Al-Shifa hospital, the Turkish-Palestinian Friendship hospital, the al-Quds hospital, and the Indonesian hospital. [Israel uses World War II rhetoric to justify Gaza war - The Washington Post](#); [IDF chief: Israeli forces have Gaza city surrounded - The Jerusalem Post \(jpost.com\)](#).

²⁷ Article 21 Geneva Convention I 1949.

²⁸ 'Hamas-Israel Conflict 2023: Key Legal Aspects, State of Israel, Ministry of Foreign Affairs, November 2, 2023, 3 <https://www.gov.il/en/Departments/news/hamas-israel-conflict2023-key-legal-aspects>

²⁹ Article 51 (5) (a) AP I and customary law; Luigi Danniele, A Legal Misconception in Gaza and Beyond: disguising indiscriminate attacks as potentially proportionate in discourses on the laws of war, EJILTalk! November 7, 2023, <https://www.ejiltalk.org/a-lethal-misconception-in-gaza-and-beyond-disguising-indiscriminate-attacks-as-potentially-proportionate-in-discourses-on-the-laws-of-war/>

³⁰ This has prompted the UN Secretary General to invoke Article 99 UN Charter and request an emergency session of the SC. Gaza: Guterres invokes 'most powerful tool' Article 99, in bid for humanitarian ceasefire, <https://news.un.org/en/story/2023/12/1144447>

population.³¹ Be this as it may, in the face of a real and unfolding humanitarian crisis, it is imperative that assistance reach the civilian population of Gaza, irrespective of the likelihood of the contingency expressed by Israel.

Conclusion

...in the face of a real and unfolding humanitarian crisis, it is imperative that assistance reach the civilian population of Gaza.

The current armed conflict in Gaza has given rise to a great humanitarian crisis and a great threat to international peace and security. The Hamas attacks on citizens and other residents in southern Israel are criminal acts that constitute war crimes and crimes against humanity; their perpetrators and those that planned them are liable to criminal prosecution. At the same time, even though Israel has claimed that it launched its large-scale military operation to defend its people and territory from acts of force by Hamas, and although many States have judged the operation to constitute action in self-defence under Article 51 UN Charter, Israel itself has not characterized it as such. It must not be forgotten that the ICJ stressed in *Nicaragua* that what matters in law is the justification a State actually makes, and not how the act of force may be designated on the basis of its external hallmarks³². Israel has not invoked the right of self-defence. It has not notified the SC that it has resorted to force in self-defence. Instead, it claims that an ongoing armed conflict exists between it and Hamas and that the law of armed conflict is the applicable legal framework. Israel claims specifically that, since the IDF withdrew from Gaza in 2005, it is the rules on the conduct of hostilities that apply, not the law of belligerent occupation.

Israel strongly insists that it is conducting the military operation in Gaza in compliance with international humanitarian law. However, its interpretation of the relevant rules and its understanding of their scope are a matter of contentious debate in the SC itself, in statements by individual governments, and in academic exchanges online. When the current conflict ends and the dust has settled, it will be revisited for a safer assessment of the international law issues in question.

³¹ 'Hamas-Israel Conflict 2023: Key Legal Aspects, State of Israel, Ministry of Foreign Affairs, November 2, 2023, 3 <https://www.gov.il/en/Departments/news/hamas-israel-conflict2023-key-legal-aspects>

³² ICJ Rep. 1986, 14, at 134 para 266.