Israel-Hamas 2024 Symposium – Israel's Jus ad Bellum and LOAC Obligations and the Evolving Nature of the Conflict

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by Michael N. Schmitt | Aug 19, 2024

According to the *New York Times*, some senior American officials have concluded Israel has achieved all it can militarily in the Gaza Strip. It reports that "a growing number of national security officials" believe that the Israel Defense Force (IDF) will never be able to eradicate Hamas (and other groups involved in the conflict). Instead, Israeli forces have been relegated to mounting so-called "Whack-a-Mole" operations in which they conduct individual strikes based on intelligence or act to regain control over an area where the enemy appears to be regrouping. Continued combat operations by the IDF will, according to those officials, only endanger civilians in the area.

Even if these assessments are accurate, the facts remain that Hamas still holds over 100 Israeli hostages, continues to fire rockets into Israel, and is still engaging IDF forces in much of the Gaza Strip.

Given the scale of the impact of the fighting on the civilian population and considering the risk that it will spread elsewhere in the Middle East, there is growing pressure on the parties to negotiate an end to the conflict. For instance, last week, the United States and other States urged the parties to conclude a cease-fire deal "as soon as possible, and stressed there is no further time to lose." Such pressure builds on a June UN Security Council resolution (2735) that "underscore[ed] the importance of the ongoing diplomatic efforts … aimed at reaching a comprehensive ceasefire deal." However, Prime Minister Netanyahu has set a high bar for ending the conflict, asserting that "Israel has only one choice: To achieve total victory, which means eliminating Hamas's military and governing capabilities, and releasing our hostages."

Hopefully, the negotiations will end successfully with a cessation of hostilities, the return of the hostages, and a post-conflict governance structure that stabilizes the situation. But, for the sake of analysis, let us assume the assessments above are accurate—that Israel has the upper hand but is unlikely to eradicate the threat posed by Hamas completely. In this post, I ask how such a situation would affect Israel's obligations under the law governing the resort to the use of force (*jus ad bellum*) and the law of armed conflict (*jus in bello*). Specifically, I examine whether the necessity and proportionality limitations on Israel's right of self-defense would still apply, how those obligations would relate to the picture painted by the American officials, and how that situation might affect ongoing IDF operations under the law of armed conflict.

A cautionary note is necessary at the outset. The *jus ad bellum* and the law of armed conflict are contextually dependent bodies of law. The discussion that follows uses as context the description offered by the unnamed American officials to tease loose legal issues. I am not offering a definitive conclusion as to Israeli operations. Instead, my goal is to depict how the legal obligations of a State acting pursuant to its right of self-defense might change if it begins prevailing on the battlefield but might not be able to completely defeat its enemy.

The *Jus ad Bellum*

As I explained in an earlier *Articles of War* post, the October 7, 2023, attacks by Hamas against Israeli military personnel and civilians triggered (or continued) Israel's right to respond forcibly under the *jus ad bellum* pursuant to Article 51 of the UN Charter and customary international law. Article 51 provides, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

At least by that date, Israel was also engaged in an armed conflict under the *jus in bello* with Hamas (I include other organized armed groups fighting Israel in Gaza in my references to Hamas). There is some disagreement as to whether the conflict is international or non-

international in character, with the latter position being, for reasons I have explained elsewhere, the better one. But, whatever the correct characterization, an armed conflict is underway as a matter of law between Israel and its enemies in Gaza.

The fact that an armed conflict is ongoing raises the question whether the core *jus ad bellum* preconditions to the resort to force in self-defense–necessity and proportionality—govern whether and how Israel may conduct its operations (see, e.g., *Paramilitary Activities*, paras. 194, 237; *Nuclear Weapons*, para. 41; *Oil Platforms*, paras. 43, 73-74, 76). The condition of necessity requires a need for forcible action to terminate the ongoing or imminent armed attack that triggered the right to respond forcibly. Should a viable and effective non-forcible option exist, there is no right to respond to the armed attack forcibly. Whereas the necessity condition addresses *whether* force may be used, proportionality governs the scale and scope of that force. By it, no more force than required in the circumstances to defeat the ongoing or imminent armed attack is permitted. This requirement limits both the scale and the scope of the permitted response.

Some experts are of the view that the necessity and proportionality conditions no longer apply when the victim State is "at war." For instance, the late Yoram Dinstein opined that "[t[he condition of necessity does not stand in the way of waging a war of self-defence until the enemy is utterly crushed and no longer poses an effective military menace," and that "[o]nce war is raging, the exercise of self-defense may bring about the destruction of the enemy's army regardless of the conditions of proportionality" (p. 282-83). For those in his camp, total victory may be lawfully pursued during an armed conflict irrespective of the *jus ad bellum* self-defense conditions.

I must disagree. In my view, the *jus ad bellum* and the law of armed conflict are distinct bodies of law (see also Sassoli and Mačák) that generally do not displace each other; they apply in tandem. Self-defense criteria continue to govern whether the victim State may lawfully continue to use force (necessity) and their permissible scale and scope (proportionality), while the law of armed conflict limits how the operations concerned may be conducted.

In fact, the gap between the two camps is narrower than it might appear. Professor Dinstein acknowledges that "it would be irrational to permit an all-out war whenever a State absorbs an isolated armed attack, however marginal" (p. 283). Thus, he would apply the necessity and proportionality conditions to "on-the-spot" reactions by military force to attacks on them, responses against other than the attacking units that are designed to cause the adversary to stop an isolated attack (he labels these "defensive armed reprisals"), and the rescue of nationals abroad. He only refrains from applying them to a defensive "war," which denotes a "comprehensive use of counter-force in response to an armed attack" (p. 279).

Others have embraced analogous gradations in defensive responses. Terry Gill and Kinga Tibori-Szazbó, for example, have crafted a typology consisting of "local" (or "unit") self-defense, "localized" self-defense, and "defense short of war" (p. 119-22; see also Boddens Hosang, p. 77-80). Like Professor Dinstein, they would apply necessity and proportionality to these situations. But unlike him, they would do likewise to what they label "defensive war" in response to "an all-out attack in the form of an invasion or large-scale attack on national territory or the armed forces" (p. 123).

This does not mean the two camps do not reach the same conclusion in many cases. For instance, Professors Gill and Tibori-Szazbó note that defensive war could, depending on the circumstances, be conducted with "the object of defeating the attacking state and removing the threat of further aggression." In fact, they observe that it might even be necessary and proportionate "to completely remove the government of the attacking state and temporarily occupy its territory until such time as a new government could take power" (p.123).

My own view tracks theirs. Written in 1945, the UN Charter was a normative response to a global conflagration intended to infuse the international system with rules and mechanisms that preclude recurrence. Codifying the "inherent right" of self-defense in Article 51 was an essential safeguard in the event that the Charter's collective security system failed to deter aggression. Yet, that right was subject to the bed rails of necessity and proportionality to ensure defensive uses of force did not exacerbate the situation, thereby threatening the goal of "international peace and security" that animated the Charter (Preamble).

It would make no sense to remove the bed rails in situations where the risk of escalation or spreading is greatest, so-called "wars." In my estimation, the logic of self-defense and its conditions apply irrespective of the scale and scope of the armed attack to which the defensive force responds. And it does so contextually. This being so, there may be situations in which force is not only necessary to address an armed attack but also proportionate at a very high level of intensity. There are even situations in which "total victory" is a lawful desired end state.

The current situation in Gaza illustrates this dynamic. So long as Hamas holds the hostages and strikes into Israel continue, military operations to "secure the release of the infants, children, women, and men being held as hostages in Gaza, and to deny Hamas and other armed groups in Gaza the capacity to continue attacking its citizens and territory as they have explicitly vowed to do" remain necessary (Israel Ministry of Foreign Affairs).

Yet, if a durable defeat of Hamas is out of reach, can an objective of "total victory" nevertheless provide the legal basis for using force? In other words, how can the use of force be "necessary" if it is doomed to be unsuccessful? The question is a red herring, for even if a *strategic* objective of total victory is a pipe dream, this does not preclude a use of force from

having some positive *defensive effect*. If the IDF's operations can reasonably be expected to reduce the effectiveness and impact of the armed attack, and there is no viable non-forcible alternative for accomplishing the same end, the necessity criterion is satisfied.

A complicating factor in this case is the possibility of a negotiated end to the hostilities (on ceasefires and other forms of negotiated conflict termination, see here). In that regard, Professor Dinstein argues that "an aggressor State may lose its appetite for continuing the hostilities, but the victim State need not be accommodating … . Unless the Council adopts a binding cease-fire resolution, a war of self-defence—once lawfully started—can be fought to the finish" (p. 284-85).

I beg to differ. Since the condition of necessity continues to operate throughout the conflict, Israel is *legally* obligated to negotiate in good faith *if* there is a viable chance of the return of the hostages and assurance of Israel's security through negotiations. After all, the requirement is that defensive force only be used if there is no reasonable, non-forcible alternative. Until an agreement is reached, the right to use force in self-defense remains intact, but this does not mean that Israel does not concurrently shoulder a duty to pursue practicable, non-forcible means of putting an end to the armed attack.

Proportionality, which limits the scale and scope of force used in self-defense to that necessary to end the armed attack, is the more nuanced requirement. In this regard, it is essential to understand that an armed attack may be "defeated" in two ways. First, the victim State may prevail militarily on the battlefield. The aggressor loses the ability to maintain the armed attack or reinitiate it after regrouping. Second, the defensive operations of the victim State may so affect the aggressor's will to continue its attack that it decides to desist. The aggressor is capable of continuing to attack, but it chooses not to do so and will not do so in the future. In other words, the decision does not represent a mere tactical pause in the fighting.

As these two modalities illustrate, proportionality requires a causal relationship between the scale (how intense) and scope (how widespread) of defensive force and the defeat of the armed attack. Restated, the legal question is whether the force being employed in self-defense *exceeds* what is required *in the circumstances* to defeat the enemy either directly through military victory or indirectly by successfully altering the enemy's cost-benefit analysis. If so, the excessive force is unlawful.

Some cases are straightforward. For instance, a State may respond to a cross-border incident forcibly to expel the intruders, but the incident would not merit an all-out attack on the offending State or actor. However, in other situations, the threshold for excessiveness can be challenging to identify, as in this case.

On the one hand, the American officials cited above believe that IDF military operations are increasingly subject to the law of diminishing returns. In a strategic sense, that may be true. Yet, on the other, attacks on Hamas fighters and assets are weakening the group's ability to continue the fight, now and in the future. The situation is not one, for instance, in which the aggressor would prefer to stop fighting but refuses to surrender, has discontinued attacks on its adversary's country and engages only in defensive operations, or in which the fighting is limited to a particular locale and conducted by specific units.

Quite the contrary is true. Hamas continues to conduct attacks on Israel and still holds hostages. Further, the fighting is occurring throughout the Gaza Strip and all of Hamas's still-operational al-Qassam Brigades remain active in combat. And Hamas has "rejected any alternative to the full and complete liberation of Palestine, from the river to the sea." In the absence of a negotiated settlement, it is difficult to conclude that operations to weaken Hamas's fighting wherewithal, and therefore, its capability to continue the armed attack, exceed those required to accomplish that task. Moreover, it does appear that the IDF's continuing operations are having the indirect effect of convincing Hamas to come to the negotiating table.

Regardless of their status under the *jus ad bellum*, the IDF operations are equally subject to the law of armed conflict. It is in that regard that Israel will feel the most significant impact of the situation on its legal obligations.

The Law of Armed Conflict

At the outset, it should be noted that if the conflict between Hamas and Israel is non-international in character, as I believe it to be, the hostilities may, at a certain point, slip below the requisite threshold of intensity for qualification as such (*Tadić Decision on Defence Motion*, para. 70). Should it be unlikely that the intensity of the fighting between Israel and Hamas would rise to that level again (an ebb and flow of intensity), the law of armed conflict rules discussed below would no longer apply.

In my view, the intensity of both the Israeli operations and those of Hamas lie well above this threshold. They will likely do so for some time unless a ceasefire is achieved. Therefore, the law of armed conflict will remain the primary governing framework for the conflict. And because the rules governing targeting in international and non-international armed conflict are very similar, the following analysis applies even if I am wrong and the correct classification of the conflict is international. So, assuming for the sake of discussion that the situation described by the American officials reflects the current reality, the question is how such a situation affects application of the law of armed conflict governing the conduct of hostilities.

The first point to be made is that the qualification of Hamas fighters, who are targetable as members of an organized armed group, and anyone who is "directly participating in the hostilities" as targetable individuals is unaffected by the fact that the IDF has gained the upper hand or, as suggested by some American officials, the unlikelihood that Israel will achieve its strategic objectives (*Customary IHL* study, rule 6; Additional Protocol I, art. 51(3); Additional Protocol II, art. 13(3)). The same is true concerning any of Hamas's military assets or civilian objects (such as civilian structures) that Hamas is using or will use for military purposes. They remain military objectives and, therefore, valid targets (*Customary IHL* study, rule 8; Additional Protocol I, art. 52(2)).

However, these factors do affect the proportionality analysis to which all attacks must be subjected during an armed conflict. In an accurate reflection of customary law in both international and non-international armed conflict, Article 51(5)(b) of the 1977 Additional Protocol I to the 1949 Geneva Conventions provides that attacks are indiscriminate, and therefore prohibited, when they "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" (see also art. 57).

Of significance in the situation being considered here is the assessment that the rule requires regarding the attack's likely collateral damage to civilians and civilian objects in light of the military advantage the attacker anticipates attaining. It may not be *excessive* relative to that advantage. In that regard, assessing military advantage does not involve a sterile calculation of the number of enemy fighters killed or assets destroyed. Instead, military advantage denotes the intended and anticipated positive *effects* of the attack on one's own operations or adverse *effects* on the enemy's. Such effects are almost always contextual. To take the simplest example, killing an enemy fighter located far from the fighting does not yield the same military advantage as killing that fighter when they are shooting at you.

As a general matter, then, the value to be attributed in a proportionality calculation to the military advantage of killing Hamas fighters or destroying Hamas assets will usually drop the more the IDF gains the upper hand militarily. Similarly, if, as claimed by some American officials, Israel is unlikely to achieve its objectives, the value of taking enemy fighters and assets out of action also falls. I want to emphasize that this observation may not apply to particular attacks, for every attack must be evaluated individually.

To some extent, the assessment of the value to be attributed to collateral damage is also variable. As is evident from the rule itself, collateral damage includes injury or death of civilians and damage or destruction to civilian objects. In my opinion, it can also encompass illness, starvation, and other forms of physical suffering not directly caused by a weapon's kinetic effects.

Consider collateral damage to a food warehouse or a medical facility as an example of variability. Greater value would be attributed to such damage in the proportionality calculation if the area served is suffering from hunger or a medical crisis than in the opening days of the conflict, for the negative physical consequences for the civilian population are more severe. This is almost certainly the case in Gaza. Of course, the value of individual civilians is unaffected by a change in the nature of the hostilities.

Accordingly, the situation in Gaza today may merit, as a general matter, a much more restrictive proportionality analysis than was the case at the initiation of the conflict because strikes on particular targets may yield less military advantage and risk greater collateral impact. The fact that the IDF is gaining the upper hand also heightens the obligation of the IDF to take precautions in attack, which is codified in Additional Protocol I, Article 57 for parties, and reflects customary international law in all armed conflict (*Customary IHL* study, ch. 5). The rule requires attackers to do everything feasible to verify that its targets are not civilians, civilian objects, or other protected persons or objects. Attackers must also select the weapon, tactic, and target that can reasonably be expected to minimize the risk of death or injury to civilians or damage to civilian objects, so long as that choice does not sacrifice the military advantage anticipated to be gained through the attack. The requirement to take precautions in attack further obligates an attacker to provide an effective warning of an attack that may affect the civilian population unless doing so is not feasible in the circumstances (as when a warning would deprive the attacker of the element of surprise).

The more the IDF gains the upper hand in the Gaza Strip, the more it may have assets available for use in selecting among targets to achieve a comparable effect, verifying targets, and conducting attacks. This is because there is likely to be less competing demand for them elsewhere, at least so long as the conflict in the north with Hezbollah or with Iran does not flare up. To take a simple example, an attack on a target may become less time-sensitive because assets to monitor it are available, thereby allowing a strike to be conducted when the risk of collateral damage is lower or enabling a weapons system that is not immediately available (e.g., an aircraft armed with the optimal weapon for the engagement) to be brought to bear. Similarly, greater transparency and control of the battlespace can reduce the need for surprise in certain operations, thereby increasing the opportunity to warn the civilian population of a pending attack.

As these examples illustrate, the rule requiring precautions in attack, like the proportionality rule, is highly contextual. As a general matter, though, the greater the superiority of a force, the greater the opportunity, and therefore obligation, to take measures to minimize civilian harm. That said, the same cautionary note offered above *vis-à-vis* proportionality assessments is warranted. There may be circumstances in which fewer precautions are feasible even though the attacker enjoys operational superiority. For instance, striking a high-value target of opportunity on the move will typically allow less opportunity for precautions than striking the same individual in a building for an extended period (as when asleep).

Concluding Thoughts

The fact that an armed conflict is underway does not relieve the IDF of the *jus ad bellum* requirement that its self-defense operations be necessary and proportionate. In my estimation, they still meet those requirements, for the armed attack by Hamas continues, and the IDF operations, even if possibly unlikely to achieve their ultimate objective, are still contributing to the blunting of ongoing and likely future attacks. That said, Israel is obliged to engage in the ceasefire negotiations in good faith if it is to comply with the necessity condition.

The greater legal impact of the evolving situation on the conflict is with regard to the law of armed conflict rules governing targeting. To begin with, the changing situation has no bearing on who and what qualifies as targetable. But the more the IDF gains the upper hand, and the more dire the plight of the Palestinian population, the more restrictive the application of the rule of proportionality by the IDF may become and the more demanding the requirement to take precautions in attack may be. As both rules are contextual, the caveat that these general observations might not hold for specific attacks is essential.

Finally, I have limited my analysis to the law. I leave conclusions as to whether Israel's operations are strategically wise, operationally and tactically sensible, or even consistent with sound military ethics to those with greater expertise on such matters. All I can offer is the reminder that while fighting unwisely or inefficiently is not *per se* unlawful, the law is but the outer boundary within which operations *must* be conducted. Many other considerations affect how hostilities *should* be fought.

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Michael N. Schmitt is the G. Norman Lieber Distinguished Scholar at the United States Military Academy at West Point. He is also Professor of Public International Law at the University of Reading and Professor Emeritus and Charles H. Stockton Distinguished Scholar-in-Residence at the United States Naval War College.

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