The Legal War: Hamas’ War Crimes and Israel’s Right to Self-Defense

June 3, 2021

Alan Baker

Jerusalem Center for Public Affairs

<https://jcpa.org/article/the-legal-war-hamas-war-crimes-and-israels-right-to-self-defense/>

* **The Israel Defense Forces have no policy of deliberately targeting civilians or civilian property and make every effort to give effective advance warning of impending strikes that could potentially affect the civilian population.**
* **The success of Israel’s “Iron Dome” anti-missile defense system in reducing the threat of over 4,000 rockets fired by Hamas and Palestinian Islamic Jihad in May 2021 cannot in any way reduce the extent of the Palestinians’ criminal liability for severe war crimes in willfully and deliberately directing massive barrages of missiles toward civilian centers in Israel.**
* **The deliberate and cynical use by Hamas and Islamic Jihad of their own civilians as human shields, as well as their use of mosques, hospitals, schools, and private houses as weapons storage facilities and firing platforms, are no less severe war crimes and violations of international humanitarian law.**
* **The construction of tactical tunnels beneath urban civilian areas, hospitals, public facilities, and urban roads are also war crimes and grave violations of international humanitarian law.**
* **The indiscriminate targeting of Israeli cities and civilians practiced by Hamas violates the rule of distinction in international law, which requires combatants to limit attacks to legitimate military targets.**
* **Moreover, advocating a religious holy war aimed at creating a regional Islamic entity encompassing the whole of the territory of Israel appears to contravene the provisions of the 1948 Convention on the Prevention of Genocide.**
* **For all such crimes, Hamas and PIJ leaders and commanders are accountable and prosecutable under international law.**

### Introduction

The Hamas and Palestinian Islamic Jihad rocket attacks during the May 2021 hostilities, in which the two terror groups proudly boasted of firing over 4,300 rockets and other missiles against Israel’s towns and other civilian centers, generated an outpouring of international consternation and condemnation.

Israel’s defensive “Iron Dome” anti-missile defense system succeeded in intercepting over 90% of the incoming missiles. Had those rockets reached their civilian targets in towns throughout Israel, one can only imagine the number of fatalities, casualties, human suffering, and material damage that the willful, deliberate, and indiscriminate firing of over 4,000 rockets could have caused.

The success of Israel’s “Iron Dome” system in reducing and neutralizing the missile threat cannot in any way minimize or reduce the extent of Hamas’ criminal liability for severe war crimes in willfully and deliberately directing such massive barrages of missiles towards civilian centers in Israel.

The deliberate and cynical abuse and exposure by Hamas and Islamic Jihad of their own civilians, as human shields, as well as the irresponsible, criminal usage of mosques, hospitals, schools, and private houses as weapons storage facilities, weapons emplacement zones, and firing platforms, are no less severe war crimes and violations of international humanitarian law. The mobilization of children and their use for armed conflict complements the war crimes committed by Hamas and its colleagues.

A Gaza teenager in a Hamas summer camp.

The construction and use of the extensive underground web of tactical tunnels beneath urban civilian areas, hospitals, public facilities, and urban roads, thereby endangering an entire civilian population living and conducting their everyday existence above such a web of strategic, military tunnels, are war crimes and grave violations of international humanitarian law.

### Hamas and PIJ Leaders Are Prosecutable for War Crimes

For all such crimes, Hamas and PIJ leaders and commanders are accountable and prosecutable.

Much has been written and spoken in the international media and by leaders in the international community regarding the violence between the Hamas terror entity in the Gaza Strip and Israel, especially given the graphic pictures displayed by various media sources.

After an overall acknowledgment by the international community that Israel has the right to defend itself and its civilians against the barrage of rockets, it did not take long for the routine wave of international criticism and condemnation of Israel to materialize and grab the international headlines.

This is particularly the case with a resolution by the UN Human Rights Council, initiated by Pakistan and the Palestinian leadership, dated May 27, 2021, which decided:

to urgently establish an ongoing independent, international commission of inquiry to investigate in the Occupied Palestinian Territory, including East Jerusalem, and in Israel all alleged violations of international humanitarian law and all alleged violations and abuses of international human rights law leading up to and since April 13, 2021, and all underlying root causes of recurrent tensions, instability, and protraction of conflict, including systematic discrimination and repression based on national, ethnic, racial or religious identity. (A/HRC/S-30/L.1)

Given all of the above, there are pertinent legal points that do not always figure in this barrage of selective, often inaccurate, and even malicious commentary, criticism, and condemnation.

The following points summarize some of the legal aspects of this situation:

### The Inherent Character of Hamas as a Terrorist Entity

As set out in its national Charter and borne out by its actions of indiscriminate terror directed against Israeli towns, villages, and citizens, Hamas’s ideological foundation clearly defines its character as a terrorist entity. This is reflected in the fact that Hamas has been formally outlawed in major states.

The professed ideological foundation of Hamas, as set out in its national Charter,1 aligns it integrally with the Muslim Brotherhood and clearly identifies it as a terrorist entity.

According to Hamas’ ideology, Israel has no place in the world; Hamas’ declared goal is the destruction of the Jewish state: “Hamas strives to raise the banner of Allah over every inch of Palestine.” In addition, the organization promotes an anti-Semitic ideology that glorifies Jihad and the killing of Jews.

Whether the Hamas administration in the Gaza Strip is regarded as a component of the Palestinian Authority, following the failed April 2014 unification accord with PLO head Mahmoud Abbas (Abu Mazen),2 or as a “quasi-state,” a “non-state entity,” or even as a “state” (with borders and government), its character as a terrorist entity is well-established and universally recognized.

Such recognition includes formal and legal classification and outlawing of Hamas as a terror organization by the United States, Canada, Jordan, Egypt, Japan, and the Organization of American States, an international coalition of 35 countries in North and South America.3

In its declaration dated May 17, 2021, the Organization of American States, in qualifying Hamas as a terrorist organization, stated:

The recent attacks launched by Hamas against the Israeli civilian population undoubtedly constitute attacks of a terrorist nature. Their violence and the objectives they pursue clearly have this characteristic.

Hamas’s terrorist aggression is unlimited and always seeks civilian victims, seeks to escalate conflict dynamics and armed actions, as well as sowing terror among innocent populations, be they Israeli or Palestinian.

The immoral and unworthy use of children and women as human shields, as well as the militarization of residential areas, constitute in themselves acts that deserve the most absolute repudiation and condemnation.

The initiation of attacks of this nature against a country with a clear terrorist objective of its civilian population makes the invocation of the principle of legitimate defense by Israel essential.

The Hamas attacks constitute an attack against the peace and security of Israel and the region and make it imperative to categorize Hamas as a terrorist organization for the General Secretariat of the Organization of American States (OAS).

Hamas’ and PIJ’s declared modus operandi advocates and espouses terror against Israel as the means to achieve its ends:

* It views every Israeli man, woman, and child as a legitimate military target, thereby justifying its terrorist attacks by rockets, suicide bombings, murders, and abductions.
* It openly admits its strategy of terrorizing Israel’s civilian population by using rockets and missiles indiscriminately aimed at Israel’s cities, towns, and villages.
* Its leaders and spokesmen are on public record admitting their responsibility for such acts of terror.
* Thus, indiscriminate rocket fire is consistent with its ideology, which sees Israeli civilian casualties as strategic and tactical military successes.4

### Terrorism in International Law

International law and practice, outlaw the use of terror for whatever reason or justification. This is confirmed in several resolutions adopted by the UN Security Council, especially following the September 11, 2001, attacks against the United States.5

In its Resolution 1269 (1999),6 the Council, in the first operative paragraph:

Unequivocally condemns all acts, methods, and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whoever committed, in particular those which could threaten international peace and security.

More specifically, United Nations Security Council Resolution 1566, dated October 2004, passed under Chapter VII of the UN Charter:

Condemns in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security.

[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitutes offenses within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature. 7

No less than 16 international conventions and protocols have been adopted between 1963 and the present day by the United Nations, criminalizing all aspects of international terror, including significant landmark resolutions of the UN General Assembly. Together they represent the clear consensus of opinion of the international community in outlawing all forms of terror.8

One such UN Convention is the 1997 International Convention for the Suppression of Terrorist Bombings,9 which criminalizes the targeting by explosive devices of government facilities or public transportation.

Similarly, in this context, the operative provisions of the unanimously supported 1994 “UN Declaration on Measures to Eliminate International Terrorism” 10 unequivocally condemn and criminalize all forms of terror.

In addition to the multinational instruments outlawing terror, there is an extensive series of regional counter-terror conventions, encompassing the African Union, OAS, ASEAN, CIS, SHARC, Shanghai Cooperation Organization, Council of Europe, EU Action Plan, Arab League, and the Organization of Islamic Conference.11

### International Crimes and Criminal Responsibility by Hamas

The terrorist actions practiced by Hamas – both indiscriminate targeting of Israeli cities and civilians, as well as the exposure of its own residents as human shields – are violations of international law and internationally accepted humanitarian norms, specifically, the violation of the rule of distinction, which requires combatants to limit attacks to legitimate military targets.12

As such, these constitute both crimes against humanity and war crimes, prosecutable before the International Criminal Court (ICC), as well as before municipal courts and tribunals that are guided by universal criminal jurisdiction.

Advocating a religious holy war aimed at creating a regional Islamic entity encompassing the whole of the territory of Israel, and the call to “liberate Palestine” and to “raise the banner of Allah over every inch of Palestine,” 13 appear to contravene the provisions of the 1948 Convention on the Prevention of Genocide.14

The 1998 Rome Statute that founded the International Criminal Court (ICC) established that the Court is intended to deal with “the most serious crimes of concern to the international community as a whole.”

Specifically, it gives the Court jurisdiction regarding the above-mentioned crimes, and in the absence of a referral by a state, it enables both the UN Security Council and the Court’s prosecutor to initiate investigations.15

Under international law, non-state actors are bound by customary norms of international humanitarian law when they become a party to an armed conflict.

Hamas has its own structured military force, political and social institutions, and de facto control over a defined territory and has launched thousands of rockets towards Israeli cities, terrorizing and jeopardizing the lives of millions of Israelis. Hamas, even as a non-state entity, or part of a non-state entity, is considered by all accepted criteria to be fully accountable under international humanitarian law for its actions in carrying out its terror attacks against Israeli civilians and for using its own civilians as human shields. Thus, its leadership, commanders, and fighters are punishable for crimes against humanity and war crimes.

In her article “Accountability of Hamas under International Humanitarian Law” [IHL], jurist Sigall Horowitz states:16

Under international law, non-state actors are bound by customary IHL norms when they become a party to an armed conflict. Thus, the Appeals Chamber of the Special Court for Sierra Leone held as follows: “It is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties.” 17

Regarding the individual criminal responsibility of Hamas members, Horowitz adds:

[T]he use by Hamas members of Qassam and Grad rockets in connection with the armed conflict, may amount to a war crime under the Rome Statute. Accordingly, these acts may entail the individual criminal responsibility of Hamas fighters who committed, ordered or assisted them, or otherwise contributed to their commission. These acts may also entail the individual criminal responsibility of Hamas military commanders and political leaders, under the principle of superior responsibility.18

In addition to the crime of conspiring and attempting to commit genocide referred to above, the following acts of terror carried out by Hamas constitute serious crimes of concern to the international community:

### Indiscriminate Targeting of Israeli Towns and Villages and Civilians with Rockets

The 1907 Hague Regulations19 stipulate:

* Article 25: “The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.”

The 1977 Protocol I to the Geneva Conventions20 includes:

* Article 48: Prohibition on targeting civilian objects
* Article 51(2): Prohibition of terrorizing the civilian population
* Article 51(4): Prohibition of indiscriminate attacks
* Article 57: Duty to minimize incidental loss of civilian life and injury

### Using Civilians as Human Shields

Deliberately storing and firing rockets from within or in close proximity to hospitals, mosques, schools, and houses in densely-populated areas, both to shield and camouflage rocket emplacements and in order to generate Israeli military action against such emplacements deliberately, thereby endangering Palestinian civilians, constitutes a war crime.21

The storing of rockets in an UNRWA school in Gaza is perhaps a typical example of this crime, which generated a statement of condemnation by UNRWA itself.22

The use of one of Gaza’s central mosques – the Al-Farouq Mosque in the Nuseirat refugee camp – for storing rockets and weapons and as a compound for Hamas operations is a further example of this crime.23

Article 51(7) of the 1977 Protocol I to the Geneva Convention24 states:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

Article 58(b) of the Protocol requires avoiding locating military objectives within or near densely populated areas.

The following provisions of the ICC Statute refer to such crimes:

* Article 7: crimes against humanity – the multiple commission of “widespread or systematic attack directed against any civilian population.”
* Article 8: war crimes – large-scale commission, as part of a plan or policy of intentional attacks against the civilian population or against individual civilians and civilian objects; intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians; attacking or bombarding towns, villages, dwellings, or buildings which are not military objectives; utilizing the presence of civilians to render certain points, areas or forces immune from military operations; and using children under fifteen to participate in hostilities.

### Abuse of Children in Violation of International Humanitarian Law

From the fundamental viewpoint of international humanitarian law and accepted norms of humanity, using civilians, and especially women and children, as human shields to conceal the presence of Hamas terrorists and terror infrastructure, as well as deliberately displaying children during combat activities, are cynical and cruel violations and abuse of such women and children.

This is in violation of several international treaties protecting children and prohibiting their involvement in warfare, to which the “state of Palestine” has become a party and thus committed to implementing.

### Israel’s Right to Self-Defense

International law recognizes Israel’s right to defend itself, whether by the conventional international right of self-defense as set out in the UN Charter or by the international customary right to self-defense.

In conventional international law as set out in Article 51 of the UN Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations. 25

The second right is that of customary international law, based on the Caroline case (1837), which established a right of self-defense in the face of a necessity which is “instant, overwhelming, leaving no choice of means, and no moment of deliberation.”26

In several key resolutions, the Security Council has made clear that “international terrorism constitutes a threat to international peace and security” and has affirmed the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations in the face of such terror.

This has been reiterated in Resolution 1368 (2001),27 adopted only one day after the September 11, 2001, attacks on the United States, in which the Security Council invokes the right of self-defense in calling on the international community to combat terrorism.

Similarly, in Security Council Resolution 1373 (2001),28 adopted pursuant to Chapter VII of the Charter, and following the September 11 attacks, the Council “reaffirmed the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations as reiterated in Resolution 1368 (2001).”

More recently, marking the 20th anniversary of the adoption of resolution 1373 and the establishment of the UN’s Counter Terrorism Committee (CTC), the President of the Security Council, in an official statement dated January 12, 2021, reaffirmed the central provisions of Resolution 1373 (2001), including:

The Security Council reaffirms that terrorism in all forms and manifestations continues to constitute one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed.

None of these resolutions and declarations imposed any limit on their application to terrorist attacks by state actors only, nor was an assumption to that effect implicit in these resolutions.29

### Claims Being Made against Israel

#### **Collective Punishment**

The claim that Israel is collectively punishing the population of the Gaza Strip is flawed as it is based on misleading legal assumptions.

Israel’s actions in self-defense are directed toward one strategic and tactical purpose – to halt the indiscriminate rocket fire and the use of infiltration tunnels to carry out acts of terror against Israel’s civilian population. There is no strategy of collectively punishing the people of the Gaza Strip.30

However, Hamas’ and PIJ’s deliberate and systematic exposure and endangering of civilians in populated areas in the Gaza Strip by locating rocket emplacements, tactical military installations, tunnels, and ammunition stores in close proximity to homes, schools, and hospitals, and within high-rise residential and commercial buildings, are flagrant and willful violations of the norms of international humanitarian law.

Willfully exposing civilians to the danger of being harmed by Israel’s responses to rocket attacks constitutes a cynical manipulation of international humanitarian law through collectively punishing Palestinian residents of the Gaza Strip.

#### **Deliberate Targeting of Residences**

Israel has been falsely accused by the United Nations and others of deliberately and willfully targeting residences.31

Tragically, one of the many violations by Hamas of international humanitarian norms is the conduct of its terror activities within residential areas throughout the towns and villages in the Gaza Strip, including the use of commanders’ own homes, where their families and other civilians may be residing. These houses have been used for weapons storage, and command, control, and communication centers.

The use of houses and tunnels beneath residential structures for military purposes endangers them and renders them as legitimate military targets under international law.

People stand on a collapsed Hamas military tunnel beneath a Gaza street after an Israeli air strike in Gaza City, May 13, 2021. (AP Photo/Hatem Moussa)

The use of residential structures for military purposes or excavating tunnels beneath them endanger the structures and render them as legitimate military targets under international law. Even so, the IDF employs advanced methods to minimize harm to civilians.

Article 52(2) of the First Geneva Protocol32 specifically refers to the obligation to limit attacks to military objectives, defined as –

objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage.

To accurately determine military targets, the IDF employs advanced methods, including multiple levels of intelligence, extensive prior training provided to operational commanders, as well as ongoing legal monitoring of the actions of commanders in the field.

Even when a structure is considered by all relevant legal criteria to be a legitimate military target because of its use for purposes of planning acts of terror, storing weapons, hiding tunnels, or serving as rocket emplacements, the Israeli forces minimize potential harm to the surrounding civilian population through real-time visual surveillance to assess the civilian presence at a target; provision of advance warning before striking a target; and the careful choice of weaponry and ammunition in order to minimize harm to civilians.33, 34

Israel has no policy of deliberately targeting civilians or civilian property and makes every effort to give effective advance warning of impending strikes that could potentially affect the civilian population.

The Israeli concern for Gazan civilians was acknowledged by the Director of the UNRWA office in Gaza, much to Hamas’ anger. Matthias Schmale told an Israeli television station on May 22, 2021, “There is a huge sophistication in the way the Israeli military struck over the last 11 days…. [The IDF did] not hit, with some exceptions, civilian targets, but the viciousness and ferocity of the strikes was heavily felt…. So the precision was there, but there was an unacceptable and unbearable loss of life on the civilian side,” he said.35

#### **Israel’s Destruction of the Al-Jala’a Building. News Agencies’ Stockholm Syndrome?**

On May 15, 2021, the IDF attacked the Al-Jala’a building in Gaza City, which, in addition to housing the offices of international media agencies such as AP and Al-Jazeera, also housed Hamas and PIJ military intelligence-gathering installations that occupied three floors of the building. Hamas maintained a military intelligence facility in the building and used it as a base for equipment used to try to jam Israeli communications and satellite navigation systems.

An Israeli airstrike destroys a high-rise building in Gaza City, Gaza Strip, that housed media outlets including The Associated Press and Al Jazeera. (Nidal Alwaheidi / SOPA Images/Sipa USA via AP Images)

Hamas and PIJ utilized the presence of international media headquarters in the building as a cover for their military activities. As such, they prejudiced and endangered the civilian nature of the building, rendering it a legitimate military target.

The Hamas military intelligence technological research and development compound situated in the building was responsible for coordinating and guiding terrorist activities against Israel. The unit, located on three floors of the building, operated offensive cyber or SIGINT (signal) capabilities, while the antennas on the roof of the building were utilized by this unit to carry out its operations against Israeli targets, both civilian and military.

**The attack on the building was designed to neutralize Hamas’ military intelligence gathering capabilities that constituted a clear and imminent danger against Israeli civilians** and was thus necessary to attack the building, destroying Hamas’ technological military infrastructure, even at the cost of evacuating the offices of AP and Al-Jazeera.36

The news agencies objected to the Israeli attack and denied that they had any knowledge of Hamas’ presence. Israel’s Chief of Staff, Lt. Gen. Aviv Kochavi, reportedly told Israeli press, “that AP journalists drank coffee every morning in the cafeteria on the entrance floor of the building with Hamas electronics experts, whether they knew it or not.”37

#### **Disproportionate Force**

The allegations in the international media and by international organizations and some governmental representatives that Israel’s actions are “disproportionate” and violate international law are factually and legally incorrect.

The requirement of proportionality in armed conflict is a measure of the extent of force needed in relation to the concrete and direct military advantage anticipated. It is not a comparison between casualties of the parties involved nor of the damage caused during the fighting.38

A monograph entitled “Applying the Principle of Proportionality in Combat Operations,” published by the Oxford Institute for Ethics, Law and Armed Conflict,39 states: “[H]arming civilians is not in itself illegal. An injury to civilians or damage done to civilian objects as a side-effect of a military operation may be permissible provided that it is proportionate to the military gain anticipated from the operation.”

This principle is considered part of customary international law, which binds all states. It has become part of the positive law of armed conflict (IHL) with its codification in the First Additional Protocol to the Geneva Conventions of 1977. Article 51, para. 5b states: “[A]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”

That there were more civilian casualties and property damage within the Gaza Strip than there were in Israel is not a function of disproportionate use of force by Israel.

The tragic and regrettable fact that there were more civilian casualties and property damage within the Gaza Strip than there were in Israel is not a function of disproportionate use of force by Israel, or use of disproportionate weaponry, but of the fact, as outlined above, that Hamas forcibly and deliberately utilizes civilians and civilian structures and homes as human shields. The buildings are used for their rocket emplacements and command centers, thereby knowingly exposing the residents to harm with a view to both preventing Israeli actions against their rocket launching and other military facilities and to cynically parade dead civilians in front of television cameras that transmit these gruesome pictures around the world with captions blaming Israel.

In so doing, Hamas committed a double war crime by deliberately targeting Israeli civilians while at the same time embedding its weapons, leaders, operatives, tunnels, and infrastructures amid uninvolved Palestinian civilians.

Similarly, the fact that Hamas prevented civilian access to secure sections of its underground web of tunnels and bomb shelters, reserving them for its military commanders, movement of fighters, and for storage of weaponry, and the fact that Israel had developed an extensive framework of shelters as well as its Iron Dome anti-missile defensive system, cannot be used as a basis for accusing Israel of disproportionate force.

#### **The Comparison of Casualties**

Perhaps one of the most reprehensible and underhand phenomenon by the international media is the so-called “body-count” comparison, which repeats itself every time there is violence between Israel and Hamas. This sad phenomenon is exemplified by claiming that there is disproportionality in the fact that more Palestinians were killed than Israelis.40 The absurdity of such a comparison is that it intimates that more Israeli casualties would be preferable to “even-out” the count.

This absurdity is all the more inane when Israel’s Iron Dome missile defense system, which has prevented thousands of potential Israeli civilian casualties from Hamas rockets, is blamed as the cause of this disparity in casualties.

Clearly, Israel cannot be held responsible for such an equation, even more so when it is clear that many of the Gaza casualties are the result of hundreds of Hamas rockets that malfunctioned and fell short on Gazan civilian areas.

As in any armed conflict, civilians are tragically killed and injured. Unlike Hamas, Israel does not have a policy of deliberately targeting civilians, but regrettably, whether due to the fact that Hamas deliberately exposes its civilians to shield targets, or whether due to the occasional human or targeting error or inaccurate mapping, civilians are casualties.

Israel has stringent policies of investigating such instances, and in cases of alleged war crimes or negligence, takes the appropriate legal and disciplinary action.

### Threats to Institute Action against Israeli Leaders in the International Criminal Court (ICC)

Among the media hype and political declarations by Palestinian leaders and senior elements within the international community, there is a constant wave of threats to institute proceedings for alleged war crimes against Israel’s leaders and military commanders before international and national criminal tribunals.

As outlined above, Israel’s code of military law and command structure require strict conformity with international humanitarian norms, and any allegations of violation of such norms by soldiers or commanders are duly investigated and, where appropriate, legal proceedings are instituted within Israel’s military justice framework. As such, the threats to institute action in the ICC are unrealistic and fail to consider the requirements of the statute of the ICC.

However, the openly admitted and blatant series of war crimes committed by Hamas and its leaders as detailed in this chapter and the lack of any will, capability, legal framework, or means within the Hamas or Palestinian legal structure of investigating and trying such crimes, require that they be referred to the ICC with a view to ensuring that the leaders and instigators of the Hamas terror infrastructure be brought to criminal justice.

### In Conclusion

Armed conflict in any circumstances involves situations in which civilians are regrettably affected. International law aims to limit harm to innocent civilians by ensuring that the involved parties conduct the hostilities in accordance with humanitarian norms with a view to preventing, as much as possible, civilian casualties.

Israel, a sovereign state with an army that conducts itself under such norms, is making every effort to abide by them, despite the blatant, willful, and indiscriminate violation by Hamas, both vis-a-vis its own population as well as vis-a-vis Israel’s population.

One hopes that the crimes against humanity and the war crimes committed by the leaders and senior terrorist commanders of Hamas will not go unpunished and that the international community will act to ensure that they do not benefit from impunity.

\* \* \*

**Notes**

1. Hamas Charter, <http://www.acpr.org.il/resources/hamascharter.html>, see Article 2:

“The Islamic Resistance Movement is one of the wings of the Muslim Brothers in Palestine. The Muslim Brotherhood Movement is a world organization, the largest Islamic Movement in the modern era. It is characterized by a profound understanding, by precise notions and by a complete comprehensiveness of all concepts of Islam in all domains of life: views and beliefs, politics and economics, education and society, jurisprudence and rule, indoctrination and teaching, the arts and publications, the hidden and the evident, and all the other domains of life.”

See also article 7:

“Hamas is one of the links in the Chain of Jihad in the confrontation with the Zionist invasion. It links up with the setting out of the Martyr Izz a-din al-Qassam and his brothers in the Muslim Brotherhood who fought the Holy War in 1936; it further relates to another link of the Palestinian Jihad and the Jihad and efforts of the Muslim Brothers during the 1948 War, and to the Jihad operations of the Muslim Brothers in 1968 and thereafter.”

And Article 13:

“There is no solution to the Palestinian problem except by Jihad. The initiatives, proposals and International Conferences are but a waste of time, an exercise in futility. The Palestinian people are too noble to have their future, their right and their destiny submitted to a vain game.”

1. Yazan al-Saadi, “Palestinian Reconciliation: A History of Documents,” Al AkhbarEnglish (Lebanon), April 28, 2014, [http://english.al-akhbar.com/node/19580](https://english.al-akhbar.com/node/19580)
2. See Declaration by the OAS dated May 15 2021 (Reference: E-051/21): <https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-051/21>. See also <https://www.timesofisrael.com/35-country-pan-american-group-designates-hamas-a-terrorist-organization/> See also U.S. ”Country Reports on Terrorism 2019,″ U.S. Department of State, Office of the Coordinator for Counterterrorism, <https://www.state.gov/reports/country-reports-on-terrorism-2019/israel/> ; Canadian “Currently Listed Entities,” Department of Public Safety and Emergency Preparedness. November 22, 2012; EU Council Common Position 2003/651/CFSP; Khaled Abu Toameh, “King Abdullah Says No to Hamas,” Gatestone Institute, September 17, 2013, <http://www.gatestoneinstitute.org/3978/king-abdullah-hamas>; “Cairo Court Bans Activities by Palestinian Hamas in Egypt, Brands It a Terrorist Organization,” Associated Press, March 4, 2014, <http://www.foxnews.com/world/2014/03/04/cairo-court-bans-activities-by-palestinian-hamas-in-egypt-brands-it-terrorist/>
3. 4 See “Hamas Claims Responsibility for Rockets Fired at Jerusalem, Tel Aviv and Haifa,” Middle East Eye, July 8, 2014, <http://www.middleeasteye.net/news/israels-army-prepared-ground-assault-gaza-official-275282816>: ”For the first time, the Ezzedine al-Qassam Brigades strike Haifa with an R160 rocket, and strike occupied Jerusalem with four M75 rockets and Tel Aviv with four M75 rockets.”

See also Khaled Abu Toameh and Yaakov Lappin, “Hamas Claims Responsibility for Rocket Fire on Israel,” Jerusalem Post, July 7, 2014, <http://www.jpost.com/Middle-East/Hamas-claims-responsibility-for-rocket-fire-on-Israel-361830> and “The Islamic Jihad took responsibility for the rockets fired toward Tel Aviv,” in Yaakov Lappin, “Hamas: We Attempted to Hit the Nuclear Reactor in Dimona,” Jerusalem Post, July 9, 2014,
<http://www.jpost.com/Operation-Protective-Edge/Rocket-alert-sirens-sound-in-Zichron-Yaakov-120-km-north-of-Gaza-362087>

See also “Hamas Says Real Battle Yet to Begin,” i24news, July 11, 2014, [http://www.i24news.tv/en/news/israel/diplomacy-defense/36623-140708-gaza-israel-launches-operation-protective-edge](http://www.i24news.tv/en/news/israel/diplomacy-defense/36623-140708-gaza-israel-launches-operation-protective-edge%20). In a video statement broadcast across Arab media, the Al-Qassam Brigade said: “The more shahids falling make us stronger and more determined for victory. For the first time yesterday, we showered from the north of the homeland to the south in Dimona. Tens of rockets showered the center of the occupation. That is only a few of what is waiting.”

See also Elhanan Miller, “Fatah Joins Hamas and Islamic Jihad in Missile Launches,” Times of Israel, July 10, 2014, [http://www.timesofisrael.com/moderate-fatah-joins-hamas-and-islamic-jihad-in-missile-launches/#ixzz37KhRmK25](http://www.timesofisrael.com/moderate-fatah-joins-hamas-and-islamic-jihad-in-missile-launches/%23ixzz37KhRmK25).

See also “Israeli Warplanes Pound Gaza Strip,” The Australian, July 9, 2014, <http://www.theaustralian.com.au/news/world/israeli-warplanes-pound-gaza-strip/story-e6frg6so-1226982452456?nk=30dd8b2330cf43d6507b130e303ae6c6>: “The Ezzedine al-Qassam Brigades, the armed wing of Hamas, said it had fired four M75 rockets at Jerusalem, which lies 65 kilometers from the Palestinian enclave. It also claimed to have launched a rocket at Haifa, 165 kilometers away. There was no report of anything hitting the northern port city but the army said a rocket did fall on Hadera, 100 kilometers north of Gaza. Hamas militants also said yesterday they fired four rockets at Tel Aviv, 60 kilometers north of Gaza, setting sirens off across the city. Earlier, another rocket aimed at Israel’s commercial capital was shot down by the Iron Dome anti-missile defense system.”

See also “Operation Protective Edge, Day 4,” Ha’aretz, July 12, 2014, <http://www.haaretz.com/news/diplomacy-defense/.premium-1.604437>: “Hamas’ armed wing has warned airlines that it intends to target Israel’s Ben-Gurion International Airport with its rockets from Gaza and has told them not to fly there, a statement by the group said on Friday.”

See also Jen Psaki, Spokesperson, U.S. State Department, July 10, 2014, <http://www.state.gov/r/pa/prs/dpb/2014/07/229048.htm>: “There’s a difference between Hamas, a terrorist organization that’s indiscriminately attacking innocent civilians in areas where there are innocent civilians in Israel, and the right of Israel to respond and protect their own civilians. And that’s what we’re seeing on the ground take place.”

See also Patrick Martin, “Lopsided Rocket Warfare Rages On between Israel and Hamas,” Globe and Mail (Canada), July 11, 2014, [http://www.theglobeandmail.com/news/world/lopsided-rocket-warfare-rages-on-between-israel-and-hamas/article19578271/](https://www.theglobeandmail.com/news/world/lopsided-rocket-warfare-rages-on-between-israel-and-hamas/article19578271/): “Hamas also showed no sign of letting up its missile strikes against Israel, acknowledging responsibility for scores of rockets fired Friday against Israeli centers including the launch of a powerful Iranian-built Fajr-5 against Tel Aviv.”

See also “Hamas Armed Wing Warns to Strike Tel Aviv,” Xinhua, July 13, 2014, <http://www.shanghaidaily.com/article/article_xinhua.aspx?id=229441>: “The armed wing of the Islamic Hamas movement, al-Qassam Brigades, said on Saturday that it will fire new rockets called J80 into Tel Aviv and its suburb at 9:00 p.m. local time. It is the first time that Hamas declared in advance that it will fire rockets into Israel. The group claimed responsibility for launching hundreds of rockets into Israel over the past five days against the Israeli offensive on the Gaza Strip.”

See also Brent Scher, “Hamas Rockets from Gaza Target Haifa, Reach Far into Northern Israel,” Washington Free Beacon, July 9, 2014, <http://freebeacon.com/national-security/hamas-rockets-from-gaza-target-haifa-reach-far-into-northern-israel/>: “The barrage of rocket fire coming from the Gaza Strip reached far beyond the known range of Hamas’ missile arsenal, hitting the northern Israeli town of Hof HaCarmel on Wednesday. The town is just south of Haifa, Israel’s third-largest city. Hamas claimed responsibility for the attacks and said that Haifa was the intended target.”

See also “Israeli Defense Forces Launch Operation ‘Protective Edge’ against Hamas,” Voice of Russia, July 8, 2014, <http://voiceofrussia.com/news/2014_07_08/Israeli-Defense-Forces-launch-operation-Protective-Edge-against-Hamas-6359/>: “The Ezzedine al-Qassam Brigades claimed responsibility for the attacks. ‘Al-Qassam fired dozens of rockets on Netivot and Ashkelon, Ashdod and Ofakim in response to the Zionist aggression,’ a statement said. ‘Qassam rockets are a natural reaction to the Israeli crimes against our people.’”

1. See UN Security Council Resolutions 1267 (1999) of October 15, 1999, <http://www.state.gov/j/ct/rls/other/un/5110.htm>; 1373 (2001) of September 28, 2001,
[http://unispal.un.org/UNISPAL.NSF/0/392A001F254B4B9085256B4B00708233;](http://unispal.un.org/UNISPAL.NSF/0/392A001F254B4B9085256B4B00708233;%20)1540 (2004) of April 28, 2004, <http://www.treasury.gov/resource-center/sanctions/Documents/1540.pdf>; as well as its other resolutions concerning threats to international peace and security caused by terrorism.
2. UN Security Council Resolution 1269 (1999) of October 19, 1999, <http://www.mefacts.com/cached.asp?x_id=10835>
3. UN Security Council Resolution 1566 (2004) of October 8, 2004, <http://www.state.gov/j/ct/rls/other/un/66959.htm>
4. “United Nations Action to Counter Terrorism – International Legal Instruments,” United Nations, <http://www.un.org/en/terrorism/instruments.shtml>
5. “Measures to Eliminate International Terrorism – Report of the Sixth Committee,” United Nations, November 25, 1997, <http://www.un.org/law/cod/terroris.htm>
6. “Measures to Eliminate International Terrorism,” UN General Assembly Resolution 49/60, December 9, 1994, <http://www.un.org/documents/ga/res/49/a49r060.htm>
7. “(Inter-) Regional Action against Terrorism,” UN Office on Drugs and Crime, <https://www.unodc.org/tldb/en/regional_instruments.html>
8. See Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict(Cambridge: Cambridge University Press, 2005), p. 82.
9. Article 6 of the Hamas Charter.
10. 78 UNTS 277.
11. Rome Statute of the International Criminal Court, [http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\_statute\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf). See specifically Articles 7(1) and (2)a (Crimes against humanity) and Article 8(2)(b)(i)(ii)(iv) (War crimes), and Article 13 (Exercise of the court’s jurisdiction).
12. See Sigall Horowitz, “Accountability of Hamas under International Humanitarian Law,” Hamas, the Gaza War, and Accountability under International Law (Jerusalem: Jerusalem Center for Public Affairs, 2009), [https://jcpa.org/article/accountability-of-the-hamas-under-international-humanitarian-la/](https://jcpa.org/article/accountability-of-the-hamas-under-international-humanitarian-la/%20). Horowitz adds, “It can safely be argued that Hamas fighters, who daily targeted Israeli civilians by launching Qassam and Grad rockets, violated the provisions of Common Article 3 (to the Geneva conventions).”
13. Quoted in Horowitz article, citing Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), May 31, 2004, para. 22. See more at Horowitz, “Accountability of Hamas,” <https://jcpa.org/article/accountability-of-the-hamas-under-international-humanitarian-la/>
14. Ibid. See also Lisbeth Zegveld, Accountability of Armed Opposition Groups in International Law(Cambridge: Cambridge University Press, 2002).
15. “Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, October 18, 1907 – Article 25,” International Committee of the Red Cross, [http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=D1C251B17210CE8DC12563CD0051678F](http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=D1C251B17210CE8DC12563CD0051678F%20).
16. “Protocol Additional to the Geneva Conventions of August 12 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977 – Article 48,” International Committee of the Red Cross, <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=8A9E7E14C63C7F30C12563CD0051DC5C>
17. For a detailed exposure of the use by Hamas of homes of senior Hamas operatives as command centers and weapons storage facilities, see “Weapons Caches in Houses of Terrorist Operatives in the Gaza Strip: The Case Study of Ibrahim al-Shawaf, Senior PIJ Commander,” Intelligence and Terrorism Information Center, July 15,
2014, <http://www.terrorism-info.org.il/Data/articles/Art_20677/E_116_14_1313703276.pdf>
18. “UNRWA Strongly Condemns Placement of Rockets in School,” UNRWA, July 17, 2014, <http://www.unrwa.org/newsroom/press-releases/unrwa-strongly-condemns-placement-rockets-school>. Evidently, according to media reports, this did not prevent the UNRWA officials from transferring the rockets found in the school to the Hamas authorities. See Raphael Ahren, “UN Agency Handed Rockets Back to Hamas, Israel Says,” Times of Israel, July 20, 2014, <http://www.timesofisrael.com/un-agency-handed-rockets-back-to-hamas-israel-says/>
19. “The Use of Mosques in the Gaza Strip for Military Purposes by Hamas and Other Terrorist Organizations: The Case of the Al-Farouq Mosque,” Intelligence and Terrorism Information Center, July 13, 2014, <http://www.terrorism-info.org.il/Data/articles/Art_20672/E_113_14_1401598645.pdf>
20. See note 10 above, <http://www.un.org/documents/ga/res/49/a49r060.htm>
21. Charter of the United Nations, “Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression,” <http://www.un.org/en/documents/charter/chapter7.shtml>
22. Louis-Philippe Rouillard, “The CarolineCase: Anticipatory Self-Defence in Contemporary International Law,” Miskolc Journal of International Law (Hungary), Vol. 1 (2004), No. 2, pp. 104-120, <http://www.uni-miskolc.hu/~wwwdrint/20042rouillard1.htm>
23. “Security Council Condemns, ‘in Strongest Terms,’ Terrorist Attacks on United States,” United Nations, September 12, 2001, <http://www.un.org/News/Press/docs/2001/SC7143.doc.htm>. See also UN Document S/PRST/2021/1 dated January 12 2021: <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_prst_2021_1.pdf>
24. UN Security Council Resolution 1373 (2001) of September 28, 2001, [http://unispal.un.org/UNISPAL.NSF/0/392A001F254B4B9085256B4B00708233](http://unispal.un.org/UNISPAL.NSF/0/392A001F254B4B9085256B4B00708233;%20)
25. See Thomas Franck, “Terrorism and the Right of Self-Defense,” American Journal of International Law, Vol. 95, (2001), pp. 839-840.
26. Justus Reid Weiner and Abraham Bell, “International Law and the Fighting in Gaza,” Jerusalem Center for Public Affairs, 2008, p. 16, <https://jcpa.org/article/international-law-and-the-fighting-in-gaza/>
27. “Statement by Director of UNRWA Operations in Gaza, Robert Turner, on the Unfolding Situation in the Strip,” UNRWA, July 10, 2014, <http://www.unrwa.org/newsroom/official-statements/statement-director-unrwa-operations-gaza-robert-turner-unfolding>
28. See note 10 above, <http://www.un.org/documents/ga/res/49/a49r060.htm>
29. “IDF Strikes Houses in Gaza Used for Military Purposes,” Israel Defense Forces, July 10, 2014, <http://www.idfblog.com/blog/2014/07/10/idf-strikes-houses-gaza-used-military-purposes/>
30. “Palestinian Envoy to UNHRC: Israelis Warn Civilians Before Attacks, We Don’t,” MEMRI TV, July 13, 2014, <https://www.youtube.com/watch?v=DjzS27ylCZ8>
31. [UNRWA Gaza chief apologizes for saying IDF strikes ‘precise’ and ‘sophisticated’ | The Times of Israel](https://www.timesofisrael.com/unrwa-gaza-chief-apologizes-for-saying-idf-strikes-precise-and-sophisticated/)
32. <https://israel-alma.org/2021/05/18/the-al-jalaa-building-neutralizing-a-clear-and-imminent-danger/> <https://www.nytimes.com/live/2021/05/21/world/israel-hamas-news#israeli-regrets-bombing>

2014, <https://socioecohistory.wordpress.com/2014/07/22/british-parliament-accuses-israel-of-war-crimes/>

1. [‘They drank coffee with Hamas men,’ comments IDF Chief of Staff on AP journalists in Gaza (worldisraelnews.com)](https://worldisraelnews.com/they-drank-coffee-with-hamas-men-comments-idf-chief-of-staff-on-ap-journalists-in-gaza/)
2. “Rule 14. Proportionality in Attack,” Customary IHL, International Committee of the Red Cross, <http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14>
3. Janina Dill, “Applying the Principle of Proportionality in Combat Operations,” Oxford Institute for Ethics, Law and Armed Conflict, University of Oxford, December 2010, <http://www.elac.ox.ac.uk/downloads/proportionality_policybrief_%20dec_2010.pdf>
4. Stephanie Gutmann, “The Body-Count Cliché – The Victim-Loving Western Media Have a Weakness for Palestinians,” National Review, July 11, 2014, <http://www.nationalreview.com/article/382471/body-count-clich-stephanie-gutmann>. See also Eric H. Yoffe, “The Bizarre Moral Criticism Against Israel – What Does It Mean to Say that Casualties Are ‘Disproportionate’?” TIME, July 14, 2014, [http://time.com/2982215/israel-gaza-casualties/](https://time.com/2982215/israel-gaza-casualties/)