

Humanitarian law and Operation Protective Edge: a survey of violations and remedies

By Noura Erakat

■ Executive summary

In the July-August 2014 Israeli operation against the Gaza Strip, Israeli forces killed 1,973 Palestinians, including 459 children; forcibly displaced 350,000 others and rendered 100,000 homeless; and destroyed or severely damaged 16,800 homes and other vital infrastructure. This devastation compounds the humanitarian crisis already endured by the Gaza Strip's besieged population. This situation is attributable to the systematic impunity afforded to Israel over several decades. This includes its failure to adhere to its obligations and duties as an occupying power and its egregious violations of humanitarian law during hostilities. This analysis addresses Israel's culpability for war crimes during this most recent offensive. It also briefly discusses the culpability of Hamas and other Palestinian resistance groups and the obligations of third-party states to remedy the situation.

As of August 19th 2014 a ceasefire to halt the hostilities between Israel and Palestinian resistance groups in the Gaza Strip that began on July 8th 2014 has been established and/or extended six times. Renewed exchanges of fire prematurely ended the most recent ceasefire, otherwise set to expire at midnight on August 19th. The humanitarian toll of the conflict, borne almost entirely by the Palestinian population in the Gaza Strip, has been devastating. Israeli forces have killed 1,973 Palestinians, including 459 children; forcibly displaced 350,000 people and rendered 100,000 homeless; destroyed or severely damaged 16,800 homes; destroyed Gaza's sole power plant; damaged 277 schools; damaged 17 hospitals; incapacitated 10 hospitals; destroyed 63 mosques and damaged another 150; and damaged two churches and a Christian cemetery, among a long list of similarly destroyed civilian infrastructure. Additionally, during the course of the fourth ceasefire humanitarian workers discovered thousands of explosive remnants of war (i.e. unexploded bombs and shells). Palestinian resistance groups have killed 64 Israeli soldiers and three civilians.

In light of Israel's ongoing blockade that limits Gaza's access to basic food goods, medicines and infrastructure materials, the humanitarian devastation is intolerable. An immediate ceasefire will stop this situation from getting worse, but an effective ceasefire will ensure that it gets better.

Palestinian negotiators have insisted that a number of humanitarian provisions be part of a longer-term ceasefire. These include lifting the blockade, expanding the coastal waters accessible to Palestinian fishermen, internationalising the Rafah crossing and placing international forces on the border. Israel has thus far rejected these demands, insisting that Hamas and all resistance forces be demilitarised first. While these opposing demands seem to be competing, in fact the Palestinian demands reflect fundamental human rights already enshrined in law and necessary for human survival. According to the World Health Organisation the Gaza Strip will be unlivable by 2020. That means that if there is an agreement that simply ceases hostilities, 1.8 million Palestinians will still die a slow but sure death.

In large measure this situation is attributable to the systematic impunity afforded to Israel over several decades. It has faced few or no consequences as a result of its non-adherence to its obligations and duties as an occupying power, as well as its egregious violations of humanitarian law during hostilities. Below I address the issue of Israel's culpability for war crimes during this most recent offensive. I also briefly discuss the culpability of Hamas and other Palestinian resistance groups, and the obligations of third-party states to remedy the situation in the Gaza Strip.

Self-defence, duties of an occupying power and permissible use of force

Despite unilaterally removing 8,000 settlers and the military infrastructure that protected their illegal presence in 2005, Israel maintained effective control of the Gaza Strip and therefore remains the occupying power as defined by Article 42 of the Hague Regulations. Article 43 mandates that, as the occupying power of the Gaza Strip, Israel must “take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”. Thus Israel has a duty and obligation to protect the Palestinian population living in the Gaza Strip.

Accordingly, Israel cannot invoke the right to self-defence under international law. Israel has attempted to frame Hamas’s rocket fire as an “armed attack” within the meaning of Article 51 of the UN Charter, thereby justifying the use of force. The International Court of Justice (ICJ), however, rejected this faulty legal interpretation in its 2004 Advisory Opinion. The court explained that an armed attack that would trigger Article 51 must be attributable to a sovereign state, but the armed attacks by Palestinians emerge from within Israel’s jurisdictional control. Israel does have the right to defend itself against rocket attacks, but it must do so in accordance with occupation law and not other laws of war.

Under occupation law, a law enforcement model regulates the permissible use of force, thus ensuring greater protection for the civilian population. Police can only kill a civilian as a measure of last resort. During an international armed conflict the laws of war balance military advantage and civilian suffering. Unlike policing powers, a belligerent can use lethal force as a first resort to target military objectives. Civilians killed in this context are considered collateral damage.

Israel denies Palestinians the right to govern and protect themselves, while simultaneously invoking the right to self-defence. This is a conundrum that Israel deliberately created to evade accountability; it is also a violation of international law. It makes the Palestinian population doubly vulnerable.

Among Israel’s most severe transgressions is the imposition of a debilitating eight-year blockade on the Gaza Strip, which preceded by a lengthy period the most recent military offensive. The comprehensive blockade prohibits trade, restricts access to agricultural lands and fishing waters, and severely limits the import of basic goods and the movement of people for personal, health, and educational purposes. Consequently, unemployment in the Gaza Strip is now 40%. The United Nations Relief and Works Agency (UNRWA) reports that the number of Palestinians dependent on food aid for survival has increased from 80,000 in 2000 to 830,000 today. The blockade violates the prohibition on collective punishment enshrined in Article 33 of the Fourth Geneva Convention.

Israeli violations of the laws of armed conflict

Assuming for the sake of argument that Israel could lawfully wage war on the Palestinian population in the Gaza Strip, it must do so within the bounds established by humanitarian law. The twin pillars of the laws of armed conflict are the principles of distinction and proportionality. The principle of distinction obligates belligerents to distinguish between civilians, who are afforded immunity, and combatants, who are lawful targets. Civilians may never be the objects of attack, but their immunity is not absolute. They can lose their immunity if they directly participate in hostilities. Civilian infrastructure can be legitimately targeted if an attack on it fulfils a definite military purpose and is not disproportionate to the harm caused.

The principle of proportionality mandates that the military advantage achieved should be balanced against harm to civilians. This principle prohibits the means and methods of warfare that can cause “superfluous injury or unnecessary suffering” and mandates that military operations be cancelled if it becomes apparent that the loss of civilian life or objects will be “excessive in relation to the concrete and direct military advantage anticipated”. Fundamentally, proportionality establishes that the permissible evils of warfare are not unlimited.

The overwhelming majority of the 1,973 Palestinians killed were civilians, indicating Israel’s failure to observe Palestinian civilian immunity. Israel claims that their deaths are collateral damage resulting from Hamas’s operations launched from civilian areas. Even if this were the case (see below), a belligerent’s violation of the laws of war does not release an adversary belligerent from its obligations to observe them. Doing so would render the entire corpus of law futile and create a no-holds-barred situation in conflict. In cases of doubt whether something is a legitimate military objective, Article 52(3) of Additional Protocol I obligates belligerents to presume civilian status and immunity.

Moreover, several journalist and investigatory reports documented that Israel directly targeted civilians. These include incidents of revenge killings in Shuja'iyyah, of killing fleeing civilians in Khuza'a, and of thousands of civilians taking shelter in six UNRWA schools on six different occasions. Israel has also attacked critical civilians and civilian infrastructure, including health workers, ambulances, and hospitals, as well as the Gaza Strip’s sole power plant. These direct attacks unequivocally violate the principle of distinction and constitute war crimes.

The question of proportionality is more difficult, but not impossible, to assess from a bird’s eye point of view. A military operation that directly or recklessly targets civilians cannot be proportionate, rendering the aforementioned incidents, along with hundreds of others, disproportionate.

A more granular analysis is more challenging because while the devastating extent of harm meted out to Palestinian civilians is known, the military advantage Israel achieved in each operation is not. Conducting this analysis requires access to Israeli intelligence that it has not made available to the public. (Save for several offensive cartoon sketches created by the Israeli army.) Significantly, Israel has recently prevented Amnesty International and Human Rights Watch teams from entering the Gaza Strip. In 2009 it denied entry to the Human Rights Council's Fact-finding Mission on the Gaza conflict.

What we do know is that as of August 19th 2014 Israel has yet to fulfil the purpose of its military operation: it has only killed a fraction of the Hamas militants it purportedly targeted, has yet to destroy Hamas's weapons arsenal and has yet to incapacitate its military capability. This means that whatever military advantage Israel has achieved, it is only a fraction of its stated military purpose. This incremental advantage has supposedly necessitated the decimation of whole neighbourhoods in the Gaza Strip and the targeting of dozens of families in their homes, and exacerbated an existing humanitarian crisis. Can this presumed and inchoate military advantage therefore be proportionate to the harm caused? If so, what would be disproportionate?

In addition to these fundamental principles are a multitude of provisions regulating combat. Israel's alleged litany of violations requires greater scrutiny and space than the present study allows. These include the use of non-conventional weapons like dense inert metal explosives, the forcible transfer of Palestinian civilians, the targeting of journalists and media buildings, and the destruction of water and sewage infrastructure.

Hamas violations of the laws of war

Hamas is a democratically elected political party with a military wing. The U.S. and the European Union (EU) are among the powerful bodies that designate it a terrorist organisation, thus neutralising its force as a political player and stymieing a political solution to the current impasse in Gaza. Hamas's indiscriminate rocket fire into Israel is an ipso facto violation of the principle of distinction and is most likely a war crime. It must still be shown, however, that Hamas intended to target civilians or recklessly launched rockets, thus endangering civilian populations.

The issue, however, is not Hamas's use of force. Peoples have a right to resort to armed force to resist "colonial and foreign domination and foreign occupation". Therefore, were Hamas or other Palestinian groups to use precision missiles to target Israeli military installations, their use of armed force would be legitimate. (Undoubtedly, however, the conversation about Palestinian rocket fire among powerful states would remain the same.) Palestinian resistance groups have the right to resist Israeli colonisation by armed force, including by building tunnel networks to capture Israeli soldiers.

Israel has accused Hamas of launching operations from civilian areas, thus using the civilians living there as human shields to protect themselves. If true, then Hamas indeed violates the principle of distinction and, specifically, Article 58 (b) of Additional Protocol I and Article 13(1) of Additional Protocol II.

Israel levelled this accusation against Hizbullah in Lebanon in 1996 and 2006, and against Hamas in 2008/09 and 2012. Past investigations by the UN, Human Rights Watch, Amnesty International, the National Lawyers' Guild, Physicians for Human Rights-Israel and Breaking the Silence (a group of former Israeli soldiers) have refuted this claim. Several of these reports confirm that instances of launching attacks from civilian areas are exceptional and not systematic. These investigations attributed high death civilian death tolls to direct and reckless targeting by Israeli forces.

Obligations of high contracting parties

High contracting parties to the Geneva Convention are obligated "to respect and to ensure respect for the [Geneva Conventions] in all circumstances". This includes restraining belligerents from committing grave breaches, prosecuting belligerents for their violations, and pressuring colonial powers to cease their domination of lands and people.

Geneva Convention Common Article 49 (GCI)/50 (GCII)/129 (GCIII)/146 (GCIV) obligates high contracting parties to prosecute persons in their territory suspected of committing grave breaches. This affords third-party states universal jurisdiction in their national courts to prosecute particular officials for grave breaches of the Geneva Convention.

Other multilateral bodies and UN initiatives have affirmed these privileges and obligations. The 2004 ICJ Advisory Opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" called on states to not recognise

the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

Recent suspensions of arms shipments to Israel by the U.S., Britain and Spain are in line with this mandate. Recent measures among several South American states to sever diplomatic ties with Israel are similarly responsive.

In contrast, the international community has explicitly and/or complicitly endorsed comprehensive sanctions on the Gaza Strip without ensuring the humanitarian passage of basic goods, medicines and persons. Recently, the EU endorsed Israel's demand for the demilitarisation of Hamas, but has not ensured international protection for the stateless population or insisted on the right of the Palestinian people to govern and protect themselves.

The 2009 Fact-Finding Mission on the Gaza Conflict also obligates states to take several measures to remedy this situation. In particular, paragraph 1971 of the mission's report calls on states to affirm the applicability of the Geneva Conventions to the Occupied Palestinian Territory, to prosecute individuals under universal jurisdiction where applicable, and to review the legality of the use of certain munitions used in hostilities.

These imperatives have yet to be pursued. Multilateral bodies have issued plenty of resolutions and recommendations

mandating Israel's adherence to law. These bodies, including the ICJ, the Human Rights Council and human rights treaty bodies, have explicitly emphasised the obligations of high contracting parties to shepherd their implementation. The missing element has been the requisite political will to guarantee compliance.

On July 29th 2014 the Human Rights Council voted to convene a new commission of inquiry to investigate war crimes committed during Operation Protective Edge. This is a positive development. However, as indicated by the negative U.S. vote and the abstention by several European states, this commission is unlikely to yield better results than its 2009 predecessor. States should inculcate the political will to overcome this impasse and achieve meaningful accountability. These are the essential first steps necessary to remedy a situation of gross and pervasive violations that facilitate and prolong a condition of settler-colonialism, apartheid and military occupation. ■

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