

# The Legal Aspects of Hamas's Murderous Attack on Israel

**Pnina Sharvit Baruch and Tammy Caner** | No. 1769 | October 18, 2023

**On the morning of Saturday, October 7, 2023, on the Jewish holiday of Shemini Atzeret and Simhat Torah, Hamas launched a murderous terror attack against Israel. In a series of war crimes and crimes against humanity, Hamas killed more than 1,400 people, the vast majority of them civilians; wounded more than 3,300; and took around 200 people hostage or captive. The numbers are still growing. Although this attack was directed toward Israeli civilians, it should be cast as a crime against humanity at large. The brutality and atrocities by the Hamas terrorists bring to mind the worst rampages of ISIS, violate the most fundamental moral and legal norms, and threaten not only the peace and stability of Israel but of the entire free world.**

## **The Murderous Attack**

In September 2005, Israel completed its disengagement from the Gaza Strip, evacuating 25 settlements and withdrawing its troops. Hamas, a radical Islamic terror organization, forcibly took control of Gaza in June 2007 and has been the de facto government there since. The organization, whose charter calls for the destruction of the State of Israel, has pursued a policy of terror against Israel over the years, leading to terror attacks against Israeli civilians and rocket fire at Israeli communities. This has prompted several rounds of fighting.

On the morning of Saturday, October 7, 2023, thousands of armed terrorists led by Hamas broke through the border fence between Israel and Gaza, using explosive devices and bulldozers, after taking down the IDF's observation equipment. Backed by a massive barrage of rockets fired toward Israel, convoys of terrorists, armed with machine guns, hand grenades, and RPGs, streamed into Israeli territory. They infiltrated over twenty civilian communities and several army bases in the south, where they slaughtered Israeli civilians and soldiers. It took three days for Israel to regain full control of this area, while rockets rained down on Israeli towns and cities, and terrorists continued to try and infiltrate the country.

Hamas itself revealed the extent of the barbarity of the attack in [videos that it posted](#) on various social media channels. In the clips, Hamas terrorists can be seen holding whole families – men, women, children, and even the elderly with their caregivers – as hostages in their own homes for hours. Most of them were brutally murdered, including by beheadings or by burning them alive. Children were tied up and murdered in front of their parents, and parents were murdered in front of their children. Brutal Hamas

terrorists sliced a baby out of a pregnant Israeli's womb. Women and girls were raped. Scores of civilians were taken captive by Hamas into the Gaza Strip, including babies and elderly people. At a music festival in a nearby nature reserve, the terrorists slaughtered more than 260 young people. In the videos, Hamas terrorists can be seen taking over the area where the festival was underway, shooting people as they fled for their lives and mutilating their bodies. Some were kidnapped and taken into Gaza; footage shows young women being dragged naked in the streets of Gaza; others are still missing. When Israeli forces retook full control of the area, the extent of the slaughter became apparent, and more evidence emerged about the atrocities committed by the terrorists. For Jews these were the worst massacres since the Holocaust, and the stories told by survivors are reminiscent of those dark days.

### **War Crimes and Crimes Against Humanity**

Hamas's bloody offensive took Israel by surprise, but the awful scope of the massacre stems, above all else, from the fact that Israeli civilians were the direct and deliberate target of the attack and the atrocities committed. The acts perpetrated during the attack were not a case of incidental civilian deaths that were an integral part of a military operation. In fact, the attacks on soldiers and other security forces immediately after Hamas entered Israeli territory were designed first and foremost to allow Hamas to achieve its primary objective – a cruel massacre and abduction of civilians into Gaza. Moreover, the direct and illegal attack on Israeli civilians was conducted with ISIS-style barbaric terrorist practices. These horrendous acts violate the most fundamental human codes of ethics; they are the manifestation of evil.

The atrocities committed by Hamas fall firmly under the category defined by international law as war crimes and crimes against humanity, and amount to genocide.

War crimes are crimes committed during an armed conflict. The crimes committed during the Hamas attack include willful killing, torture, and inhumane treatment, willful cause of great suffering, or serious injury to body or health, rape and sexual violence, taking of hostages, use of civilians as human shields, and looting.

Such acts are also crimes against humanity, which are those committed as part of a widespread or systematic attack directed against a civilian population. The crimes against humanity that Hamas committed include murder, extermination, enslavement, torture, rape and sexual violence, inhumane acts causing great suffering and enforced disappearances.

In addition, these acts fall under the definition of genocide that appears in the Rome Statute, which lists a series of acts, including murder, infliction of serious bodily or mental harm, and forcible transfer of children, when carried out against members of a national, ethnic, racial, or religious group with the specific intent of destroying that group in whole or in part.

The perpetrators of these atrocities could be prosecuted in an Israeli criminal court, as well as in courts in any country that has universal jurisdiction over such crimes. In

addition, they could be tried in any country whose citizens were among the victims, given a nation's jurisdiction over crimes directed against its citizens. Among the victims of the Hamas attack were citizens of over 40 countries; some of these countries have already announced that they are launching investigations into crimes against their nationals.

The Hamas crimes must also be addressed within the ongoing investigation by the International Criminal Court (ICC), which encompasses alleged crimes committed in the West Bank (including East Jerusalem) and the Gaza Strip. As that investigation is mandated to examine all crimes committed after June 13, 2014, these recent crimes are included. Given that Israel opposes the ICC jurisdiction to carry out such an investigation, there is no reason to assume that it will take any active measures to encourage the Court to examine these crimes. At the same time, this would not prevent others that are not official representatives of the State of Israel from providing the ICC prosecutor with evidence of the brutal crimes committed by Hamas and other terrorist elements.

Many countries issued harsh condemnations of Hamas's brutal terror attack. US President Joe Biden gave a powerful and emotional [speech](#) on October 10. The response from the United Nations, in contrast, has been weak. The Security Council held an emergency session on October 8 but did not issue a formal condemnation of Hamas. UN Secretary General António Guterres issued a condemnation shortly after the attack was launched, but since then his comments have focused on the need for Israel to protect civilians and civilian infrastructure in the Gaza Strip. Other UN bodies, which are responsible for human rights, issued negligible condemnations, mostly calling on both sides to refrain from harming civilians and thereby equating the Hamas atrocities and Israel's military response.

Prosecutions and condemnations help to shape global public opinion and the diplomatic narrative, but they will not halt Hamas, just as they did nothing to stop the murderous campaigns of al-Qaeda and ISIS. Thus, Israel has no choice but to use military force to end Hamas' terror once and for all.

### **Israel's Right to Defend Itself**

The brutal attack and the horrendous crimes committed by Hamas against Israeli citizens prove beyond doubt the years-long Israeli argument that it is fighting a war of self-defense against a murderous terrorist organization. Israel is fully justified – and even has an obligation to the citizens for whom it is responsible – to act in such a way that ensures that Hamas cannot continue attacking the country or threaten its security. Hamas's massive and sophisticated attack, which used advanced equipment and was based on meticulous planning, makes it patently clear that it is an extremely dangerous enemy. Israel has no choice but to eliminate Hamas' dangerous military capabilities. To this end, Israel has no recourse other than to use a massive amount of firepower.

In this context, it is important to examine comments made in certain Israeli circles that suggest there are no legal limitations on any Israeli response, given the extreme

brutality of the Hamas attack. Such comments, a result of the shock over the horrific massacres, are unfounded and might create a misleading impression of the nature the Israeli response. Israel is a law-abiding country, and as such, even in its darkest hour, is obligated to act in accordance with the rules of war. This time, however, those rules give Israel much greater room for maneuver because of the immense threat that Hamas poses to its security.

In the framework of an armed conflict, every party to that conflict – including non-state entities like Hamas – must act in accordance with the laws of armed conflict (also known as international humanitarian law – IHL). Hamas patently violated those laws. At the same time, Israel is not exempt from abiding by them since there is no principle of reciprocity in the laws of war. Israel's military forces, emissaries of a law-abiding country, operate in accordance with orders that have the laws of armed conflict embedded within them and are advised by military legal advisors. The laws of armed conflict acknowledge military necessity as a leading principle and grant a country more freedom of action, the greater the threat before it.

According to the principle of distinction, it is forbidden to direct an attack against civilian objects, and attacks are permitted only against military objectives. However, when civilian objects are used for military purposes they lose their civilian nature and become military targets that are lawful targets for attack. Israel is targeting Hamas' military infrastructure, which is located in and under civilian buildings. This is a purposeful strategy, meant to use civilians as shields in order to thwart Israeli operations for fear of losing the legitimacy for the attacks. This makes these buildings a lawful military target.

Beyond the principle of distinction, Israel must also abide by the principle of proportionality. According to this principle, an attack against a military objective will be unlawful if the anticipated collateral damage to civilians and civilian objects would be excessive in relation to the military advantage expected from the attack.

In light of the major threat that Hamas currently poses to the State of Israel, attacking it and neutralizing its military capabilities, which is essential in order to remove the threat, can be expected to bring a huge military advantage to Israel. If Israel does not remove this threat, residents of southern Israel will not be able to return to their homes, and Hamas will have prevented Israel from fulfilling its sovereignty over the area adjacent to the Gaza Strip. To eliminate Hamas' military capabilities, Israel is forced to carry out massive successive strikes in the heart of the civilian population. Due to the very significant military advantage this would afford, even if a considerable number of civilians are harmed this does not necessarily mean that the attacks are disproportionate, and as such, an attack of this sort can be considered perfectly legal. This is certainly the case with regard to harm caused to civilian infrastructure, when the aim is to protect the lives of Israel's civilian population. Moreover, one can also argue, and this is the US official position, that those civilian buildings used for military purposes have forfeited their civilian nature by the military use, and therefore the damage to such structures in the attacks are not part of the proportionality equation.

Israel also has an obligation to take feasible precautions intended to minimize harm to civilians from the military strikes. There is no legal obligation to provide individual warnings prior to attack. Israel has provided a general warning to civilians to evacuate the areas prior to attacks and allowed time to leave. This is a feasible precaution under the circumstances. Hamas is trying to prevent this evacuation, as it is interested in using the civilians in Gaza as human shields.

Beyond questions of legality there is the issue of international legitimacy. Israel is currently enjoying wide international legitimacy, which grants it greater freedom of operation. The horrific atrocities perpetrated by Hamas, which were broadcast across the world, and the huge number of Israeli victims have evoked broad support on the international stage and an understanding of Israel's need to use force. Nevertheless, in order to maintain legitimacy, Israel must ensure – both in practice and in statements by officials – that it respects legal norms. President Biden said as much in his highly sympathetic speech of October 10, in which he pointed out that democracies like the United States and Israel are strongest when they abide by the law. Beyond this, it is safe to assume that as soon as images of the atrocities committed by Hamas are replaced by reports of death and destruction in Gaza, that legitimacy will erode. Therefore, Israel should take full advantage of it in the early stages of the conflict.

The murderous and barbaric attack by Hamas proves that the global trend to blame Israel exclusively for the conflict with the Palestinians is groundless. The goal of Hamas and its supporters is the destruction of the State of Israel. The Iranian regime and Hezbollah in Lebanon, both of which support Hamas to a massive degree, share that goal. It can only be hoped that people across the world who bought into the twisted messages of those conducting a campaign of delegitimization against Israel will wake up and realize that Israel's enemy in the Gaza Strip is not a peace-loving Palestinian victim and that Israel's goal is not to keep the Palestinian people under occupation. Rather, Israel's enemy is a hostile, powerful, and cruel enemy that seeks to destroy it, and is ready to pay with the lives of its own people. The Hamas terror organization is not fighting for the freedom of Palestinians – it is sacrificing Palestinians to fulfill its sole mission – the destruction of the State of Israel.

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Editors of the series: Anat Kurtz, Eldad Shavit and Judith Rosen