

# Israel – Hamas 2023 Symposium – Distinction and Humanitarian Aid in the Gaza Conflict

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It is axiomatic that commanders are required to discriminate between civilians and combatants when attacking enemy positions. However, the difficulty in discriminating between civilian and military personnel and objects is heightened in the Gaza conflict, due to the fact that Hamas fighters frequently wear civilian clothes, drive civilian vehicles, and embed themselves in built up civilian areas.

This post considers Israel's obligations in the Gaza conflict in light of these difficulties, using the U.S. Department of Defense (DoD) *Law of War Manual* as a guide. Although the *Manual* does not apply to Israeli operations, its provisions are instructive when assessing how the law of armed conflict applies to the Gaza conflict, as well as how the U.S. armed forces would approach similar issues. The post commences by addressing Israel's legal obligations when targeting before turning to consider safe zones and humanitarian corridors.

## Distinction

When determining whether an individual or object is serving a civilian or military purpose in the Gaza conflict, the question arises as to the extent of the measures that commanders must take to verify the target. Some commentators have suggested that warfighting in situations in which combatants and civilians are tightly intertwined presents a heightened responsibility on the part of the attacking party to discriminate between the two.

Interestingly, this seemingly difficult legal problem is answered quite directly by paragraph 17.5.1 of the DoD *Law of War Manual*. It states that in both international and non-international armed conflicts, “an adversary’s failure to distinguish its forces from the civilian population does not increase the legal obligations on the attacking party to discriminate in conducting attacks against the enemy.” This provision indicates that commanders cannot be held to same degree of accountability for mistakenly targeting civilians when an adversary fails to distinguish its forces.

This conclusion is perfectly logical in light of the requirement imposed by customary international law that military combatants distinguish themselves from the civilian population. Paragraph 17.5.1 encapsulates the concept that military commanders are not required to assume additional burdens resulting from the failure of an enemy to adhere to the provisions of international law.

Clearly, paragraph 17.5.1 does not state that commanders are relieved of a duty to discriminate. Rather, the DoD’s position reflects a well-reasoned conclusion that no party should be permitted to obtain a military advantage by ignoring well established principles of international law. Indeed, any other result would encourage, rather than discourage, flagrant violations of the laws of armed conflict. It is therefore appropriate that the policy outlined in the DoD *Manual* is equally applicable to the context of the Israel Defense Force’s (IDF) operations in Gaza.

Accordingly, the normative provisions contained in the DoD *Manual* concerning discrimination between civilian and military targets should apply even when attacking Hamas targets in the built-up areas of Gaza. This means that commanders must take “feasible precautions” to verify that the individuals or objects being attacked are military in nature (see *DoD Law of War Manual*, § 17.7). The “feasible precaution” standard does not require a commander “to do everything possible” to determine whether a target is military or civilian. Indeed, such precautions need not be taken if a commander “determines that a precaution would not be feasible because it would result in increased operational risk or an increased risk of harm to his or her forces” (see *DoD Law of War Manual*, § 5.2.3.2).

The feasible precautions required to be taken in Gaza must take into consideration that Hamas fighters regularly use civilian structures as a base for operations. This factor operates to mitigate the normal presumption that civilian structures are used for civilian purposes. Accordingly, there is no requirement that an Israeli soldier must be fired upon from a civilian facility before determining that it is being used as a base of military operations. Imposing

such a requirement would effectively increase the legal obligations imposed on the IDF to distinguish between civilian and military objects, when compared to the situation of an adverse party which uses non-civilian structures to launch attacks as required by international law.

## **Safe Zones**

Another highly prominent issue in the Gaza conflict is the availability of so-called “safe zones.” Israel has been accused of bombing in areas of southern Gaza that it had previously declared to be safe zones. The problem with this critique is that it is legally impossible for a safe zone to come into existence absent mutual agreement on the part of the warring parties (see Additional Protocol I to the 1949 Geneva Conventions, art. 60). Indeed, a *sine qua non* for a legally binding safe zone is consent between the warring parties. A unilateral declaration of a safe zone could not possibly be effective if an adverse party elects to attack from inside the safe zone. It is perfectly clear that Hamas and Israel have never agreed to any safe zones. Therefore, none have come into existence.

Nonetheless, Israel properly advised civilians to move to the southern part of the strip, because it is relatively safer there than in the northern part. This reflected a good faith analysis on the part of the IDF as to where military operations most dangerous to civilians would likely occur. In advising civilians to move south, Israel provided notice “so that civilians and the authorities in control of the civilian population can take measures to reduce the risk that civilians will be harmed by military operations” (see DoD *Law of War Manual*, § 5.11.5.2 (Effective Advance Warning)).

## **Humanitarian Relief**

Another major factor in the Gaza conflict involves the creation of humanitarian corridors. There is no question that humanitarian corridors constitute an appropriate method of relieving the suffering of non-combatants. However, any requirement to provide humanitarian aid to the civilian population applies only when the relief is provided in an “impartial” manner and without “adverse distinction” (Additional Protocol II, art. 18). This means that Israel has a right to ensure that humanitarian relief is also provided to the hostages taken from Israel on October 7. This can easily be accomplished if Hamas allows authorized representatives of the International Committee of the Red Cross or another credible international body access to the hostages. Israel can properly condition any provision for humanitarian aid, especially with respect to the northern part of the Gaza enclave, upon compliance with the non-discrimination provisions of Article 18

As to the fuel embargo, Israel has an obligation to allow relief consignments of supplies which are essential for the survival of the civilian population (Additional Protocol II, art. 18). However, Israel argues that Hamas already has adequate fuel supplies for its civilian population but has instead elected to use those supplies for military purposes. Israel is not

required to allow passage of fuel supplies which are in excess of the basic humanitarian needs of the civilian population, and which would instead be used for the purpose of augmenting the amount of fuel available for military purposes.

## **Concluding Thoughts**

The conflict in Gaza will likely define the law of armed conflict for decades to come. The international community must avoid imposing impossible burdens on a State actor who is fighting an irregular force which flagrantly violates international law by kidnapping hostages, deliberately targeting civilians, and by forcing its own civilians to act as human shields. While Israel is committed to adhering to the laws of war, it must not be asked to supply enemy combatants with the sustenance required for them to continue their fight.

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