

What is Permissible in the War against Hamas?

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On October 7, 2023, Hamas attacked Israeli communities near the Gaza Strip. Alongside indiscriminate firing of thousands of rockets into many areas in Israel, hundreds of Hamas militants breached the border fence and committed heinous acts against the civilian population. They killed over a thousand civilians, kidnapped dozens into the Gaza Strip, including children and the elderly, injured thousands, and committed a long series of ISIS-like crimes against humanity. In response, the Israeli government launched a war against Hamas. As we are writing these lines, the war includes heavy airstrikes that have caused the deaths of hundreds of Hamas members as well as hundreds of civilians not participating in the hostilities, including many children, and injuries to thousands more.

The question is what is permissible for the Israeli government to do in response to the murderous attack by Hamas. The answer to this is difficult, not only because blood is boiling and hearts are broken, but also because there is a complex moral dilemma here. In this blog, we hope to offer some guidelines to clarify the issue. We do not claim to provide definitive answers. The required analysis is complex, and it is incumbent upon the Israeli government and the IDF to ensure that the various steps taken are morally justified. It may even be appropriate, within operational constraints, to make the justifications for the steps taken public.

The discussion presented here focuses on the immediate timeframe, in which the only actions likely to be considered are military ones. Alongside the obligation to take these steps to defend the lives of civilians and save the captives and the kidnapped, the Israeli government is obligated to pursue peace. Within this framework, the Israeli government should recognize the right of the Palestinian people to an independent state alongside the State of Israel, and assist in its implementation.

Our starting point is that Hamas poses an imminent and severe threat because it has repeatedly committed crimes against humanity on a very wide scale and has avowed to continue to do so. The threat is significant enough to justify attempting to kill anyone associated with the organization, directly or indirectly, to prevent the threat from materializing. This applies also to persons who were directly or indirectly involved in the recent attack. This conclusion is further justified by the fact that Hamas holds not only soldiers captive, in conditions that blatantly violate the laws of war, but also civilians abducted from their homes in Israel.

The moral challenge arises from the fact that there is likely no way to harm Hamas operatives (nor to save their captives and the kidnapped), without harming innocents. In order to target Hamas operatives, it is necessary to take steps that will likely result in the killing of hundreds, and probably even thousands, of individuals in Gaza who do not take part in the hostilities.

While the question of what is *morally* permissible for the Israeli government to do partially overlaps with what is *legally* permissible according to international law, we only focus on the former. When deciding whether to act in a way that is highly likely to result in killing people, what international law mandates is not the decisive factor. If the relevant acts are morally forbidden, they must not be carried out even if international law permits them; and given what is at stake, if they are morally justified, they should be carried out even if it means violating international law. International law nonetheless matters: because it provides universal guidelines, determined in times of peace, that closely approximate moral norms, it ought to guide the exercise of governmental discretion.

Our first fundamental assumption is that there is no moral barrier to killing anyone directly or indirectly involved in combat activities. There may be hard cases regarding the definition of sufficient indirect involvement, but we will not delve into that. The second fundamental assumption is that it is forbidden to intentionally harm those who are not involved in the hostilities, for example for the purpose of revenge or general deterrence. The doubts concern the extent of permissible unintended, but highly likely and foreseen harm to the un-involved, harm which is a necessary and unavoidable consequence of obtaining the purpose of neutralizing the risk emanating from Hamas.

Permissible Goals

One fundamental issue pertains to the kind of military objectives that can justify imposing unintentional harm on those who do not participate in the hostilities. There is no doubt that Israel is permitted to take necessary steps to prevent the threat posed by Hamas and to bring about the release of the captives and the kidnapped. The underlying goal is to neutralize Hamas' capacity to continue its activities, including holding the Israeli population living near the Gaza Strip hostage.

A second possible objective is the punishment of Hamas operatives involved in crimes against humanity. While the severity of their actions can render this aim legitimate for military action, it cannot justify killing non-combatants, even if done unintentionally.

A third possible objective is deterrence. This would justify an attack on Hamas operatives because it deters them as well as other organizations in the region (primarily Hezbollah), from attacking Israel again, irrespective of whether it actually neutralizes the threat they pose. Thus, while clearly also preventative in nature, this is not achieved through the physical neutralization of the enemy's military capacity, but through deterring it from engaging in further attacks on Israel.

All three objectives stipulate that Israel's military actions should be aimed at harming Hamas operatives to defend Israeli civilians. This is not a subjective matter regarding the aspirations of policymakers. Rather, the question which of these (and other) objectives are relevant to the moral assessment of Israel's military action depends on which of them actually guides and explains Israeli decision-making. Each objective can only justify unintentional harm to uninvolved individuals

if three conditions are met: firstly, the attack must reasonably contribute to the achievement of the relevant objective; secondly, the expected extent of harm to uninvolved individuals is necessary to achieve the objective; and thirdly, there is some reasonable balance between the extent of harm to the uninvolved and contribution to the objective's realization.

The Goal of Neutralizing Hamas

The main purpose of the IDF's activities is to suppress Hamas' ability to endanger Israel by targeting its personnel and infrastructure, as well as to secure the release of captured and missing individuals.

(1) One aspect to consider is whether the actions taken by the Israeli government are effective in achieving this objective. Given that human lives are at stake on both sides, the attack's effectiveness is not only a tactical but also a moral issue. An attack is only considered effective if it is reasonably expected to harm Hamas personnel and capabilities. Attacks which are not reasonably expected to do so, and harm civilians are not justified. However, the goal discussed here requires that the attack is expected, with a non-negligible probability, not only to harm some Hamas operatives but also undermine the organization's ability to threaten Israel in the future, and facilitate the release of captives and prisoners.

The accumulated experience in confrontations with Hamas over the past twenty years does not bode well in this context. For example, in Operation "Protective Edge" in 2014, which lasted 50 days, the IDF launched widespread offensive operations, including air strikes and ground occupation of parts of the Gaza Strip. During the operation, 74 Israeli soldiers and civilians were killed, and approximately 2,000 Palestinians, half of whom were estimated by the IDF to be combatants, were killed. Additionally, half a million residents were forced to leave their homes. However, it is questionable whether the objective of suppression was achieved. During the operation, Hamas continued to launch rockets until the final day of the war (approximately 4,500 rockets were fired during the operation, with an average of about 150 rockets fired at Israel daily in the last week of the operation). After the operation, Hamas rebuilt and even strengthened its capabilities. In subsequent years of relative calm, it renewed its offensive activities, as was evidenced in 2021 under Operation "Guardian of the Walls" (when about 4,000 rockets were fired at Israel) and, especially clearly and tragically, in 2023, which have not yet concluded. Operation "Protective Edge" also did not lead to the release of the captive soldier then held by Hamas.

Perhaps this time the situation will be different, and the strength of the Israeli attack will result in a more substantial blow to Hamas. However, what we know so far (as of October 15, 2023) is not encouraging: despite the extensive aerial attacks that have killed about 2,000 Palestinians in Gaza, there has been no noticeable decrease in Hamas' ability to launch both short- and long-range rockets at Israel. Even if a certain blow to Hamas' military strength is achieved, it is unlikely to facilitate its collapse. If so, it is questionable whether the widespread harm to non-combatants

caused in order to achieve the goal of suppressing Hamas or the release of the hostages can be justified.

At the same time, suppression is not an absolute matter, and reducing the level of risk reflected by Hamas, even if for a limited time, carries weight in this determination. How much weight is complicated by the fact that the relevant comparison is between the current situation and its counterfactual, ie what would have happened if the IDF had not acted against Hamas. Moreover, beneficial suppression can also include offensive activity that primarily aims to postpone the risk posed by Hamas for several years or that reduces, to some extent, its operational capability. As such, it is equally incorrect to argue that an action aimed at suppression is only beneficial, and thus capable of justifying certain, even indiscriminate harm to non-combatants, if it leads to the absolute, indefinite eradication of Hamas. The fact that a person is hungry even though he ate the day before does not mean that eating is not a rational solution, even if a temporary one, to the problem of hunger.

The decision ultimately depends on a military assessment, regarding the chances of achieving the goal of suppression. Certainty that the goal will be achieved is not required, but there must be a reasonable chance that Hamas will be suppressed for a relatively long period. For the purposes of continuing the discussion, let us assume that this condition is met.

Additionally, a concrete, case-by-case examination is also necessary. We must determine for each action that risks harming the lives of non-combatants its expected contribution to the goal of suppressing Hamas and releasing captives. For example, an attack may be justified on buildings where Hamas personnel reside or where equipment aiding Hamas in its operations is found.

(2) Assuming there is a reasonable chance that the military action will contribute, even temporarily, to the suppression of Hamas, we must then assess the necessity of the steps taken to achieve this goal. At first glance, the alternative to countering the threat posed by Hamas is defensive action. Unfortunately, experience teaches us that there is no way to ensure adequate defense against attacks by Hamas (or Hezbollah).

For every action risking harm to the lives of non-combatants, we must determine the degree to which they are necessary for achieving the goal of suppressing Hamas and releasing the kidnapped. The necessity requirement renders an attack on buildings where Hamas members reside or where equipment aiding Hamas in its operations is located only justified if there is no equally effective way to achieve this result without harming non-combatants. Such an assessment clearly involves operational, context-specific considerations. These should include the obligation to minimize the expected harm to non-combatants to the extent necessary to achieve the goal of suppressing Hamas.

(3) Let us assume that the first two conditions are met: the action causing unintended but certain harm to non-combatants is expected to reasonably contribute to the suppression of Hamas; and it is necessary because there is no other effective

way to achieve this goal with less harm to the uninvolved. It is still necessary to determine whether the expected harm is proportionate. This determination cannot be a matter of mere arithmetic. The proportionality requirement does not mean, for instance, that the number of non-combatants it is permissible to harm unintentionally is the exact number of casualties expected on the Israeli side if the action is not taken.

Considerations of guilt and responsibility for creating the risk must be considered. While these include the Israeli government's special responsibility to protect its citizens, it also cannot ignore the damage caused to non-combatants in Gaza. While states are permitted to prioritize their own citizens, this priority is not absolute. A precise determination of the permissible extent of harm is not possible, but general guidelines can be established.

Above all, there are clear limits to the magnitude of harm that can permissibly be inflicted. If the only way to suppress Hamas is to evacuate the Gaza Strip of its inhabitants (in its entirety or its northern half, including the city of Gaza), this is likely an unjustifiable move. The pursuit of absolute security cannot justify the infliction of absolute harm upon Gaza's inhabitants. Note that this is not a binary decision: while the goal of harming Hamas cannot justify unlimited harm to non-combatants, the possibility of harm to non-combatants also does not serve as an absolute bar to military action.

Moreover, quantitative aspects (the number of expected casualties) as well as qualitative ones (harm to human life, displacement of people from their homes) must be weighed on both sides, along with probabilistic aspects (the probability of harming the uninvolved on one side and the probability that the harm will be beneficial and necessary for the suppression of harm to Israelis on the other side). While a proportionality assessment may thus justify great harm to non-combatant civilians, there must always remain a reasonable balance between the harms.

In the past, the main threat emanating from Hamas was linked to their rocket fire. Consequently, the scope of the killing that the government was authorized to cause to suppress the firing was very limited. However, once Hamas showed it had the power and will to kill hundreds of Israelis, to capture dozens of others, to commit a series of crimes against humanity, and to act in a way that may amount to the crime of genocide, the proportionality assessment of Israel's military responses changes. Nonetheless, the obligation to minimize as much as possible the harm to non-combatants remains intact. The same holds for the obligation to refrain from certain actions, even if they are necessary to suppress Hamas's activities, if their expected harm exceeds a certain magnitude.

The Goal of Punishing the Perpetrators

Another possible military objective is the punishment of those involved in the crimes against humanity committed by Hamas against Israeli civilians. In principle, punishment is permissible only following a judicial process that establishes a person's guilt and a determination of the punishment by a judicial authority.

However, under the current exceptional circumstances, there may be a need to recognize a deviation from this principle. The main reasons are twofold: the practical impossibility of capturing the perpetrators of these crimes to bring them to justice, and the extreme severity of the acts. The decision in this matter is not simple. For one, the degree of involvement of the perpetrators in the atrocities differs. As such, while killing some of them may be justifiable on grounds of punishment, it may not be so for others, whose involvement justifies punishment but not necessarily death.

If punishment is a legitimate objective for the military, it can justify an attack that has a non-negligible probability of harming Hamas members. However, here too, as with the objective of neutralization, each action must be examined in relation to how likely it is to result in harm to Hamas terrorists.

The main challenge in this context relates to the requirement of proportionality. Even if targeting the perpetrators is justified, it is forbidden to jeopardize the lives of uninvolved individuals in order to achieve this goal. The purpose of punishment is important, and considerations of retribution carry a moral weight that cannot be dismissed. However, these are qualitatively (or lexically) inferior considerations to the imperative of avoiding as much as possible any harm to non-combatants. Unintended but foreseen harm to uninvolved caused by actions intended to punish Hamas perpetrators for their heinous acts is not justifiable. Also, the risks to the lives of Israeli soldiers – inescapable in any punitive efforts – cannot be justified on grounds of punishment.

There is difficulty in reconciling the injustice caused by the possibility of those involved in atrocious acts being exempt from punishment due to the practical impossibility of capturing or harming them without harming others. However, a moral examination may necessitate coming to terms with such injustice in order to prevent even graver injustice.

Notably, revenge is an illegitimate objective for the use of military force and certainly cannot justify the inflicting of severe harm, even if unintended, on the uninvolved. Decision-makers have an obligation to ensure, even in times when emotions run high, and perhaps especially in those times, that revenge has no role in the exercise of power and in motivating the use of force.

The Goal of Deterrence

The war against Hamas, even if not expected to directly neutralize the organization, is also intended, perhaps even primarily, to deter it and other organizations in the region from attacking Israel again. Assessing the circumstances under which this objective may justify a certain, definite, unintended harm to the uninvolved in Gaza is particularly difficult. Thus, a determination of the effectiveness of means intended to achieve this objective involves significant factual uncertainty. This also renders a proportionality assessment of the extent of justifiable harm to the uninvolved exceedingly difficult. In other contexts, such uncertainty may lead to the conclusion that deterrence is an illegitimate objective for the purpose of justifying such widespread violation of human [rights](#). However, context matters. Thus,

deterrence seems to be the only way to significantly reduce both the risk of Hamas' resurgence and further attacks Israel, at least in the near future and with the same level of severity. As such, it arguably falls within the realm of legitimate objectives of warfare.

Nonetheless, this objective cannot justify intentional harm to the uninvolved, rendering population starvation and the denial of food and water unjustified. However, because the deterrent objective may justify steps designed to harm Hamas operatives in order to deter them, certain non-targeted harm to the uninvolved that is incidental to these steps might be justified. In the absence of a practical possibility for physically neutralizing Hamas, reinstating deterrence may be a significantly effective way to protect national security.

An evaluation is necessary on two planes: first, to what extent military activity is expected to contribute to strengthening deterrence, and second, to what extent military activity is necessary to create a reasonable measure of deterrence. Generally, deterrence is achieved through a combination of elements, including but not limited to: the evaluation of Israel's intelligence capabilities, which will increase the likelihood of detecting planned attacks and thus create deterrence; the assessment of IDF soldiers' professionalism, which affects the evaluation of the enemy's chances of success; and civil society's psychological and economic resilience to withstand an attack. Unfortunately, the attack initiated by Hamas led to a noticeable erosion in the measure of deterrence resulting from these factors. At the very least, it caused erosion in the intensity of these components as perceived by Israel's enemies, and therefore may lead to severe damage to deterrence.

In these circumstances, alongside the government's duty to act to restore social resilience, or at least to desist from continued harm to it, the remaining significant factors to achieve a reasonable measure of deterrence are military ones: the combination of the firepower of the IDF, i.e., the force that the IDF can exert to harm the enemy, and the (perceived) willingness to use this force. In the difficult circumstances that Israel has found itself in, it seems that a widespread attack, resulting in severe, unintentional harm to the uninvolved, may be necessary to restore deterrence.

The difficult dilemma is the extent to which harm to the uninvolved is considered proportionate. As mentioned, intentional harm is prohibited, even if it is expected to contribute to deterrence. However, the pursuit of deterrence can legitimize state action that in attempting to harm combatants, demonstrates a willingness to risk widespread harm to non-combatants. In this sense, the consideration of deterrence justifies a more extensive unintended harm to the uninvolved than the consideration of neutralizing Hamas can justify.

Here too, there is no justification for unlimited harm. Given the significant uncertainty involved in implementing the objective of deterrence, the expected harm to uninvolved individuals must be minimized as much as possible. It is also essential to ensure that the extent of harm to the uninvolved is reasonable in relation to the benefit that will be achieved through the strengthening of deterrence and the damage that will be prevented as a result. Steps taken to minimize the harm to the

uninvolved as much as possible must include refraining from measures that would result in harm to a large number of people.

