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Revisiting the rules of war in Israel and Palestine

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TEL AVIV, Israel (IRIN) -- In the wake of increased violence between the Israeli army and fighters in the Gaza Strip, Israeli threats of a second large-scale attack on the occupied Palestinian territory raise pressing questions of international humanitarian law:

How can civilians be better protected during urban warfare? And does IHL need to be amended given the increasingly blurred line between civilians and combatants, especially in places like Gaza?

Israeli military officials argue that many humanitarian rules are ill-suited to fighting militants in the densely populated Gaza Strip and say the current reality there makes a revision of IHL necessary.

"International law is not the embodiment of morality," Israeli philosopher Asa Kasher, who wrote an early version of the army's code of conduct, said at a recent conference in Tel Aviv, aimed at finding answers to some of the challenges urban warfare poses to military practices in the field. "We need different rules that apply to our army facing terrorists in densely populated areas."

This position is strongly disputed by the International Committee of the Red Cross, charged with monitoring the compliance of warring parties with IHL. It says the Geneva Conventions on the laws of war also apply to asymmetric conflicts in urban settings.

With Israeli military officials saying an attack similar to the 23-day Operation Cast Lead,

which killed hundreds of Palestinian civilians in 2008-9, is inevitable, the question is increasingly relevant.

“There is no doubt that fighting in Gaza will come, probably earlier than we think. And each time it will be more difficult,” Dan Harel, former IDF deputy chief of staff, said during the conference.

His remarks coincided with a recent flare-up in violence in Gaza, as Israeli air strikes killed at least one civilian and wounded several others in early December, while militants in Gaza fired several rockets into Israeli territory.

What defines 'direct participation'?

While international law prohibits the targeting of civilians, Harel defended Israel’s past military ventures in Gaza, pointing to the challenges posed by fighting in dense urban areas.

“How can we differentiate between groups of civilians and combatants on a packed street, especially when combatants don’t wear uniforms? How do we avoid killing civilians in urban areas, when Hamas militants hide among them?” he asked during the conference, hosted by the **Institute for National Security Studies**.

Hamas, the group that rules the Gaza Strip, has denied accusations that it has used civilians as human shields; and the report of the UN Fact Finding Mission on the Gaza Conflict, which accused both Israel and Hamas of committing war crimes, found no evidence of civilians being forced by Hamas to remain in areas under attack.

Knut Dörmann, head of the ICRC legal division in Geneva, said any use of so-called “human shields” would be a war crime under IHL. But voluntary human shields can only be considered direct participants in warfare “if they pose a physical obstacle to a military

operation," he said.

This notion, he acknowledged, is subject to continuous debate. Neither the Geneva Conventions nor their Additional Protocols provide a clear definition of what represents direct participation in armed hostilities. But according to the ICRC's interpretation of IHL, direct participation involves an act likely to inflict harm or affect military operations; there must be a direct causal link between the act and the harm likely to result; and the act must be specifically designed to directly cause the harm in support of a party to the conflict and to the detriment of another.

Civilians lose the right to protection against direct attack for the duration of each specific act that amounts to direct participation in hostilities, and in case of doubt as to whether they are combatants, must be presumed to be protected against direct attack until their status can be determined, the ICRC said.

Complex application of IHL

But the application of IHL in the context of the conflict between Israel and Gaza is highly complex because it does not fall easily into defined categories of international and non-international armed conflict.

Despite an absence of Israeli troops on the ground, the ICRC considers Gaza an occupied territory because Israel has retained a considerable degree of control over it, including over its territorial waters, airspace and land borders. Still, Israel's obligations under IHL in Gaza are very limited, because it does not have any permanent presence inside the Gaza Strip.

"There is a nexus between the scope of Israel's control and its legal responsibilities -- where there is control, there is responsibility," Tel Aviv-based ICRC legal adviser Eitan Diamond said. For instance, running the education system of the population may be the occupier's

obligation, but because Israel does not have any permanent presence in Gaza, it is not able and therefore not required to do so. Still, Israel has to ensure that the population's basic needs, such as food, water and medical supplies, are met.

But the situation is complicated still further. Any occupation invokes the category of international armed conflict, and yet this occupation is a result of a historical armed conflict between Israel and Egypt, which no longer exists. Hamas is not a party to that armed conflict, but rather a new conflict that would normally be considered a non-international armed conflict. But because of the ongoing occupation, the rules on international armed conflict continue to apply.

PoWs

However, Palestinian militants captured by Israel are not considered prisoners of war -- entitled to special protection -- because they are not state actors.

“But this doesn’t leave them in a legal vacuum,” Diamond said, because they still qualify for protection under the Fourth Geneva Convention on the protection of civilians.

As Article 4 of that convention states: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

“While there are some who dispute that Gaza is occupied, the West Bank is undisputedly occupied territory,” Diamond explained, “and since the West Bank and Gaza Strip are recognized to be one territorial unit, Gazans held by Israel are clearly persons in the hands of an Occupying Power.”

Though Palestinian militants can legally be the target of attack while participating in hostilities, they should be protected as civilians when captured because the threat they pose is neutralized by detention.

“The fact that they participate in hostilities is significant only during hostilities,” Diamond said. Once they are detained, they are entitled to all the protections laid out in the Fourth Geneva Convention, including humane treatment, contact with family, and assistance from the ICRC.

'Transnational asymmetric warfare'

Furthermore, even when a militant is identified as a legitimate target, other factors must be considered.

“You can’t just proceed with the killing” in all cases, Dörmann told the conference in Tel Aviv. Following the principle of proportionality, the potential loss of life would have to be weighed against a concrete and direct military advantage, especially in densely populated areas like Gaza, where military targets are often in the midst of residential areas.

This does not sit well with the Israeli philosopher Kasher, who has been explicitly frank about his contempt of current IHL. He, like some others at the conference, questioned why Israel should have more responsibilities towards what he perceived as the “enemy’s civilians” than towards its own soldiers.

“IHL only cares about civilians, not about soldiers, and this is immoral,” Kasher said.

For the former chief of Israeli military intelligence Amos Yadlin, the ethical norms of IHL do not fit Israel’s operations in Gaza.

“If we need moral rules,” Yadlin said, “we have to adapt them to Israeli circumstances. Commanders are facing too many dilemmas when taking decisions on the ground.”

All the more reason, Dörmann said, that commanders must know the legal rules thoroughly in order to apply them in the field. “Every soldier’s knowledge of IHL is essential.”

Israel is a party to the Geneva Conventions, but has not ratified the protocols for the protection of victims of armed conflict. However, it is widely accepted that these rules are customary international law, and therefore applicable in all conflicts.

A joint research project by the INSS and Tel Aviv University is currently investigating how IHL might be amended, a very difficult move given that a separate international treaty would be necessary. “We try to make international law suitable for the fight against what we call transnational asymmetric warfare”, Yehuda Ben Meir, principal research fellow at the INSS, explained.

'Some reflection must begin'

However, the ICRC’s Dörmann said such a step would be dangerous. Instead of adapting laws to asymmetric warfare, existing regulations should be reinforced and strengthened, he said.

“Otherwise we will find ourselves in a downward spiral of disrespect for IHL.”

Making the rules more suitable for regular armies would only force militants to change their tactics, which would in turn result in another undercut of IHL by the state army, he warned.

In preparation for upcoming challenges, the ICRC strongly recommended that the Israeli army learn from its past experiences in Operation Cast Lead, which saw 1,387 Palestinians killed, around half of whom did not take part in hostilities.

Civilians could be better protected through effective warning ahead of an attack, he said.

He also raised concerns over the use of specific weapons in residential areas, like white phosphorus, used by Israel during the ground phase of the operation. Originally used as a smoke screen to hide movement, white phosphorus is increasingly used as an offensive weapon, because it can cause serious burns or even death.

“Some reflection must begin over the use of artillery and mortars in populated areas, and especially the use of white phosphorus,” Dörmann said.

Promoting a concept he called “courageous restraint”, Stanley McChrystal offered these words of advice to Israelis at the conference, based on his experience as the former commander of US forces in Afghanistan.

"Limiting fire power might put soldiers more at risk. That is a correct argument,” he told the conference in Tel Aviv. “But it was necessary to protect civilians on a long term ... [and] because the perception of our conduct among the people in Afghanistan became so important."

For Israel, perception also plays a big role during conflict in the Gaza Strip, the ICRC’s Diamond said.

“This conflict wages on well beyond the battlefield, with each party investing considerable effort in a struggle for legitimacy. If you are seen to violate the rules, you can’t maintain legitimacy.”

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