



Reflections on the current war in Palestine (as of November 12, 2023)

Jennifer Leaning MD SMH*

Introduction

There are reasons the international community still holds fast to the tenets of international humanitarian law. The world itself, as populated by governments and citizens, might not have persisted to this day without these legal injunctions requiring forbearance during armed conflict. Distilled from over 150 years of considered experience of war and suffering and loss, these carefully crafted documents of legal consensus guide and constrain the strategy and conduct of the world's governments and armed forces.

The passage of time has allowed the international courts and the UN to establish the category of Customary International Law, integrating all of the documents described briefly below into one body of law that now applies to all states in the world, regardless of whether they have signed or ratified the main historic treaties.

These legal constraints are most in play when states and their militaries determine how, when, and with what means they will undertake and prosecute a war against a state or non-state actor. To support this observation, we need look no further than to the recent attack on Israeli civilians by Hamas and the response of the Israeli government and its military conduct of the war in Gaza and the West Bank. When the laws of armed conflict are flouted, sheer brutality may well rule the land.

I write this reflection in full acknowledgment that the United States (whose citizenship I hold) has committed exceedingly grave violations of the principles and laws I discuss below. The ghastly carnage of World War II (1939-1945) prompted the drafting and debate process that produced the 1948 Convention on Genocide and the 1949 Geneva Conventions. We all live in the moral shadow of the Holocaust and Hamburg, Dresden, Hiroshima and Nagasaki.

The Treaties

Geneva Conventions of 1949:

In war contexts, the relevant texts are the Four Geneva Conventions of 1949, the Two Additional Protocols of 1977 (AP I and II); and the Hague Conventions of 1890 and 1907. Geneva law relates to the conduct of war with regard to protected categories of persons, Hague Law to the conduct of belligerents and the design and use of weapons.

The state of Israel has signed and ratified the four Geneva Conventions and key elements of Hague Law. Israel has not signed or ratified AP I and AP II. The US has signed and ratified the four Geneva Conventions and signed (but not ratified) both AP I and AP II. The US has also signed all elements of Hague Law.

The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War includes a substantive section on the law of Occupation (Section III, articles 47-78). Occupation itself is defined as a temporary phenomenon, established within an armed conflict and permitted for short duration for particular reasons. People living in zones of occupation are considered Protected Persons, with specific constraints placed on what the Occupying Authority is permitted to do with or to this population. Treaties ending armed conflicts contain provisions for ending the status of occupation as well.

It is contested whether the Israeli occupation of Gaza and the West Bank since the 1967 war remains one of the most enduring violations of this substantial section of the Fourth Geneva Convention. In October 2022 the UN Commission of Inquiry submitted its decision that the occupation was illegal under international law and upon its request, the UN General Assembly referred the matter to the International Court of Justice, which is now hearing testimony.

Hague Law (1899, 1907, subsequent disarmament and weapons treaties):

In all contexts of military engagement, certain weapons are prohibited, and certain tactics are unlawful. Prohibited weapons are those that by design maim (blinding weapons) or by design are indiscriminate (use of poison gas or aerial bombardment of areas densely populated by non-combatants). Specified tactics are also banned (perfidy, or deliberate misuse of legitimate tactics of protection for seeking help, such as feigning injury or waving a white flag to draw the enemy near). All 20th and 21st century disarmament treaties related to regulation of use of chemical weapons, biological weapons and nuclear weapons are categorized under Hague Law.

In the overall context of application of Hague or Geneva Law, key principles regarding the approach to civilians caught up in war also arise from many commentaries, manuals, and court rulings.

The war in Gaza (October 7, 2023 to date):

October 7, 2023: Hamas attacks civilian Israeli settlements: 1,200 killed, over 240 people taken hostage.

October 7, 2023—ongoing: Israel attacks Gaza. As of November 11, 2023, over 11,000 people have been killed, of whom more than 4,400 were children, over 2,900 women, and over 600 elderly. Around 27,000 Palestinians have been wounded in the Israeli airstrikes, and over 3,000 are reported missing.

As of November 12, 2023, the Gaza health authorities have stopped updating casualty numbers because the Gaza hospitals (the source of these data) have either been forced to close or are currently under heavy attack (Al Shifa Hospital in the north).

With regard to the war in Gaza, the relevant legal principles are:

- Restraint in the use and means of war;
- Necessity to distinguish between military and civilian targets;
- Necessity to distinguish civilians from combatants in order to spare civilians;
- Duty to warn civilians of impending harm and to protect them from injury or death as much as possible.
- Regulation of forced displacement of civilian populations

Restraint:

The Gaza Strip is one of the most densely populated areas in the world—2,100,000 people in 140 square miles or 15,600 people per square mile (more than the density of the Greater London area, with 14,550 residents per square mile, 2017 data). Gaza City has a population density of 21,034 people per square mile (the city of London has a density of 7,700 people per square mile).

With infrequent temporary exceptions for individuals, the Israeli government has forbidden the people of the Gaza Strip to leave this territory since the Hamas takeover in 2007. Exit by sea was also outlawed at that time. In effect, since 2007, the population has been shorn of its capacity to flee. (This fact differentiates the war situation of civilians in Gaza from recent previous instances of urban warfare. The Gazans are trapped whereas most of the civilians in the battles of Mosul and Falluja in Iraq were able to flee in advance.)

Individuals in Gaza seeking to enter Israel for medical issues or other reasons must receive Israeli military permission to walk or drive through the Erez crossing at the northern border.

in times of tension over these years this military permission has proved very difficult to obtain. (The only crossing for Palestinian individuals into Egypt was via the southern Rafah Gate which was closed by Egypt after the Hamas takeover.) Kerem Shalom is the only other legal crossing point at the south-eastern edge of the Gaza border with Egypt and Israel. Under the close scrutiny of Israeli and Egyptian authorities, trucks carrying goods, supplies, and produce may cross out of Gaza to Israel or into Gaza from Egypt and Israel.

The longer north-south axis of the Gaza Strip is heavily built up with clusters of 5-12 story concrete apartment buildings and densely settled housing in old refugee camps. The Jabalia refugee camp in northern Gaza, a frequent target of Israeli attacks over the years, has a population density of 116,000 people living in an area less than 0.58 square mile.

These camps date from the Nakba, the 1948 Israeli expulsion of Palestinians from the British mandate land of Palestine. They are tightly crowded with many generations of families. On each floor of these concrete apartment buildings (in the refugee camps and in the cities proper) reside one to three extended family groupings, each ranging from 5-15 people. In a few of these buildings, it was known that Hamas officials might occupy the top floor or the ground floor. After the punishing Gaza 2014 war, some Hamas officials left Gaza and others moved to more underground lives in the tunnels. But some of their family members undoubtedly have continued to live in these buildings.

The legal question is whether the hunt for Hamas would justify targeting and bombing these refugee camps and apartment buildings, densely populated primarily by non-Hamas civilian Palestinians. These circumstances should severely restrict the means and methods of war that could be lawfully employed under Geneva and Hague law.

Necessity to distinguish between military and civilian targets:

Aerial bombardment with planes and missiles launched by plane or tank against densely settled neighborhoods are most likely to cause indiscriminate harm to civilian populations. In Gaza, 2.1 million people live on its surface. The Israeli-declared targets, Hamas soldiers and officials, use tunnels that go as much as 65 feet deep below the civilian infrastructure. Between the Hamas targets and the Israeli aerial and ground bombardment are layers of civilians and civilian life, including hospitals, schools, mosques, and churches (all prohibited targets under the Geneva Conventions). The difficulty in making the distinction between civilian and military targets is obvious when confronting the problem of layers.

It is also the case that under intense bombardment of their homes, thousands of people have fled sequentially to larger civilian buildings, such as schools, mosques, and churches. In the last few weeks tens of thousands of people have finally been driven to seek shelter in the few functioning hospitals. It is not lawful to target hospitals or people running into or out of hospital buildings or compounds—regardless of Israeli assertions (denied by Palestinian hospital officials) that Hamas lurks in or below the hospitals to avoid attack.

Now, as of the date of this writing, Al Shifa has announced it has had to close because of loss or destruction of all supports (electricity, fuel, water, supplies, medications). All staff are trying to flee. The snipers surrounding Al Shifa and heavy aerial bombardment along its tight perimeter make flight at this time very dangerous. As this hospital closes, the Israeli government and military have eliminated any viable shelter option in northern Gaza.

The hospitals have long been sources of pride and stability for the Palestinian population, staffed as they are by trained physicians, nurses, and specialists, equipped with good diagnostic capacities. Al Shifa is the most advanced of these hospitals and, as other sites of care have been heavily damaged, this site had become one of last resort for populations seeking emergency care (wounds, childbirth, worsening chronic illness) in the northern section of Gaza.

Necessity to distinguish between civilians and combatants:

The weapons and targeting strategies currently used by the IDF do not permit making a distinction between civilians and combatants. The civilians in Gaza are prohibited by the IDF to have weapons. Hamas and their adherents hold weapons they have smuggled in.

Yet the streets are crowded and narrow and the rush of people carrying wounded relatives into hospitals or fleeing after bombardments of their homes adds high tension. In seeking refuge from heavy fire, people had flocked to presumed sites of safety. Increasingly, with dwindling options for life in northern Gaza, the remnant masses, joined now by hospital staff, are swelling the crowds already in flight to the south. These crowds are dense and complex (children, women, men on foot or in carts pulled by donkeys), carrying a wide diversity of baggage, swerving suddenly to avoid craters or piles of sharp concrete and rebar and destroyed cars.

Reported Israeli fire on these crowds and occasional bombing strikes would be grave violations of the Geneva Conventions.

Distinguishing a civilian from a combatant begins with the precept that if the person looks like a civilian (no weapons, no uniform, no insignia) and behaves like a civilian (fleeing battle, seeking shelter from air bombardment, carrying one or more children, lugging heavy belongings) then the person is a civilian. A large grouping of people in flight, such as those now crowding the main road heading south at Israeli command, can never, under international law, be targeted on the assumption that though they look like civilians, in their midst some are not.

In active fire zones, it requires close, consistent, and experienced assessment of a person's actions and behavior to determine whether the person might be a combatant in civilian disguise. Such determinations are not the prerogative of an individual soldier or even a ground commander except in split-second urgency. Targeting decisions, relayed to those who fire the weapons, require the sustained observation and assessment of military lawyers—each hour, each day.

The current casualty figures as of November 11, 2023, suggest a serious failure of the Israeli military to conform to the duty to distinguish. At minimum, looking only at the number of children killed, a 40% civilian casualty rate is unacceptable; including women and the elderly, the civilian casualty rate is 71 percent. In other war contexts, the ICRC has refused to define an “unacceptable civilian casualty rate” because doing so implies that killing some civilians might be acceptable; but in general understanding, a civilian casualty rate of 10-25%, although terrible, does not in itself signal grave disregard for civilians on the part of the attacking power. Concern arises proportionately with increasing percentages of civilian death.

Duty to warn:

The obligation of armed forces to warn civilians that an attack is about to commence in a given area must be delivered in sufficient time for civilians to take precautionary measures. Only in

circumstances where surprise is essential to the military intent in a given engagement does the duty to warn not hold. This obligation is enshrined in many conventions and codes and is considered by the ICRC to be part of International Customary Law.

Warning messages may be distributed by leaflets, loudspeakers, or other means designed to reach the civilian population. In the current war, it is evident that the population in the north of Gaza did not initially deem credible the leaflet's warning to move entirely to the south. The Israeli government also has the telephone numbers of many residents of many buildings in Gaza and calls people living in targeted high rises to deliver more specific warnings to evacuate in 5-10 minutes.

A technique used over the last several conflicts between Israel and Hamas (including in Gaza 2014) has been “roof-knocking”—according to which a missile is shot to hit the top corner of the high-rise building, again with the phone call to occupants of the building that they have the requisite 5-10 minutes to evacuate (before a much heavier barrage). In Gaza 2014, the “roof- knock” was often sufficient to initiate the partial collapse of the top floor and further stories down. Panicked residents would scramble to take their children and infirm elderly down the 12 or more flights (while the building might be shaking or crumbling from the initial “knock”).

Often the many occupants could not complete the descent within the imposed deadline before the heavier bombardment would bring the building down on top of them. Depending on time of day (late afternoon, evening, and night were times when more people were at home) scores if not hundreds of people would be injured or killed.

Forced displacement of civilian populations:

In a non-international conflict (which defines the current war in Gaza), Israel “may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.” (Rule 129, International Customary Law.) It could be reasonably argued that these reasons apply in the current war. In this context, Rule 131 “prescribes . . .that all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety, and nutrition and that members of the same family are not separated.” Here is where the breach widens markedly between what is prescribed in international humanitarian law and what is now going on in the southern part of Gaza.

Conclusion:

The Israeli government is sufficiently conversant with the norms and laws of armed conflict to make some of their assertions and explanations plausible within the prevailing legal structures. It is in the government's prosecution of the war, what it actually does in the Gaza context, that undermines their normative and legal justifications--firing on crowds fleeing south; the 5-10-minute warning. Once an observer experiences Gaza during war or closely studies videos from

photojournalists, it becomes evident that this war, as with the proceeding ones, is fought very harshly with little concern for civilians. The Israeli military authority applies an intense focus on killing the armed belligerents who live and hide among the ordinary people. But the civilians cannot flee their densely populated strip of land and cannot escape those who now control whether they live or die. So, they, with their homes and traditions and sites of worship and schools and hospitals—all protected entities in international humanitarian law—fall victim to the tactics of the Israeli military, at the moment not effectively restrained by the current political leadership.

*Senior Research Fellow, Harvard FXB Center for Health and Human Rights, Harvard University; Professor of Health and Human Rights, retired, Harvard School of Public Health; former Director of the Harvard FXB Center; and former Associate Professor of Emergency Medicine, Harvard Medical School.

I write this as a someone who over the last decades has traveled many times to Israel, the West Bank, and Gaza. Only once as a tourist, visiting a friend in a kibbutz in the Galilee in the summer of 1969; subsequent trips were for human rights and fact-finding investigations or for conferences on international law and human rights.

My academic and research interests focus on issues of public health in war, international human rights and humanitarian law, and forced migration in conflict and climate change. I have field experience in assessment of these issues in a range of crisis situations (including Afghanistan, the African Great Lakes area, Albania, Angola, Bangladesh, the Chad-Darfur border, Israel-Palestine, Kosovo, Lebanon, Russia, Somalia, and Soviet Georgia).