Let Us Be Rational About War Crimes

By Craig Martin

For the second time in the span of just a few months the public suggestion that Israel committed war crimes during the recent Lebanon conflict has provoked highly polarized, emotional, and largely uninformed public debate in Canada. Accusations of anti-Israeli bias and the sacrificing of “truth” for political expedience abound. Yet these shrill accusations, and even the responses to them, reflect an ignorance of the laws of war that apply, and more fundamentally raise questions as to why we in Canada cannot engage in rational and reasonable discourse on such issues.

Aside from the polarizing nature of the middle east conflicts, it is perhaps due to the horrendous connotations of Nuremberg and Tokyo that are associated with the term “war crimes”. But a war crime is a violation of the laws of war for which individual criminal liability may attach. It is important to have some understanding of the law before jumping to conclusions. The violations alleged in the recent Lebanon conflict relate to the laws designed to protect civilians in international armed conflict. It is crucial to recognize, first off, that these laws are utterly independent of the laws relating to the justification for the use of force. A state may be justified in using force in self-defence, but its forces may nonetheless conduct themselves unlawfully in the course of hostilities. Similarly, a country may wage an unjust war but be scrupulously lawful in its conduct in the war.

One of the fundamental objectives of humanitarian law, which governs the conduct of hostilities in armed conflict, is to protect civilians in war. States are required to distinguish between combatants and civilians, and to take all possible efforts to spare civilians from harm. The specific laws are set out in such treaties as the Hague Convention IV of 1907, the Geneva Convention IV of 1949, and the Additional Protocol I to the Geneva Conventions. These provide that the targeting of civilians is prohibited, unless and for such time as they take a direct part in hostilities. Moreover, combatants are prohibited from making indiscriminate attacks. Indiscriminate attacks are those that are not directed at specific military objectives, or employ a method or means such that military and civilian targets will be harmed without distinction. Combatants have a positive obligation to obtain intelligence on the presence of civilians, target military objectives individually, use weapons that are as precise as necessary to limit harm to only military targets, and to balance the military necessity against the extent of possible civilian injury before acting. The use of civilians as human shields is prohibited, but such use by the other side does not relieve a party of the obligation to make every effort to prevent harm to civilians.

Human Rights Watch, Amnesty International and other organizations have alleged that both Israel and Hizbullah violated these laws in the course of the conflict this summer. It seems abundantly clear that Hizbullah deliberately targeted civilian positions. Israel however denies these allegations. There are several issues open for argument. The extent to which Israeli commanders did not meet the requisite standards in targeting only military objectives or making efforts to minimize civilian casualties, specifically in the use of indiscriminate munitions and methods in the strikes on Quana and elsewhere, are questions of fact that likely requires further investigation. Also, Israel is a state party to the Geneva Convention IV, but not to the Additional Protocol I that provides the detailed provisions on protecting civilian populations. Many argue that the relevant provisions of Protocol I are now customary

international law, and thus are binding on Israel. But that issue too is subject to proof of whether there is sufficiently widespread state practice to establish custom, and so it is open to argument whether these provisions apply to Israel.

Justice A. Barak, President of the Supreme Court of Israel, has written (in the context of operations in Gaza), that "the military operations of the IDF are not conducted in a legal vacuum. There are legal norms – of customary international law, of treaties to which Israel is a party, and the fundamental principles of Israeli law – which set out how military operations should be conducted." He went on, before reviewing the obligations to protect civilians, including those being used as human shields, to write that the foundation for enforcing such laws is that "it is an expression of the difference between a democratic state fighting for its life and the aggression of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law" (*Physicians for Human Rights* v. *Commander of the IDF in the Gaza Strip*, May 2004).

Whether Israeli forces did or did not commit war crimes is a complex question, but the suggestion is not absurd in light of the applicable law and many of the publicly known facts. It is not a question that ought to be dogmatically rejected out of hand in countries where the rule of law is said to be important. We in Canada ought to be able to discuss these issues in an informed and reasonable manner, without personal and savage attacks on the *bona fides* of those who raise them.

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