

Briefing

The current situation in Israel and International Humanitarian Law

In a Briefing held on 19 May 2021, *thinc.* spoke with **Professor Geoffrey Corn** about the international humanitarian law implications of the current conflict between Israel and Hamas.

Prof. Geoffrey S. Corn is professor of National Security Law at South Texas College of Law, Houston, and a retired U.S. Army Lieutenant Colonel. His Army career included service as both an intelligence officer and a military attorney. His last position with the Army was as senior law of war expert advisor for The Judge Advocate General and Chief of the Law of War Branch. He is co-author of i.a. *The Law of Armed Conflict: An Operational Perspective*, and *The Laws of War and the War on Terror*.

Q: Why do the media promote the perception that Israel is the primary wrongdoer?

A: The narrative is distorted by two influences, in my view. First, the instinct of the media and public is to engage in what I call “effects-based condemnation” – you look at the effects of a military attack and extrapolate from that who is responsible for the suffering. That is very complicated, because it is often not the side that launched an attack that is responsible for the civilian suffering.

The other factor is that people don’t understand international law – they don’t understand a state’s right to self-defense, or how the law functions when you are conducting hostilities. The law is intended to ensure mitigation of risk to civilians, but not to the point of disabling military commanders from achieving vital military objectives.

Q: On 10th May things got out of hand on the Temple Mount, and then suddenly Hamas threatened to attack Israel. Did Israel’s conduct on the Temple Mount justify Hamas attacks?

A: First of all, we need to recognize that the people in Gaza are living under a tyrannical quasi-terrorist state. When Israel pulled out of the Gaza Strip in 2005 they didn’t meet a violent reaction immediately. Fatah was in there. But then Hamas won the election, and was literally throwing PA officials off of the top of buildings as they took over.

One of the consistent themes of Hamas tactics is to exploit the suffering of their own population. They put their military objectives in the midst of the civilian population. They tell their civilian population: if you evacuate the area you’re going to be viewed as a collaborator with the Zionists.

As to what happened on the Temple Mount – there probably needs to be a very careful investigation of the way the Israeli police reacted with that situation. It didn't seem to be a very well-handled situation, from my perspective. But that in no way gave Hamas a legal authority to suddenly start indiscriminately launching rockets at Israel.

Hamas saw the events on the Temple Mount as an opportunity to raise their profile among the Palestinian population – not primarily in Gaza, because they have them in an iron grip, but in the West Bank, where their goal is to push Fatah out of the control in order to advance their agenda.

Q: What is Hamas' agenda?

A: Their agenda is to delegitimize Israel and to prevent a peaceful solution to the Israel-Palestine conflict. I think they see the long game – not just five or ten years, but 100 years – where the population of Arabs in the region will basically overwhelm the Jewish population. The Islamic extreme agenda of Hamas is that from the Jordan River to the [Mediterranean] Sea there will be an Islamic state ruling over the entire region. I don't see how anybody can dispute that that's what their ultimate goal is. That's why it's in their interest to constantly create these cycles of violence.

Q: Many people see Hamas as freedom fighters, fighting to free Palestine, which is a legitimate and worthy cause. What does international law say about the right of freedom fighters to use force?

A: The international law related to the use of military force gives a monopoly to states. Only states have the authority to act in self-defense, individually or collectively, and only states have the authority through the United Nations Security Council to take enforcement measures under Chapter 7.

Non-state organized armed groups may feel that they have a moral right to use force to achieve self-determination, but it's not an internationally-recognized legal right. So even if a group has a right to self-determination, they have to work within legal means to achieve that right.

But even if Hamas had a right to use force, Hamas doesn't even try and follow the rules of war once they initiate action. If there's one thing that's clear about international law it's that, whether you're fighting for a state or a non-state group, your obligation to respect the fundamental principles of international humanitarian law is an equal obligation. You're not somehow released from the obligation to distinguish between civilian and military targets because you're the weaker party to the conflict, or because you think your cause is just. That would be perverse, because most States and non-state groups that engage in hostilities believe their cause is just.

Q: What kind of rockets is Hamas firing, and how dangerous are they?

A: It seems relatively clear from the open-source reporting that Hamas' rocket capability has increased substantially since the last conflict in 2014. The volume of fire itself – over 3000

missile shots or rocket shots today – is deeply troubling, and the quality seems to have been improved. This increased capability is coming from Hamas’ sponsor, which is Iran – which has an interest in ensuring that there's a robust proxy capability on both the northern and southern borders of Israel.

Q: Why is Iran’s role significant?

A: Many people say that Israel really doesn't have to act aggressively in response because they can hunker down under Iron Dome and everything will be safe. But that misses the point. Every time Israel is compelled to activate Iron Dome it gives its opponents the opportunity to gather information on its capabilities and start to develop tactics that will overcome those capabilities. I don't think there's any doubt that the use of these missile attacks is also serving the interests of Iran, which uses the intelligence gathered from the Israeli response in order to enhance their own capability or – almost equally frightening – the capability of Hezbollah in the north whose rocket arsenal is tremendously more significant than that of Hamas. Anything they can do to mitigate the effect of the Iron Dome is a real danger for the Israelis.

The volume of rockets from Gaza is also very troubling, because it seems to me that – from a strategic self-defense perspective – there's a limit to what Iron Dome can do. If you have a two-front war with rocket volleys in the hundreds per day coming from both the north and the south, at some point you're going to exhaust your re-supply rate for the intercepting missiles, or, more likely, have to prioritize the most vital objectives in the state which leaves the civilian population unprotected. So Hamas’ increased capabilities is, together with the threat from Hezbollah, a game changer. That’s why you see that the campaign that the IDF has been launching is trying to neutralize as much as possible the capability of Hamas to resurrect its threat in the near future.

Q: How does the principle of proportionality work?

A: The principle of proportionality applies in two distinct contexts. The first is as an aspect of assessing the necessity of an action in self-defense. It’s no different than if you were in a bar and someone took a swing at you. You have a right to act in self-defense because you've been the victim of unlawful violence, but you are only allowed to do what's necessary to restore your safety. If someone throws a punch at you and you pull out a gun and shoot them, you're probably going to be brought to trial for a criminal homicide because you used excessive force. Proportionality in that context means that Israel has to make a reasonable judgment that the scope of its operation – the totality of the operation – is genuinely necessary to reduce the nature of the threat it's facing. This is what I meant earlier when I said the law doesn't require a “tit-for-tat” response. You first assess what the gravity of the threat is, and then assess what you need to do to reduce that threat. That's what we call *ad bellum* proportionality, or the “legal right to use force” proportionality.

Then, once you are engaged in hostilities, there is a different aspect of proportionality: that's the proportionality rule that's designed to mitigate the collateral and incidental risk to civilians when you're attacking a lawful target. Let’s say I find an enemy missile launch site in a deserted area in Gaza and there are no civilians around. When I attack that target I don't have to consider proportionality because proportionality in the conduct of hostilities does not

protect the deliberate object of your attack; what it protects is the people and things that are proximate to that target from indiscriminate effect.

The law actually doesn't use the word proportion; the law says that when a military commander is preparing to launch an attack, and he or she anticipates that the attack will result in civilian casualties or destruction of civilian property, he has to make a judgment that the value of the target is significant enough so that the anticipated civilian harm will not be "excessive". Interestingly, in the Statute for the International Criminal Court, in order to become a criminal offense you have to make a finding that the civilian risk was "clearly excessive" – so it's an even heightened standard.

What this means in practice is relatively simple: if you have a party to a conflict, like Hamas, that's deliberately shooting its missiles at civilians, proportionality is not even an issue; that's just a violation of the obligation to distinguish between military targets and civilian targets.

If an attack against what appears to be military objectives causes a lot of damage to civilian property – for example if there's a command post in the basement and you bring down the entire building – it's very easy to say "wow, look at that amount of damage, that must have been disproportionate!". But unless you know what the target was, and the value that the commander assessed in destroying that target, you don't know if it's illegal. The effects of combat are certainly probative of compliance with the law, but they are rarely dispositive. They may be circumstantial evidence of whether there was compliance or non-compliance, but you need to know the full equation – you need to know why the commander was attacking, why he used that weapon, and why he did it at that time, in order to make an assessment of whether the proportionality judgment was credible.

Q: How does the IDF deal with this aspect of the principle of proportionality?

A: I've had a lot of interaction with the international division of the Israeli Military Advocate General's Office and they are some of the most talented experts in international humanitarian law I've ever encountered – and that's saying a lot. The British, Dutch, U.S. and Canadian experts understand that a tactical victory can very quickly turn into a strategic disaster based not only an actual violation of the law but perceived violation of the law. The Israelis know that better than anyone.

There's been a substantial increase in the appreciation among Israeli military commanders of the importance of the principle of legitimacy. When the dust settles from a conflict, you better be prepared to demonstrate your commitment to the principles of international humanitarian law to explain why you attacked certain targets. The IDF Military Advocate General's website puts a lot of information out there now that would never have been put out 20 years ago – targeting data, images, videos. They're trying to demonstrate that what they are attacking are in fact military targets and they are taking measures to mitigate the risk. And that begins early in the process – training and weapons development.

The precision is in military terms relatively remarkable. The IDF is not doing artillery barrage into populated areas, and their pre-attack warning system is unprecedented. They have the phone numbers and emails of the entire Gaza population and they send out text messages

telling them to get out. Even the building that housed the journalists: the immediate reaction was the idea that the IDF was deliberately attacking journalists. Well, if that were the case why would you give a warning to get out? Every time the IDF gives a warning they compromise, to a certain extent, their military advantage, because the warning is also being heard by the enemy. But that's a price they're willing to pay: they made the calculation that it's worth it, to do what they can to mitigate the risk of the civilian population – which, perversely, has been exacerbated by Hamas' tactics of co-locating its vital military objectives in the midst of the civilian population.

So one side is trying to mitigate risk, while the other side's trying to exacerbate risk, and the side that's trying to mitigate the risk is condemned, because it's easy to look at the effects of an attack and say you must be the evil party.



Rockets from Gaza, on right, are seen in the night sky fired towards Israel from Beit Lahia in the northern Gaza Strip on May 14, 2021, while Iron Dome interceptor missiles, on left, rise to meet them. (Anas Baba/AFP)

Q: Is Hamas deliberately locating military operations in civilian locations?

A: There's no doubt whatsoever. Just as in the north with Hezbollah, where many of the houses in southern Lebanon are fighting positions or missile launch sites. The IDF knows this.

It is often argued that because they're fighting the Israeli's they've got to do something to mitigate the strength of the Israeli military. Well, that's a choice they make, but let's be honest, that means that they are probably more culpable for the inevitable civilian risk than the party launching the attack.

This is the great dilemma for military commanders today. I mean, they could forgo the attack because they know there are civilians there, in which case the enemy gains the advantage of not being attacked, or they can launch the attack knowing they're going to cause civilian casualties, in which case the enemy gets strategic information.

As Tony Jones, a retired US two star general, recently said, usually information is used to support combat; but what I've learned about Hamas is that for them combat is a supporting effort for information. They don't care what the consequences are of the battle, all they want to do is come out standing because the inevitable civilian casualties and destruction will give them the strategic information advantage in the public domain, and that's what they're really after.

So the IDF is walking a tightrope between trying to achieve its military objective but doing it in a way that doesn't create such a perception of illegitimacy that you win the battle and lose the war.

Q: How far can Israel go, in your view, under international law, to destroy Hamas' military capabilities?

A: If I were a legal adviser on the National Security Council in Israel and I were asked what could we do having endured this threat now multiple times, and knowing that the northern border has a substantially more robust missile threat directed at us, I would say as a matter of self-defense Israel could go in and wipe out Hamas. It could root them out and destroy their capability.

But the old saying is that sometimes something can be lawful and still be awful. Just because it's legal doesn't mean it's the right thing to do. I think we see that in Israel's approach to this campaign. Israelis really don't have an interest in re-occupying Gaza. What would fill that vacuum when they left? Sometimes the devil you know is better than the devil you don't, and even if Israel wipes out Hamas, you could end up with a more radical regime in Gaza. ISIS could see it as an opportunity to fill a vacuum.

I think the strategic mission of the IDF is to disable or dismantle, as best they can, the Hamas capability to attack the territory of Israel, and that means basically three things: weapons storage and launch facilities; command, control and communications; and tunnels.

Regarding tunnels, Israel has learned since 2014 that they needed capabilities to avoid the ground assault option. For example, they now destroy tunnels from the air. They drop a bomb to destroy a tunnel and civilians are killed. So from the perspective of the legal obligation to seek measures to mitigate civilian risk, this R&D and weapons and tactics capability that has been developed since 2014 has actually accrued to the benefit of the civilian population of Gaza, because it enables Israel to achieve its legitimate military objectives without having to put in major ground force as they did in 2014. This has to be assessed against the alternatives available to the state seeking to defend itself.

Q: If a building is targeted and destroyed, and it turns out that there was no military installation, is that necessarily a war crime?

A: It's probative, it's evidence that we have to look very carefully at why this building was targeted. But the test for a lawful targeting decision is not an after the fact – *post hoc* – test. The question is: at the time the attack was launched, did the authorizing commander make a reasonable judgment that it was a military objective and that the value of the target was not substantially outweighed by the risk to the civilian population, and that he did what he could that was feasible to mitigate civilian risk – like give a warning or select a certain weapon. The law doesn't require that the commander always be right. What the law demands is that he be reasonable. This is an objective standard. So for example if the commander was ignoring intelligence that suggested the enemy had moved its equipment out of the building and said I don't want to hear that, I saw the report from last week that's a military objective, then that would be evidence of a war crime because you would say your judgment was under the circumstances not reasonable.

The quality of Israeli intelligence, and their capability to assess targets, is a relevant consideration in that assessment. So the argument “I made a reasonable mistake” gets harder and harder the more you can demonstrate your ability not to make mistakes.

Q: From the perspective of violation of humanitarian law, could Israel switch off the electricity and water supply to the Gaza Strip?

A: I think switching off the water would be deeply troubling. One of the rules of war is a prohibition on using indiscriminate weapons, not just attacks but weapons, and you can't cut off water or electricity to only affect your enemy. It's like releasing gas or chemical weapons: once you release them you can't control their effects.

Q: Is the use of human shields a war crime?

A: Using a civilian as a human shield is a war crime. But it's worse than that. Hamas frequently uses the Israeli military as an “innocent instrumentality”. In other words, they use them as their agent to kill their own civilians in order to create a media advantage out of it. In my view that's a more aggravated violation of the law, it is almost murder of those civilians and should be characterized that way.

Q: Do you think the International Criminal Court will be able to seriously investigate potential war crimes by Hamas or Israeli leaders in Gaza?

A: The ICC Office of the Prosecutor is always concerned about legitimacy in the eyes of the State Parties. If the only object of their prosecutorial efforts ends up being prosecution of Israelis, and not Hamas leaders, that's going to delegitimize the entire ICC process.