

Hamas, the Gaza War and Accountability, under International Law

Updated Proceedings of an International Conference on June 18, 2009



Hamas Activity in Northern Gaza



Jerusalem Center for Public Affairs
המרכז הירושלמי לענייני ציבור ומדינה (ע"ר)



Konrad
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קרן קונרד אדנאור

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Maj.-Gen. (res.) Yaakov Amidror | Prof. George P. Fletcher | Dr. Dore Gold | Dr. Lars Hänsel |
Sigall Horovitz, Adv. | Col. Richard Kemp CBE | Maj. Gil Limon | Col. (res.) Daniel Reisner |
Dr. Roy S. Schondorf | Col. (ret.) Pnina Sharvit-Baruch | Prof. Gerald Steinberg



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Photo Credits: Cover Photo - IDF spokesperson, AP Images, Michael Mass, UN website

ISBN 978-965-218-090-2

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Opening Remarks

Dr. Lars Hänsel

Dr. Lars Hänsel is Director of the Israel Office of the Konrad-Adenauer-Stiftung.

I am very pleased to welcome you here on behalf of the Konrad Adenauer Stiftung to this joint conference together with the Jerusalem Center. The Konrad Adenauer Stiftung is a political organization which promotes democracy, rule of law, social market economy, and human rights in Germany, as well as in nearly one hundred countries all over the world.

Germany and other countries in the European Union have a privilege that Israel does not enjoy. The European Union and Germany have lived in peaceful times for more than sixty years. This is one of the reasons that there is a broad consensus in Europe that there is no military solution to political problems. I am also sure that this conviction is shared here in Israel, but with one major difference concerning the conclusion. In Germany and in European countries, the conclusion would be that if there is no military solution, then don't use military means. In Israel there is broad support for military action. Israelis know that even if there is no military solution, sometimes it is necessary to answer militarily, due to the hostile environment in which Israel lives. Sometimes you have to react militarily, even if this cannot produce long-term solutions. I am sure that also in Israel long-term solutions are seen only in a negotiated peace agreement with the Palestinians. Therefore, having sometimes to use military force puts Israel in a very difficult situation, including moral dilemmas which are even more complicated than using force against non-state actors like Hamas.

Since international law was mainly formulated for inter-state conflicts, the question is if and how international law applies for this specific situation. In these kinds of conflicts, the law and its interpretation, in particular, also becomes a means to further the interests of the parties. 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, as in the case of Gaza, after years of rocket attacks from the Gaza Strip.

During the Gaza operation, the pictures of suffering in Gaza made it difficult for many abroad to judge what the reason was for this suffering. In the war of pictures, Israel was always on the defensive, since there is a moral decision in Israel not to publish pictures or footage of dead people. However, compassion for those suffering should not hide the reason for the suffering. The reason was clearly because of Hamas and not Israel, because Hamas did not use its rule in the Gaza Strip for developing the economy and society, but used its power to build up its arsenal of weapons. Hamas did not take responsibility for the civilian population; on the contrary, Hamas made cynical use of civilians during the Gaza operation.

Angela Merkel took a key position when she commented, during the first stage of the operation, that nobody should mix up the cause and effect of the situation. Israel is facing major military, moral, and legal challenges. I hope that our conference will contribute to clarifying how Israel can better cope with the legal challenges in fighting terrorist organizations such as Hamas. I think that it is not only Israel's challenge to deal with non-state military actors. We will see more in Germany and Europe since Germany has troops fighting terror groups in Afghanistan and sometimes finds itself in a similar dilemma as Israel. This conference might also serve as a starting point for a dialogue between Israel and Germany about how to combat terror groups and to adhere to international standards.

The Goldstone Commission, July 7, 2009



Introduction: The Dangerous Bias of the United Nations Goldstone Report

Dr. Dore Gold

Dr. Dore Gold, former Israeli Ambassador to the UN, is President of the Jerusalem Center for Public Affairs.

The UN Fact-Finding Mission on the Gaza War, known more popularly as the Goldstone Report, best illustrates the fundamental problems associated with reliance on international mechanisms for assuring true accountability in a conflict like Operation Cast Lead. The Goldstone Report turned out to be heavily flawed. Originally, it was the initiative of the Geneva-based UN Human Rights Council, which named South African Justice Richard Goldstone to head it. It was promoted at the time by Cuba, Egypt, and Pakistan – not exactly the beacons of human rights – and had no support from Western democracies.

Strictly speaking, the report was primarily directed against Israel, which was seeking to bring to a complete halt the indiscriminate rocket and mortar fire by the international terrorist organization Hamas against Israeli towns and villages, that had been going on for nearly eight years. The Goldstone Report alleged that Israeli troops had committed “war crimes” by attacking purely civilian targets in the Gaza War. To make matters worse, the report failed to link Hamas to any violations of the laws of war, even though its continuing rocket attacks on Israeli civilians caused the Gaza War to begin with. There was only mention of anonymous “Palestinian armed groups.” It is probably for that reason that the Hamas second-in-command in Damascus, Musa Abu Marzuq, told the Saudi satellite channel *Al-Arabiya* that “the report acquits Hamas almost entirely.”

The net results of this attempt to create accountability in the war on terrorism were actually dangerous for pursuing the war against terror in the future. For what emerged was that an official report, with the stamp of the United Nations, made serious, but largely unsubstantiated, allegations about a state engaged in lawful self-defense, while letting the aggressor, an international terrorist organization, completely off the hook. Running through the report in incident

after incident is the charge that Israel *intentionally* attacked civilian targets. It did not conclude that civilian injuries were a product of collateral damage that occurs in many wars, but rather it resulted from a deliberate policy of the IDF. Israeli President Shimon Peres understandably called the Goldstone Report “scandalous” when he met UN Secretary-General Ban Ki-Moon in Jerusalem on March 20, 2010.

How did the Goldstone team produce such a result? It is essential to understand that its members had a very specific outlook of the nature of this kind of armed conflict that affected their conclusions. Colonel Desmond Travers of Ireland was the senior military figure on Goldstone’s panel and probably its most important member after Justice Goldstone. In a wide-ranging interview in *Middle East Monitor* from February 2, 2010, he utterly rejects that there is something called “asymmetric warfare” in which insurgent forces are introducing civilians into the battlefield against modern armies in a way that changes the nature of warfare. This outlook directly affected what Travers and his colleagues looked for as they gathered evidence, and how they went about the interviews that they conducted with Palestinians in the Gaza Strip.

Muhammad Abu Askar told the Goldstone panel that his house had been “unjustly” blown up by Israel. Yet his son Khaled worked for the military supply unit of Hamas and Iranian-supplied Grad rockets that were fired at Israel were stored in the cellar.

Take, for example, the case of Muhammad Abu Askar, a longtime Hamas member who served as the director-general of the Ministry of Religious Endowments in the Gaza government. He appeared before the Goldstone panel arguing that his house had been “unjustly” blown up by Israel, though he admitted that he was warned in advance by the IDF, who telephoned him directly, informing him that his home was to be targeted and he had better vacate the area. The Goldstone Report concludes that Abu Askar’s home was of an “unmistakably civilian nature.” If that was the case, then Israel would have violated one of the basic principles of international law by failing to discriminate between military and civilian objects and personnel during wartime.

Because the UN actually posted on its website video clips with the questioning of Abu Askar by the Goldstone panel, it is possible to examine how panelists reached their conclusions. They asked him detailed questions about the warning he received. They also asked about the other homes in the area. But the most pivotal question that would help them determine whether Abu Askar’s house was purely civilian in nature or was a legitimate military target was not even asked. No one bothered to confront him with the unpleasant but necessary question of whether Hamas munitions were being stored in his house.

In January 2010, the Israel Defense Forces completed its own internal investigation of many of the incidents that appeared in the Goldstone Report, including the case of Abu Askar. Israeli representatives submitted their findings to the UN secretary-general. It turned out that the cellar and other parts of Abu Askar’s house served as a storage facility for large stockpiles of weapons and ammunition, including Iranian-supplied Grad rockets that had been used against Israeli cities like Ashkelon, Ashdod, and Beersheba.

Indeed, the area around the house had been used as a launch site for attacking many Israeli towns and villages. If someone in the UN’s research division would have bothered to check the Arabic website of the Izz al-Din al-Qassam Brigades of Hamas, they would have disclosed that Khaled

Abu Askar, Muhammad's son, worked for the military supply unit of Hamas and provided its operatives with rockets and military equipment. The failure of the Goldstone panel to look into these issues and to ask the most basic questions of Muhammad Abu Askar regarding his use of his house to store rockets illustrates how unprofessional this investigation really was.

The Abu Askar case is only one of many incidents that appear in the Goldstone Report, but it is representative of a pervasive problem that appears throughout. In trying to reconstruct the reality of what occurred in the Gaza War, the team members refused to consider that Hamas was exploiting civilian areas to gain military advantage. In late October 2009, Colonel Travers confidently told *Harper's*: "We found no evidence that mosques were used to store munitions." He then added his own ideological position on the matter that helped him make such a conclusive assertion: "Those charges reflect Western perceptions in some quarters that Islam is a violent religion."

When Travers was asked how many mosques he inspected, he answered that he visited two. He did not even think that he needed to be more thorough, for he dismissed the very possibility that anyone would hide munitions in a place of worship. In contrast, in January 2010, Col. Tim Collins, a British veteran of the Iraq War, visited Gaza for BBC Newsnight and actually inspected the ruins of a mosque that Israel had destroyed because it had been a weapons depot. He found that there was evidence of secondary explosions caused by munitions stored in the mosque cellar. Travers clearly did not think it was necessary to make the same effort.

In other theaters of war in the Middle East, the militarization of mosques was very common. In 2004, U.S. forces in Iraq found weapons and insurgents in no less than 60 mosques in the town of Fallujah. While the Goldstone Report itself stated that it was unable to make a determination whether mosques were used for military purposes by the Palestinians, it nonetheless concluded that mosques were a "civilian object" and that Israeli operations against them were a violation of international law.

More generally, the Goldstone team simply refused to accept the argument that Hamas had used the Palestinian population in the Gaza Strip, as well as its civilian infrastructure, as human shields – a hallmark of the asymmetric warfare used by insurgents. Speaking about Hamas, Travers in his 2010 interview states point blank: "We found no evidence for the human shield phenomenon." As a result, from the Goldstone panel's worldview, Hamas had no responsibility for exploiting the Palestinian population to shield its military operations. Travers, in particular, was operating with ideological filters that prevented him from seeing evidence that contradicted his worldview.

From Israel's military experience, it was clear that Hamas used human shields effectively. A report by Israel's Intelligence and Information Center contains Israel Air Force video showing how on December 27, 2008, the first day of the Gaza War, after the residents of a building serving as a munitions storehouse were warned of an imminent Israeli air operation, they did not evacuate but ran to the roof of the building. As a result, Israel aborted the air strike it had planned. Other Israel Air Force videos show Hamas operatives deliberately moving toward groups of children or using them in the fighting in order to escape possible Israeli attack. Detained Hamas combatants confirmed this had been part of their military tactics.

However, the Goldstone panel did not want to consider the possibility that the Gaza War was part of an emerging battlefield in which private homes, mosques, and innocent civilians are being intentionally exploited by terrorist groups that seek to fight the West. In February 2010, Afghan officials reported that the Taliban were increasingly using human shields against U.S. and

allied forces trying to make inroads in Helmand province. Similar tactics have been employed by the Taliban in Pakistan as well.

With respect to the Gaza Strip, the Goldstone Report recommended that states open up criminal investigations against those whom it alleges may have committed war crimes. It also seeks the intervention of the International Criminal Court. Already, British courts have sought the arrest of former Israeli officers on the basis of complaints issued by Islamic and radical left-wing groups in London. Might not U.S. and other NATO officers be exposed to the same treatment on the basis of these precedents? Hamas created a legal arm, called *al-Tawthiq* (lit. documentation), which fed information to the Goldstone panel and today provides British lawyers with material to seek the arrest of Israelis in Britain. Why can't the Taliban find lawyers to do the same?

What needs to be done is to recognize that Western armies are going to be dealing increasingly with situations in which terrorist groups are embedding their military capabilities in the heart of civilian areas. In these circumstances, Western armies have three choices if their countries come under attack: 1) to surrender to terrorism and not defend their citizens, 2) to act like the Russians in Chechnya and use indiscriminate firepower, or 3) to find a way to separate the civilians from the military capabilities they hope to destroy.

Israel clearly chose the last option, using an unprecedented system of warnings to the Palestinian population by means of leaflets, breaking into Hamas radio broadcasts with special Arabic transmissions, and finally by telephone calls and text messages to the residents of a targeted area to evacuate and avoid danger.

The Goldstone Report never suggests how Israel was supposed to respond to eight years of rocket fire. Despite the multiple warnings that Israel issued to the Palestinian population, the report has the audacity to charge that Israeli soldiers "deliberately" killed Palestinian civilians, basing this accusation on biased interviews with Gaza residents whom it admitted were in "fear of reprisals." The Goldstone Report does not ask how it could charge that Israel had a policy of deliberately killing civilians, if Israel actually took extraordinary measures to warn the very same civilian population of impending attacks. But rather than being discredited, unfortunately the Goldstone Report picked up steam. The UN General Assembly voted on the report on November 5, 2009.

It was noteworthy that countries with forces deployed in insurgency wars, like in Afghanistan, either opposed or abstained. Yet in a second vote in late February 2010, Britain and France changed their vote from abstention to support for the Goldstone Report. In mid-March 2010, the European Parliament voted to endorse the report as well.

No one is suggesting that human rights be sacrificed on the altar of national security. The laws of war need to be carefully protected along with the lives of the innocent. The problem with the Goldstone Report is not the result of the need to revise those laws: They need to be applied correctly and not in a way that ignores what insurgent forces are doing on the ground. If a public building filled with munitions needs to be attacked at night when civilians are not present, it is not for reasons of revenge but rather from military necessity. The Goldstone panel did not want to consider that possibility because of its own prejudices and mind-set. Should that mind-set spread, then not only will Israel's security be endangered but also the security of the West as a whole.

Israel's Merkava 4 main battle tank



International Law's Limitations on Contending with Terror

Dr. Roy S. Schondorf

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.

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?

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



Redefining the Law of Armed Conflict? Legal Manipulations regarding Israel's Struggle against Terrorism

Maj. Gil Limon

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.

Introduction

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.¹

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 Buergethal),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 force⁷ – 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.⁸

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.⁹

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.¹³ 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,¹⁴ as well as the Israeli Supreme Court.¹⁵

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.

The conference that we are attending today is an important step towards that end.

Notes

- 1 This lecture was written and delivered 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.
- 18 http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf.

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



Accountability of Hamas under International Humanitarian Law

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Introduction

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 *Tadić* 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 *Tadić* 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 *Boškoski* 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 *Tadić* 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.

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.

Notes

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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. Tadić*, ICTY Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995 (*Tadić* 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 *Tadić* Jurisdiction Decision, note 8 above, at para. 70.
- 20 *Prosecutor v. Tadić*, 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. Boškoski 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_wlwfj.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° 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. Schöndorf, “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. Schöndorf, “Extra-state armed conflicts: is there a need for a new legal regime,” 37 *NYU J. Int’l L. & Pol.* (2005). Dr. Schöndorf 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 *Tadić* 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 (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 (last visited on 14 June 2009); Rory McCarthy, " Hamas accused of war crimes in Gaza," *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 (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).

لہ تعلمون ..

Lebanese Hizbullah fighters stand
next to a mock rocket under a poster of
Hizbullah leader Sheik Hassan Nasrallah
in Nabatiyeh, Lebanon, on Jan. 10, 2009.



International Law and Military Operations in Practice

Maj.-Gen. [res.] Yaakov Amidror

Maj.-Gen. (res.) Yaakov Amidror is former head of the IDF's Research and Assessment Division, with special responsibility for preparing the National Intelligence Assessment.

At one time I was in charge of intelligence for the Israel Defense Forces Northern Command. We had laid an explosive charge underneath the car of a very senior official in Hizbullah near the Nabatiya region and we had to decide when to detonate that explosive. We followed him with a UAV and at one point it became apparent that he did not get into the car on his own, but with two other members of Hizbullah and a child. We had to make a decision and a discussion evolved – not once was the term “international law” mentioned. We only asked ourselves whether it was moral to kill a senior Hizbullah member, one we had been trying to reach for a very long time, for which many people had risked their lives, and here we were perhaps forgoing this one rare opportunity. On the other hand, there was a child there of about seven or eight. We asked ourselves not whether international law applied in such an instance but rather whether an attack would have been moral. The decision that we took was not to push the button and the individual emerged unharmed. We did return to him later on and he had to pay the bill, but on that day a very clear decision was made and no issue of international law was taken into consideration, only the moral aspect.

The issue was very clear here. I am not certain that international law is sharp enough when one addresses the minute problems of the way war should be managed, mainly vis-à-vis organizations which are not precisely military organizations. This person lived in Nabatiya and in a totally civilian home with his family and he traveled in a civilian car. He had his personal weapon but he was dressed like a civilian. In terms of international law he was a civilian. He was not shooting at us, but was planning it in advance for a week later and he sent other people to kill Israeli civilians and military personnel. So where does he stand in terms of international law? The questions we raised then were

moral, not legal, questions, and I am not that certain whether that is not the right way in the long run, even though you cannot ignore international law. We are a country that wishes to be a part of the United Nations, of the family of nations that regards itself and is regarded as one committed to international law. It applies in relation to so many topics that we have to address – when it comes to the involvement of civilians, collateral damage, the way we handle civilians themselves – and these issues are far from easy.

In this respect we have here today a history of the understanding that evolved in the IDF and the organization which deals with these issues – the Advocate General of the IDF – and we have a great opportunity to hear from one of the outstanding officers of the British Army with a great deal of experience because the British military in recent years has been fighting similar wars. They have fought in Iraq and Afghanistan, but they came to these wars with previous experience. Perhaps this is one of the military organizations which has the most experience fighting non-military or military organizations, that beat the insurgency in Aden, and helped win the guerilla war in Greece. They fought in Malaya and they defeated Palestinian terror in the 1930s.

All those who say that it doesn't matter as long as we kill them are wrong. The way we do that is important. Sometimes the victory on the battlefield can be detrimental if it is turned into a tool in the hands of those opposed to the State of Israel in the international community. We have to do these things with a great deal of thought and without ignoring the conventions of the world. Very often these conventions are not compatible with the problems that we are facing today here in Israel, as well as problems the British are facing in Afghanistan.

*Sunni insurgents guard the streets of
Fallujah, Iraq.*



International Law and Military Operations in Practice

Colonel Richard Kemp CBE

Col. Richard Kemp is former Commander of British Forces in Afghanistan.

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.

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.

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 graffititing 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.

Israeli soldiers inspect the wreckage of a bus destroyed in a bomb explosion in downtown Jerusalem on Feb. 25, 1996.



International Law and Military Operations in Practice

Col. (res.) Daniel Reisner

Col. (res.) Adv. Daniel Reisner is a former Head of the International Law Department of the IDF Military Advocate General's Office.

Over the last several years, after I retired from the army in 2004, I have been asking myself a lot of questions about what I think and how I classify myself. In a lecture at Kiryat Ono College I said that I should classify myself as a human rights lawyer. Now, to anyone who knows my background and how many years I spent in counterterrorism, that doesn't seem like an obvious choice, but I have two things to say about this. The first thing is, I have a very good friend who is an expert in labor law, but he only represents large-scale companies. I have a partner in my firm who is a world expert on environmental law, but she only represents polluting companies. But no one argues that they are experts in their field. So how come when I say that I am a human rights expert, everyone says, no, it can't be. That's not your field, you don't do human rights, you violate human rights. You help governments violate human rights.

There is a joke about the priest, the rabbi, and the Israeli taxi driver who all died and went to heaven. They were told that they would receive housing on the basis of their contribution to the holy cause, and the priest got a very nice apartment with a very good view. The rabbi got an even better apartment on a higher floor with a better view, and suddenly both of them see that the Israeli taxi driver gets a huge villa on a hill. So they both go to the angel in charge and say that they dedicated their lives to God, how come he gets the villa? And the angel said that with his driving he puts the fear of God into more people than they ever did.

In that respect I am the taxi driver because I think the people who work in our field do more for human rights than probably most of the human rights lawyers working in the field. But the problem is that what I say now will not be accepted by them, and this is the crux of my discussion. There are clubs in

international law, as in international politics, which you cannot join and will not be asked to join if you don't hold the right opinion.

Until 2000 Israel classified the fight against terror as a criminal law enforcement scenario. In the West Bank or Gaza Strip, during the first intifada, during all the operations up to the year 2000, the goal of IDF soldiers when entering the West Bank or Gaza was to arrest suspected terrorists. IDF rules of engagement during that period, and I have drafted them for quite a long time, had different names. They were called rules for the detention of suspects. There were no rules of engagement in military parlance in effect in the West Bank or Gaza Strip, except that soldiers were allowed to use their rifle in self-defense. IDF soldiers were using their capabilities solely as policemen, and that is the format with which Israel fought Palestinian terrorism after 1967. In 2000, when the Second Intifada broke out, we saw that the scope of the fighting was immense. It did not look like sporadic stone-throwing, Molotov cocktail-throwing, or riots. In addition, the type of equipment being used was not that of criminals, but rather military hardware, such as live fire from machine guns, mortars, surface-to-surface missiles, and one-ton bombs hidden under the asphalt when the tanks came into the town.

The terrorists were not fighting in sporadic groups. Some of them were quite organized into guerilla or militia armies. It was happening everywhere – in the West Bank, Gaza, and Israel. And finally, from a statistical perspective – one Israeli out of 800 was either killed or injured in a terror attack during a five-year period. If I translate that ratio to the U.S., that would be the equivalent of 300,000 American casualties, which is one hundred times the scope of 9/11.

In 2000, with the Second Intifada, Israel concluded that the Palestinian violence was no longer a law enforcement issue because people were firing machine guns at us – and that we were now in the world of armed conflict.

In 2000, Israel, including Israel's lawyers, came to the conclusion that this is no longer a law enforcement issue, that we are no longer required to send our soldiers as policemen to arrest the people firing the machine guns at us. It was decided that we had passed a certain as yet undefined and undesignated threshold and that we are now in the world of armed conflict.

We had to sell this new idea to other countries, and I want to mention two examples of my failure in this regard. First, there was a meeting with the British deputy minister of defense in 2002, and he had a British general with him who, two weeks later, would be commanding British forces in Iraq. I explained to them my idea of crossing the threshold into the world of armed conflict against terrorism and told them that we are now allowing the Israeli army to use military hardware, technology, techniques, and *modus operandi* to fight terrorism. The deputy minister said that terrorism is not a military affair and it does not address international law, but rather it is an internal matter. I believe that he was comparing it to Northern Ireland, and the general agreed with him. I then asked this general would he still agree with his colleague in one month, after the first Iraqi suicide bomber attacked his forces? He answered that then he would probably agree with me.

The second failure was after Camp David in 2000, when President Clinton decided to appoint a fact-finding commission, of which he asked two questions. Why had the violence broken out, and how was it possible to bring the peace process back on line? Senator George Mitchell was in charge of that committee. I appeared before the committee, explained our concept of

war against terrorism, and the fact that we need to change our perspective and to address the question of what laws apply. However, the committee's recommendations to the new president, George Bush, called for the State of Israel to take back its classification of the dispute with the Palestinians as an armed conflict, and to go back to the law enforcement approach. It took four months and four aircraft to change the mind of the U.S. government, because after 9/11 the world changed for a moment, and the Americans got it. The American response to Israel's idea of unlawful combat was that now they understood what we were talking about.

However, 9/11 did not solve Israel's problems. Some time following 9/11, I received a letter from a British lawyer who wanted my help in defending a certain Serb general accused of war crimes in the former Yugoslavia. He turned to me because he felt that what that general was charged with was what Israel was doing to the Palestinians. He had no idea that he was being anti-Semitic, because he actually thought that what he wrote was true. From his perspective it seemed like the same complaints. As far as he was concerned, I was working for the bad guys.

Because of the media, people never ask questions deeper than who are the good guys and who are the bad guys, and they don't really care, as long as they have a soundbite, and they know who are the good guys and the bad guys.

After being interviewed for British television by an antagonistic journalist, I confronted him. He thought that if it were not for Israel, this part of the world would be quiet. I asked him if he was aware of the fact that for many Israelis, we liken ourselves to Sparta, that we are the three hundred crazy people stopping the flood of Islamic fundamentalists from swooping over Europe, and that we are covering your back. He laughed and said that we can't really believe that is true. It hit me again that people really don't believe us when we say what we believe, which is a problem, because if they don't think you are serious, they don't take you seriously.

There is another problem. Military people, armies, and people like us are no longer in favor. In this new world we live in, the majority of the people have outgrown wars, or at least they think they have. Therefore, we are viewed as the old guard, the people who are still fighting while the rest of the world has moved beyond that.

Several years ago, a United Nations organization responsible for cultural property was convening a conference on the protection of cultural property in wartime. This is a very important topic for Israel as well, because cultural property can mean a mosque, for example. There are a lot of things you have to be careful about and I wanted to know what the developments were, and I went to the conference, which was in Paris. There were about 300 or 400 people from 150 countries in the room. They were talking about the fact that there should be a new protocol which should totally prohibit any damage to cultural property in warfare, even at the cost of a soldier's life. I am saying to myself, I can understand Mona Lisa, but if you are talking about a religious icon which someone hand-sculpted for twenty years and put in a church somewhere, no, I am not going to sacrifice a soldier's life for this.

On the second day of the conference, I asked the following questions: What happened to the principles of military necessity, the fact that there should be a balance? And if you are allowed to kill civilians inadvertently in conflict, how come you can't destroy cultural property in conflict? Only then did I understand, and actually I was shocked to learn that I was the only military person in the entire conference. Everyone else was a museum curator, and only they had been invited. It was my idea to come. No one was presenting the other side of the argument, and as a result of my participation we came back in force the next time. All of the Western countries came in with military lawyers, but the organizers tried to shut me up, and put me in charge of drafting a part of the protocol. I helped draft the protocol and then I made sure we never signed it.

It is extremely important that Israel's positions be heard. There is a huge tendency among people to say that we have already lost the fight. If we don't engage we will lose the legal fight and the war crimes fight. Most of the normal people don't hate us in person once they get to know us, but they do hate us in principle because we are the bad guys.

I have three recommendations: The first is, before we engage anyone, we must make sure that we are whiter than white, and I don't think we've done enough on that. I am uncomfortable with the fact that the speed of the investigations about the allegations against IDF forces is so slow that when we come up with results no one believes them because they are six months old. I cannot accept that it takes six months to find out what happened in a conflict, although I know it does. We have to find a way to come up with a quicker response than we do today. We need to look at the way we actually investigate ourselves because I am not sure we have found the right balance yet.

However, once we understand what we did right and what we did wrong, armed with that moral and legal ammunition, we should actively engage public opinion everywhere, even if we are the odd man out. I have been the odd man out on more than one occasion at international conferences where I felt like the sacrificial lamb. It is worth it. If we expect our soldiers to enter Gaza and to risk their lives, then a lawyer can go into a hostile environment where the maximum that can happen is that he will be booed.

The third thing we should be doing is to recognize the fact that we are not alone. Almost every single military officer and military lawyer in the world actually thinks we are right. If he does not think we are right on the details, he thinks we are in the right area. He may have a disagreement with us on how to use force, and exactly what proportionality means, but the language is the same. These are people who are like-minded and not because they like Israel. I have had good friends from countries which have absolutely no basis for a very favorable relationship with Israel. It is because they have been where we have been and they understand the dilemma, and once they understand the dilemma they are willing to actively engage in finding a solution. That is a target group that we should actively engage, and create a coalition of like-minded states, not pro-Israel states. They could all be countries that don't like us, but the people there who make a difference are the people who know what we are talking about.

There is safety in numbers. The more important, intelligent, and understanding people from different countries see that the Israeli viewpoint is not crazy, and that we are not the bad guys, the less there will be a tendency to associate us with the bad guys.

*From left to right: Hamas leaders
Nizar Rayan, Mahmoud Zahar, and
Ismail Haniyeh*



Asymmetric Conflicts and the Rules of War

Col. (ret.) Pnina Sharvit-Baruch

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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.

United Nations headquarters in New York



Self-Defense and the Dignity of States

Prof. George P. Fletcher

Prof. George P. Fletcher is the Cardozo Professor of Jurisprudence at Columbia University School of Law.

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.

A 2003 poster by Oxfam Belgium called for the boycott of Israel by showing a bleeding orange, with the caption "Israeli fruit tastes bitter."

Israëlish fruit smaakt bitter.

Zeg neen tegen de bezetting van Palestina.
Koop geen groenten en fruit uit Israël.

Stop het zinloze geweld. Talloze Palestijnse en Israëlishche slachtoffers zijn macabere getuigen van een politiek van geweld en bezetting. Een falende politiek. Daarom deze oproep van het Actieplatform Palestina



om een einde te maken aan de bezetting. Wij ijveren voor het naleven van het internationaal recht en steunen de gerechtvaardigde eisen van het Palestijnse volk en van Israëlishche vredesorganisaties.

Wil je meer weten over de boycot van Israëlishche landbouwproducten en de politieke eisen van het Actieplatform Palestina, surf dan naar www.11.be/palestina
Campagnesecretariaat: 02 552 03 14 - stefaan.peirsman@fos-socsol.be

Een initiatief van het Actieplatform Palestina: Koepel van de Vlaamse Noord-Zuidbeweging - 1111.11, Artsen voor Vrede, Broederlijk Delen, Centrum voor Ontwikkeling, Documentatie en Informatie Palestijnen - CODIP, FOS-Socialistische Solidariteit, Geneeskunde voor de Derde Wereld, Oxfam Wereldwinkels, Oxfam Solidariteit, Pax Christi Vlaanderen, Protos, Socialisme zonder Grenzen, VIC - Vlaams Internationaal Centrum, Vlaams Palestina Komitee, Vrede. Met steun van de Association Belgo-Palestinienne.

“Lawfare”

Prof. Gerald Steinberg

Prof. Gerald Steinberg of the Political Studies Department at Bar-Ilan University is Executive Director of NGO Monitor.

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) 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 super powers. 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.

About the Jerusalem Center for Public Affairs

The Jerusalem Center for Public Affairs is a leading independent research institute specializing in public diplomacy and foreign policy. Founded in 1976, the Center has produced hundreds of studies and initiatives by leading experts on a wide range of strategic topics.

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Defensible Borders Initiative – A major security and public diplomacy initiative that analyzes current terror threats and Israel's corresponding territorial requirements, particularly in the strategically vital West Bank, that Israel must maintain to fulfill its existential security and defense needs. (www.defensibleborders.org)

Global Terrorism – Using previously unpublished documents, Jerusalem Center President Dore Gold explored the influence of Saudi Wahhabism on 9/11 in the *New York Times* bestseller *Hatred's Kingdom: How Saudi Arabia Supports the New Global Terrorism* (Regnery, 2003).

Institute for Contemporary Affairs (ICA) – A diplomacy program, founded in 2002 jointly with the Wechsler Family Foundation, that presents Israel's case on current issues through high-level briefings by government and military leaders to the foreign diplomatic corps and foreign press, as well as production and dissemination of information materials.

Global Law Forum – A ground-breaking program that undertakes studies and advances policy initiatives to protect Israel's legal rights in its conflict with the Palestinians, the Arab world, and radical Islam. (www.globallawforum.org)

Anti-Semitism After the Holocaust – Initiated by Dr. Manfred Gerstenfeld, this program includes conferences, seminars, and publications discussing restitution, the academic boycott, Holocaust denial, and anti-Semitism in the Arab world, European countries, and the post-Soviet states. (www.jewishaffairs.org)

Jerusalem in International Diplomacy – Dr. Dore Gold analyzes the legal and historic rights of Israel in Jerusalem and exposes the dangers of compromise that will unleash a new *jihadi* momentum in his book *The Fight for Jerusalem: Radical Islam, the West, and the Future of the Holy City* (Regnery, 2007). Justus Reid Weiner looks at *Illegal Construction in Jerusalem: A Variation on an Alarming Global Phenomenon* (2003). Researcher Nadav Shragai assesses the imminent security threats to Israel's capital resulting from its potential division, and offers alternative strategies for managing Jerusalem's demographic challenge in his monograph *Jerusalem: The Dangers of Division* (2008).

New Models for Economic Growth in Israel – This comprehensive, 10-year project has studied the application and impact of privatization policy and other financial innovations in Israel. Sponsored by the Milken Institute, the project includes nine published volumes in Hebrew and English.

About the Konrad-Adenauer-Stiftung

More than 40 years ago, Konrad Adenauer and David Ben-Gurion laid the foundation for reconciliation between Germany and Israel and for the future in partnership of the two nations. Carrying on the legacy of the late chancellor, the Konrad-Adenauer-Stiftung (KAS) has been active in Israel for more than 25 years.

Together with local partner organizations we work on three main objectives:

1. We preserve and further develop the relationship between Germany and Israel. This task is increasingly acquiring a European dimension as well.
2. We support efforts to strengthen democracy and the rule of law in Israel.
3. We strive to facilitate a peaceful coexistence between Israel and its neighbors.

The future of German-Israeli relations is one of KAS's most challenging tasks. We are currently facing a watershed in German-Israeli history: The generation of survivors and witnesses of the Shoah is slowly passing away. To many members of the younger generations it is often not obvious why the relations between the two countries are so important for both sides. KAS sees it as one of its prime tasks to foster a future-oriented and sustained dialogue between Germans and Israelis. This trustful dialogue is to be based on the lessons of the past, but also on common values and shared future challenges in the fields of society, science and security.

Our efforts in aiding Israeli civil society mainly focus on projects improving the integration of minorities. One example is our joint program with the Ben-Gurion University of the Negev, which helps Bedouins achieve higher education and thus enables them to participate more successfully in Israel's modern society. For years we have also undertaken extensive programs advancing in practice equal rights for women. In further projects we raise awareness for human rights issues and non-violent conflict management.

In order to help assure Israel's existence in peace and security by bringing about a peaceful solution to the conflict with the Palestinians and Israel's Arab neighbors, KAS organizes dialogue programs for Israeli and Palestinian politicians, officials, businessmen, journalists and students. Not even during the worst times of the Second Intifada did these meetings stop. In many cases the participants managed to solve practical problems while at the same time helping to lay the basis for a future comprehensive peace. Other outcomes were common Israeli-Palestinian teaching materials and the strengthening of Israeli-Jordanian relations through joint business meetings.

All KAS projects are guided by our belief in the benefits of democracy, freedom, social market economy and peaceful coexistence. We aim at making a lasting and sustainable contribution to Israel's thriving in peace, prosperity and partnership with Europe.

Dr. Lars Hänsel