

Israel – Hamas 2023 Symposium – A Moment of Truth: International Humanitarian Law and the Gaza War

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Hamas's horrendous October 7 attack on Israeli civilians and Israel's anticipated response pose a unique challenge to scholars and practitioners of the Law of Armed Conflict or International Humanitarian Law (IHL), possibly a challenge they have never faced before.

There is considerable support among international jurists for the premise that Israel has a right to defend itself against Hamas. Israel's claim that the only way to do so is to topple the Hamas regime and destroy its governance and military capabilities also seems reasonable. At least, there is wide international support for the premise that Hamas terrorists should not be allowed to continue to freely operate and target Israeli civilians from the Gaza strip. Recognizing these operational realities and their legal implications will both serve humanitarian interests to the greatest extent feasible and strengthen the credibility of IHL.

Operational Considerations

Hamas operates from a web of tunnels under Gaza City and as long as these tunnels remain, Hamas can preserve its military capabilities. Bombing these tunnels from the air might not be effective even if bombs could penetrate the tunnels with precision. If only air strikes are used, Hamas terrorists might simply intermingle with the civilian population. And even if destroying these tunnels by a bombing campaign were effective, it would require Israel to destroy civilian buildings located above the tunnels, including hospitals, mosques, schools, and houses. The death toll in such an operation could be immense, and based on acquaintance with the way decisions are taken in the Israeli Defense Forces (IDF), that course of action would not be undertaken. For instance, Israel has not destroyed the Shifa Hospital in Gaza City with thousands of patients in it, in order to destroy the Hamas HQ allegedly located underneath the hospital.

Without claiming to be a military strategist, let us take Israel's position seriously. Namely, that the only solution to this problem is a ground operation. Sending Israeli soldiers in would certainly risk their lives. Previous assessments presented to the Israeli cabinet estimated IDF casualties from such an operation in the hundreds. Nevertheless, the IDF claims that this is the only viable course for Israel to achieve its declared goal or the much more limited goal of inflicting severe damage on Hamas.

Moreover, a ground operation in Gaza City and surrounding areas in the northern Gaza strip, where more than one million inhabitants still live, would cause immense civilian losses, even if Israel acts according to the strictest interpretation of IHL. Boots on the ground always cause unavoidable collateral civilian deaths. When facing a terrorist organization that hides in a civilian population and uses civilians as human shields, the harm to civilians would be much greater.

Humanitarian Considerations

So, it seems that if one accepts the premise that a ground operation is required, the only viable solution for minimizing civilian casualties is an evacuation of the civilian population from the area. Evacuation, needless to say, is first and foremost the responsibility of the party which places its armed forces within the civilian population, in this case Hamas. It is perhaps worth noting, in this regard, that Israel evacuated more than three-hundred thousand Israeli civilians from areas close to the Gaza strip and Israel's northern border in order to protect them, despite the fact that the towns and villages in which they live are purely civilian. These people now live in various locations across Israel until they can return home safely. Yet, it is quite clear that Hamas will not make even the slightest effort to protect the Palestinian civilian population. In fact, Hamas has actually warned civilians not to evacuate. The duty must then be transferred to the Israelis. The requirement to convey an effective warning before an attack in which civilians might be killed entails a responsibility to call upon civilians to evacuate Gaza City and move to a safe location.

All this is quite clear and Israel itself does not challenge it. In fact, Israel has repeatedly called for the evacuation of the civilian population. Israel has never ordered the civilian population to evacuate. It also never threatened that any civilians remaining in the area would lose their right to protection. True, Israel states that Palestinian civilians that chose to remain in Gaza City would be subject to great risks. But that is the reality of the military situation and not a threat.

This Israeli attempt to secure the evacuation of civilians was almost immediately condemned as a violation of IHL (or even genocidal). Some claimed that Israel has not given enough time to evacuate, although it has been more than a week since Israel issued the warning. Some have said that evacuation can only be undertaken with the consent of the evacuated persons, and that evacuation under a threat of attack is unlawful. Others have criticized the fact that Israel has not pre-prepared sufficient housing at the site of the proposed evacuation or have lamented the fact that the “humanitarian corridors” Israel identified through which the civilian may move to the southern part of the Gaza strip, are not sufficiently protected.

Some of these claims and criticisms are indeed legitimate. Israel, the United States, Egypt, and international organizations should see to it that there are enough humanitarian supplies in place at the point of arrival of the evacuated population. It is unfortunate that American pressure was required to force the hand of the Israeli government to agree to the transfer of such supplies. Israel should also do its best to protect the humanitarian corridors. There should be a clear demand from Israel to declare that the evacuation is a temporary measure. But all this is beside the point; the main question is whether those criticizing Israel would agree to a feasible plan to evacuate Palestinians from Gaza City as a temporary measure.

Imposing conditions and provisos that render an evacuation *de facto* impossible may disguise a more general objection regarding the legality of any form of evacuation. Since evacuation is a means of saving lives, an objection to it should be honest and well founded.

It is unrealistic to expect Israel to wait months before launching the attack on the monstrous Hamas organization that slaughtered its civilians. Israel will not build houses or put up tents for the million people that need to be evacuated before they arrive at the designated site. Israel cannot really stand behind a promise that no civilian person will be hurt, or even killed, during the evacuation, especially if the threat to the civilians evacuating is from Hamas, which views the evacuation itself as undermining its strategy of operating from within the civilian population. An evacuation of a million civilians is always a complex and fraught business, and more so in a war zone. People will inevitably suffer, and some might even die. And yet, an evacuation is ten-folds preferable to the only realistic alternative, an Israeli attack on Gaza city from which no citizens have evacuated.

Legal Considerations

Here lies the decisive moment for international lawyers. We have before us a rare case: a democracy at war with a terrorist organization is declaring its willingness to comply with international law. But by posing unrealistic requirements for the planned evacuation, international lawyers might render IHL irrelevant.

The other option is to take the path first taken by President Biden. Support Israel in its just campaign against Hamas, and at the same time clarify the feasible requirements of international law. There are legitimate issues of concern that should be identified and addressed. For example, one issue is how to ensure that the evacuation is temporary. Another is the issue of humanitarian support, both during the hostilities and in the days after. There are various possibilities and guarantees that can and should be demanded in this regard to keep IHL true to one of its main goals, the protection of civilians from the horrors of war.

Concluding Thoughts

It is clear why international lawyers are wary of supporting evacuations. Most such measures have ended in illegal deportations. It is also clear why international institutions are careful to take seriously the danger that Israeli air strikes could cause disproportionate damage to civilians. But the way to promote respect is to take Israel's declared intention and willingness to respect IHL seriously. I suspect that as the war proceeds, there will be more cases in which it will be important and helpful to discuss whether the parties' policies and actions are carried out in accordance with IHL. International lawyers and institutions can contribute to this, but certainly not by ignoring who the real culprits in this situation are and by holding Israel to standards that are unrealistic in the kind of conflict now developing in the Gaza strip. It will be very unfortunate if international lawyers miss the opportunity to strengthen IHL and the protection of civilians by proving the relevance of this branch of international law even to the fight against terrorist organizations like Hamas at this moment of truth.

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