

Warfare in Densely Populated Areas: Identification, Discrimination, and Deterrence

Thomas E. Ayres

As a military lawyer who served in Iraq and Afghanistan, I participated in operations that are different from those conducted by the Israeli Defense Forces (IDF). There is, however, one similarity – the necessity to handle asymmetric warfare in urban areas.

When referring to asymmetric warfare, I speak of individuals who do not wear uniforms or follow the laws of armed conflict, but have the type of weapons and technology that until recently, due to the high cost and difficulty of maintaining, belonged only to states. These individuals have the advantage of achieving big strategic impacts for a very small outlay through multiple casualties, media use, and so on.

The world has become much more urbanized. Under the laws of armed conflict, urban areas are not to be used as a base of operations, but this is certainly not adhered to by those we fight against. There is, therefore, a need to root them out from populated areas, which has to be done in ways that abide International Humanitarian Law (IHL). As President Obama said, when we adhere to international standards, we strengthen those who do and isolate those who do not.¹

The United States tries to abide by the laws of armed conflict, although this goal has not always been fully met. As Winston Churchill said, the United States always finds the correct solution but only after exhausting all other options first. And, indeed, the United States receives much criticism regarding its mistakes, but it also learns from this criticism and constantly

Brigadier General Thomas E. Ayres, US Army Legal Services Agency and US Army Court of Criminal Appeals. The views expressed here are his alone and do not represent official views of the United States or the US Department of Defense.

tries to improve its operations. Some of this criticism asserts that with the development of asymmetrical warfare and urban combat, the United States should change its view on warfare and use a different paradigm, and I disagree with this criticism. IHL was formulated following World War II, at a time when the forms of warfare used were similar to those of the asymmetric warfare we deal with today, like guerilla warfare, saboteurs, spies, and piracy.

The fundamental principle of the law of armed conflict is that it is based upon obligations. Soldiers are actors, and when in war, they continue fighting until there is victory or no victory even when faced with unknown odds. In that sense, soldiers are irrational actors, which means obligations should be placed upon them, and that's what the law of armed conflict achieves.

The human rights law bases its rationale on the rights of those who are being fought against. When the police deal with their country's citizens, force is considered the very last resort and must be proportionate. If a criminal fights a police officer, the latter must respond proportionately and cannot merely pull out a weapon and shoot the criminal.

The United States is a huge proponent of human rights everywhere but it is not a proponent of the human rights law. Instead, the law of armed conflict is the paradigm by which the United States understands and conducts its activities. The United States attempts to set clear obligations for its soldiers, but it is not always successful in doing so. Nevertheless, when attempting to understand or think about these problems, the law of armed conflict is the right paradigm to use, as opposed to that of the human rights law. The following three examples will demonstrate my point further.

Suicide bombers, for example, are irrational actors – they try to blow themselves up when in close proximity to military or civilian targets. This poses an extreme difficulty for military people, as they cannot discern or identify who the suicide bombers are. In Iraq, there was an instance where an improvised explosive device (IED) was detected on the highway. Checkpoints were quickly put up and marked by lights and wires, and the soldiers stopped traffic to protect the civilian population. At a certain point, a truck sped towards the IED and did not stop even after the soldiers shot in the air in warning. The driver was eventually shot by the soldiers. After the matter was investigated, it was discovered that the driver was a Hungarian contractor. Intoxicated at the time, he had been driving with earphones

on and could not understand or hear the warning shots. A civilian was, therefore, killed on the battlefield due to the operations of those who do not abide by the law of armed conflict and planted the IED in the first place.

Learning happens over time, though, and the soldiers learned to put up signs next to checkpoints. They also realized that some civilians do not react quickly enough. The implementation of lessons learned results in warnings and procedures so that innocent civilians will be deterred. But those whose aim it is to kill the soldiers will never be deterred, and in fact, they will always come up with new tactics to prevent the soldiers from stopping the insurgency. In the case of the truck, the soldiers had a split second to decide whether they were going to shoot – if they did not shoot and the driver was a suicide bomber, he would have exploded, but if they did shoot, they could kill an innocent civilian, who did not see the warning signs. Killing a civilian is clearly a bad action on its own merit, but it also turns the civilian's family, tribe, or clan, into the military's blood enemies for life – a win-win situation for the insurgents. The soldier who is going through the calculus of response, however, must be concerned with minimizing civilian casualties (i.e., the military necessities and obligations) and not with the truck driver's rights.

Another example is that of a sniper inside a building. The soldiers cannot decipher which window the fire is coming from, but they also cannot spray the building indiscriminately and put civilians in danger. Instead, they have to identify the target first to minimize the potential for civilian casualties and then decide whether the fire received is effective fire, putting civilians in danger, or whether the sniper is merely a "matador," waving a red flag in an attempt to get the soldiers to incur civilian casualties, lose hearts and minds, and win more enemies. The factor of winning the hearts and minds of the civilian population is very important in this calculus as well, but probably also stands in contrast to the situation in Israel, where at times the feeling is that hearts and minds could not be won. But even when hearts and minds cannot be won, there is a calculus about making enemies for generations by activities.

If the soldiers determine that the building is empty aside for the sniper, they can use typical military tactics – one squad can fire to cover for another squad that can move towards the sniper and use thousands of rounds to engage him. Under human rights law, this would not be considered a proportionate response as it is not the least amount of force that can be used,

but under International Humanitarian Law the soldiers' response makes sense. Colombian soldiers, for example, were held to their own human rights law standards within their country and were indicted for responding to snipers in similar situations. Soldiers who are fighting irrational actors, however, cannot engage in a fair fight or use a proportionate response – they need to engage in a quick and violent combat, where there is a winner and a loser, and where the sniper is killed, preferably without any military casualties. IHL allows for that, whereas human rights law may not.

The final example is of an insurgent shooting a rocket. Early on in Afghanistan, the insurgents rocketed small American fire bases in very creative and ingenious ways. One of those ways involved placing a frozen, cut off water bottle inside a rocket, which would balance the weighted pieces of metal during the night. When the sun came out and melted the ice, it would cause the pieces of metal to touch, completing the circuit, and igniting the rocket that would bomb the American bases at around 10 A.M. One night, the squad we sent out to find the insurgents responsible for these rockets called the base and reported seeing three or four guys digging in the ravine from which the base was fired on previously. The squad asked for permission to engage, but the commander at the base inquired if there were weapons spotted on the people's backs. When the squad responded that they could not see, the commander asked that they try to get closer, but still no weapons were detected. As the commander repeated his request that the squad get closer and closer, he acted according to the rationale that the people digging could be civilians, who may be receiving pay or are being forced to dig, and he did not want the squad to kill them and gain more enemies, instead of winning hearts and minds. The commander could have also thought that the people digging could be captured and perhaps provide intelligence even though the necessary intelligence would not come from foot soldiers but from the next level of leadership. Nevertheless, the squad continued getting closer and eventually the people digging fired two shots, killing Sergeant Steven Checkow, a 21 year-old from Brooklyn, NY, who was a beloved son and brother. At that point, we had 4,000 US casualties in Iraq and 3,000 in Afghanistan.

Even in this situation, International Humanitarian Law continues to be the right framework to use because the rocket aimed at the base will not go off for hours. In Israel, the same calculus of military necessity would

perhaps not work, as many times the ones being targeted are civilians and not soldiers.

What is, then, the military necessity? How does one establish the potential for civilian casualties, which demands the soldier fulfills his obligation under that military necessity? And what is the calculus of determining the proportionality? It is not easy to decipher, as it was not easy for that commander to deal with the knowledge that he made the decision to get closer, which later killed one of his soldiers. That is a tough position for anybody to be in. But the proper paradigm, provided by International Humanitarian Law, allows us to consider these problems.

Note

- 1 President Barack Obama, "Remarks by the President at the Acceptance of the Nobel Peace Prize," Oslo, December 10, 2009, <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.