



BOFAXE

Israel and Gaza in the Heat of the Moment (Part 1)

Why Sound Legal Analysis Must Trump Rhetoric and Prevail

— On 7 October 2023, Hamas militants staged an unprecedented attack on Israel, indiscriminately launching thousands of rockets from Gaza into Israel, rampaging through villages and a music festival site, and leaving around 1400 dead, mostly civilians (see [here](#)). In light of the, reportedly gruesome, slaughter of so many, it is not surprising that Israel reacted with shock and indignation, even more so given that Hamas also abducted around 220 hostages to Gaza. That a heinous attack of this magnitude would evoke collective memories of the Nazi Holocaust of Jews and anti-Jewish pogroms in Europe in the 19th and 20th centuries, the historical impetus for Jewish immigration to Palestine, is equally understandable. Israel, exercising its right to self-defence under Article 51 of the United Nations (UN) Charter has begun an operation to eradicate Hamas and demilitarize Gaza. The applicable legal framework and whether this response is carried out in a manner compatible with international (humanitarian) law is currently being discussed extensively (see for example [here](#) and [here](#)).

This piece intends to point to a different issue, namely the rhetoric employed throughout the conflict: It calls into question the way Hamas, as well as several Israeli officials, have been employing the language of international law to stake claims, while simultaneously making statements displaying a disregard for international law rules perceived as inconvenient. In the heated situation at hand, such rhetoric only entails further potential to exacerbate violence (see [here](#) for a current study on the effects of dehumanization and revenge propaganda).

Hamas' s attack constitutes an egregious violation of international law and has rightly been condemned as such. In a public statement, many [international law experts](#) have noted the level of violence inflicted and, with regard specifically to the abduction of hostages, including children, into Gaza, stressed Hamas' s accountability for any violations of their human rights and called for immediate action to ensure their safety and well-being. For its part, the groups' attempts to defend its attack using legal arguments have been lukewarm at best. Still, Hamas has explicitly invoked international law and so its claims must be addressed. Shortly after Hamas entered Israeli territory, Mohammed Deif, the elusive leader of its military wing, the Al-Qassam Brigades, referring to the attack as "Operation Al-Aqsa Flood" in a rare address [stated](#):

"In light of the orgy of occupation and its denial of international laws and resolutions, and in light of American and western support and international silence, we've decided to put an end to all this".

Hamas' s Political Chief Ismail Haniyeh similarly [claimed](#) that the attack, without discussing its heinous nature regarding civilian casualties, was part of a battle to liberate Palestinian land and prisoners.

Khaled Mashal, former Hamas chief and currently head of its diaspora office, and Hamas head of political relations Basem Naim also have, in subsequent interviews and statements (see [here](#), [here](#) and [here](#)) referred to Israel' s ongoing occupation and the right of the Palestinian people to self-determination and claimed a right to armed resistance or self-defence. Moreover, referring to the nature of the attack itself, both essentially went so far as claiming Hamas brigades did not kill any civilians on 7 October, insinuating that all Israelis murdered in the attack were legitimate targets as "settlers" or "soldiers", all the while referring to the "rules of war" to justify such actions.

This line of argument has been convincingly dismissed (see [here](#)). Nevertheless, it was reiterated later by Hamas' s deputy foreign minister, Ghazi Hamad, [stating](#) in a BBC interview: "[Hamas] did not have any intention or decision to kill civilians [... but] the area is very wide, there were many people and there were clashes and confrontations".

It is telling that when pressed by the BBC' s interviewer on how the killings of Israeli civilians in their homes squared with this claim, Mr. Hamad decided to simply end the interview. By the logic that all Israelis are in one way or another settlers on Palestinian lands, subject to armed resistance, it appears that for Hamas, in complete disregard of the law of armed conflict, every Israeli, from a soldier stationed in an army barracks, to a family in their home, would become a legitimate target at any time. Given the lack of public opposition from within the organisation to this argument, one may assume that Hamas will continue to indiscriminately target all Israelis within its reach. In this way it appears, pointing to recognized Israeli violations of international law vis-à-vis Palestinians, for Hamas effectively serves as a rhetorical defence for a self-issued blank cheque to commit atrocities against Israelis.

All of this is not to say that the wider context of the Israeli-Palestinian conflict must not be considered in finding a solution to the humanitarian crisis currently unfolding in Israel and the Palestinian territories, specifically Gaza. On the contrary, context does indeed matter as previously argued [here](#), and the ongoing plight of Palestinians subsisting in the occupied territories or the long-sealed-off Gaza strip likely lies at the root of radicalization. Consequently, a large [group of UN Special Rapporteurs](#) speaking on the crisis has called on the international community to address the root causes of the conflict, including Israel' s occupation of Palestinian territories. Contrary to Hamas' s claims, however, none of these Palestinian grievances can in any way be used to justify the terror it has inflicted on Israeli civilians.



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Israel and Gaza in the Heat of the Moment (Part 2)

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— This is also what UN Secretary-General Antonio Guterres clearly highlighted in his remarks to the Security Council of 24 October at a time when Israel had launched its military operation, “Iron Swords”, to destroy Hamas in Gaza. Still, Israeli ambassador to the UN, Gilad Erdem, accused Guterres of distorting reality, called for his resignation and announced Israel would refuse visas to UN representatives. In doing so, he appears to imply that any contextualisation of Hamas’s actions means condoning them. That is a dangerous fallacy. It is both possible and necessary to denounce Hamas’s killing of civilians as a violation of international law while asking for any response to comply with the rules of war, all the while keeping track of the wider Israeli-Palestinian conflict in view of a long-term solution (see here for a thoughtful case in point from renowned Israeli scholar Itamar Mann and here for a nuanced analysis with comments from Marco Sassòli, leading scholar on the rules of armed conflict). Worryingly, several Israeli actors, including members of the highest circles of government, have instead resorted to calls for revenge and employed dehumanizing language on multiple occasions. Shortly after the Hamas attack, Israel’s Minister of Defence and member of its War Cabinet Yoav Gallant said the following: “I have ordered a complete siege on the Gaza Strip. There will be no electricity, no food, no fuel, everything is closed (...). We are fighting human animals and we are acting accordingly”.

Echoing Gallant, Maj. Gen. Ghassan Alian heading the Coordinator of Government Activities in the Territories (COGAT), after denouncing Hamas and perceived support among Palestinians for its attack, further stated:

“Human animals must be treated as such. There will be no electricity and no water [in Gaza], there will only be destruction. You wanted hell, you will get hell.”

Notwithstanding Israel’s right to self-defence, such rhetoric does not appear at all conducive to the Israeli military forces on the ground carrying out a response in line with international law, particularly the law of armed conflict. That any Israeli response must comply with international law should be a given. Although Israeli indignation and anger in response to the criminal acts perpetrated by Hamas are understandable, calls for revenge and carte blanche for its war on Hamas can and must not be heeded by the international community (see here). Considering Israel’s complete siege of Gaza, incessant bombing of alleged Hamas targets in densely populated cities and its relocation order for 1,1 million Gazans for all of whom so far no more than the number of truckloads of aid that usually entered Gaza in one day have been allowed to enter in a span of three weeks, urgent calls from international institutions for compliance with the rules of armed conflict and critical assessments (see here) of the legality of specific measures shouldn’t be construed as mere moral lecturing.

Calls for compliance with international law are important, given the stance of several Israeli officials who have denied there is any humanitarian crisis in Gaza (see only here), despite statements to the contrary from all major humanitarian aid organizations (see only here). Israel also has a track record of disregarding demands from the International Court of Justice and the UN Security Council, to change its approach as an occupying power vis-à-vis Palestinians (see here). Disparaging remarks about Palestinians in general from Israeli officials have also been documented before Hamas’s attacks. The Minister for National Security, Itamar Ben-Gvir and Finance Minister Bezalel Smotrich, both cabinet members under the current Netanyahu government, have been especially unhelpful in this regard and condemned both within and outside Israel on multiple occasions (see just here and here).

The danger of Israel overstepping the limits of self-defence in its legitimate bid to crush Hamas also cannot be brushed aside by referring to its character as a democratic state which can be counted on to do the right thing, as German Chancellor Olaf Scholz indicated just a few days ago. After all, the undeniably democratic character of the United States of America did not keep it from responding to the heinous attacks of 11 September 2001 (9/11) with a “War on Terror”, the legally and strategically questionable nature of which spurred a surge of anti-Americanism far beyond the Muslim world and, led among others, to the destabilization of the Eastern Mediterranean including hundreds of thousands of dead under the American occupation of Iraq and, ultimately, prompted the rise of the Islamic State.

Israel needs to avoid a similar scenario. However, statements like the one by former Prime Minister Naftali Benett resemble the vengeful tone of some of America’s post-9/11 rhetoric when he lectures and lambasts the BBC: “We’re fighting the war of the free world against radical Islamic barbarism, rape, head-chopping and baby-burning. It’s a war between good and evil. The fact that you call these Hamas barbarians ‘militants’ [...] shames you. [...] Your moral weakness invites these monsters to attack you.”

This can also be said for the following comment by Israel’s former Minister of Justice Gideon Sa’ar who stressed that “Gaza must be smaller after the war, [not only for security reasons, but because] it’s the price of loss that the Arabs understand”.

It is therefore relieving to note that the international community has increasingly called on Israel to allow for unimpeded humanitarian aid into Gaza from the Egyptian-Gaza border crossing at Rafah, which slowly seems to materialize. Given the nevertheless catastrophic conditions of more than two million inhabitants of Gaza who remain effectively trapped in the enclave, the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 Francesca Albanese has warned of mass ethnic cleansing and a group of international law scholars has referred to a potential for genocide in Gaza, a term whose application to the current situation is also viewed critically.

Still, whether such warnings are imminently in danger of becoming a reality is beside the point. Considering the rhetoric that has so far been employed, invoking the supremacy of international law under all circumstances is not a cynical moral exercise but essential in the wake of Hamas’s disregard for the paramount distinction between civilians and combatants and the danger of Israeli outrage leading to further violations of international law.

There certainly is an inherent complexity to the Israeli-Palestinian conflict that has been simmering for 75 years and whose roots lie in the more distant past (for recent legal scholarship on the conflict and its history, see here). That, however, does by no means imply it cannot be broken down into its component pieces and made the subject of rigorous legal analysis. Times may be especially trying now, but that only makes it all the more important for international lawyers and, especially, conflict parties to not replace a law-oriented approach with brash political action.