JURIST Guest Columnist Anthony D’Amato of Northwestern University School of Law, a former defense counsel for war crimes suspects, says that both Hezbollah and Israel are guilty of committing war crimes in the latest Middle East conflict...

The laws of war are divided into two categories that I often get mixed up because of the similarity of their Latin names: *jus ad bellum* (the legality of initiating the war) and *jus in bello* (the legality of the conduct of the war). The distinction is not just one of convenience, however; it has a substantive aspect. For the legality of the conduct of the war has nothing to do with the question of who started it. *Jus in bello* applies equally to all sides of a conflict. This is sometimes hard for people to understand, but it is of critical importance.

Last week my editorial for JURIST addressed the *jus ad bellum* aspects of the current Mideast conflict. Today I examine allegations of war crimes committed by the parties to the conflict.

1. **Hezbollah**

There can be no doubt that every active member of the Hezbollah organization in Lebanon is guilty of participating in the war crime of crossboundary artillery fire on civilian targets. The rocket attacks on Israeli towns and cities launched from within Lebanon violate one of the earliest and most explicit of war crimes: Article 25 of the Fourth Hague Convention of 1907: “The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.”

It is no defense, as we have already seen by the distinction between *jus ad bellum* and *jus in bello*, for Hezbollah to say they are engaged in indiscriminate rocket attacks because Israel is doing the same thing, or because Hezbollah has no military alternative. The Hezbollah leader Sheikh Hassan Nasrallah recently stated: “When the Zionists behave like there are no rules and no red lines and no limits to the confrontation, it is our right to behave in the same way.” He is suicidally incorrect. He and his followers are committing war crimes for which the punishment is death or life imprisonment.

2. **Israel**

In April 2002, Israeli soldiers, preceding an invasion by ground troops, lobbed
explosive artillery shells into the crowded Jenin refugee camp located in the West Bank. This clear violation of Article 25 of the Hague Convention was met with silence from other states. The government of Israel took no action against the artillery personnel. A few American international lawyers called attention to the war crimes and were promptly excoriated as anti-Semites.

The same thing happened more recently when heavy Israeli artillery shells were fired into Gaza. Here there was perhaps a slight justification compared to Jenin. The inhabitants of Gaza were shooting primitive home-made rockets across the border into Israel, causing, however, only slight damage. Again, the Israeli government took no court-martial action against the soldiers who fired the explosive shells into Gaza.

The idea that civilians in Gaza were participating in the terrorist war against Israel — the so-called “dual use” argument — brought to mind a talk I gave a West Point a few years ago. I argued that the greatest single war crime of the Second World War was the napalming of the north Tokyo suburbs — the most densely populated areas in the world at that time, consisting solely of women, children, and the elderly living in wooden, flammable homes — by General Curtis LeMay and the Army Air Force. It was a sheer act of terrorism, I argued, because of the absence of a modicum of military necessity. A colonel, who had done an extensive study of the incident, replied that it was a dual-use area in which civilians were taking part in the war effort. When I asked him to explain, he said that there was conclusive evidence that the women were darning socks and mending uniforms for the Japanese armed forces.

Whether the shelling of Jenin and Gaza amounted to “war crimes” importantly depends on characterizing Israel as an “occupying power,” a designation that Israel does not accept. Certainly the shelling amounted to murder under Israeli law, but what prosecutor would have the nerve to charge soldiers for common crimes? In any event, when Israel started bombing Lebanon ten days ago, there could be no doubt that the conflict was legally subsumed under the laws of war. For an international border — between Israel and Lebanon — was crossed, and thus under current international law the humanitarian laws of war fully apply to the situation. This is an a fortiori argument from recent decisions of the Hague Criminal Tribunal for Former Yugoslavia, holding that even some within-border conflicts may be characterized as international conflicts.

The armed conflict with Lebanon, involving as it did a transboundary attack, brought it immediately under the glare of the world media. In the first few days, Israel seemed cautious in its air warfare against the Hezbollah. Bombs were directed
against known Hezbollah enclaves, power stations (to disrupt Hezbollah communications), and anything that looked like a rocket launcher. In addition, Israel was justified in bombing ports, airports, bridges, and highways, and imposing a sea blockade against Lebanon, so as to prevent the Hezbollah from acquiring more missiles from friends abroad. There was quite a breadth of permissible targets. At the time I wrote my first Jurist editorial a week ago, it was not at all clear whether Israel had been violating any of the laws of war.

But in the last week it became evident that the Israeli bombardments were not succeeding in diminishing the number of daily Hezbollah rocket attacks against Israeli towns and cities. Frustration set in. It was apparent to all observers that Israel’s air campaign was not doing the job of destroying the enemy’s military capabilities.

Was this because Israel’s vaunted intelligence services did not know that Hezbollah’s missile centers were underground? Bunker complexes connected by tunnels had been built over the past decade in numerous scattered locations in Lebanon. They are camouflaged so that they cannot be seen from the air. A ground-level door swings open when a missile is ready to be fired. The bunker is “hardened” in the sense that only a direct hit would destroy it. But in order to have a direct hit, the exact location of the bunker must be known. Mossad and the other Israeli intelligence services had numerous agents wandering freely all over Lebanon during the past decade. Why hadn’t they pinpointed the location of each of those bunkers as they were being built?

The only feasible way in the absence of positional knowledge of getting rid of the bunkers and the missiles they contain is by a comprehensive search-and-destroy mission carried out by ground troops. This has begun to happen, although on a curiously limited scale. After three days of fighting, the Israeli Defense Forces have secured the town of Maroun al-Ras, a few miles inside the Lebanese border north of the Israeli town of Avivim. In the process they located and destroyed a bunker complex that had been used to launch rockets into northern Israel. Israel’s IDF is large, and in addition reservists are being called into duty.

Israel thus has a militarily efficient way to get rid of Hezbollah’s bunkers: an inexorable and comprehensive advance by ground troops. Israel would also be well advised to use aerial surveillance to locate bunkers when they are launching missiles, spotting, if nothing else, the flash-fire. But to be simultaneously engaging in a bombing campaign can obscure if not interfere with aerial reconnaissance. Why, then, is Israel continuing to drop bombs on Lebanese territory? For it is this very
continuation of the bombing attack, rather than what occurred during the first few days of the attack, that could amount to a war crime implicating all of Israel’s leaders on the theory of command responsibility. For Israel surely knows by now, if it did not know earlier, that a bombing campaign is ineffective against missiles hidden in camouflaged bunkers. Therefore the traditional war-crimes defense of “military necessity” to support the continuation of the bombing campaign can no longer be open to Israel.

Although statements and reports out of Lebanon are notoriously unreliable, there appears to be a sufficient confluence of internet posts that Israeli planes are now dropping their bombs and firing their missiles indiscriminately against civilian targets. Grain silos, food production, and storage plants have been destroyed. Bombs have reportedly been dropped on hospitals and on convoys of villagers fleeing from the Israeli shelling. It is getting close to the kind of carpet bombing that occurred during the Vietnam war against Hanoi. At that time, pilots were repeatedly sent out on bombing missions, told to return without any bombs, and not to disclose their targets. The result, after the first visible military targets were bombed, was the bombing of civilian targets such as schools, hospitals, and the Hanoi dam. These, too, were war crimes, and although the perpetrators were never prosecuted, at least the United States has never condoned them.

Israel appears to be continuing its bombing campaign out of a sense of frustration, bitterness at the failure of the bombs to slow down Hezbollah’s rocket launchings, and perhaps a homegrown political need to demonstrate to the Israeli public that “something is being done” about the rocket attacks. The militarily inexperienced Olmert-Peretz government may think that its political future is at stake if the public is not reassured by daily bombardment of Lebanon. But if these are the reasons for the continuation of the aerial campaign, they are among the feeblest of excuses for the commission of war crimes.

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