

# **Israel's Right of Self-Defense: International Law and Gaza**

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Jerusalem Center for Public Affairs  
13 Tel Hai Street, Jerusalem, Israel  
Tel. 972-2-561-9281 Fax. 972-2-561-9112  
Email: [jcpa@netvision.net.il](mailto:jcpa@netvision.net.il) - [www.jcpa.org](http://www.jcpa.org)  
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The first seven chapters in this volume are based on the updated (2011) proceedings of an international conference on "Hamas, the Gaza War, and Accountability under International Law," held in Jerusalem on June 18, 2009.

The remaining five chapters were first published between 2008 and 2010 by the Jerusalem Center for Public Affairs.

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## **Foreword**

Three years after Israel withdrew all its soldiers and civilians from Gaza, Hamas said it would not renew an Egyptian-brokered lull that expired on December 19,

2008. During the following week, Palestinians in Gaza fired close to 200 Katyushas, Kassam rockets, and 120-mm., Iranian-produced mortar shells at Israel's civilian population.(1)

After eight years of restraint in the face of continuing Palestinian rocket fire from Gaza at Israeli civilians, which is a violation of the Geneva Conventions and a war crime under international humanitarian law (see "Accountability of Hamas under International Humanitarian Law" by Segall Horovitz in this volume), the Israel Defense Forces launched Operation Cast Lead on December 27, 2008. The IDF struck hundreds of terrorists and destroyed hundreds of smuggling tunnels, weapons-manufacturing sites, and storage facilities in a well-coordinated aerial and ground campaign. In three weeks of fighting (until January 18, 2009), 13 Israelis died (three civilians and ten soldiers – four of whom were killed by "friendly" fire).

An examination carried out by IDF Military Intelligence found that of the 1,166 Palestinians who were killed, 709 belonged to terrorist organizations. Some 295 non-combatant civilians were killed. The identity and degree of involvement of the remaining 162 Palestinians (all of them male) remained unclear. Of the 709 armed Palestinians killed during the operation, 609 were Hamas terrorist operatives and operatives belonging to its security forces.(2)

During the operation, the IDF made unprecedented efforts to avoid civilian casualties in Gaza, including making over 300,000 phone calls to residents, urging them to leave the area before the IDF struck nearby Hamas targets. "This was not a war against the Palestinians," a senior IDF officer explained. "It was an operation of self-defense against Hamas and related terror organizations. Unfortunately, this task was made extremely difficult by Hamas, as they made the choice to use civilians as human shields. Thus, protecting civilians was almost impossible, but I am proud of the way that we did it – our own forces took safety risks in order to protect Palestinians."(3)

Five months after the Gaza war ended, on June 18, 2009, the Jerusalem Center for Public Affairs and the Konrad Adenauer Stiftung convened an international conference in Jerusalem on "Hamas, the Gaza War, and Accountability under International Law," where leading experts examined how international law, which was mainly formulated for inter-state conflicts, applies to conflicts involving non-state actors like Hamas. Participants were aware that the law is often used to delegitimize Israel and its self-defense actions. Many support Israel's right to self-defense until the moment when Israel exerts that right.

Dr. Roy S. Schondorf of the Israel Ministry of Justice begins with a discussion of "International Law's Limitations on Contending with Terror," noting that at the time the major conventions regulating the laws of war were drafted – the Hague Conventions of 1907 and the Geneva Conventions of 1949 – the phenomenon of a conflict between a state and a terrorist organization outside its boundaries was almost nonexistent and these conventions did not pretend to regulate this issue. Nevertheless, international law recognizes that under certain circumstances the state can operate outside its territory against a terror organization and is entitled

to harm the fighters of that organization and its military targets.

Maj. Gil Limon of the International Law Department of the IDF Military Advocate General's Office discusses "Redefining the Law of Armed Conflict? Legal Manipulations Regarding Israel's Struggle Against Terrorism." He notes that UN Security Council Resolution 1368, adopted immediately after the 9/11 attacks, recognized the right of states to act in self-defense against terrorist organizations. At the same time, human rights laws are only applied to parties to armed conflicts which are states, creating a lack of symmetry between the legal obligations of both parties with regard to the law of armed conflict.

Sigall Horovitz, Adv., who worked as legal adviser to the President of the International Criminal Tribunal for Rwanda and served with the Office of the Prosecutor at the Special Court for Sierra Leone, looks at the "Accountability of Hamas under International Humanitarian Law." She concludes that Hamas fighters who daily targeted Israeli civilians with rockets, as well as suicide bombers, violated the Geneva Conventions which prohibit violence towards life and body of anyone who is not taking part in hostilities. Furthermore, individual Hamas members could be charged with war crimes for violations of international humanitarian law.

Col. Richard Kemp, the former Commander of British Forces in Afghanistan, looked at "International Law and Military Operations in Practice," warning that based on his experience, Islamist fighting groups not only do not adhere to the laws of war, they employ a deliberate policy of operating consistently outside international law. He notes that Israel is fighting an enemy that is deliberately trying to sacrifice their own people and deliberately trying to lure Israel into killing their civilians. Yet during Operation Cast Lead, the IDF did more to safeguard the rights of Palestinian civilians in a combat zone than any other army in the history of warfare.

Col. (ret.) Pnina Sharvit-Baruch, the former head of the International Law Department of the IDF Military Advocate General's Office, reviews "Asymmetric Conflicts and the Rules of War." She concludes that the existing body of laws of armed conflict is suitable in dealing with counterterrorism operations and may be adapted to such situations.

Prof. George P. Fletcher of the Columbia University School of Law, in "Self-Defense and the Dignity of States," said that everybody in the international arena agrees that no country should have to tolerate attacks against its territory and that it is entitled to use defensive forces to repel aggression. Article 51 of the UN Charter enshrines the principle of self-defense. If we tolerate missile attacks upon our territory, then we surrender our dignity as an independent entity in the international arena.

Prof. Gerald Steinberg of Bar-Ilan University and Executive Director of NGO Monitor, discusses the phenomenon of "Lawfare" – the use of often marginal legal claims to create publicity to link the word "Israel" with war crimes, apartheid, and violations of international humanitarian law. "Lawfare" against Israel is not a matter of justice, but rather a matter of resources, politics, and propaganda. The

main players are NGOs supported with money from European governments.

In "Blocking the Truth of the Gaza War: How the Goldstone Commission Understated the Hamas Threat to Palestinian Civilians," Lt. Col. (ret.) Jonathan D. Halevi, a former senior adviser for political planning in Israel's Foreign Ministry, takes the UN's Goldstone Commission, which investigated the Gaza war, to task for ignoring the activities of Hamas and the other Palestinian terrorist organizations operating in Gaza which could be classified as war crimes or that were potentially dangerous to innocent Palestinians. He cites reports issued by the Palestinian terrorist organizations themselves that detailed how the Palestinian witnesses before the commission hid vital information regarding the presence of armed terrorists in their vicinity.

Halevi then turns to allegations that Israel attacked innocent Palestinian "traffic policemen" in "Palestinian 'Policemen' Killed in Gaza Operation Were Trained Terrorists." A detailed investigation shows that a decisive majority of the Palestinian "policemen" were members of the military wings of the Palestinian terror organizations and fighters who had undergone military training. Human rights organizations had artificially inflated the numbers of Palestinian "civilian" casualties by including these men.

Prof. Ruth Lapidoth, Professor Emeritus of International Law at the Hebrew University of Jerusalem, discusses "The Legal Basis of Israel's Naval Blockade of Gaza." Since Israel and Hamas are engaged in armed conflict, the laws of armed conflict apply. This means that Israel may control shipping headed for Gaza – even when the vessels are still on the high seas. Thus, in time of armed conflict, stopping the flotilla heading for Gaza in international waters 100 kilometers from Israel was not illegal. Israel is within its rights to maintain the blockade and is in full compliance with international law.

Dr. Abraham Bell of the Faculty of Law of Bar-Ilan University investigates the question: "Is Israel Bound by International Law to Supply Utilities, Goods, and Services to Gaza?" In light of a decade of ongoing Palestinian rocket attacks from Gaza against Israel's civilian population, Article 23 of the Fourth Geneva Convention permits states like Israel to cut off fuel supplies and electricity to territories like Gaza. Dependence on foreign supply – whether it be Gazan dependence on Israeli electricity or European dependence on Arab oil – does not create a legal duty to continue the supply. He notes that there is no precedent that creates legal duties on the basis of a former military administration. For instance, no one has ever argued that Egypt has legal duties to supply goods to Gaza due to its former military occupation of the Gaza Strip.

Finally, Dr. Amichai Cohen of the Faculty of Law of Ono Academic College takes an extensive look at "Proportionality in Modern Asymmetrical Wars." He notes that the concept of proportionality in international law permits military personnel to kill innocent civilians – provided that the intended targets of the operation are enemy forces and not civilians. As the uses of force in Somalia, Kosovo, and Iraq show, Western armies are willing to risk many civilian lives to protect the lives of their soldiers.

Israel's Gaza operation clearly shows that Israeli commanders successfully followed the principle of proportionality. The IDF required commanders to take humanitarian law into account in the planning stages of the operation and legal advisors were involved in the planning of many operations, providing advice regarding specific targets.

This volume provides a review of Israel's unprecedented and careful consideration of questions of international law when forced to go to war to defend its civilian population from attack. It concludes that existing international law permits a nation to act in self-defense, and that Israel gives more thought to upholding the laws of war during its military operations than any other nation in history.

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For a broader look at major issues relating to Israel and international law, see the companion volume [\*Israel's Legal Case: A Guidebook\*](#).

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An Israeli man stands in the destroyed kitchen of a house in Sderot after it was hit by a rocket fired by Palestinians in Gaza on March 6, 2008.

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## **International Law's Limitations on Contending with Terror**

Dr. Roy S. Schondorf

My remarks will focus on the manner in which international law regulates armed conflicts between states and terror organizations. The struggle with a terrorist organization does not reach the status of an armed conflict on every occasion. In certain cases the acts of violence are relatively limited in their extent. In such situations, a state generally contends with terror threats via its law enforcement system by investigating, imprisoning, and placing terrorists on trial.

International law also refers to these issues. However, there are those situations where violent acts reach a level that induces us to recognize them as armed conflicts.

The phenomenon of an armed conflict between a state and a terrorist organization that takes place outside the state's territory has developed rapidly in recent decades. States in most cases employ law enforcement measures to contend with threats emanating from terrorist organizations operating outside of their territory. In extreme cases, states have initiated specific self-defense actions outside their boundaries against terrorist organizations.

As noted, conflicts between states and terrorist organizations have begun to mature into the dimensions of armed conflict. One can note the activity by Turkey in Northern Iraq and Israel's fighting in Lebanon in 1982. Additional prominent examples are Morocco's fighting with the Sahrawis in Western Sahara; the war between India and the Tamil Tigers in Sri Lanka at the close of the 1980s; the battles between Rwanda and the Hutu tribe rebels that took place within the area of the Congo; and, according to certain opinions, the war between the United States and al-Qaeda. With regard to wars in our theater: one can refer to Israel's war with Hizbullah that took place in Lebanon, and the 2009 war in Gaza between Israel and Hamas. Differences exist between these armed conflicts that can yield distinctions regarding their legal classification, but what they all have in common is that they involve a conflict between a state and a non-state organization that takes place outside the territory of the state which is a party to the dispute.

Without pretending to provide an exhaustive explanation for the phenomenon, one can identify two factors that led to the empowerment of the terrorist organizations which, by the day's end, compelled states to act against them outside the states' own territory. First, in the latter half of the twentieth century, concomitantly with the increased number of states, the phenomenon of failed states also developed. These are countries where the central government has lost its monopoly on the use of force within the state, and therefore they constitute a convenient base of activity for terrorist organizations. The central government cannot prevent the organizations' activity, and in this manner the organizations can maintain training camps, accumulate weaponry, and plan



terror activities unmolested.

Other countries are relatively limited in their capabilities to act against a terror organization because activity in the area of another country is required. Even if from a legal standpoint they are not totally restrained from taking action, still the action needed is more complex because it requires activity in the territory of another country.

Secondly, technological developments in recent years have vastly strengthened the terror organizations. If previously, terrorist organizations could not genuinely endanger states by activities outside their territory, currently, modern technology allows them to attack a state via activities from outside that state's territory, such as the use of rocket fire. This situation as well mandates actions in the territory of the country from which the firing takes place.

It is important to note that at the time the major conventions regulating the laws of war were drafted – the Hague Conventions of 1907 and the Geneva Conventions of 1949 – the phenomenon of a conflict between a state and a terrorist organization outside the boundaries of the state was almost nonexistent. Therefore, these conventions did not pretend to regulate this issue. The challenge is therefore clear: international law is required to contend with a relatively new phenomenon that has not been hitherto regulated by the conventions, while the practice in this regard was likewise not extensive.

Therefore, how does international law contend with this challenge? How does it relate to the phenomenon of armed military clashes between states and terrorist organizations that take place outside the state's territory? The question is whether it is proper to recognize a military conflict between a state and a terrorist organization that takes place outside the state's territory as an armed conflict. In my opinion, it is important to distinguish between the question of when is it permissible for a state to act through military measures against a terrorist organization and the question of what law applies to the military actions that the state adopts in the framework of its struggle with a terrorist organization. I do not want to focus on the question of whether a state is permitted to take military action against a terrorist organization. It would seem to me that even those who believe that one should handle terrorist organizations by law enforcement means would find it difficult to defend a position that a state such as the State of Israel is restrained from taking any military action against a terrorist organization such as Hizbullah which has launched rockets from Lebanese territory at the territory of the State of Israel, without the Lebanese government doing anything to stop it.

What legal system should apply in a situation where a state takes military measures against a terrorist organization, when the military conflict between the parties takes place at such a high intensity? It would appear that broad agreement exists on this matter among experts in international law, as well as between states, that one should view such a situation as armed conflict, and apply to it the legal system of international law that refers to armed conflicts; in other words, to apply the laws of war.

However, even if one embraces the view that we are dealing with an armed

conflict, the question of what type of conflict we are dealing with still arises. Traditionally, international law recognizes two categories of armed conflicts:

International armed conflicts or, to be more precise, inter-state armed conflict.

Armed conflict that is not international, or, as it is sometimes called in the literature, an intra-state conflict.

It is acceptable to think that an international armed conflict is a conflict between states – for example, the Yom Kippur War or the Iran-Iraq War. The classic example of an armed conflict that is not international is a civil war – for example, the conflict in Sri Lanka between the Tamil rebels and the government.

The question of classifying the conflict is an important question because it determines the legal system that will be applied to the conflict. Without delving into details, one can say that international law imposed much greater restrictions on countries involved in international conflicts than upon states involved in conflicts that are not international. The major reason for this was that quite a few states viewed civil wars as an internal matter and refused to include in the conventions directives that would limit them in a war of this category.

If we accept the basic categories of international law as a departure point for discussion, then armed conflict with terror organizations that takes place at least partially outside the boundaries of the state does not fall into any of the aforesaid categories. On the one hand, we are not talking about a conflict between states, and therefore we are not dealing with an international conflict, at least not in its classic understanding. On the other hand, we are not dealing with a dispute that is limited to the territory of a state, on the order of a civil war, and therefore the conflict does not fall into the classic category or the classic definition of a conflict that is not international.

Originally I proposed that the way of contending with this difficulty is to recognize a new category of armed conflicts which I termed “extra-state” armed conflict. Extra-state armed conflict does not conform to the definitions of either of the two familiar categories of conflicts in international law – an international armed conflict and an armed conflict that is not international – and this is not purely a formal matter of non-conformity to definitions. In a substantial sense a conflict between a state and a terrorist organization includes elements that are appropriated from both categories. On the one hand, the conflict has an international dimension because it is taking place outside the territory of a state. Therefore, some of the arguments that yielded a reduced regulation of conflicts that are not international, such as the argument that we are dealing with a state's internal matter, do not apply. On the other hand, we are dealing with a conflict against an organization that is not a state, and therefore it more precisely resembles an armed conflict that is not international rather than a conflict between states.

Although I still believe that from a theoretical standpoint there are interesting elements in the proposal to recognize a new category of armed conflict, this has

not gained broad backing. The courts that were seized with the issues in recent years preferred to categorize armed conflicts in the framework of the existing categories rather than recognize the existence of a new category. For example, the American Supreme Court in *Hamdan v. Rumsfeld* refrained from deciding the question of how to define the conflict between the United States and al-Qaeda.

The situation with which the U.S. is contending in Afghanistan differs slightly from the situation with which Israel contended in its war with Hizbullah. The U.S. was fighting against two forces – the Taliban forces that held power in Afghanistan and the al-Qaeda forces, a terrorist organization that operated within the territory of Afghanistan. The American Supreme Court was presented with two approaches. One was to view al-Qaeda as part of the Taliban and characterize the conflict as an international conflict whose parties were the United States and Afghanistan. The alternative was to recognize the existence of two separate armed conflicts, one with the Taliban and the second with al-Qaeda, and contend with the question of what law applied to the armed conflict between the United States and al-Qaeda.

The Supreme Court decided that it was not required to decide between the various approaches. The judges ruled that paragraph 3 of the Geneva Conventions, the paragraph that regulates armed conflicts that are not international, applies to the entire armed conflict, which was not between two states, and its fixed principles apply to all categories of conflicts. As it sufficed to apply paragraph 3 of the Geneva Conventions in order to solve the problem facing the court, the court did not find it necessary to decide how to categorize the conflict.

*International law recognizes that under certain circumstances the state can operate outside its territory as well as against a terror organization.... The state is entitled to harm the fighters of a terrorist organization and its military targets.*

On the other hand, the Israeli Supreme Court in a series of decisions, the first of them being the targeted interdictions case, decided that the conflict between the State of Israel and the Palestinian terror organizations was an international armed conflict. In this decision, the court was relying on the position of Prof. Antonio Cassese, one of the leading scholars of international law, to the effect that armed conflict in occupied territory is an international armed conflict.

However, the court adopted a broader position than the position of Prof. Cassese and, in fact, decided that any armed conflict that crosses the boundaries of the state, without reference to the question of whether it occurred in an occupied area, is an international armed conflict. It is clear that the court reiterated its position recently when it analyzed the law applying to the 2009 Gaza operation. Understandably, this is a very different position from the position that the American court adopted on the fundamental issue of the legal categorization of an armed conflict between states and a terrorist organization.

The bottom line, therefore, is that broad agreement exists in international law that

the laws of war apply to armed conflicts between states and terrorist organizations. The question of which legal system among the laws of war applies to armed conflicts between states and terrorist organizations *has not yet been decided definitively* in international law. Some believe that the laws that apply to an international armed conflict must apply in this case as well. Others maintain the position that the laws that apply to a non-international armed conflict must apply in these circumstances.

The difficulty that has been created due to the existing uncertainty regarding the specific legal system applicable to armed conflicts between states and terrorist organizations has been reduced to a certain extent, given the materializing trend in the field of the laws of war pointing to a convergence of the laws applying to a non-international armed conflict and an international armed conflict. Relatively broad agreement exists that the principles applying to an international armed conflict with regard to protection of civilians or choice of targets applies as well in the framework of an armed conflict that is not international. The main difference that still remains between these two legal systems pertains to the combatants' right to the status of prisoner of war. The status of prisoners of war is recognized only in the framework of international conflicts and is not yet recognized in the framework of non-international conflicts.

In the final result, international law awards significant tools for fighting terror. International law recognizes that under certain circumstances the state can operate outside its territory as well against a terror organization. If the scope of a military conflict, its nature, and intensity cross a certain threshold, international law recognizes the existence of a situation of armed conflict between a state and a terrorist organization. In this situation the state is entitled to harm the fighters of a terrorist organization and its military targets.

Nevertheless, it is important to remember that this development of international law arouses serious questions. For example, under what circumstances is it permissible to act against a terrorist organization in the area of another country? How does one decide if a certain organization is a terrorist organization? Are we not awarding the states too much power to transpose a situation from a condition of law enforcement to a condition of fighting? How does one contend with the fact that terrorist organizations frequently operate from within a civilian population?

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Masked Palestinian militants from the Popular Resistance Committees with Kassam rockets on the outskirts of Gaza City, December 24, 2008.

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## **Redefining the Law of Armed Conflict? Legal Manipulations Regarding Israel's Struggle against Terrorism**

**Maj. Gil Limon**

In recent years – and especially since the IDF Operation in Gaza (Operation Cast Lead) – the State of Israel has been confronting an extensive hostile legal campaign. This legal campaign (also known as “lawfare”) is being conducted on a number of fronts at the initiative and with the participation of various actors, in particular, NGOs and certain countries that seek to denounce Israel in any way possible in the international arena. This lawfare includes – among other things – the publication of one-sided reports on IDF activities, and continued efforts to pursue legal proceedings in both national courts and international tribunals. Beyond the direct intention of damaging Israel's image, this campaign is also designed to question the very legitimacy of the use of force by states against terrorist organizations and to deny those states any effective ability in such a struggle.

The said lawfare is closely linked to the political disagreement on the subject of

terrorism and in particular to the question of whether the causes underlying certain acts of terrorism makes them justifiable. Although there is no universally agreed-upon formal definition of the term “terrorism,” most definitions to date have four elements in common: an act of terror is an *act of violence*, it is *illegal*, it is intended to *promote a political end*, and it employs some method of *intimidation*.

For many years the struggle of states against terrorism emphasized the illegality of such acts, thus, focusing on law enforcement measures and on bringing terrorists to trial. But more recently – and especially following the attacks of September 11th – more attention has been given to the element of violence.

This shift in focus came about because of the increased power of terrorist organizations and technological developments which have contributed to placing the strength of terrorist organizations on a par with that of regular armies. Accordingly, states began to take military action against terrorist organizations, using their armies within the framework of the *use of force* model.

The difficulty in applying these two afore-mentioned models – law enforcement on the one hand and the use of force on the other – derives from the third component in the definition of an act of terrorism: the political objective which such an act aims to promote; and the subjective attitude of states towards terrorist organizations operating in the name of different political objectives (hence the well-worn phrase: “one man's terrorist is another man's freedom fighter”).

In the context of law enforcement, such political dissent has – thus far – resulted in failed efforts undertaken over many years to produce a comprehensive international convention that will ban any acts of terrorism whatsoever. In the case of the use of force, the same dissent produces ongoing attempts to undermine the legitimacy of the use of force by states against terrorist organizations, and to re-define the Law of Armed Conflict in such a way as to deny nations the ability to make effective use of force against terrorist organizations. These attempts are conducted simultaneously on several levels. They are motivated by various special interest groups using many different techniques.

The legal campaign against the State of Israel in the wake of the operation in Gaza led this campaign to new extremes, which I would like to illustrate in different contexts.<sup>(1)</sup>

*UN Security Council Resolution 1368, adopted immediately after the 9/11 attacks, recognized the right of states to act in self-defense against terrorist organizations.*

## **Undermining the Right to Self-Defense against Terrorist Organizations**

One of the most important changes in international law following the September

11th attacks was the recognition by the international community that states have the right to take defensive action against non-state organizations engaging in armed attacks against them. The international community came to the understanding that terrorist organizations had acquired a destructive power similar to that of national armies and that, accordingly, international law needed to be adapted for this new reality. Such an adaptation did not require any formal change in the written laws: Article 51 of the United Nations Charter, which stipulates the inherent right of states to self-defense, does not condition that right on the armed attack being conducted by a state. Moreover, the famous "Caroline" Affair of 1837-38, which established the principle of self-defense, expressly addressed the use of force against a non-state actor (i.e., a rebel organization). Accordingly, Security Council Resolution 1368, which was adopted immediately after the September 11th attacks, recognized the right of states to act in self-defense against terrorist organizations. On this basis, there was no disagreement among the countries of the world regarding the legality and legitimacy of the U.S.-led Operation Enduring Freedom in Afghanistan.

Nevertheless, when the issue of the use of force against terrorist organizations was brought before the International Court of Justice in the advisory opinion case on "the wall in the occupied Palestinian territory" (the General Assembly's term for the security fence), the Court ruled as follows:

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.(2)

This position without a doubt stands in contravention of the written laws and the practice of states. It came under harsh criticism from some of the International Court judges (most notably Judges Higgins and Buergenthal),(3) many legal scholars,(4) and the Israeli Supreme Court.(5)

During the Gaza War a group of reputable jurists published a letter in the British *Sunday Times* under the title: "Israel's Bombardment of Gaza is Not Self-defence – It's a War Crime."(6) The article stated:

The rocket attacks on Israel by Hamas, deplorable as they are, do not, *in terms of scale and effect* amount to an armed attack entitling Israel to rely on self-defence. (Emphasis added – G.L.)

Let us recall that this refers to 8,000 rockets and mortar shells fired at Israel since the year 2000, of which 3,000 were fired in 2008 alone. The claim that such a quantity of rockets and mortar shells does not justify the employment of force in self-defense has no basis in law and is designed to hinder any possibility of acting in self-defense against terrorist organizations.





The *Sunday Times* letter continues: "Israel's actions amount to aggression, not self-defence, not least because its assault on Gaza was unnecessary."

The claim that Operation Cast Lead was an *act of aggression* on the part of Israel was mentioned by several states in debates held at the United Nations in the course of the operation. The interesting point is that the same countries that made that claim also consider Gaza as an occupied territory. International law, as widely accepted today, defines an act of aggression as the unlawful use of force by one state against another. In other words, in positive law a state cannot perform an act of aggression against a territory which is – arguably – under its control. However, neither the authors of the letter to the *Sunday Times*, nor the states criticizing Israel at the United Nations, were disturbed by this legal "detail."

To sum up this point, we see a clear attempt to re-define the rules of international law in such a way that the prohibition on the use of force is absolute in certain situations. It particularly attempts to define the Gaza Strip as a territory against which Israel may not legally take any military action, even if that territory is being used as a base to fire thousands of rockets at its civilians.

## Legitimizing Acts of Terrorism

The mirror image of the efforts to undermine Israel's right to self-defense is the effort to legitimize terrorist attacks against Israel, relying on the "legitimacy" of the motivation underlying those attacks. This is in clear contravention of the express determination – by both the UN General Assembly and the Security Council – that terrorist acts are unlawful and unjustified, whatever the motives behind them. In the Israeli-Palestinian context, some parties seek to deviate from this determination on the basis of the "just" struggle of the Palestinians "to oppose occupation."

The long ongoing campaign to establish the right of peoples to oppose occupation and foreign rule is far from new in the international sphere. It has its roots in various resolutions of the General Assembly from the 1960s and 1970s; since then it has had the consistent support of the developing countries, many of which were at that time emerging from colonial rule. However, whereas there was previously a consensus that the right to oppose occupation was subject to



the principles of the UN Charter – including the prohibition of the use of force<sup>(7)</sup> – in more recent years there has been a concerted effort to instill the perception that the very presence of occupation justifies acts of terror against the occupying power.

For instance, Prof. John Dugard, the former Special Rapporteur of the Human Rights Council on the situation of human rights in the “occupied Palestinian territories,” wrote in 2008:

Common sense, however, dictates that a distinction must be drawn between acts of mindless terror, such as acts committed by Al Qaeda, and acts committed in the course of a war of national liberation against colonialism, apartheid or military occupation. While such acts cannot be justified, they must be understood as being a painful but inevitable consequence of colonialism, apartheid or occupation....

Acts of terror against military occupation must be seen in historical context. This is why every effort should be made to bring the occupation to a speedy end. Until this is done peace cannot be expected, and violence will continue....

Israel cannot expect perfect peace and the end of violence as a precondition for the ending of the occupation.<sup>(8)</sup>

Incidentally, in an article published in 1973 titled “Towards the Definition of International Terrorism,” the same Prof. Dugard wrote the exact opposite:

There are two principles, however, drawn from past experience, which...need to be stated more clearly: first, that motive is irrelevant in determining whether an act of terrorism has been committed.<sup>(9)</sup>

As part of the efforts described here to legalize and legitimize terrorist acts carried out as part of a struggle for national liberation, some countries have delayed – for several years now – an agreement on a comprehensive convention against international terrorism. The delay is based on the claim that such a convention should not apply to such type of activity. If that approach is accepted, the result will be a *carte blanche* to terrorist organizations to perform violent attacks against states, whereas the state under attack will be banned from implementing its right to self-defense and responding with military force.

## **Measures Available for States While Fighting Terrorism – The Law of Armed Conflict**

### **The Applicability of the Law of Armed Conflict in the Struggles of States against Terrorism**

For many years states fighting terrorist organizations refused to accept that the Law of Armed Conflict applied to the situation, fearing that such acceptance would legitimize the use of military force by those organizations. These countries preferred to define their counter-terrorism activities as law enforcement.

Developing countries, on the contrary, sought to broaden the application of the Law of Armed Conflict to include also the struggle of peoples against occupation and foreign rule, in their quest to legitimize the use of force by national liberation movements. The most notable outcome of this effort is Article 1(4) of Protocol I of the Geneva Convention, adopted in 1977, which determines that “peoples fighting against colonial domination and alien occupation” shall be considered as engaged in international armed conflict.

The attacks of September 11th, which led to wider implementation of military measures by states in their counter-terrorism activities, turned this reality over. States who fight against terrorist organizations began to support the implementation of the Law of Armed Conflict on their activities in order to obtain the powers provided to states only during hostilities (such as the use of lethal force against members of the enemy's armed forces, and the possibility of attacking military targets). On the other hand, those who justify the activities of terrorist organizations sought to block the application of the Law of Armed Conflict to such situations so as to restrict the ability of states to employ military force against these organizations.

One example of such efforts is the report of a Human Rights Inquiry Commission set up by the Human Rights Council in 2000 to investigate the Israeli response to events that occurred during the “Al Aqsa Intifada.”(10) In order to prevent the application of the Law of Armed Conflict, the report denied the existence of an armed conflict, by ignoring the level of violence that resulted from the terrorist attacks against Israel at that time, stating:

[S]poradic demonstrations/confrontations often provoked by the killing of demonstrators and not resulting in loss of life on the part of Israeli soldiers, undisciplined lynchings...acts of terrorism in Israel itself and the shooting of soldiers and settlers on roads leading to settlements by largely unorganized gunmen *cannot amount to protracted armed violence on the part of an organized armed group*. (Emphasis added – G.L.)

As in the *Sunday Times* article mentioned earlier, which rejected Israel's right to defend itself during Operation Cast Lead, here too there is an attempt to set a legal threshold that has no grounds in the written laws or the practice of states, in order to deny Israel the possibility of taking military action against terrorist organizations.

In the “Wall in the Occupied Palestinian Territory” case, the International Court of Justice chose a different legal technique in order to deny the application of the Law of Armed Conflict to Israel's struggle against terrorism.(11) The Court applied Article 6 of the Fourth Geneva Convention of 1949 – which is generally considered to have been revoked within the framework of Protocol I of the 1977 Geneva Conventions – and introduced an innovative interpretation which denied Israel the right to take any military action in its administered territories.(12)

### **The Fundamental Principles of the Law of Armed Conflict**

During Operation Cast Lead, in light of the extent of hostilities and the use of military force on both sides, it was difficult to argue that this was not an armed conflict subject to the Law of Armed Conflict. Accordingly, the main emphasis of the campaign to limit Israel's ability to deal effectively with terrorist organizations turned to manipulating the rules themselves.

The Law of Armed Conflict is based on four fundamental principles: military necessity, distinction, proportionality, and humanity. Regarding each and every one of them, there is a continuous effort to interpret and apply it in such a way as to limit states' ability to effectively fight terrorism.

According to the *principle of military necessity*, the Law of Armed Conflict permits the parties to an armed conflict to take the measures necessary to weaken the enemy's military power in order to win the conflict, subject, of course, to the other applicable rules and principles. This principle dominates the overall normative framework of the Law of Armed Conflict and by virtue thereof, the fighting parties have the right to attack combatants and military targets of the adversary, destroy private property for military purposes, restrict the freedom of movement of civilians, and so forth. Nonetheless, in a number of instances, it was argued that Israel is not allowed to undertake security measures, even where there is a clear military necessity that justified them. Here are two examples:

1. In May 2009 the UN published the summary of a report prepared by a Board of Inquiry set up by the UN Secretary General to "review and investigate" damages to UN installations in Gaza that occurred during Operation Cast Lead.<sup>(13)</sup> The Board of Inquiry was asked, *inter alia*, to determine when such damages would be Israel's responsibility. The Board's conclusion was that any damage to UN installations is absolutely forbidden and this prohibition remains in force even in the face of military necessity during an armed conflict. This – in the Board's opinion – means that even if terrorist operatives hide within a UN installation and fire at a military force from there, that force is still prohibited from responding with fire that may cause damage to the UN facility. This is an absurd result that does not correspond with the Law of Armed Conflict or with the practice of states.

2. Another example of undermining the principle of military necessity can be seen in the advisory opinion – mentioned above in more than one context – handed down by the International Court of Justice in the matter of the "the wall in the occupied Palestinian territory." The opinion determines that because of the illegality (in the Court's opinion) of the settlements, it is not possible to build a security fence to protect their residents. Hence it would appear to follow that the principle of military necessity is not applicable, even in a situation where there is without doubt a military necessity to protect Israeli citizens in those towns and villages from the threat of terror. This conclusion was harshly criticized by academics,<sup>(14)</sup> as well as the Israeli Supreme Court.<sup>(15)</sup>

The *principle of distinction* directs the parties to an armed conflict to distinguish between civilians and civilian objectives on the one hand and combatants and military targets on the other, and to aim their attacks only at the latter. It represents the most significant challenge for states fighting terrorist organizations, since the activity of such organizations is inherently based on a systematic violation of this very principle. They direct their attacks at the opposing party's civilian population, while at the same time masking their activity within the civilian population they claim to represent. By doing so, they intentionally endanger not only the opposing party's civilians, but also civilians under their own control.

It might have been expected that human rights organizations, which are committed to promote the protection of civilians in armed conflict situations, would move to expose the phenomenon of using civilians as “human shields” and openly condemn such occurrences. But regrettably, in many cases this phenomenon is ignored – or worse – relied upon to forbid any military activity on the part of the state fighting the terrorist organization.

One such instructive example is mentioned in the report submitted in February 2009 to the United Nations Human Rights Council by Richard Falk, the Special Rapporteur on the human rights situation in the “occupied Palestinian territories.”(16) The report includes a section entitled: “Inherent Illegality: Legally Mandatory Distinction between Civilian and Military Targets Impossible in Large-Scale Attacks on Gaza Commenced by Israel on 27 December 2008.” In other words, instead of condemning the illegal activity of Hamas, which located its bases in densely populated areas of the Gaza Strip, the Special Rapporteur chose to validate and legitimize such actions and conclude from it that any military activity by Israel against those targets would be considered unlawful.

A further example of overlooking illegal Hamas actions in the Gaza Strip in the name of human rights is the report of the Fact-Finding Committee established by the Arab League to investigate acts of warfare in the Gaza Strip during Operation Cast Lead.(17) Despite many reports testifying to the use of human shields, this Committee found no evidence of such an action by the terrorist organizations in the Gaza Strip.

*Under the principle of proportionality, the Law of Armed Conflict recognizes the legality of incidental damage or injury to civilians and civilian objectives.*

This *modus operandi* of terrorist organizations – depending on civilian infrastructure to protect their own forces – presents a serious challenge to states fighting terrorism, not only in connection with the principle of distinction, but also in the context of the *principle of proportionality*. According to this principle, the Law of Armed Conflict recognizes the legality of incidental damage or injury to civilians and civilian objectives, provided that at the time of taking the decision to attack, the anticipated incidental damage was not expected to be excessive in relation to the projected military advantage. This refers to an advance estimation

carried out by the military commander on the basis of information available to him at the time of taking the decision to attack. This approach is well illustrated in the report submitted to the prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the matter of NATO bombings in the former Yugoslavia.(18) According to the report:

It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants...the determination of relative values must be that of the reasonable military commander.

Notwithstanding this unambiguous approach, we can see that the many reports which examined the IDF's actions during the operation in Gaza and sought to apply the principle of proportionality did not even attempt to take into account projected military necessity or anticipated incidental injury to civilians. For the authors of those reports, the very fact that injury or damage to civilians and civilian objectives was incurred sufficed to reach the conclusion that the use of force was "disproportionate." As mentioned previously, this approach lacks any foundation in law and is in clear contravention of the practice of states.

## **Summary**

The Law of Armed Conflict is the outcome of international conventions and accepted rules formulated over many decades in a persistent attempt by the international community to find a proper balance between the legitimate military needs of the fighting parties and the humanitarian need to minimize injury and damage to civilians and civilian objectives as far as possible. As we saw above, in recent years there has been a concerted attempt to deflect that balance so as to deny states the effective ability to use military force against terrorist organizations. In addition to the examples already listed, there is also an effort to apply human rights laws to combat situations. Since those laws are incumbent only on parties to armed conflicts which are states, their application creates a lack of symmetry between the legal obligations of both parties to the conflict, while further restricting the ability of the party that is a state to fight terrorism.

The coalition of actors seeking to "snatch" international law away from states should face an opposing coalition of states which object to legal manipulations of the type described above. An alternative dialog should be established to highlight the correct manner in which international law and the Law of Armed Conflict in particular regulate the activities of states within the framework of the struggle against terrorism.

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## Accountability of Hamas under International Humanitarian Law

Sigall Horovitz

The laws of war have historically developed in two separate normative frameworks. The first is known as *jus ad bellum*, and refers to the legality of the resort to war. This area is governed by the UN Charter, as well as international customary law. The second normative framework is called *jus in bello*, also known as International Humanitarian Law (IHL). This area regulates the manner in which the fighting is conducted, once the warring parties have entered into an armed conflict. IHL applies in situations of armed conflict, whether international or non-international in nature. Its main goal is to protect civilians and other categories of persons who do not participate in the hostilities, as well as certain objects, from harm inflicted during armed conflicts.(1) To achieve this goal, IHL treaties and customary norms define which acts are legitimate and which are prohibited during armed conflicts. IHL applies equally to all parties to an armed conflict, regardless of whether they were justified in resorting to war in the first place.

The most important IHL treaties are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.(2) The provisions in these treaties define the categories of persons and objects which are protected from attacks during armed conflicts. They also restrict the means and methods of warfare, in conformity with the principles of distinction, proportionality, military necessity and humanity. It is noteworthy that acts of “terrorism” are explicitly prohibited by these treaties, (3) as are “acts or threats of violence the primary purpose of which is to

spread terror among the civilian population.”(4) Many of the rules in these treaties have become customary IHL norms, such as the prohibition on targeting civilians.

This essay will briefly describe how IHL developed to apply to non-state actors. It will then ascertain which IHL norms are binding on Hamas in connection with its conflict with Israel. Finally, it will identify the IHL norms which were violated by Hamas and refer to available enforcement measures. Areas where normative or institutional developments are thought to be desirable will be highlighted.

## **Applicability of IHL Norms to Non-State Actors**

Historically, as with other areas of international law, only states were subjects of IHL.(5) After the Second World War, the focus of IHL shifted from regulating inter-state relations to protecting civilians, as reflected by the terminological transformation of “laws of war” into “international humanitarian law.” To reinforce this shift in focus from a normative perspective, existing IHL treaties which regulated international armed conflicts were supplemented or replaced by the four Geneva Conventions of 1949 and the First Additional Protocol of 1977.(6) Another significant change was that, while wars were traditionally fought between states, most armed conflicts after 1945 were internal (such as civil wars) and involved non-state armed groups. Against this background, rules that bind parties to non-international armed conflicts, including non-state actors, were codified in Article 3 common to the Geneva Conventions of 1949 (Common Article 3) and in the Second Additional Protocol of 1977. (7) Some of these rules have become customary IHL norms, such as those contained in Common Article 3.(8) Moreover, additional customary IHL norms applicable to non-international armed conflicts developed over the years.(9)

Under international law, non-state actors are bound by customary IHL norms when they become a party to an armed conflict. Thus, the Appeals Chamber of the Special Court for Sierra Leone held as follows: “it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties.”(10)

A comprehensive study published in 2005 by the International Committee of the Red Cross (ICRC) identifies all existing customary IHL norms, and specifies in which type of armed conflict they apply.(11) Interestingly, a large number of the customary norms identified in the study are applicable in both international and non-international armed conflicts.(12) Some scholars maintain that the gap between the norms which govern international armed conflicts, and those which govern non-international armed conflicts, is narrowing down as a result of human rights considerations which call for increased protection for victims of armed conflicts (regardless of the type of conflict in which they find themselves).(13) But at the same time, there still remain significant differences between these two distinct sets of rules, mainly due to the reluctance of states to restrict their authority over non-state actors with which they may want to deal under their

domestic law. For example, according to the First Additional Protocol, members of the armed forces of each party to an international armed conflict have “the right to participate directly in hostilities.”(14) By contrast, the provisions of the Second Additional Protocol (or Common Article 3) do not explicitly grant fighters of a non-state armed group the right to take up arms against the state.(15)

Another distinction between the two sets of rules revolves around the concept of prisoner-of-war status. Thus, in international armed conflicts, each party's combatants may be apprehended and detained by the opposite party until the cessation of hostilities, but the captured combatants must be granted prisoner-of-war status and cannot be prosecuted for their combat activities.(16) By contrast, in non-international conflicts, the state may capture and prosecute the fighters of the non-state actor for targeting its soldiers and military objects, or take other measures against them which are necessary to “defend itself and to reestablish law and order.”(17) Still, the state has to observe, in relation to the captured fighters, the minimum standards of humanity provided in Common Article 3, but this does not amount to granting them a prisoner-of-war status.(18)

## **The Nature of the Israel-Hamas Conflict**

To determine *whether* IHL applies in a given conflict, that conflict must amount to an “armed conflict” under IHL. Once the existence of an armed conflict is established, to determine *which* IHL norms bind the warring parties, as demonstrated above, the conflict must be classified as either an international armed conflict (traditionally fought between states) or a non-international armed conflict (traditionally fought within a state).

The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in the *Tadic* case, defined the meaning of armed conflict as follows: “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”(19)

*Because Hamas is involved in an armed conflict with Israel, it is obligated to observe certain norms of international humanitarian law.*

This definition of armed conflict is increasingly applied by institutions and commentators. For a conflict between governmental authorities and non-state armed groups to amount to an “armed conflict,” the *Tadic* case set two additional requirements: that the non-state actors be sufficiently organized and the conflict sufficiently intense. Without meeting these conditions, explained the ICTY, the violence will merely amount to “banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”(20) In the *Boskoski* case, the ICTY considered crimes committed in connection with a conflict in Macedonia, between government forces and the Albanian National Liberation Army (NLA). Referring to the test established in the *Tadic* case, the defendants argued that since the acts of NLA



were of a terrorist nature, there was no armed conflict.(21) The ICTY rejected their argument, finding that the intense and protracted nature of the violence, and the level of organization of the NLA, rendered the conflict an (internal) armed conflict.(22) The Tribunal explained that “what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities. It is immaterial whether the acts of violence perpetrated may or may not be characterized as terrorist in nature.”(23)

Hamas does not amount to a legitimate government of a recognized state, and is therefore considered a non-state actor.(24) However, it has a high level of organization, with a structured military force, political and social components, and de facto control over a defined territory, Gaza. During Operation Cast Lead, the fighting was undoubtedly sufficiently intense to amount to an armed conflict under IHL, considering the serious clashes between Israeli and Hamas armed forces. Even in the months (and perhaps years) leading to the operation, the fighting was quite intense, given the thousands of rockets launched by Hamas fighters towards Israeli towns, terrorizing and jeopardizing the lives of thousands of Israelis. This extended time-frame clearly renders the armed violence “protracted,” although even the three-week period of Operation Cast Lead is sufficiently long to be considered an armed conflict under IHL.(25) In this light, the conflict between Israel and Hamas, in particular since the commencement of Operation Cast Lead but possibly since an earlier date, qualifies as an armed conflict which entails the application of IHL. In fact, the Israeli Supreme Court considers that Israel has been in a state of armed conflict with Palestinian terrorist organizations, including Hamas, since the outbreak of the Second Intifada in September 2000.(26)

*Hamas fighters who daily targeted Israeli civilians with rockets, as well as suicide bombers, violated the Geneva Conventions which prohibit violence towards life and body of anyone who is not taking part in the hostilities.*

Because Hamas is involved in an armed conflict with Israel, it is obligated to observe certain IHL norms. In order to identify the IHL norms which apply to Hamas, its armed conflict with Israel must be classified as international or non-international in nature. The Israeli Supreme Court characterizes the conflict between Israel and Palestinian terrorist organizations, including Hamas, as international in nature.(27) In 2005, the Court based this finding mainly on the theory that any armed conflict fought in the context of situations of belligerent occupation qualifies as international in nature.(28) Until that year, all Palestinian terrorist organizations operated from areas occupied by Israel, including the West Bank and Gaza.(29) But the Court also suggested that an armed conflict which “crosses the borders of the state” should be considered international, regardless of its connection to a situation of belligerent occupation.(30) Based on this point of view, in 2008, although the Court found that Gaza was no longer occupied by Israel,(31) it continued to regard the armed conflict between Israel and Palestinian terrorist organizations based in Gaza as international.(32)

Furthermore, one of the reasons that some IHL norms are not binding in non-international armed conflicts (e.g., granting prisoner-of-war status to captured combatants) is to allow the state to “defend itself and to reestablish law and order” by handling non-state armed groups under its domestic law.(33) This rationale does not apply in the context of the Israel-Hamas conflict, mainly because Israel has no effective or overall control in Gaza and therefore cannot employ law enforcement measures such as physically apprehending the fighters. This is another argument in favor of regarding the Israel-Hamas armed conflict as international.(34)

However, many scholars consider that since Hamas is a non-state actor, the Israel-Hamas conflict should be considered a non-international armed conflict, regardless of its cross-border nature.(35) Moreover, according to most commentators, the position of the U.S. Supreme Court in the *Hamdan* judgment is that the conflict between the U.S. and al-Qaeda is a non-international armed conflict, in contrast to the Israeli Supreme Court's view that any cross-border armed conflict is international in nature.(36) This is also the view of the U.S. administration.(37)

## **IHL Norms Violated by Hamas**

As noted above, there is no consensus on whether the Israel-Hamas armed conflict is international or non-international in nature, and the law is unsettled in relation to this issue. Therefore, this essay will consider which IHL norms that apply in *both* international and non-international armed conflict may have been violated by Hamas and its members.(38) It is noted that the same IHL norms which apply to Hamas, in connection with the Israel-Hamas conflict, also apply to Israel.

Although Common Article 3 explicitly states that it applies to “armed conflicts not of an international character,” its provisions are considered to amount to customary IHL norms which are applicable in both non-international and international armed conflict. The International Court of Justice (ICJ) explained that these provisions amount to “elementary considerations of humanity” which apply to any armed conflict.(39) The ICTY, in adopting this ruling, held that they reflect “minimum mandatory rules” with respect to which “the character of the conflict is irrelevant.”(40) Paragraph 1 (a) of Common Article 3 prohibits violence towards life and body of anyone who is not taking part in the hostilities.(41) In this light, it can be safely argued that Hamas fighters, who daily targeted Israeli civilians by launching Qassam and Grad rockets, violated the provisions of Common Article 3. If we consider that the armed conflict between Israel and Hamas started before Operation Cast Lead, in line with the Israeli Supreme Court's position,(42) then suicide bombings and other attacks by Hamas members against civilians also violated Common Article 3.

Furthermore, as mentioned above, many additional customary IHL norms were identified in the ICRC study as applicable in both international and non-international armed conflicts.(43) Based on publically available reports,(44)

consideration may be required as to whether the following customary IHL norms were violated by Hamas and its members:

1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.(45)
2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.(46)
3. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.(47)
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are those: (a) which are not directed at a specific military objective; (b) which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.(48)
5. The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.(49)
6. The improper use of the distinctive emblems of the Geneva Conventions is prohibited.(50)
7. The use of weapons which are by nature indiscriminate is prohibited.(51)
8. Civilians and persons *hors de combat* (out of action) must be treated humanely.(52)
9. The use of human shields is prohibited.(53)
10. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.(54)

In the ICRC study, some of the norms which were found to apply in international armed conflict were labeled as “arguably” applicable in non-international armed conflict. The ICRC labeled them in this manner “because practice generally pointed in that direction but was less extensive.”(55) The following are such customary IHL norms, the violation of which may be attributable to Hamas and its militants:

1. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas.(56)

2. Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives.(57)

## **Enforcement Measures at the Level of the Organization**

There are measures which can induce compliance with IHL such as providing general education to all warring parties on IHL, or advising them with regard to the legality of specific acts in times of armed conflict.(58) However, given the nature of armed conflict, it is difficult to prevent violations of IHL during its course. Thus, most measures employed to enforce IHL are punitive rather than preventive in nature. Such measures can be applied at the level of the organization which amounts to a party to the armed conflict (whether a state or non-state actor), and in some cases at the level of the individual who violates IHL norms.

At the level of the organization (a state or non-state party to an armed conflict), enforcement measures can be diplomatic or judicial. Available diplomatic measures include, for example, condemnations by states or UN organs, international pressure on the violating entity to compensate the victims, and economic sanctions against the violating entity. Judicial measures may include civil reparation claims before national courts, or, in relation to states, commencement of ICJ proceedings or setting up an International Fact-Finding Commission under the First Additional Protocol to the Geneva Conventions.(59)

To employ enforcement measures at the level of the organization, responsibility for the IHL violations must be attributed to the organization, whether a state or non-state actor. The responsibility of states for violations of international law is regulated by the “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” prepared in 2001 by the International Law Commission (ILC Draft Articles).(60) In the case of a non-state actor like Hamas, some of the provisions of the ILC Draft Articles may be relevant in that they clarify that internationally wrongful acts can be attributed, in certain circumstances, to non-state actors. Thus, Article 10 of the ILC Draft Articles addresses the responsibility of “an insurrectional or other movement,” providing that when such a movement becomes the “new Government of a State,” or “succeeds in establishing a new State,” the violations it committed while it was still a movement will be considered an act of that (new or existing) State. Commentary 16 to Article 10 states:

A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present articles, which are concerned only with the responsibility of States.(61)

The above stipulation suggests that responsibility for IHL violations can be

attributed to non-state actors, but falls outside the subject-matter of the ILC Draft Articles. Indeed, regional institutions, such as the Inter-American Commission on Human Rights, often attribute responsibility to non-state armed groups (for example, with respect to the Colombian guerrilla group FARC). Furthermore, UN resolutions often refer to the responsibility under IHL of non-state actors, such as the Sudan People's Liberation Army, Taliban, Hizbullah and others.

*Hamas can be held responsible for violations of international humanitarian law. Individuals can be charged with criminal responsibility for serious IHL violations, referred to as war crimes.*

Accordingly, Hamas can be held responsible for the above IHL violations, and the following enforcement measures can be employed in relation to Hamas as an organization:

- condemnations of Hamas by states or UN organs;
- diplomatic pressure on Hamas to compensate the victims;
- economic sanctions against Hamas;
- civil reparation claims before national courts against Hamas.

It may be difficult to employ international judicial enforcement measures, such as bringing a claim against Hamas before the ICJ, as only states can be subject to such proceedings. Hence, this area may require further development at the normative and institutional levels in light of the nature of contemporary armed conflicts.(62)

## **Individual Criminal Responsibility of Hamas Members**

As mentioned above, IHL enforcement measures can be employed at the level of the individual. This is done through imposing criminal responsibility on individuals for serious IHL violations. The field which deals with individual criminal responsibility under international law is called International Criminal Law (ICL). Aside from violations of IHL norms, referred to as war crimes, violations that are criminalized under ICL include genocide and crimes against humanity, which can be committed during international or non-international armed conflicts, or in times of peace.

The criminalization of IHL was influenced by the need to find a more effective way to enforce IHL norms. It started with the creation of the Nuremberg and Tokyo International Military Tribunals, which established the individual criminal responsibility of the main perpetrators of the atrocities committed during the Second World War. In the words of the Nuremberg Tribunal: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."(63)

This process of criminalizing IHL violations continued with the inclusion of

provisions in the Geneva Conventions of 1949 which impose criminal responsibility on individuals who commit certain acts in violation of the Conventions (grave breaches).(64) Also the Genocide Convention of 1948 and the Convention Against Torture of 1984 impose individual criminal responsibility for violations of international law. Finally, violations of certain IHL norms are criminalized by the Rome Statute of 1998, which will be addressed in further detail below.

The criminalized violations, also called “international crimes,” can be enforced by national courts asserting jurisdiction based on a link to the crimes, the perpetrators or the victims, or based on the principle of universality (also called universal jurisdiction).(65) In addition, international crimes can be prosecuted by international courts. The trend of establishing international criminal tribunals to prosecute individuals for IHL violations, which started in Nuremberg, continued in the mid-1990s with the creation by the UN Security Council of the two ad hoc tribunals – the ICTY and the International Criminal Tribunal for Rwanda, as well as several UN-backed courts of a mixed international-national nature. This process peaked with the establishment in The Hague of the International Criminal Court (ICC), which recently began hearing its first cases. The ICC was created by the Rome Statute of 1998, a multilateral treaty which 108 states have joined so far. International criminal courts and tribunals contribute to general and specific deterrence as well as to the prevention of certain IHL violations. They also contribute to the development of IHL norms, through interpreting and applying these norms in individual cases.

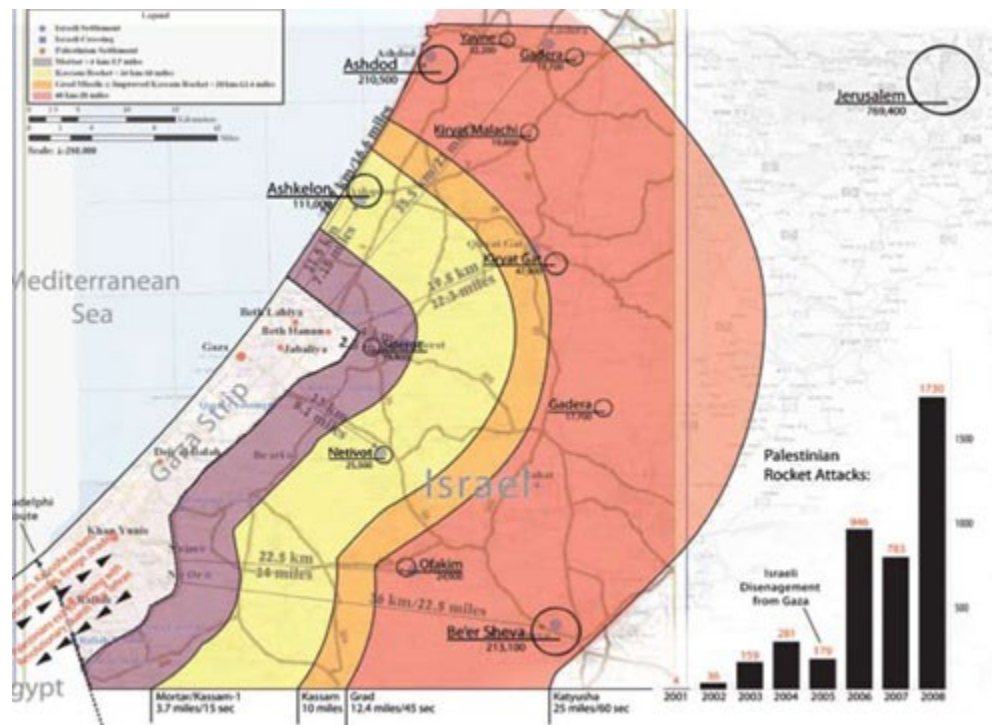
The ICC has jurisdiction over war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”(66) The Rome Statute criminalizes violations of Common Article 3 by listing acts which constitute war crimes when “committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.”(67) One of these listed acts is “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.”(68) Thus, the use by Hamas members of Qassam and Grad rockets in connection with the armed conflict may amount to a war crime under the Rome Statute. Accordingly, these acts may entail the individual criminal responsibility of Hamas fighters who committed, ordered or assisted them, or otherwise contributed to their commission.(69) These acts may also entail the individual criminal responsibility of Hamas military commanders and political leaders, under the principle of superior responsibility.(70)

The following is a list of additional war crimes under the Rome Statute which may have been committed by Hamas members, and in which case may entail the individual criminal responsibility of these persons, as well as their military commanders and political leaders:(71)

- Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;(72)

- Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;(73)
- Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;(74)
- Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.(75)

*The use of rockets and suicide bombings to attack civilians may amount to genocide and/or crimes against humanity.*



By 2008, nearly a million Israelis came under the reach of Hamas rockets launched from Gaza.

As mentioned above, the Rome Statute also criminalizes genocide and crimes against humanity, regardless of whether they were committed in connection with an armed conflict.(76) Thus, the use of Qassam and Grad rockets, as well as other acts by Hamas members which were not committed in connection with Operation Cast Lead, such as suicide bombings and other attacks against civilians, may amount to genocide and/or crimes against humanity. For these acts to qualify as crimes against humanity, it must be established that they were “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”(77) If this requirement is met,

the above acts may qualify as the crime against humanity of murder,(78) the crime against humanity of other inhumane acts,(79) and possibly the crime against humanity of extermination.(80) For these acts to amount to genocide, it must be established that they were committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”(81) Genocide and crimes against humanity, as in the case of war crimes, may entail the individual criminal responsibility of Hamas members, and their military and political leaders. (82)

The ICC may assert jurisdiction over a crime if the state where the crime occurred (territorial state) or the state of nationality of the perpetrator is a party to the Rome Statute,(83) or has accepted the ICC's jurisdiction on an ad hoc basis by submitting a declaration under Rome Statute Article 12 (3). It is noted that in such cases, it is the “situation” and not specific acts by specific perpetrators that is brought under the jurisdiction of the ICC. In addition, a situation may be referred to the ICC by the UN Security Council.(84) In relation to crimes committed by Hamas members in connection with the Israel-Hamas conflict, it is difficult to identify the territorial state of the crimes. Should Israel be considered the territorial state, even though it no longer controls Gaza? Or perhaps the Palestinian National Authority (PNA), which is not a state, should be considered for this purpose as the territorial state?

Regarding Israel as the territorial state makes sense, especially since the Qassam and Grad rockets were fired at Israeli towns and hit Israeli victims and property. This argument is even more valid with relation to other acts of Hamas such as suicide bombings and other attacks against Israeli civilians, which were committed on Israeli soil.(85) However, Israel is not a state party to the Rome Statute. Even if it joined the Rome Statute now, the ICC will only have jurisdiction over events which occurred in its territory after Israel joined the Rome Statute. (86) Nonetheless, Israel could accept the ICC's jurisdiction on an ad hoc basis by submitting a declaration under Rome Statute Article 12 (3). It is noted that if the ICC Prosecutor asserts jurisdiction over the situation in Gaza, he may decide to examine the legality under the Rome Statute of conduct by Israeli forces.

The argument that the PNA should be regarded as the “territorial state” is problematic in light of the plain reading of the Rome Statute which refers to “states” in connection with jurisdictional considerations. Nonetheless, and despite the reality that it is not a state, the PNA has recently lodged a declaration under Rome Statute Article 12 (3), accepting the ICC's ad hoc jurisdiction. The ICC Prosecutor has indicated that the question of whether this declaration meets statutory requirements is currently under consideration.(87) Thus, it is up to the ICC to determine the PNA's “statehood” for the purpose of asserting jurisdiction over the situation in Gaza, which will enable it to exercise jurisdiction over crimes committed by Hamas members. Finally, it is recalled that the UN Security Council may refer the situation to the ICC. Such referral is sufficient for the ICC to acquire jurisdiction over the Gaza situation, without Israel or the PNA accepting its jurisdiction.

International crimes, as noted above, can also be prosecuted at the national



level. Thus, the individual criminal responsibility of Hamas members for war crimes, crimes against humanity, or genocide can be established by national courts. Since it is unlikely that the courts of the PNA will assume such a task, it is left to Israeli or third state courts to prosecute Hamas members for international crimes, based on either a link to the crimes or universal jurisdiction. However, it would be difficult to obtain physical custody of the suspects. This could also be an obstacle which the ICC may face if it eventually asserts jurisdiction over the situation in Gaza.

## **Conclusion: The Need for Future Developments**

As explained above, in order to best protect civilians and other individuals not taking part in the hostilities, IHL imposes obligations not only on states but also on non-state actors, such as individuals and organized armed groups. But it is hard to identify the IHL obligations which bind Hamas because of the difficulties involved in classifying the Israel-Hamas armed conflict as international or non-international. Some normative development may be needed to clarify the state of the law in this respect. In addition, contemporary means and methods of warfare may require further normative and institutional developments in order to better achieve the goals of IHL.

Establishing the individual criminal responsibility of Hamas members for their participation in international crimes also has its challenges. Thus, for example, it may be difficult to find a forum which will prosecute them, and which can also guarantee their physical presence during trial. Another difficulty may be to isolate political considerations from judicial processes, in order to guarantee both an objective decision to initiate criminal proceedings and a fair process. Accordingly, also in this area normative and institutional developments are desirable.

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## **International Law and Military Operations in Practice**

## Colonel Richard Kemp CBE



I will examine the practicalities, challenges and difficulties faced by military forces in trying to fight within the provisions of international law against an enemy that deliberately and consistently flouts international law. I shall focus on counter-insurgency operations from the British and to some extent the American perspective drawing on recent British experience generally and my own personal experience of operating in this environment.

Soldiers from all Western armies, including Israel's and Britain's, are educated in the laws of war. Commanders are educated to a higher level so that they can enforce the laws among their men, and take them into account during their planning. Because the battlefield – in any kind of war – is a place of confusion and chaos, of fast-moving action, the complexities of the laws of war as they apply to kinetic military operations are distilled down into rules of engagement. In the British forces, rules of engagement normally regulate military action to ensure that it remains well within the laws of war, giving an additional safety cushion to soldiers against the possibility of war crimes prosecution.

In the most basic form these rules tell you when you can and when you cannot open fire.

In conventional military operations between states the combat is normally simpler and doesn't require complex and restrictive rules of engagement. Your side wears one type of uniform, the enemy wears another; when you see the enemy's uniform you open fire. Of course there are complexities. The fog of war, sometimes literally fog, but always fog in the sense of chaos and confusion, means that mistakes are made. You confuse your own men for the enemy.

The tragedies that have ensued from such chaos and misunderstanding are legion throughout the history of war. We call it blue on blue, friendly fire or

fratricide. And there are other complexities in conventional combat that make apparent simplicity less than simple. Civilians perhaps taking shelter or attempting to flee the battlefield can be mistaken for combatants and have sometimes been shot or blown up. Enemy forces sometimes adopt the other side's uniforms as a deception or ruse. But in the type of conflict that the Israel Defense Forces recently fought in Gaza and in Lebanon, and Britain and America are still fighting in Iraq and Afghanistan, these age-old confusions and complexities are made one hundred times worse by the fighting policies and techniques of the enemy.

The insurgents that we have faced and still face in these conflicts are all different – Hizbullah and Hamas over here, al-Qaeda, Jaish al Mahdi and a range of other militant groups in Iraq. Al-Qaeda, the Taliban and a diversity of associated fighting groups in Afghanistan. They are different but they are linked. They are linked by the pernicious influence, support and sometimes direction of Iran and/or by the international network of Islamist extremism.

These groups, as well as others, have learnt and continue to learn from each others' successes and failures. Tactics tried and tested on IDF soldiers in Lebanon have also killed British soldiers in Helmand Province and in Basra. These groups are trained and equipped for warfare fought from within the civilian population.

*Islamist fighting groups not only do not adhere to the laws of war, they employ a deliberate policy of operating consistently outside international law.*

Do these Islamist fighting groups ignore the international laws of armed conflict? They do not. It would be a grave mistake to conclude that they do. Instead, they study it carefully and they understand it well. They know that a British or Israeli commander and his men are bound by international law and the rules of engagement that flow from it. They then do their utmost to exploit what they view as one of their enemy's main weaknesses. Their very *modus operandi* is built on the correct assumption that Western armies will normally abide by the rules. It is not simply that these insurgents do not adhere to the laws of war. It is that they employ a deliberate policy of operating consistently outside international law. Their entire operational doctrine is founded on this basis.

In Gaza, as in Basra, as in the towns and villages of southern Afghanistan, civilians and their property are routinely exploited by these groups, in deliberate and flagrant violation of any international laws or reasonable norms of civilized behavior, for both tactical and strategic gain.

Stripped of any moral considerations, this policy operates simply and effectively at both levels.

On the tactical level, protected buildings, mosques, schools and hospitals are used as strongholds, allowing the enemy the protection not only of stone walls but also of international law. On the strategic level, any mistake, or in some cases legal and proportional response, by a Western army will be deliberately

exploited and manipulated in order to produce international outcry and condemnation.

In sophisticated groupings such as Hamas and Hizbullah, the media will be exploited also as a critical implement of their military strategy. Thus in April 2004 as Coalition forces fought to wrest the Iraqi town of Fallujah from al-Qaeda's control, the media reports screamed of a U.S. bombardment of a mosque. The reality of that day was that five U.S. Marines were wounded by fire from that mosque and that the Marine commander on the ground exercised great care and restraint, only allowing fire to be directed upon the outer wall of the building. Despite this, the damage was done and the impression that we had leveled a mosque indiscriminately was firmly established.



Sunni insurgents guard the streets of Fallujah, Iraq.

In Gaza, according to residents there, Hamas fighters who previously wore black or khaki uniforms discarded them when Operation Cast Lead began, to blend in with the crowds and use them as human shields. We have seen all this before, in Lebanon, in Iraq and in Afghanistan.

Today, British soldiers patrolling in Helmand Province will come under sustained rocket, machine-gun and small-arms fire from within a populated village or a network of farming complexes containing local men, women and children. The British will return fire, with as much caution as possible. Rather than drop a 500-pound bomb onto the enemy from the air, to avoid civilian casualties they will assault through the village, placing their own lives at greater risk. They might face booby traps or mines as they clear through. When they get into the village there is no sign of the enemy. Instead, the same people that were shooting at them twenty minutes ago, now unrecognized by them, will be tilling the land, waving, smiling and talking cheerfully to the soldiers.

These same insurgents will mine roads used by British vehicles and tracks used by foot patrols. Many soldiers have lost their legs or their lives in such attacks. There is of course no question of minefields being marked, as is required under international law. The idea would be preposterous, but although one of the clearest tenets of the laws of war, it is rarely if ever commented on by the media.

Like Hamas in Gaza, the Taliban in southern Afghanistan are masters at shielding themselves behind the civilian population and then melting in among them for protection. Hamas deployed suicide attackers in Gaza, including women and children. Women and children are trained and equipped to fight, collect intelligence and ferry arms and ammunition between battles. I have seen it first hand in both Afghanistan and Iraq. Female suicide bombers are almost commonplace.

Schools and houses are routinely booby-trapped. Snipers shelter in houses deliberately filled with women and children. Every man captured or killed is claimed as a taxi driver or a farmer.

In Basra, the common plea from captives was that they were police officers. Unfortunately, more often than not, this particular claim proved to be true. They were only involved in terrorist operations as their shift patterns allowed! I make light of it, but the difficulties in fighting an enemy who legitimately owns and uses the uniforms, vehicles and weapons of a police force, established, funded and trained by us, are self-evident.

The British and U.S. armies have grappled with these problems and I hope that we are now finding some solutions – solutions that allow us to treat those that oppose us according to the laws of war while also defeating them on the battlefield. When an enemy flouts the rules of war, then we cannot shy away from hard decisions. Let me quote from the U.S. military counterinsurgency manual, produced under the direction of General Petraeus and using lessons from Iraq and Afghanistan. This pretty much encapsulates the approach that we use as well as that used by the Americans. “The principle of proportionality requires that the anticipated loss of life and damage to property incidental to attacks,” that is, to non-combatants, “must not be excessive in relation to the concrete and direct military advantage expected to be gained. Soldiers and marines may not take any actions that might knowingly harm non-combatants.” This does not mean they cannot take risks that might put the populace in danger.

“In conventional operations, this restriction means that combatants cannot intend to harm non-combatants, though proportionality permits them to act, knowing some non-combatants may be harmed.”

Under our equivalent of General Petraeus' doctrine, when necessary, British forces now attack protected locations after weighing up the risk that non-combatants might suffer. We respect international norms and the sanctity of holy places. However, when our troops take fire from these locations or roadside bombs stored there are used to murder the innocent, we have no choice other than to act. British and American troops now routinely search mosques in Afghanistan and Iraq and when necessary we bring down fire on those locations. This is not done, or should not be done, in a trigger-happy or careless manner, but rather in a proportionate way and always with the aim of minimizing wider suffering. Obviously this kind of action is undesirable – but faced with the enemy we face, there is no alternative.

*British and American troops now routinely search mosques in Afghanistan and Iraq and when necessary we bring down fire on those locations – in a proportionate way and always with the aim of minimizing wider suffering.*

General Petraeus' manual goes further than the strict requirements of the laws of war. Let me quote again: “The use of discriminating, proportionate force as a mindset goes beyond the adherence to the rules of engagement. Proportionality and discrimination applied in counterinsurgency require leaders to ensure that their units employ the right tools correctly with mature discernment, good judgment and moral resolve.” This describes the use of restraint and focused violence as a positive tool in counterinsurgency, not just as humanitarian and legal moderation. It recognizes the importance of winning and maintaining the support of the local population, and sometimes even the insurgent himself, perhaps over and above the priority of winning a particular engagement. Ultimately, in counterinsurgency operations the military commander must balance a series of often conflicting and very difficult judgments in addition to the other pressures he faces on any battlefield. The balance is between firstly achieving the mission by engaging and killing the enemy, secondly, avoiding civilian casualties, and thirdly, the effect on hearts and minds – the support or otherwise of the civilian population.

There is a fourth judgment as well. It is often overlooked in media and human rights groups' frenzies to expose fault among military forces fighting in the toughest conditions. The fourth is preventing or minimizing casualties among your own soldiers. There will frequently be times when a military commander must make a snap judgment between the safety of his own troops and that of other people. Human nature dictates that he will often choose his own men. It is hard to see how it could be otherwise. And there is more to it even than the commander's human nature and loyalty to his men. For soldiers to follow their commander into combat – at any level, but especially at the point of battle – they must trust him.

How many soldiers want to die, be blinded, burnt, or have their arms, legs or faces blown off? No soldier will trust, or follow, a commander who is profligate with his men's lives.

Let us not forget that these calculations, judgments and decisions are not taken in an air-conditioned office or from the safety of a rearward military headquarters. The commander must weigh these things in altogether different circumstances. As a commander you are surrounded by your men, yet totally alone. You have the military arsenal of your country or perhaps an alliance like NATO at your disposal. But the most useful weapons in the kind of close combat I am talking about are the rifle and the bayonet. You have to kill the enemy knowing that you will then need to shake hands and win the consent of the family in the compound that he is occupying. You haven't slept for two days, you are shattered, you are wet with sweat and the chaos of battle reigns all about you. There are no computers and on your map with your pen you must compute the locations and intentions of the enemy, your flanking forces, and your own troop positions. You must do this immediately because the CO needs a situation report, your company need a briefing to orient them, and your Fire Support Team commander is about to bring in fast air, helicopters and mortars, and needs to know that the danger-close fire missions are not going to kill your own men. You must assess the situation and give the go in seconds to secure the initiative. The only advantage for the commander of all this is that it makes you forget the eighty pounds on your back, the water in the ditch that is up to your waist, and the sweat and dirt that streams constantly into your eyes.

The battle manifests itself as a wall of noise that surrounds you, interspersed with the infantryman's most detested sound, incoming bullets cracking above, to the side and below your head. Every soldier who has been in combat – whether it is Gaza, Lebanon, Afghanistan or Iraq – can testify to the chaos and confusion of war. According to a well-known military adage, “no plan ever survives contact with the enemy.” It is difficult enough to maneuver large numbers of troops and vehicles across treacherous and inhospitable terrain, sometimes by night, in dust storms, rain or searing heat, in armored vehicles with limited external vision, against near-impossible time-lines, and coordinating with neighboring forces, ground attack aircraft, helicopters, artillery, engineers and logistic support. The complexities and potential for confusion are hugely increased when the enemy is trying to prevent you from doing it by killing you and blowing up your vehicles and equipment. Piled on top of this are the limits of reconnaissance and the frequent inaccuracy or incompleteness of the intelligence picture, sometimes brought about by the enemy's own operational security, deception and disinformation, sometimes by lack of resources or inadequacy of collection systems.

For every intelligence success, even in modern armies, there are a hundred failures. In close combat even the most technologically sophisticated weapons, surveillance systems and communications devices can, and frequently do, fail, especially when you need them most.

Messages are sometimes not transmitted, not received, or garbled. Precision-guided munitions don't always hit the target they're supposed to and sometimes



explode when they shouldn't or don't explode when they should. Especially in close infantry combat, the concept of the precise, surgical strike is more often pipe dream than practical reality. The close combat, urban or rural environment that often exists in Helmand, Gaza or Iraq can also serve to diminish the advantages of technology, frequently putting hi-tech British forces on an equal footing with the Taliban. Then there is perceptual distortion, common in combat situations, which can lead a commander or soldier to comprehend events in a way that is different from reality.

The stresses and fears of battle tiredness and the body's natural chemical reactions, including production of adrenalin, can lead to excluding or intensifying sounds, tunnel vision, temporary paralysis, events appearing to move faster or more slowly than they actually are, and loss, reduction or distortion of memory, as well as distracting thoughts. These affect different people in different ways and can add to the confusion and chaos of battle. Amid the disorientation, the smoke, the fire, the explosions, the ear-piercing rattle of bullets, the screams of the wounded, the incomplete intelligence picture and the failure of technology, commanders and soldiers must work on how to achieve their mission, no matter how hard it gets.

These realities apply to any combat situation and the challenges they add are self-evident. But they become that much harder when fighting a tough, wily, skilful enemy, one minute shooting at you or setting a landmine to blow up your vehicle, the next leaning on the threshold of his compound, smiling at you, dressed indistinguishably from the population.

General Stanley McChrystal, the U.S. commander of forces in Afghanistan, said the reduction of unnecessary civilian casualties is one of his top priorities. It should be. That is also a high priority of British commanders in Afghanistan. I have personally witnessed the efforts that American forces have been making for years in Iraq and Afghanistan to minimize civilian deaths. These have been impressive, but they have not always worked in either of our armies, in some cases because of the factors I have mentioned: imperfect intelligence, technological failure, poor communications, and the fog of war.

There is also another factor that we should not forget. There will always be bad soldiers who deliberately or through incompetence go against orders. We have seen this in the British Army and among the Americans, in well-publicized cases in Iraq and elsewhere.

*Israel is fighting an enemy that is deliberately trying to sacrifice their own people and deliberately trying to lure Israel into killing their civilians.*

I have spoken of the considerable British and American efforts to operate within the laws of war and to reduce unnecessary civilian casualties, but what of the Israel Defense Forces? The IDF faces all the challenges that I have spoken about, and more. Not only was Hamas' military capability deliberately positioned behind the human shield of the civilian population, and not only did Hamas

employ the range of insurgent tactics I mentioned earlier. They also ordered, forced when necessary, men, women and children from their own population to stay put in places they knew were about to be attacked by the IDF. Israel is fighting an enemy that is deliberately trying to sacrifice their own people and deliberately trying to lure Israel into killing their own innocent civilians.

Hamas, like Hizbullah, is also highly expert at driving the media agenda. It will always have people ready to give interviews condemning Israeli forces for war crimes. It is adept at staging and distorting incidents. Its people often have no option other than to go along with the charade in front of the world's media that Hamas so frequently demands, often on pain of death.

What is the other challenge faced by the IDF that we British do not have to face to the same extent? It is the automatic, pavlovian presumption by many in the international media and international human rights groups that the IDF is in the wrong, that it is abusing human rights. So what did the IDF do in Gaza to meet its obligation to operate within the laws of war? When possible the IDF gave at least four hours' notice to civilians to leave areas targeted for attack.

Attack helicopter pilots, tasked with destroying Hamas mobile weapons platforms, had total discretion to abort a strike if there was too great a risk of civilian casualties in the area. Many missions that could have taken out Hamas military capability were cancelled because of this.

During the conflict, the IDF allowed huge amounts of humanitarian aid into Gaza. This sort of task is regarded by military tacticians as risky and dangerous at the best of times. To mount such operations, to deliver aid virtually into your enemy's hands, is to the military tactician normally quite unthinkable. But the IDF took on those risks.

In the latter stages of Operation Cast Lead, the IDF unilaterally announced a daily three-hour ceasefire. The IDF dropped over 900,000 leaflets warning the population of impending attacks to allow them to leave designated areas. A complete air squadron was dedicated to this task alone.

Leaflets also urged the people to phone in information to pinpoint Hamas fighters, vital intelligence that could save innocent lives. The IDF phoned over 30,000 Palestinian households in Gaza, urging them in Arabic to leave homes where Hamas might have stashed weapons or be preparing to fight. Similar messages were passed in Arabic on Israeli radio broadcasts warning the civilian population of forthcoming operations.



Hamas television interview confirms receipt of Israeli telephone warning to Gaza resident

Cellphone Message  
Text 12/27/2008  
(Representative)



Despite Israel's extraordinary measures, of course innocent civilians were killed and wounded. That was due to the frictions of war that I have spoken about, and even more was an inevitable consequence of Hamas' way of fighting. By taking these actions and many other significant measures during Operation Cast Lead, the IDF did more to safeguard the rights of civilians in a combat zone than any other army in the history of warfare.

However, the IDF still did not win the war of opinions – especially in Europe. The lessons from this campaign apply to the British and American armies and to other Western forces as well as to the IDF. We are in the era of information warfare. The kind of tactics used by Hamas and Hizbullah and by the Taliban and Jaish al Mahdi work well for them. As they see it, they have no other choice. And they will continue to use them.

How do we counter it? We must not adopt the approach that because they flout the laws of war, we will do so too. We must be, and remain, whiter than white. Within the absolute requirements of operational security, and sometimes we may need to really push the boundaries of this as far as we can, we must be as open and transparent as we can possibly be. There are three lines of attack.

First, we must allow, encourage and facilitate the media to have every opportunity to report fairly and positively on us and on our activities. This requires positive and proactive, not defensive and reactive, engagement with the media. We should bring the media into our training, let them get to know our units before battle, bring them in whenever possible during combat. Perhaps embed them into combat units as the British forces often do, sometimes for protracted periods, in Iraq and Afghanistan. Let them see our soldiers doing their job in as complete a way as we can.

There are risks in all this, big risks which are self-evident and do not need to be spelt out. But we must be brave enough to take those risks. The benefits are great. The insurgents – Hamas in particular – put a human face on war with spectacular success. We must do the same. We must let the field soldiers speak, with sand on their boots and with a sweat and dirt-covered human face.

Second, we must show the media in a way they cannot misunderstand the abuses perpetrated by the enemy. Our own units must identify such enemy

abuses, and make statements about them, backed up by the hardest available evidence. Every front-line unit must be trained and equipped to collect this information in the same way as they are trained and equipped to collect intelligence on enemy operations. This is information war.

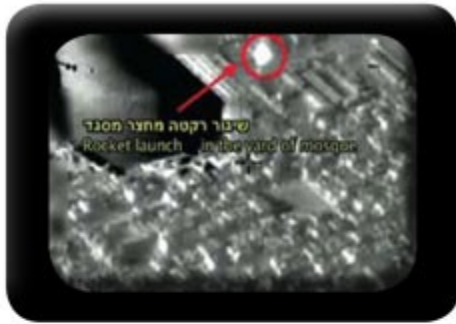
Third, we must be proactive in preventing adverse media stories about our own units. I am not talking here about distorting the facts. We must look ahead and identify potential problem areas – preferably before they arise. We must have what the British Labour Party used to call rapid rebuttal units. They should have the ability to establish the facts on the front line quickly. Be absolutely sure of the facts, and ensure they are pushed rapidly to the media. If they are not one hundred percent sure of the facts, they must say as much. Where real problems do occur, where our troops are in the wrong, if possible we should say so as quickly as we can, driving the agenda, pre-empting the shrieks of the enemy or of the UN. This demands a culture of openness and honesty among commanders and soldiers at all levels, so they are willing to admit their mistakes readily to their chain of command. For any of this to work, I repeat, our people must be whiter than white. This requires the best of training and the toughest of discipline and it is sometimes even harder among conscript troops and mobilized reservists.

Here I am not just talking about serious abuses and breaches of the laws of war. I include smaller things like graffitiing and trashing people's homes that have been taken over, or are searched or cleared, and being as courteous as possible to civilians. Maintaining control over soldiers who have just seen their best mates blown apart is far from easy, but it is vital. Where there is genuine concern over our own troops' conduct or action, we must not hesitate to conduct enquiries and investigations, and if necessary bring people to justice. As far as possible, these processes should also be open and transparent. This involves yet another major complication, because we must not confuse mistakes made as a genuine consequence of the chaos and fog of war with deliberate defiance of rules of engagement and the laws of war. Mistakes are not war crimes. We must also know how to explain this.

Most armies do some of these things already, but what we need is a radical re-evaluation of the effort required to achieve the impact we need. This requires a mind-set that is hard to find in most armies around the world. It requires extra resources and a shift in priorities, and it significantly complicates already highly complex military operations. All the steps I have mentioned are, in my view, essential to countering the strategies and tactics of the insurgents we are faced with today in Gaza, Afghanistan, Iraq and elsewhere. They are also essential in defending our military policies and objectives, and in defending our brave servicemen and women who are prepared to put their lives on the line to defend their country.

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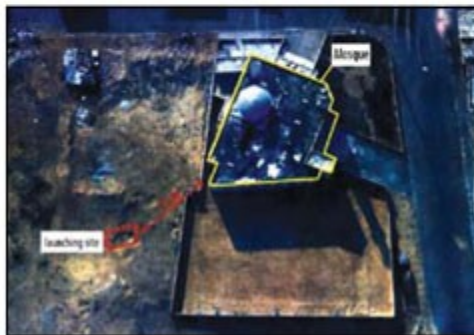
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Rocket launch from mosque



Smoke from rocket with mosque minaret



Rocket launch site adjacent to mosque



Anti-aircraft weapon stored in Zeitoun Mosque

## Asymmetric Conflicts and the Rules of War

Col. (ret.) Pnina Sharvit-Baruch

For many years my job was to provide actual legal advice to decision-makers. Today I teach international law in an academic institution. There is a link between these two occupations. International law is not a theoretical body of law. It is connected to actual practice. It is a field that is ever evolving, dynamic, flexible, and adjusting to the various changes which occur in the real world. I believe it is important to maintain this connection to reality in the academic world, without underestimating the importance of academic analysis and theoretical discourse.

We in Israel are forced to confront a situation in which we have an enemy – like Hamas – which:

- is not a state but rather a non-state entity;
- does not operate by conventional means of war, but through non-conventional and subversive means, such as hiding among the civilian population and aiming at harming and obstructing civilian life of the other side; and
- does not respect the laws of war – both by deliberately attacking civilians and civilian objects and by not distinguishing Hamas operatives from the

civilian population on their side, who are used by Hamas to shield their military operations.

What do these characteristics mean in terms of the applicable laws of war?

About ten years ago, the main debate was whether the rules that apply in such situations (of fighting against terror organizations) are those of law enforcement applicable when confronting criminals, or those of the laws of armed conflict that apply when confronting an armed conflict situation. Can we employ force, as we do in war, in order to defeat those who are defined as enemies? Or may we use force only in order to arrest or to impose order, as required in regular law enforcement situations?

Since then, the horrific events of 9/11 occurred and, as a result, the debate today has radically changed. There is little disagreement today that in certain circumstances, even when faced with a situation of fighting against a terror organization (as opposed to the armed forces of a state), one is not necessarily bound by the rules of law enforcement and that a situation of an armed conflict against a terror organization may exist in which the laws of war apply. This exemplifies a significant shift in legal perceptions which took place in a relatively short period of time – less than a decade.

Instead, the current debate focuses on the question of whether the existing laws of armed conflict are suited to dealing with these kinds of situations or whether such asymmetric armed conflicts require a new set of rules.

*I disagree that new rules are necessary. The existing body of laws of armed conflict is suitable even in counterterrorism operations.*

There is an argument which is often made, mainly by people who do not come from the field of international law, according to which the existing rules are unsuitable and inapplicable. This argument is based on two main tenets: Firstly, that the existing laws of armed conflict were based on a vision of armies of countries fighting against each other in situations of conventional war, but are not suitable when fighting against a non-state entity employing non-conventional methods. Secondly, that the laws were based on notions of mutuality and reciprocity and on the assumption that they are adhered to by both sides of the conflict and, thus, do not suit situations where only one side applies the rules.

The conclusion reached is that new rules are necessary and that a new treaty should be formulated in this regard. I disagree with this conclusion.

I believe that in principle the existing body of laws of armed conflict is suitable and relevant even in counterterrorism operations, and may be adapted to such situations.

I will not enter into the historic question of whether the laws of war were indeed written on the exclusive basis of conventional inter-state wars. I would mention, however, that throughout history there have been conflicts that were not conventional, which were fought against non-state actors, in which the laws of war had been applied.

As for reciprocity or mutuality, perhaps originally, at the time of their inception, the laws of war were based on notions of knighthood and chivalry. However, a long time has passed since then, conceptions have changed, and the basic principle that underlies most of the laws of war today is not respect for the honor of the other side, and whether that is infringed or not, but rather the need to protect as much as possible those who are not taking part in the fighting – namely, civilians not taking a direct part in hostilities and protected objects – and ensure that the damage they incur as a result of the hostilities is minimal. This is the fundamental rationale and this is why there is no reliance on the concept of reciprocity. Admittedly, there are still rules which are based on the concept of reciprocity, but these are the exception.

The view which insists on the need for the drafting of a new convention disregards an important way by which international law, in general, and the laws of armed conflict, in particular, are developed. Indeed, one of the main ways by which the laws of armed conflict have been developed throughout the years is through the practice of states, the way they operate, including the way in which they explain their conduct, which generates the law. The significance of this is that when countries encounter different types of threats and situations, such as confronting terror organizations, they implement the existing principles and rules while taking into account the relevant characteristics of the situation. Such adaptation of the rules to the realities of a given situation leads to the development of the law. This is one of the principal means by which the laws of war have evolved over the years and I believe that this remains an important way by which they must continue to evolve. Indeed, today there is no real tangible alternative to this way of development, because, at present, there appears to be no feasible possibility of convening an international conference and reaching a new convention on the rules applicable to asymmetric armed conflicts.

Some contend that since the existing laws of armed conflict are unsuitable in the kinds of conflicts we are discussing, there are no applicable rules and therefore states enjoy a free hand. This is an unacceptable outcome and is not a practical option. From the standpoint of a military legal advisor, you cannot say that there are no rules. You have to give tangible, practical legal advice and you have to work on the basis of some framework of laws, and these derive from what you have. You derive them from the accepted principles, from the existing rules, and you apply them in a way that takes into account the unique characteristics of the situation in hand.

So what are the relevant principles and how do we apply them? The two major principles that are relevant to this issue are, first of all, the principle of distinction and secondly the principle of proportionality.

The principle of distinction distinguishes between a military objective that is legitimate for attack and a civilian object against which you cannot direct an attack. The definition of a military objective is flexible. It is defined by its nature, location, purpose or use, and judged by the military advantage derived from its attack. The meaning of this definition is that if a civilian dwelling is used by the forces of the enemy as a launch pad for attacks or to store ammunition or as an

operational headquarters, it loses its civilian nature and may be regarded as a military objective that can be lawfully attacked (subject to the principle of proportionality which I will address shortly).

The same rationale applies with regard to “human targets.” The straightforward implementation of this principle is that enemy armed forces may carry out attacks and are legitimate targets for attack, on the one hand, while civilians are not allowed to take part in hostilities and must not be the aim of an attack, on the other. However, this clear dichotomy between members of state armed forces and civilians does not necessarily exist in reality, especially in asymmetric conflict situations.

In 2001 we faced, for the first time, the question of how to define fighting elements of terror organizations in the context of the targeted killing cases. Should they be regarded as “civilians” who enjoy immunity from attack? At first, the prevalent position was that they are criminals that may be arrested but not attacked. With time this perception has changed to an understanding that once a situation is defined as an armed conflict, such persons do not enjoy civilian immunity from attack when involved in hostilities. Moreover, it was acknowledged that, in certain circumstances, they may even lose their civilian status altogether and be regarded as members of the armed forces of a party to the conflict. This is the analysis made in the interpretive guidelines of the International Committee of the Red Cross on the issue of Direct Participation in Hostilities. This is a good example of how international law develops through practice. This development is due to the practice generated mainly by the United States and Israel, and the impact it has had on the position of other countries facing similar conflicts.

The second fundamental principle is that of proportionality. The application of the principle of proportionality generates a lot of misunderstanding and misconception. It states that an attack is legal as long as the collateral damage expected to occur to civilians, or civilian objects, is not excessive with respect to the military advantage that is anticipated from the attack. One can see that this formula seeks to achieve a realistic balance between the protection of civilians and the military necessities of war, and does not therefore prohibit collateral damage per se. When you have a densely populated area, and there is a risk that civilians and civilian objects would be harmed in pursuit of a military objective, does this mean that military forces cannot operate there at all? It seems that some of those criticizing Israel think that this is indeed the case, but that is not the law, nor the way any military in the world operates. Accepting such a result would leave states facing situations of asymmetric conflict with no legitimate choice of action except to continue being attacked with no option of a forceful response. This runs counter to the logic of the laws of armed conflict. The principle of proportionality reflects an appropriate balance reached by the laws of armed conflict. It directs the commander, who ultimately has to make the operational decision, as to what considerations he has to weigh before carrying out an attack on a target: what is the anticipated military advantage, on the one hand, and what is the expected collateral damage, on the other – and on this basis he must strike the balance. There is no exact formula. If the commander



takes these elements into consideration, and he arrives at a reasonable balance, then legally he has met the proportionality test.

One example that illustrates the difficult dilemmas which arise in applying the proportionality balance is the question of the extent to which a commander may take into account the risks posed to the lives of his soldiers. Legally speaking, avoiding soldier casualties is a legitimate consideration when weighing the military advantage of a certain course of action, but this does not mean that one may disregard in such a situation the risk to the civilian population. The law requires us to always take into consideration the expected collateral damage.

However, how does one strike the balance? There is no precise formula, and accordingly, there may sometimes be circumstances in which two commanders might reach different conclusions about the appropriate balance in the same set of circumstances, and both decisions might be lawful.

In making these kinds of difficult decisions, morality and ethics come into play, and they operate alongside the law. Operational decisions are ultimately not made with exclusive reliance on either the law or morality. The law provides us with a set of considerations that must be taken into account. The final balancing process, however, also involves complex questions of ethics and morality.

The principles and rules of the laws of armed conflict are integrated into the operational plans and commands issued to IDF forces, including in operations such as Operation Cast Lead. All such plans and orders include a legal annex where the relevant rules are specified, but legal advisors are involved in the preparation of such instruments in order to make sure that the operative parts are compatible with the demands of the law, and the legal aspects are not confined to the "legal annex." There is a constant dialogue between the commanders and the legal advisors since each must understand the concerns of the other in order to reach both a lawful and workable end result.

In this context, it is important to note that the legal advisor does not (and should not) replace the commander. The legal advisor is usually not present on the battleground, but even if present, he or she is not supposed to replace the discretion of the commander with his or her discretion. Ultimately, the decision is left to the commander.

As explained before, I disagree on the substantive level with statements made about the inadequacy of the existing rules and of the need to change them. Moreover, such statements are in fact damaging. They lead to a result whereby, although Israel did in fact base itself on the rules, an impression is formed as if it ignored them due to their "lack of suitability." This is only used as another tool in the effort to undermine the legitimacy of Israel's conduct.

As for the way ahead, I would make a few suggestions. First of all, we must stop saying that the rules and laws are unsuitable. I do not think that this is the case and such statements are also unnecessarily undermining our legitimacy. What we need to do is to keep working within the existing legal framework, while applying the laws in a sensible manner, after careful analysis, in a professional

and thorough way. We need to have more articles and papers published explaining the Israeli practice, and in this way have a more significant impact on the development of international law.

We also should increase our dialogue with other legal specialists working in foreign governments and militaries, as well as in academia and with bodies such as the International Red Cross, with whom we already have an ongoing dialogue. We must not give up on the attempt to influence the legal arena. We have many shared interests with legal advisers of other countries, who often encounter dilemmas not so different from our own.

We might feel that the world is against us no matter what we do, but we cannot despair and quit in our efforts to explain our position and influence the legal developments in the field of the laws of armed conflict.

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## **Self-Defense and the Dignity of States**

**Prof. George P. Fletcher**

I live in Israel, but I have been a professor of criminal law and of jurisprudence at Columbia University in New York for the last twenty-five years. In the United States my record has largely been a liberal record of opposing the Bush administration on issues of Guantanamo and the use of military commissions. In 2006 I wrote the winning brief in *Hamdan v. Rumsfeld*, the first decision by the Supreme Court against President Bush's circumventing civil liberties in his war on terror. Four Justices accepted my argument that the law of war limited the jurisdiction of military tribunals and that conspiracy – the charge used against Hamdan – was not a crime under the law of war. The majority of the Court held that the military could not try suspects without conforming to the principles of fair trial mandated by common Article Three of the Geneva Conventions. In particular, the military tribunals could not violate the defendant's right to confront the witnesses against him.

In my writings I have consistently attacked the position of the Bush administration, which has developed a parallel system of international law that emphasizes concepts like enemy combatants, unlawful combatants, and uses a set of terminologies that are not found in the traditional law of war. I am very much opposed to the alternatives to international law that the U.S. administration and courts have developed in the last decade. I hope that as soon as possible we shall return to the language of international law that has basically defined relations among states for the last hundreds of years, and, in my opinion, has been a great friend to the State of Israel.

Many people in Israel criticize international law for what it can do for the politics

of Israel. I think this is a major mistake. I recall in the major controversy before the International Court of Justice about the defensive wall, Israelis refused even to enter an appearance. Israelis recently made the same mistake by refusing to cooperate with the Goldstone Commission. The general fear is that international bodies will not treat Israel fairly and therefore we should not cooperate with them.

This fearful and condescending attitude has only hurt Israelis in their dealings with other countries. We should recognize that our best friend in the international arena is not a set of people but a set of institutions, a set of principles, a set of ideas that are incorporated in the United Nations Charter. Let me just review carefully what those principles are and why we in Israel, as the State of Israel, should be committed as strongly as possible to these principles underlying international law.

*Everybody in the international arena agrees that no country should have to tolerate attacks against its territory and that it is entitled to use defensive force to repel aggression.*

The first principle in armed conflict is the principle of self-defense. This is the one provision recognized in Article 51 of the Charter as a basis for the legitimate use of force when an armed conflict occurs. Everybody in the international arena agrees that no country should have to tolerate attacks against its territory and that it is entitled to use defensive force to repel collective or individual aggression against its territory. It does not matter for these purposes whether the aggression is collective and conducted by a state or whether it is conducted by an organization like Hamas, or whether it is conducted by a group of volunteers; the principle is basically the same. Self-defense lies at the core of the idea of a set of mutually recognizing independent states.

There has been a lot of discussion lately about human dignity in the law of war, and when in various military operations it might be possible to attack the dignity of the civilians or the soldiers on the other side. The point that is frequently left out of the discussion is the human dignity of states. For a state to maintain its dignity it must have a complete right to defend its borders against external attack.

Self-defense, in this sense, is a sacred institution that expresses the state's capacity for dignity. When we tolerate invasions of our territory, or if we tolerate missile attacks upon our territory, then we surrender our dignity as an independent entity in the international arena.

How we classify defense is another question. Whether it is defense against a nation, defense against an armed band, defense against a terrorist organization; whether it is asymmetrical or symmetrical warfare, all of these are technical questions which international law can solve. The most important thing for Israel is to think of itself as being in a position of an individual that claims its essential human dignity by being able to preserve the integrity of its external boundaries. This is a principle that all nations of the world understand and all express.

In addition, Israel should welcome critiques of its position by the other side. There are rumors that the Palestinians might try to bring a lawsuit in the

International Criminal Court against Israel based upon Article 12.3 of the Rome Statute which enables non-member entities to sue in the ICC for violations of the law of war and for crimes against humanity. This would be the best possible thing for Israel if this legal attack occurred. The most important thing to recognize about initiatives under Article 12.3 of the Rome Statute is that the party who goes to Rome to complain about an incident opens itself up to all related crimes connected with that incident.

There is no way that Hamas can go to Rome and complain about Israeli behavior without, at the same time, opening the door to a litigation about all the crimes against humanity, all the war crimes, all of the suicide bombings, all of the illegitimate cases of targeting that the Palestinians have committed against Israelis and to which they have never been called to account. So, the more Israel emphasizes its international legal responsibility, the more it has to gain because it is only in the arena of legal responsibility that we can establish something that we know in our hearts; namely, that Israel has been the victim of discriminatory aggressive attacks from neighboring countries, and these have never been dealt with properly under the law of war. The only way in which they will be dealt with is if we can engage the other side in a legal argument in which their crimes become relevant in exactly the same way as the alleged crimes of the Israelis become relevant.

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## **Lawfare**

**Prof. Gerald Steinberg**

There is a very important political, diplomatic, and media aspect to all of these issues, which in many ways are combined together under the term “lawfare.” The claims that are made, the cases that are being brought, are often distant from the kinds of legal principles that we hear discussed now and that are in fact very important to the discussions that take place in the courts of the United States, Israel, and sometimes in the UK. There are literally hundreds of non-governmental organizations funded by the European Union, Norway, and Switzerland, with very significant amounts of money – on the order of at least a hundred million euros per year – that are in some way related to all of this activity. The New Israel Fund also kicks in another few million dollars a year, and these cases are multiplying. The volume of activity would probably be less than one-tenth of what it is if we didn’t have this huge non-governmental organization engine that pushes these cases.

There is much documentation on the role of NGOs in the “lawfare” process. The NGO Monitor website ([ngo-monitor.org](http://ngo-monitor.org)) goes into some of this, and we are updating it every day. The following is a short list of the cases that have actually

gone to court and there is a wide range of venues and targets. What is common is that these are all forms of a very clearly articulated lawfare strategy, whether it is the case against Ariel Sharon in Belgium in 2001 that was brought by a number of NGOs with the active involvement of Human Rights Watch and Amnesty International, or the *Quarry v. Caterpillar* case. If you look at the cases you often see these are marginal in terms of their legal concept, but that is not the purpose. The purpose of all of these cases is primarily to create publicity – to link the word “Israel” with war crimes, apartheid, and with violations of international humanitarian law in various other forms.

The foundation for this strategy can be traced back to the NGO Forum of the 2001 Durban conference. Fifteen hundred NGOs, largely funded by Canadian, European, and other governments as well as the Ford Foundation, adopted a final declaration that clearly articulated the use of the international legal system to promote their political agenda – the isolation of Israel – through the cases, and the branding of Israel as the world’s greatest war criminal. This was done through universal jurisdiction in a number of countries, including libel laws, and property claims.

If we analyze the different venues where this takes place, you see three or four different levels. The most visible are the international bodies. Without the NGO role, the case against Israel and the separation barrier (alias, the “apartheid wall” in the International Court of Justice) would never have been brought. If you track the history of that case, you see international NGO superpowers. In almost all of these cases, Human Rights Watch, Amnesty International, and the FIDH in France, plus a lot of Israeli and Palestinian organizations, start to use the same language, and in their “reports,” e-mails, and campaigns they will always include a demand that these issues be brought before some sort of international legal body. From the beginning they pressed the UN General Assembly which, for political reasons, the Europeans agreed to. Then later on they decided they had made a mistake and didn’t vote to endorse the advisory decision of the ICJ. The NGOs pressed the European governments, along with the members of the Organization of the Islamic Conference and their African and other allies. Legally it was the General Assembly and the ICJ, but the history clearly rests on a foundation of the role of these international NGOs and the huge budgets that they have for this purpose.

The calls for International Criminal Court prosecutions in the case of Gaza are led by NGOs such as the Palestinian Center for Human Rights, funded by Norway, the European Union and other governments, and al-Haq. This is the second United Nations investigatory enquiry or commission, and in this case, it is led by Professor Richard Goldstone. If you look at the language that was used throughout the Gaza conflict you will see dozens of demands for an independent international enquiry that would be led by these types of figures, and that was very much part of the NGO agenda at the time.

The second layer in this analysis is the role of universal jurisdiction statutes at the national level. There was an article in *Ha’aretz*, originally in *Der Spiegel*, wherein al-Haq is planning 939 cases against Israel in different European

countries. The role of venue shopping is very important. Spain was chosen because the Palestinian Center for Human Rights found a judge that was sympathetic to their issues. There are many judges and courts throughout Europe, Canada, and the United States that have universal jurisdiction statutes, and so it is not hard to find one or two who are going to take the case, regardless of its merits. There is nothing connecting Spain to the case against the Israeli officials that are accused of having violated international law in Gaza. It is simply a matter of having found a convenient judge.

Another approach is to use civil suits against Israeli officials. By the way, it is not exclusively against Israelis. You also see these kinds of cases being brought against American and British officials, often by the same organization, particularly in the United States.

Another aspect of the national approach is civil lawsuits against corporations doing business with Israel. There is a case in Canada which has to do with the question of building in Modi'in Illit and the case is very obscure. The plaintiffs do not claim they have title to the land. It is clearly part of a campaign which began with an op-ed article in the *Toronto Star*, which was the main goal. It is a vehicle to link Israel to all these violations. It is basically an attempt to sue three Canadian corporations for having done business that is connected to Modi'in Illit.

Now al-Haq and Amnesty International are trying to sue the British Government for having sold military equipment to Israel for use in Gaza in violation of British law. The main goal here is public relations. In fact, even if the suit were to succeed and Britain were to say that they won't sell these things any more, it is not going to affect Israeli military capabilities, but that is not the goal. The goal is the political and propaganda impact.

The main aspect of this is the abuse of universal jurisdiction, which actually goes back to the piracy laws of the United States in 1789. The purpose was to remedy gross abuses of human rights, like genocide, for example. Rwanda is another case of crimes against humanity where there is no rule of law in the particular national jurisdiction. That clearly does not apply to Israel, but that is irrelevant because most of these cases are thrown out within the first couple of hearings. Even if you find a friendly judge and they go to appeal and they get thrown out, the judgment is not the purpose of this process.

*NGO lawfare against Israel is not a matter of justice, but rather it is a matter of resources, politics, and propaganda.*

This is a form of soft power, a term which academics and political scientists are very familiar with. Joseph Nye has written about it. The Americans woke up to this around the time of 9/11. Why do they all hate? What are they doing better than we are doing? How are we being labeled? How is the press being manipulated? It is connected to a post-ideological agenda in which the West is bad and democracy is bad. The West is responsible for and guilty of colonialism, neo-colonialism, and neo-imperialism. It is a very strong ideology against nation-states and against national sovereignty, and Israel is now considered to be, in

many ways, the worst of the offenders. Being American is bad; being an American ally or being an Israeli Zionist national state is worse. The ideology plays a central role in these soft-power wars.

International law or the rule of law is in many cases secondary, tertiary, or simply disregarded. I talked about forum shopping, and in many cases you have the same litigation being raised over and over again. The Israeli version of that is all the cases being brought by the EU, Norwegian, and NIF-funded NGOs that applaud the Israeli High Court, constantly putting these cases forth with the knowledge that they get publicity every time, and if you are there twenty times, you're going to eventually get some sort of response that is favorable to you. There is no penalty for doing that, so that re-litigation is very much part of the process.

The issue involves the abuse of international law, taking terms and concepts which have long since become outdated and using them as part of this lawfare process. There are no cases against Arafat or Hamas because there is no NGO funding from European governments to promote that case. It is not a matter of justice, but rather it is a matter of resources, politics, and propaganda.

In many cases the lawfare process is clearly an antithesis of the whole international legal process, particularly in the case of state sovereignty. Elected governments are circumvented in this. It is not the governments that are going to determine whether they should or should not sell defensive equipment to Israel, or whether they should or should not accept the justification for the separation barrier. If you use the legal systems in these countries you can circumvent the way in which public and diplomatic policy is made, and you can prevent the exercise of rights under customary law. The main point is to promote the propaganda process.

The Goldstone Gaza enquiry is not going to change anything about the way in which international law is applied. What we are going to see is a further abuse of this system. Professor Goldstone was a member of the board of Human Rights Watch up until a week or two ago, when NGO Monitor pointed out to him that this constituted a conflict of interest. He had acted as a prosecutor in promoting this agenda and made some statements during the Gaza war, including being a signatory to an Amnesty letter which had already determined Israeli policy as war crimes. He claimed to be shocked to the core by events in Gaza, of which he had no first-hand knowledge, because all he saw were reports by NGOs, which were not first-hand. There were no members of the media on the ground either, other than people who were affiliated with Hamas.

Goldstone should have excused himself, but instead he resigned from the Human Rights Watch Board. The terms of reference for the Goldstone enquiry are biased because they reflect the NGO agendas that were promoted during the war. The way they collect evidence will also be based on what they get from the NGOs. They are not going to be able to determine what actually happened in the fighting, but they will get very detailed and footnoted reports from Human Rights Watch, Amnesty International, the Palestinian Center for Human Rights, and al-

Haq, none of which can be verified independently.

The main players are the NGOs. They are supported with money from European governments such as Denmark, Norway, Ireland, Holland, the European Commission, as well as Christian Aid which is funded both by the UK and Irish governments. There is also a large sum of money from the MBC, funded by Switzerland, Sweden, Denmark and The Netherlands, some of which was used for a big conference in Cairo expressly directed at preparing the process of lawfare. In addition, the Ford Foundation and George Soros' Open Society Institute contribute to the cause.

The Palestinian Center for Human Rights is very active in many of these organizations. They are the ones who publish the claims of Palestinian civilian casualties which the IDF and the ITC have refuted. There is no evidence to test any of this, and who is defined as a civilian is critical to all of this. We had the same problem in Lebanon.

Another organization, al-Haq, is funded by the Swedish International Development Agency, Canada, Norway, Ireland, Draconia, which is linked to Sweden, the Ford Foundation, the Open Society Institute, and Christian Aid. It is the same people, organizations, and governments repeatedly which are active in parallel law suits.

Al-Haq's general director, Shawan Jabarin, has been denied travel visas. His case has come up before the Israeli Supreme Court a number of times, and the court has ruled that because he is affiliated with the PFLP, and not because he is a human rights activist, he is not allowed to travel. Al-Haq's co-founder, Charles Shamas, is also a member of the Human Rights Watch Mid-East Board, and so it is not surprising that Human Rights Watch will promote al-Haq's claims through their much larger budget and access to the media.

The Center for Constitutional Rights is an American organization based in Europe, supported by the Ford Foundation and the Open Society Institute. They are the ones who brought the cases against Avi Dichter and Moshe Ayalon in the U.S. The cases were dismissed on appeal, but the main point was the publicity with the word "Israel" and pictures of Israeli government officials and generals linked to the term "war crimes."

The civil suit against Caterpillar by the parents of Rachel Corrie was led by the Center for Constitutional Rights, and Amnesty International and Human Rights Watch were very active in the Caterpillar boycott movement. There are many other ways in which this lawfare process takes place.

The latest frivolous libel suit against NGO Monitor is being brought by a group called Mosawa, funded by the New Israel Fund and a number of European countries. It hinges on the question of how we define "undermining."

NGO Monitor is the only research organization in the world that watches the watchers and asks if Human Rights Watch, with an annual budget of \$40 million, Amnesty International, with an annual budget of \$200 million, and about two hundred more such organizations are saying anything of validity, both in terms of



the facts that they claim, or international law.

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## **Blocking the Truth of the Gaza War: How the Goldstone Commission Understated the Hamas Threat to Palestinian Civilians**

**Lt. Col. (ret.) Jonathan D. Halevi**

- Was the UN commission's approach one-sided against Israel, or unbiased and objective as commission chairman Richard Goldstone contended? Statements of Palestinians recorded by the commission and posted on the UN website provide authentic evidence of the commission's methodology and raise serious questions about its intentions to discover the truth.
- Commission members did not ask the interviewed Palestinians questions about the activities of Hamas and the other Palestinian terrorist organizations operating in the Gaza Strip which could be classified as war crimes or that were potentially dangerous to innocent Palestinians. Furthermore, there was no serious consideration of Palestinian "friendly fire" incidents, and we can only guess how many Palestinian civilians were killed or wounded by Palestinian fire.
- Reports issued by the Palestinian terrorist organizations themselves detailed the fighting in a way that often contradicted the Palestinian witnesses. In addition, the witnesses hid vital information from the commission regarding the presence of armed terrorists or exchanges of fire in their vicinity.
- On June 28 and 29, 2009, the Goldstone Commission recorded Palestinian statements at the UNRWA headquarters in Gaza City. The following is an analysis of the four main statements, the way the commission interpreted them, and reports from other Palestinian sources which contradict the testimony presented to the commission.

On September 15, 2009, the UN investigating commission known as the Goldstone Commission published its conclusions regarding Israel's Gaza operation (December 27, 2008-January 18, 2009), accusing Israel of violating both international humanitarian law and the Geneva Conventions, and committing war crimes.



The Goldstone Commission, July 7, 2009

In response, the Israel Foreign Ministry issued an official statement accusing the commission of bias and one-sidedness, and of ignoring the thousands of Hamas rocket attacks on Israeli civilians which, Israel claimed, made the military operation an absolute necessity. "The one-sided mandate of the Gaza Fact-Finding Mission, and the resolution that established it, gave serious reasons for concern....At the same time the report all but ignores the deliberate strategy of Hamas of operating within and behind the civilian population and turning densely populated areas into an arena of battle," said the ministry.

## **The Goldstone Commission Never Asked About Palestinian War Crimes**

Was the UN commission's approach one-sided against Israel, or unbiased and objective as commission chairman Richard Goldstone contended? Statements of Palestinians recorded by the commission and posted on the UN website provide authentic evidence of the commission's methodology and raise serious questions about its intentions to discover the truth. Commission members did not ask the interviewed Palestinians questions about the activities of Hamas and the other Palestinian terrorist organizations operating in the Gaza Strip which could be classified as war crimes or that were potentially dangerous to innocent Palestinians. They never asked about:

1. Launching rockets at Israeli towns and villages from within residential dwellings;
2. Firing mortar shells into Palestinian neighborhoods when IDF forces were operating in or near the area;

3. Firing anti-tank missiles, rifles, and machine guns at Palestinian buildings in Gaza suspected of having been entered by IDF forces despite the presence of Palestinian civilians in the area;
4. Seizing private homes from which to ambush IDF forces;
5. Booby-trapping houses before and during the war and detonating the bombs;
6. Planting various types of anti-personnel and anti-vehicle IEDs near houses and detonating them;
7. Sniping and firing heavy machine guns at IDF forces within Palestinian residential areas.

None of the statements taken by the commission (as posted on the UN website) reported even one single instance of the presence of armed Palestinians, or of armed Palestinians firing rockets at Israel or shooting at IDF forces operating in the Gaza Strip. There was no serious consideration of Palestinian "friendly fire" incidents, which occurs with the most disciplined armies, but is not adequately examined as an explanation for Palestinian losses, and we can only guess how many Palestinian civilians were killed or wounded by Palestinian fire. In fact, they reported that throughout the entire three weeks of fighting there was no significant Palestinian resistance.

The commission did not press the witnesses in order to elicit more information and did not confront them with the reports issued by the Palestinian terrorist organizations themselves, which detailed the fighting in a way that often contradicted the Palestinian witnesses. It did not adequately examine Palestinian rules of engagement - or the lack of any such rules. In addition, the witnesses hid vital information from the commission regarding the presence of armed terrorists or exchanges of fire in their vicinity, casting doubt on their reliability.

## **Case Studies: Analysis of Palestinian Testimony to the Goldstone Commission**

On June 28 and 29, 2009, the Goldstone Commission recorded Palestinian statements at the UNRWA headquarters in Gaza City, and posted the questions and answers on the commission's website.(1) The following is an analysis of the four main statements, the way the commission interpreted them, and reports from other Palestinian sources which contradict the testimony presented to the commission:

### ***Statements from the al-Silawi Family***

Three members of the al-Silawi family were interviewed by the commission: Moussa al-Silawi (91, blind), Sabah al-Silawi (Moussa's wife), and Mouteeh al-Silawi, a Hamas official.(2) The most detailed statement was that of Mouteeh al-Silawi, deputy director of the Hamas administration's Muslim religious endowments ministry for the northern Gaza Strip, who said he was giving a

sermon when the mosque was attacked. He claimed that there was no military activity in the Ibrahim al-Maqadma mosque or around it during the attack. Worshippers came to the mosque seeking a safe haven on the assumption that it was a secure place. The evening and night prayers were said one after another to prevent unnecessary movement of worshippers outside the mosque. Israel committed a war crime in violation of international law by attacking civilians in a mosque.

The commission members asked: What is the name of the mosque and where is it located? What was the date of the event? Was a warning given before the attack? When was the mosque built? Were the people killed the supporters of families? Was there a noise before the explosion and what damage did it do? How many people were killed and wounded in the attack? How many people were in the mosque when it was attacked? How far is the mosque from the nearest hospital? Does the hospital have a sufficient quantity of medical equipment and are its services sufficient?

They also asked: Under what conditions are the two prayers [evening and night] joined? Do more people come when prayers are joined? Was this the first time the prayers were joined? When does the evening prayer begin and when does it end? When prayers are joined, exactly how much time elapses between them? When, during the confrontation, did the mosque begin joining the prayers? Was January 3 the first day the prayers were joined?

Many of the questions were irrelevant and unconnected to the circumstances of the event. The commission members did not ask about armed men in the mosque, whether it was used for military purposes or incited worshippers to carry out terrorist attacks against Israel. They did not ask if there were weapons in the mosque, if armed men were operating near the mosque, whether Hamas and its Izz al-Din al-Qassam Brigades controlled the mosque and used it to recruit operatives, or the identity of the casualties and their organizational affiliation (including members of the al-Silawi family).

An examination of freely accessible Palestinian sources shows that the casualties in this incident were terrorist operatives and included members of the al-Silawi family, who were represented to the commission as innocent civilians.

The terrorists killed in the attack included:

Ibrahim Moussa Issa al-Silawi, an operative in the Izz al-Din al-Qassam Brigades, Hamas' military-terrorist wing. Born December 1, 1946, in Jabaliya in the northern Gaza Strip. According to the Izz al-Din al-Qassam Brigades website, Ibrahim "received his love of *jihad* and hatred for the Zionist enemy with his mother's milk." In 1984 he joined the Islamic Movement (which later became Hamas) and was a Muslim Brotherhood operative. He had close relations with Nizar Riyyan, a senior Hamas terrorist operative, and joined the Izz al-Din al-Qassam Brigades in 2003, at the age of 38. He was posted to the northern Gaza Strip brigade and participated in military missions: manning front-line positions in Jabaliya, fighting IDF forces, and digging and preparing tunnels for Izz al-Din al-Qassam Brigades use.(3)

Omar Abd al-Hafez Moussa al-Silawi (Abu Souheib), an Izz al-Din al-Qassam Brigades operative. Born in Saudi Arabia on September 29, 1981, and joined Hamas and the Muslim Brotherhood. In 2004 he joined the Izz al-Din al-Qassam Brigades and was posted to front-line positions on the eastern border of Jabaliya. He also prepared and planted IEDs, participated in fighting the IDF, and launched mortar shells and Kassam rockets at Israeli towns and villages.(4)

Sayid Salah Sayid Batah, an Izz al-Din al-Qassam Brigades operative. Born on April 7, 1986, in Jabaliya. A Hamas and Muslim Brotherhood operative, he joined the Izz al-Din al-Qassam Brigades and was deployed in the northern Gaza Strip brigade. He was posted to front-line positions in Jabaliya, prepared and planted IEDs, and dug and prepared tunnels for Izz al-Din al-Qassam Brigades use.(5)

Ahmed Hamad Hassan Abu Ita, an Izz al-Din al-Qassam Brigades operative. Born in Saudi Arabia on February 15, 1984. A Hamas and Muslim Brotherhood operative, he joined the Izz al-Din al-Qassam Brigades in 2006 and was posted to front-line positions. He fought the IDF in the Jabaliya, al-Salatin and al-Atatra regions, prepared and planted IEDs, was deployed in the suicide bombers' unit, and regularly participated in ambushes against IDF soldiers. The Izz al-Din al-Qassam Brigades website reported that he was one of the operatives who received instructions, after the initial Israeli air attack on December 27, to deploy in accordance with previous instructions. According to the website report, on January 3 he went to the Ibrahim al-Maqadma mosque to meet "young people" and was killed in the IDF attack there.(6) [Note: The Izz al-Din al-Qassam Brigades version clearly shows that Hamas uses mosques as meeting places for its operatives to coordinate their fighting against the IDF.] His father said that during the first week of the fighting his son launched rockets into Israeli territory every day.(7)

Muhanad Ibrahim al-Tanani (Abu Islam), an operative in the Al-Quds Battalions, the military-terrorist wing of the Palestinian Islamic Jihad, born April 23, 1988. The Palestinian Islamic Jihad website reported that his parents brought him up to love *jihad*. When the Second Intifada broke out he was 12, and often went to the Erez crossing with other children to throw rocks at the IDF post and confront the soldiers. In 2002 he joined the Palestinian Islamic Jihad and later its military-terrorist wing. He underwent military training and was posted to front-line positions on the northern border of the Gaza Strip. In addition to his military activities he participated in Palestinian Islamic Jihad meetings and events, and led the organization's Internet forums.(8)

Rajah Nahad Rajah Ziyada, 18, an Al-Quds Battalions operative.(9)

Ahmed Assad Diyab Tabil, 16, a Hamas operative, was a member of the Hamas student organization, which recruited him into the Izz al-Din al-Qassam Brigades.(10)

### ***Statement of Mohammed Fuoad Abu Askar***

Mohammed Fuoad Abu Askar represented himself to the commission as the director-general of Hamas' ministry of Muslim religious endowments.(11) He said

he had been detained in Israel in 1992 for belonging to Hamas. He told the commission that his house was "unjustly" blown up by the IDF. He said he had received a telephone call warning him to evacuate the house from someone who identified himself as an IDF representative and that twenty minutes later his house was struck from the air.

Askar said a short time later the area around the Al-Fakhura school was also bombed. The school served as a shelter for many Palestinians from Beit Lahiya, Al-Salatin and Al-Atatra, who regarded it as a safe haven because it was located in the middle of the refugee camp and it was flying the UNRWA flag. He said he saw three bombs hit the school region and he heard more. Two hit the house of the Diyab family, killing 11 people. Dozens of people were killed near the school and most of the casualties were children. There were no armed men in the area, as opposed to Israeli claims. Two of his children, Khaled and Imad, were killed, as was his brother Raafat, all of them, according to Askar, innocent civilians.

The commission members asked: Was the telephone warning you received a recorded announcement and what did you do following it? Did you receive the call via a land line or cell phone? Where did you go when you left the house? How much time passed between the attack on the Al-Fakhura school and the attack on the Diyab family house? Did you or any of your family visit the Diyabs' house after the attack on yours?

Although Mohammed Fuoad Abu Askar admitted being a Hamas operative and having been detained by Israel, the commission did not think to ask whether he was connected with the Izz al-Din al-Qassam Brigades. They did not ask him whether those killed near the school belonged to any organization or were military-terrorist operatives.

An examination of freely accessible Palestinian sources shows that contrary to his claims, he and his sons were directly and closely linked to the Izz al-Din al-Qassam Brigades, a connection which included providing terrorist operatives with weapons and ammunition, and that there were a number of Palestinian terrorist operatives in the Al-Fakhura school area, as follows:

Mohammed Fuoad Abu Askar himself plays a key role in the Izz al-Din al-Qassam Brigades.<sup>(12)</sup> Some of his sons also belonged to the Brigades, among them Khaled (killed in the attack), Ahmed (killed on July 7, 2006, when he tried to launch an anti-tank missile against an IDF force),<sup>(13)</sup> and Osama (critically wounded fighting the IDF on October 13, 2004).<sup>(14)</sup>

Khaled Mohammed Fuoad Abu Askar (Abu al-'Izz), Mohammed's son, an Izz al-Din al-Qassam Brigades operative, was born on December 12, 1989, in Jabaliya. At the age of 15 he joined the Muslim Brotherhood and was active in the Hamas student organization, which serves as a recruiting agency for the Izz al-Din al-Qassam Brigades. In 2006 he was accepted into fighting groups posted in front-line positions. He underwent an advanced military training course and was posted to a special unit of the north Gaza battalion where he participated in dozens of ambushes and fought against IDF forces. He served as a military instructor in the Imad Aqel battalion and supervised the ambush and suicide unit.

He was supposed to be the third member of a Hamas squad in a suicide bombing attack on October 26, 2007, but an operative named Ghassan al-Ela was sent in his place. Khaled was offended and demanded to be sent on a suicide bombing mission. In March 2008 he was sent to ambush IDF forces operating in the northern Gaza Strip, but because of conditions on the ground the attack was aborted. He again demanded to be put at the top of the suicide bomber list. On June 4, 2008, he and four other Izz al-Din al-Qassam Brigades operatives prepared a suicide bombing attack, but a technical error caused the bomb to explode and he was the only one who survived. He again demanded to be sent on a suicide bombing mission, although he had gotten married on December 12, 2008.

He was killed in January 2009 in the attack in the region of the Al-Fakhura school. The Izz al-Din al-Qassam Brigades website reported that during the last months of his life he worked for the military supply unit and provided operatives with weapons, missiles, and military equipment. This information is particularly important because it supports IDF intelligence that the house of Mohammed Fuoad Abu Askar, where his son Khaled lived, served as an Izz al-Din al-Qassam Brigades weapons storehouse.(15)

Others terrorist operatives killed in the same incident included:

Bilal Hamzah Obeid, an Izz al-Din al-Qassam Brigades operative, who was killed along with Khaled Abu Askar in the attack near the Al-Fakhura school.(16)

Raafat Abu Askar, a military-terrorist operative in the security services with the rank of warrant officer, killed in the attack near the Al-Fakhura school.

·Osama Jemal Obeid, an Izz al-Din al-Qassam Brigades operative, killed in the attack near the Al-Fakhura school.(17)

Iyad Jaber Aman, an Izz al-Din al-Qassam Brigades operative, killed in the attack near the Al-Fakhura school.(18)

Abd Muhammad Abd Qudas, a Fatah operative active in Palestinian Military Intelligence, killed in the attack near the Al-Fakhura school.(19)

Atia Hassan al-Madhoun and his son, Ziyad al-Madhoun, operatives in the Brigades of National Resistance, the military-terrorist wing of the Democratic Front for the Liberation of Palestine. Atia was regional commander for Jabaliya. The two were the father and brother of Hassan al-Madhoun, one of the senior commanders of Fatah's Al-Aqsa Martyrs Brigades, who was lynched by Hamas in the summer of 2006. The two were killed in the attack near the Al-Fakhura school.(20)

### ***Statements of Wail and Salah al-Samouni***

Wail and Salah al-Samouni described the shelling of Wail's house, where the extended al-Samouni family had sought shelter and where more than 20 people were killed.(21) They told the commission: At about 5:30 a.m. on the morning of January 5 Wail left the house with some other men to bring wood for a fire. As soon as they left the house a helicopter fired a missile at them and then a number

of missiles as the house. After the house was hit the wounded proceeded toward Salah a-Din Street and were refused medical attention by the IDF soldiers. Salah claimed that the soldiers fired shots over their heads to frighten them and make them leave more quickly. They said there was no activity of armed Palestinians around the house where the family members had sought shelter. Salah al-Samouni said that "everyone is a farmer, I swear to Allah that everyone is a farmer," and rejected the possibility that they were armed or wanted.

The commission members asked: Can Wail describe the soldiers and identify them according to their voices and uniforms? How did the IDF forces destroy the agricultural land near the house? How large was the agricultural area destroyed by the IDF? Was the witness treated at the Shifa Hospital?

The commission did not ask about the identity of the dead Palestinians and about the possibility that some of them were terrorist operatives. It did not challenge their claim that there were no armed Palestinians in the area, despite reports by both Palestinian terrorist organizations and the IDF about exchanges of fire in the area. In addition, the commission did not press the witness about his claim that the soldiers did not provide medical attention, in contradiction of a statement given by a female member of the family who told the NGO B'tselem that the soldiers had given them medical aid.

An examination of freely accessible Palestinian sources shows that Wail and Salah al-Samouni hid important details from the commission which could shed light on the event. An examination of their statements and the statements of other members of the al-Samouni family to human rights organizations and published in Palestinian newspapers raises questions as to the veracity of their version of what actually happened on January 5.(22)

Members of the family repeatedly claimed that all the people in the house were ordinary civilians. However, at least three were affiliated with Palestinian Islamic Jihad. Meisa al-Samouni did not tell B'tselem that her husband, Tawfiq Rashad Hilmi al-Samouni, who was killed on January 5, was a Palestinian Islamic Jihad terrorist operative. She and the other members of the extended family, including Wail and Salah (who gave statements to the Goldstone Commission), never mentioned or hinted that other family members in the house at the time were Palestinian Islamic Jihad operatives, among them Muhammad Ibrahim Hilmi al-Samouni and Walid Rahad Hilmi al-Samouni. A Palestinian Islamic Jihad flyer noted that Muhammad and Walid al-Samouni were active in fighting against the IDF in the Zeitun neighborhood.

The al-Samouni family members firmly adhere to the version that there was no Palestinian military activity near the house and that the nearest military activity was at least a mile away, and that, they claimed, was limited to firing rockets into Israeli territory, not close fighting.

However, the official Palestinian Islamic Jihad version is completely different. In a statement issued on January 5, Palestinian Islamic Jihad said that on the evening of January 4 its fighters had fired an RPG from the Zeitun neighborhood at an Israeli tank and had opened fire at IDF soldiers. At 1:20 a.m. on January 5,



a Palestinian Islamic Jihad engineering unit detonated a 50-kg. bomb near an Israeli tank not far from the Al-Tawhid mosque near the house of Wail al-Samouni. At 6:30 a.m., the engineering unit detonated a bomb near an IDF infantry unit operating near the Al-Tawhid mosque in the Zeitun neighborhood. (23) According to another official Palestinian Islamic Jihad statement, one of its operatives was killed in fighting nearby. His name was Muhammad Ibrahim al-Samouni.

The significance of the foregoing is that the four men who left the al-Samouni house in the early hours of the morning, among them Muhammad Ibrahim al-Samouni, did not necessarily do so for the innocent reasons given by their family. They might have gone out for a reason connected to the military activities taking place in the same area between Palestinian Islamic Jihad terrorist operatives and IDF forces. Palestinian Islamic Jihad reported that operatives of its military-terrorist wing, the Al-Quds Battalions, "surprised the occupation forces and attacked them from behind their lines, and there was a fierce battle in the southern part of the Zeitun neighborhood." Another report, given "exclusively to the Muslim Brotherhood website," detailed Palestinian Islamic Jihad activities in the Zeitun neighborhood on January 5: "According to eye-witnesses, the fighters of the resistance waited and barricaded themselves in secure locations, remaining in places inhabited by civilians, from which they left to carry out planned attacks against the forces of the Zionist occupier."



A Palestinian Islamic Jihad poster commemorating Muhammad Ibrahim al-Samouni is captioned: "He (Muhammad), along with the *mujahed* Walid Rashad al-Samouni, blew up the tank, causing the deaths of a number of Zionists, as

admitted by the enemy, on the first night of the ground invasion during the war south of the Zeitun neighborhood."(24)

***Statement of Khaled Muhammad Abd Rabbo***

Khaled Abd Rabbo reported on the deaths of two of his children on January 7, 2009.(25) Khaled lives in Jabaliya near the Israeli border in a four-story house. He and his family did not leave it even when the land battles began. He claimed he saw no activity of armed Palestinians in the area. He said that on January 7 an IDF force entered the area around his house and positioned tanks nearby. The soldiers used a megaphone to call the residents out of the house. They came out holding a white flag, and one of the soldiers got out of a tank and shot at his children for no reason. He said two of his daughters were killed, another was seriously wounded, and his wife was also wounded.

No questions were asked by the members of the commission, not about the events, or whether there was fighting in the area, or whether there were armed Palestinians.

Contrary to the claims made by Khaled Abd Rabbo, Palestinian sources reported on armed Palestinian activity in the area near the incident and on exchanges of fire between Palestinians and IDF forces. At the time Khaled claimed his daughters were shot by IDF soldiers, four other Palestinians were killed nearby: Ibrahim Abd al-Rahim Suleiman, 19, an Izz al-Din al-Qassam Brigades operative; Shadi Issam Hamad, 33, a Popular Front for the Liberation of Palestine (George Habash) operative; Muhammad Ali al-Sultan, 55, an Izz al-Din al-Qassam Brigades operative; and Ahmad Adib Faraj Juneid, 26, an Izz al-Din al-Qassam Brigades operative.(26)

The circumstances of Ahmed Juneid's death shed light on the event: Ahmed Juneid joined Hamas in 2003 and later joined the Muslim Brotherhood and also became an Izz al-Din al-Qassam Brigades operative. He was posted to the front-line positions in Jabaliya, joined the Brigades' sabotage and suicide bomber unit, and participated in ambushes and fighting with IDF forces. According to the Izz al-Din al-Qassam Brigades website, Ahmed Juneid was another one of its operatives who, after the IDF attack on December 27, 2008, was ordered to take up a position at the front according to previous instructions. According to the website report, on January 7 he participated in an ambush of IDF soldiers in one of the houses in the eastern part of Jabaliya along with other Izz al-Din al-Qassam Brigades operatives. The Hamas squad was identified by the IDF and an exchange of fire ensued. The IDF force was forced to withdraw and armed vehicles were brought in, forcing Juneid to leave the house he was in and go elsewhere. A surveillance plane located him and fired a rocket, killing him.(27)

The Izz al-Din al-Qassam Brigades report reveals information about the exchange of fire between the IDF and armed Palestinians in the area where Khaled Abu Rabbo's daughters were killed, and its closeness in time to the events he reported. His version and the Izz al-Din al-Qassam Brigades website provided similar descriptions of the advance of IDF armored vehicles into the area at the same time. However, Khaled Abu Rabbo did not tell the UN

commission about the exchanges of fire between IDF forces and Izz al-Din al-Qassam Brigades operatives. The possibility cannot be ruled out that his children were caught in the crossfire and may have been killed by Palestinians.

As we can see from a detailed analysis of freely accessible Palestinian sources (in Arabic), competing explanations exist that counter the claims of the Palestinian witnesses who testified before the Goldstone Commission. At the same time, questioning by the members of the commission proved to be superficial and was ill-suited to elicit the truth about events in Gaza.

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## **Palestinian "Policemen" Killed in Gaza Operation Were Trained Terrorists**

**Lt. Col. (ret.) Jonathan D. Halevi**

- After international human rights organizations accused Israel of killing innocent Palestinian "traffic policemen" during the Gaza operation, a detailed investigation shows that a decisive majority of the Palestinian "policemen" were members of the military wings of the Palestinian terror organizations and fighters who had undergone military training.
- Among the 343 members of the Palestinian security forces who were killed, 286 have been identified as terror organization members (83 percent). Another 27 fighters belonging to units undergoing infantry training raises this total to 313 (91 percent).
- Lumped under the rubric of the "Palestinian police" are all the security bodies that fulfilled combat and terror roles against Israel, the intelligence and preventive intelligence bodies, as well as those active in policing and maintaining order. Those serving in all of the Palestinian security apparatuses in 2007 and 2008 took part in terror activity and fighting against the IDF.
- In the December 27, 2008, attack on an officer training course at Gaza police headquarters, 89 dead were counted. Of these, 60 (67 percent) belonged to Hamas and almost all were members of its military wing, the al-Qassam Brigades. The total number of terror activists and fighters among those killed at police headquarters was 81 (91 percent).
- The human rights organizations which reported on Palestinian casualties in Gaza failed to mention the affiliation of hundreds of Palestinian security personnel who were members of terrorist organizations and who were

trained fighters, thus artificially inflating the list of "civilians" killed by the IDF.

After international human rights organizations accused Israel of killing innocent Palestinian "traffic policemen" during the Gaza operation (Dec. 27, 2008-Jan. 18, 2009) who were not involved in fighting or in terror, a detailed investigation shows that a decisive majority of the Palestinian "policemen" were members of the military wings of the Palestinian terror organizations and fighters who had undergone military training.

Among the 343 members of the Palestinian security forces who were killed, 286 have been identified as terror organization members (83 percent). Another 27 fighters belonging to units undergoing infantry training raises this total to 313 (91 percent).



Hamas "policemen"

## Who Were the Palestinian "Policemen"?

The official list of the slain Palestinian policemen was published for the first time on the police website on February 24, 2009.<sup>(1)</sup> The term "Palestinian police" was incorporated in the interim accords between Israel and the Palestinian Authority (1995) pursuant to the Israeli demand that sought to avoid awarding the Palestinians the trappings of an independent state. Lumped under the rubric of the "Palestinian police" were all the security bodies that fulfilled combat and terror roles against Israel, the intelligence and preventive intelligence bodies, as well as those active in policing and maintaining order.

Following the Hamas victory in the parliamentary elections of January 2006, Hamas established a new security force – the Executive Force – subordinate to the Ministry of Interior, which was a military force intended for "qualitative missions" in the fight against Israel and elements opposed to the regime. Hamas ally Jamal Abu Samhadana, who headed the Popular Resistance Committees terror organization, was placed in charge of this force.

Following the June 2007 military coup that enabled Hamas to take over the Gaza Strip, Hamas authorities conducted a reorganization of the Palestinian security forces, known as the "Palestinian police." Its main components include:

- The Police – infantry forces that are intended also to fight against Israel, comprised of the Rapid Intervention Force, the Executive Force, the Naval Police, and the Military Police
- National Security – an infantry force
- Security and Protection – a skilled force loyal to the Hamas regime and charged with providing security for the leadership and sensitive institutions
- Internal Security – the preventive intelligence apparatus
- Civil Defense – evacuation and rescue forces

An analysis of the lists of Palestinians slain in 2007 and 2008 reveals that those serving in all of the Palestinian security apparatuses took part in terror activity and fighting against the IDF.(2) The Hamas leadership presented these organizations alongside "the Palestinian Resistance" as the spearhead of the continued armed struggle and the *jihad* for liberating all of Palestine.

## **How Many Slain Palestinian "Policemen"?**

The Palestinian police published an official list of 231 "policemen" killed in the course of the Gaza operation. Ihab al-Ghussein, spokesman for the Palestinian Ministry of Interior, later divulged that the number of Palestinian "police" killed totaled 230, the Security and Protection apparatus lost 50, National Security and Internal Security had 10 slain, and Civil Defense 11. This makes a total of 301 killed among the various Palestinian security apparatuses of the Hamas government.(3)

This study examined the official published lists of policemen as well as the lists of fatalities put out by the Palestinian human rights organizations PCHR and El-Mizan, as well as additional information published in open sources (such as the websites of the Palestinian Authority, the Hamas government, and the Palestinian press). The total data listed the names of 343 who were defined as Palestinian "policemen" or "security personnel" killed during the course of the Gaza operation.

## **The Connection between the Palestinian Security Forces and the Palestinian Terror Organizations**

An analysis of the list of slain Palestinian security forces shows that of the 343 killed, 258 (75.2 percent) were Hamas members, almost all of them members of the Izz ad-Din al-Qassam Brigades, the military wing of Hamas.(4) Twelve more were members of the Popular Resistance Committees, eight belonged to the military wings of Fatah, three were members of Islamic Jihad, four were defined as "fighters" whose organizational affiliation is unknown, and one belonged to the "Army of the Umma," an extreme Islamic terror organization identified as an al-Qaeda offshoot.

In the official fatality list published by the Palestinian police, only one policeman was listed as a member of the traffic division, senior NCO Hussein Naim Hussein Abbas, who was also a member of the al-Qassam Brigades.

Another 27 fighters belonged to units undergoing infantry training intended for fighting against Israel. Thus, the total number of terror activists and fighters among those killed from the Palestinian security apparatuses totals 313, or 91 percent of the fatalities.

In the December 27, 2008, attack on an officer training course at Gaza police headquarters, 89 dead were counted, according to the PCHR. Of these, 60 (67 percent) belonged to Hamas and almost all were members of the al-Qassam Brigades. Two belonged to the military wings of Fatah and one to the Popular Resistance Committees. Eighteen came from units that were undergoing infantry training intended for fighting against Israel. Thus, the total number of terror activists and fighters among those killed at police headquarters was 81 (91 percent).

## **Ten Examples of "Policemen" from Hamas' Military Wing**

Among those killed in the IDF attack on police headquarters on December 27 were the following members of the military wing of Hamas:

1. Omar Bakr Shimali (b. 1988) was a member of the Izz ad-Din al-Qassam Brigades. Shimali began as an activist in the Hamas student organization (*al-Kutla al-Islamiya*). He was assigned to a "Special Unit" and was stationed at front-line positions. At the same time, Shimali was active in the military police and worked at police headquarters.(5)
2. Mohammed Khaled Shahiber (b. 1987) joined the al-Qassam Brigades in 2007 and was stationed at front-line positions.(6)
3. Bilal Mahmoud Omar (b. 1989) joined the Muslim Brotherhood in 2006 and at the same time was active in the Hamas security apparatus. In 2007 he joined the al-Qassam Brigades and was assigned to forward positions. He served as a security guard at the home of Police Commander Tawfik Jabber.(7)
4. Sidqi Ismail Hamad (b. 1983) was active in Hamas and the Muslim Brotherhood, and in mid-2008 joined the al-Qassam Brigades. He served as a bodyguard for Hamas Prime Minister Ismail Haniyeh. He was an officer with the rank of lieutenant in the Security and Protection apparatus.(8)
5. Mohammed Tawfik al-Nimra (b. 1986) joined Hamas in 2003 and also swore loyalty to the Muslim Brotherhood. In 2006 he joined the al-Qassam Brigades and was stationed in front-line positions.(9)
6. Mohammed Ziad al-Nabih (b. 1981) joined Hamas and the Muslim Brotherhood in 1995 and the al-Qassam Brigades in 2004.(10)

7. Nasser Abdallah al-Ghara (b. 1962) joined Hamas and the Muslim Brotherhood in 1989, and in 2004 he joined the al-Qassam Brigades. He was active in the engineering unit that was engaged in preparing explosive charges.(11)
8. Nahez Salim abu-Namous (b. 1989) joined the al-Qassam Brigades in 2007 and underwent infantry and mortar training.(12)
9. Hussam Muhammed al-Majaida (b. 1982) joined Hamas in 2004 and a year later the al-Qassam Brigades. He was active in the Executive Force of the Palestinian Police established by Hamas in 2006.(13)
10. Hassan Maher Hassan Aruk (b. 1985) was active in the al-Qassam Brigades and was stationed in front-line positions.(14)

## **No "Friendly" Fire Incidents Among Palestinians**

The Palestinian terror organizations reported on the intensive fighting they conducted against IDF forces within densely populated urban areas of Gaza. There are reports about the launching of many hundreds of mortar shells in populated Palestinian areas, the launching of antitank missiles at Palestinian houses entered by IDF forces, small arms fire and machine gun fire at IDF forces within Palestinian neighborhoods, the detonation of powerful explosive charges near Palestinian houses, booby-trapped houses, and setting explosive charges along transportation arteries.

Nevertheless, I have yet to encounter a single report about a Palestinian who was killed or even lightly wounded by "friendly" Palestinian fire. All the Palestinians killed and wounded were attributed exclusively to the IDF, while none of the human rights organizations speculate about this manifest miracle. On the other hand, in all of Israel's wars, the IDF sustained a number of losses from "friendly" fire, including four out of the ten soldiers killed in the Gaza operation.

## **Implications**

The charges made against the IDF for presumably killing "traffic cops" and "innocent policemen" fulfilling a civilian role are incorrect. The decisive majority of the Palestinian "police" were members of the military wings of the Palestinian terror organizations (primarily Hamas) and fighters who had undergone military training. The recruitment of Izz ad-Din al-Qassam Brigades members into the official security services allowed the Hamas government to pay their salaries out of the government budget.

The human rights organizations which reported on Palestinian casualties in the Gaza operation failed to mention the affiliation of hundreds of Palestinian security personnel who were members of terrorist organizations and who were trained fighters, thus artificially inflating the list of "civilians" killed by the IDF.



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The Turkish ship *Mavi Marmara* taking part in the Gaza flotilla.

## The Legal Basis of Israel's Naval Blockade of Gaza

**Prof. Ruth Lapidoth**

- The relations between Israel and Hamas are in the nature of armed conflict. Nowadays no formal declaration of war is needed. Hence the rules of the laws of armed conflict apply. This means that Israel may control shipping headed for Gaza – even when the vessels are still on the high seas.
- The rules of naval warfare have not been fully codified in a treaty and are in the nature of binding customary rules. They can be found in the relevant manuals of Western armies (in particular the U.S. and Britain) and in the San Remo Manual prepared by a group of experts.
- In order to be legal, a blockade has to be declared and announced, effective, non-discriminatory, and has to permit the passage of humanitarian assistance to the civilian population. In addition, the San Remo Manual of 1994 includes two conditions: first, the state which applies the blockade may decide where and when and through which port the assistance should reach the coast. In addition, the state may require



that a neutral organization on the coast should verify who is the recipient of the assistance. In Gaza, for instance, does it reach the civilians or Hamas?

- A ship that clearly intends to breach the blockade may be stopped already when it is still on the high seas. Stopping the flotilla heading for Gaza in international waters 100 kilometers from Israel was not illegal; in time of armed conflict, ships intending to breach the blockade may be searched even on the high seas.
- Israel is within its rights and is in full compliance with international law because it has fulfilled all of the above-mentioned conditions for a lawful blockade. E.g., in January 2009 Israel notified the relevant authorities of its intention to establish a blockade of the Gaza coast.

What is the legal basis of Israel's naval blockade of Gaza? The relations between Israel and Hamas (which has ruled the Gaza Strip since 2007) are in the nature of armed conflict, meaning that the rules of the laws of armed conflict apply. This means that Israel may control shipping headed for Gaza – even when the vessel is still on the high seas. Israel may not do so in the territorial sea of a third country, such as Cyprus, but in time of armed conflict Israel may check vessels on the high seas that are headed for Gaza.

A naval blockade means preventing the passage (entry or exit) of all vessels to or from the ports and coastal areas of the enemy, irrespective of the kind of cargo carried by these vessels. One has to define clearly the borders of the area to which the blockade applies. The blockade has to be distinguished from other institutions of naval warfare, such as exclusion zones and security zones.

## **The Sources of International Law on Blockades**

What are the sources of international law on blockades? The rules on blockades are based on customary international law, as there is no comprehensive international treaty on this subject. Customary law is binding in international law. According to Article 38 of the Statute of the International Court of Justice, the sources of international law are: a) international treaties, b) international custom, and c) general principles of law recognized by civilized nations. A binding customary rule is created when many states have for a long time behaved in a certain way and have done so because they felt an obligation to behave in that manner.

Blockades have been in existence for hundreds of years. They were mentioned specifically in the 1856 Declaration of Paris (after the Crimean War) Respecting Maritime Law. A more detailed text followed in 1909 – the London Declaration on Naval Warfare. This declaration sought to codify the rules of war at sea, but the states that participated in the declaration never ratified it. However, states actually followed the rules laid down in the declaration, and thus its provisions became binding customary rules.

The customary rules on blockade can be found in the manuals of the laws of war issued by certain Western countries such as the United States and Britain. In addition, there is a manual prepared by an international group of experts in 1994 called the San Remo Manual. (While some speak about the San Remo Agreement, there was no agreement, but rather a manual.) In addition, the general principles of the laws of armed conflict apply also to naval warfare.

## **When Is a Blockade Legal?**

In order to be legal, several conditions have to be fulfilled. The first is the requirement to give widespread notice when a blockade is applied and to make sure that any ship that is stopped knows that there is a blockade. Nowadays the problem of notification is much easier than in the past because of the great improvement in communications.

Another condition for the legality of a sea blockade is effectiveness. It is not enough simply to declare a blockade. It has to be enforced, otherwise it is not valid and legal.

According to a further condition, a blockade should not cut off an unrelated foreign state from access to the sea. In the case of Gaza, the blockade does not prevent Egypt from reaching the sea.

Furthermore, a blockade has to be based on equality: It must apply to everybody. Of course there is always the possibility that the blockading party may give special permission to certain neutral ships to go through, but these are exceptions.

A blockade has to permit the passage of humanitarian assistance if needed. However, the San Remo Manual includes two conditions (in Article 103): first, the blockading party may decide where and when and through which port the assistance should reach the coast. In addition, the state may require that a neutral organization on the coast should control the distribution of the items. For instance, in Gaza, does it reach the civilians or Hamas?

Finally, there is the condition that a state may not starve the civilian population (San Remo, Article 102). This conforms also to the general principles of the laws on armed conflict.

## **What If a Ship Disobeys the Blockade?**

What may be done to a ship that disobeys the blockade? Here, there may be a distinction between merchant ships and warships. A merchant ship may be visited, searched, or captured; and if the ship resists, it may be attacked. The situation of neutral warships is not quite clear: Warships may also be searched and captured, but opinions are divided on whether they may be attacked. An attack is certainly permitted in a situation of self-defense.

A ship that clearly intends to breach the blockade can be dealt with while it is still

on the high seas. Stopping the flotilla in international waters 100 kilometers from Israel was legal: In time of armed conflict, ships breaching the blockade may be searched even on the high seas.

## **Precedents of Blockades**

There are numerous precedents of blockades. During the Korean War between 1950 and 1953 there was a blockade. In 1971, when Bangladesh tried to secede from Pakistan, India applied a blockade. During the Iran-Iraq war between 1980 and 1988, there was a blockade of the Shatt el-Arab. Lebanon was blockaded for several months in the 2006 war between Israel and Hizbullah, and Israel allowed safe passage from Lebanon to Cyprus for humanitarian purposes.

In the treatment of the flotilla heading for Gaza, Israel has acted in compliance with international law because it has fulfilled all the conditions for a lawful blockade. In January 2009 Israel notified the relevant authorities of its blockade of Gaza – a lawful means of naval war. The existence of an armed conflict between Israel and Hamas in Gaza was well known and did not need a special declaration to that effect.

## **But Gaza Is Not a State**

Can Gaza be considered an enemy although it is not a state? According to international law, this is possible. In any case, according to various judgments of Israel's Supreme Court, the conflict with Gaza is an international conflict and not an internal one because Gaza is not part of Israel. Neither Gaza nor the West Bank have been annexed by Israel, nor has Israel's "law, jurisdiction and administration" been extended thereto (as was done with east Jerusalem in 1967 and the Golan Heights in 1981).

With regard to the status of Gaza: the territory was under Ottoman sovereignty from 1517 until 1917, and then it became part of the British Mandate for Palestine. In 1948 Britain left the area and Gaza was occupied by Egypt, but Egypt never annexed it. In 1967 Gaza was occupied by Israel, which also did not annex it. In 2005 Israel withdrew from Gaza, and in 2007 it was completely taken over by Hamas. Some say that Gaza is an area *sui generis*, which means a special situation, while according to others, it is a self-governing territory with certain powers but not with all the powers of a state.

In both the 1993 Israeli-Palestinian Declaration of Principles on Interim Self-Government Arrangements and the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, it was agreed that after a certain period of time negotiations would take place on the permanent status of Gaza and the West Bank, but these negotiations have so far failed. The 2003 Roadmap, to which both parties have agreed, foresees a two-state solution, and that a Palestinian state should be established by agreement with Israel.

## **Is Israel Still an Occupier?**

A recurring question is whether Gaza is still occupied or not. Some say that since Israel is still in control of Gaza's airspace and adjacent sea, Israel is still the occupier. According to another opinion, under the Hague Regulations of 1907 (Respecting the Laws and Customs of War on Land), occupation has to include full control of the area. ("Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." – Article 42), and of course Israel does not control the whole territory of Gaza. Therefore, it is not responsible for what happens there.

In my opinion, since Israel is not in control of Gaza, it is not the occupier, but in those areas in which Israel still has control – which means sea and airspace – Israel is responsible. Here we have to distinguish between full control of the territory and control only of the sea and airspace.

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## **Is Israel Bound by International Law to Supply Utilities, Goods, and Services to Gaza?**

**Abraham Bell**

- British Foreign Secretary David Miliband and Development Secretary Douglas Alexander alleged that Israel's decision to respond to ongoing Palestinian rocket attacks by limiting the supply of fuel to Gaza violated international law. The UN Special Coordinator for the Middle East Peace Process, Robert H. Serry, also asserted: "Israeli measures amounting to collective punishment are not acceptable. We call on Israel to meet its obligations toward the civilian population of Gaza under international law." Yet international law does not require Israel to supply Gaza with fuel or electricity, or, indeed, with any other materials, goods, or services.
- Article 23 of the Fourth Geneva Convention permits states like Israel to cut off fuel supplies and electricity to territories like Gaza. It only requires Israel to permit passage of food, clothing, and medicines intended for children under fifteen, expectant mothers, and maternity cases. Moreover, Israel would be under no obligation to provide anything itself, just not to interfere with such consignments sent by others. Article 70 of the First Protocol Additional to the Geneva Conventions of 1977 creates a slightly broader duty regarding the provision of essential supplies, but it does not

list fuel and electricity as items for which passage must be permitted.

- Dependence on foreign supply – whether it be Gazan dependence on Israeli electricity or European dependence on Arab oil – does not create a legal duty to continue the supply. Absent specific treaty requirements, countries may cut off oil sales to other countries at any time. In addition, neither Israel nor any other country is required to supply goods in response to its foes' resource mismanagement or lack of natural bounty.
- There is no precedent that creates legal duties on the basis of a former military administration. For instance, no one has ever argued that Egypt has legal duties to supply goods to Gaza due to its former military occupation of the Gaza Strip. Furthermore, control of airspace does not create a legal duty to supply goods either. For instance, UN Security Council-ordered no-fly zones in Iraq and Libya were not seen as the source of any legal duty to supply those countries with electricity, water, or other goods.

On Feb. 9, 2008, British Foreign Secretary David Miliband and Development Secretary Douglas Alexander attacked Israel's decision to respond to ongoing Palestinian rocket attacks from Gaza by limiting the supply of fuel to the Hamas-ruled territory. The two British leaders alleged that Israel's action violated international law. On Feb. 27, 2008, the new UN Special Coordinator for the Middle East Peace Process, Robert H. Serry, also asserted in a briefing to the UN Security Council: "Israeli measures amounting to collective punishment are not acceptable. We call on Israel to meet its obligations toward the civilian population of Gaza under international law."

International officials are entitled to object on political grounds to Israel imposing even limited economic sanctions in response to Palestinian terrorism. However, they err in insinuating that international law forbids Israel's actions. International law does not require Israel to supply Gaza with fuel or electricity or, indeed, with any other materials, goods, or services.

## **What Does Article 23 of the Fourth Geneva Convention Say?**

Article 23 of the Fourth Geneva Convention requires parties to certain conflicts to permit transit to enemy civilian populations of a limited number of items under a limited set of conditions. However, the fighting in and around the Gaza Strip is not a conflict covered by the Fourth Geneva Convention: the conflict is not one between state parties to the Convention, and Gaza is not occupied territory. Therefore, Israel is free to ignore the injunctions of Article 23.

Even if it were bound by the Fourth Geneva Convention, Israel would be acting in full compliance with international law. Article 23 of the Fourth Geneva Convention permits states like Israel to cut off fuel supplies and electricity to territories like Gaza. Article 23 only requires a party to permit passage of food, clothing, and medicines intended for children under fifteen, expectant mothers, and maternity cases. Were Article 23 to apply, Israel would still be under no obligation to permit

passage of electricity or fuel or any items other than food, clothing or medicine.

Moreover, under Article 23, Israel would be under no obligation to provide anything itself; Israel would only be required not to interfere with consignments of food, etc. sent by others. Article 23 does not require unfettered passage of food, clothing, and medicine to the entire civilian population of enemy territory; if the article applied, Israel would be required only to permit passage for the benefit of Palestinian children, mothers of newborns, and pregnant women.

Finally, under Article 23, a party can block passage even of food, clothing, and medicine for children and mothers if it has serious grounds for worrying that the items will be intercepted before reaching their destination or that the items may benefit the enemy's economy by substitution. Israel has excellent grounds for fearing both of these results, especially after Hamas seized fourteen Red Crescent trucks with humanitarian aid on Feb. 7, 2008, on the pretext that only Hamas may decide how to distribute aid in Gaza. Thus, Article 23 would permit Israel to block shipments even of food, clothing, and medicine intended for children, pregnant women, and mothers of newborns.

### **What Does Article 70 of 1977 Say?**

Article 70 of the First Protocol Additional to the Geneva Conventions of 1977 creates a slightly broader duty regarding the provision of food, medical supplies, clothing, bedding, means of shelter, and "other supplies essential to the survival of the civilian population." Israel, however, is not a party to the First Protocol and is therefore not bound by the provisions of Article 70.

Even if Israel were so bound, Article 70 does not list fuel and electricity as items for which passage must be permitted. Moreover, Article 70 does not place any duty on warring parties to supply the required items. It imposes a general duty on all states to organize "relief actions" and on the warring parties not to interfere with the actions. Thus, under Article 70, Israel would have no obligation to provide fuel or electricity; indeed, it would not even have any particular duty to provide food and medicine. At most, Article 70 would require Israel to permit transit to others' shipments of food and medicine. Israel already does this without Article 70.

### **Must Israel Ensure a Minimum Supply of Fuel and Electricity to Gaza?**

More generally, the Israeli Justice Ministry has acknowledged a duty under customary international law not to interfere with the supply of basic humanitarian items such as food and medicine, and the Israeli Supreme Court has enforced this duty in several decisions (most recently, HCJ 9132/07, *Ahmed v Prime Minister*, on Jan. 30, 2008).

In a Feb. 11, 2008, article in the *Jerusalem Post*, a former Israeli Foreign Ministry attorney summarized this acknowledged duty expansively and inaccurately as a

requirement that Israel ensure a minimum necessary supply of food, fuel, and electricity to prevent starvation or a humanitarian crisis. Even if the duty were as broad as in this misstatement, Israel has not breached its duty by cutting off Israeli fuel; Israel has only reduced supplies, while Gaza maintains more than sufficient supplies for basic humanitarian needs.

Israel is not required by its customary general humanitarian duties to provide required items itself, only not to interfere with their passage. And fuel and electricity are almost certainly not items that Israel or other warring parties are required to supply. Additionally, Israel is not the sole available source of fuel and electricity to Gaza and, therefore, even if it were true that, as Milibank and Alexander stated, "without a steady supply of electricity hospitals cannot function, pumping stations and sewage systems fail, and access to clean water is denied," Israel would not be required to permit passage of fuel and electricity. Moreover, given the likelihood of Hamas diversion of assistance, even the customary rule permits Israel to interfere with the passage of humanitarian items to ensure that they do not reach the wrong hands or benefit the military efforts or economy of the enemy.

Beyond these customary duties, the same Israeli attorney wrote that "the international community...regards Israel as continuing to have some responsibility for ensuring supplies to the civilian population" because Gaza "depends" on Israel for its electricity and water after local mismanagement of water supplies, several decades of Israeli military administration, Israeli control of Gazan airspace, and continuing military clashes. Unfortunately, he inaccurately referred to the Israeli curbs on the supply of goods as a "blockade" and misleadingly refrained from noting explicitly that there is no legal basis for the stated expectations of the "international community."

None of the grounds referenced by the *Jerusalem Post* article provide a legal basis for claiming that Israel must supply Gaza with electricity or the like. First, dependence on foreign supply – whether it be Gazan dependence on Israeli electricity, European dependence on Arab oil, or Somali dependence on foreign food aid – does not create a legal duty to continue the supply. Absent specific treaty requirements, countries may cut off oil sales to other countries at any time. Second, neither Israel nor any other country is required to supply goods in response to its foes' resource mismanagement or lack of natural bounty. Third, there is no precedent or legal text that creates legal duties on the basis of a former military administration. For instance, as the article noted, no one has ever argued that Egypt has legal duties to supply goods to Gaza due to its former military occupation of the Gaza Strip. Fourth, control of airspace does not create a legal duty to supply goods either. For instance, UN Security Council-ordered no-fly zones in Iraq and Libya were not seen as the source of any legal duty to supply those countries with electricity, water, or other goods. Finally, military clashes do not themselves create a legal duty to supply goods. Only occupation as described by the Fourth Geneva Convention requires an occupier to ensure supply of goods. In other cases of military clashes, the parties' duty is limited to not interfering with the passage of certain humanitarian goods, as described

above.

It is noteworthy that Miliband and Alexander, while condemning the recent Palestinian terrorist bombing in Dimona, were not reported as having referred to the illegality of the Palestinian attack under international law or, indeed, to have made any reference whatsoever to the continued illegal Palestinian rocket attacks on Israeli towns like Sderot. This is unfortunate, as the Dimona bombing and rocket attacks are clearly war crimes and illegal acts of terror under customary international law and international treaties such as the International Convention for the Suppression of Terrorist Bombings.

Miliband and Alexander appear to misunderstand the duties of their country and Israel under the relevant treaties on terrorism and relevant UN Security Council resolutions. Under Security Council Resolution 1566, Britain is required to cooperate fully in Israel's fight against terrorism "in order to find, deny safe haven and bring to justice...any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens." Even if Miliband and Alexander are correct in assessing the motivation of the terrorist attack in Dimona as an attempt to "undermine the peace process," British support for the "peace process" does not absolve Britain or other states of their duties to cooperate in Israel's fight against terrorism.

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## **Proportionality in Modern Asymmetrical Wars**

**Amichai Cohen**

### **Executive Summary**

- Asymmetrical conflicts are fought between a state following the laws of armed conflicts or international humanitarian law, and organizations that almost never follow these rules and have very little incentive to do so. While the Geneva Conventions and their protocols were framed in an era of "classic" military engagements, when wars were fought between nations and by armies that observed the rules of armed conflict, we should examine whether these norms are suited to modern armed conflicts.
- In practice there exist two very different approaches to the interpretation of the principle of proportionality: the human rights model, which gives preference to the interests of civilians who might be harmed by military action, and the contractual model, which gives precedence to state



interests. Yet a third approach may be more suitable: the administrative model, based on respect for the professional discretion of the commander in the field, with some necessary limitations.

- The concept of proportionality permits military personnel to kill innocent civilians – provided that the intended targets of the operation are enemy forces and not civilians.
- In October 1993 a force of U.S. troops was caught inside the streets of Mogadishu, Somalia. Some 18 American soldiers were killed in a battle where women and children were being used as shields. Over one thousand civilians are believed to have been killed by American fire.
- In its air campaign against Serbia in 1999, NATO adopted a policy of zero risk to its soldiers. This meant that pilots flew at a relatively high altitude, which also enlarged the risk to civilian lives on the ground. The number of civilian deaths in the NATO campaign was around 500.
- American forces first attempted to retake the city of Fallujah, one of the centers of the Iraqi insurgency, in April 2004. The operation was halted after a few days due to the large number of civilian casualties. In November 2004, U.S. and Iraqi forces attempted to take Fallujah again. Reports of the number of people killed range from a few hundred to several thousand. The tactics used by U.S. forces included the use of white phosphorous. Vast quantities of fire power were employed in an urban setting known to house civilians, in order to protect the lives of American soldiers.
- As the uses of force in Somalia, Kosovo, and Iraq show, Western armies are very concerned about protecting the lives of their soldiers, and to that end are willing to risk many civilian lives. They also find acceptable the notion that civilian lives can be forfeited in order to attain important military goals.
- Proportionality cannot be detached from the question of responsibility: which side created the situation in which civilians find themselves? From a military as well as a moral perspective, the onus clearly lies with the party that chooses to fight from within civilian concentrations.
- Once the non-state actor internalizes the fact that his foe is committed to the protection of civilians, even at the expense of military actions, that actor will use civilians as shields that might protect him from enemy assaults. This is precisely the tactic adopted by Hamas and Hizbullah.
- Israel's Gaza operation clearly shows that Israeli commanders successfully followed the requirements of the administrative model of the principle of proportionality. According to newspaper and oral reports, the IDF did require commanders to take humanitarian law into account in the planning stages of the operation. Moreover, legal advisors were involved in the planning of many operations and provided advice regarding specific

targets. The right questions were asked, checks were made, and the incidental damage to civilians was on the whole limited.

Envision a state involved in an armed conflict with a non-state actor – a terrorist organization, a militia, or an organized armed band. The non-state actor embeds itself within the civilian population. Its fighters dress as civilians; they hide their weapons and equipment in civilian houses and places of worship; they launch rockets from school precincts. Moreover, these combatants deliberately fight from within the civilian population. Every time they are attacked, they seek protection by surrounding themselves with civilians (who voluntarily or under duress participate in these actions).

Recent armed conflicts have increasingly accorded with the model described above. Such, for instance, was the U.S. experience in Somalia, and later in Iraq and Afghanistan. Such was the Sri Lankan experience with the Tamil Tigers, such was the Russian experience in Chechnya, and the Georgian experience in South Ossetia. Such was the Israeli experience in Lebanon (2006) and Gaza (2008-9). This study looks at the special context of these conflicts. It also seeks to draw more general conclusions about the nature of the law of war with regard to modern armed conflicts.

Armed conflicts of this type have sometimes been termed “asymmetrical”(1) – an adjective used principally with reference to the fact that the protagonists are a state, with all its might and force, and an organization with few heavy arms and a limited number of fighters. But such conflicts are also asymmetrical in a more complicated sense: they are fought between a state, in possession of sound reasons for following the laws of armed conflicts (LOAC) or international humanitarian law (IHL),(2) and a high incentive and organizational obligation to do so, on the one hand, and on the other hand, an organization that almost never follows these rules and has very little incentive to do so.

*Asymmetrical conflicts are fought between a state following the laws of armed conflicts or international humanitarian law, and organizations that almost never follow these rules and have very little incentive to do so.*

States involved in these conflicts mostly attempt to follow, or are expected by the international community to follow, IHL as detailed in customary international law, in the Geneva Conventions, and in other sources of applicable international law. (3)

However, it has become increasingly difficult to abide by these laws, mainly because of the novel nature of the problems that constantly arise. This brief review will only deal with two of the most prominent of such problems:

- The first is how to apply the rule forbidding indiscriminate attacks on a civilian population when the enemy deliberately operates from within that environment. Direct attacks against civilians are of course always forbidden. However, what are the appropriate norms that a state should

apply when the only possible way of fighting the enemy involves risking the lives of civilians whom the enemy is using for its own protection?

- A second problem arises from the fact that non-state actors are not susceptible to the range of formal and informal sanction which may be used against states. Since international law is not policed effectively, non-state actors may readily assume that their violations of the laws of war, including those mentioned above, will not be punished by law. For example, they may target civilians of the state actor in the knowledge that there exists very small chance that they will be punished for doing so by any international judicial body. Consequently, while one side to the conflict behaves in accordance with IHL, the other considers itself to be free of the limitations imposed by these rules.(4)

Consideration of these and similar issues has motivated some scholars and politicians to call for the redefinition or reinterpretation of the rules of armed conflicts. The Geneva Conventions and their protocols, runs their argument, were framed in an era of more “classic” military engagements, when wars were fought between nations and by armies that observed the rules of armed conflict. The norms that may have been suitable in such situations are not suited to modern armed conflicts.

Changes to IHL may indeed be required, although it will prove very difficult to actually convince states to adopt them. However, before tabling dramatic changes, it might be useful to evaluate the current state of IHL, and ask whether some of the problems discussed above cannot be solved within the existing framework, without a need for reconstruction.

This study begins (Part I) by outlining the principle of proportionality in IHL, which has proven to be the major source of contention regarding the implementation of IHL in the asymmetrical conflicts described above. Understanding the problems involved in the proportionality principle constitutes the first step towards solving this issue.

Parts II and III analyze the different interpretations given to the principle of proportionality by state practice, judicial decisions, and in studies undertaken by academics and NGOs. In practice there exist two very different approaches to the interpretation of this principle: the *human rights model*, which gives preference to the interests of civilians who might be harmed by military action, and the *contractual model*, which gives precedence to state interests.

*In practice there exist two very different approaches to the interpretation of the principle of proportionality: the human rights model, which gives preference to the interests of civilians who might be harmed by military action, and the contractual model, which gives precedence to state interests.*

Part IV outlines an approach which may be more suitable: the *administrative model*, based on respect for the professional discretion of the commander in the

field, with some necessary limitations. This part explains what this model means, the implications of this interpretation, and applies these principles to the Israeli operation in Gaza.

## **Part I: Proportionality and Its Requisites**

Proportionality in IHL is a difficult concept for field commanders, legal experts and philosophers to analyze, and much more so to accept. On the one hand, it permits military personnel to kill innocent civilians – provided that the intended targets of the operation were enemy forces and not civilians. Not even knowledge in advance that civilians might be hurt outlaws an operation – unless the estimated civilian casualties are excessive relative to the military advantage that the prospective attack seems likely to confer. On the other hand, the principle of proportionality limits military action even when a legitimate military target is attacked, when the attack may cause excessive damage to civilians. Hence, an exact understanding of the norm is required.

### **A. What Is Proportionality in IHL?**

Although the term “proportionality” does not explicitly appear in any IHL treaty,(5) it boasts a long pedigree within the laws of war, according to some scholars dating back to the Middle Ages.(6) However, even as the laws of war and armed conflict developed, states were very reluctant to limit their freedom of operation in armed conflict by the principle of proportionality which, as we shall see, possesses the potential to severely limit a commander's flexibility regarding the use of force. So, while certain facets of the principle of proportionality were adopted in specific contexts,(7) there existed no general pronouncement on the subject.

A major breakthrough in this area was not attained until the Additional Protocol to the Geneva Conventions of 1977 (First Additional Protocol).(8) This document includes several specific clauses that are considered to embody the concept, of which the clearest is Article 51(5). The article as a whole warrants extensive citation, not least because it also embodies the principle of *distinction*.

### **Art. 51 – Protection of the Civilian Population**

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate [and therefore prohibited - AC]: (a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

As thus contextualized, the principle of proportionality, as it appears in Article 51(5), constitutes a form of indiscriminate attack. This might seem a little odd, since disproportionate attacks are not *directed* against civilians. The framers of the protocol posited a similarity between a foreseen damage to civilians in excess of the military advantage and a deliberate attack on civilians. We shall return to this point later.

As can be seen, the principle of proportionality, as embodied in Article 51(5) and other similar articles in the First Protocol, is based on two complementary ideas. (9) One is that measures have to be taken to limit the harm that efforts to attain military goals will cause to civilian populations. Geographically, the military target should be defined in the narrowest possible way. Similarly, the attacking power should consider whether there exists a method of attaining the military objective with less or no damage to the civilian population. Thus employed, proportionality constitutes a logical extension of the principle of distinction: everything possible should be done to target exclusively military objectives.(10)

The second section of Article 51(5) is more innovative and embodies a second facet of proportionality. It makes the balance between military necessity and humanitarian interests horizontal rather than vertical – i.e., instead of military necessity justifying any damage to civilians, it orders the attacking power to audit his proposed operation, comparing the foreseeable damage to the civilian population with the expected military advantage.(11) It requires the army to relinquish the effort to gain a military advantage if its attainment threatens to cause disproportionate harm to the civilian population. Damage to the civilian population becomes prohibited once it is seen to be excessive in relation to the military advantage. This equation, which requires the commander to carry out extremely delicate calculations in the heat of battle, has generated much confusion and controversy.

The idea of proportionality is even more unclear because it appears within an article that outlaws indiscriminate attacks – a prohibition based on the principle of distinction. IHL requires that the attacking army target only military objectives, installations, etc.(12) However, the principle of proportionality states that even if an attack is directed against a military target (and hence not prohibited by the principle of distinction), it might still be prohibited if not proportional – i.e., if the attack directed at the military target would cause greater harm to civilians than the military advantage gained. Hence, distinction and proportionality are two separate concepts, with proportionality limiting the permitted scope even of attacks that are otherwise allowed.(13)

## **B. Questions about Proportionality**

As noted earlier, in Article 51(5) the concept of proportionality appears in its most radical sense: the article requires armed forces to forgo some actual military advantage if the incidental civilian suffering can be expected to exceed the military gains. Of the several questions to which this interpretation gives rise,(14) the most salient relate to the impossibility of balancing rights and interests. It is difficult enough to evaluate the value of human lives against military advantages. (15) But even if this hurdle is overcome, there remain several practical questions concerning the application of the norm of proportionality with respect to attacks that affect civilian targets. The formula of proportionality requires the interpretation of several different terms. In all cases the interpretation is debated.

### **(1) The Definition of Attacks**

What exactly is meant by the term “attack”? Does it imply that before firing his rifle each and every soldier should assess the possible consequences of his actions, and estimate the possible incidental damage that his shots might cause? Or is there a requirement for a more cumulative test, which takes into consideration the overall objectives of the military operation and the incidental damage involved?

The protocol provides little guidance as to this issue, and the interpretations submitted by state parties in their declarations differ considerably. Probably, the most extreme cases could easily be excluded – i.e., we do not have to adjudicate every single shot fired, nor limit examinations of proportionality to the overall conflict.(16) At issue are “military operations” – a given tactical process during the course of which several armed activities take place.(17) Nevertheless, the grey area remains considerable. Advocates of a strict interpretation of the term “attack” favor focusing on the specific offensive, while those supporting a more flexible interpretation tend to accept a more liberal understanding of the term – the entire tactical operation.

### **(2) Military Advantage**

Lack of clarity is similarly characteristic with respect to the protocol's reference to “military advantage,” which does not specify the sort of military advantage that might be taken into consideration. The text does attempt to limit the application of the term to military advantages that are “concrete and direct,” which the

International Committee of the Red Cross (ICRC) interprets to mean “substantial and relatively close” with regard to causation.(18) Hence, advantages that are very general and possess no clear causal connection to the occurrence should be disregarded. This limitation seems to exclude several major military operations of the recent past.(19)

Interpretations submitted by several states stress that the military advantage taken into consideration should be that which results from the action as a whole, and not simply from one of its isolated or particular components.(20) This viewpoint seems to substantiate the view that the advantage gained should be assessed not as resulting from a single military action, but from the campaign as a whole. Of course, some limits should be put on this understanding,(21) but what they are remains unclear.

### **(3) Which Civilians Should Be Taken into Account?**

“Civilians” too is a very imprecise term. Does it include non-military personnel employed on a military base? When the enemy intentionally places its facilities within a civilian population, for the explicit goal of protecting his armed forces, should the lives of civilians here be taken into account by the attacking army?

### **(4) Civilian vs. Military Casualties**

How does one measure the excessiveness of civilian casualties with regard to possible danger to the life of soldiers? In other words, does the protection of the lives of one's soldiers constitute a permissible criterion in the equation? How much weight should be given to the protection of the other party's civilian population? Are casualties to be measured on a precise one-to-one basis?

Several states have explicitly made known their position that the term “military advantage” includes the security of the attacking force.(22) The committee appointed by the prosecutor of the International Criminal Tribunal for Former Yugoslavia (ICTY) concluded that states are permitted to protect their soldiers by resorting to an aerial campaign, even though it places a greater number of civilian lives at risk.(23) However, whether or not that conclusion reflects a correct statement of international law is much disputed by international lawyers. (24)

What about the lives of one's own civilians? How should they be measured against the lives of the enemy's civilian population? Is a state required to risk the lives of its own citizens in order to protect those of the other side? Similar questions arise with respect to targeted killings of terrorists.(25) Clearly, commanders of such operations must take into account the likelihood that their implementation endangers anyone in the immediate vicinity of the terrorist who is targeted. However, they must also weigh the threat that the terrorist, unless killed, will inevitably pose to the intended victims of his planned suicide bombing. Is there a gauge for comparing the price to be paid by the two sides?

### **The Future Is Unclear**

The most obvious difficulty generated by the concept of proportionality relates to the feasibility of rational choice in battlefield situations. In essence, the concept of

proportionality assumes that the attacker has an option. He can either take action, thereby bringing to bear his full military advantage, or he can relinquish a small part of his military advantage, in order to significantly limit the damage that he will cause to civilians. Confronted with that choice, proportionality requires the attacker to choose the latter course.

In reality, however, military operations very rarely offer such a clear-cut choice. In most cases, the dangers and potential of the battlefield are unknown. The commanding officer simply cannot make an informed assessment of the harm to the civilian population vis-a-vis the gains from a specific military attack. Hence, the problem with proportionality is that it seems to place an unrealistic burden on the attacker to make a cost-benefit analysis in the midst of a battle.

*The problem with proportionality is that it seems to place an unrealistic burden on the attacker to make a cost-benefit analysis in the midst of a battle.*

The result of this situation is that, as the special report to the prosecutor of ICTY regarding the NATO campaign in Yugoslavia pointed out: “[i]t is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances.”(26) In fact, one may argue that the inability to offer more precise guidelines derives from the very nature of the principle of proportionality. It is an open-ended legal standard designed to accommodate an indefinite number of changing circumstances, not a hard and fast set of rules.

Hays Parks, who perhaps more than any other scholar has invested time on this issue, concluded in 1990:

Following more than a decade of research and meetings of international military legal experts, who are anxious to implement the language contained in protocol I, to the extent that it advances the law of war and the protection of civilian population, there remains a substantial lack of agreement as to the meaning of the provisions in protocol I relating to proportionality. This is a rather disconcerting situation, given that other lawyers claim that this principle is part of Customary International Law.(27)

In the two decades since those words were written, relatively little has been done to rectify that situation.

## **Part II: Human Rights vs. Contractual Models: Two Understandings of Proportionality**

### **A. The Balance of Proportionality**

In a recent study Eyal Benvenisti suggested that a tension between two views is embedded in the norms and principles of IHL. Armies view IHL as a “compact between rival armies” in an attempt to limit the atrocities of war.(28) On the other hand, humanitarian organizations, international war crimes tribunals, and other



international organizations view the aims of IHL as that of protecting civilians, regardless of their nationality.(29) This tension is reflected in the attempt to understand the principle of proportionality, and is evident also in the interpretation of proportionality.

## **B. How NGOs View Proportionality**

### **(1) The General Approach**

From the perspectives of those who emphasize the need for complete protection of civilians, proportionality is indeed problematic. The respect for human rights, and life, rejects the possibility that injury caused by armies to civilians might be classified as *collateral damage*. In this view, nothing validates the subjugation of civilians to lethal attacks simply because they happen to be situated in the vicinity of a military target.(30) Any such prospect fails to respect the rights of human beings as individuals, and punishes them for a crime they did not commit and could not possibly avert. However, the necessities of war dictate that some form of attack against hybrid (military and civilian) targets would be allowed; otherwise, the enemy could station all its military resources near a civilian population and thus render them immune to attack.

Proportionality, then, is an exception to the general rule of protecting human life. (31) Attacks that harm civilians are allowed only because no possible alternative exists. A complete ban on all civilian casualties would be impossible to implement, and would only result in a growing disregard of IHL rules. Therefore, according to this narrative, the protocol adopts a very strict attitude when allowing a limited exception to this prohibition. That exception too, however, should be interpreted in the most restrictive way possible, and should never serve as a license to kill civilians other than under the strictest limitations.

This negative tendency towards proportionality was articulated even when the principle was written into the First Additional Protocol. At the 1977 international conference, states voiced their opposition to any kind of statement that would allow the killing of civilians, even if it was incidental to the military advantage.(32)

A similar tendency can be found in the commentary to Additional Protocol I published by the ICRC. When interpreting Article 51 the authors of the commentary state:

The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 (Basic rule) and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. *Incidental losses and damages should never be extensive* [my italics—AC].(33)

As Dinstein notes, the authors of the commentary here confused the terms “excessive,” which appears in the protocol, and “extensive.”(34) This change, however, was based not on a mistake, but on the ideologically-based conviction

that IHL may not be used to cause an extensive quantity of civilian deaths, no matter what states insist on writing into the protocol.

## **(2) Fact-Finding and NGO Missions**

A similar attitude towards the principle of proportionality appears in reports by NGOs whose members consider it their mission to protect human rights, and by certain fact-finding bodies commissioned by the UN. The reports on armed conflicts submitted by such bodies actually provide a dual service regarding the application of the laws of war. First, and in accordance with their primary function, they attempt to verify the facts on the ground. At the same time, however, most fact-finding missions and NGO reports also attempt to apply the law to the specific facts, and indicate whether or not the law had been violated.

As far as the question of proportionality is concerned, the function of these missions is even more complicated. Since (as we have seen) the law itself is not clear, members of the missions have to interpret the law before they can apply it to the specific case at hand. As I have already suggested elsewhere,<sup>(35)</sup> it is the nature of the reports submitted by such bodies that they try to avoid ambiguities in the law. If indeed the principle of proportionality is ambiguous, and actually relies to a considerable extent on the discretion of the specific commander in the field, then the report cannot say very much about whether or not it was violated. Hence, many reports evidently attempt to avoid the question of proportionality altogether. Amnesty International's and Human Rights Watch's reports on the Second Lebanon War constitute a clear case in point.<sup>(36)</sup> Their underlying assumption (based almost entirely on evidence supplied by Lebanese villagers who had a clear interest in denying any Hizbullah activities in their localities) is that Israeli forces were never fired upon from villages. Hence, all Israeli attacks on villages were by definition aimed at civilian targets, and illegal *per se*. In almost no case did Amnesty accept the Israeli position that shots had been fired from civilian dwellings, thus rendering them legitimate military targets, and that therefore the true legal question concerns proportionality, not distinction.

## **(3) Case Study: The Goldstone Report**

The question of proportionality is raised in the *Report of the UN Fact-Finding Mission on the Gaza Conflict* (the Goldstone Report),<sup>(37)</sup> which dealt with the Israeli operation in Gaza in December 2008-January 2009.<sup>(38)</sup> For the most part, however, this report too follows the convention outlined above and therefore attempts to avoid complex discussions of the issue. For example, the report continuously rejects Israel's claims that mosques served as places of storage for military supplies, and that shots were fired from them.<sup>(39)</sup> Notwithstanding Israel's provision of several independent, and even Palestinian, sources to the contrary,<sup>(40)</sup> the Goldstone Report simply rejects all claims that hospitals and ambulances were used for military purposes.<sup>(41)</sup>

Against this background, one can conclude that, as a rule, reports submitted by international NGOs and some UN missions reflect a very strong presumption against a state-based attacker who claims that a civilian facility had been put to military use and had thus become a military target. States submitting a claim of

that sort have to be able to provide conclusive proof, of a credibility close enough to that which would be required in order to prove the assertion in a court of law. This seems an absurd requirement, and it will be discussed later.

Even the Goldstone mission was unable to deny that in some cases civilian premises did indeed constitute legitimate military targets, and that therefore the principle of proportionality should be applied.

The first instance in reference to which the Goldstone Report raises the issue of proportionality concerns the Israeli attack on elements of the Gaza police force on the first day of the operation, December 27, 2008.(42) Members of the Goldstone mission rejected Israel's claim that all police officers in Gaza are by definition members of Hamas.(43) However, they could not deny that several members of the Hamas police force were indeed members of the Izz ad-Din al-Qassam Brigades (the military wing of Hamas) and hence personally constituted legitimate targets of Israeli attack. As the Goldstone Report concedes, whether or not the presence of these persons within the police force permit Israel to target the entire police framework is a question controlled by the rule of proportionality. Were this principle taken seriously, one would have expected to see: (1) a detailed breakdown of the names of the policemen killed in the Israeli attacks; (2) an attempt to verify which of them could – and could not – be classified as legitimate military targets; and (3) an application of this information to the proportionality equation in some way. Not unexpectedly, the mission was incapable of conducting so detailed a study and, therefore, could only limit itself to general claims and statements of uncertainty. But instead of dropping the matter due to lack of sufficient information, the mission – without any discussion whatsoever of the issues itemized above – went on to claim that Israeli actions were disproportional. Indeed, this conclusion is pronounced in just one sentence. (44) Once again, it can only be assumed that the mission proceeded from the presumption that any civilian killed is killed illegally. In order for the attacker to be excused of a charge of illegal behavior, it is his duty to provide strong and concise evidence in his defense.

The Goldstone Report discusses the principle of proportionality in somewhat greater detail within the context of the shelling near the UN school at al-Fakhura on January 6, 2009.(45) Confronted with hard evidence, in this case the mission reluctantly accepted that shots might have been fired from the street near the school in the direction of an IDF force advancing in the area.(46) The Palestinians used 120mm mortars and, according to an Israeli report, endangered the lives of soldiers. After locating the source of fire, about 80 meters from the UN school, the Israeli force responded with mortars, after which the firing ceased. The number of people killed in this incident is not clear, but the mission assumes that they numbered around 33. The Israeli claim, on the other hand, is that far less people were killed, though naturally Israel was not in possession of all the information. The mission could not ascertain the identities of all the fatalities.

Furthermore, while Israel claimed to have exchanged mortar fire in order to protect the lives of Israeli soldiers, the mission had no knowledge about the

specific danger to the soldiers that was avoided.(47) The mission accepts that a state has a right to take actions to protect its own soldiers, but nowhere in the report is there an attempt to verify the risks that soldiers should take, in view of possible loss of civilian life. In other words, the mission was almost totally ignorant when it came to the variables that ought to be applied to the proportionality equation. All it knew is that among those killed in this incident were two women and two children (one of them a 13-year-old boy) from a family whose house had been bombed earlier that day by the IDF.(48) The mission also assumed, once again without any factual proof, that Israel could have attained the same military result by employing weapons which would have caused fewer civilian fatalities.(49) The mission concluded that the use of mortars was in this case disproportional. So, even though it knew close to nothing about the incident, the mission still decided that a violation of the principle of proportionality had occurred.

This incident also illustrates several other points which frequently appear in international mission reports that have a bearing on proportionality. One is the rejection of the reasonable assumptions made by the commander in the field. Not a single fact adduced by the Goldstone Report on the incident indicates why a reasonable commander could not have assumed that the use of mortars was in this case proportional. On the contrary, the Israeli report shows, and the facts on the ground prove, that before giving orders to fire the commander took all necessary precautions to verify that the UN school, in which refugees from other areas were located, would not be harmed.(50) Significantly, not one of the fatalities was killed within the school compound. Hence, instead of analyzing the commander's state of mind (as should have been the case), the mission focused on the results of the attack.

A second issue concerns the shelling. As noted earlier, proportionality should be adjudged in the light of the full spectrum of the "tactical process" underway, and not on the basis of a single shell or bomb. To read the Goldstone Report, however, is to gain an impression that the reasons for the military unit's presence in the area are not at all important. All the mission analyzed were the results of a specific round of shelling. It neither possessed nor sought information regarding the military advantage that the IDF military unit engaged in this particular operation was supposed to attain.(51) This too seems to be a common failing in NGO reports, which appear to work on the proposition that military advantage can be assessed only in relation to the evaluation of a specific target.

Lastly, despite paying lip-service to Israel's right to protect its soldiers, the analysis presented by the mission appears to proceed from the position that lives of soldiers do not really constitute part of the proportionality equation. Without explicitly saying so, the report implies that the danger to soldiers should never be considered equal to dangers to civilians. Civilians always count for more.(52)

In sum, what the Goldstone and NGO reports offer is the *human rights model* of the proportionality principle. This term reflects the perspective that there exist no real differences between the requirements for an assessment of proportionality in general human rights law (which applies universally to all cases of rights abuse

by governments) and those of a military conflict. The conflation of the two spheres is exemplified in the strong presumption that every civilian death in a military conflict is illegal. It is further exacerbated in the conditions allowed to a state to counter this presumption. In order to do so, a state has to demonstrate – almost beyond doubt – that the target was a legitimate military target; the specific military gains it actually received from the specific use of power; and that the military gains did not simply consist of a reduction of the risk to the lives of soldiers.(53) This degree of proof accords with that expected of a government that seeks to justify the use of force in conditions of domestic unrest. It seems that when analyzing the principle of proportionality, NGOs tend simply to take the legal norms which apply in times of internal unrest and apply them to military conflicts.

However, the human rights model as described here is a deviation from treaty law, pronouncements of judges, state practice, morality, and logic.

*The human rights model of the principle of proportionality is a deviation from treaty law, pronouncements of judges, state practice, morality and logic.*

### **C. The Contractual Model**

While NGOs and fact-finding missions attempt to apply the human rights model, some commentators suggest that states actually view their obligations in accordance with a contractual model. As mentioned, Eyal Benvenisti suggested that armies view IHL as a “compact between rival armies” in an attempt to limit the atrocities of war.(54)

Scholars who support that view claim that if non-state actors do not follow IHL, then it makes no sense for the other side to weaken itself by unilaterally observing rules that its enemy will not recognize. In its extreme version, this view rejects the relevancy of IHL in its entirety to all situations of armed conflicts – a view that seems to underlie many decisions taken by the Bush administration in the wake of the attacks perpetrated on September 11, 2001, especially with respect to the status of al-Qaeda and Taliban combatants kept in Guantanamo. (55)

Yet even a less radical version of the contractual model (i.e., one that does not go as far as to reject altogether the applicability of IHL) would consider the rule of proportionality to constitute a limitation on the right to belligerent reprisals. A note about the role of reprisals in IHL is in place: There is a long-standing debate within IHL over whether any kind of reprisal against civilians is permissible. It is clear that in the past, reprisals were considered an acceptable means of enforcing IHL obligations, even though the right of reprisal was restricted by several important rules, which allowed it to be used only in a very limited set of circumstances.(56) It is also clear that the use of belligerent reprisals is prohibited against persons defined as “protected” by the Geneva Conventions of 1949.(57) Whether reprisals against civilians not otherwise protected by the Geneva Conventions are actually prohibited in international law is hotly

contested. Additional Protocol I prohibits reprisals against civilian populations altogether.<sup>(58)</sup> The UN General Assembly has explicitly stated that they are forbidden,<sup>(59)</sup> and many military manuals prohibit them. The ICTY in its Kupreskic case implied that it views reprisals against civilians as prohibited by customary international law.<sup>(60)</sup> However, several states – some of which, like Israel, are involved in conflicts – are not party to this protocol,<sup>(61)</sup> while others – even though they are parties to the protocol – have submitted reservations to this specific article.<sup>(62)</sup> It is clear that in at least one armed conflict, the Iran-Iraq war in the 1980s, armed reprisals against civilians did in fact take place.<sup>(63)</sup> Yoram Dinstein explicitly rejects the notion that the prohibition on reprisals against civilians has become customary,<sup>(64)</sup> and even the ICRC study on customary international law takes a cautious stance, declaring that the “international community is increasingly opposed to the use of violation of international humanitarian law as a method of trying to enforce the law.”<sup>(65)</sup>

Sometimes states, and especially those scholars who advance the contractual model, view the principle of proportionality, at least in part,<sup>(66)</sup> as a response to a prior violation of the laws of armed conflict by another party, and hence as a form of reprisal. Even if a policy of reprisals is disallowed, when one party to the conflict uses civilians as shields, and launches attacks from within civilian populations, it could be said that it coerces the other side to attack targets in ways that would necessarily harm civilians. Under such circumstances, an attack on civilians could be understood as a form of reprisal.<sup>(67)</sup>

Where the specific application of the principle of proportionality is concerned, proponents of the contractual and human rights models would arrive at very different conclusions. One possible case in point arises when attention focuses on the categories of civilians to be counted when auditing the proportionality balance. Hays Parks, a leading proponent of the contractual model, maintains that when counting the civilians who might be incidentally injured, the attacking army should simply disregard those deliberately placed in danger by the defending side.<sup>(68)</sup> In other words, when the non-state disregards the lives of civilians, the attacking side should be able to do so too.<sup>(69)</sup> Indeed, Parks concludes that no violation of proportionality exists until the quantity of civilians killed clearly outweighs the importance of the declared military objective, and is high enough to generate suspicions that the civilian target was the primary objective of attack.<sup>(70)</sup> As we have seen, supporters of the human rights model completely ignore the question of who is responsible for the risk to civilian lives.

### **Part III: Evaluating the Evidence – Which View Is Correct?**

The earlier parts of this study identified two competing perspectives on proportionality: the human rights model and the contractual model. What support for either of these models can be found in treaties, judicial decisions, state practice, and moral claims?

#### **A. International Criminal Law and Judicial Decisions**

One possible way to clarify the ambiguities in the term “proportionality” is to examine its use in pronouncements handed down by judicial bodies and in treaties where it is discussed. It must be born in mind, of course, that some such references will occur in the context of international criminal law and that discussions of individual criminal responsibility will not be exactly commensurate with the general meaning of proportionality in IHL.(71) Even so, their utility as guidelines for an understanding of the term cannot be discounted.

### **(1) The International Criminal Court**

The emergence of proportionality as part of codified IHL has also led to its inclusion within the growing body of international criminal law. We shall immediately see how this played out in the decisions of international criminal courts. However, that proportionality has become part of international criminal law is also clear from Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court.(72) This text includes as a war crime:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Several points in this pronouncement are worth noting: To begin with, there are the changes in the formulae. While Additional Protocol I required the incidental damage to be “excessive” in relation to the military advantage, the Rome Statute now specifies damage that would be “clearly excessive.” This addition might help to clarify two of the questions already referred to. First, it specifies that criminal liability will only be granted when the damage to civilians is deemed much greater than the military advantage. In addition, and secondly, the term “clearly” goes to the question of the requirement from the attacker. For criminal responsibility to be attributed to the attacking party, it has to be proven that he possessed clear knowledge of the consequences.

Another important point which might be clarified in this provision is the use of the word “overall” in the last sentence. The equation has to be made not with regard to a specific attack, but in relation to the overall military advantage anticipated. The use of this term seems to agree with our prior assumption that a military operation cannot be viewed in isolation.

One additional interesting point is that proportionality as a criminal offence is mentioned only in the context of an “international” armed conflict. While this in no way guarantees that the requirement of proportionality does not apply to non-international conflicts,(73) it certainly hints that there could be certain *differences in the application* of this principle between these kinds of armed encounters.

### **(2) Judicial Decisions**

Criminal prosecutions for violations of the principle of proportionality are almost non-existent, and only in the Blaskic case was a conviction in a criminal tribunal reached on that basis. Even then, the conviction was overturned on appeal,

although on different grounds.

### **The *Blaskic* Case of the ICTY(74)**

The *Blaskic* case dealt with an incident in the war between Croatia and Bosnia in 1993. The trial chamber of the ICTY declared that the Croatian attack on the Muslim area in the town of Vitez on April 1993 constituted a war crime because a *disproportional* amount of force had been employed.

Superficially, this seems to have been a very problematic decision. Partly, this was because it seems to have implied that the fact that many civilians were killed is in itself a proof that the attacks were disproportionate.(75) If that was so, then the court seems to have created a new norm, a need for *the proportionality of consequences*. But when the decision is studied in its full context, a different picture emerges. It then becomes clear that the court was using proportionality in a completely different manner – as an institutional tool to refute a clearly false claim by the attacking party.

Courts are supposed to decide on matters that are by their nature impossible to verify. For example, in cases involving accusations that an attack was illegal because it ignored the principle of distinction, the court is required to decide whether the attacking party intended to cause harm to civilians. The intention of the attacking army is of course something that is very tricky to prove. Hence, the court is required to use proportionality as a probative mechanism and, in the *Blaskic* case, to show that the attack on Vitez was undeniably *directed against civilians*. To that end, the court cited the staggering number of civilian casualties, and especially the almost complete absence of military casualties. The real claim of the court is the violation of the principle of distinction; proportionality was used here only as an additional proof for this assertion.

To sum up this point: International criminal law as it stands does not support the *human rights model* of interpreting the principle of proportionality. On the other hand, neither does it provide support for the *contractual model*. While there is no mention of reprisals in the Rome Statute, it also does not form an excuse for committing any of the actions forbidden in the Rome Statute.

### **B. How States Behave**

One of the classic foundations of international law is state practice. State practice is both part of the definition of customary international law and an interpretive tool to understanding commitments in international law. Hence, state practice should be evaluated while trying to understand the ways in which international law actually operates. In the context of warfare, however, assessments of the behavior of states are notoriously difficult to attain, especially since few states explicitly explain their decisions and the procedures by which they were arrived at.

One method employed to solve these difficulties, and that is employed for instance by the ICRC study,(76) is to look at military manuals as reflections of state practice. Although this method can, and has, been criticized (on the grounds that it conflates two questions: how states behave and what they think is



the law [*opinion juris*]),<sup>(77)</sup> it nevertheless offers some promise.

As already detailed (above in Part I), the military manuals produced by several states emphasize a number of points with regard to the use of proportionality. Military manuals stress that the commander makes decisions based on the information that he may reasonably be considered to possess at the relevant time.<sup>(78)</sup> They also emphasize how important it is to assess military gains from the perspective of the operation in its entirety.<sup>(79)</sup>

Only by studying specific examples is it possible to ascertain whether even the armies of liberal democratic states have in recent conflicts operated in accordance with the guidelines provided in their manuals in matters affecting proportionality. (The behavior of states such as Algeria, Pakistan, Saudi Arabia or Russia – all members of the Human Rights Council – hardly merits investigation in this respect.)

### **(1) The Battle of Mogadishu<sup>(80)</sup>**

When in October 1993 a force of U.S. troops was caught inside the streets of Mogadishu, Somalia, American forces deployed relatively large numbers of troops and firepower in a rescue effort. Eighteen American soldiers were killed in the course of the operation, while on the other side, according to the testimony of Ambassador Robert Oakley, the U.S. special representative to Somalia:

My own personal estimate is that there must have been 1,500 to 2,000 Somalis killed and wounded that day, because that battle was a true battle. And the Americans, and those who came to their rescue, were being shot at from all sides...a deliberate war battle, if you will, on the part of the Somalis. And women and children were being used as shields and some cases women and children were actually firing weapons, and were coming from all sides. Sort of a rabbit warren of huts, houses, alleys, and twisting and turning streets, so those who were trying to defend themselves were shooting back in all directions. Helicopter gun ships were being used as well as all sorts of automatic weapons on the ground by the U.S. and the United Nations. The Somalis, by and large, were using automatic rifles and grenade launchers and it was a very nasty fight, as intense as almost any battle you would find.<sup>(81)</sup>

Of course, there was never an evaluation of how many of the Somali dead were civilians, and how many were Somali militiamen operating under the instructions of Aidid. However, Captain Haad, of the Somali militias, in an interview on American public television, said 133 of the SNA militia were killed.<sup>(82)</sup> If accurate, such estimates imply that over one thousand civilians were killed by American fire. Absent an in-depth study, it is of course impossible to assess whether the principle of proportionality was indeed preserved in all stages of the battle. However, the proportion between Somali civilian fatalities and those of U.S. soldiers provides some indication of the relative importance that each side attached to its own soldiers.

*In October 1993 in Somalia, 18 American soldiers were killed in a battle where women and children were being used as shields. Over one thousand civilians were believed killed by American fire.*

## **(2) The NATO Serbia Air Campaign**

In contrast to the Mogadishu incident, the NATO air campaign against Serbia in 1999 has indeed been the subject of detailed study.<sup>(83)</sup> The NATO attack was launched as a measure of humanitarian intervention after the Serbian government began to expel the Muslim residents of Kosovo.<sup>(84)</sup> Hence, the campaign was not a war of self-defense, and NATO member states feared that even a small number of casualties would undermine domestic public support for the campaign. In order to limit casualties, NATO adopted a policy of zero risk to its soldiers.<sup>(85)</sup> In the context of the air campaign this meant that pilots flew at a relatively high altitude. This tactic certainly reduced the danger of their falling victim to anti-aircraft fire. But since it also increased the chance of bombing inaccuracies, it also enlarged the risk to civilian lives on the ground.

A committee appointed by the prosecutor of the International Criminal Tribunal for Former Yugoslavia was mandated to assess whether any NATO actions during the course of the campaign aroused suspicion of war crimes.<sup>(86)</sup> The committee decided that the zero-risk guideline did not constitute a violation of the norm of proportionality, even if it did result in higher risks for civilians.<sup>(87)</sup>

*In its air campaign against Serbia in 1999, NATO adopted a policy of zero risk to its soldiers, which also enlarged the risk to civilian lives on the ground. A committee appointed by the International Criminal Tribunal decided that this policy did not constitute a violation of proportionality.*

The committee also assessed the legality of the air attack on the Serbian TV building on April 23, 1999, which caused between ten and seventeen civilian deaths. The report is at pains to clarify several points. One is that the attack has to be seen as part of larger attempt to destroy all command, control and communications facilities, and that the bombing of the TV station should not be studied in isolation. Secondly, much of the blame for the events should be attributed to Serbian leaders who failed to evacuate the building, even after they received advance warning of the attack.<sup>(88)</sup>

The number of civilian deaths in the NATO campaign was around 500,<sup>(89)</sup> a relatively small number. However, most of the campaign was conducted against an enemy which generally operated within the confines of the laws of war.<sup>(90)</sup>

More than anything else, the Kosovo campaign has come to symbolize the fact that states think about the legality of their military operations. Each target in the Kosovo campaign was approved prior to being attacked and lawyers played a significant role in the approval process.<sup>(91)</sup> A prior review of targets has become an integral part of war.

### **(3) American Operations in Fallujah: Operation Vigilant Resolve (April 2004) and Operation Phantom Fury/Al-Fajr (November-December 2004)**

Fallujah is a city in Iraq of approximately 300,000 inhabitants, most of them Sunni Muslims. In 2003 and the beginning of 2004 it became one of the centers of the Iraqi insurgency, and it was clear to the U.S. that the city had to be retaken in order to restore order to the region.

The first attempt to take Fallujah is known as “the first battle of Fallujah,” or Operation Vigilant Resolve, waged in April 2004.<sup>(92)</sup> This operation was not successful. The Marine units that participated in this operation were halted after just a few days in their attempt to retake the city of Fallujah. Moreover, problems in planning the operation caused a large number of civilian casualties, which resulted in internal Iraqi pressure to halt the operation.

In November 2004, U.S. and Iraqi forces attempted to take Fallujah again.<sup>(93)</sup> Most reports agree that the majority of the city's inhabitants – perhaps as many as 270,000 out of 300,000 – escaped. Many of those who remained were combatants. The number of people killed was never verified, with reports ranging from a few hundred to several thousand.<sup>(94)</sup> The tactics used by U.S. forces in this operation included raids and the use of white phosphorous and air power. Most importantly, vast quantities of fire power were employed in an urban setting known to house civilians, in order to protect the lives of American soldiers.

*In 2004, American forces operating in Fallujah, Iraq, used white phosphorous. Vast quantities of fire power were employed in an urban setting known to house civilians, in order to protect the lives of American soldiers.*

Several conclusions may be drawn from the case of Fallujah. First, a Western army cannot, and does not, ignore civilian casualties, even if the reason for the risk to civilians was that the enemy, the non-state organization, took refuge within the civilian population. The first battle of Fallujah was simply halted when the number of civilian casualties became too high.<sup>(95)</sup>

On the other hand, when the military advantage of the operation is extremely important – such as quashing the insurgency in Iraq – states do not shy away from using massive power, even when the fighting takes place within a civilian population and there is a significant risk to the lives of civilians. Even when a state initially abandons an operation because of risk to civilians, it has no choice but to come back to the same place later, and take the same risk, simply because of military necessity.

To sum up: although it is clear that even democratic states do not accept the human rights model as a practical guide, neither do they adopt the contractual model. As the uses of force in Somalia, Kosovo, and Iraq show, Western armies are very concerned about protecting the lives of their soldiers, and to that end are willing to risk many civilian lives. They also find acceptable the notion that civilian lives can be forfeited in order to attain important military goals. At the same time,

however, Western armies are certainly aware of the need to protect the lives of civilians on the other side, even when responsibility for their endangerment lies with the non-state organization that the Western army is fighting.

### **C. The Moral Analysis**

At first sight, the human rights approach to proportionality appears to possess a moral advantage over any other model. After all, what could be more morally reprehensible than the killing of innocent civilians? Most human rights analyses of the issue indeed stop at that point, and go no further.

The problem with that approach is that there is in fact much more to be said. Specifically, there exist at least three separate reasons why – from a moral viewpoint – the premise of the human rights approach is open to question, especially in cases of asymmetrical armed conflicts.

Proportionality cannot be detached from the question of responsibility: which side created the situation in which civilians find themselves? In an abstract sense, there may be no correct answer to this question. From a military as well as a moral perspective, however,(96) the onus clearly lies with the party that chooses to fight from within civilian concentrations. This circumstance does not, of course, absolve the attacking force from its obligations to protect civilian lives. But it does shift moral responsibility for the situation thus created to the other side.

*Proportionality cannot be detached from the question of responsibility: which side created the situation in which civilians find themselves? From a military as well as a moral perspective, the onus clearly lies with the party that chooses to fight from within civilian concentrations.*

Second, and perhaps more important, are the consequences of the human rights model perspective. Once the non-state actor internalizes the fact that his foe is committed to the protection of civilians, even at the expense of military actions, he will be bound to use civilians as shields that might protect him from enemy assaults. That is precisely the tactic adopted by Hamas and Hizbullah, and one of the reasons for the fact that they situate their headquarters, fighters, and armaments within civilian concentrations.(97) In effect, then, an effort to protect civilians in one case places them in danger further down the line.(98)

On the other hand, the contractual viewpoint also raises moral problems. Some writers, as we have already seen, insist that civilians endangered by the deliberate actions of the other side should not at all be taken into account in the proportionality equation.(99) I do not consider this position to be correct as a matter of state practice, nor do I believe that it can be defended morally. If the enemy intentionally places its headquarters within a hospital, it is unthinkable that a liberal state would simply ignore all potential civilian casualties in the facility, claiming that responsibility lies entirely with the enemy. Some middle ground should be found between these views.

Finally, and most complex of all, is the moral issue raised by the relative value of

the lives of soldiers and civilians. On this point, Walzer and Margalit best articulate one extremity of the spectrum of views. Their premise is that the most basic rule of armed conflict is the protection of civilians, a protection which soldiers by definition forfeit. Since the lives of soldiers are therefore worth “less” than those of civilians, of both sides, soldiers must almost always be placed at risk rather than civilians.(100) Kasher and Yadlin adopt a diametrically contradictory position and maintain that the lives of soldiers should almost never be put at risk, even at the price of risking the lives of civilians on the other side. (101) At the heart of this argument lies the contention that states owe debts to their soldiers, especially those who have been subject to mandatory enlistment. Hence, their lives must be judged to be “worth more” than those of enemy civilians.

Here, too, both extreme positions seem to me to be incorrect. Lives of soldiers have not been made inconsequential simply because of the draft. On the other hand, states are duty-bound to provide enemy civilians, too, with some protection. The most appropriate solution to the dilemma thus posed may be to allow the entire issue to be governed by the principle of proportionality. The following section will attempt to show how that suggestion might be implemented.

#### **Part IV: The Administrative Model**

The ambiguity inherent in the notion of proportionality is well accepted by states and commentators alike, and was acknowledged even when the terms of Additional Protocol I were drafted.(102) Moreover, judicial decisions and formal declarations interpreting this article are scarce. Those that exist have contributed very little in the way of clarification, which has also not been advanced by analyses of moral claims and state practice.

Here we seek to help remedy this situation by offering a new model for the interpretation of proportionality. We begin by examining the Israeli Supreme Court decision in the targeted killings case, and then generalize the analysis.

##### **A. The Targeted Killings Case**

The decision of the Israeli Supreme Court sitting as the High Court of Justice (HCJ) in the targeted killings case(103) constitutes one of the very few exceptions to the rule of judicial silence regarding proportionality. In this case the court declared the targeted killing of terrorists to be legal under certain specific conditions. Principal among the limitations placed by the court is the need to minimize the “collateral damage” sustained during the course of targeted killing operations by civilians not taking direct part in hostilities (referred to by the HCJ as “innocent civilians”).(104) The court appreciates that the application of the test is riddled with uncertainty:

[O]ne must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if, as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed

from the air and scores of its residents and passersby are harmed. The hard cases are those which fall into the space between the extreme examples.(105)

With relation to “hard cases,” the court offered only limited guidance, referring again to ambiguous or subjective considerations: 1) the desired military advantage has to be both “direct and anticipated”;(106) 2) a balance has to be maintained between the “state's duty to protect the lives of its soldiers and civilians” and its “duty to protect the lives of innocent civilians harmed during attacks on terrorists.”(107)

While this part of the decision is of little help in clarifying the parameters of proportionality, far more useful are the institutional elements that the court introduced in those of its judgments that appear to relate to the application of the proportionality principle. Justice Aaron Barak (then President of Israel's Supreme Court) posited in his judgment that targeted killing operations ought to be made subject to *ex ante* and *ex post* examination or investigation. With relation to *ex ante* review, Barak required that prior to the attack a “meticulous examination” be conducted of every case that potentially could give rise to collateral damage. (108) This requirement seems to correspond to the precautionary obligations introduced by Article 57 of the First Additional Protocol.(109) Even more significant is Barak's introduction of the concept of *ex post* review in the targeted killings cases – a review process that is ultimately subject to judicial supervision. (110)

Hence it seems that for the Israeli Supreme Court, the solution to the ambiguity of the term of proportionality lies in investigations, both before and after the attack. This, however, seems to be problematic – what use are investigations if the parameters of proportionality are not clear? What should be investigated when it is not clear how the decision should have been taken?

## **B. Proportionality as Reasonableness**

### **Investigations and Reasonable Commanders**

Proportionality, like many other open-ended terms in law, is concerned with reasonableness. Most states that have expressed opinions on this matter seem to assume that there exists some standard of proportionality which the reasonable commander must apply in accordance with his knowledge of the field. (111) This, of course, is a very general standard and one which is very hard to implement.(112) Does there exist a gauge that would facilitate an estimate of what a reasonable commander would decide?

Clearly the answer is negative. However, this question is neither novel nor unique. Similar issues commonly arise whenever courts review the actions of administrative bodies. Most governmental agencies are expert in their field of operation, and the courts are reluctant to dispute the decisions of the agencies in their areas of expertise. Instead, when courts review decisions of governmental agencies, the question that they ask is whether the decisions taken deserve to be considered reasonable.(113) The test for reasonableness is in the main

procedural:(114) Did the agency follow the correct procedure? Was it in possession of all the relevant data? Did it give a proper hearing to all views? (115) This is the only way courts can decide whether the actions of the agency were reasonable. It is the usual practice of administrative courts to give at least some deference to the substance of the agency's decision.(116)

A substantively similar process takes place with regards to proportionality in IHL. What we really want to know is whether the commanders in the field, when making their decisions, took into account the likelihood of civilians being hurt. We cannot possibly judge whether the decision ultimately taken was correct; we do not possess all the required information, and even if we did, we wouldn't know which parameters to apply. The best we can do is judge the *decision-making process*.

Naturally, then, *ex ante* review is required. A military operation should be initiated only if we can be sure that an appropriate investigation as to the amount of collateral damage to civilians will be carried out. Of course, this requirement carries different meanings in different contexts. In a pre-planned attack of a large scale, it mandates gathering all available information and subjecting the planned operation to in-depth analysis. By contrast, should an immediate decision be required during the course of an operation already under way, an entirely different level of both information gathering and decision-making would be applied.

*A military operation should be initiated only if we can be sure that an appropriate investigation as to the amount of collateral damage to civilians will be carried out. Most armies in the West are using legal advisors to verify that such a review is undertaken.*

*Ex ante* review is a most important facet of any military operation, and especially so when civilian casualties are involved. This is one of the basic requirements of the First Additional Protocol, and it seems that most armies, in the West at least, are indeed using legal advisors exactly in order to verify that such a review is undertaken.(117) Whatever the context, the important point to verify is that the question was asked. If we apply the same assumptions to military commanders as to administrators, and hence approach them as reasonable persons, that is the most we can ask.

### **C. Ex Ante Review Is Not Enough**

Commanders, however, are not equivalent to administrators. Most obviously this is because of the differences in their functions. Officials who work in administrative agencies service their own communities and deal with citizens of their own country. Hence, an assumption that they will behave reasonably is, so to speak, reasonable. Field commanders are different; their function is to fight the enemy. Hence, we should be much more careful in assuming that they take the interests of the lives of enemy civilians into account.

Second, even those commanders who are "reasonable" will only reach a

reasonable answer if they ask the correct questions. How can we be sure that such is indeed the case? In matters pertaining to administrative law, that is precisely the task of the courts; by subjecting many administrative issues to judicial review both before and after their occurrence, they verify that the administrators did indeed ask the correct questions prior to embarking on a course of action. However, courts are reluctant to intervene in military operations prior to their initiation.(118) After all, judicial review takes time and could involve a postponement in the timing of the action. And no court is happy to shoulder the responsibility for whatever damage a delay might cause. Moreover, judges are noticeably hesitant to intervene in military matters even after the fact, since they consider their knowledge of the situation to be inferior to that of military commanders.

Even the Israeli Supreme Court, which has shown an exceptional and unprecedented degree of willingness to intervene in military matters, has usually avoided intervening in specific military operations while they are in progress, and has limited its review to general comments about appropriate courses of action.

In sum, therefore, it must be concluded that *ex ante* review cannot provide assurance that the action taken did indeed comply with the requirements of proportionality. There exists no guarantee that commanders are acting reasonably, and that the actions are subject to adequate judicial review prior to their initiation. What is required, therefore, is a further form of review: *ex post* investigations.

#### **D. *Ex Post* Investigations**

*Ex post* review ensures that the actions of the commander will eventually be examined. As such, it constitutes an additional influence on his decision-making process prior to the operation. A commander who is aware that his actions will be monitored after the fact is likely to take care that he gives due consideration to all possibilities when reaching a decision to act. *Ex post* review can mean several things: usually, armies use internal investigations as a means of evaluating the effectiveness of their mission. In many cases, armies employ the same method in order to investigate allegations of war crimes. However, if the investigators of the commander form constituent elements in the same chain of command, there is little chance that the investigation would yield trustworthy results.

*A commander who is aware that his actions will be monitored after the fact is likely to take care that he gives due consideration to all possibilities when reaching a decision to act.*

In cases involving accusations of human rights violations, several courts have expressed opinions as to how an investigation should be conducted. The most expansive description is that of the European Court of Human Rights in the *Isayeva* case,(119) which concerned the death of several hundred Russian-Chechnyan civilians during the armed conflict in that region. The European Court of Human Rights decided that the death of civilians provided *prima facie* grounds for claiming violation of the right to life, and deemed the internal Russian



investigation that exonerated all participants to have been insufficient. The court specified that in order for an investigation in these matters to be considered adequate, four criteria had to be met:

1. The formal and practical independence of the investigators from the persons whose actions they were examining
2. Effectiveness: the ability of the investigation to lead to effective remedies including, where appropriate, criminal investigations
3. Promptness of the investigation
4. Availability of public scrutiny<sup>(120)</sup>

There exists no clear international rule which declares these to be the only possible criteria. Neither is there a precise formula as to their respective weights and how they are to be applied. However, they do provide the general basis for the type of investigation that should be initiated into operations involving civilian casualties<sup>(121)</sup> and that will contribute to the general adherence to the rules of IHL. With specific reference to proportionality: an *ex post* investigation, conducted in accordance with the guidelines set down in the *Isayeva* case, is likely to cause soldiers and commanders to take into account the requirements of proportionality, and especially the need to consider the “collateral damage” when they plan or carry out an attack. Moreover, it seems that in order for such an investigation to be effective, the committee of enquiry should include military personnel capable of assessing the reasonableness of the actions undertaken by the attacking force.<sup>(122)</sup>

#### **E. The Implications of the Administrative Model of Proportionality**

The administrative model for proportionality, as detailed here, focuses on the professional soldier as the ultimate decision-maker on questions of proportionality. It is based on several foundations:

**The Importance of Asking the Questions:** The assumption lying behind the administrative model is the fact that a commander who *asks himself the correct questions* would provide better results in terms of protecting innocent lives. This assumption is based on the fact that the ethics of the military profession require that armed conflict will be mainly directed against soldiers and combatants. Hence, if we leave the decision to soldiers, with a review of the decision-making process, they would arrive at results which tend to protect human lives.

**The Importance of Understanding the Effects:** The suggested model is compatible with the general aims of the military. It is based on the fact that the commander ordering an attack should have an understanding of the results of his actions.

**Command Responsibility:** A very important application of the institutional ingredient of proportionality may be felt not in cases alleging direct responsibility of soldiers and commanders, but rather in command responsibility cases.<sup>(123)</sup> Article 28 of the ICC Statute imposes responsibility on commanders who did not prevent international crimes from occurring, despite the fact that “owing to the

circumstances at the time” they “should have known” about their occurrence. That being the case, a robust *ex ante* review could significantly extend the exposure of commanders to such negligence-based responsibility (in addition to the knowledge-based responsibility discussed above). In fact, where circumstances so warrant, it can be argued that commanders should insist upon effective *ex ante* review and might incur criminal liability for failing to do so. Furthermore, since Article 28 also criminalizes failures on the part of commanders to punish soldiers for violations that had already occurred, improved *ex post* investigations could introduce significant pressures on commanders to order criminal prosecutions of subordinates involved in attacks entailing “clearly excessive” consequences. Here again, failure to order an investigation might serve in itself as the basis of responsibility in appropriate circumstances.

**Taking Responsibility into Account:** As mentioned earlier, responsibility is an integral part of the proportionality equation. In applying proportionality to a specific case, the commander may ask himself who is responsible for the possible incidental loss of lives. If indeed it is the enemy that is responsible, then this might allow the commander more flexibility in the application of the principle of proportionality. Even then, the commander should still take into account the possible incidental loss of civilian lives. The balance that the commander has to strike is between avoiding the danger that the enemy would turn civilians into human shields, on the one hand, and that too many innocent civilians will be killed, on the other.

**Protecting the Lives of Soldiers:** As we have seen, all armies protect the lives of their soldiers, even at the risk of lives of civilians on the other side. The commander may take this into account. However, it seems clear that policies of “zero casualties,” when they might result in the death of too many civilians, should not be used. A reasonable commander should also take the lives of civilians of the other side into account.

**Proportionality and Criminal Responsibility:** The institutional elements of proportionality developed here might be useful in determining a violation of proportionality requirements in the criminal law context too. The quality of any *ex ante* review might be relevant in ascertaining the mental state of soldiers and commanders carrying out military operations, in the sense that an improved decision-making process might seriously curtail the ability of the commanding ranks involved in the review process, or exposed to its findings, to claim ignorance of the anticipated disproportional consequences of their actions. In other words, the criminal trial would inquire whether the attackers asked themselves questions relating to proportionality. At the same time, low-ranking soldiers in the field engaged in military operations could, perhaps, rely on their knowledge that an effective review process exists in maintaining the reasonableness of their belief that their actions were indeed proportional.(124)

## **F. Application: Israel and the Gaza Operation**

Here it might be useful to review the case of Operation Cast Lead, Israel's

operation in Gaza between December 27, 2008, and January 18, 2009, not in order to determine whether Israel's operation was fully in compliance with international law, but rather to examine whether the assumptions made in this study are plausible.

On the whole, the evidence regarding the Gaza operation clearly shows that Israeli commanders successfully followed the requirements of the administrative model of the principle of proportionality. According to newspaper and oral reports, the IDF did require commanders to take humanitarian law into account in the planning stages of the operation.(125) Moreover, legal advisors were involved in the planning of many operations and provided advice regarding specific targets.(126) The right questions were asked, checks were made, and the incidental damage to civilians was on the whole limited. As detailed above, the Goldstone report makes several claims regarding deliberate attacks against civilians. These claims still await a proper Israeli response. Notwithstanding these claims, in those instances where it is agreed that an Israeli commander was indeed within the sphere of the principle of proportionality, the behavior of the IDF seems to have been completely reasonable and totally within the parameters of legitimate use of proportionality as detailed in this study.

*In the Gaza operation, the IDF required commanders to take humanitarian law into account in the planning stages of the operation. Legal advisors were involved in the planning of many operations and provided advice regarding specific targets. The right questions were asked.*

One further question of importance is the total number of civilian casualties. The actual number of casualties is debated. Figures released by Hamas report 1,417 Palestinians killed; of whom 236 were combatants, 255 members of Hamas security forces, and 926 civilians. A further 5,300 Palestinians were wounded. (127) A report issued by the IDF speaks of 1,166 Palestinian fatalities, of whom at least 709 were combatants and 295 uninvolved civilians. The remainder are listed as undetermined.(128) On the Israeli side there were 13 fatalities: ten soldiers and three civilians. On the one hand, looking at the total number of civilian casualties seems to be totally irrelevant, since the principle of proportionality requires evaluation of each tactical operation by itself. On the other hand, public opinion seems to be mesmerized by the total number of civilian casualties.(129)

For argument's sake, let us suppose that the total number of casualties is important. While the Israeli figures are saddening, since they speak of three to four hundred civilian casualties, they seem to be completely within the parameters of reasonable application of force according to historical examples. Moreover, even if the numbers suggested by the Palestinians are correct, this does not immediately mean that the quantity of civilian casualties is unreasonable or disproportional. Both historical evidence and moral claims point to the fact that when the enemy chooses to fight from within the civilian population, the large number of civilian casualties is the enemy's responsibility.

However, a final opinion in this matter must await the final tally of civilian casualties in this conflict.

Naturally, and as stressed in this study, the application of the norm of proportionality should also be tested in *ex post* investigations. These investigations are indeed taking place.<sup>(130)</sup> If indeed a specific unreasonable military action has taken place, the commanders should be punished and the lessons must be learned.

## Conclusion

States which face non-state actors in military armed conflict tend to claim that changes to IHL/LOAC are required. This study attempts to show that a proper interpretation of the existing principles of IHL might sometimes provide satisfactory answers to the problems posed by non-state actors.

Its main argument involves the principle of proportionality. This principle is best understood as an administrative or institutional principle intended to be based on the reasonable discretion of the commander in the field. This discretion is not unlimited – it is guided by respect for human life and civilian immunity. It should be reviewed in advance to make sure that the proper questions are asked. It should be reviewed after the actions take place in order that mistakes might save future commanders from similar mistakes.

Proportionality in international humanitarian law is a complicated principle to apply. However, this does not make this norm unimportant, or inapplicable. This work shows that a proportionality principle, properly defined, could serve as a reasonable and appropriate guiding principle even in asymmetrical wars against terrorist organizations, non-state actors, and all those who do not respect the laws of war. This has been done in the past, and should likewise be done in the future.

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## Notes

### For Foreword

1. Amos Harel and Avi Issacharoff, "An End to Israeli Restraint in Gaza," *Ha'aretz*, December 26, 2008.
2. "Examination of the Number of Palestinians Killed during Operation Cast Lead," Intelligence and Terrorism Information Center, April 7, 2009, <http://www.terrorism-info.org.il/en/article/18293>, citing IDF Spokesman's website, March 26, 2009.
3. "Senior Military Officials Brief the International Press on Operation Cast Lead," Israel Defense Forces website, Jan. 19, 2009, <http://www.idf.il/1283-11200-en/Dover.aspx>

## Redefining the Law of Armed Conflict – Gil Limon

1. This lecture was written and delivered on June 18, 2009, prior to the report of the Goldstone Commission, which was appointed by the UN Human Rights Council with a mandate to investigate “the grave violations committed by the Occupying Power, Israel, in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip” (from the text of UN Resolution A/HRC/S-9/1, January 12, 2009). The Goldstone Report, published in September 2009, went to new lengths of manipulative description and presentation of the Law of Armed Conflict, as part of the ongoing anti-Israel campaign following Operation Cast Lead (see Laurie R. Blank, “Finding Facts But Missing the Law: Goldstone, Gaza and IHL,” *Yearbook of International Humanitarian Law* (2009, forthcoming).
2. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. reports 136, 194 (para. 139).
3. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 2, separate opinion of Judge Higgins, 215 (para. 33); declaration of Judge Buergenthal, 242 (para. 6); separate opinion of Judge Kooijmans, 229-230 (para. 35).
4. S.D. Murphy, “Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?,” 99 *AJIL* 62, 62-63 (2005).
5. HCJ 7957/04 *Maraba et al v. Prime Minister of Israel et al*, Judgement O(2) 477, 502-503.
6. <http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece>.
7. E.g. Article 7 of Resolution 3314 of the General Assembly, 1974.
8. *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, John Dugard, UN Doc. A/HRC/7/17 (21 January 2008), pp. 5-6 (para. 4-5).
9. J. Dugard, “Towards the Definition of International Terrorism,” 67 *Proceedings of the American Society of International Law*, 94, 99 (1973).
10. *Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000*, UN Doc. E/CN.4/2001/121 (March 2001).
11. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 2, 185 (para. 125).
12. For criticism of the International Court of Justice's interpretation of Article 6, see O. Ben-Naftali, “*A La Recherche du Temps Perdu*: Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion,” *Israel Law Review* 211, 214-220 (2005).
13. <http://www.innercitypress.com/banrep1gaza.pdf>.
14. Y. Shany, “Capacities and Inadequacies: A Look at the Two Separation Barrier Cases,” 38 *Israel Law Review* 230, 243-244 (2005); D. Kretzmer, “The Advisory Opinion: The Light Treatment of International Humanitarian Law,” 99 *AJIL* 88, 91-94 (2005).
15. HCJ 7957/04 *Maraba et al v. The Prime Minister of Israel et al*, *ibid.*, note 5, 499-500.
16. Richard Falk, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, UN Doc. A/HRC/10/20 (11 February 2009).
17. [http://www.arableagueonline.org/las/picture\\_gallery/reportfullFINAL.pdf](http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf).
18. [http://www.icty.org/x/file/About/OTP/otp\\_report\\_nato\\_bombing\\_en.pdf](http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf).

## Accountability of Hamas under International Humanitarian Law – Sigall Horovitz

\* The author is a candidate for PhD, Hebrew University of Jerusalem; LL.M. Columbia University (2003); Legal Officer at the UN International Criminal Tribunal for Rwanda (currently on leave of absence). Although this paper was written for the Jerusalem Center for Public Affairs conference, the author is in no way affiliated with the Jerusalem Center nor does she share its political views. The author thanks Prof. Yuval Shany, Dr. Roy Schindorf, Sivan Shlomo, and Gil Limon for their helpful comments.

1. Another goal of IHL is reducing unnecessary suffering of combatants, e.g., by regulating the use of certain weapons.
2. The Geneva Conventions of 1949 consist of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV). The Additional Protocols of 1977 include Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I); and Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II). Another important IHL treaty is the Hague Convention and Regulations Respecting the Laws and Customs of War on Land of 18 October 1907 (Hague Convention IV), which, among other things, regulates situations of belligerent occupation. In addition, there are IHL treaties which regulate means of warfare, such as the 1980 UN Convention on Conventional Weapons.
3. Article 33 (1) of Geneva Convention IV; Article 4 (2) (d) of Additional Protocol II.
4. Article 51 (2) of Additional Protocol I; Article 13 (2) of Additional Protocol II.
5. This state-centric international order was rooted in the 1648 Treaty of Westphalia. However, non-state actors are increasingly becoming subjects of international law, with recognized international rights and obligations.
6. Some of the IHL treaties which existed before 1949 are: Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864; Additional Articles relating to the Condition of the Wounded in War, 20 October 1868; Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, 29 July 1899; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906; Convention for the Adaptation of the Principles of the Geneva Convention to Maritime War, 18 October 1907; Hague Convention (IV) of 18 October 1907; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929.
7. Until 1949, norms applicable to international armed conflicts were applied to intra-state wars only when they reached a certain threshold of violence and where the non-state party was recognized as a “belligerent.”
8. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Judgment, 1986 ICJ Rep. 14 (Nicaragua Judgment), at 114; *Prosecutor v. Tadic*, ICTY Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995 (*Tadic* Jurisdiction Decision), para. 102. It is noted that both the ICJ and ICTY held not only that the provisions of Common Article 3 have become customary IHL norms, but also that they apply in both international and non-international armed conflict (see discussion below).
9. The Rome Statute of the International Court of 17 July 1998 (Rome Statute) codified some of these customary IHL norms. The Rome Statute, which criminalizes certain violations of international law, will be addressed below.

10. *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 22.
11. The study was published in two volumes in *Customary International Humanitarian Law*, eds., Jean-Marie Henckaerts and Louise Doswald-Beck (ICRC and Cambridge University Press, 2005) (ICRC Study on Customary IHL). Conveniently, a list of the norms identified in the study is included in Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law - Annex: List of Customary Rules of International Humanitarian Law," 87 *Int'l Rev. Red Cross* (2005), 198 (Annex to ICRC Study on Customary IHL). The ICRC, an organization based in Geneva, is considered the "guardian" of IHL. The four 1949 Geneva Conventions and their two 1977 Additional Protocols grant the ICRC the right to carry out activities such as bringing relief to wounded, sick or shipwrecked military personnel, visiting prisoners of war, re-establishing contact between members of families separated by conflict, aiding civilians, and ensuring that those protected by humanitarian law are treated accordingly. The ICRC was responsible for the initial drafting of the four 1949 Geneva Conventions and their two 1977 Additional Protocols.
12. It is also noted that the Rome Statute illustrates that most of the important IHL norms applicable to international armed conflicts are also applicable to non-international armed conflicts. The Rome Statute distinguishes between war crimes (serious IHL violations) committed during international armed conflicts and those committed during non-international armed conflicts. A comparison between these sets of crimes shows few substantial differences.
13. Theodor Meron, "The Humanization of Humanitarian Law," 94 *Am. J. Int'l L.* (2000), 239.
14. Article 43 (2) of Additional Protocol I.
15. Still, it can be argued that consistent with the principle of distinction, customary IHL norms do not prohibit the targeting of state forces by members of a non-state actor which is engaged in an armed conflict with the state.
16. Under Geneva Convention III, the immunity of prisoners-of-war from prosecution covers combatant activities (i.e., lawful acts of war such as targeting military personnel and objects) but does not cover war crimes (i.e., violations of IHL norms), for which prisoners-of-war can be prosecuted.
17. Article 3 of Additional Protocol II.
18. The relevant text of Common Article 3 is included in note 41 below. It is also noted that Additional Protocol II, in Article 6 (5), encourages the state to release such detainees at the end of hostilities without prosecuting them for their combat activity. On the argument that IHL protections accorded to detainees who deserve prisoner-of-war status are essentially similar to the protections accorded to detainees who do not deserve such status, see Derek Jinks, "The Declining Significance of POW Status," 45 *Harv. Int'l L.J.* 367 (2004).
19. *Tadic* Jurisdiction Decision, note 8 above, at para. 70.
20. *Prosecutor v. Tadic*, ICTY Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997, para. 562. Compare with Rome Statute Article 8(2)(d), relating to serious violations of Common Article 3, which "applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."
21. *Prosecutor v. Bodkoski et al*, ICTY Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 184.
22. *Ibid.*, para. 292.
23. *Ibid.*, para. 185.
24. E.g., "Israel and Hamas: Villain-and-Hero Narrative and the t-Word," by Prof. Brigitte Nacos, 11 January 2009 ("Hamas is also a political party that won the 2006 elections in the Palestinian territories but that does not make the organization a state actor. There is no Palestinian state"), available at <http://www.reflectivepundit.com/reflectivepundit/2009/01/israel-and-hamas-villain->

and-hero-narrative-and-the-t-word.html (last visited on 13 June 2009). Additional statements explicitly referring to Hamas as a non-state actor can be found in "Gaza Is Not Lebanon - Why Israel's campaign against Hamas may succeed," by Thomas Donnelly & Danielle Pletka, *The Weekly Standard*, 5 January 2009, available at [http://www.weeklystandard.com/Content/Public/Articles/000/000/015/975\\_wlwj.asp](http://www.weeklystandard.com/Content/Public/Articles/000/000/015/975_wlwj.asp) (last visited on 13 June 2009); and "Dealing with Hamas - Efforts to contain Hamas successful so far, but what's the next step?" by Ephraim Halevy, YnetNews, 8 March 2007, available at <http://www.ynetnews.com/articles/0,7340,L-3432848,00.html> (last visited on 13 June 2009).

25. Even much shorter conflicts, if intense enough, have been recognized as non-international armed conflicts. Thus, the Inter-American Commission on Human Rights found a 30-hour battle between the Argentine military and a group of 42 armed attackers who invaded a military barracks to amount to a non-international armed conflict. See *Juan Carlos Abella v. Argentina*, Case 11.137, Report N<sup>o</sup> 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997).

26. *Mara'abe v. The Prime Minister of Israel*, Supreme Court of Israel, HCJ 7957/04, 15 September 2005, para. 1.

27. *Public Committee against Torture in Israel v. Government of Israel*, Supreme Court of Israel, HCJ 769/02, 11 December 2005 ("Targeted Killings Judgment"); *A v. the State of Israel*, Supreme Court of Israel, CrimA 6659/06, 1757/07, 8228/07, 3261/08, 11 June 2008 ("Unlawful Combatants Judgment"). For a judgment in which the Israeli Supreme Court applies the laws of international armed conflict to Operation Cast Lead see *Physicians for Human Rights v. The Prime Minister of Israel*, Supreme Court of Israel, HCJ 201/2009, 19 January 2009, para. 14.

28. The Israeli Supreme Court relied in part on Professor Cassese, who in his textbook on international law wrote that "[a]n armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict." (See Antonio Cassese, *International Law*, 2nd ed. (Oxford: University Press, 2005), p. 420, as cited in the Targeted Killings Judgment, para. 18). It is noted that some scholars maintain that an armed conflict between a state and a non-state actor is non-international in nature, even if the non-state actor operates from an area occupied by the state.

29. Five months before the Targeted Killings Judgment was rendered, Israel pulled its military forces and civilian population out of Gaza. However, the judgment's point of departure was that Gaza is occupied by Israel. This can perhaps be explained by the fact that the petition under consideration was filed in 2002 and the judgment was completed many months before its publication.

30. Targeted Killings Judgment, para. 18 ("international law regarding international armed conflict [...] applies in any case of an armed conflict of international character - in other words, one that crosses the borders of the state - whether or not the place in which the armed conflict occurs is subject to belligerent occupation"). For a reading of the Targeted Killings Judgment as characterizing any cross-border armed conflict as international in nature, and a critique of this issue in the judgment, see Roy S. Schondorf, "The Targeted Killings Judgment - A Preliminary Assessment," 5 J. *Int'l Crim. Just.* (2007), 301.

31. Unlawful Combatants Judgment, para. 11. Also see *Gaber Al-Bassiouni v. Prime Minister*, Supreme Court of Israel, HCJ 9132/07, 30 January 2008, para. 12.

32. Unlawful Combatants Judgment, para. 9 ("The premise in this context is that an international armed conflict prevails between the State of Israel and the terrorist organizations that operate outside Israel"). The Court relied on the Targeted Killings Judgment without referring to the fact that Gaza was, in that judgment, considered occupied by Israel, a matter which provided the basis in that judgment for regarding the conflict as international. It is noted that there are commentators who maintain that Gaza is still occupied by Israel today.

33. However, the state would still have to adhere to Common Article 3 standards.

34. For an in-depth discussion of the problems associated with the traditional classification of



conflicts into either international or non-international, see Roy S. Schondorf, "Extra-state armed conflicts: is there a need for a new legal regime," 37 *NYU J. Int'l L. & Pol.* (2005). Dr. Schondorf proposes to define any "ongoing hostilities between a state and a non-state actor that take place, at least in part, outside the territory of the state," as "extra-state hostilities" (p. 3).

35. E.g., Anthony Dworkin, "Are Israel and Hamas Committing War Crimes in Gaza?" 7 January 2009 ("Since the conflict in Gaza pits the state of Israel against a non-state organization, Hamas, the applicable rules are those that govern 'non-international conflict'"), available at <http://www.crimesofwar.org/onnews/news-gaza3.html> (last visited on 12 June 2009). Also see Marko Milanovic, "Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case," 89 *Int'l Rev. Red Cross* (2007), 384 ("the single defining characteristic of international armed conflicts has not been their cross-border, but their interstate, nature"). Compare Derek Jinks, "The Applicability of the Geneva Conventions to the 'Global War on Terrorism'," 46 *Va. J. Int'l L.* (2005), 165 (arguing that the conflict between the U.S. and al-Qaeda should be regarded as a non-international armed conflict). As mentioned above, some scholars maintain that an armed conflict between a state and a non-state actor is non-international in nature, even if it is linked to a belligerent occupation. However, some of those who claim that Israel is still occupying Gaza may claim on this basis that the armed conflict between Israel and Hamas is international, in line with Cassese's view (see note 27 above).

36. *Hamdan v. Rumsfeld*, United States Supreme Court, 548 U.S. (2006), 126 S. Ct. 2749, available at <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf> (last visited on 12 June 2009). For a survey of the literature which interprets the *Hamdan* judgment as expressing the view that the conflict between the U.S. and al-Qaeda is a non-international armed conflict, see, e.g., Eran Shamir-Borer, "Revisiting Hamdan v. Rumsfeld's Analysis of the Laws of Armed Conflict," 21 *Emory Int'l L. Rev.* (2007), 601 (Revisiting Hamdan). Also see George P. Fletcher, "The Hamdan case and conspiracy as a war crime," 4 *J. Int'l Crim. Just.* (2006), 444.

37. For references to the U.S. Administration's reading of the *Hamdan* judgment as expressing the view that the conflict between the U.S. and al-Qaeda is non-international, see Shamir-Borer, "Revisiting Hamdan," *ibid.*, at 603-604.

38. A similar approach was adopted by the four UN Human Rights reporters who examined the violations of IHL and human rights law during the conflict between Israel and Hizbullah in Lebanon in 2006. See UN Doc. A/HRC/2/7, 2 October 2006, para. 23 ("While the qualification of the conflict as international or non-international is complex, this report is mainly based on international customary law applicable in both forms of conflict").

39. ICJ, *Nicaragua* Judgment, note 8 above, at 114.

40. *Tadic* Jurisdiction Decision, note 8 above, at para. 102.

41. Common Article 3, in paragraph 1, provides as follows: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

42. As explained in note 26 above and the attached text, the Israeli Supreme Court's position is that the armed conflict between Israel and the Palestinian terrorist organizations started when the Second Intifada broke out in September 2000.

43. ICRC Study on Customary IHL, note 11 above.

44. E.g., Israel Ministry of Foreign Affairs, "Hamas Exploitation of Civilians as Human Shields," 8

January 2009, available at [http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups/Hamas\\_Exploitation\\_Civilians\\_Human\\_Shields.htm](http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups/Hamas_Exploitation_Civilians_Human_Shields.htm) (last visited on 14 June 2009); Israel Ministry of Foreign Affairs, " Hamas's Illegal Attacks on Civilians and Other Unlawful Methods of War - Legal Aspects," 7 January 2009, [http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/Legal\\_aspects\\_of\\_Hamas\\_methods\\_7\\_Jan\\_2009.htm](http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/Legal_aspects_of_Hamas_methods_7_Jan_2009.htm) (last visited on 14 June 2009); Rory McCarthy, " Hamas accused of war crimes in Gaza," [guardian.co.uk](http://www.guardian.co.uk), 23 March 2009 (referring to reports by NGOs including Human Rights Watch and Amnesty International regarding Hamas violations of IHL), available at <http://www.guardian.co.uk/world/2009/mar/23/gaza-war-crimes-hamas> (last visited on 14 June 2009); Report of the Independent Fact Finding Committee on Gaza, Submitted to the League of Arab States on 30 April 2009 (referring to both Israeli and Hamas violations of IHL), available at [http://www.arableagueonline.org/las/picture\\_gallery/reportfullFINAL.pdf](http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf) (last visited on 15 June 2009).

45. ICRC Study on Customary IHL, note 11 above, Rule 1.

46. *Ibid.*, Rule 2.

47. *Ibid.*, Rule 7.

48. *Ibid.*, Rules 11-12.

49. *Ibid.*, Rule 22.

50. *Ibid.*, Rule 59.

51. *Ibid.*, Rule 71.

52. *Ibid.*, Rule 87.

53. *Ibid.*, Rule 97.

54. *Ibid.*, Rule 139.

55. Henckaerts, Annex to ICRC Study on Customary IHL, note 11 above, at 198.

56. ICRC Study on Customary IHL, note 11 above, Rule 23.

57. *Ibid.*, Rule 24.

58. Common Article 3, in paragraph 2, provides: "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict." It is also noted that non-governmental organizations such as Geneva Call are engaging with non-state actors to monitor their commitments under IHL. See <http://www.genevacall.org/home.htm> (last visited on 15 June 2009).

59. Article 90 of Additional Protocol I.

60. Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, *Int'l Law Comm'n*, 53d Sess., pt. I, ch. 1, U.N. Doc. A/CN.4/L.602/Rev.1 (2001) (ILC Draft Articles).

61. Commentaries to Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Report of the International Law Commission on the work of its 53rd session (A/56/10)*, Y.B. *Int'l Law Comm'n*, 2001, vol. II, pt. II.

62. It should be added that the ICJ has another capacity besides hearing contentious cases between states: it can provide legal advice to UN organs. Thus the UN General Assembly or the Security Council can seek an advisory opinion from the ICJ on the legality of Hamas' acts.

63. Judgment of the Nuremberg International Military Tribunal (30 Sept. 1946), in 22 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946 (1948) 411, at 466. As explained by Prof. Schabas, the Nuremberg Tribunal made this statement in response to the claim by Nazi leaders that they were not responsible for war crimes because they were acting on behalf of the German State. See William A. Schabas, "State Policy as an Element of International Crimes," 98 *J. Crim. L. & Criminology* (2008), 953.

64. Grave breaches include the following acts when directed against people protected under the 1949 Geneva Conventions: wilful killing, torture or inhuman treatment (including medical experiments); wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or civilian to serve in the forces of the hostile power; wilfully depriving a prisoner of war or protected civilian of the rights of a fair and regular trial; unlawful deportation or transfer of a protected civilian; unlawful confinement of a protected civilian; and taking of hostages. See Articles 49-50 of Geneva Convention I; Articles 50-51 of Geneva Convention II; Articles 129-130 of Geneva Convention III; Articles 146-147 of Geneva Convention IV.

65. The basis for the jurisdiction of the Israeli courts in the Eichmann case was the principle of universality, which allows any state to assert jurisdiction over international crimes based on the gravity of the crimes. Today, there are some commentators who seek to limit the application of universal jurisdiction by states, to prevent its political use.

66. Rome Statute Article 8 (1).

67. Rome Statute Article 8 (2) (c).

68. Rome Statute Article 8 (2) (c) (i). This provision applies to non-international armed conflict. However, even if the Israel-Hamas conflict is viewed as an international armed conflict, the above acts will amount to war crimes under Article 8 (2) (a), which applies to international armed conflicts and criminalizes grave breaches, namely, "any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wilful killing; ... (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

69. Rome Statute Article 25.

70. Rome Statute Article 28.

71. The following acts are considered war crimes when committed in connection with a non-international armed conflict. However, even if the Israel-Hamas conflict is viewed as an international armed conflict, the acts below will amount to war crimes under Article 8 (2) (b), which applies to international armed conflicts.

72. Rome Statute Article 8 (2) (e) (i).

73. Rome Statute Article 8 (2) (e) (ii).

74. Rome Statute Article 8 (2) (e) (iii).

75. Rome Statute Article 8 (2) (e) (iv).

76. Rome Statute Articles 6 and 7, respectively.

77. Rome Statute Article 7.

78. Rome Statute Article 7 (a).

79. Rome Statute Article 7 (k).

80. Rome Statute Article 7 (b).

81. Rome Statute Article 6.

82. Rome Statute Articles 25 and 28, respectively.

83. Rome Statute Article 12 (2).

84. Rome Statute Article 13 (b).

85. Those who claim that Israel is still occupying Gaza may argue on this basis that it is clear that Israel is the territorial state of all crimes committed in Gaza.

86. Rome Statute Article 11 (2).

87. <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279787/QARegistryArticle14.pdf> (last visited on 14 June 2009).

### **Goldstone Commission – Jonathan D. Halevi**

1. <http://www.un.org/webcast/unhrc/archive.asp?go=090628>
2. <http://webcast.un.org/ramgen/ondemand/conferences/unhrc/gaza/gaza01-orig.rm?start=01:35:05&end=02:15:20>
3. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1495>
4. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1416>
5. [http://www.alqassam.ps/arabic/sohdaa5.php?sub\\_action=sera&id=1373](http://www.alqassam.ps/arabic/sohdaa5.php?sub_action=sera&id=1373)
6. [http://www.alqassam.ps/arabic/sohdaa5.php?sub\\_action=sera&id=1356](http://www.alqassam.ps/arabic/sohdaa5.php?sub_action=sera&id=1356)
7. <http://www.sabiroon.org/news/specialNewsDetails.php?code=731&category=7>
8. <http://www.saraya.ps/forum/showthread.php?p=112352>
9. <http://www.saraya.ps/forum/showthread.php?t=9356>
10. <http://www.sabiroon.org/news/specialNewsDetails.php?code=1373&category=7>
11. <http://webcast.un.org/ramgen/ondemand/conferences/unhrc/gaza/gaza02-orig.rm?start=00:02:36&end=00:32:17>
12. <http://www.palestine-info.info/ar/default.aspx?xyz= U6Qq7k%2bcOd87MDI46m9rUxJEpMO%2bi1s7E2vaEXQm5C6U%2bt%2b%2bd65eOED%2bs9lqg5clKspsNLv%2bC4NbAGvmPHDv0t8StBpxSdkUfNb0gKi7pZyx6VahFdoaCrgX%2f%2bPH3ywx%2fm1BpLmoow%3d>
13. <http://www.alqassam.ps/arabic/sohdaa5.php?id=652>
14. <http://www.alqassam.ps/arabic/sohdaa5.php?id=652>
15. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1441>
16. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1439>
17. <http://www.paldf.net/forum/showthread.php?t=416258>
18. <http://www.paldf.net/forum/showthread.php?t=346094>
19. <http://www.palvoice.com/forums/showthread.php?t=210507>
20. <http://www.alhourriah.org/?page=ShowDetails&Id=3061&table=articles>
21. <http://webcast.un.org/ramgen/ondemand/conferences/unhrc/gaza/gaza02b-orig.rm?start=00:01:26&end=00:24:12>
22. The full investigation of the events at the al-Samouni house, including references, can be found at <http://www.jcpa.org.il/Templates/showpage.asp?FID=586&DBID=1&LNGID=2&TMID=99&IID=22500>
23. <http://www.saraya.ps/view.php?id=10389>
24. <http://www.almoltaqa.ps/arabic/showthread.php?t=126200>
25. <http://webcast.un.org/ramgen/ondemand/conferences/unhrc/gaza/gaza02b-orig.rm?start=01:10:57&end=01:26:08>
26. <http://www.alqassam.ps/arabic/news1.php?id=7417>
27. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1315>

## **Palestinian Policemen – Jonathan D. Halevi**

1. <http://police.ps/ar/articles.php?action=listarticles&id=3>

2. <http://www.jcpa.org.il/Templates/showpage.asp?FID=528&DBID=1&LNGID=2&TMID=99&IID=19183>

A similar study on the 2008 fatalities has been completed and will be published shortly.

3. <http://www.moqawmh.com/ara/index.php?act=News&id=2649>

4. A table (in Hebrew) analyzing each name appears on the Jerusalem Center's Hebrew website at: <http://www.jcpa.org.il/JCPAHeb/SendFile.asp?DBID=1&LNGID=2&GID=475>

5. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1342>

6. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1352>

7. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1287>

8. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1396>

9. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1399>

10. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1402>

11. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1406>

12. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1393>

13. <http://www.alqassam.ps/arabic/sohdaa5.php?id=1380>

14. <http://www.sabiroon.org/news/specialNewsDetails.php?code=730&category=7>

## **The Legal Basis of Israel's Naval Blockade – Ruth Lapidoth**

*Sources:*

Natalino Ronzitti, "Naval Warfare," in *Max Planck Encyclopedia of Public International Law*, ed. Rudiger Wolfrum, Oxford U.P., 2008.

Wolf Heintschel von Heinegg, "Blockade," in *Max Planck Encyclopedia of Public International Law*, ed. Rudiger Wolfrum, Oxford U.P., 2008.

Oppenheim – Lauterpacht, *International Law*, Vol. 2: "Disputes, War and Neutrality", Seventh Edition, London, Longmans 1952, pp 768-797.

Charles Rousseau, *Le droit des conflits armes*, Paris, Pedone, 1983, pp 258-274.

## **Proportionality – Amichai Cohen**

\* This article was prepared for the Jerusalem Center's Global Law Forum series in 2010.

1. David Kretzmer, "Rethinking the Application of IHL in Non-International Armed Conflicts," 42 *Isr. L. Rev.* 8 (2009).

2. Some, especially in the U.S., use these two terms (LOAC and IHL) as synonyms. Traditionally, the laws of war were called the Laws of Armed Conflict. This signifies their general goal – to regulate armed conflicts according to pre-agreed forms. During the second half of the twentieth century the terms were changed and the name of this area of law became International Humanitarian Law. Clearly, this change also shifted the focus of the area of law from agreement between armies to protection of civilians. For a general description, see A.M. Slaughter and L.

Helper, "Why States Create International Tribunals: A Response to Professors Posner and Yoo," 95 *California Law Review* 899 (2005).

3. For detailed descriptions of IHL, see Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge UP, 2004); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (ICRC, Cambridge UP, 2005).

4. There are even those who claim that such non-state actors are not subject to IHL because they are not a state. For the purpose of this study I will assume that this is an incorrect interpretation of the laws of armed conflict.

5. Note that this is not a mere oversight since there was a serious attempt, which failed, to include the term "proportionality" in the First Additional Protocol to the Geneva Conventions (1977). W.J. Fenrick, "The Rule of Proportionality and Protocol I in Conventional Warfare," 98 *Mil. L. Rev.* (1982) 91, 102-107. One may note, however, that the term "proportionate" is used in the ICC Statute as a limitation on the grounds for excluding criminal responsibility. Rome Statute of the International Criminal Court, 17 July 1998, art. 31(1)(c), 2187 U.N.T.S. 90 (hereinafter ICC Statute).

6. Some scholars maintain that the concept was already part of the Christian medieval laws of war, which posited that war could be deemed to be just, and hence legitimate, only if its gains exceeded the horrors that it wrought. J.G. Gardam, "Proportionality and Force in International Law," 87 *A.J.I.L.* (1993) 391, 394-395. A more concrete articulation of this standard can perhaps be seen in the Hague regulations. These adopted as a basic rule the principle of *distinction*, which outlawed direct attacks against non-military targets (Article 25). But this did not mean that all other attacks, for instance attacks against targets that were both civilian and military, could be undertaken without restraint. Article 23(e) prohibits employing "arms, projectiles, or material calculated to cause unnecessary suffering," while Article 27 directs the attacking army to spare, as far as possible, buildings which possess religious or cultural importance.

7. See e.g., the St. Petersburg declaration of 1868 that condemns the "employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable." "Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight," 29 November/11 December 1868, reprinted in 1 *AJIL Sup.* 95 (1907). Similarly Article 35(2) to AP-I forbids explicitly the use of these arms. See Gardam, *supra* note 6, at p. 406 ("This provision codifies the preexisting customary principle and is also based on proportionality"). See also M. Bothe, H.J. Partsch and W.A. Soft, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) 195-197; Y. Sandoz, C. Zwinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 401-402.

8. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3 (hereinafter AP-I or First Additional Protocol).

9. IHL traditionally applies to conflicts between two states: *international armed conflicts*. In recent years, more and more of IHL is applied to conflicts between states and non-states: *non-international armed conflicts*. According to the ICRC study of customary IHL, the principle of proportionality applies to non-international armed conflicts too. J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (ICRC, Cambridge UP, 2006).

10. See generally, Larry May, *War Crimes and Just War* (Cambridge UP, 2007), 211-227.

11. M. Cohen-Eliya, "The Formal and Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence," 38 *Isr. L. Rev.* (2005) 262, 288-289.

12. J. Gardam, *Necessity and Proportionality in International Law* (Cambridge UP, 2004), 93.

13. R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford UP, 1994).

14. For a more detailed analysis of debates concerning the application of the rule of proportionality, see J. Gardam, *supra* note 12, Chap. 4.

15. Of course, this question arises every time human rights are balanced against other state interests, even in domestic settings. In attempting to resolve this dilemma, constitutional jurisprudence courts generally adopt one of two possible courses of action. The first is to lay down a clear rule which declares in advance when the interest will overcome the right. E.g., security interests take precedence over freedom of speech in cases of clear and present danger. The other course is to leave the application of the general standard to the courts. Article 51 has adopted neither route – hence the problem. As we shall see, the ICC has employed both.

16. Examining the whole war would, of course, mean that there would be no distinction between proportionality in *jus in bello* and in *jus ad bellum*.

17. L. Doswald-Beck, “The Value of the 1977 Geneva Protocols for the Protection of Civilians” in: *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, Michael A. Meyer, ed., at 156-7.

18. Y. Sandoz et al., eds., *Commentary to the Additional Protocols*, supra note 7, at p. 684.

19. Gardam, supra note 12 at 101. Judith Gardam suggests that the application of this construction would probably have made illegal the American defoliation campaign in the Vietnam War. In this campaign the U.S. army destroyed several of Vietnam's forests so as to prevent the Vietcong from using them as cover. In that case the military advantage was to be achieved only in the long term, and even then only in a piecemeal manner.

20. See J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, supra note 9, vol. I, at 49, and the practice of Australia, Belgium, Canada, France, Germany, Italy, Netherlands, New Zealand, Spain, United Kingdom, and United States cited there.

21. Taken to the extreme, this would mean that the entire military operation should be the basis for assessment. That, however, could lead to a blurring of the line between *jus ad bellum* and *jus in bello*. What states mean is that the military advantage from a military operation should be assessed as a result of a policy. This perspective will be examined in greater detail below.

22. Henckaerts and Doswald-Beck, supra note 20, at p. 50.

23. “Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia,” 39 *I.L.M.* 1257 (2000).

24. See e.g., Amnesty International, “NATO/Federal Republic of Yugoslavia, ‘Collateral Damage’ or Unlawful Killings? Violations of the Law of War by NATO during Operation Allied Force,” 6 June 2000, available at <http://www.amnesty.org>.

25. For a discussion of this issue, see H.C.J. 769/02, *The Public Committee Against Torture in Israel v. Gov't of Israel*, judgment of 14 Dec. 2006, at para. 21, [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf) (Allowing the use of the practice of targeted killing provided the conditions of proportionality are met). But see A. Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law*, <http://www.stoptorture.org.il/heb/images/uploaded/publications/65.pdf> (claiming that the policy of targeted killing is forbidden *per se*).

26. “Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia,” 39 *I.L.M.* 1257 (2000).

27. Hays Parks, “Air War and the Law of War,” 32 *Air Force L. Rev.* 1, 175 (1990).

28. See E. Benvenisti, “Human Dignity in Combat: The Duty to Spare Enemy Civilians,” 39 *Isr. L. Rev.* (2006) 81, 82.

29. *Id.* at 83.

30. For a detailed description of the attitude of human rights law to the loss of life, see David Kretzmer, supra note 1, at 14-17.

31. In the negotiations over Additional Protocol I, several states suggested deleting the last sentence of Article 51(5)(b) (from the words “which is expected”), thus completely prohibiting any

attack which the attacking party knows would cause suffering to civilians, even if it is directed at military targets. See ICRC commentary on AP-I, *supra* note 7 at p. 683.

32. The Romanian representative was apparently one of the major opponents of the insertion of proportionality into the article. His delegation had abstained in the vote on Article 50 [now 57] and had voted against paragraph 2(a)(iii) and 2(b), which embodied the “rule of proportionality” that his delegation had always opposed. Article 50 [now 57] introduced into humanitarian law a concept which was contrary not only to humanitarian principles but to the general principles of international law. It amounted to legal acceptance of the fact that one part of the civilian population was to be deliberately sacrificed to real or assumed military advantages and it gave military commanders the power to weigh their military advantage against the probable losses among the civilian population during an attack against the enemy. Military leaders would tend to consider advantage to be more important than the incidental losses. The principle of proportionality was therefore a subjective principle which could give rise to serious violations. Accidental losses among civilians must be reduced to a minimum through scrupulous application of the Geneva Conventions. All precautionary measures must be taken to protect the civilian population before embarking on an attack. In no circumstances should legal provisions give parties the right to dispose of human lives among the civilian population of the adversary. Modern international law prohibited aggression and only wars of defense against aggression were permitted. The rule of proportionality was therefore against the principles of international law. Quoted in Fenrick, *supra* note 5, at 105-6.

33. *Commentaries to the Additional Protocol of the Geneva Conventions*, p. 626.

34. Yoram Dinstein, *supra* note 3, p. 120.

35. A. Cohen, “The Lebanon War and the Application of the Doctrine of Proportionality,” in: *The Doctrine of Proportionality* (ICFAI University Press, 2009).

36. Amnesty International, “Israel/Lebanon: Out of All Proportions, Civilians Bear the Brunt of War” (hereinafter: Amnesty report), available at <http://web.amnesty.org/library/Index/ENGMD020332006?open&of=ENG-ISR>; and Human Rights Watch, “Fatal Strikes: Israel’s Indiscriminate Attacks Against Civilians in Lebanon” (hereinafter: HRW report), available at <http://hrw.org/reports/2006/lebanon0806>.

37. Available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>.

38. While the Goldstone Report is not an NGO report, but was rather commissioned by the UN Human Rights Council, I think it is reasonable to see it as part of the “family” of NGO reports. First, members of the mission, including Justice Goldstone himself, were affiliated with NGOs in the past. Second, an enormous amount of the report, close to half if one calculates according to citations, is based on NGO accounts of the Gaza conflict. Third, the substantive position taken by the report seems to me to be in precise accord with the views of NGOs regarding proportionality. To the best of my knowledge, no international human rights NGO took issue with the Goldstone Report in these matters.

39. E.g., paragraphs 464-5 to the final report. This was despite the fact that Israel published a picture of weapons within a mosque, and provided a detailed account of an investigation of Hamas operatives which provided precise names of mosques in which weapons were stored. See *The Operation in Gaza – Factual and Legal Aspects*, Israel Ministry of Foreign Affairs, July 2009, para. 164 (The Israeli Report), available at [http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation\\_in\\_Gaza-Factual\\_and\\_Legal\\_Aspects.htm](http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm).

40. The Israeli Report, para. 171-180.

41. Goldstone Report, para. 466-474.

42. *Id.*, para. 393-438.

43. *Id.*, para. 427.



44. Id., para. 437.

45. Id., para. 653-708.

46. In this case, as in others, the Palestinian witnesses denied that there was any shooting at the IDF from near the school. However, in this case, two different media reports from the same day (one by AP and the other by Channel 4 [UK]) also described shooting. The mission could not simply discard this evidence. Id., para. 690.

47. Of course, the reason for this is Israel's controversial decision not to cooperate with the Goldstone mission. Yet, the decision not to cooperate does not mean, I think, that a state concedes that all factual claims of the other party are correct.

48. The family members were not hurt in the earlier bombing because they received a warning by phone and had time to evacuate their house. Goldstone Report, para. 687. Nowhere does the report claim that the house was bombed illegally. However, in an interesting twist of logic, the commission uses this incident to prove that the family members were not Hamas operatives. Otherwise, so claims the report, the IDF would have surely not warned them in the earlier bombing, and would have killed them then. Id., para. 684. The possibility that the IDF tried to avoid exactly the sad result of the death of innocent family members apparently did not cross the mission members' minds. The possibility that Hamas shootings were intentionally undertaken with innocent civilians in the vicinity so as to protect Hamas fighters was also not thought even worthy of mentioning by the mission.

49. Goldstone Report, para. 699.

50. The Israeli Report, para. 340.

51. It should be noted that the reference here is not to the Gaza operation as a whole, but just to the specific operation in which this particular unit was engaged.

52. The claim was articulated in an article by Michael Walzer and Avishai Margalit, "Israel: Civilians and Combatants," *New York Review of Books*, vol. 56, no 8 (May 14, 2009), <http://www.nybooks.com/articles/22664>. I shall address this claim below.

53. For a detailed support of this position, see Adil Ahmed Haque, "Killing Civilians," available at SSRN: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1439803](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1439803).

54. E. Benvenisti, *supra* note 28.

55. For a detailed support of this position, see e.g., John Yoo, *War by Other Means: An Insider's Account of the War on Terrorism* (2006).

56. Henckaerts and Doswald-Beck, *supra* note 20 at pp. 515-8, name five principles in customary IHL which limited the use of belligerent reprisals. (1) Purpose: only for the purpose of inducing the enemy to comply with IHL. (2) Reprisals are used as measures of last resort. (3) Reprisal action must be proportionate to the violation. (4) The decision should be taken at the highest level of government. (5) Reprisals must be terminated as soon as the other party complies with IHL.

57. Geneva Convention I, Art. 46, prohibits reprisals against wounded on land; Geneva Convention II, Art. 47, prohibits reprisals against wounded and survivors of shipwrecks at sea; Geneva Convention III, Art. 13, prohibits reprisals against prisoners of war; Geneva Convention IV, Art. 33, prohibits reprisals against civilians in occupied territories.

58. Additional Protocol I, Art. 51(8) states that: "Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57."

59. UN General Assembly Res. 2675 (XXV) 1970.

60. *Prosecutor v. Kupreskic* (ICTY, Trial Chamber, Judgment of 14 January 2000), para. 515-536; judgment available at <http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm>.

61. Other states include: United States, India, Afghanistan, Eritrea, Indonesia, Iran, Iraq, Malaysia, Morocco, Pakistan, Sri Lanka and Turkey. Altogether 167 states are parties to the protocol.
62. Positions of United States and UK cited in the *Kuperskic* case, supra note 60, fn. 785 and 787 respectively.
63. *Id.*, at para. 533.
64. Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (Grotius, Cambridge, 2004).
65. Henckaerts and Doswald-Beck, supra note 20, at 514.
66. Of course, not all uses of proportionality are related to reprisals. Yet the basis of the situation respecting the conflicts discussed in this study, such as the conflicts in Lebanon and Gaza, posit a situation which calls for an analysis from this point of view, even if it does not encompass the entire notion of proportionality.
67. I am of course aware that proportionality does not apply exclusively in situations in which I suggest some kind of reprisal is called for. Proportionality is also relevant where a bridge which serves both military and civilian populations is the target, without involving any violation on the part of the army using the bridge. Yet, I suggest that the application of the principle of proportionality is *most problematic* in situations where the other party deliberately places itself within civilian population, because it is exactly where the opposing party is taking advantage of proportionality that the principle raises the most objections.
68. Parks, supra note 27, at 162-3.
69. Richard Rosen likewise suggests that a presumption of innocence should be accorded to commanders of armies confronting situations of this sort. R. D. Rosen, "Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity," 42 *Vanderbilt J. Int'l L.* 683 (2009).
70. Parks, supra note 27, at 174.
71. International criminal law and individual criminal responsibility are intended to cover only the most serious war crimes (and other serious violations of international law). Hence, in the criminal context we can expect proportionality to be defined in a narrower way than in IHL in general. On the other hand, basic rules of international law require clarity (*Nulle Crimen Sine Lege*) and therefore the quest for clarity should begin in criminal law.
72. Supra note 5.
73. As mentioned in supra note 9, the ICRC study lists proportionality as applicable in both international and non-international armed conflicts.
74. *Prosecutor v. Blaskic*, Judgment of Trial Chamber of 3 March 2000.
75. *Id.*, at para. 507.
76. Supra note 9.
77. Customary international law includes two aspects, which together create a custom – state practice, and *opinion juris* – what states believe is the law.
78. Supra note 20.
79. Supra note 20.
80. "Somalia: Anatomy of Disaster," *Time Magazine*, October 18, 1993, available at <http://www.time.com/time/magazine/article/0,9171,979399-1,00.html>.
81. "Ambush in Mogadishu," *Frontline* interview with Ambassador Robert Oakley, available at <http://www.pbs.org/wgbh/pages/frontline/shows/ambush/interviews/oakley.html>.
82. "Ambush in Mogadishu," *Frontline* interview with Captain Haddad, available at <http://www.pbs.org>.

org/wgbh/pages/frontline/shows/ambush/interviews/haad.html.

83. Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations* (Cornell UP, 2000), 161-168. Daniel L. Byman and Matthew C. Waxman, "Kosovo and the Great Air Power Debate," 24(4) *International Security* (Spring 2000) 33-34.

84. Benjamin S. Lambeth, *NATO's Air War for Kosovo* (RAND, 2001).

85. Thomas, *supra* note 83.

86. *Supra* note 24.

87. *Id.*, para. 56.

88. *Id.*, para. 71-79.

89. Thomas, *supra* note 83, puts the number between 477-512.

90. Thomas, *supra* note 83.

91. *Id.*

92. Ahmed S. Hashim, *Insurgency and Counter-Insurgency in Iraq* (Cornell UP, 2006), 31-46; Carter Malkasian, "The First Battle for Fallujah," in *War in Iraq: Planning and Execution*, T.G. Mahnken and T.A. Keaney, eds. (Routledge, 2007), 163.

93. The facts here are based on "Operation Al-Fajr" in [www.Globalsecurity.com](http://www.Globalsecurity.com); Rosen, *supra* note 69; Hashim, *supra* note 92.

94. The website Iraq bodycount, which keeps track of all databases regarding civilian casualties, puts the number at a few hundred. Available at <http://www.iraqbodycount.org/>.

95. Similar evidence to support the same conclusion may be adduced from the constant changes in Rules of Engagement and NATO directives regarding bombing in Operation Enduring Freedom in Afghanistan. As documented in several reports, the number of civilians killed in bombings in this operation was alarmingly high in 2005-2007. See, e.g., Human Rights Watch, "Troops in Contact: Airstrikes and Civilian Death in Afghanistan" (September 8, 2008), available at <http://www.hrw.org/en/node/75157/section/2>. The result of the high number of civilian deaths is a constant attempt by U.S. and NATO commands to tighten the rules of engagement, and limit the use of especially harmful bombs. See, e.g., R. Norton-Taylor, "NATO Tightens Rules of Engagements to Limit Further Civilian Casualties in Afghanistan," *Guardian*, September 9, 2008, available at <http://www.guardian.co.uk/world/2008/sep/09/nato.afghanistan>. There is some support to the assumption that these changes actually limit the number of collateral civilian casualties.

96. Michael Walzer, "Responsibility and Proportionality in State and Non-State Wars," *Parameters* (Spring 2009), 40-52.

97. For detailed accounts, see Rosen, *supra* note 69.

98. Strict deontologists might reject this argument on the grounds that it analyzes the consequences of actions rather than their inherent moral value. However, and as Gabriella Blum has suggested, deontologist moral views are at any rate problematic when wars are involved because of the fact that war is always about using "bad" methods to achieve good results. Gabriella Blum, "The Laws of War and the Lesser Evil," 35 *Yale J. Int'l L.* (2010). The principle of proportionality itself, even in its most limited interpretation, is by definition in contradiction to deontological principles because it evaluates the results of actions rather than their inherent values. Moreover, it seems to me a caricature of deontological views to claim that we may ignore the effects of our actions in terms of civilian deaths.

99. Parks, *supra* note 68.

100. Walzer and Margalit, *supra* note 52.

101. Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective," 4(1)

*J. Military Ethics* 3-32 (2005).

102. William Fenrick, *supra* note 5.

103. H.C.J. 769/02, *The Public Committee Against Torture in Israel v. Gov't of Israel*, judgment of 14 Dec. 2006, [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf), hereinafter: *Targeted Killings case*.

104. *Targeted Killings case* at para. 45.

105. *Ibid.*, at para. 46.

106. *Ibid.* This legal standard appears to derive from the language of Art. 51(5)(b) of AP-I.

107. *Ibid.*, at para. 46.

108. *Ibid.*, at para. 46.

109. Article 57(2)(a) of AP-I requires parties to:

(i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

110. *Targeted Killings case* at para. 54.

111. Fenrick, *supra* note 5. ICRC study, *supra* note 9.

112. See Amichai Cohen, "Rules and Standards in the Application of IHL," 39 *Isr. L. Rev.* 41 (2008).

113. E.g., Stephen Breyer, "Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy," 91 *Harv. L. Rev.* 833 (1978).

114. I do not intend to go here into the full discussion in U.S. administrative law regarding the correct parameters of review of administrative law. Suffice it to say that even after the Supreme Court's decisions of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm*, 463 U.S. 29, 43 (1983), etc., procedural review still seems to be the court's main tool of review of administrative action. The most vocal proponent of procedural review was Judge Bazelon of the D.C. Circuit. E.g., *Ethyl Corp. v. Environmental Protection Agency*, 541 F. 2d 1 (DC Cir. 1975) cert. denied 426 US 941 (1976). Though it seems that his extreme views of exclusive procedural review were rejected, courts still mostly employ procedural review as the preferred method of review.

115. On judicial review of governmental agencies' procedures, see generally, Richard Pierce et al., *Administrative Law and Process*, 3rd ed. (Foundation Press, 1999), chapter 6, p. 221. For a critical position, see Jerry L. Mashaw, *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (Yale UP, 1997), pp. 158-180. As said, I cannot exhaustively discuss this issue here, nor do I propose that procedural review is the only review available for courts over agency action.

116. In the United States the discussion revolved around the "hard look" view. This view is usually rejected by courts, judges and academics alike. For an extended discussion, see Pierce, *supra* note 115, at pp. 386-393.

117. On legal advisors in modern military conflicts, see Kenneth Anderson, "The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War," 2 *Chi. J. Int. L.* 445 (2003).
118. Jonathan Masur, "A Hard Look or a Blind Eye: Administrative Law and Military Deference," 56 *Hast. L.J.* 441 (2005) (describing the deference administrative courts give to the military, and criticizing it).
119. Application no. 57950/00 *Isayeva v. Russia*, European Court of Human Rights, Judgment of February 24, 2005.
120. *Ibid.*, para. 209-214.
121. Contrary to some claims made by NGOs, there exists no specific requirement for an international investigation, although of course such an investigation would seem to be more independent. I know of only one incident of loss of life where a government appointed a committee of investigation which included international members. That is the Saville inquiry initiated by the British government in 1998 in order to investigate the events of Bloody Sunday in Ulster in 1972.
122. Indeed, this is the practice of the commission of inquiry appointed by the UN. E.g., the commission of the UN appointed to investigate the Qana incident in Lebanon in 1996 was headed by a retired general. See *Report of the Secretary's General Military Advisor Concerning the Shelling of the United Nations Compound at Qana on 18 April 1996* (1 May 1996), U.N. Doc. S/1996/337, annex.
123. On command responsibility in general, see Yuval Shany and Keren R. Michaeli, "The Case against Ariel Sharon: Revisiting the Doctrine of Command Responsibility," 34 *N.Y.U. J. Int'l L. & Pol.* (2002) 797, 816-867; M. Lippman, "Humanitarian Law: The Uncertain Contours of Command Responsibility," 9 *Tulsa J. Comp. & Int'l L.* (2001-2002) 1; A.D. Mitchell, "Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes," 22 *Sydney L. Rev.* (2000) 381.
124. ICC Statute, Art. 33(1). Note that according to the Elements of Crime, soldiers in the field are expected to make a value judgment on the proportional effects of their acts on the basis of the information available to them. International Criminal Court, Elements of Crimes, note 37, U.N. Doc. PCNICC/2000/1/Add.2 (2000).
125. E.g., Yotam Feldman, "Operation Cast Lead: The Military Advocates Let the IDF Win," *Ha'aretz* [Hebrew], January 23, 2009 [my translation of the title-AC], available at <http://www.haaretz.co.il/hasite/spages/1057768.html>.
126. *Ibid.*
127. Palestinian Center for Human Rights, *Report*, March 12, 2009, available at <http://www.pchrgaza.org/files/PressR/English/2008/36-2009.html>.
128. "Majority of Palestinians Killed in Operation Cast Lead: Terror Operatives," IDF Spokesperson, March 26, 2009, available at <http://dover.idf.il/IDF/English/News/today/09/03/2602.htm>.
129. The importance of the total number of civilian casualties is supported by the controversial *Kuperskic* decision of the International Criminal Tribunal for Former Yugoslavia. The court declared that "in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law." *Prosecutor v. Kuperskic* (ICTY, Trial Chamber, Judgment of 14 January 2000), para. 526.
130. A separate question is whether such investigations should be undertaken by an independent commission. I do not wish to go into this discussion in this study.

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## About the Authors

**Dr. Abraham Bell** of the Faculty of Law of Bar-Ilan University is currently a visiting professor at the University of San Diego. He specializes in international law, particularly the laws of war. Dr. Bell served in an IDF reserve paratrooper brigade in combat in the Second Lebanon war.

**Dr. Amichai Cohen** is an associate dean and senior lecturer of International Law at Ono Academic College in Israel and visiting professor at American University – Washington College of Law.

**Prof. George P. Fletcher** is the Cardozo Professor of Jurisprudence at Columbia University School of Law.

**Lt. Col. (ret.) Jonathan D. Halevi** is the research director for the Orient Research Group and a research fellow of the Jerusalem Center for Public Affairs. Halevi previously served as a senior adviser for political planning in Israel's Foreign Ministry.

**Sigall Horovitz**, Adv., worked as legal adviser to the President of the International Criminal Tribunal for Rwanda and served with the Office of the Prosecutor at the Special Court for Sierra Leone.

**Col. Richard Kemp** is former Commander of British Forces in Afghanistan.

**Prof. Ruth Lapidoth**, a Fellow of the Jerusalem Center for Public Affairs, is a Professor Emeritus of International Law at the Hebrew University of Jerusalem and a recipient of the Israel Prize (2006). Prof. Lapidoth served in the Israeli delegation to the UN in 1976, and in 1979 was appointed Legal Advisor to the Israel Ministry of Foreign Affairs. She is the author of nine books and more than a hundred articles on international law, human rights, the Arab-Israeli conflict and Jerusalem.

**Maj. Gil Limon**, former Legal Advisor for the Israeli Mission to the United Nations, heads the Legal and Security Affairs Section in the International Law Department of the IDF Military Advocate General's Office.

**Dr. Roy S. Schondorf** heads a department within the Israel Ministry of Justice charged with handling all international legal proceedings against Israel, Israeli soldiers or officials.

**Col. (ret.) Pnina Sharvit-Baruch** is a former Head of the International Law Department of the IDF Military Advocate General's Office.

**Prof. Gerald Steinberg** of the Political Studies Department at Bar-Ilan University is Executive Director of NGO Monitor.

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