

## S A P I R



SPECIAL EDITION | OCTOBER 2023

# How Israel Can Respond Ethically to Hamas

“It’s precisely this moment, as the medieval commentator Nahmanides asserts, that we need to maintain the moral stamina to avoid the evil excesses of wartime behavior.”

by RABBI SHLOMO BRODY

Contemporary military ethics are built around one central principle: Keep noncombatants out of warfare as much as possible. This principle imposes two major rules on fighting parties: Do not target noncombatants, and do not entangle your troops with the civilian population, so that it remains clear who are combatants and who are noncombatants. The 1977 Additional Protocol I (AP/1) to the Geneva Conventions lays out these principles:

51 (2): The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

51 (7): 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, favour or

impede military operations.

The authors of these laws thought they would minimize the bloody costs of war, as long as everyone played by the rules. The success of the international law project depends on reciprocity.

In practice, however, terrorist groups such as Hamas fight with one basic principle: Kill as many people as possible. Hamas's only exception has been to seize people as hostages instead. In the unprovoked October 7 attack on Israel that killed 1,400 people, Hamas also raped women, beheaded children, kidnapped grandparents, and shot rockets indiscriminately at Israeli cities. Hamas continues to offer no access to the prisoners of war they are holding in Gaza as hostages.

While their recent actions were particularly brutal, the complete disregard for military ethics is nothing new. For many years, Hamas has committed war crimes that include fighting from civilian areas and utilizing protected buildings including schools and hospitals as “human shields.” To kill Israelis, Hamas takes cover behind its own people, making it very difficult to distinguish between the terrorists and the noncombatants they are allegedly fighting for. Given Hamas's disregard for civilian lives, Israeli and Palestinian alike, one might argue that Israel should be able to attack Hamas without regard to killing noncombatants, too.

This is a particularly important question because Hamas's tactics are not unique. As international-law expert Michael Schmitt documents, all terrorist and guerrilla groups from around the world—Iraq, Lebanon, Bosnia, Gaza, El Salvador, Somalia, Liberia, Sierra Leone, and Chechnya—treat international law as irrelevant to their actions while also using it as shield to

protect them from counterattacks, crying “war crimes” when civilians die as an inevitable result of how they defend themselves.

Is it, then, the case that the rules mean something only when both sides keep them—that, without reciprocity, there is no deal? As Jeff McMahan, a leading military ethicist, recognizes, “it is rational for each side in a conflict to adhere to them only if the other side does.”

Not too long ago, this is how civilized countries dealt with egregious war crimes from the other side: They offered them a taste of their own medicine. The Allies bombed Dresden and other cities after the Nazis blitzed Coventry and London. In one prominent example from 1944, German soldiers killed 80 captured French partisans. Their French comrades in Annecy then issued a warning through the Red Cross that they would execute the same number of German soldiers. When they received no reply, the French executed eighty German POWs. No captured French partisans were killed by the Germans again. You want to make the other side play by the rules? Make them pay for war crimes by hitting back in a way that will deter them from repeating the offense.

The ethicist Michael Walzer, however, whose discussion of this episode made it famous, considers the French response immoral. POWs are never to be killed—period. This ethos was codified in AP/1: “Attacks against the civilian population or civilians by way of reprisals are prohibited” (51/6). The reprisal ban extends to civilian objects, cultural objects, and places of worship.

So it’s no surprise that NGOs accuse Israel of disproportionate responses and war crimes, as a leader of Human Rights Watch recently asserted. Even though Hamas places its own citizens in harm’s way, this “does not give the Israeli government the right to then disregard its obligation to avoid

disproportionate or indiscriminate harm to those civilians.” Reciprocity for the rules of war, in short, does not matter. Are they right in terms of international law or military ethics? The answer, in both cases, is they are wrong—dangerously wrong. Reciprocity matters, and it’s critical to understand why.

Legally, leading Western countries have never accepted these provisions of AP/1. France, for example, signed AP/1 in 2001 but added that it does not accept its restrictions when it must respond to gross violations of military ethics against its citizens. Britain, which signed in 1998, specifically asserted that it retains the right to reprisals against civilians when “it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations.” These European powers, in short, assert that AP/1 cannot limit the means necessary to prevent war crimes against their citizens.

Most significantly, the United States and Israel have both refused to sign AP/1, and for good reason. First, a strict reading of AP/1 would mean that these powers could not retaliate with a weapon of mass destruction (WMD) against a nuclear or chemical attack. After all, WMDs are not precision weapons; they kill indiscriminately. Forswearing their use would undermine the premise of “mutually assured destruction,” the Cold War strategy of deterrence, which assumes that either side would retaliate in kind to a nuclear attack. Second, and more important, these two countries understand that AP/1 incentivizes nefarious groups to use human shields by making international humanitarian law into a shield against attack. Rules of war that are ignored and manipulated by one side are no rules at all.

So does this mean that Israel should retaliate by targeting noncombatants or shooting indiscriminately? No, for three reasons:

**Personal virtue and martial honor:** Soldiers refrain from horrific acts not because of treaties but because of obligations we have to ourselves. For many, this includes the idea that soldiers, for the sake of their own conscience, do not indiscriminately kill noncombatants. Virtue has always played an important role in military culture. The military historian John Keegan goes so far as to say that this is the only true motivation of restraint on the battlefield. “There is no substitute for honor as a medium of enforcing decency on the battlefield—never has been and never will be.” This notion draws from an admonition to soldiers in Deuteronomy 23: “When you go out as a troop against your enemies, be on your guard against anything untoward.” The sages understood this as a warning for soldiers to avoid murder, sexual immorality, blasphemy, and even gossip. War can bring out the worst in people. It’s precisely this moment, as the medieval commentator Nahmanides asserts, that we need to maintain the moral stamina to avoid the evil excesses of wartime behavior.

**National exceptionalism:** A related claim asserts that we cannot fight against evil in a way that leads us to abandon our country’s principles. That’s not “who we are,” so to speak. Thus, Senator John McCain, a POW during the Vietnam War, argues, “When the principle of reciprocity does not apply, we must instead remember the principles by which our nation conducts its affairs. ... Were we to abandon the principles of wartime conduct to which we have freely committed ourselves, we would lose the moral standing that has made America unique in the world.”

**Inherent human dignity:** The ultimate antidote to targeting noncombatants is to remember that all human beings are created in the image of God. This theological tenet has direct ethical implications. In the

1940s, in response to the reprisal tactics of the *Lehi* underground group, who would target random Arabs after terror attacks on Jews, Rabbi Shlomo Goren, who would become the IDF's head chaplain, argued vociferously against using "terror to fight terror":

I was against the murder of Arabs just because they were Arabs. I objected to the murder of people who had committed no crime against the Jews. ... After all, I was a rabbi, and we had our moral standards, the Torah's moral standards, according to which every person is created in God's image. Therefore, I believed we must be merciful and respect every person's life, as long as he is not a danger to us and is not fighting us.

We must focus on protecting ourselves by targeting enemy combatants. Responsibility for increased collateral damage lies with Hamas. We should follow the lead of Yoram Dinstein, a leading authority of international humanitarian law, who has argued that the rules of proportionality must be relaxed when one side takes no measures to prevent civilian casualties. AP/1 demands that one side should not attack if it believes that civilian casualties will be "excessive" in relation to the anticipated military advantage. When a military target is illicitly located in the presence of civilians, however, the number of civilian casualties will clearly be higher than usual.

This balanced response to the lack of reciprocity is wisely codified in the U.K.'s *Manual of the Laws of Armed Conflict*:

Any violation by the enemy of this rule [the prohibition of "human shields"] would not relieve the attacker of his responsibility to take precautions to protect the civilians affected, but the enemy's unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected.

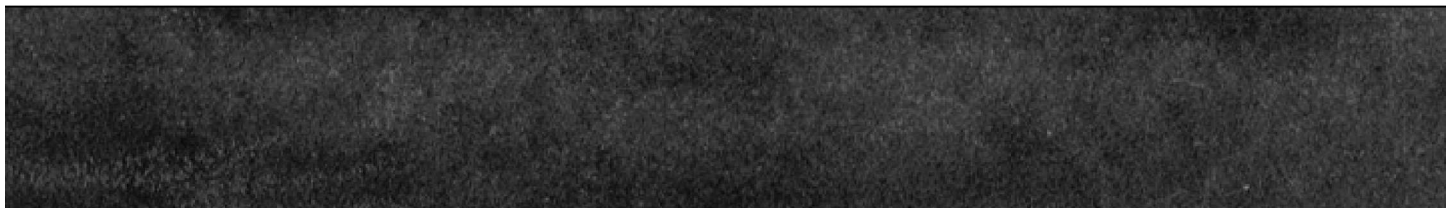
We will not descend to the levels of our enemies. But we will not allow them to use the laws of war as a shield against us.



Rabbi Shlomo Brody is the executive director of Ematai and the author of the forthcoming *Ethics of Our Fighters: A Jewish View on War & Morality*.

SUBSCRIBE TO THE  
SAPIR NEWSLETTER >>

VIEW CONTENTS  
OF THIS ISSUE >>



# S A P I R

BROWSE THE ARCHIVE

By theme

By issue

By author name, A-Z

JOIN THE CONVERSATION

---

Upcoming events

SAPIR Conversations

Letters to the Editor

BE IN TOUCH

---

Sign up for our newsletter

About us

Contact us

*And they saw the God of Israel: Under His feet there was the likeness of a  
pavement of sapphire, like the very sky for purity.*

—Exodus 24:10

