

# THE “SWORDS OF IRON” WAR AND INTERNATIONAL LAW - Q & A

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## ► 1 | So, What is International Law?

*Public international law is not “law” in the familiar sense, but a somewhat different field. There is no recognized, supreme legislative body; the law is not always clear cut and isn’t always enforced, certainly not equally. In fact, international law is the name given to international norms, the violation of which causes diplomatic, economic, and other repercussions.*<sup>1</sup>

International law is comprised mainly of customary and treaty law. Treaty law relies on various treaties that member states join voluntarily.<sup>2</sup> Customary law is the unwritten duty derived from the general practice around the world, and it binds all states, even without explicit agreement on their part. Over the years, a treaty can become customary law if virtually always, nearly all states act in accordance with it. Customary law is controversial among legal scholars due to the difficulty in agreeing on the nature of common practice on the ground, whether such practice constitutes “customary law” and if certain cases do in fact align with said customary duty.<sup>3</sup>

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- 1 Sabel, Robbie. “The Essence of International Law” *International Law* 43 (Ed. Robbie Sabel and Yaël Ronen, Third Edition, 2016) [Hebrew] (hereinafter: Sabel, *International Law*); Hirsch, Moshe. “Sociological Approach to International Law – Compliance and Non-compliance with International Rules” [Hebrew] **Law and Business** 25 459 (2022).
  - 2 Sabel, Robbie. “Sources of International Law” *International Law*, supra note 1 at 149, 54-56; Efrat-Smilg, Esther. “Laws of Conventions and Israeli Practice” *International Law* supra note 1 at 747; Ben-Naftali, Orna and Shany, Yuval. **International Law Between War And Peace** (2006) (hereinafter: Ben-Naftali and Shany **International Law Between War And Peace**) 367-377.
  - 3 Ben-Naftali and Shany, **International Law Between War And Peace** supra note 2 at 378-399.; Sabel, Robbie. “Sources of International Law”, supra note 2, at 49-54.

The primary sources for the laws of war are the Hague Conventions of 1899 and 1907<sup>4</sup>, the four Geneva Conventions from 1949 and the two additional protocols to those conventions (protocols being later additions to treaties that states can choose whether to sign on to).<sup>5</sup> It should be noted that Israel did not sign the Additional Protocols.<sup>6</sup>

The UN General Assembly's resolutions are not binding;<sup>7</sup> however, the resolutions made by the Security Council do obligate all states when voted on according to Chapter VII of the UN Charter (a special procedure).<sup>8</sup>

Any claim made against Israel must be evaluated in light of other lawful states' actions in similar situations. This is not to point out hypocrisy, but because a norm can be considered binding only when it is a generally accepted practice. Claims made solely against Israel cannot be considered legal rules in any accepted sense, including in the context of international law.<sup>9</sup>

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4 1907 Hague Convention IV, Respecting the Laws and Customs of War on Land, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land (hereinafter: the Hague Conventions).

5 The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, held on 22 August 1864 (hereinafter: First Geneva Convention) 25 30, 387; Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea, held on 12 August 1949 (hereinafter: Second Geneva Convention) 25 30, 423; The Third Geneva Convention, relative to the treatment of prisoners of war, held on 12 August 1949 (hereinafter: Third Geneva Convention) 25 30, 423; Convention (IV) relative to the Protection of Civilian Persons in Time of War held on 12 August 1949 (hereinafter: Fourth Geneva Convention) 25 30, 559; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 609, 1977 (hereinafter: Geneva Protocol I); Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1125 U.N.T.S. 609, 1977 (hereinafter: Geneva Protocol II).

6 See for example, Ben-Naftali and Shany **International Law Between War And Peace** *supra* note 2 at 131; Hilly Moodrick-Even Khen, "Law of War", in International Law, *supra* note 1 at 357-358.

7 United Nations Charter, Articles 10-17. Available [here](#). The General Assembly has the authority only to make recommendations.

8 See United Nations Charter, Articles 39-51. See too, Sabel, Robbie. "International Organizations" *International Law supra* note 2 at 107, 122-125.

9 Schondorf, Roy and Shamir-Borer, Eran. "The (In) applicability of the Law of Occupation to the Gaza Strip" 43 TEL AVIV UNIVERSITY LAW REVIEW 403 (2020) [HEBREW] 424-425; SEE ALSO, **CA 993/19 ANONYMOUS [NABAHEEN] v. ISRAELI DEFENSE MINISTRY**, PARA. 114 OF JUSTICE SOHLBERG'S OPINION (NEVO 5.7.2022).

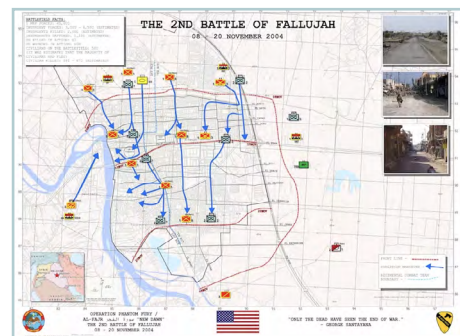
## ▶ 2 | What is the Law of War?

Contrary to the impression created by public discourse, the law of war under international law was never meant to prevent states from conducting wars, winning them, or defeating their enemies. It was also not meant to force states to use the minimum amount of force necessary. To the contrary, subject to certain parameters primarily concerning civilian noncombatants, military necessity holds paramount status.<sup>10</sup>

The guiding principle in the law of war is military necessity, according to which it is lawful to use all means to subdue an enemy as effectively and swiftly as possible, so long as such measures are not prohibited by the law of war.<sup>11</sup> To illustrate, the following two are test cases of how, in practice, lawful states carry out warfare under difficult urban conditions:

### The Second Battle of Fallujah (Operation al-Fajr, 2004):

The second battle of Fallujah during the Iraq (Second Gulf) War between the coalition armies (of the US, Britain, and Iraq) and Al-Qaeda was the most significant urban battle for the US since Vietnam. The Americans and the British called upon the residents to evacuate, and close to 90% of all civilian non-combatants did so. The city was then besieged by the coalition forces to prevent supplies from reaching the jihadi forces. Fallujah was known as the “City of Mosques”, and Al-Qaeda used most of them to store weapons. The US destroyed close to 60 mosques in the fighting. At the end of the battle, approximately 80% of the city’s buildings were damaged or destroyed. In Western military circles, the second battle of Fallujah was considered a great success. American losses amounted to thirty-five soldiers, the British four and the Iraqis eight, as compared to around 1,500 jihadists and an additional eight hundred civilian casualties.<sup>12</sup>

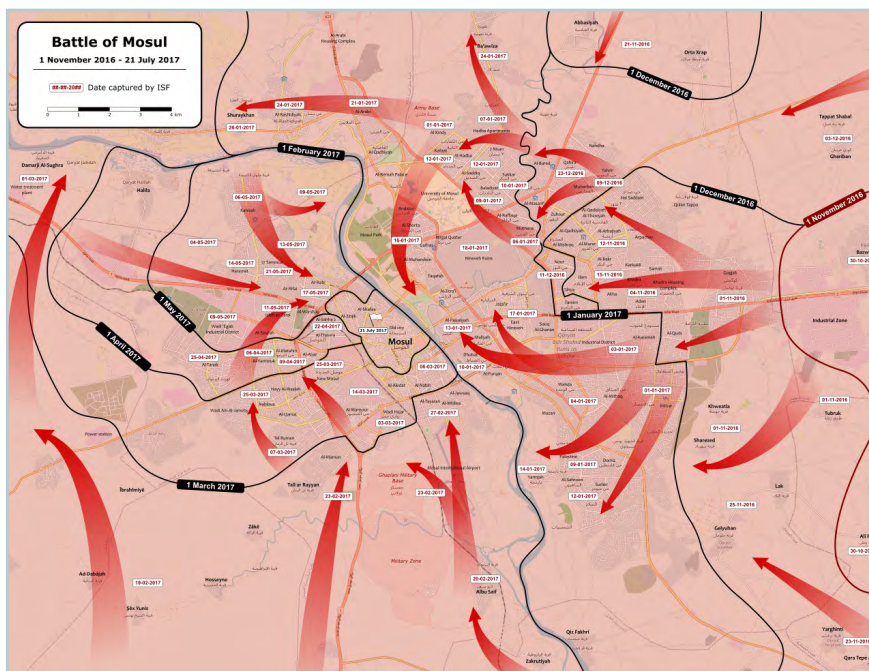


[the battle plans and the aftermath of the second battle of Fallujah. Marco Di Lauro / Getty Images]

- 10 Ben-Naftali and Shany **International Law Between War And Peace** *supra* note 2 at 115-120; Moodrick-Even Khen, “Law of War” *supra* note 6 at 353,361; Bitton, Raphael “The Law of War as a General Framework for Regulating Institutional Killing” [Hebrew], *Mishpat U’Tzavah* 19 245, 257 (2006).
- 11 Ben-Naftali and Shany **International Law Between War And Peace** *supra* note 2 at 147-151; Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795 (2010).
- 12 <https://mwi.westpoint.edu/urban-warfare-case-study-7-second-battle-of-fallujah/> John Spencer, Jayson Geroux, and Liam Collins, *Case Study #7 – Fallujah II*, (25.7.2023).

## The Battle of Mosul (2016):

The battle to liberate the city of Mosul, Iraq from the hands of the ISIS terror organization by the coalition forces (the US, France, Britain, Canada, Austria, Germany, Turkey, the Netherlands, Iraq and the Kurds) is considered the most difficult urban battle to be fought since WWII. ISIS fighters sheltered inside the civilian population, using human shields, placing explosive devices in homes, and attacking civilians who attempted to flee the city. Despite the civilian casualty rate, the coalition forces did not regard the risk to noncombatants as something that granted immunity to ISIS forces and proceeded to destroy the city almost completely in their effort to wipe out the terrorists. The American commanders compared the occupied city after the battle to Dresden after the British air strikes in WWII. During the eight months of bombardment, over 10,000 Iraqi civilians were killed by the American forces, while a similar number were murdered by ISIS.<sup>13</sup>



[Battle Plans for Mosul – SuriyakMaps]

13 John Spencer and Jayson Geroux, *Case Study #2 – Mosul* (15.9.21) <https://mwi.westpoint.edu/urban-warfare-project-case-study-2-battle-of-mosul/>.



[satellite imagery of Mosul – before and after the battle<sup>14</sup>]

These test cases demonstrate the obvious – war is not a sterile event, and inevitably involves damage, destruction, and death. The law of war is not meant to prevent wars but rather to prevent any suffering that can be avoided without impairment to military necessity.

The law of war is unlike criminal law - there is no investigation of a specific person's guilt based on evidence and there are no accused vs innocent parties; rather, there is the clear division between combatants and civilians.<sup>15</sup> The goals, context, rationale, and proceedings that are familiar to us from the realms of criminal law enforcement should not be confused with the law of war.

14 <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=2828&context=cisr-journal>

15 Ben-Naftali and Shany **International Law Between War And Peace** *supra note 2* at 151-152; LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS, 1996 I.C.J 226, 257.

## ▶ 3 | Does Hamas Commit War Crimes?

The horrific actions that Gazans serving Hamas carried out on the 7th of October were an extreme violation of international law and constitute both war crimes and crimes against humanity.

**Hamas war crimes from The October 7th massacre include:** <sup>16</sup>

- A. Unlawful and unjustified initiation of war.
- B. Intentional targeting of civilian noncombatant population centers with artillery.
- C. Mass murder of civilian noncombatants.
- D. Torture and inhuman treatment
- E. Rape and sexual violence.
- F. Desecration of bodies.
- G. Pillage.
- H. Taking of hostages.
- I. Extensive destruction and appropriation of property, not justified by military necessity.
- J. Non-distinction of civilians from combatants.

Hamas further committed crimes of genocide, the most serious crime in international law. In fact, modern laws of war were drafted after the Second World War primarily to prevent genocide.

Under the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide, genocide is the killing of people “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.<sup>17</sup> Thus, there is no doubt Hamas committed the worst of war crimes.

The Convention on the Prevention and Punishment of the Crime of Genocide, which has been accepted as binding customary law, obligates all states to prevent genocide and punish its perpetrators. As such, international law enjoins all states to act in assisting Israel to prevent any chance of a repetition of the threat carried out in the October 7th massacre, and to act to punish all those involved in it and in the Hamas decision making apparatus.

It should be noted that in addition to the monstrous actions which speak for themselves, Hamas has also officially declared murdering Jews to be one of its central objects (Article 7 of the Hamas charter, and countless words to that effect by Hamas officials).<sup>18</sup>

In the course of Israel’s defensive war in Gaza, named “Swords of Iron”, Hamas continues

<sup>16</sup> Rome Statute of the International Criminal Court, 2187 U.N.T.S. Articles 3- 8.

<sup>17</sup> The Convention on the Prevention and Punishment of the Crime of Genocide, Article 2 25 1, 65 (ratified by Israel in 1950).

<sup>18</sup> [https://www.terrorism-info.org.il/Data/pdf/PDF\\_18894\\_1.pdf](https://www.terrorism-info.org.il/Data/pdf/PDF_18894_1.pdf).

to commit ever more war crimes. One of the bedrock principles of laws of war, for instance, is the principle of distinction – which calls for a distinction to be made between military objects and combatants and civilian objects and civilians.<sup>19</sup> This principle is so foundational that it appears in the first codification of the laws of war, the “Lieber Code” drafted during the American Civil War. In practice, the accepted definition for the principle of distinction is Article 48 of the Additional Protocol I of the Geneva Convention:

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>20</sup>

The principle of distinction is recognized as binding customary law under international humanitarian law and by the law of war, which means it obligates all countries whether or not they are signatories to any treaty. Hamas crudely violates the principle of distinction in every way and manner possible.

### **Hamas War Crimes during the “Swords of Iron” War include:**

- A. Hamas combatants hide among the civilian population.
- B. Hamas does not create a distinction between their military objects and civilian objects, thereby transforming nearly every protected civilian building (schools, hospitals, mosques, etc.) into military objects.
- C. Hamas does not mark their combatants with identifiable uniforms as required by international law, and their combatants wear various modes of dress, including fully civilian clothing.
- D. Hamas attacks civilians who flee battle areas, erects barriers, and does all it can to violate the principle of distinction.
- E. Hamas attacks IDF forces while they secure humanitarian safe evacuation corridors for civilian noncombatants.
- F. Hamas has violated ceasefire agreements in the past, killing Israeli soldiers and taking them hostage during the ceasefire period.
- G. Hamas directs its artillery towards Israeli civilian populations.
- H. Hamas continues to attempt to invade and harm Israeli citizens after 7.10.
- I. Hamas has blocked Red Cross access to the Israeli hostages it holds

19 Article 22 of the Lieber Code; Article 48 of Additional Protocol I; Blank, Laurie R., *Taking Distinction to the Next Level: Accountability for Fighters’ Failure to Distinguish Themselves from Civilians* (September 27, 2011). 46:3 Valparaiso University Law Review 765-802 (2012), Emory Public Law Research Paper No. 11-169, Available at SSRN: <https://ssrn.com/abstract=1934513>.

20 <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>.

The list is hardly exhaustive. There appears to be no war crime that Hamas does not joyfully, brutally, and crudely perpetrate. The question that needs to be asked is not about the legality of Israel's actions (which are absolutely lawful, as detailed below) but about the international community's response to continuous Hamas war crimes and their duty to pursue punishment for the criminals who carried out acts of genocide.

In the "Iron Swords" war, Israel is not only operating within the bounds of international law by eliminating Hamas' capability to harm the Israeli civilian population but is in fact carrying out its internationally bound duty to prevent genocide, alongside its general duty, shared by all states, to safeguard its citizens and protect its borders.

## ▶ 4 | Does Israel Have the Right to Defend Itself?

According to Article 51 of the UN Charter, every country has the right to defend itself.<sup>21</sup> UN Security Council Resolution 1373, adopted in the aftermath of the 9/11 attacks, makes it clear that the right to self defense includes a response to attacks from non-state entities, such as Al-Qaeda and Hamas.<sup>22</sup> The resolution was adopted under Chapter VII of the UN Charter, and therefore binding rather than merely recommendatory for all states.

The attempt to present international law as the establishment of a *de facto* disarmament and the forced vulnerability of states to all their enemies is misleading and has no basis in legal scholarship.

In the "Swords of Iron" war, Israel not only operates within the bounds of international war but is, in fact, carrying out its duties therein to prevent genocide crimes, alongside its general responsibility to protect its citizens and borders. This war is not only Israel's right but Israel's duty. As demonstrated, all western countries act in a similar fashion.

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21 United Nations Charter, Article 51. available [here](#).

22 United Nations Security Council (UNSC) Res 1373 (28 September 2001) UN Doc S/RES/1373. <https://digitallibrary.un.org/record/449020>



## ► 5 | What About the Harm to Noncombatants in Gaza?

Contrary to what is often claimed in the general discourse, civilian casualties are, despite the human tragedy, an inevitable reality of war, and causing them is not categorically prohibited under international law, so long as doing so is justified by military necessity ("proportionality").<sup>23</sup> Of course, all countries must strive as much as possible to minimize collateral damage when carrying out military objectives,<sup>24</sup> but there is no war without collateral damage. Pointing to the death of noncombatants is not proof of international war violations but only of the existence of a war. And war, unfortunately, is inescapable for those countries who wish to safeguard their citizens and protect their borders.

According to international law, all parties to a conflict bear the responsibility to distinguish between combatants and noncombatants,<sup>25</sup> and intentionally targeting enemy civilians is a violation of the law of war. Israel therefore called on the Gazans to move to the South of the Gaza Strip before the land incursion and, as much as militarily possible, gave various warnings prior to aerial bombardment. In doing so, Israel fulfilled its obligations under international law.<sup>26</sup>

It is important to note that the responsibility to distinguish between civilians and combatants lies with the party who effectively controls the territory.<sup>27</sup> Hamas, which controls the Gaza Strip, is obligated to remove citizens from battle zones and from military objects. In practice, Hamas deliberately bases itself in civilian centers to protect its operatives and maximize civilian casualties. Hamas even attacks its own civilians when they attempt to move south to evacuate from the war zone. The legal and moral responsibility for anyone harmed by such actions lies with the Hamas organization.<sup>28</sup>

23 Geneva Protocol I, Article 51(5)(b).

24 Hague Conventions, Article 26.

25 Geneva Protocol I, Article 51 (4).

26 Geneva Protocol I, Article 57; Michael N. Schmitt, *ISRAEL – HAMAS 2023 SYMPOSIUM – THE IDF, HAMAS, AND THE DUTY TO WARN*, (27.10.2023) <https://lieber.westpoint.edu/idf-hamas-duty-to-warn> ("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 IHL").

27 Geneva Protocol I, Article 51 (7); Geneva Protocol I, Article 58 (b).

28 Michael N. Schmitt, *ISRAEL – HAMAS 2023 SYMPOSIUM – WHAT IS AND IS NOT HUMAN SHIELDING?* (3.11.2023) <https://lieber.westpoint.edu/what-is-and-is-not-human-shielding/> ("Hamas has violated the prohibition by, among other acts, using hostages as shields and preventing civilians from leaving northern Gaza. It has also violated obligations not to use specially protected facilities as shields. And even when its actions do not amount to unlawful shielding, they are subject to the requirement to take feasible passive precautions to safeguard the civilian population").

## ▶ 6 | Are Israeli Strikes Proportionate?

Proportionality is not about balancing the number of casualties on each side. According to international law, proportionality means the relationship between collateral damage and the predicted military advantage of a military strike.<sup>29</sup>

There is no magic formula for proportionality, which is context dependent.<sup>30</sup> The scope and cruelty of the Hamas attack also has implications for the legal analysis. Approximately 3000 terrorists brutally murdered close to 1400 civilians and led to the displacement of tens of thousands of others. Israeli citizens cannot return home and rehabilitate as long as Hamas exists. Needless to say, the destruction of Hamas will grant the State of Israel and its citizens a significant and vital military advantage. Therefore, so long as effort is expended to minimize collateral damage on the way to destroying Hamas and its partners, all such casualties are undoubtedly legal in the context of the law of war. The number of casualties is certainly open to public discussion, but has no bearing on legal disproportionality.<sup>31</sup> To understand what is disproportionate in the context of international law, we must examine other countries' actions in practice.

During the Second Gulf War, for instance, the coalition forces' drone strikes policy dispensed with getting the green light from the White House if the estimate for noncombatant casualties during a strike on valuable targets was under thirty people. A higher amount of collateral damage warranted a direct order from the White House.<sup>32</sup>

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29 Geneva Protocol I, Article 51 (5)(b).

30 Shany, Yuval. "International Law and Hostilities in Gaza: Aligning Expectations" [Hebrew] **Mishpatim Online** A 6 (2009).

31 HCJ 769/02 **Public Committee Against Torture v. Government** 84 62(1) 507, para. 46 President Barak's opinion (2006) (hereinafter: **Public Committee Against Torture v. Government**).

32 Benjamin, M. (2007). When is an accidental civilian death not an accident? Salon. [https://www.salon.com/2007/07/30/collateral\\_damage/](https://www.salon.com/2007/07/30/collateral_damage/)

## ▶ 7 | Who Decides what Amount of Collateral Damage is Proportional?

The proportionality of a strike is at the professional discretion of the military command.<sup>33</sup> Fighting always occurs under partial information and “the fog of war”. Military commanders must therefore make decisions according to the information they have at the time. Proportionality is not measured by information discovered at a later date.<sup>34</sup> This is known as the “Rendulic Rule”.<sup>35</sup>

It is important to stress that the principle of proportionality does not require the force initiating the strike to put itself at risk in order to minimize collateral damage to enemy citizens. This is why the former ICTY prosecutor determined that NATO forces were permitted to conduct a bombardment from on high, despite the fact that such elevation led to less precision and higher casualty rates. Given the military necessity of minimizing the risk of NATO planes being shot down, the harm to civilians was proportionate<sup>36</sup>. Canada, Australia, and New Zealand declared their interpretation of the proportionality provisions to be such as well when they signed the Protocol Additional.<sup>37</sup>

The “fuel tankers case” is also instructive of states’ practice. In September 2009, a German commander in Afghanistan ordered the demolition of two fuel tankers stolen by Taliban forces. Approximately 100 noncombatants were killed in the action. Following harsh public condemnation, a criminal investigation was launched against the commander. The Court ruled that his actions were legal, on the grounds that they conformed to international law standards. Even a short-lived military advantage or a tactical one, such as preventing the Taliban’s use of fuel, constitutes a legitimate objective. The commander had taken into consideration such factors as the distance between the tankers and the civilian residences, the fact that civilians tended to not be in the area at the small hours of the night and the Taliban fighters’ location. These considerations constituted sufficient ground to assume that anyone within the perimeter was a combatant. There is no requirement for absolute certainty. The Court determined that there is no firm, external standard for reviewing proportionality, and the reasonable discretion of a military commander should be accepted.<sup>38</sup>

33 **Public Committee Against Torture v. Government** *supra* note 31, para. 57 President Barak’s opinion.

34 Ben-Naftali and Shany **International Law Between War And Peace** *supra* note 2 at 155.

35 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”).

36 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia par. 52-56 <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal>

37 See ICRC Study (n 38) commentary to ‘Rule 14. Proportionality in Attack’ at ‘Interpretation’.

38 Germany, Federal Court of Justice, Federal Prosecutor General, *Fuel Tankers case*, Decision, 16 April 2010, pp. 63–66.

## ▶ 8 | Does Israel Have an Obligation to Provide Humanitarian Aid to Gaza under International Law?

No country is obliged to provide anything to enemy territory. Israel has no obligation under international law to supply the Gaza Strip. Moreover, there is a legal duty to refrain from supplying territory ruled over by a terror organization. UN Security Council Resolution 1373 obligates all states to refrain from financing or supplying terror organizations with “financial assets or economic resources or financial or other related services”.<sup>39</sup>

## ▶ 9 | Is Israel Obligated to Allow Third Parties to Transfer Humanitarian Aid?

During a war, the sides are obligated to assist third parties in the supply of different types of humanitarian aid. There is some disagreement over which goods are considered humanitarian.

According to Article 23 of the Fourth Geneva Convention, the duty to allow humanitarian aid is conditioned on the aid arriving at its destination and not supplying the enemy with any military or economic advantage. On the 16th of October, UNWRA reported Hamas terrorists stealing fuel and medical supplies. It was further reported that Hamas is stockpiling fuel while hospitals complain of a shortage, and its operatives steal the humanitarian aid for their own purposes and beat civilians who attempt to claim it.

Considering Hamas control of the Gaza Strip, any aid will obviously make its way into their hands and be used to continue the fight against Israel. Israel is therefore under no international law obligation to allow such aid into the Gaza Strip. Israel may choose to allow the supply of humanitarian aid for diplomatic and other reasons, but the laws of war do not require it to do so.

<sup>39</sup> See 18 above. See too: Ori Pomson, *ISRAEL – HAMAS 2023 SYMPOSIUM – THE OBLIGATION TO ALLOW AND FACILITATE HUMANITARIAN RELIEF, ARTICLES OF WAR* (7.11.2023) <https://lieber.westpoint.edu/obligation-allow-facilitate-humanitarian-relief/>.

As a sidenote, after the disengagement in 2005, the HCJ declared the relationship between Israel and Gaza not immediately and fully severed due to the length of Israeli control over the Gaza Strip, constraining Israel to allow the entry of basic humanitarian aid such as foodstuff, medicine, clothing, electricity, and fuel (HCJ 9132/07 **Al Basyouni et al. v. The Prime Minister et al** Nevo 30.1.2008). The verdict was heavily criticized, and it is unclear what the HCJ would rule today considering the length of time since the disengagement from Gaza. The above is in any case irrelevant during wartime, and the current situation will inevitably affect any future ruling. It should be additionally noted that the decision does not distinguish between a country's duty under international law to allow humanitarian supply by third party and the duty imposed on Israel itself.

## ▶ 10 | Is Israel Obligated to Agree to a Ceasefire on Humanitarian Grounds?

Any humanitarian demand, which must be addressed as much as possible, is subject to military necessity. According to the Red Cross interpretation of the Fourth Geneva Convention: "Military necessity generally runs counter to humanitarian exigencies. Consequently the purpose of humanitarian law is to strike a balance between military necessity and humanitarian exigencies."

It is important to note that there is no duty to allow a cease-fire that harms the war effort and allows Hamas to rearm, reorganize, entrench and even launch attacks. Hamas has, in the past, severely violated humanitarian cease fires granted by Israel by carrying out numerous attacks during them. Most memorable is the 2014 Hamas killing of Major Benaya Sarel, Staff-Sergeant Liel Gidoni, and Lieutenant Hadar Goldin, the last being kidnapped as well, during an Israeli humanitarian ceasefire.

## ▶ 11 | Is It Permissible to Attack Hospitals, Schools, and Mosques That House Hamas Activity?

Hospitals, schools, and places of prayer enjoy special protected status under the Fourth Geneva Convention and as a general rule are not legitimate targets.<sup>40</sup> However, when these facilities also serve military goals (weapons storage, soldiers' accommodation, snipers' posts, headquarters, and the like) they become a legitimate military objective.<sup>41</sup>

On the flip side, it is absolutely illegal to use these facilities for military purposes.<sup>42</sup> As such, Hamas commits war crimes by using human shields, by firing weapons from within civilian areas and by operating in mosques, schools, and hospitals (Hamas headquarters are located underneath the Shifa Hospital). The Geneva Convention states that the presence of civilians within or near a military target does not grant immunity to those targets from military strikes. Obviously so, or such immunity would encourage the enemy to hide in these sensitive places and harm the civilian, noncombatant population even more.

As laid out in the introduction, international law can be deduced by the actual practice of Western countries. For instance:

40 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, Geneva Protocol II (APII) 11-12, 14-16

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

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

## A. Fallujah (2004):

The Second Battle of Fallujah commenced on 7.11.2004 with the takeover of a hospital by American special forces (supported by British and Iraqi troops). The hospital was being used by Al-Qaeda as a base of operations<sup>43</sup>.



[AP Photo / APTN / Pool]

## B. Fallujah (2014):

the Iraqi Army bombarded the Fallujah hospital with mortars several times in 2014 because it was controlled by ISIS and used for military purposes.<sup>44</sup> At the time, the Iraqi Army acted in tandem with the US as partner to the coalition forces, and according to reports, most likely carried out the strikes with American ammunition.<sup>45</sup>



[AP Photo / APTN / Pool]

43 <https://www.nytimes.com/2004/11/08/world/middleeast/early-target-of-offensive-is-a-hospital.html>  
<https://mwi.westpoint.edu/urban-warfare-case-study-7-second-battle-of-fallujah/>

44 <https://www.hrw.org/news/2014/05/27/iraq-government-attacking-fallujah-hospital>.

45 <https://www.commondreams.org/news/2014/05/27/armed-us-weapets-iraqi-govt-repeatedly-attacked-hospital>.

### C. Kunduz (2015):

In 2015, the United States Air Force bombed the hospital in Kunduz, Afghanistan. The collateral damage rose to forty-two dead and scores of wounded. The action was internationally condemned, even launching a NATO investigation that never publicized its findings. The American Army claimed the strike was intended to protect its forces who were under fire from the Taliban residing there.

Legal scholars addressed the incident in different ways. However, even the fiercest critics such as prosecutor of the International Criminal Tribunal for the former Yugoslavia Prof. Cherif Bassiouni<sup>46</sup> and the more cautious like Adv. Horowitz<sup>47</sup> all concluded alike that justification for the strike must include real time knowledge of the presence of military targets in the hospital, a military necessity and proportionality between said military necessity and the collateral damage. The disagreement centered on the US's ability to prove these stipulations. Ultimately, President Obama ordered monetary compensation for the victims' families.



[Najim Rahim/AFP/  
Getty Images]

### D. Mosul (2016):

In 2016, the United States Air Force conducted a strike on the “Al-Salam” hospital in Mosul during the fighting between ISIS and the coalition forces. Additionally, ground forces invaded the hospital and fought inside the building. ISIS stationed a base of operations in the Iraqi hospital, posting soldiers in the upper levels and fighting from within the building, while the hospital continued its regular function on the lower levels.<sup>48</sup>

46 <https://abcnews.go.com/International/international-war-crimes-charge-us-kunduz-hospital-bombing/story?id=34345406>.

47 <https://www.justsecurity.org/27026/kunduz-update/>

48 <https://www.reuters.com/article/us-mideast-crisis-iraq-idUSKBN13X1E1>  
<https://euromedmonitor.org/en/article/1750/Iraq:-In-Mosul-Battle,-ISIS-Used-Hospital-Base>

### E. Mosul (2017):

In 2017, the United States Air Force conducted a strike on the “al-Jamhuri” hospital, which also housed an ISIS base of operations; they subsequently made an official announcement:

“The ISIS terrorists continue to ignore the Law of Armed Conflict and use protected sites such as hospitals, schools and mosques to try and shield themselves from Coalition airstrikes”.<sup>49</sup>



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[Sarah Margon/  
Human Rights Watch]



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]REUTERS/Suhaib Salem[

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49 <https://www.defense.gov/News/News-Stories/Article/Article/1088185/coalition-forces-strike-five-story-facility-in-mosul/>



## F. Yemen (2015-2017):

Strikes were carried out against over 160 medical institutions in Yemen by the Saudi-led coalition forces in the years 2015-2017 during the fight against the Houthis.<sup>50</sup> The coalition was led by Muslim countries but supported by the US, Britain, France, and others. Apparently, the Houthis, much like ISIS, habitually made systematic, military use of hospitals in an attempt to shield themselves from attack.<sup>51</sup>



[STRINGER/AFP/GETTY IMAGES]

All these lead to three unequivocal conclusions:

- A. Al-Qaeda, the Taliban, ISIS, the Houthis, and Hamas in the Gaza Strip all use hospitals as bases, cynically and cruelly violating international law in an attempt to protect themselves. The noncombatant civilians, the hospitalized patients, their families, and the medical staff all serve under duress as human shields for Islamist terror forces.**
- B. International law revokes protected status from institutions when they are used militarily.**
- C. The international norm during war is to strike hospitals, subject to the fact they serve military purposes, that the military necessity to attack them is proportionate to the collateral damage thus incurred and that all measures were taken to minimize the collateral damage.**

It should be noted that all the abovementioned strikes aroused significant condemnation on the part of the human rights and international law community, as has happened in every

50 <https://www.bbc.com/news/world-middle-east-39651265>  
<https://www.savethechildren.ca/wp-content/uploads/2017/04/2212-Watchlist-Field-Report-Yemen.pdf>

51 <https://www.hrw.org/news/2015/06/17/yemen-houthis-southern-fighters-endanger-aden-hospital>.

war in the past several decades. However, international law is not fashioned by human rights organizations, the academia, or media network studios. **International law of war is delineated by ratified treaties and by the *de facto* practices of leading countries which bear the responsibility to safeguard their citizens forced to struggle with the dilemmas real fighting gives rise to.**

Granting *de facto* immunity to terroristic bases of operations and military objects placed in protected civilian facilities is not only an absurdity, a misconception of international law and a cause of harm to the soldiers and citizens of the striking party – it is also an incentive for terror organizations to continue to stage their troops in the heart of the civilian population and protected civilian objects such as hospitals, schools and mosques.

## ▶ 12 | Is Gaza occupied by Israel?

In 2005, Israel pulled all its soldiers and civilians out of the Gaza Strip. Since June 2007, Hamas is the sole authority in Gaza.

According to the laws of Belligerent Occupation, the basic condition of occupation is “effective control” of the territory. Effective control includes civilian governance of the occupied territory by the occupying forces.<sup>52</sup>

Since 2005 Israel does not effectively control Gaza and is not the sovereign governing the Gazans’ life in any accepted legal sense. If Israel needs to conduct an extensive military operation in order to take over Gaza and collapse Hamas’ rule, it’s hard to claim that it already governs there.

Some claims are made that Israeli control of land and sea borders as well as aerial space means Israel is still occupying Gaza. In practice, Israel controls only its own border with Gaza and not the border Gaza shares with Egypt. Every state controls its border with other states. Spain does not occupy Portugal because it controls its only land border. The international community does not recognize any other territory as occupied territory on similar grounds. This situation may of course change at the end of the war.

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52 Eyal Benvenisti, *The International Law of Occupation* (Princeton, NJ: Princeton University Press, 1993), 4.; Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), 43.; United States of America Wilhelm List et al., 8 *Law Reports of Trials of Major War Criminals* 38, 55–56 (United Nations War Crimes Commission 1949).

## ▶ 13 | Is the Siege of Gaza a War Crime?

Siege is an accepted military tactic, governed by the Hague and Geneva conventions. A siege is an encirclement of the enemy, including total blockage of supplies.<sup>53</sup> Under the law of war, the relevant question is whether there is a military necessity to carry out a siege and if the collateral damage to civilians is proportionate. International law does forbid starving the population as a targeted military tool.<sup>54</sup> In other words, a siege is prohibited only if its goal is starving noncombatants. The purpose of the siege on Gaza is not to starve its citizens (there is no food shortage in any case), but to weaken and defeat Hamas and to rescue the hostages, and Israel is doing all in its power to remove citizens from the areas under siege.

In Gaza, disconnecting the Strip from electricity and internet, for instance, advances a military goal by preventing Hamas from rocket manufacture, activating the ventilation and lighting systems inside the tunnels, maintaining lines of communication between their forces, operating their headquarters and command centers and so forth. It should be noted that since, as is well known, Egypt shares a border with Gaza, it is not clear that Israel's actions are even considered a siege under international law.

## ▶ 14 | Is Israel's Use of White Phosphorus Prohibited by International Law?

White phosphorus is intended to illuminate targets and create a protective smokescreen. It is not a new measure and was put to use by the US and Great Britain back in WWII. The US forces used it in the Fallujah Battle in 2004 as well as in many of the battles against ISIS.

There is no prohibition in international law against using white phosphorus. It does not appear on the lists of "incendiary munitions" or "chemical weapons" featured in the relevant treaties governing the use of conventional or chemical weapons.<sup>55</sup> US, Canadian, French, German and Australian military manuals all regulate its use. Therefore, it is permitted under the general principles of the laws of war.

53 For recognition of the siege as a legitimate measure during war, see: J. L. Briery, *The Law of Nation* 287–286 (1953). Also see: Sean Watts "Siege Law", Lieber Institute: West Point (4.3.22).; Siege. Oxford Reference. Retrieved 15 Oct. 2023, from <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100504971>.

54 The prohibition on starvation is a matter of customary law, mentioned in treaty provisions such as Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 54. 8 June 1977.

55 Protocol III of Convention on Conventional Weapons; Chemical Weapons Convention <https://lieber.westpoint.edu/white-phosphorus-and-international-law/>.

## ▶ 15 | How Should Israel Address the Issue of the ICC?

Remembering the Holocaust, Israel supported the establishment of an international criminal court, but has never ratified the Rome Statute, the ICC's foundational convention because of last minute changes made by Arab states that added a special paragraph, the sole purpose of which was to criminally implicate Jewish residence in Judea and Samaria. The Rome Statute defines "population transfer" differently than does the Geneva Convention, tailored to fit Israel<sup>56</sup>; the hostility to Israel is baked into the ICC from its conception.<sup>57</sup>

Objective legal analysis finds that the ICC has no jurisdiction over Israel. The Court has jurisdiction only over member states which accepted its authority by ratifying the Rome Statute. The ICC is not a global criminal court but a treaty body that can wield only the criminal authority granted it by member states. The only way the Court can enforce its authority on Israeli citizens is in the case of war crimes committed in a member states' territory, a situation that does not arise under current conditions.<sup>58</sup>

It is important to retain a sense of proportion and not get carried away by panic. Until today, the ICC has convicted in only ten cases – and all of them involved a targeted strike on noncombatants in one war crime or another and the obstruction of the investigation of those crimes. They have not the smallest connection to the Israeli case.

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56 Compare Fourth Geneva Convention Article 49 and Rome Statute Article 8(2)(b)(vii)

57 See the July 1998 statement of the Head of the Israeli delegation, Justice E. Nathan, Official Report Vol. II, 17 at 122 and the "Declaration made upon the Signature of Rome Statute", December 31, 2000.

58 See "The International Criminal Court's Lack of Jurisdiction Over the So-Called 'Situation in Palestine'" Avichai Mandelblit, Office of the Attorney General, Nov 20, 2019.

## ► 16 | Is the Compulsory Movement of Noncombatants to the South of the Gaza Strip Israel’s Humanitarian Duty or, in Fact, a War Crime?

As mentioned, the principle of distinction between combatants and noncombatants is the guiding principle of international law. Israel’s efforts at moving noncombatants out of battle zones is not only legal but its duty under the law of war, in order to minimize collateral damage and unnecessary civilian casualties.

The actions taken by Hamas to prevent noncombatants’ movement southwards constitute a war crime and a violation of the principle of distinction.

Since the beginning of the war, the IDF repeatedly urged North Gazan residents to move southwards to protect themselves from Israeli strikes. Some international organizations, amongst them the UNHCR, Amnesty International and the International Committee of the Red Cross, condemned the Israeli warnings and called them “forced evacuation orders”.

There is a difference between various international institutions, which are at times hostile to Israel, and the international law in and of itself, under which Israel and all other Western countries abide. The US and the coalition forces employed similar calls to the citizens to evacuate Fallujah and Mosul before commencement of the military operation.<sup>59</sup>

Israeli warnings are not “orders” since Israel has no jurisdiction over Gaza residents. Israel warns Gazans but has no means to enforce action. According to Rule 15 of the ICRC International Humanitarian Law Database there is a duty to take “all feasible precautions” to avoid civilian harm.<sup>60</sup> Rule 20 recognizes advance warning as an accepted measure to minimize such harm.

Hamas has the duty to assist in evacuating noncombatants from battle zones.<sup>61</sup> In calling on the residents of Northern Gaza to stay in place Hamas violates its international duties.<sup>62</sup> The only reason to demand that civilians stay in the killing fields is to endanger and use them as human shields.<sup>63</sup>

59 “Warning Orders: Strategic Reasons for Publicizing Military Offensives”, War on the Rocks, Carrie Lee, October 28, 2016.

60 <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15>.

61 [Rule 24](#); see also Geneva Protocol I, art. [58\(a\)](#); Geneva Protocol II, art. [13\(1\)](#); ICTY, [Dragomir Milošević](#), para. 949; ICTY, [Galić](#), para. 61).

62 <https://www.ynet.co.il/news/article/r1zlteuza>.

63 See Michael N. Schmitt, *ISRAEL – HAMAS 2023 SYMPOSIUM – THE EVACUATION OF NORTHERN GAZA: PRACTICAL AND LEGAL ASPECTS* (15.11.2023) <https://lieber.westpoint.edu/evacuation-northern-gaza-practical-legal-aspects/>

## ▶ 17 | What is the International Community's Duty Towards Hamas and Other Palestinian Terror Organizations?

Under international law, terror is a crime according to both customary and treaty law. The crime of terror is regulated under nineteen international treaties and dozens of additional UN Security Council resolutions.<sup>64</sup>

UN Security Council Resolution 1373 was adopted under Chapter VII of the UN Charter, and therefore binds all states to:

- A. Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts;
- B. Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts;
- C. Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- D. Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens”.

Thus, all states have the unequivocal duty to declare Hamas a terror organization, deny safe haven to its operatives and leaders, and prohibit the raising of funds and resources from its territories.

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<sup>64</sup> See United Nations Office of Counter-Terrorism, International Legal Documents. <https://www.un.org/counterterrorism/international-legal-instruments>