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The problem of 'just' warfare

An expert in international law assesses the legal rights and wrongs of the conflict between Israel and Hamas



(Bernat Armangué/AP)

An Israeli armored vehicle drives back to the staging area near Israel's border with Gaza

Paul J. Hayes

Earlier this month as the lead protesters surged through the centre of London and up St James Street, a panicked bobby urged me to get inside and out of the way. I had unwittingly stumbled upon the ardent demonstration of the Palestinian diaspora and its supporters in England, whose zeal had been enlivened by the sudden conflict this month between Israel and Hamas in Gaza.

I immediately took refuge in the closest shop, William Evans, a gun shop of all places, where I watched the march pass through the Tweed-laden display window in the company of some startled shop assistants and a couple of Russian wannabe oligarchs, trying hard to ape the lifestyles of the jaded members of the anachronistic gentleman's clubs nearby.

The protesters, estimated by the Metropolitan Police to have exceeded 12,000 in number, were angry and determined. They were angry at the scale of Israel's attacks on Gaza which now has killed almost a thousand Palestinians. And they were determined to get to Trafalgar Square as quickly and as loudly as possible, for their voices of dissent to be heard not just in London, but also back in the Middle East and throughout the rest of the world.

Since the London protest march, Israel has mounted a land incursion into Gaza and its air offensive against Hamas targets has continued unabated. Undeterred, Hamas has continued to launch missile attacks on Israel. Just like Israel and Hezbollah in 2006, Israel and Hamas are now at war with each other.

According to Professor Mary Kaldor, of the London School of Economics, war is organised violence between two or more political entities.

Central though to both Israel's and Hamas's strategic objectives in waging war against each other, is the need for political legitimacy, or justification, not just in the eyes of their respective constituencies and diasporas, but also in the broader international community.

Irrespective of whether a war is conventional or asymmetrical, there must be some political (usually moral) justification for those acts of violence committed by the entity (usually a state) engaging in war, for it to find acceptance and legitimacy locally and also within the international community, if that entity

is to survive and flourish beyond the battle.

Unlike conventional wars between states, the war between Israel, a nation-state (a geo-political entity recognised in accordance with international law), and Hamas, a political entity or movement (considered by Israel, the United States, the European Union and Australia to be a terrorist organisation), is predominantly an asymmetrical conflict.

Justification for Israel's retaliation in Gaza against Hamas rocket attacks rests on two well accepted international political and legal norms.

Firstly, Israel is morally justified in waging war against Hamas in Gaza if regard is had to the *jus ad bellum* (justice of war) doctrine, promoted by American academics Michael Walzer and James Turner Johnson, which justifies a state's actions for waging war against another state or political entity. The just war doctrine morally permits a state to go to war where there is just cause (such as acting out of necessity in self defence) and war is waged with proper authority, as a last resort, proportionately and for peaceful ends. Israel insists that the attacks on Hamas targets in Gaza are in self defence, as a consequence of recent Hamas rocket attacks on nearby Israeli villages and the attacks of suicide bombers in Israeli towns and cities. Israel's justification is that its military response is intended to have the effect of disarming Hamas and its ability to attack Israel, thereby bringing about an end to the threat it faces. The fact that attacks on Israel by Hezbollah have diminished since Israel's war with Hezbollah in 2006, creates a political precedent for Israel which supports its current action against Hamas.

Secondly, Israel is further justified in its actions in Gaza, if Article 51 of the United Nations Charter is taken into account. Although a Hamas controlled Gaza is not a legally recognised nation-state under international law, if it was, then under Article 51 of the UN Charter, Israel would be entitled to act in self-defence against such an entity as it has. Israel's response to date is also consistent with the 1996 advisory opinion of the International Court of Justice, on the Legality of the Threat or Use of Nuclear Weapons, which acknowledged a state's right to act in self-defence under Article 51 of the UN Charter, provided of course its actions complied with the legal doctrines of necessity and proportionality.

Proportionality in the present case is determined not by a scoresheet comparing the number of deaths and casualties on either side of the conflict, but more, whether or not Israel has sufficiently discriminated between legitimate targets (such as those from where Hamas operates) and non-legitimate targets and has used no more force than is necessary in order to disarm the threat that it faces. Ultimately Israel's actions and their justification *in bellum* (in war), as opposed to its entitlement to wage war against Hamas in Gaza, will be subject to the judgment of the international community and the political consequences which will follow, once the precise details of its military action are more fully and widely known.

Justification though for Hamas's attacks on Israel is more problematic.

Unlike Israel, Hamas is a non-state actor. Although it has significant popular support among Palestinians in Gaza and is currently the dominant party of the Palestinian Authority, it still lacks international recognition and broad domestic support, both of which are necessary, if Hamas (or any other Palestinian political entity) is to steer an independent Palestine towards statehood.

Hamas, of course, justifies its rocket and terror attacks on Israel as being in furtherance of its immediate political objective to rid the occupied territories of Israeli forces and also in pursuit of its long term political aim, namely the destruction of Israel.

Unfortunately for Hamas, such justification for its rocket and terror attacks, beyond Gaza and into Israeli territory, to which Israel has responded, is not recognised by the prevailing international legal and political norms which inform the just war tradition, which is observed by the overwhelming majority of the world's states.

For Hamas to gain any form of political legitimacy within the international community and for it to be seen as a credible vehicle through which Palestinian independence and statehood can be achieved, it must subscribe to the same just war doctrine to that which is acknowledged by the rest of the world's states.

Failure to do so by Hamas will ensure that it continues to be blackballed by the world's society of states and that its political authority among Palestinians in the occupied territories and Israel, and its diaspora, becomes increasingly irrelevant just like White's, Boodle's and Brooks's and all of the other gentlemen's

clubs in St James.

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