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Weighing Crimes and Ethics in Urban Warfare

By [STEVEN ERLANGER](#)

JERUSALEM — Your unit, on the edges of the northern [Gaza](#) town of Jabaliya, has taken mortar fire from the crowded refugee camp nearby. You prepare to return fire, and perhaps you notice — or perhaps you don't, even though it's on your map — that there is a [United Nations](#) school just there, full of displaced Gazans. You know that international law allows you to protect your soldiers and return fire, but also demands that you ensure that there is no excessive harm to civilians. Do you remember all that in the chaos?

You pick GPS-guided mortars, which are supposed to be accurate and of a specific explosive force, and fire back. In the end, you kill some [Hamas](#) fighters but also, the United Nations says, more than 40 civilians, some of them children.

Have you committed a war crime?

Whatever the military and political results of [Israel's](#) 21-day war against Hamas in Gaza, Israel is again facing serious accusations and anguished questioning over the legality of its military conduct. As in Israel's 2006 war against [Hezbollah](#) in Lebanon, the popular perception abroad of how Israel fights, and hence of Israelis, may prove to be more lasting than any strategic gains or losses.

The televised images of devastation in the crowded Gaza Strip and the large asymmetry in deaths, especially of civilians, have created an uproar in the Arab world and the West reminiscent of 2006.

A plethora of Western foreign ministers, United Nations officials and human rights groups, both Israeli and foreign, have expressed shock and disgust; some have called for investigations into possible war crimes. Such groups also say Hamas is clearly violating the rules of war.

More than 1,100 [Palestinians](#) have died in Gaza, according to the Hamas-run Ministry of Health, which estimates that 40 percent are women and children under 18. Israel estimates that only a quarter of the dead are civilians. Israel, which has suffered 13 dead, 3 of them civilian, is being accused of a disproportionate use of force. Death tolls in warfare may carry a moral weight, but not a legal one.

Question of Proportionality

Under international law, proportionality is defined as a question of judgment, not of numbers: Is the potential risk to civilians excessive in relationship to the anticipated military advantage? That puts the weight on military advantage, since civilian risk is a given and must only not be "excessive." Even if the target is legitimate, was the right weapon used to try to minimize civilian damage? The key is the expected damage the commander anticipated from the use of a certain weapon, and not what actually happened when it was fired.

The other key legal principle is discrimination: has a military struggled hard enough to hit only military targets and combatants, while trying to avoid purely civilian targets and noncombatants?

Deciding requires an investigation into battlefield circumstances that cannot be carried out while the fighting rages, and such judgments are especially difficult in urban guerrilla warfare, when fighters like Hamas live among the civilian population and take shelter there. While Israel is the focus of most criticism, legal experts agree that Hamas, a radical Islamic group classified by the United States and Europe as terrorist, violates international law.

Shooting rockets out of Gaza aimed at Israeli cities and civilians is an obvious violation of the principle of discrimination and fits the classic definition of terrorism. Hamas fighters are also putting civilians at undue risk by storing weapons among them, including in mosques, schools and allegedly hospitals, too, making them potential military targets. While urban and guerrilla warfare is not illegal, by fighting in the midst of civilians, often in civilian clothing, Hamas may also bring risk to noncombatants.

But Hamas's violations tend to be treated as a given and criticized as an afterthought, Israeli spokesmen and officials say. They say that Israel has never sought to hit civilians, medical workers or United Nations facilities or personnel. "The rules of engagement are very clear," said Mark Regev, the government spokesman. "Not to target civilians, not to target U.N. people, not to target medical staff. All this is very clear in Israeli military doctrine."

Asa Kasher, 69, has a chair in ethics at Tel Aviv University and helped write the Israeli military's ethical code. He still teaches in the army's College of Command and General Staff.

He said that the Israeli Army's ethical and legal standards were high and that he believed they were conscientiously taught to its military. But as for what happens on the ground, he said, "I have a general confidence in their attitudes and decency, but who knows?"

A senior lawyer for the United Nations, who was authorized to speak only if she remained anonymous, agreed that the Israeli code was excellent, but said that the military was not doing enough to protect neutrals or to provide havens for civilians. "A proper weighing of proportionality on the battlefield is just not happening as it should," she said.

Israel's chief army legal officer, whose name cannot be published under censorship rules, called the charges "deeply unfair and unjust," and spoke of the horrible realities of war and compared Israel's behavior favorably to that of the American military in Iraq, Afghanistan and Kosovo.

The most intense criticism of Israel's behavior has centered on how it has conducted the war and weighed risks to civilians, access of medical personnel to the wounded and provision of vital supplies to civilians in Gaza who cannot escape the sealed territory. A few events encapsulate the arguments and are fiercely disputed.

The Fakhura School

One of the touchstones of the war so far has been the fate of a group of Palestinian civilians fleeing the fighting who were lining up to enter a United Nations school. They were killed on Jan. 6 in an exchange of

mortar fire between Hamas fighters and Israeli troops. The facts are disputed; John Ging, the Gaza director of the United Nations Relief and Works Agency, said that 43 people died and that no militants fired from inside the school grounds or were harbored there. The Israeli military first said that it had returned fire at a Hamas mortar team inside the school and killed two fighters. Then the army briefed diplomats to say that the Hamas men were firing next to the school, and that one mortar shell, equipped with a guidance system, had gone off target. But after completing its initial inquiry, the army now has returned to its first version — that Hamas militants fired from inside the school compound. The army has also questioned the figure of 43 dead, saying that it was manipulated by Hamas and is too high, given the limited explosive power of a mortar shell.

The director of the Palestinian human rights group [Al-Haq](#), Shawan Jabarin, said in an interview that the Israelis knew that the school was sheltering civilians.

“While they did not attack the school directly, they have to take into account civilians there. Because they didn’t take that into account, and they knew the shells would fragment, they didn’t take care with civilian lives,” he said. “They bear the responsibility. Under international law, if you don’t take all measures to respect civilians, you bear responsibility.”

Witnesses, including Hanan Abu Khajib, 39, said that Hamas fired just outside the school compound, probably from the secluded courtyard of a house across the street, 25 yards from the school. Israeli return fire, some minutes later, also landed outside the school, along the southwest wall, killing two Hamas fighters. Nearly all the casualties were in the street outside the compound, with only three people wounded from shrapnel inside the walls.

The United Nations relief agency takes great care not to harbor militants in its buildings in order to protect civilians and their children, said the agency’s spokesman, Christopher Gunness. The agency normally deals with as much as half of Gaza’s population of 1.5 million, and it is eager to make clear that its workers are neutral and not to be fired upon.

Mr. Gunness and other agency officials say that they do not want to get into a fight with Israel over allegations of war crimes, though they stress that they had provided the map coordinates of all agency schools, shelters and buildings to the Israeli military. But they are troubled by regular Israeli allegations, most recently by the Foreign Ministry and by Avi Dichter, Israel’s minister of public security and former head of the Shin Bet counterterrorism agency, that the agency has been infiltrated by Hamas partisans and fighters, which may, Mr. Gunness said, lead young Israeli soldiers to believe that the agency is a justifiable target.

Israel, too, has tried to avoid a public fight with the agency, sending a senior Defense Ministry official to express his regrets for the death of an agency driver — whose killing the United Nations attributed to Israel but Israel denied it — and to say that Israel appreciates the work the agency does in Gaza, diplomats and Israeli officials said.

But the legal question of war crimes is different.

First, if Hamas fired from inside or even next to the United Nations school, knowing that it was an agency building and thus trying to use its neutrality for protection, endangering civilians, then the Hamas fighters are potentially guilty of a crime, according to B’Tselem, an Israeli human rights group. They also, by firing,

turned the place from which they fired into a legitimate military target — as mosques became legitimate targets because Hamas stored large caches of rockets and weaponry inside them.

Investigators would then have to decide if Israeli troops fired back with appropriate weapons, and with the appropriate balancing of military benefit for the entire operation against potential civilian harm.

“The important issue is how the Israeli forces balanced the military benefit of hitting the target with the expected collateral damage to civilians,” said the Israeli army chief legal officer. “As I understand it, I don’t think they expected this number of casualties. When you look at mortar fire, you don’t expect 43 casualties — if in fact there were 43 casualties. We think a wall collapsed or there was another explosion. It’s not clear.”

The Israeli mortars had GPS guidance, the army said. But a commander must also consider the probability that it might miss. “If it is rare to go off target, then it’s not something you have to take into account,” the legal officer said. “But I don’t know how much the soldiers were aware of who was inside the building — maybe they should have known better, but getting information to forces in a firefight on the ground is a problem. But if the firing was from outside and they didn’t expect the building to be hit, then that affects the judgment.”

There is a “field debriefing” going on, the officer said. But it is not clear when the investigation will be completed or whether it will be made public. Usually field investigations are internal, with only conclusions revealed, unlike criminal investigations and courts-martial.

The Samouni Clan

The Israeli ground invasion began Jan. 3, and in the early hours of Jan. 4, the International Committee of the Red Cross began hearing of a large clan, the Samounis, who were wounded and trapped by the fierce fighting around Zeitoun, in eastern Gaza City. The Red Cross began asking the Israeli Army for access to the wounded.

The Samouni clan said it was moved by Israeli soldiers from house to house, but the Israeli military denies it. The last house was shelled, and some 30 members of the extended family died, raising the question of whether the Israeli Army targeted a house where it knew refugees were sheltering. The Red Cross was not granted access to the area to reach the Samounis and others until Jan. 7, when four children were found emaciated, next to their dead mothers.

It was not clear why the house was shelled, but Maj. Jacob Dallal of the Israeli Army said an investigation showed that no specific buildings in Zeitoun had been chosen as targets that day, and that the army only heard later about the family’s plight. He said that an inquiry showed that the army had not moved the Samouni family from house to house, though they may have done so themselves in response to Israeli calls to leave the battlefield.

The Red Cross, which normally works quietly, issued a rare public statement rebuking Israel, charging that the Israeli military had failed to meet its obligation under international humanitarian law to care for and evacuate the wounded in a timely way.

Anne-Sophie Bonefeld, a Red Cross spokeswoman based in Jerusalem, said, “We were really, really shocked

by the delay.” The aim of going public, she said, “was to try to ensure that we never have such a situation again.”

The Red Cross statement also shocked the Israelis, who work well with the Red Cross and trust it, Mr. Regev said. “We found it very troubling, because we take them very seriously,” he said. “It is incumbent on us in difficult situations to help the I.C.R.C. to do its job.”

Maj. Peter Lerner, spokesman for the Defense Ministry’s coordination office for Gaza, said that access to the battlefield “is severely influenced by the combat going on,” adding that “tactical coordination was there from the start and worked in many cases, and sometimes due to intense fighting it didn’t work as well.”

But Israel then moved to set up an additional special joint operations room with the main humanitarian agencies near Tel Aviv.

Hamas has misused ambulances and Red Crescent and United Nations symbols in the past and is doing so during this conflict, Major Lerner charged.

“We’ve had gunmen coming out of ambulances and taking up positions here in the last week; my people saw it,” he said. “So of course this makes the troops in the field very wary about any vehicles approaching them, and why coordination has to be from the top to the very bottom, all the way down the line to the unit in the field.”

The army’s chief lawyer said about the Samounis: “There was at no stage a policy to not take care of the wounded. We’re trying to improve coordination. But there can be no high intensity fighting in such a densely populated place without mistakes. I’m sure there are mistakes.”

Since then, the Red Cross has noted improvements, even praising Israel for trying to avoid civilian casualties and provide humanitarian assistance in a briefing for Europeans in Tel Aviv, according to a European diplomat who attended the briefing.

Pierre Wettach, head of the organization in Israel and the Palestinian territories, said of the Israel Defense Forces in an interview: “I believe there is a true concern on the part of the I.D.F. to address these things, which are extremely complicated to organize.”

Targets Challenged

Human rights groups are also troubled by Israel’s strikes on buildings they believe should be classified as civilian, like the parliament, police stations and the presidential palace.

“Some of the targets are government offices of Hamas and the civilian authorities,” said Jessica Montell of B’Tselem. Unless used for military purposes, she said, “these are not legitimate targets,” and added, “we have suspicions that the I.D.F. does not respect these regulations.”

The army attacked “both aspects of Hamas — its resistance or military wing and its dawa, or social wing,” a senior intelligence officer said. He argued that Hamas was all of a piece and in a war, its instruments of political and social control were as legitimate a target as its rocket caches. Since June 2007 and the Hamas takeover of Gaza in a brief war with its secular rival [Fatah](#), both Israel and Egypt have tried to seal the

territory. But there has been an active smuggling trade through tunnels from Egypt, and a year ago, Hamas blew open the Egyptian border, letting Gazans go to Egypt and shop for food, cooking oil, medicines, refrigerators and the like. But Hamas also used the open border to smuggle in large rockets and other weapons, Israeli officials say.

To try to stop rocket attacks from Gaza, Israel halted normal trade with Gaza and kept it on a much reduced diet for electricity, gasoline, diesel and cooking oil, wheat flour and many other items. The idea was a form of economic sanction, Mr. Regev, the government spokesman, said, a reminder that Israel would not let life be normal under Hamas.

But many human rights groups banded together to sue the government in the Supreme Court, alleging violation of international law and “collective punishment of civilians.” The Israeli government argued that there was no humanitarian crisis in Gaza, that basic necessities were provided — using the United Nations’ figure for the minimum calories required daily for subsistence — and the court generally agreed. But the rockets did not stop.

The effective closure continued through a six-month cease-fire with Hamas that ended last month, and the shortage of diesel oil for Gaza’s only power generator, for example, meant many hours a day without electricity. That put a strain on hospitals, generators and on the water supply and sewage system, which depend on electric pumps.

Nine Israeli human rights groups charged that the fighting had caused a crisis in the health and sanitation systems and have petitioned the Supreme Court again.

Sari Bashi, of the human rights group [Gisha](#), said the current lack of electricity had limited the access to potable water to more than 500,000 people; she said that there was sewage in the streets and that hospitals were running on generators missing spare parts. Ms. Montell of B’Tselem said that even though Israel pulled out of Gaza in 2005, “there is no legal vacuum” and it retains responsibility for basic needs and trade. “The argument that it’s collective punishment of civilians I find very compelling,” she said.

Replacement for Sanctions

But since the war began, fighting has replaced sanctions as a means for stopping the rockets, Mr. Regev said.

Philippe Lazzarini, head of the United Nations Office for the Coordination of Humanitarian Affairs, said that since the war started, “The number of trucks Israel has allowed into Gaza is much higher than during the blockade.” But he laughed and said, “Anything seems like a big increase when you compare it to practically nothing.” Major Dallal said that “people lose sight of the context of a war zone in a densely populated area, where every time a door is pulled open, a soldier wonders who is behind it.”

[The Palestinian Center for Human Rights](#) said the Israeli military had acted with “total disregard for the lives of Palestinian civilians.”

Major Dallal, however, said the fundamental question, and not just for Israel, was, “How does an army fight a terrorist group?”

“If we,” he added, meaning the world, “just see the pictures and don’t use our heads, then the terrorists will always win these public opinion battles.”

Taghreed El-Khodary contributed reporting from Gaza, and Sabrina Tavernise from Jerusalem.

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