Hamas' Atrocities, Israel's Response, and the Primacy of International Law to Protect Civilians

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This is an English translation of an article which previously appeared in German on Verfassungblog on October 20, 2023. Figures and the progress of events in the interim have been updated as to October 29, 2023. Please keep this in mind while reading, given that figures and events in this war are changing rapidly.

In light of the atrocities committed by Hamas and Palestinian Islamic Jihad (PIJ) fighters in Israel on October 7, 2023 and the days thereafter, and against the backdrop of Germany's historical responsibility, the German government and German politicians have unanimously expressed solidarity with Israel and emphasized its right to self-defense. By contrast, the voices emphasizing that Israel's response is nevertheless bound by the rules of international humanitarian law (IHL), and that third countries such as Germany have an obligation to prevent the violation of binding rules of international law, have been much less vocal in the German political debate so far. In this context, the protection of the civilian population is paramount. Following the October 17, 2023 call by Kai Ambos for a differentiated debate, the intention here is to explain which IHL precautions are relevant and what German policy can contribute to contain the escalation of violence as well as the suffering of the civilian population in the immediate conflict and in the future.

Since October 7, Hamas and its allies have fired thousands of rockets from Gaza towards Israel, striking mainly in neighboring areas but also in northern Israel, killing indiscriminately. In parallel, on October 7, armed Hamas and PIJ fighters stormed the Gaza-Israel border fence, captured Israeli military posts, and invaded several Israeli towns and *Kibbutzes*, such as Be'eri and Kfar Aza. They brutally killed hundreds of people and took some 220 soldiers and civilians as hostages (including babies, children, women, and the elderly), and abducted them to the Gaza Strip. After the start of Israeli airstrikes on the Gaza Strip, Hamas threatened to kill a hostage every time Israel bombed homes without prior warning. All in all, according to Israeli figures, rocket fire and massacres by Hamas and its allies killed at least 1,300 Israelis and foreign nationals in Israel.

Numerous first-hand accounts and video footage indicate that gruesome massacres and severe physical abuse took place as part of the Hamas-led surprise attack. The documented acts of violence suggest that these constituted war crimes and violations of IHL, as well as, in all likelihood, crimes against humanity as defined in Art. 7 of the Rome Statute of the International Criminal Court. In particular, the intentional killings, unlawful imprisonments, and civilian hostage-takings are likely to constitute war crimes under Arts. 8(2)(a)(i), (vii) and (viii) of the Rome Statute. Since Palestine's accession to the Rome Statute in April 2015, the International Criminal Court has also had jurisdiction over war crimes committed on Palestinian territory and by Palestinians – and thus over the acts of Hamas and PIJ fighters identified above. IHL which is applicable in armed conflicts, as laid down in Art. 34 of the Fourth Geneva Convention and the joint Art. 3 of the Four Geneva Conventions, prohibits the taking of hostages in both international and non-international conflicts.

Israel's Response and Other Conflict Dynamics

The Israeli Prime Minister Benjamin Netanyahu declared a state of war the day after the Hamas-led attacks and announced retaliation. Israel's goal, he said, was to completely destroy Hamas's military capabilities in Gaza. The Israeli Defense Minister Yoav Gallant subsequently announced that he would completely seal off the Gaza Strip as it would not be

enough to fight Hamas from the air. Rather, it would be necessary to completely end any supplies to the Gaza Strip. Since October 9, 2023, no goods of any kind – no food, no electricity, no fuel, no medicine and no drinking water – have been delivered to the Gaza Strip via Israel's border. Prime Minister Netanyahu has made it clear that no aid would be delivered from Israel as long as Hamas does not release the hostages. Due to a lack of fuel, the only electricity plant in the Gaza Strip shut down on October 12, 2023. This has resulted in the collapse of the public electricity supply, with severe consequences, especially for health and drinking water supplies. According to reports by the UN Relief and Works Agency for Palestine Refugees (UNRWA), Israel provided drinking water to parts of the south of the Gaza Strip through a pipeline for a few hours each day since October 15. However, this has only provided water to half of the population of Khan Younis; other towns have remained completely unsupplied.

On October 18, in response to U.S. pressure, Israel's government announced that aid supplies could be delivered through the Rafah crossing, i.e., from Egypt, but only to the south of the Gaza Strip and only as long as they would not reach Hamas. So far, it has not agreed to humanitarian cessation of hostilities, which would be essential for the safe delivery and distribution of supplies. Since October 21, four aid convoys have entered the Gaza Strip providing mainly drinking water, food and medicine. Yet, this is only a drop in the bucket and does not meet the needs for basic life-saving supplies for the civilian population. According to the UN, this would require around 100 trucks of aid supplies every day.

A strict distinction between military and civilian targets in Gaza from the air is very difficult due to a multitude of factors, including Hamas' underground tunnel systems, which often lie below residential houses or civilian facilities, the extremely dense construction in the Gaza Strip, and the fact that many residential buildings also contain Hamas facilities or those of other militant groups or host fighters and cadres. As a result, Israeli air strikes cause high casualties among the Palestinian civilian population and massive damage to homes and civilian infrastructure. For example, on October 17, a UNRWA school was hit by Israeli shelling, causing severe structural damage and killing at least six people. The destruction of a hospital in Gaza City that same evening, which killed more than 400 people according to the Hamas-led Ministry of Health in Gaza, seems to have been caused by stray parts from a rocket fired by the PIJ. It has not been independently verified. U.S. intelligence agencies estimate that 100-300 people were killed. Since the beginning of Israeli air strikes and up to October 29, according to the Gazan Health Ministry, over 8005 Palestinians – as well as some of the hostages – have been killed in Gaza.

Prior to the air strikes, Prime Minister Netanyahu had called on Gaza's civilian population to leave the combat zones. Then, on October 13, in preparation for an intensification of air strikes or an Israeli ground offensive, the Israeli military called on the civilian population and international organizations to evacuate the northern Gaza Strip within 24 hours. In contrast, the Hamas-led government called on the population to not leave northern Gaza and, according to the Israeli military, attempted to prevent civilians from fleeing. The United Nations and human rights organizations deemed a mass evacuation of this scale (of some 1.1 million people) impossible within 24 hours and called for the Israeli announcement to be rescinded.

In fact, there are hardly any possibilities for Gaza's civilian population to seek safety. Shelters and bunkers for civilians do not exist; only a few hundred thousand have been able to find shelter in UN facilities or hospitals. Even there, supply and protection are only secured to a limited extent. The border crossing to Egypt (Rafah) is completely closed for Gazans who want to leave and has been bombed several times by Israel on the Palestinian side. Only a few hostages that Hamas has released have been able to cross into Egypt.

Protection of Civilians in Armed Conflict

Regardless of who initiated the armed conflict, the rules of international humanitarian law apply to all parties to the conflict. What is permissible under international law in the context of an armed conflict also

does not depend on whether the respective party involved in the conflict is acting as an aggressor or as a defender. This is because it is exclusively aimed at protecting the civilian population and other protected persons and legal assets, such as medical personnel, journalists and cultural property. This protection is to be ensured, among other things, by prohibiting indiscriminate attacks (i.e., attacks that do not distinguish between civilians and combatants). This prohibition applies in all types of armed conflict and is codified in Art. 48 of the First Additional Protocol to the Geneva Conventions (AP I); Art. 51(1) and (2) AP I; and Art. 13(1) of the Second Additional Protocol to the Geneva Conventions (AP II). In this context, hospitals and medical personnel are under special protection and, in principle, may not be the target of military attacks if they are marked accordingly. A violation of this prohibition constitutes a war crime under Art. 8(2)(b)(xxiv) and (e)(ii) of the Rome Statute.

According to Art. 51(7) AP I, the civilian population may not be prevented from fleeing a combat zone in order to shield military targets from attack. At the same time, even a request to evacuate does not cause civilians who cannot or do not wish to evacuate to lose their protected status. What is more, due to ongoing hostilities and the closure of the border crossings (on the part of Israel and Egypt), it is not possible for the civilian population of the Gaza Strip to leave the area under siege (i.e., the Gaza Strip). Egypt allowed some Palestinians to leave the Gaza Strip in the first days of the military operation but has since kept the border closed. Decisive factors include security concerns and the danger of a permanent displacement of Gaza's population to Egyptian territory.

Although Israel has not ratified the AP I and AP II, the aforementioned provisions apply under customary international law[1] and are thus binding on Israel as well.

Likewise, in all types of armed conflicts, the starvation of an enemy civilian population as a means of warfare (siege warfare) is expressly prohibited[2] and is outlawed as a war crime under Art. 8(2)(b)(xxv) of the Rome Statute. In practice, this means that a complete lockdown or siege may only be used against a legitimate military objective. Civilians may not be the target of the siege under any circumstances, and the supply of essential goods to the civilian population may not be prevented. Access to food must not be impeded even if it could also be provided to combatants.[3]

A complete shutdown, which makes it impossible to supply Gaza's civilian population with food, drinking water and medicines, is, unlike preventing the import of fuel or the supply of electricity, under no circumstances proportionate and permissible under international law. Not least, the blockade of supplies vital for life is a collective punishment[4] in accordance with Art. 33 of the Fourth Geneva Convention and hence violates international humanitarian law.

German solidarity, German responsibility

The German government's commitment to Israel's security, its disgust at Hamas's atrocities, and its overall consent to Israel's goal of dismantling Hamas do not relieve Germany of its responsibility under international law. Rather, Germany, like other third countries, not only has an obligation to respect the rules of international law for the protection of civilians in armed conflicts. It also has a duty under international law to urge compliance with them under the common Art. 1 of the four Geneva Conventions. This was confirmed by the International Court of Justice (ICJ), among others, in its 2004 Advisory Opinion "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory".[5]

In this vein, the German government should now first and foremost make use of its close relations with Israel to influence the release of the hostages through

[1] According to Art. 48(1) of the AP I see IHL Database, Commentary to Additional Protocol I to the Geneva Conventions 1977, p. 598, available here; According to Art. 54(1) of the AP I, see IHL Database, Commentary to Additional Protocol I to the Geneva Conventions 1977, p. 654, available here

[2] This is a *ius cogens* rule according to Flavia *Lattanzi* and Clapham, Gaeta, Sassòli (ed.), The 1949 Geneva Conventions – a Commentary, Oxford 2018, chapter 12, para. 44.

[3] Yoram *Dinstein*, The Conduct of Hostilities under the Law of International Armed Conflict, 2nd edition, p. 218 ff.

negotiations; to effectively protect the population of Gaza through the establishment of protection zones; to refrain from the use of inadmissible methods of warfare; to ensure humanitarian access (and humanitarian cessations of violence) so that drinking water, food, medicines, and fuel for hospital generators can be delivered to all of Gaza; and to establish humanitarian corridors that allow the evacuation of urgent medical cases and foreign civilians. At the same time, it is equally crucial to exert pressure on Hamas via states with contacts to its leadership, such as Egypt and Qatar, in order to ensure the welfare of the hostages and to press for their release, to stop the indiscriminate firing of rockets at Israel, and not to prevent the escape of its own population from combat zones.

In the aftermath of the acute escalation, Germany should support the investigation by the International Criminal Court of presumed war crimes committed by all parties involved in the conflict in Israel and the Palestinian territories. For the continued failure to sanction serious violations of international humanitarian law and human rights law and to prosecute alleged war crimes invites the parties to continue to violate the law. These violations also push a political resolution to the conflict and durable peaceful coexistence into the more distant future.

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[4] Shane *Darcy,* in: Clapham, Gaeta, Sassòli (ed.), The 1949 Geneva Conventions – a Commentary, Oxford 2018, Chapter 56, para. 32f – there, the Israel-Palestine conflict is listed as an example.

[5] IGH, Advisory Opinion: Legal Consequences of the Construction of a Wall in the Occupied, I.C.J. Reports 2004, p. 136, para. 157: "With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law." (I.C.J. Reports 1996 (I), p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character."