

# Hamas's Use of Human Shields and Israel's Response - Legal aspects

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The protection of civilians is one of the basic purposes of the laws of war. The principles of proportionality and distinction are intended to minimize harm to citizens.

**Distinction** requires that all parties to the conflict distinguish between civilians and combatants, and between civilian and military objectives.<sup>1</sup> Distinction prohibits the intentional or indiscriminate targeting of civilians.

**Proportionality** requires that any incidental harm to civilians must be proportional to the anticipated military advantage gained by the attack.<sup>2</sup>

The nature of war is that it takes place under limited and unreliable information (“**the fog of war**”). Military commanders therefore must make decisions in good faith and based on the information available at the time.<sup>3</sup> As such, by definition, mistakes will be made based on partial information. In general, states have recognized this aspect of warfare and many courts have declined to second-guess military decisions after the fact.<sup>4</sup>

Proportionality is not a specific formula but rather measured contextually in relation to anticipated military advantage. Hamas’ unprecedented barbarity and cruelty necessarily changes the legal analysis of Israel’s response. The IDF now estimates that the October 7th massacre was carried out by 3,000 terrorists. Hamas officials have stated that “the Al-Aqsa Flood [the October 7th massacre] is just the first time, and there will be a second, third, and fourth”.

Unless Hamas is deprived of its military capabilities, it will continue to threaten Israeli citizens and towns with murder and destruction. Tens of thousands of Israelis will be unable to return home and rebuild their lives as long as Hamas rules the Gaza Strip. Therefore, Hamas’ destruction will give Israel a significant military advantage. As such, the laws of war allow for higher collateral civilian casualties and would not necessarily indicate a lack of proportionality.

1 Additional Protocol to Geneva Convention (API) Art. 48, 51 and 52

2 API Art. 51 and 57

3 US Department of Defense Law of War Manual, Sec. 5.4.2.

4 In Israeli case law, see HCJ 561/75 Ashkenazi v. Defense Minister; HCJ 606/78 Ayub v. Defense Minister; HCJ 910/86 Ressler v. Defense Minister.

United States v. List, et al. (The Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1295-96 (“It was with this situation confronting him that he [the defendant, Rendulic] carried out the ‘scorched earth’ policy in the Norwegian province of Finmark which provided the basis for this charge [of wanton destruction of property] of the indictment. ... There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal.”)

## ▶ 1 | The Use of Human Shields in Warfare - Hamas' war crimes

Responsibility for distinguishing between civilians and combatants rests on the Party which controls the civilian population. Therefore, as the government of Gaza, Hamas is primarily responsible to make sure that its citizens are identifiable, are not involved in hostilities and that civilian objects are not used for military purposes.<sup>5</sup>

Certain objects are presumed to have a civilian status and have a protected status from attacks. Among these objects are hospitals, places of worship, schools, and historic and cultural sites.<sup>6</sup> According to international law, hospitals may not be used for military activity and may not be used to shield military objects.<sup>7</sup>

The use of human shields, ie. placing civilians in harm's way in order to protect combatants or military targets, is strictly forbidden. The use of human shields or the use of protected buildings for military purposes is a war crime under customary international law.<sup>8</sup>

Article 28 of the Fourth Geneva Convention states that “*the presence of a protected person may not be used to render certain points or areas immune from military operations.*”

Article 51(7) of the of First Additional Protocol to the Geneva Convention similarly states that “*the presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.*”

The use of human shields is a common tactic used by terrorist groups. American and British troops in Afghanistan encountered [Taliban](#) attacks from houses and mosques. The Taliban placed women and children on rooftops in order to protect themselves from coalition offensives. During the 2016 American-led offensive against [ISIS](#) in Mosul, ISIS was reported to have prevented civilians from fleeing and forcing them to accompany their fighters.

Hamas has long used civilians and civilian buildings to store weapons, build tunnels or launch attacks. The Office of the United Nations Special Commissioner for the Middle East Peace Process said: “Hamas & other militants’ indiscriminate launching of rockets & mortars from highly populated civilian neighborhoods into civilian population centers in Israel violates [the law of armed conflict] and must cease

5 See J. Fred Buzhardt, DoD General Counsel, Letter to Senator Edward Kennedy, Sept. 22, 1972, *reprinted in* 67 AJIL 122 (1973) (“A summary of the laws of armed conflict, in the broadest terms, reveals certain general principles including the following: ... (c). That a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible. ... The principle in (c) addresses primarily the Party exercising control over members of the civilian population.”); BOTHE, PARTSCH, & SOLF, NEW RULES 284 (AP I art. 48, ¶2.2) (explaining that “an important share of the responsibility for implementing the principle of distinction rests on the Party which controls the civilian population.”); United States, *Statement on Ratification of the 1954 Hague Cultural Property Convention*, Mar. 13, 2009, 2575 UNTS 7, 8 (“It is the understanding of the United States of America that, as is true for all civilian objects, the primary responsibility for protection of cultural objects rests with the party controlling that property, to ensure that it is properly identified and that it is not used for an unlawful purpose.”).

6 Fourth Hague Convention (HR) Art. 27, First Geneva Convention (GCI) Art. 19-22 and 35-37, Fourth Geneva Convention (GCIV) Art. 18-19, 21-22 and 53, PI 12, 21-31, 52-56, 85, Second Additional Protocol to Geneva Convention (APII) 11-12, 14-16

7 GCI Art. 19, API Art. 12(4)

8 See UK Joint Service Manual of the Law of Armed Conflict, Par. 16.29

immediately.”<sup>9</sup> A NATO report examining Hamas activities between 2008 and 2012 also confirmed the widespread use of human shields.<sup>10</sup>

During the 2021 Gaza war, the IDF documented several examples of Hamas using human shields: headquarters installed next to kindergartens, storage and manufacturing of weapons in civilian houses, rocket launches and military tunnels from schools and mosques.<sup>11</sup>

It has been widely reported that Hamas uses Gazan hospitals as military bases. In [2009](#), Israeli intelligence officials suspected that Hamas was operating out of bunkers in the Shifa Hospital in Gaza City. These were also [reported](#) in the foreign press as well as Palestinian open source information. After the 2014 Protective Edge Operation, foreign reports [confirmed](#) the allegations upon leaving Gaza.

The Al-Wafa hospital has also been used to [fire rockets](#) and house Hamas terrorists. In 2014, the IDF [wrote](#) that “Hamas transformed Wafa Hospital, a civilian building in the Shuja’iya neighborhood of Gaza City, into a command center, rocket-launching site, observation point, sniper’s post, weapons storage facility, cover for tunnel infrastructure, and a general base for attacks against Israel and IDF forces. Hamas repeatedly opened fire from hospital windows and used anti-tank missiles from the premises.”

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9 @UNSCO\_MEPP, “.@TWennesland: Hamas & other militants’ indiscriminate launching of rockets & mortars from highly populated civilian neighborhoods into civilian population centers in #Israel violates IHL law and must cease immediately. Civilian areas must never be used for military purposes.” Twitter, May 16, 2021. ([https://twitter.com/UNSCO\\_MEPP/status/1393940810937348098?s=20](https://twitter.com/UNSCO_MEPP/status/1393940810937348098?s=20))

10 Hamas’ use of human shields in Gaza, NATO Strategic Communications Centre of Excellence, [https://stratcomcoe.org/cuploads/pfiles/hamas\\_human\\_shields.pdf](https://stratcomcoe.org/cuploads/pfiles/hamas_human_shields.pdf)

11 Israel Defense Forces, “Operation Guardian of the Walls,” May 16, 2021. (<https://www.idf.il/en/articles/defense-and-security/israel-under-fire>); Israel Defense Forces, “Operation Guardian of the Walls,” May 16, 2021. (<https://www.idf.il/en/articles/defense-and-security/israel-under-fire>); “Photos show Hamas tunnel dug underneath courtyard of UNWRA school in Gaza,” The Times of Israel (Israel), June 11, 2021. (<https://www.timesofisrael.com/photos-show-hamas-tunnel-dug-underneath-courtyard-of-unwra-school-in-gaza>)

## ▶ 2 | Israel's obligations under international law

As previously mentioned, the presence of civilians does not immunize a military target from attack. According to the laws of war, only military objectives are legitimate target. Civilian objects are defined negatively, meaning non-military objects.

Military objects are defined as *“those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”*<sup>12</sup>

Therefore, a hospital, school, mosque or residential building used to fire rockets, store weapons or house combatants is a legitimate military target. The United States adhered to this policy in its fight against [ISIS](#) in Iraq, bombing a Mosul hospital from which ISIS terrorist launched grenades and machine gun fire.

According to the 1956 American Department of the Army Field Manuel (Change No. 1 1976), examples of legitimate objects of attack are *“a place which is occupied by a combatant military force or through which such a force is passing,”* as well as *“[f]actories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places devoted to the support of military operations or the accommodation of troops.”*

Similarly, the International Commentary of the Red Cross (ICRC) states that *“if combat is taking place within a city or a town, and there is fighting from house to house, which is frequently the case, it is clear that the situation becomes very different and that any building sheltering combatants becomes a military objective.”*<sup>13</sup> As such, Israel is fully in its right under international law to attack hospitals, schools, homes or any other object used for military purposes.

When attacking formerly protected objects, the attacking party must provide advance warning *unless circumstances do not permit it.*<sup>14</sup> These circumstances include legitimate military reasons, such as exploiting the element of surprise in order to accomplish the mission and preserve the security of the attacking force.<sup>15</sup>

According to the Additional Protocol, the attacking force must take all “feasible precautions” to reduce harm to civilians and protected objects.<sup>16</sup> Despite the strong language, feasible has been interpreted to

12 API, Art. 52(1) and (2)

13 ICRC AP COMMENTARY 701 (¶2265)

14 HAGUE IV REG. art. 26 (“The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.”); HAGUE IX art. 6 (“If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.”); LIEBER CODE art. 19 (“Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.”). *Consider* AP I art. 57(2)(c) (“Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”).

15 *U.S. Comments on the International Committee of the Red Cross’s Memorandum on the Applicability of International Humanitarian Law in the Gulf Region*, Jan. 11, 1991, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1991-1999 2057, 2064 (“The ‘unless circumstances do not permit’ recognizes the importance of the element of surprise. Where surprise is important to mission accomplishment and allowable risk to friendly forces, a warning is not required.”).

16 API Art. 5.11 and 5.17.5

mean practicable, reasonable, due or necessary precautions.<sup>17</sup> The duty is not absolute. Military necessity must also be taken into account.<sup>18</sup> Therefore, Israel's [repeated warnings](#) for civilians to evacuate Hamas-controlled hospitals and areas meets with international requirement.<sup>19</sup>

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17 Michael J. Matheson, Deputy Legal Adviser, Department of State, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law* (Jan. 22, 1987), 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 426-27 (1987) (“We support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects, and that effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit.”).

*See, e.g., U.S. Comments on the International Committee of the Red Cross’s Memorandum on the Applicability of International Humanitarian Law in the Gulf Region*, Jan. 11, 1991, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1991-1999 2057, 2063 (“A defender must exercise reasonable precaution to separate the civilian population and civilian objects from military objectives.”); 1956 FM 27-10 (Change No. 1 1976) ¶41 (“Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places within the meaning of the preceding paragraph but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.”); Neville Chamberlain, Prime Minister, United Kingdom, *Statement before the House of Commons*, Jun. 21, 1938, HANSARD, 337 HOUSE OF COMMONS DEBATES §§ 937 (“[R]easonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed.”). United States, *Statement on Consent to Be Bound by the CCW Amended Mines Protocol*, May 24, 1999, 2065. UNTS 128, 129 (“The United States reserves the right to use other devices (as defined in Article 2(5) of the Amended Mines Protocol) to destroy any stock of food or drink that is judged likely to be used by an enemy military force, if due precautions are taken for the safety of the civilian population.”).

U.N. GENERAL ASSEMBLY RESOLUTION 2675, *Basic Principles for the Protection of Civilian Populations in Armed Conflict*, U.N. Doc. A/8028 (Dec. 9, 1970) (“In the conduct of military operations, every effort should be made to spare the civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.”); HAGUE IX art. 5 (“In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.”).

18 See CCW PROTOCOL III ON INCENDIARY WEAPONS art. 1(5) (“‘Feasible precautions’ are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”); CCW AMENDED MINES PROTOCOL art. 3(10) (“Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”); CCW PROTOCOL V ON EXPLOSIVE REMNANTS OF WAR art. 5(1) (“Feasible precautions are those precautions which are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”). *Cf.* United Kingdom, *Statement on Ratification of AP I*, Jan. 28, 1998, 2020 UNTS 75, 76 (“The United Kingdom understands the term ‘feasible’ as used in the Protocol to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”); Canada, *Statement on Ratification of AP I*, Nov. 20, 1990, 1591 UNTS 462, 464 (“It is the understanding of the Government of Canada that, in relation to Articles 41, 56, 57, 58, 78 and 86 the [word] ‘feasible’ means that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”); Germany, *Statement on Ratification of AP I*, Feb. 14, 1991, 1607 UNTS 526, 529 (“The Federal Republic of Germany understands the word ‘feasible’ in Articles 41, 56, 57, 58, 78 and 86 of Additional Protocol I to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time including humanitarian and military considerations.”); Netherlands, *Statement on Ratification of AP I*, Jun. 26, 1987, 1477 UNTS 300 (“With regard to Article 41, paragraph 3, Article 56, paragraph 2, Article 57, paragraph 2, Article 58, Article 78, paragraph 1, and Article 86, paragraph 2 of Protocol I: It is the understanding of the Government of the Kingdom of the Netherlands that the word ‘feasible’ means that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”).

19 Baruch, P. S., & Neuman, N. (2011). Warning civilians prior to attack under international law: theory and practice the law of armed conflict in asymmetric urban armed conflict. *International Law Studies*, 87(1), 16.

## ▶ 3 | Conclusion

Hamas' use of human shields, including using hospitals and civilian objects to store weapons, launch attacks and place operations, is forbidden under international law and constitutes a war crime. Once civilian objects are used for military purposes, they are considered as legitimate military targets.

Israel may strike such targets, subject to the principle of proportionality. Israel must give advanced warning, subject to military necessity, as it currently does. Military commanders must make difficult decisions under fog of war conditions. States must make efforts to minimize civilian casualties, but unfortunately such casualties are inevitable in the tragic circumstances of war.