

Operation Protective Edge: The Legal Angle

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At the start of Operation Protective Edge, Israel enjoyed relatively broad international support and understanding about the need to take action to stop Hamas' rocket fire. Israel's proposed "quiet in exchange for quiet" reinforced the legitimacy of the operation. However, as the operation continued, the number of Palestinian casualties rose and the scope of destruction in Gaza expanded, leading to voices in the international community and international organizations accusing Israel of violating international law and carrying out war crimes. On July 23, 2014, while the operation was still underway, the United Nations Human Rights Council established an international commission of inquiry headed by Professor William Schabas to investigate violations of the laws of armed conflict and human rights law during the campaign.¹ This was the same council that appointed the Goldstone commission after Operation Cast Lead in 2009. The UN Secretary General also announced his intention to establish a commission of inquiry to examine the damage to UN facilities during the operation.² Thus, while at this stage the military campaign has ended, the legal battle over Operation Protective Edge is just beginning.

As in every case in which Israel has used military force, certain allegations have arisen concerning its very use of force in the summer of 2014. These allegations have no convincing legal basis because Operation Protective Edge was part of an ongoing military campaign against Hamas, which has been underway for many years and has included numerous rounds of fighting. Therefore, the laws regulating the very use of force (*jus ad bellum*), which apply only at the start of an armed conflict, are irrelevant. Furthermore, in the case in question, it appears that Israel has a well-grounded claim of self-defense, given the ongoing rocket fire from the Gaza Strip.

Rather, the more significant claims concern the manner in which the IDF used force in the operation and the application of the laws of warfare (that is, the area of *jus in bello*). In this context it should be noted that while there is no doubt that Hamas' indiscriminate rocket fire at the civilian population in Israel and its use of Palestinian civilians as human shields meets the level of clear war crimes, this does not lessen Israel's obligation to act in accordance with the binding international rules. Therefore, Israel cannot take refuge in the claim that the other side has grossly violated the rules.

The laws of warfare are based on a number of fundamental principles; the main ones relating to the issue at hand are distinction and proportionality. According to the principle of distinction, military attacks should be aimed only at military targets and enemy combatants (including civilians taking direct part in hostilities), and thus targeting civilians or civilian objects is prohibited.³ According to the laws of warfare, civilian objects lose their immunity and become legitimate military targets for attack if "by their nature, location, purpose or use" they make an effective contribution to military action and their destruction offers a definite military advantage.⁴

Some allegations regarding the implementation of the principle of distinction by IDF forces during Operation Protective Edge focus on certain kinds of targets attacked – including the homes of Hamas operatives, multi-story buildings, and UN institutions – and their characterization as legitimate military targets. In order for attacks on these objects to be legal, they must have served a military-related function and be used, for example, as command and control posts, weapons storehouses, firing posts, or hiding places for Hamas operatives. However, more generally, the main challenge in dealing with allegations regarding the application of the principle of distinction is the difficulty to prove after the fact that civilian buildings in the Gaza Strip were used for military purposes. Therefore, it is very important to document the events, including by attaining soldiers' testimony when the events are still fresh in their memory, compiling photographic documentation, and collecting all other relevant evidence to document the "incriminating" findings about the military activity Hamas carried out in these buildings. In this context, it is difficult to overstate the severity of the damage caused by irresponsible remarks made at times by Israeli political and military officials about "exacting a price" from the population or by calls to "flatten Gaza." These statements are used as *prima facie* proof of Israel's intention to harm civilians. This is so, notwithstanding the fact that the officials have

no connection to IDF orders or influence over them, and despite the fact that these statements do not reflect the actual contents of the military directives.

In order for an attack to be considered legal, it is not sufficient that it comply with the principle of distinction. It must also comply with the principle of proportionality, which prohibits an attack expected to cause collateral damage to civilians and civilian objects that will be excessive compared to the direct and concrete military advantage anticipated.⁵ In light of the extensive harm to civilians and damage to civilian property in the Gaza Strip, presumably most of the claims that will be made against Israel will be that it used disproportionate force.

To fulfill the principle of proportionality, the expected military advantage from an attack must be assessed and then balanced against the anticipated harm to civilians and civilian objects. This is naturally a subjective test, and there are no precise formulae for determining what is proportional. The laws of warfare state that the standard is that of a “reasonable military commander.”⁶ It is also acknowledged that the examination should be conducted on the basis of the information in the commander’s possession at the time the decision is made, while taking into account the uncertainty that exists in combat, and not based on the actual result.

An examination of how the principle of proportionality was applied during the operation calls for a number of clarifications: First, one must understand how expected harm to civilians is assessed. The laws of warfare require that precautions be taken to evaluate the extent of the damage anticipated, but they recognize that these must be measures that are feasible in the particular circumstances.⁷ Therefore, before executing a pre-planned attack against a known target, a more thorough evaluation of anticipated collateral damage is required than prior to carrying out an urgent, immediate action. It is also understood that forces operating on the ground cannot be expected to conduct an inquiry on the same level as aerial forces, and it is accepted that the information they possess is more uncertain and more limited. It should be noted that all civilians who might be harmed must be taken into account. Therefore, if civilians were given a warning but did not evacuate the area even though they had the opportunity to do so, they still must be taken into consideration in examining the proportionality of the action.

Second, the laws of warfare recognize that even an action that results in harm to civilians could be considered legal, as long as the harm is proportional compared to the military advantage or if the actual harm was unexpected.

In other words, there is no demand to completely avoid harm to civilians. Nevertheless, in recent decades, there has been a spillover of values originating in human rights law to the analysis of combat situations (in particular, when the examination is conducted by human rights institutions). In the world of human rights law, which is intended to apply to law enforcement situations and not combat, when a civilian is killed, the starting assumption is that a prohibited action has taken place that requires a criminal investigation.⁸ Moreover, human rights institutions tend to judge according to the results and to reject claims that the damage was unanticipated or the result of an error.⁹ The advanced technological precision capabilities of the IDF (and other Western militaries) create the illusion that Israel is free of errors and that any difficult result is therefore intentional.

Third, in an assessment of the expected military advantage of an attack, the starting assumption is that the higher value the target, the greater the advantage. Nevertheless, the anticipated military advantage is examined in relation to the attack as a whole.¹⁰ This has great relevance in the context of Operation Protective Edge. One of the problems in the fighting against Hamas is the lack of high value targets. Hamas has no large military bases or significant strategic weapon systems, and all its senior commanders hid deep underground. Therefore, the targets, when they are examined by themselves, do not appear especially valuable. However, the test is not necessarily the value of each individual target, but the cumulative value of the targets and the contribution of their destruction to the objective of the military attack as a whole.

Fourth, the claim that the ratio of casualties between the sides indicates *prima facie* that there was a lack of proportionality in Israel's use of force must be examined. According to the argument, the small number of casualties on the Israeli side indicates that the military advantage of the campaign was limited. On the other hand, Israel caused extensive harm to civilians and civilian objects, and therefore, in the balance between them, the damage is excessive and thus disproportionate. From a legal perspective, proportionality is not assessed on the basis of the number of casualties or level of destruction on either side. There are quite a few precedents in which most of the damage was caused by one side. However, it is still necessary to address the claim on its merits. A total disruption of life in certain areas of Israel and a significant disruption in the rest of the country is intolerable, and Israel's investment in defensive capabilities such as Iron Dome and other protective measures,

which were entirely responsible for the very small number of civilian casualties on the Israeli side despite the thousands of rockets fired by the Hamas, should not be held against it. Moreover, there is significance to the fact that Hamas, for its part, not only did not worry about protective measures for the Gaza population but purposefully placed it in the line of fire because it was deliberately operating from among civilians and under their cover. While this conduct does not remove Israel's obligation to comply with the provisions of the law, there would appear to be a basis for arguing that this fact must be taken into account in evaluating proportionality.

Fifth, there have been claims that excessive weight was given to protecting the lives of soldiers and avoiding abduction of soldiers. According to the laws of warfare, the approach that the lives of one's soldiers are more important than the lives of enemy civilians is not acceptable. However, in situations where the soldiers were in mortal danger and acted to protect themselves or their comrades, it appears that the accepted practice is to permit the use of force necessary to confront this danger. The assessment of proportionality takes into account the basic right to self-defense, which is given even in situations involving law enforcement, and all the more so in combat. Of course, even in these situations, an attempt must be made to minimize the harm to civilians. However, it does not appear that there is a basis for determining that harm caused as a result of an unavoidable act of self-defense by troops will be considered disproportionate. It is important for Israel to demonstrate the complexity of fighting in a built-up area in Gaza, the challenges of mines and booby traps, and Hamas' reliance on underground fighting. An understanding of the complex battlefield is important for understanding the limitations that existed on the soldiers' ability to minimize harm to civilians beyond what was done. It is also important to investigate and present events in which soldiers took risks to prevent harm to civilians, and there is no doubt that such incidents occurred. Presenting a comprehensive picture of the campaign will help cope with the allegations of unrestrained and disproportionate use of force.

Another question that is expected to arise concerns the use of artillery fire in a populated area. Arguments against the use of this weapon derive from its being a "statistical weapon" with a certain deviation from the precise target at which it is aimed. The use of artillery fire in a built-up area during combat is not banned by the laws of warfare, and all regular armies have artillery weapons and rules permitting their use in certain circumstances

even in populated areas. However, there are initiatives today to set limits on the use of such weapons.¹¹ It can be assumed that this debate will arise again in the discussion of Israel's actions in the operation.

The criticism of the State of Israel in Operation Protective Edge could lead to criminal proceedings in state courts throughout the world on the basis of universal jurisdiction. It could perhaps even lead to investigations and proceedings in the International Criminal Court (ICC) if the court acquires jurisdiction in the wake of a Palestinian appeal.¹² In addition, critical reports against Israel regarding the operation will be used as another tool in the political campaign to delegitimize the state.

The main way to confront the anticipated allegations in the international arena, and especially in potential criminal proceedings, is to carry out independent investigations that are thorough, effective, fast, and transparent, and are conducted in such a way that the investigative mechanism will also receive international legitimacy.¹³ In specific cases – if for example, it becomes clear that IDF forces acted contrary to military orders and the laws of warfare – a hard line should be taken against those responsible, including prosecution in suitable cases. This is necessary in order to preserve and protect the rule of law and the values of the IDF. But in addition, this will enable reliance on the principle of complementarity, whereby international proceedings and foreign judicial intervention are not appropriate when the state concerned carries out a genuine and effective investigation on its own.¹⁴

Israel must arrive at the legal campaign it is facing armed with factual and legal material that will enable it to present its point of view and to demonstrate the complexity and challenges of the campaign. It should carry out field investigations of a variety of incidents, including those in which no civilians were harmed and no allegations were made against Israel, in a manner illustrating the caution with which Israel acted, and not focus only on incidents where there are claims of wrongdoing (while these must of course be thoroughly investigated). It is important to allow maximum transparency, including making an effort to reveal relevant intelligence if possible. It is also necessary to gather testimony on the challenges of combat from as many soldiers as possible. This will provide a fuller and more complete picture of the campaign.

Finally, a rational decision should be made on the issue of cooperating with the UN commission. Israel is justifiably resentful about the commission's mandate and makeup and rightfully assesses that the report the commission

writes will be biased. However, if cooperation might help make the report more balanced, which would lead to fewer negative consequences and dangers, then Israel should not hurry to reject this idea, but rather carry out a dispassionate objective analysis of the cons and pros of cooperation.

Notes

- 1 A/HRC/RES/S-21/1, July 23, 2014, Article 13, <http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session21/Pages/21stSpecialSession.aspx>.
- 2 Yoav Zeitun and Roi Kais, "Killing of Children on Gaza Beach and Attack on UNRWA School: IDF Opening Criminal Investigation," *Ynet*, September 10, 2014, <http://www.ynet.co.il/articles/0,7340,L-4569517,00.html>.
- 3 Article 48 of Additional Protocol I to the Geneva Conventions of 1977 (henceforth: the Protocol). See also Article 51(2) of the Protocol. The State of Israel is not a party to the Protocol, but insofar as these provisions reflect customary international law, they also apply to it. Any provisions quoted in this article are considered customary law.
- 4 Article 52(2) of the Protocol.
- 5 Article 51(5)(b) of the Protocol. See also Article 57(2)(a)(iii) and Article 57(2)(b) of the Protocol.
- 6 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 2008, para. 50, <http://www.icty.org/sid/10052>.
- 7 Article 57 of the Protocol.
- 8 On this matter, see The Public Commission to Examine the Maritime Incident of 31 May 2010 (Second Report – The Turkel Commission), *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict according to International Law* (henceforth: the second Turkel report), Chapter A, Section D, "The Grounds for Carrying Out the Obligation to Examine and Investigate ('When to Investigate?)," pp. 91-96, <http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website%20-%20hebrew.pdf>.
- 9 See, for example, the Goldstone report on Operation Cast Lead in the Gaza Strip, A/HRC/12/48, paras. 861-65.
- 10 See the states' reservations about the expression "military advantage" in the provisions of the Protocol, which in their opinion, refers to "the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack." See also Australia's clarifying interpretation that the term "concrete and direct military advantage anticipated" refers to "a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved." Julie Gaudreau, "The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims," *International Review of the Red Cross*, No. 849, March 2003, pp. 143-84, https://www.icrc.org/eng/assets/files/other/irrc_849_gaudreau-eng.pdf.

- 11 See, for example, the ruling of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) on the matter of Gotovina, Prosecutor v ante Gotovina and Markac (IT-06-90-A), Appeals Chamber, November 16, 2012.
- 12 See the article written by ICC prosecutor Fatou Bensouda, “The Truth about the ICC and Gaza,” *Guardian*, August 29, 2014, <http://www.theguardian.com/commentisfree/2014/aug/29/icc-gaza-hague-court-investigate-war-crimes-palestine>.
- 13 Second Turkel Report, Chapter A, Section E, “Method of Conducting an Examination and an Investigation (‘How to Investigate?’),” pp. 100-32.
- 14 See Article 17 of the 1998 Rome Statute of the International Criminal Court, which anchors the principle of complementarity, <http://legal.un.org/icc/statute/romefra.htm>.