



# AMERICAN PERSPECTIVES ON THE LAW OF ARMED CONFLICT & THE 2023 ISRAEL-HAMAS WAR

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November 5, 2023

## I. PURPOSE & OVERVIEW

The purpose of this paper is to provide a comparative legal analysis of Israel’s military response to Hamas’s deadly attacks in southern Israel on October 7, 2023. Using the U.S. Department of Defense (DoD) Law of War Manual<sup>2</sup> and examples from American history, this paper aims to shed greater light on the legality of Israel’s actions under the Law of Armed Conflict (“LOAC” or “law of war”).

The paper will proceed by first outlining specific critiques of Israel’s approach commonly offered by commentators and journalists. Then, the paper will identify and apply the relevant American interpretation of the law of armed conflict, citing historical examples from American military campaigns as support. Finally, each section will culminate in a conclusion of law as it relates to Israel’s actions.

Given this most recent conflict between Israel and Hamas has elements of both international and non-international armed conflict, the pertinent laws of both to which Israel has chosen to bind itself, as interpreted by the DoD, will apply. Specifically, these laws include the 1949 Geneva Conventions (“GC”), Common Articles 2 and 3 of the same, the principles of LOAC, and customary international law. Although Israel is not a party to Additional Protocol I (“AP I”) or Additional Protocol II (“AP II”) to the Geneva Conventions, the analysis will consider both when advantageous for greater context or understanding.

## II. SIEGE

One of the foremost criticisms of Israel’s response to the attacks of October 7, 2023, concerns Israel’s siege of the Gaza Strip, with some referring to the siege as an unlawful form of “collective punishment.”<sup>3</sup>

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<sup>2</sup> Available at <https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/DOD-LAW-OF-WAR-MANUAL-JUNE-2015-UPDATED-JULY%202023.PDF>.

<sup>3</sup> See, e.g., *Israel/OPT: Israel Must Lift Illegal and Inhumane Blockade on Gaza as Power Plant Runs Out of Fuel*, AMNESTY INT’L (Oct. 12, 2023), <https://www.amnesty.org/en/latest/news/2023/10/israel-opt-israel-must-lift-illegal-and-inhumane-blockade-on-gaza->



Although the effects of a siege on noncombatants and civilians can be devastating, siege is not prohibited under the law of war.<sup>4</sup> Inherent to the authority to lay siege is the authority to “exercise control (e.g., stopping, searching, and diverting traffic) over civilians” and forbid “all communications and access between the besieged place and the outside.”<sup>5</sup> Although encouraged to do so, a commander is not required under the Geneva Conventions to arrange for the “removal of wounded, sick, infirm and aged persons, children, and maternity cases, or for the passage of ministers ... medical personnel, and medical equipment on their way to such areas.”<sup>6</sup> Commanders are likewise encouraged to allow the passage of relief consignments (e.g., food, medicine, clothing), but no such requirement exists if the commander laying siege believes such consignments either “may be diverted from their destination” or may not be effectively controlled or “a definite advantage may accrue to the military efforts or economy of the enemy.”<sup>7</sup> While forces laying siege may not refuse to allow civilians to flee a besieged area, there is no requirement on the part of the besieging force to guarantee civilians’ ability to flee, to permit civilians to flee behind the besieging forces lines, or to provide for refugees or displaced persons.<sup>8</sup>

Reducing the risk of incidental harm to civilians falls primarily on the besieged force, who should “mark protected buildings to indicate their protected status to enemy forces” and “concentrate the wounded and sick and civilians in areas remote from military objectives.”<sup>9</sup>

Starvation directed at civilians by the besieging force is prohibited, but starvation directed at enemy forces—even where the incidental starvation of civilians results—is lawful if conducted in accordance with the principles of distinction and proportionality.<sup>10</sup> AP I generally prohibits the destruction of “objects indispensable to the survival of the enemy civilian population,” to include “foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations, and supplies for irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party.”<sup>11</sup> Yet even AP I has a carveout for “imperative military necessity” when a party to the conflict is engaged in territorial defense.<sup>12</sup>

Given the counter-insurgency paradigm of the Global War on Terror over the past two decades, siege warfare is less common today than it once was. That said, it remains a viable means of waging war—especially when an adversary takes up refuge in an urban center.<sup>13</sup> For example, the United States, alongside the Iraqi Army and as part of the multinational Combined Joint Task Force – Operation Inherent Resolve, engaged in siege warfare as recently as 2017 against the Islamic State in the city of Mosul.<sup>14</sup> During that siege, the death toll, which included civilians, reportedly reach as high as 11,000, and roughly three-quarters of the city was destroyed.<sup>15</sup> Despite these losses, siege warfare was credited as instrumental in delivering a victory to Iraqi Army and the

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as-power-plant-runs-out-of-fuel/; Akshaya Kumar, *With Gaza Sealed Off, Palestinians Face Aid Freezes Too*, HUMAN RIGHTS WATCH (Oct. 11, 2023), <https://www.hrw.org/news/2023/10/11/gaza-sealed-palestinians-face-aid-freezes-too>.

<sup>4</sup> See U.S. Department of Defense Law of War Manual, § 5.19.1 (hereinafter “DoD LoWM”).

<sup>5</sup> DoD LoWM, §§ 5.19.1.1; 5.19.2. (citing GC art. 17; GWS art. 15; and GWS-SEA art. 18).

<sup>6</sup> *Id.*

<sup>7</sup> DoD LoWM at § 5.19.3 (citing GC art. 23).

<sup>8</sup> DoD LoWM at § 5.19.4.1.

<sup>9</sup> DoD LoWM at § 5.19.5.

<sup>10</sup> DoD LoWM at §§ 5.20 (citing LIEBER CODE art. 17); 5.20.1-2.

<sup>11</sup> DoD LoWM at § 5.20.4 (citing AP I art. 54(2)).

<sup>12</sup> *Id.* (citing AP I art. 54(5)).

<sup>13</sup> Hitoshi Nasu & Winston Williams, *Urban Siege Warfare: A Workshop Report*, ARTICLES OF WAR (Aug. 19, 2022), <https://lieber.westpoint.edu/urban-siege-warfare-workshop-report/>.

<sup>14</sup> Amos Fox, *The Reemergence of the Siege: An Assessment of Trends on Modern Land Warfare*, INSTITUTE OF LAND WARFARE: LAND POWER ESSAY (June 2018) at 3, <https://www.ausa.org/sites/default/files/LPE-18-2-The-Reemergence-of-the-Siege-An-Assessment-of-Trends-in-Modern-Land-Warfare.pdf>.

<sup>15</sup> *Id.*



multinational coalition, with one scholar observing, “[S]o long as the positional battle of attrition’s layered urban defense continues, so too will its counterpoint, the siege.”<sup>16</sup>

Turning to Israel’s situation, although it has laid siege to the Gaza Strip, it has not done so out of retribution or “punishment,” but for a military advantage in pursuit of its adversary’s surrender or defeat. Israel has neither directed its siege at civilians nor prohibited civilians from fleeing the area (it has, in fact, urged civilians to leave the locality). Moreover, Israel is under no obligation under the law of war to facilitate the passage of humanitarian assistance to benefit civilians remaining in the Gaza Strip—especially given the likelihood that such assistance will be intercepted by Hamas.<sup>17</sup> (It is worth noting here that although Israel has declined to provide humanitarian aid from its own stores, it has agreed to permit food, water, and medicine for civilian use to pass into the Gaza Strip from Egypt.<sup>18</sup>) For similar reasons, Israel is under no obligation to agree to a ceasefire or humanitarian “pause,”<sup>19</sup> particularly if the risk is too great that such a break in the hostilities will advantage Hamas.<sup>20</sup>

To the extent that Israel’s siege has resulted in incidental harm to civilians, the harm has been worsened profoundly by Hamas’s refusal to “mark protected buildings to indicate their protected status to enemy force” and “concentrate the wounded and sick and civilians in areas remote from military objectives”<sup>21</sup>; indeed, it seems Hamas has done the opposite, intentionally concentrating its military forces near hospitals<sup>22</sup> and discouraging civilians from fleeing to safety.<sup>23</sup> As the actions of the United States’s and coalition partners showed in retaking Mosul in 2017, a siege is a proper and lawful tool to gain the upper hand in urban combat. For these reasons, Israel has acted lawfully.

### III. FORCIBLE TRANSFER OF CIVILIANS

Following Israel’s order for civilians to evacuate northern Gaza October 13, 2023, some commentators, including those at the United Nations, claimed that “Israel’s complete siege of Gaza, combined with the evacuation order, could amount to a forcible transfer of civilians, breaching international law.”<sup>24</sup>

The prohibition against forcible transfers in international law comes from Article 49 of the Fourth Geneva Convention of 1949, which states, “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”<sup>25</sup> However, total or partial evacuations of an area are

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<sup>16</sup> Amos Fox, *What the Mosul Study Group Missed*, MODERN WAR INSTITUTE (Oct. 22, 2019), <https://mwi.westpoint.edu/mosul-study-group-missed/>.

<sup>17</sup> *The Gaza Hospital and the Missing Aid*, WSJ (Oct. 17, 2023), <https://www.wsj.com/articles/gaza-aid-unrwa-united-nations-hamas-israel-45bfbfe>.

<sup>18</sup> See Statement from the Prime Minister’s Office (Oct. 18, 2023), <https://www.gov.il/en/departments/news/spoke-cabinet181023>.

<sup>19</sup> See Chris Megerian and Aamer Madhani, *Biden Calls for Humanitarian ‘Pause’ in Israel-Hamas War*, ASSOC. PRESS (Nov. 1, 2023), <https://apnews.com/article/israel-palestinians-hamas-biden-ceasefire-422ed95081e5fe224dd9f0ed7920c4e8>.

<sup>20</sup> Timothy Nerozzi, *Hillary Clinton Says Those Demanding Ceasefire ‘Don’t Know Hamas’*, YAHOO! NEWS (Oct. 31, 2023), <https://news.yahoo.com/hillary-clinton-says-those-demanding-125734375.html>.

<sup>21</sup> DoD LoWM at § 5.19.5.

<sup>22</sup> Transcript of Press Briefing, Brigadier General Pat Ryder, Pentagon Press Secretary (Oct. 30, 2023), (<https://www.defense.gov/News/Transcripts/Transcript/Article/3572933/a-senior-defense-official-holds-a-background-briefing/>).

<sup>23</sup> *Hamas Tells Gaza Residents to Stay Put as Israel Ground Offensive Looms*, REUTERS (Oct. 13, 2023), <https://www.reuters.com/world/middle-east/hamas-tells-gaza-residents-stay-home-israel-ground-offensive-looms-2023-10-13/>.

<sup>24</sup> *Israel Could be in Breach of Global Law with Gaza Relocation Order: UN*, AL JAZEERA (Oct. 17, 2023), <https://www.aljazeera.com/news/2023/10/17/israel-could-be-in-breach-of-global-law-with-gaza-relocation-order-un>.

<sup>25</sup> Art. 49, Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949). Rule 129 of Additional Protocol I echoes this language, saying parties to an international armed conflict may not “deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand.” A similar provision in AP I applies to non-international armed conflict, saying, “Parties to a non-international armed conflict may not



permissible if performed for the “security of the population” or for “imperative military reasons.”<sup>26</sup> An Occupying Power that conducts such a transfer or evacuation “shall ensure, to the greatest practicable extent: (1) that proper accommodation is provided to receive the protected persons; (2) that evacuations or transfers are effected with satisfactory conditions of hygiene, health, safety, and nutrition; and (3) that members of the same family are not separated.”<sup>27</sup>

Applying these rules to Israel’s case, a threshold question is whether Israel is an “Occupying Power” within the meaning of Article 49. To be sure, some in the international community regard Israel as an occupier of the Gaza Strip as a result of Israel’s continued control of Gaza’s territorial waters and airspace.<sup>28</sup> But there nonetheless remains substantial disagreement over whether Israel is occupying the Gaza Strip under the customary definition of occupation under Article 42 of the Fourth Hague Convention, which considers a territory occupied “when it is actually placed under the authority of a hostile army” and further limits the definition of “occupation” to apply to “only the territory where such authority has been established and can be exercised.”<sup>29</sup>

Following Israel’s unilateral disengagement from the Gaza Strip in 2005, many in the international community—including international law scholars, military professionals, and foreign policy experts—concluded Israel’s occupation of the Gaza Strip had ended.<sup>30</sup> For its part, the United States does not recognize Israel as an occupier of the Gaza Strip.<sup>31</sup> Israel has no ground troops stationed in Gaza and has no meaningful control over life in Gaza; its orders therein are thus completely unenforceable. Nor has Israel used force or even the threat of force to remove citizens of Gaza from their homes—it has merely warned them of an impending attack and encouraged them to leave temporarily for their safety. That the effects of a lawful siege might also motivate some civilians to seek safe haven elsewhere hardly amounts to a “forcible transfer”; if the contrary were true, then any instrumentality of war detestable enough to civilians to bring about their flight could form the basis of a forcible transfer.

Yet even if Israel were properly deemed an “Occupying Power” within Article 49’s meaning and were engaged in a temporary evacuation for the security of Gaza’s civilians, it does not follow that Israel is required to provide for the accommodation and basic human needs of evacuees. Article 49 imposes such an obligation on the Occupying Power only insofar as it is “practicable.” It is difficult indeed to say such accommodations are practicable in Israel’s case; even the mere presence of Israeli troops in the Gaza Strip is liable to “result in numerous casualties among Palestinian civilians as well as Israeli soldiers, potentially triggering a dramatic escalation of hostilities in the region[.]”<sup>32</sup>

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order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.”

<sup>26</sup> DoD LoWM at § 11.12.3.1.

<sup>27</sup> DoD LoWM at § 11.12.3.1 (citing GC art. 49).

<sup>28</sup> Celeste Kmiotek, *Israel Claims it is No Longer Occupying the Gaza Strip. What Does International Law Say?*, ATL. COUNCIL (Oct. 31, 2023), <https://www.atlanticcouncil.org/blogs/menasource/gaza-israel-occupied-international-law/>.

<sup>29</sup> Article 42, Fourth Hague Convention (1907).

<sup>30</sup> Celeste Kmiotek, *Israel Claims it is No Longer Occupying the Gaza Strip. What Does International Law Say?*, ATL. COUNCIL (Oct. 31, 2023), <https://www.atlanticcouncil.org/blogs/menasource/gaza-israel-occupied-international-law/>.

<sup>31</sup> Peter Baker, *Biden Warns Israel Not to Occupy Gaza*, N.Y. TIMES (Oct. 15, 2023), <https://www.nytimes.com/2023/10/15/us/politics/biden-israel-gaza.html>.

<sup>32</sup> Yasmeen Abutaleb, et al., *U.S. Urges Israel Against Gaza Ground Invasion, Pushes Surgical Campaign*, WASH. POST (Oct. 27, 2023), <https://www.washingtonpost.com/politics/2023/10/27/us-urging-israel-rethink-gaza-ground-invasion/>.



One need only revisit the haunting reason for Article 49's existence, as captured in the 1958 Commentary to the Fourth Geneva Convention, to see just how dissimilar Israel's actions are from that which was contemplated by Article 49's authors:

There is doubtless no need to give an account here of the painful recollections called forth by the "deportations" of the Second World War, for they are still present in everyone's memory. It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions. These mass transfers took place for the greatest possible variety of reasons, mainly as a consequence of the formation of a forced labour service. The thought of the physical and mental suffering endured by these "displaced persons", among whom there were a great many women, children, old people and sick, can only lead to thankfulness for the prohibition embodied in this paragraph, which is intended to forbid such hateful practices for all time.<sup>33</sup>

A far cry from tearing "women, children, old people and sick" from their homes to work to death in forced labor camps, Israel's actions are far more appropriately characterized as a warning to civilians of an imminent attack, as is required by the long-standing rule of customary international law.<sup>34</sup> Indeed, Israel may be trying not to repeat history; after the 2008-2009 conflict in Gaza, a report issued following a United Nations fact-finding mission criticized Israel for, among other things, *not* providing sufficient warning to civilians in Gaza.<sup>35</sup>

Certainly in American military history, such warnings are par for the course. In the Korean War, for example, the United Nations Command broadcasted warnings to the people of North Korea.<sup>36</sup> Among other things, these warnings included explicit calls for civilians to leave areas near military targets.<sup>37</sup> In 1999, during the conflict in the Federal Republic of Yugoslavia, Amnesty International criticized NATO for what it described as "a consistent failure to give effective warning to civilians."<sup>38</sup> In Afghanistan, at the beginning of the Global War on Terror, NATO "routinely issued general warnings to the civilian population prior to attack"; in fact, some NATO aircraft would "fly close to targets or shoot warning rounds to move civilians away from a potential target."<sup>39</sup> In Iraq, NATO forces dropped approximately 31.8 million leaflets advising Iraqi civilians of pending attacks and urging them to move to safety.<sup>40</sup>

Israel's calls for a temporary evacuation of northern Gaza amount to warnings to a civilian population prior to an imminent attack, as is required by customary international law. They do not rise to the level of an unlawful "forcible transfer," as Israel does not fit the definition of an "Occupying Power" as understood by customary international law. Yet even if it did, the Fourth Geneva Convention of 1949 provides an explicit carveout for the temporary evacuation of civilians for the "security of the population" or for "imperative military

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<sup>33</sup> Commentary of 1958 to Article 49 of the Fourth Geneva Convention of 1949 (1958).

<sup>34</sup> Rule 20: Advance Warning, Customary IHL Database, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule20>.

<sup>35</sup> Michael Schmitt, *Israel – Hamas 2023 Symposium – The IDF, Hamas, and the Duty to Warn*, ARTICLES OF WAR (Oct. 27, 2023), <https://lieber.westpoint.edu/idf-hamas-duty-to-warn/>.

<sup>36</sup> Pnina Sharvit Baruch and Noam Neuman, *Warning Civilians Prior to Attack under International Law: Theory and Practice*, 87 INT'L L. STUDIES 359, 365 (2011), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1086&context=ils>.

<sup>37</sup> *Id.*  
<sup>38</sup> *Id.* (citing AMNESTY INTERNATIONAL, "COLLATERAL DAMAGE" OR UNLAWFUL KILLINGS? VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE 15 (2000), available at <http://www.amnesty.org/en/library/asset/EUR70/018/2000/en/e7037dbb-df56-11dd-89a6-e712e728ac9e/eur700182000en.pdf>).

<sup>39</sup> Pnina Sharvit Baruch and Noam Neuman, *Warning Civilians Prior to Attack under International Law: Theory and Practice*, 87 INT'L L. STUDIES 359, 366 (2011), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1086&context=ils>.

<sup>40</sup> *Id.*





reasons,” and an exception to the requirement of providing for the accommodation and basic human needs of evacuees if doing so is impracticable for the Occupying Power. Thus, whether viewed as an Occupying Power or not, Israel has acted lawfully.

#### IV. PRINCIPLES OF THE LAW OF ARMED CONFLICT

Another criticism leveled at Israel in its response to the October 7, 2023, attacks is that in its use of white phosphorus<sup>41</sup> and broader bombing campaign in the Gaza Strip,<sup>42</sup> Israel has violated the law of war principles of distinction, humanity, and proportionality. Each issue will be considered separately, in turn.

##### A. *White Phosphorus*

The DoD Law of War Manual describes “white phosphorus” as a “munition that contains fragments of white phosphorus” intended primarily for “marking or illuminating a target or masking friendly force movement by creating smoke.”<sup>43</sup> Although white phosphorus is not included in the DoD’s definition of an “incendiary weapon” (it is instead considered a weapon with “incidental” incendiary effects), it may be used as an anti-personnel weapon.<sup>44</sup> Moreover, given it is not considered an incendiary weapon, white phosphorus is not subject to the DoD Law of War Manual’s restrictions on the use of incendiary weapons, such as the general prohibition on using incendiary weapons within a concentration of civilians.<sup>45</sup> Indeed, there is no categorical prohibition under international law on the use of white phosphorus in war. However, any use of white phosphorus, like any action taken in war, must comply with the principles of the law of armed conflict, to wit: military necessity, humanity, distinction, and proportionality.<sup>46</sup>

“Military necessity” is defined as “the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”<sup>47</sup> Military necessity justifies wartime violence and destruction, but also justifies certain incidental harms that inevitably stem from such violence and destruction.<sup>48</sup>

“Humanity” is defined as “the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.”<sup>49</sup> It is the “logical inverse” of military necessity, acting as a limitation on the violence and destruction broadly justified by military necessity.<sup>50</sup>

“Proportionality” is defined as “the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive.”<sup>51</sup> This principle reflects the *jus in bello* prohibition on excessive incidental harm and creates a duty in belligerents to “take feasible precautions for the protection of civilians and other protected persons and objects.”<sup>52</sup>

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<sup>41</sup> *Israel: White Phosphorus Used in Gaza, Lebanon*, HUMAN RIGHTS WATCH (Oct. 12, 2023), <https://www.hrw.org/news/2023/10/12/israel-white-phosphorus-used-gaza-lebanon>.

<sup>42</sup> See, e.g., Helen Regan, et al., *Second Israeli Airstrike in Two Days Pummels Gaza Refugee Camp, Deepening a Growing Outcry*, CNN (Nov. 2, 2023), <https://www.cnn.com/2023/11/02/middleeast/israel-gaza-hamas-war-jabalya-camp-strike-intl-hnk/index.html>.

<sup>43</sup> DoD LoWM § 6.14.1.3.

<sup>44</sup> DoD LoWM § 6.14.2.1.

<sup>45</sup> *Id.*

<sup>46</sup> The DoD Law of War Manual includes a fifth law of war principle—honor—that will not be analyzed here.

<sup>47</sup> DoD LoWM § 2.2.

<sup>48</sup> DoD LoWM § 2.2.1.

<sup>49</sup> DoD LoWM § 2.3.

<sup>50</sup> DoD LoWM § 2.3.1.1.

<sup>51</sup> DoD LoWM § 2.4.

<sup>52</sup> DoD LoWM § 2.4.2.

“Distinction” is the principle that “obliges parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects.”<sup>53</sup> It imposes on belligerents two sets of duties: (1) the duty to discriminate between enemy combatants and others when conducting attacks against the enemy<sup>54</sup> and (2) the duty for a belligerent to “distinguish or separate its military forces and war-making activities from members of the civilian population to the maximum extent feasible[.]”<sup>55</sup> It also obliges parties to a conflict to “refrain from the misuse of civilians and other protected persons and objects to shield their own military objectives.”<sup>56</sup>

The United States led a coalition that used white phosphorus as recent as 2017 in the fight for Mosul to help facilitate the evacuation of civilians from the city.<sup>57</sup> Prior to that, the United States used white phosphorus—nicknamed “Willie Pete” by soldiers—in 2011 in Afghanistan to “set fire to any Taliban rockets at the firing positions, causing them to explode and preventing them from being fired on the American outposts.”<sup>58</sup> In 2004, the United States used white phosphorus extensively in the Second Battle of Fallujah, where it was credited as “an effective and versatile munition” when employed via the “shake and bake” method—that is, when used offensively against entrenched insurgents.<sup>59</sup>

In Israel’s case, there is no evidence Israel’s use of white phosphorus in Gaza is anything but lawful. No evidence has been put forward showing Israel targeted civilians or used white phosphorus indiscriminately—indeed, there is no evidence Israel used the munition against personnel whatsoever (though they could have done so under the United States’s rules). Israel’s critics seem to operate under the mistaken belief that because Israel’s used white phosphorus in an urban environment and civilians were subsequently harmed, a war crime or violation of the law of war has occurred *per se*. This is not so. To start, Israel is not a party to Protocol III of the 1980 Convention on Certain Conventional Weapons, which prohibits “in all circumstances” making “any military objective located within a concentration of civilians” the object of attack by incendiary weapon.<sup>60</sup> Nor does any likewise prohibition exist in customary international law.<sup>61</sup> With no treaty obligation or legal custom prohibiting the use of white phosphorus in urban centers, the analysis turns to whether Israel’s actions violated the principles of the law of armed conflict.

Yet, here, too, Israel’s critics come up short. White phosphorus is an effective tool in war, used, among other reasons, to provide concealment and mark lawful military targets. Although the specifics of the military advantage Israel gained by using white phosphorus have not been made public, that does not mean such an advantage did not exist or was not proportional to the harm suffered. Nor does it imbue Israel’s actions with the illicit purpose of causing needless suffering or mean that Israel failed to take feasible precautions to protect civilians. For these reasons, it cannot be said that Israel’s use of white phosphorus was unlawful.

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<sup>53</sup> DoD LoWM § 2.5.

<sup>54</sup> DoD LoWM § 2.5.2.

<sup>55</sup> DoD LoWM § 2.5.3.

<sup>56</sup> DoD LoWM § 2.5.3.3.

<sup>57</sup> Alison Meuse, *U.S.-Led Coalition Has Used White Phosphorus In Fight For Mosul, General Says*, NPR (June 13, 2017), <https://www.npr.org/sections/parallels/2017/06/13/532809626/u-s-led-coalition-has-used-white-phosphorous-in-fight-for-mosul-general-says>.

<sup>58</sup> <https://www.nytimes.com/2011/10/08/world/asia/attacks-rock-us-outposts-near-afghanistan-pakistan-border.html>

<sup>59</sup> DoD LoWM § 6.14.2.1, n. 366.

<sup>60</sup> Art. 2, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) (1980).

<sup>61</sup> Kevin S. Coble and John C. Tramazzo, *Israel – Hamas 2023 Symposium – White Phosphorus and International Law*, ARTICLES OF WAR (Oct 25, 2023), <https://lieber.westpoint.edu/white-phosphorus-and-international-law/>.



## B. Bombing Campaign Generally

In addition to criticizing Israel's use of white phosphorus, some observers have accused Israel of violating the law of armed conflict in its broader bombing campaign in the northern portion of the Gaza Strip.<sup>62</sup> Notably, this includes recent airstrikes that killed civilians residential and refugee areas.

The four principles of the law of armed conflict, as the DoD defines them, were discussed in the previous section and will not be restated here. However, the DoD Law of War manual offers additional instruction on the responsibility borne by the party subject to attack to reduce the risk of harm to protected persons and objects.<sup>63</sup> In all conflicts, "parties to a conflict should ... take feasible precautions to reduce the risk of harm to protected persons and objects from the effects of enemy attacks."<sup>64</sup> Parties subject to attack, when appropriate, should "avoid placing military objectives, such as the armed forces, in urban or other densely populated areas"<sup>65</sup>; should take particular care to ensure "civilian hospitals [are] ... situated as far as possible from military objectives"<sup>66</sup>; and should seek the "voluntary removal" of civilians from the vicinity of military objectives through warnings.<sup>67</sup> The last of these might include "establish[ing] safety, hospital, or neutralized zones so that civilians have safe places to move toward"<sup>68</sup> or "conclud[ing] local agreements for the removal of civilians from besieged or encircled areas."<sup>69</sup> Predictably, the use of "human shields" is unlawful, and although attackers must take feasible precautions to minimize the risk of harm to human shields, "the party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury."<sup>70</sup>

As the "de facto governing body in the Gaza Strip since 2007," Hamas, under the foregoing rules and the principle of distinction, has a duty to reduce the risk of harm to civilians from an adversary's armed attack.<sup>71</sup> Yet at every turn, it has refused to do so. Where Hamas was required to avoid placing military objectives in densely populated areas, it has exploited the civilian population as "human shields,"<sup>72</sup> with one Hamas leader declaring, "We need the blood of women, children, and the elderly of Gaza ... so as to awaken our revolutionary spirit."<sup>73</sup> Where areas for medical care for civilians should be clearly distinguished and separated from the vicinity of military objectives, Hamas has reportedly established a military command and control center under Al Shifa Hospital,<sup>74</sup> the largest hospital in the Gaza Strip, and used civilian ambulances to transport weapons and militants.<sup>75</sup> And where civilians should be encouraged to flee the vicinity of lawful military targets, Hamas has

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<sup>62</sup> See, e.g., Rory Carroll, *Dozens Killed After Israeli Airstrikes on Gaza Refugee Camp*, THE GUARDIAN (Oct. 31, 2023), <https://www.theguardian.com/world/2023/oct/31/dozens-killed-after-israeli-airstrikes-on-gaza-refugee-camp>.

<sup>63</sup> DoD LoWM § 5.14.

<sup>64</sup> *Id.*

<sup>65</sup> DoD LoWM § 5.14.1.

<sup>66</sup> DoD LoWM § 5.14.2.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> DoD LoWM § 5.14.3.4.

<sup>71</sup> Hamas, *Counter Terrorism Guide*, Dir. of Nat'l Intel. (Sept. 2022), [https://www.dni.gov/nctc/ftos/hamas\\_fto.html](https://www.dni.gov/nctc/ftos/hamas_fto.html).

<sup>72</sup> See, e.g., Natalie Ecanow, *Hamas Officials Admit its Strategy is to Use Palestinian Civilians as Human Shields*, NY POST (Nov. 1, 2023), <https://nypost.com/2023/11/01/opinion/hamas-officials-admit-its-strategy-is-to-use-palestinian-civilians-as-human-shields/>.

<sup>73</sup> *Israel's US Embassy Lambasts Hamas Boss over Comments Celebrating Deaths in Gaza*, JERUSALEM POST (Oct. 28, 2023), <https://www.jpost.com/israel-news/article-770615>.

<sup>74</sup> See Vivian Yee, *Israel Says Al Shifa Hospital Conceals Hamas Underground Command Centers*, N.Y. TIMES (Oct. 28, 2023), <https://www.nytimes.com/2023/10/28/world/middleeast/gaza-al-shifa-hospital-israel.html>. If confirmed, such reports are consistent with Hamas's actions in the past. See Terrance McCoy, *Why Hamas Stores its Weapons Inside Hospitals, Mosques, and Schools*, WASH. POST (July 31, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/07/31/why-hamas-stores-its-weapons-inside-hospitals-mosques-and-schools/>.

<sup>75</sup> See Asa Fitch, *Israeli Airstrike Hit Ambulance Carrying Hamas Militants, Country's Military Says*, WSJ (Nov. 4, 2023), <https://www.wsj.com/livecoverage/israel-hamas-war-gaza-strip-2023-11-02/card/israeli-airstrike-hit-ambulance-carrying-hamas-militants-country-s-military-says-4mM91PvBtWzZ5FHtocFT>.





demanded civilians remain in place amid the fighting in northern Gaza,<sup>76</sup> reportedly even going so far as to execute civilians caught trying to escape.<sup>77</sup>

These failures are not just important evidence of Hamas’s failure to comply with the law of armed conflict, but are directly relevant to determining whether Israel violated the law of armed conflict, namely the principle of proportionality. “When the attacking force causes harms that are the responsibility of the defending force due to its use of voluntary human shields or due to the employment of civilian personnel in or on military objectives,” states the DoD Law of War Manual, “the responsibility of the defending force is a factor that may be considered in determining whether such harm is excessive.”<sup>78</sup>

In contrast, as in the white phosphorus analysis above, no evidence has been put forward that shows civilian deaths in Gaza were by intentional design. To that end, not only has Israel repeatedly warned civilians to leave northern Gaza, there is also no evidence that Israel has abandoned the principle of distinction in its military operations, that its bombing campaign has caused needless suffering, or that the bombing has not been proportional to the military advantage to be gained. That civilians have been incidentally harmed in the course of the war does not negate this fact. Nor does Israel’s decision not to publicize, likely for reasons of military necessity, its internal processes to ensure observance of the law of armed conflict (although such secrecy admittedly puts Israel at a disadvantage; the world sees when Israel chooses to shoot, but never sees when it chooses *not* to shoot). Indeed, Hamas itself seems convinced of Israel’s adherence to the law of armed conflict and is keen on exploiting it—hence its interest in enmeshing lawful military targets among civilian populations and hospitals.

As a final matter, the principle of proportionality raises an additional consideration—one where *jus ad bellum* intersects with *jus in bello* and commanders’ consideration of “the broader imperatives of winning the war”<sup>79</sup> are most salient. Unlike the fight to retake Mosul from the Islamic State or the American campaign against al Qaeda in Afghanistan following 9/11, Israel’s mission is not one of “nation-building,” “winning hearts and minds,” or a Cold War-era attempt at “containment.” Nor is it engaged in “peacekeeping” or other form of law enforcement through military means. Israel is not seeking unconditional peace, but an explicitly conditional, more just peace.

Israel is fending off an attempt at territorial conquest—“from the river to the sea”<sup>80</sup>—and the violent assault on its sovereign independence. For this reason, Israel’s ground war in Gaza is less like the U.S. invasion of Iraq and more like the Allied assault on Nazi Germany in June of 1944. In the hours preceding Operation Overlord, General Dwight D. Eisenhower called for the “the destruction of the German war machine, the elimination of Nazi tyranny over the oppressed peoples of Europe, and security for ourselves in a free world”; he was unwilling to accept anything less than “full victory.”<sup>81</sup> By its stated terms, Israel’s war following the events of October 7, 2023, is no different. For peace in the Gaza Strip, and the Levant more broadly, Hamas must be destroyed—its tyranny eliminated.<sup>82</sup>

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<sup>76</sup> *Hamas Tells Gaza Residents to Stay Put as Israel Ground Offensive Looms*, REUTERS (Oct. 13, 2023), <https://www.reuters.com/world/middle-east/hamas-tells-gaza-residents-stay-home-israel-ground-offensive-looms-2023-10-13/>.

<sup>77</sup> See Chris Nesi, *Horrific Video Purportedly Shows Gaza Street Strewn with at Least a Dozen Bodies Gunned Down by Hamas*, N.Y. POST (Nov. 3, 2023), <https://nypost.com/2023/11/03/news/video-reportedly-shows-gaza-residents-gunned-down-in-streets-by-hamas/>.

<sup>78</sup> DoD LoWM § 5.12.1.4.

<sup>79</sup> DoD LoWM § 2.2.3.

<sup>80</sup> Allegation: “From the River to the Sea Palestine Will be Free”, ADL (Oct. 26, 2023), <https://www.adl.org/resources/backgrounder/allegation-river-sea-palestine-will-be-free>.

<sup>81</sup> Gen. Dwight D. Eisenhower’s D-Day Message, Dept. of Def. Videos, available at <https://dod.defense.gov/News/Special-Reports/D-Day-and-the-Invasion-of-Normandy/Gen-Dwight-D-Eisenhowers-D-Day-Message/> (last accessed Nov. 3, 2023).

<sup>82</sup> See Max Boot, *Israel’s Ground War Against Hamas: What to Know*, COUNCIL ON FOREIGN RELS. (Oct 23, 2023), <https://www.cfr.org/in-brief/israels-ground-war-against-hamas-what-know>.



For this reason, any military advantage weighed as part of a larger proportionality assessment must account for Israel's strategic goals. This analytical foundation, taken in conjunction with Hamas's repeated failures to follow the law of armed conflict, leaves little doubt Israel has acted lawfully under the principles of the law of armed conflict.

## VI. CONCLUSION

Israel's actions in response to Hamas's murderous rampage of October 7, 2023, have thus far been lawful under international law and the law of armed conflict, as interpreted by the U.S. Department of Defense and applied in American military operations since World War II. Israel's siege of Gaza reflects a longstanding and legitimate means of waging war, and the available evidence does not support the conclusion Israel is engaged in unlawful "collective punishment." As to the allegation that Israel has forcibly transferred civilians in violation of the Fourth Geneva Convention of 1949, Israel's call for civilians to evacuate northern Gaza ahead of its bombardment and ground invasion is more in the nature of an advance warning to civilians of an imminent attack, as is required by customary international law—not a forcible transfer of civilians. As to Israel's use of white phosphorus, there is no categorical prohibition under international law on the use of white phosphorus and Israel is not a party to any treaty outlawing the use of white phosphorus in urban areas. Moreover, there has been no showing that Israel's use of white phosphorus in recent weeks has violated any of the principles of the law of armed conflict. Finally, as to its bombing campaign generally, although Israel's bombardment has led to civilian deaths, the simple fact that civilians have been harmed in war does not mean a war crime or a violation of the law of war has occurred; particular evidence of a disregard for the principles of distinction and proportionality is necessary. Yet as with the white phosphorus analysis, there has been no evidence put forward suggesting the design of Israel's bombardment was to attack civilians or flout the law of armed conflict; indeed, its call for civilians to evacuate suggests the opposite is true. In addition, Hamas's own failure to abide by the law of armed conflict—particularly by using civilians as human shields—cuts in Israel's favor in a proportionality analysis. For these reasons, Israel has acted lawfully in its prosecution of the war against Hamas.

