

Legal Aspects of the Humanitarian Crisis in Gaza

By

Stephen R. Shalom

Remarks for a program on the Gaza Humanitarian Crisis sponsored by the US Federation for Middle East Peace, January 23, 2009.

Gaza has gone through a humanitarian disaster of the first order, and is still suffering from a severe humanitarian crisis. I would like to briefly indicate some of the things that international humanitarian law (IHL) can tell us about the situation.

1. International humanitarian law prohibits the intermingling of military and civilian forces. However, IHL does not say that if one party DOES intermingle then the other party is entitled to act without regard for civilian casualties. On the contrary, it remains incumbent on the attacking party to still weigh the harm to civilians against the military benefit of any strike.

Imagine if the police were chasing a murder suspect who ran into an apartment building. Now obviously the murderer is acting wrongly in going into the building. However, does anyone think that it would be Ok if the police chief ordered his officers to blow up the building and kill all its residents on the grounds that "any civilian deaths are the responsibility of those who use human shields"?

2. So how do we weigh the military benefit of any strike? Consider two examples: in World War II, a one civilian is near a column of German tanks. Here IHL might well conclude that the military importance of destroying the tank column outweighs the human cost of the dead civilian. On the other hand, imagine if a single Nazi soldier was standing guard outside a sports stadium. In this case, IHL would insist that the military benefit of the attack is trivial compared to the harm to civilians.

Obviously, there is great military benefit in destroying a military target that is responsible for massive numbers of civilian deaths on the opposing side. Nevertheless, no military target in Gaza conceivable posed such a threat. Only three Israeli civilians were killed in the entire war, and indeed, those were the only Israeli civilians killed from Gaza since June 5.

Surely, this level of military threat could not be important enough to warrant the killing of 100 civilians, let alone many hundreds.

3. So far I have been talking about civilian deaths that occur as collateral damage when one is trying to aim at a military target. IHL is clear that it is never permissible to intentionally aim at a civilian target.

Hamas, as we all know, has fired rockets at civilian targets. This is a violation of IHL.

However, it is also the case that Israel has attacked -- intentionally -- civilian targets, on a much larger scale.

I am not talking about mosques which Israel claims were hiding weapons -- who knows whether the Israeli claims are true, since they barred independent observers from the scene. But let us put to the side all the civilian structures that Israel claimed were being improperly used for military purposes.

First, Israel intentionally targeted civilian police. International law distinguishes between police who are involved in armed combat and those who have essentially civilian functions (whether they are armed or not). In its opening salvo, Israel bombed (in the words of the Israeli human rights organization B'Tselem)

"The main police building in Gaza and killed, according to reports, forty-two Palestinians who were in a training course and were standing in formation at the time of the bombing. Participants in the course study first aid, handling of public disturbances, human rights, public-safety exercises, and so forth. Following the course, the police officers are assigned to various arms of the police force in Gaza responsible for maintaining public order."

It is true, of course, that these police trainees might have become Hamas fighters at a later point in time. However, it is also true that attacks on many Israeli civilian targets kill those who -- given widespread membership in the reserves -- might later be called to military duty. It would be grotesque to justify the suicide bombing of a bus by pointing to the reserve status of the victims. It is no less grotesque to justify the slaughter of these police cadets.

4. Aside from police, it is well established that Israel has intentionally attacked civilian buildings and facilities -- and the people inside those buildings and facilities -- if those buildings and facilities were in any way connected to Hamas. Its social service facilities, its parliament, its justice building, and so on.

A senior Israeli military official told the *Washington Post*,

"There are many aspects of Hamas, and we are trying to hit the whole spectrum, because everything is connected and everything supports terrorism against Israel."

Major Avital Leibovitch, an IDF spokesperson, said,

"Anything affiliated with Hamas is a legitimate target."

Brigadier General Dan Harel declared:

"We are hitting not only terrorists and launchers, but also the whole Hamas government and all its wings.... We are hitting government buildings.... After this operation there will not be one Hamas building left standing in Gaza...."

However, of course in every one of these civilian buildings there are civilians present.

Israel attacked money exchanges in Gaza -- because, they said, these financially assisted Hamas. Recall what happened on 9-11. Al Qaeda attacked the World Trade Center. When they were condemned for their horrific murder of civilians, they replied that economic facilities like the WTC provided the wherewithal for the US government to carry out its unjust policies.

4. In just war theory there are two basic concepts: Jus ad bellum, the justness of the cause, and jus in bello, the justness of how the war is fought.

There are two schools of thought about how these two principles relate to one another. One view is that they are totally separate: one can fight unjustly for a just cause and one can fight justly for an unjust cause. The second view is that it is impossible to fight justly if the cause is unjust. That is, even killing a soldier is wrong if it is in pursuit of an unjust cause.

Many human rights organizations, like Amnesty International, the Red Cross, and Human Rights Watch say that their mandate is only to judge the conduct of war, jus in bello, and therefore they don't consider the justness of the cause.

However, there is another view that says that the conduct of fighting is related to the justness of the cause. This doesn't mean that in a just cause it is OK to kill civilians -- that is always wrong. But it does mean that in an unjust cause, it is wrong even to kill soldiers.

Therefore, if you find, like the International Court of Justice, that the continuing Israeli occupation is unjust, then no killing carried by the IDF can be just.

If you find that Israel could have extended the lull with Hamas simply by agreeing to remove the "collective punishment" of the border closures, then Operation Cast lead was not a last resort, and thus not a just cause. Again, any deaths -- even of combatants -- that followed as a result would be unjust.