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CONTENTS

Editor's Note

The articles compiled here are based on lectures given at a conference organized within the framework of the Military and Strategic Affairs Program at INSS in conjunction with the International Committee of the Red Cross (ICRC). The conference, "Challenges of Warfare in Densely Populated Areas," was held at INSS on December 6, 2011.

Warfare in densely populated areas presents complex operational, ethical, and legal challenges, as experienced by the IDF in recent years in its campaigns against Hizbollah and Hamas. Armed conflicts elsewhere in the world, such as in the Caucasus, Iraq, Nigeria, Afghanistan, and Sri Lanka are creating and encountering similar dilemmas. These and other instances point to the need to grapple with the challenges of warfare in order to find the correct balance between the needs of the fighting forces and the need to protect the uninvolved civilian population. Indeed, it is this latter sector that is often forced to pay heavily, in lives and in property, the costs of war.

The collaboration between the Military and Strategic Affairs Program and the ICRC reflects the shared understanding that deliberating the issues of warfare in densely populated areas is incumbent on military and political leaders from states all over the world. The goal is to impart greater knowledge of the subject to those professionals directly related to it, and help formulate the proper ethical principles that will guide armed forces as they meet the obligations mandated by international human law, i.e., the laws of warfare.

Some presentations from the conference that are not included here will be published in later issues of *Military and Strategic Affairs*.

Gabi Siboni
Editor, *Military and Strategic Affairs*

The Challenges of Warfare Facing the IDF in Densely Populated Areas

Gabi Siboni

Current assessments are that fighting in densely populated areas will be one of the main types of combat the IDF will face in the foreseeable future. This essay will focus on three points: one, the change in threats facing the State of Israel; two, the main characteristics of the military response necessitated by the change in the threat; and three, some components of the necessary method of action in such confrontations.

The Yom Kippur War marked the beginning of a process of a steady gradual change in the nature of the threat to Israel. The enemy began to abandon its previous strategy, i.e., seeking the destruction of the state or conquering parts of it through military offensives, while it developed an approach that sought to exhaust the citizens and make their lives unbearable by firing high trajectory weapons at Israeli population centers from civilian enclaves. The experience of the last three conflicts – against the Palestinians in 2000-2005, the Second Lebanon War, and Operation Cast Lead – shows that there has been a fundamental transformation in the enemy's conduct: the enemy now penetrates a civilian environment, constructs its operational capabilities within it, and deploys its military positions there, replete with launch pads and weapons caches.

In late March 2011, the *Washington Post* published a map showing Hizbollah facilities located inside and next to civilian homes in 160 Lebanese villages. These facilities are military positions by any definition of international law. Not only does Hizbollah deploy military positions in civilian environments; it also plans on operating from within them. Its launch capabilities are expanding by every relevant parameter: destructive

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force, number of rockets and missiles, deployment along the front and into Lebanon's depth, and range and ability to cover Israel, as well as accuracy. A similar process is underway with regard to Hamas' growing strength in the Gaza Strip.

The purpose of intentionally operating out of civilian environments is to defend these launch capabilities against an IDF offensive, because Hizbollah has determined that given the IDF's desire to avoid harming non-involved civilians, the army is hard-pressed to operate there with the required effectiveness. Thus, the enemy's declared mode of conduct is to direct fire from within civilian environments, which serve as shields, towards civilian environments in Israel, which are seen as the country's Achilles' heel. In order to maintain its launch capabilities over time, the enemy engages in guerilla warfare, making it difficult for the IDF's maneuvering forces to reach these villages to stop the fire and destroy the military positions there. This change creates some difficult challenges. The IDF must deter the enemy from making use of its capabilities and, should the deterrence fail, stop the fire quickly while restoring its deterrence to the extent possible.

The second point deals with the main characteristics of the IDF's response to the challenge described above. Using Prime Minister David Ben-Gurion's declaration that Israel's ability to effect a fundamental political change in its geo-strategic situation in this region through the use of force is limited, one may set some basic objectives for the use of military force. In routine periods and as long as there is no significant violent conflict, the IDF must demonstrate deterrence over time and maintain it. The objective of deterrence is to undermine the enemy's motivation to use force beyond a bearable threshold and allow the constructive activity in which the state engages in its routine – economic development, infrastructures, education, aliyah absorption, and so on – to take place. However, if deterrence collapses, a widespread conflict, in which the citizens of the state are attacked by enemy fire, can be expected to erupt. In such a case, the IDF must attain two basic goals, first, the restoration of effective deterrence for years to come, which can usually be achieved by dealing the enemy a powerful blow that will compel it to engage in a long process of reconstruction, similar to what was achieved by the results of the Second Lebanon War and to a lesser extent as a result of Operation Cast Lead, which achieved a certain amount of deterrence and a significant

reduction in the scope of fire. The second basic goal underlying the IDF use of force is to reduce the damage the enemy is liable to inflict on the citizens and infrastructures. This can be attained by hitting the launch capabilities and their supporting facilities, by using both precision fire and ground maneuvers in the area from which the enemy fires (not for the purpose of a long term presence, rather to destroy the enemy's military infrastructures located there). At the same time, it is necessary to act to reduce the damage by improving defensive capabilities (passive and active) and rebuilding the home front. These two goals must be achieved while limiting the duration of the fighting to the extent possible.

Achievement of these goals requires operating inside densely populated civilian environments, which brings us to the third point of this essay: the method of action in order to minimize the number of casualties among non-involved civilians. It is more complex than that: it is very hard to distinguish non-involved civilians from combatants because often the combatants put down their weapons and are disguised as civilians. However, it is clear that the vast majority of the population is not involved in the fighting. In light of the experience of the Second Lebanon War, the IDF has developed an approach to handle the challenge. This approach consists of three stages. First, the army attacks targets located in the heart of the population representing a clear and present danger while adhering to the strict guidelines spelled out by international law about the proportionality of damage to civilians. This point must be comprehensible to the public in Israel and abroad: there will be targets whose capacity for inflicting damage is such that it is necessary to attack them, even if they are located within civilian enclaves, without prior warning and in real time. The *Washington Post* article listed military positions in the village of al-Hiyam in Lebanon. One may assume that some of the targets could be justifiably attacked by precision fire even if located among civilians. One may assume that civilians would be harmed during such an attack. In the second stage, the IDF acts to move the non-involved civilians out of harm's way for their own protection. Only after undertaking an evacuation of sufficient scope does the IDF move on to the third stage, which includes maneuvering in the area and launching extensive attacks.

Evacuating the civilians would significantly reduce the number of casualties from the non-involved population. Rapid evacuation is a difficult mission and does not occur in a vacuum. An organization such as Hizbollah

8

would likely try to prevent such a step because the population serves a critical role in defending its launch capabilities. In order to facilitate the evacuation process, some preliminary steps must be taken. Official state elements must announce that for all intents and purposes Israel is relating to the village and homes in which there are military facilities as military positions, and that these positions will be targeted and destroyed. Concurrently, Israel must work with the international community. It is necessary to condemn the mode of conduct that uses civilians as human shields. There is nothing new about this, but the international community and its institutions must take a clear stance on the matter. It is necessary to place the responsibility on the Lebanese government and the Hamas government in the Gaza Strip and to explain to them the cost of their strategy. In addition, the sovereign institutions in Lebanon and Gaza must help to prepare the populations for a process of evacuation. They must ensure that the evacuation is carried out in a way that allows for effective defense of the population. It is necessary to allow international elements in the area, such as the Red Cross, to plan their assistance in the evacuation process ahead of time and help the population evacuate for its own safety. Moreover, the IDF must provide the populations of these villages with reliable information in advance, e.g., by using an Arabic language website where civilians can obtain information about evacuation, safe passage, and a site providing instructions about the logistics. This will enable civilians to evacuate and manage their lives at this time in a reasonable fashion. All of this must be planned and organized ahead of time. Realizing the processes described herein will help reduce civilian casualties and also gain legitimacy – both internal and international – for an IDF operation, should such an operation be deemed necessary.

The Challenges of Fighting in Densely Populated Areas: The Israeli Case

Arnon Soffer

Since the middle of the twentieth century there has been a process of dramatic change in the history of warfare. The change in the landscape, i.e., natural landscapes turning into urban areas, requires a change in the nature of war, both on the part of the defender and on the part of the attacker.

Every day some 190,000 new people stream into the urban areas around the world – 70 million each year. Half of the human race already lives in cities, and out of the general population, the percentage of city dwellers is growing. Longstanding rules among military experts to avoid entering cities unless absolutely necessary are no longer relevant given the changing reality. Today, areas that in the past were open have become urban, thereby not leaving the attacker any choice but to conduct urban warfare. Moreover, decisions are no longer taken on the open battlefield, rather in the offices of the decision makers, relatively few in number, who are generally tucked away in city centers (often near TV studios and other communications centers shielded by massive numbers of hostages).

Until recently it was only developments in weaponry and troop maneuvers that necessitated changes in military doctrine. Today the situation is different. The model of World War II, where it was necessary to cross all of Europe in order to reach Hitler's bunker, is no longer relevant. Battles in the streets of Berlin and house-to-house fighting are behind us, though battles of this sort have occurred in recent years as well (Gaza, Nablus, Beirut, Grozny, Fallujah, and Baghdad).

The modern city is larger and more central than ever, in terms of population, area, and range of political, economic, communications, and

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social activities taking place within. The size of major cities is 5-30 million people. It is impossible to conquer cities of this size and control them, but it is precisely these cities that serve as the bases for the decision makers and are the sites of most of the economic, political, and national strength.

What would happen in such a city a day after its conquest? The army would have to deal with hundreds of women giving birth and millions of hungry and wounded people. Hundreds, perhaps thousands, of guerillas would be active in the city, both underground (in public transportation and infrastructure tunnels) and above ground, in thousands of skyscrapers standing hundreds, even thousands, of feet high. Should a skyscraper collapse, all traffic in the area would stop because of the mounds of rubble that would block the roads. Guerrillas would traverse the area, and be present in residential buildings, sewers, shops, factories, hospitals, and public parks. All of this would take place within a human density unknown in the past.

Density in such cities ranges from 5,000 per sq km to 100,000 per sq km, in the extreme case of Hong Kong. Hundreds and thousands of bored lawyers and media people wander these cities, capture the events on camera, and publish photos all over the world. They offer their legal and media wares to every hostile individual or institution in order to cast blame on every soldier, officer, and leader. Their activities are supported by a large international "cartel" of organizations defending terrorists, criminals, and illegal immigrants. These are the "rights organizations," clearly distinguishable from rights organizations that do laudable work in defending the disabled, persecuted, tortured, and oppressed, such as, e.g., the Red Cross.

The physical size of the new cities is comparable to entire nations. For example, the size of Los Angeles, Beijing, Mexico City, and Tokyo is almost that of all of Israel and double that of Lebanon. How does one conquer a city of such proportions? How does one besiege it or impose a curfew on it?

Defining the physical size of a city is quite tricky. Consider a familiar area: are Rosh Ha'ayin, Kokhav Ya'ir, Netanya, and Ashdod part of Tel Aviv? The very best geographical and statistical minds struggle with this question, because the physical size of a city defines the size of its population, and that is no small matter. It plays a decisive role in physical and social planning and taxation, and it is certainly significant in wartime.

What is the population of Tel Aviv – 400,000, 1.3 million, 2.5 million, or 4 or maybe 7 million? All of these answers are right. The municipal entity of Tel Aviv consists of 400,000 people; the so-called Gush Dan (Dan bloc) has a population of 1.4 million; the greater Tel Aviv metropolitan area, which includes Rishon Lezion, Nes Tziona, Rehovot, Ramla, Lod, Petah Tikva, Kfar Saba, Raanana, and Herzliya, has 2.5 million people; if one adds a fourth ring – Netanya, Hadera, western Samaria settlements, and Ashdod – the total is 4 million; and if one views the entire coastal strip, from Rosh Hanikra to the Gaza Strip as a megalopolis, the population reaches 7 million.

By what means is a city of this size conquered? Does the conqueror try to capture the leader or leaders hiding throughout the city and in communication with one another? Does the conqueror try to occupy the media centers, airports, military camps and centers of the other security services, power stations, water installations, stock exchange and central banks, government ministries, economic centers? It may be that all the conqueror needs to do is starve the populace or close or poison the water sources of a city of 20 million. It is very easy to do and the results are liable to be much worse than the outcome of a nuclear bomb. Is the conqueror's goal to destroy the population of an enemy city? Leaving aside the moral question, would such an act be acceptable to the international community?

Let us return to the question of the means by which a city of millions is conquered. It is enough to harm the decision makers: eliminating them would change the structure of the regime, its outlook, desires, and abilities. In may be that in addition to eliminating one leader or ten, the conqueror would also have to damage the enemy's communications capabilities and some hundreds of fighters and thereby end the nightmare.

This would appear to be the answer in our time, and the tools to carry it off exist. Still, it has recently become evident that it is necessary to conquer the whole city despite the ramifications, as was the case in Grozny and the near Middle East. In the case of the cities mentioned above, it became clear that in order to attain a victory, there was no choice but to capture large areas of the cities.

Urban Warfare in the Middle East

In the axis parallel to the Jewish city-in-the-making along the entire coast of Israel (with a population of some 4-5 million), an enormous Palestinian

city (of some 4.5 million) is developing, starting in the Galilee, continuing through Samaria, the Jerusalem district, the Hebron hills, Beer Sheva, and ending in Gaza. Its suburbs to the east penetrate the Jordan Valley, but more significantly, its western suburbs interface with the Jewish city along the coast. Thus the Palestinian city gradually reduces the already narrow waist of the Jewish city. This reality is far from simple.

What is the map of urbanization in the second circle around Israel? Today, Cairo's population is about 15 million and its suburbs approach the Suez Canal and beyond, towards El Arish. The city of Gaza has a population of more than half a million; in 2011 there were 1.6 million people in the Gaza Strip, and this number is expected to rise to 2.5 million by 2025. Damascus has a population of 5-6 million and its suburbs stretch to Quneitra and Sheikh Maskin, a phenomenon that is clearly visible from the observation post on Mt. Bental. The greater Amman area has 4-5 million people, the greater Nablus area approaches half a million, and the Hebron hills have a population similar to that of Nablus.

What would Israel have to do were it forced to arrest fire coming from these cities? Would it have to conquer one of these areas or just threaten it? Would Israel set out to conquer cities of millions? Would it attempt to besiege a city of 2-3 million or even 6-15 million? Would it perhaps only occupy the strategic centers (political, economic, media, and military centers) of cities such as Damascus, Beirut, or Gaza?

It may be that from Israel's perspective, the optimal solution would be targeted killings. This would mean locating the individual terrorist hiding in a home surrounded by thousands of non-involved civilians serving as human shields or finding him hiding under a hospital and neutralizing him while risking possible harm to doctors and patients in the area.

In my opinion, targeted assassinations are the most moral option because they entail harm to hundreds of non-involved civilians rather than hundreds of thousands in a city under attack. The method is also less destructive of property, and spares unnecessary deaths and mass suffering as the result of an ongoing conflict. And in this context, we are allowed to take into account the citizens of Israel, located on this side of the line: here, too, it is necessary to avoid bloodshed, destruction, and terror. We are allowed to think about ourselves, and not just the other.

The United States army cleared Fallujah, Iraq, while destroying some 50 mosques and massacring some 5,000 people (terrorists and non-involved

civilians). The UN Security Council did not convene to discuss it, and no one accused any American officer of war crimes, and rightly so. The Russian army carried out two horrendous massacres in Grozny, Chechnya, and caused great destruction to the city. Hafez Assed and his son Bashar perpetrated horrific acts in Syria, and the Security Council had nothing to say. Even as the number of dead in Syria in the last two weeks of 2011 hit a new high, the Security Council in its December 20, 2011 meeting did not discuss it, but chose to spend its time on condemning construction in the Jewish settlements in the West Bank and on the "price tag" phenomenon. The initiators of this cynical resolution – at least in terms of its timing – were Portugal, Great Britain, Germany, and France. One may assume that there will be a severe reaction to anything Israel does, unlike what takes place in other war-torn areas such as Iraq, Syria, Grozny, Afghanistan, and elsewhere.

The "cartel of righteous among the nations," i.e., nations such as Great Britain, France, Russia, and China, backed by the "cartel of rights organizations," do not in fact care about the murdered, suffering, persecuted, and desperate Syrians, Iraqis, Egyptians, or Tibetans. The sole purpose of these cynics is to wage a campaign of delegitimization against Israel and condemn it around the world for any and every deed it has done and will do in its war on the terrorist organizations surrounding the nation.

The conclusion is clear: in the urban warfare that has been imposed on it, Israel must attack every terrorist even if he has surrounded himself with dozens or hundreds of hostages. The elimination of these terrorists and their human shields will save a great deal of suffering to the populations on both sides of the conflict. It must be done, while over and over again exposing the cynicism of the hypocritical moralists.

Cartel Representatives in Israel

There is no need to go far in search of cynicism, ignorance, and hypocrisy. Consider what is happening here in Israel. Some leading jurists in academia preach endlessly to the IDF on how to fight. My claim is that these people are out of touch with reality, geographically and culturally, and with the Middle East experience.

One of these individuals is Prof. Mordechai Kremenitzer, who in an essay published in *Hamishpat* (January 2008), claimed: "In order to succeed in battling terrorists it is necessary to isolate them physically and mentally

from the population from which they come."[1] In other words, in his opinion it is possible to isolate from the site of fighting 95 percent of the population of a city under attack and focus on the 5 percent of the area and the people that are the source of terrorism against Israel. From this proposal it is unclear how to identify and later isolate the terrorist from his family and the hostages shielding him (e.g., several dozens of preschool children). It is unclear what can be done when it transpires that there are snipers and an enemy command post or a missile launcher under a residential building. Only someone out of touch with the Middle East, its culture, religion, and worldviews, only someone who is unaware of its attitude to women and human life in general or democratic values, can suggest so clueless a notion. Such experts don't only give advice, but they also sit on the half-baked stage of every peace, democracy, and media institute for people who consider themselves peace-loving and preach morality from there.

Another such jurist is Prof. Menachem Mautner. In his book, *Law and Culture in Israel at the Dawn of the Twenty-first Century*,[2] he deals with the liberal Western nation and writes: "[It is necessary] to strengthen Israel's link to Western liberalism, [and this can be done by] regulating the relations between the nation and the central cultural groups living within it in the spirit of multiculturalism." Here, in Israel, Mautner constructs himself a liberal, multicultural society – uniting Hizbollah and Syria in the north, Hamas and the Muslim Brotherhood in the south, Raed Salah and the extremist Muslims in Israel, and another two million Hamas supporters in Judea and Samaria. As if that were not hard enough, how would he construct a multicultural society with the ultra-Orthodox and ultra-Orthodox nationalists? In order to live in a multicultural society, Mautner would grudgingly accept female genital mutilation alongside male circumcision! With worldviews such as these, which are totally out of touch with the region in which we live, these legal minds try to teach the IDF how to fight and, yes, also how to win. Jurist Prof. Daphne Golan of the Hebrew University in Jerusalem suggests: "Why not talk with our neighbors about reconciliation? Why not listen to their dream of returning to their homes in Jaffa, Ramla, and Lod?"[3] This is also the suggestion of sociologist Prof. Yehuda Shenhav and geographer Prof. Oren Yiftahel. All of them are asking the IDF not to harm non-involved civilians who protect or help pitiless murderers. Some would suggest not taking any shortcuts, e.g.,

the approach advocated by Prof. David Anokh of the Hebrew University, which speaks of "the willingness to absorb losses as a moral imperative."

In late 2011, my grandson enlisted in a combat unit in the IDF. It would be unpardonable for him to be sacrificed on the altar of fuzzy, cynical Western morality; if at all, he must only be sacrificed in defense of the Jewish, Zionist, democratic State of Israel. One must not propose to anyone to sacrifice one's children on the altar of cynical morality.

Conclusion

This essay does not deal with a theoretical problem far removed from reality. It may well be that within a short period of time, the IDF will have to stop a heavy attack on Tel Aviv by missiles fired from dozens of batteries located in the heart of Beirut, the heart of many Lebanese villages, Gaza, and even Damascus, with every missile battery surrounded by hundreds of human shields.

The dilemma IDF officers will have to face is whether to harm the human shields while neutralizing the barrage or to continue to absorb missiles, destruction, and the loss of Jewish lives, in line with the worldview that says we have to absorb losses as a moral imperative. You, the readers, will have to decide. I've already made my choice.

Another dilemma is likely to arise very soon. Above Hizbollah's command center in Beirut and above Hamas' command center in Gaza there are hospitals treating many patients. From these command centers a brutal war is being waged against Israel. Should the hospital and command center be destroyed in order to cut the war short, or should we talk about multiculturalism, morality, "isolating terrorists," and other empty phrases while at the same time sacrificing several hundred Jewish fighters and civilians? The right thing to do seems perfectly clear to me.

It may be that due to political or military considerations it will make sense to capture the entire Gaza Strip or southern Lebanon, perhaps southern Syria, as the only way to stop missiles fired at Israel. The IDF would have to do it quickly and with massive power in order to limit the days of fighting, thereby reducing the suffering to both sides. Paying any attention to the "cartel" – in Israel or abroad – will only extend the war and suffering; its advice must be ignored because it is both irresponsible and immoral. My point was strengthened by Yuval Bazak in his essay, "Responding to the Need for International Legitimacy: Strengthening the

IDF's Striking Force,"[4] and by Gabi Siboni in his article "Fighting Among Civilians."[5]

I conclude with an excerpt from my essay, "Between Jurists, Demography and the Existence of Israel":[6]

> I propose changing the public discourse that was begun by various jurists in Israel, who have concluded that any targeted killing is a war crime, and have also included the destruction of home and the construction of the separation fence – our fence of life – in the same category, and state the very opposite: jurists preventing the elimination of a terrorist or preventing the reduction of a war's duration cannot be said to have no blood on their hands. Such jurists are complicit in acts of terrorism, and their actions are liable to be considered war crimes.

In the new urban war that confronts us we cannot lose. We cannot agree to absorb heavy losses. It must be won and everything must be done to limit the war's duration. These are the only objectives that commanders and soldiers must bear in mind. We cannot be confused about this, despite the fact that in recent years many have tried to sow precisely such confusion.

Notes

1   Mordechai Kremenitzer, "Terrorism and Democracy, and the Case of Israel," *Hamishpat*, 2008, pp. 2-12.
2   Menachem Mautner, *Law and Culture in Israel at the Dawn of the Twenty-first Century* (Am Oved, Sapir Academic College and the Rubin Publishing House of Tel Aviv University, 2008).
3   Daphne Golan, *Haaretz*, May 6, 2008.
4   Yuval Bazak, "Responding to the Need for International Legitimacy: Strengthening the IDF Strike Force," *Military and Strategic Affairs* 3, no. 2 (2011): 3-17, http://www.inss.org.il/upload/(FILE)1326272957.pdf.
5   Gabi Siboni, "Fighting Among Civilians," *Yisrael Hayom*, December 6, 2011.
6   Arnon Soffer, "Between Jurists, Demography and the Existence of Israel," *National Security* No. 7, 2009.

Asymmetrical Warfare in the Gaza Strip: A Test Case

Dan Harel

The Gaza Strip stretches over a small area of only some 360 sq km. It is 42 km long and 12 km wide at its widest point, though the width of most of the Strip is only 6 km. The population is approximately 1.6 million and the natural annual birthrate is 3.3 percent. More than half the population is below the age of 15. The Gaza Strip has no natural resources; there is not enough land to grow wheat and therefore it cannot provide the most basic of foodstuffs needed by the population. It also has no water. Residents of the Gaza Strip rely on the State of Israel for all aspects of their existence: food, water, electricity, and sewage infrastructures. In every sense the density is typical of crowded, urban areas. In Jabaliya, for example, there are 100,000 people living in a very small area; this was where Israel had to fight when it embarked on Operation Cast Lead in late December 2008. The issue of asymmetry is an element that greatly affects the way Israel confronts the challenges of fighting in Gaza.

When international laws of warfare were formulated, particularly with regard to the Fourth Geneva Convention, World War II served as the model of war between nations. All international laws of warfare rest on the experience accrued in WWII in which the armies of nations fought one another. When analyzing the relative forces of Israel and Hamas, it is obvious that the IDF is the more powerful: it comprises hundreds of thousands of soldiers, thousands of tanks, planes, and ships. By contrast, Hamas is the seemingly weak side, as it has only tens of thousands of combatants and no heavy weapons. Clearly, one would think that when the two sides engage in battle the strong would win out over the weak.

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However, it is also clear that this is simply not the case. It would be a grave mistake to measure the relative force between the sides by taking a superficial view. In fact, because of the weak side's need to confront the strong, Israel is dragged into confrontations on other planes that to a very great extent determine the outcome of the military engagement, not only at the tactical level but also and particularly at the systemic and strategic levels. This is the essence of an asymmetrical conflict.

It therefore behooves us to investigate asymmetry. Asymmetry between entities is measured not only in terms of force but also exists in every aspect in which there is a difference in the nature of the conflicting sides, in their goals, power, methods of operation, and especially the rules of the game by which they play.

Between Israel and Hamas in Gaza there is a deep-seated, inherent asymmetry that pushes the adversaries to a particular and unique form of confrontation in this conflict. Therefore a fundamental mapping of the asymmetry is necessary from the strategic to the tactical levels; at the end of the day, the tactical level is what determines how one fights in the streets. At the strategic level, structurally speaking, Israel is a democratic state that maintains an elected government and institutions and is highly sensitive to public opinion and the media. In the Gaza Strip, by contrast, there is an entity that is not defined as a state that conducts itself on the basis of a single voice. While Israel acts on the basis of Western logic reflecting a multiplicity of ideas and where governance is examined in light of the results of its actions in the here and now, the Gaza Strip has a government with a fundamentalist ideology and is guided by a long term messianic idea for which the people are prepared to make enormous sacrifices. In terms of the goals of a confrontation, while Israel wants to solidify the geo-political reality and attain a peaceful existence, Gaza wants to change reality – wipe out the State of Israel – and is willing to pay the price for doing so. In terms of constraints, while the State of Israel is committed to an accepted statesman-like code of conduct, the entity of Hamas in Gaza writes its own rules and codes. All of this greatly affects the manner of confrontation.

At the systemic level and structurally speaking, Israel has a regular, traditional army that conducts itself on the basis of a Western military code of action. The members of this army are easily recognizable as they wear a uniform. The IDF acts only against military targets and tries to avoid damage to the surroundings. In the Gaza Strip, a force has been constructed

that Israel, for reasons of convenience, designates with terms such as company, battalion, and brigade, but the force is in fact not constructed with recognizable hierarchies. The force is tailor-made and assimilated into its protected civilian environment. It purposely plants itself in civilian homes and institutions and operates on the basis of a code that allows it to present itself alternately as civilian or military, as required by circumstance.

There is also a difference in terms of the rationale of the campaign. According to Israel's approach, fighting should be short and achieve unambiguous results that allow a peaceful existence for the long term, whereas the other side talks of remaining in the existing arenas over time. Hamas tries to achieve a situation that will impose long term limitations on the other side (because no one actually expects Hamas to win against Israel, which is significantly stronger); thus it seeks, slowly but surely, to cripple the other side and make it difficult for it to act. In terms of constraints, Israel is very sensitive to the duration of combat and the effect on the home front as well as the number of casualties on both sides; casualties inflicted on the other side also limit its actions. By contrast, Hamas' main sensitivity is the survivability of its leadership.

At the tactical level and structurally speaking, the IDF is constructed of traditional military units; its operations profile is conspicuous and has a high signature. By contrast, the "units" in the Gaza Strip, which are not at all units in the traditional military sense, use the method of disappearance, i.e., they have a very low signature. This makes it impossible to know if someone is a combatant or not. They operate within the civilian environment networked to allow military action, are located underground with separate communications from the general networks, and have decentralized weapons caches so that they do not have to move arms from place to place. They try to stay far removed from their centers of gravity so that the latter cannot be attacked. In fact, there are many combatants – tens of thousands – who operate in a decentralized manner within the civilian setting, taking advantage of the IDF's constraints so that when they engage the IDF (or Israel's civilian front) the IDF cannot take effective action against them.

In terms of the tactical rationale, Hamas fires high trajectory weapons against the Israeli rear from within densely populated civilian centers, intentionally using the civilians as human shields in order to draw the enemy into sending its infantry and armored corps into urban areas.

Fighting in an urban setting neutralizes the advantages that the strong side seems to have: in Hamas' view, a fighter with a Kalachnikov is equivalent to a fighter facing him with an M-16. Hamas is eager to see many casualties on both sides. Its guiding principle is damaging Israel's resilience and maintaining the determination to fight after having sustained many losses, while at the same time creating a troubling humanitarian picture that will lead to international pressure that will result in the end of the fighting. By contrast, according to Israel's guiding principle, it is necessary to suppress Hamas fire as rapidly as possible (suppress, not stop, because militarily it is very difficult to stop it altogether) and to damage Hamas militarily as much as possible in order to create deterrence for the future. Israel's ending mechanism involves achieving these goals, whereas the Palestinians' ending mechanism is undercutting Israel's legitimacy to act.

Israel's constraints are the relevance of the weapons, the small number of systemic centers of gravity, and clear military targets that can be attacked, as well as the sensitivity to casualties on both sides. By contrast, Hamas' constraints are a function of its difficulty in operating due to Israel's dominance in many spheres.

The question of how Hamas operated in the last confrontation and how it will operate in the future addresses the problem of confrontations in densely populated civilian settings. In Operation Cast Lead, an attempt was made to remove the residents from their homes and relocate them during the fighting. Even though this is a very complex act, it is necessary to take every measure to distinguish between civilians and combatants.

At the tactical level, the first question that must be asked is: who is the enemy? It is very hard to identify the enemy and distinguish the enemy from innocent bystanders. It is also very hard to figure out how the enemy's systems are integrated into the neighborhoods of Gaza: where the major weapons, launch areas, and booby traps are located (after all, these neighborhoods are not the innocent neighborhoods of Tel Aviv). It is very hard to attack such an enemy without causing great harm to the surrounding population. It is difficult to find the military facilities located beneath residential complexes and public institutions and remove them without inflicting significant damage on the surroundings. In order to respond to these problems, Israel has developed special high precision weapons that cause minimal or reduced damage to the surroundings, unlike any weapons used by other armies in the world. The point is not to be

right but rather to be smart. In addition, it is necessary to find the enemy's centers of gravity that, once destroyed, would relieve the IDF of the need to send in ground troops (as using ground troops portends damage that is almost impossible to avoid). The IDF is obligated to protect its personnel, and it is very hard to do so when fighting an entity that labors not to have any centers of gravity.

IDF forces face great challenges when fighting in urban areas. It is necessary to keep track of one's forces at all times – a group in this room and a squad in another apartment in the building. Because the surroundings are complex, it is necessary to spread out the forces, and this poses a challenge for controlling them. It is also necessary to clear residences that house both civilians and terrorists, and this is true of many neighborhoods. The challenge is to maintain activity that is coordinated among all the forces, e.g., to operate covering fire for maneuvering forces, while avoiding damage to the surroundings. Even though the IDF has found solutions involving different levels of authorization and different types of weapons for various situations, the challenge remains enormous. Some additional difficult questions are: how do you manage the civilian sphere in which the enemy intertwines civilian activities with booby traps? How do you ensure axes of logistics and evacuation? Another challenge is distinguishing between civilians and terrorists. The IDF must communicate with the population and remove it from the battlefield. At the end of the day the full responsibility for caring for the population in the areas that the army has taken control of falls to the IDF: it has to care for it and supply it with food and water. It is also necessary to cooperate with international organizations so that they can fulfill their function while remaining safe as they operate on the battlefield itself.

Politically, the major challenge lies in clearly and unambiguously articulating the goals of the operation before it is begun, to avoid a situation in which the goal is changed midway through the action. For example, several ideas were raised during Operation Cast Lead for changing its objective, even though the operation was underway and had evolved in a certain direction to attain particular goals. Another challenge is attaining the political conditions that make it possible to embark on the mission, and ensuring the operational sphere of action required to conduct and end it. This point is of the utmost importance.

The media and communications are another challenge. It is necessary to set in motion a national information campaign in order to create and maintain internal and international public legitimacy to ensure the time and space required to attain the operation's goals.

There is also a legal challenge. It is necessary to conduct a joint national legal campaign to create the room needed for operating before embarking on a mission in order to conduct it properly and reap its fruits later on. Therefore, jurists must come down from their ivory tower and enter the real world and get to work. This is a battlefield just like any other. In this respect too, it is necessary to wage a national campaign to create the proper environment for action and take advantage of the enemy's weaknesses and capitalize on them, while at the same providing proper protection to one's forces, as it is inconceivable that the enemy should be allowed to do whatever it pleases without having to pay a price (in terms of achieving its goals).

Militarily there is also the challenge of intelligence gathering before going into battle in order to make it possible to destroy targets massively and damage centers of gravity while avoiding collateral damage to non-involved civilians. The challenges are sending in ground forces while dictating the pace, reaching the targets, avoiding losses to the IDF and of course the non-involved population (this is not merely a legal but also a moral matter, and I believe all share this goal), and suppressing Hamas fire while ensuring a proper balance between achieving the goals and operating on the basis of the international law.

In my opinion there is a need to formulate a Fifth Geneva Convention because the Fourth has lost much of its relevance. We must operate in a way that will ensure few civilian casualties and of course the welfare of our troops. The last challenge is dictating the unilateral withdrawal and its timing, as was done in Operation Cast Lead.

Operation Cast Lead: A Test Case

Until November 2008, Israel faced alternating periods of rocket fire and *tahdiya* (calm) from Gaza, and all the while Hamas grew significantly stronger. After some 400 rockets were fired towards Israel during November and December 2008, the State of Israel was forced to enter the Gaza Strip, even though it was not keen on doing so. The enemy had 20,000 fighters in place and weapons that included light weapons, anti-

tank and anti-aircraft weapons, batteries, rockets, and mortar bombs. The objective of the operation was to damage Hamas severely and reduce the rocket fire and hostile terrorist activity emanating from the Gaza Strip in order to strengthen the country's deterrence and create the conditions for improving the security situation of the south, as well as prevent the conflict from spreading to other arenas. The goal was not to conquer the area in order to remain there, but to inflict massive damage on Hamas, create deterrence, and then leave the Strip. From Hamas' perspective, the end of the fighting was exhausting Israel's legitimacy to operate against the organization and seeing the IDF withdraw from the area. In accordance with the mission charged by the IDF, the Southern Command defined three goals by which it would be possible to say if it had completed the mission: stopping Hamas fire, damaging the organization, and strengthening Israel's deterrence.

The operation lasted 22 days. It began with an opening strike in which dozens of targets were attacked within 3 minutes and 40 seconds, in order to attain the effect of devastating damage and cause a state of shock. Subsequently, dozens of launch areas were hit in order to damage the launchers or remove them out of Israel's range. Later, fire was directed at hundreds of targets for a full week. In total, more than one thousand targets were attacked during the operation. The second stage was the maneuver, sending in ground troops and assisting with covering fire. The last stage was the unilateral withdrawal and redeployment. The ground troops were sent only to the area of Gaza and remained in encircling positions only, while the diversion in the south prevented Hamas from concentrating its force in any one location.

The operation began on December 27, 2008, and lasted until January 18, 2009. During the operation, 730 rockets were fired at Israel, and it was easy to see a steady effect of rocket suppression to zero in the last days of the operation. Hamas failed to launch rockets despite its significant efforts and lost its most senior commanders in charge of the rocket launch apparatus. On the Israeli side there were few casualties; most were the result of friendly fire typical of urban warfare. The IDF has a list of 709 terrorists who were killed and belonged to one terrorist organization or another. In the fighting, 295 non-involved civilians were killed (elderly, women, and children under the age of 16), and 162 whose involvement was unclear. A ratio of 75 percent terrorists to 25 percent civilians is generally considered

by Western armies to be a good result in urban warfare. This outcome was achieved thanks to two factors: the first was psychological warfare, which included taking control of Gaza's TV and radio broadcasting and broadcasting messages, as well as making calls to civilians' homes (in total, 290,000 calls were answered), during which civilians were instructed how to behave; the second was the extensive use of high precision weapons.

In conclusion, we must ask ourselves whether the State of Israel achieved its goals and how it met these challenges at the tactical level and the systemic level, and more explicitly, whether Operation Cast Lead achieved the deterrence it sought and whether it left room for more fighting in the future. In my opinion, the answer to both questions is yes.

Principles of Warfare in the Densely Populated Areas of Arab Non-State Entities

Shaul Mishal

In Israeli research there are two types of discourse regarding how to assess and judge warfare in densely populated areas: the normative discourse and the operative discourse. Conspicuously absent is the interactive discourse with the non-state enemy, i.e., the willingness to look at oneself through the eyes of the enemy in the course of the fighting. This discourse exists among non-state organizations such as Hizbollah and Hamas.

The normative discourse examines actions in war using parameters based on absolute moral values. The action and outcome are examined on the basis of norms, and therefore, "think before you act." The operative discourse bases its assessment and judgment of actions of war on professional parameters and comparisons with similar events of war in Western militaries. Events are judged on the basis of outcome rather than norms, so that the beginning is subject to the end, or according to T. S. Eliot's *Four Quartets*, "in my beginning is my end."

In Israel, the two types of discourse, the normative and operative, limit the value of feedback and trial and error mechanisms that allow for learning in real time about the enemy's multifaceted conduct and responses.

On the side of the non-state Arab entity, where the interactive discourse is prevalent, the normative and operative discourses are intertwined. The end, i.e., the test of results, and the beginning, i.e., the test of norms and intentions, are part of a dynamic process of learning in which the end is a longing for the beginning. Going beyond traditional Israeli myopia, it behooves us to say something about the discourse on the Arab side,

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and refer to the poet Mahmoud Darwish (though one should beware of making sweeping generalizations): "I walk without rendezvous, vacant / of my tomorrow's promises. I remember that I forgot, / and I forget as I remember…I forget the things I have said / and remember what I haven't said yet."[1]

This essay discusses three articles dealing with Operation Defensive Shield and Operation Cast Lead that reflect the normative and operative discourses common in Israel. It will also discuss statements made by Hizbollah and Hamas leaders that reflect the interactive discourse.

The essay by Yagil Henkin, "Kosovo, Somalia, Jenin: A Comparative Analysis,"[2] deals with the events of Operation Defensive Shield in order to form a clear idea of what took place. It surveys the portrayal of the operation in the media and tries to clarify whether the accusations against Israel, whereby the IDF perpetrated war crimes, are in fact valid. To this end, the author states: "It is impossible to assess what happened in Jenin without a clear understanding [from the army's point of view] of what is involved in urban warfare."[3] According to Henkin, in order to understand what occurred in Jenin, it is necessary to judge matters in their military context and examine the cost-benefit ratio between the steps that were taken and the cost that was paid, while learning from the experience of other armed forces that operated under similar circumstances.[4] Given that Henkin is trying to get "a clear understanding" about the actual events, there is no interactive discourse with the changing reality by means of a process of trial and error. The comparative method Henkin uses is inconsistent with the interactive approach.

Asa Kasher, in his essay "Operation Cast Lead and the Ethics of Just War,"[5] attributes particular significance to examination of the value-based aspects of a military operation that he defines as a clearly political act. Particular military components with value-based aspects are "decisions, commands, and actions [that] should be closely examined in order to determine whether they appropriately manifested the moral principles of the State of Israel, the ethics of the IDF and the General Security Service, and the laws to which Israel is subject."[6] Kasher, unlike Henkin, derives the principle that defines the action from the fundamental intention. Laws explicitly clarify what is right and what is wrong, what is permitted and what is forbidden. Therefore, processes of trial and error are not part of what is taken into consideration for a military action. Feedback is also

nonexistent here because of the clear precedence of abstract rules over concrete situations.

There is an obvious difference between Henkin's approach and Kasher's. Assessing warfare in an urban zone, says Henkin, requires a professional discussion about military moves as well as a comparison with similar military moves by other Western forces. For Kasher, the context is legal and philosophic. An enlightened nation is measured by its adherence to the rules and laws incumbent upon it. Kasher does not engage in comparisons unless it is a comparison between the ideal and reality. According to his approach, success lies in creating as much congruence as possible between the two.

Despite the difference between Henkin's and Kasher's approaches, the two have a common denominator: neither discourse is based on Israel's interactions with the nation's non-state enemies in the context of warfare in densely populated areas. In both cases, interaction with the enemy is absent from the discussion about military action in an urban setting.

From Kasher and Henkin's point of view, the enemy is an object. It serves as a mirror in which Israel can view itself according to moral and professional yardsticks while engaging in a comparison with other Western nations. According to Henkin, the mirror used by Israel reflects an IDF that knows how to attain the goals with which it was charged while maintaining the professional rules that obligate the army to protect civilians. According to Kasher, the mirror used by Israel reflects an IDF that upholds both binding moral principles and self-imposed ethical limitations.

Even when Israeli commanders manage to go beyond seeing the enemy as an object, they find it hard to create significant interaction with the enemy. In his essay, "Walking through Walls," Eyal Weizman[7] claims that during Operation Defensive Shield, the commanders in the sector, especially the paratroopers' brigade commander at the time, Col. Aviv Kokhavi, sought to apply military methods based on rational deconstruction of the urban space in order to surprise the enemy. These methods of warfare stressed the reshaping of the space. The ability to reshape the space became the commanders' major objective on the ground. However, even this reshaping, as Weizman explains, was undertaken without any sensitivity to the interactive dimension. The assumption of the commanders on the ground was that they were dealing with a micro-technical calibrating of the military toolbox available to the IDF.[8] They ignored the fact that in

addition to a view of the expanse, they should also have considered the enemy as a dynamic entity with a clear functioning presence in the combat sphere, a player demanding interactive consideration at the strategic level. In other words, even in a situation of a comprehensive radical analysis, Israel remained – in its own view – the only entity in existence in the sphere and in planning the campaign.

In my mind, the geocentric approach, as reflected in the discussion about warfare in densely populated areas, represents a significant gap between Israel and its enemies, in particular its non-state enemies.

How do non-state organizations such as Hizbollah and Hamas relate to fighting in densely populated spheres? In a speech made in July 2006, Hassan Nasrallah stated:

> Our policy is not to cling to one particular point or another in a particular town, and so on. Our fighting doesn't have a geographical dimension, because we are not an organized army and do not fight like an organized army; we fight a guerilla war. Therefore, from our point of view, it is better to let them advance and enter the cities and villages because that way we can fight them directly and cause them damage and loss of life. That is our goal in a ground confrontation.[9]

In Hizbollah's view, close contact with the Israeli enemy allows its presence in the arena without committing it to holding any particular target or line.

Although his goal is to kill as many Israelis as possible, the number of Israeli dead is not a yardstick of victory from Nasrallah's perspective. An interview he gave to al-Jazeera reflects a common motif in Hizbollah's policy:

> A victory for us means that the resistance remains, that its spirit is not broken, that Lebanon is not vanquished and maintains it honor…As long as missiles are launched from Lebanon and hurt the Zionists, as long as there is even one soldier firing his gun… it means that resistance still exists… The fact that we've lasted this long – that's victory. We're talking about Israel! I've always said that one can't underestimate Israel. We're not fighting the militia, party, organization, or army of a weak or poor nation. We're fighting against an army that beat several Arab armies combined in a single blow…The fact that we're still standing is a victory, the fact that we've

taken a blow is a victory, and the fact that we've continued the struggle is a victory.[10]

In this segment too, there is a clear stress on feedback: what Israel does defines what Hizbollah does, and vice versa. Nothing exists only in and of itself. Even the respect he grants Israel is evidence of Hizbollah's determination in service of its definition of self. The success of the resistance is thus measured by its standing up to a particular enemy in a particular context. The ability to interpret stamina as victory is a direct outcome of the aggressor's obvious characteristics. Nasrallah made it clear that a part of what he thinks of Hizbollah's success lies in the organization's ability to see itself through the eyes of the aggressor, i.e., Israel.

In an interview with al-Jazeera about Hizbollah's rocket fire, he said:

The first time we trained our weapons on Israeli settlements was on the day the former General Secretary Abbas Musawwi was killed [February 1992]. The first blow we landed on them [that year] was very painful because it came as surprise to the Israelis. For our part, after we launched the Katyushas on the settlements, we realized that the enemy stopped its attack on us, and from that day onward we understood the lesson that lay at the heart of that incident.[11]

Nasrallah's statement indicates the importance he attributes to trial and error. Hizbollah fired for one reason – to respond. It was surprised by the restraint shown by Israel and changed its conduct on the basis of the evolving reality.

Hizbollah can therefore be said to be a learning organization. Its basic assumptions are: every action on its part will elicit an Israeli response; the response will not necessarily be predictable or proportionate; and it is important to study the response and derive modes of action from it.

This interaction with the enemy is of primary importance in the organization's self-definition as it confronts the enemy. The situation in which there is no choice but to see oneself through the enemy's eyes leads to a learning of lessons and also to the shaping of systems and the agenda. The enemy is not "objective," in the sense of being unchanging. On the contrary: the enemy is dynamic, capable of change. If I want to confront him, I cannot be less dynamic or capable of change than he.

Interaction – the state in which one is willing to see oneself through the enemy's eyes – is therefore a sign of strength in Hizbollah's view. From

Israel's point of view it is a sign of weakness. Nonetheless, in warfare in densely populated cities – both from afar and within the urban zone itself – this interaction clearly comes to the fore. In such warfare, boundaries are crossed and distinctions blurred. Three feet conquered by your forces can quickly be retaken by the enemy. Innocent civilians can turn out to be combatants. A secure axis is liable to turn into a death trap. The gaps of context I have discussed so far demonstrate the extent to which such intensive interaction is problematic from Israel's perspective and the extent to which it affords opportunities to non-state entities such as Hizbollah.

Hamas is another non-state entity that wages war on Israel in densely populated areas. An examination of statements by Hamas leaders shows that Hamas too defines success via a deep understanding of its enemy, an understanding that comes from interaction. Hamas spokesman Abu Obeideh, in an interview with *al-Hayat*, said:

> We studied the methods of the Israeli army as it comes across fighters and we laid a relevant defensive infrastructure. We prepared for this war. We in [the] al-Qassam [Brigades] studied for a long time... because the enemy is planning to strike at Gaza...From the first moment of the war, we started changing our tactics and scenarios.[12]

Mohammed Def, one of the founders of the military arm, stated in an interview with al-Jazeera:

> Does the resistance have to attain a crushing victory by means of a knock-out or simply make the occupier pay a heavy price by attaining local victories, in stages?...It's part of the strategy that has made Benjamin Netanyahu understand, over and over again, that Israel's War of Independence has been going on since 1948 and is still not over.[13]

In Hamas' view, military skills are not measured by professional yardsticks, à la Henkin. They are also not an expression of absolute principles, as Kasher would have them. They are acquired and learned through facing a concrete enemy, and by constantly changing and regrouping anew.

The ability to exploit the IDF's weakness on the basis of a deep understanding of its capabilities and routines lies at the very heart of Hamas' strategy. However, this recognition is not absolute. Mohammed Def said that Hamas did not embark on operations whose chances of

success are 5-10 percent; it strove to be in the 70-80 percent range. The possibility of failure despite the interaction was always taken into account.

Another feature discernable in statements by Hamas leaders is the organization's communal rather than the state-like nature. Hamas' vitality does not emerge from the formal activities of a state's apparatus and institutions, or from abiding by predefined rules. In this context, Mahmoud al-Zahar noted: "Palestinian unity is what will help us attain the goal…We will continue [to act] patiently and persistently − this is the weapon we must present to the enemy."[14] On another occasion, Ismail Haniyeh pointed out: "It is true that our people have no planes, tanks, submarines, nuclear missiles or phosphorous bombs, but we have will, intention, belief, and determination characterized by perseverance, unity, and the ability to be patient and remain firm."[15] It seems that in order to understand interaction as a strength, it is necessary to be self-confident and to know who you are. The Palestinians know who they are. Israel is still on a journey that has yet to end.

Hamas does not seek to depend on comparative professional standards, as does Henkin, or the existence of laws, as does Kasher. Hamas derives its strength from the community's strengths − solidarity, functional flexibility, and ideological horizons. This vitality is expressed not only in military actions but also in the organization's highly developed social philosophy. This philosophy, which Israelis understand to be a means of recruitment for terrorist activity, stands as a communal mechanism of the highest order. Research that has been published gives evidence of the independence of Hamas' social wing and its civic commitment to the members of the community. The recent book by Sarah Roy on civil society in the Gaza Strip[16] reveals a strong, cohesive community that views ambitions of statehood as a legitimate goal but not as a starting point.

In its struggle against states, Israel has less difficulty. Israel's tendency to create contexts that derive from "big ideas" such as professionalism, morality, sovereignty, and so on is appropriate for confrontations with nations that view such standards as desirable.

In the regional reality, in which confrontations with nations are waning, especially in the reality in which the nations themselves are changing in unrecognizable ways, it behooves us to consider the modes of operation of non-state entities and the reality of situations such as warfare in densely populated spheres. The interaction that lies at the heart of a successful

32

battle can and must also lie at the heart of successful contacts to end hostile activities and even to peaceful ways of resolving longstanding conflicts.

Israel needs a fundamental revolution, one that will cause the decision makers to understand that Israel is not the stable entity around which the entire region revolves. On this, Buddhist teachers would say: "Anyone who doesn't see the world as it is will never be able to contend with it."

Notes

1 Mahmoud Darwish, "Tuesday and the Weather Is Clear," http://www.poetrysociety.org.uk/lib/tmp/cmsfiles/File/review/Darwish.pdf.
2 Yagil Henkin, "Urban Warfare and the Lessons of Jenin," *Azure* 15 (summer 2003).
3 Ibid., p. 36.
4 Ibid., p. 40.
5 Asa Kasher, "Operation Cast Lead and the Ethics of Just War," *Azure* 37 (summer 2009).
6 Ibid., p. 45.
7 Eyal Weizman, "Walking through Walls," *Mita'am* 15 (September 2008).
8 Ibid., pp. 79, 83.
9 *Al-Manar*, July 16, 2006.
10 Hassan Nasrallah in an interview with al-Jazeera, July 21, 2006.
11 Hassan Nasrallah in an interview with al-Jazeera, May 27, 2003.
12 Hassan Nasrallah in an interview with al-Jazeera, December 17, 2007.
13 Muhammad Def in an interview with al-Jazeera, July 2006.
14 Al-Jazeera, January 5, 2009.
15 Palestine-info, January 5, 2009.
16 Sarah Roy, *Hamas and Civil Society in Gaza: Engaging the Islamist Social Sector* (Princeton: Princeton University Press, 2011).

How Challenges of Warfare Influence the Laws of Warfare

Eyal Benvenisti

This essay will deal with the challenges to the laws of warfare posed by fighting in urban zones, the consequent changes to these laws, and the problems these changes have aroused and responses to them.

The first challenge to laws of warfare comes from the realm of human rights, from the right to life. Traditional laws of warfare were formulated in relation to a particular definition of war: fighting between armies, two-sided battles, a horizontal move of army versus army, a violent but organized contest. The central idea was that each side would see to its own forces. Mutuality between the sides and the threat of "an eye for an eye" underlay the fighting and were upheld in battle.

Today the situation is different. Laws of human rights have trickled into laws of warfare, even though they were never meant to apply to them. In the process of formulating human rights laws there was never any intention that they be applied to a state of war. Their starting point was the power that a regime brings to bear on its citizens. This was not a case of horizontal warring – such as a duel or contest – but rather a hierarchy, a vertical relationship in which the one possessing public power controlled the citizen.

The trickling of human rights laws into the sphere of laws of warfare is a result of changes in the nature of warfare. Warfare today resembles vertical control more than a horizontal contest. Warfare today has two primary points of focus: the first is the nature of the enemy, its methods of infiltration, its experience in exploiting the protection of civilians to its own ends, and its elusiveness; the second, and more significant, is the

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technology that allows the stronger army to know whom it is targeting (although being less certain whether the targeted person is indeed its enemy). Using computer software, the attacking force can anticipate ahead of time the collateral damage to the civilian population and choose the types of weapons and angles of attack, while taking several variables into account, for example the weather, and thereby minimize the damage. Various types of drones flying over Afghanistan and Pakistan have the technological capability of identifying individuals: the system can identify the person's family members and calculate if and which relatives are liable to be hurt should the individual be targeted and attacked. Consequently, there is an orderly process of identifying and attacking the target; pressing the button and dispatching the missile is an act of individualized control over the one being attacked.

Legally speaking, there is a transition from the realm of private law, such as enforcing a contract between two sides, to the realm of public law, which supervises the exercise of authority by decision makers, regulatory bodies, the people in power, the people in charge, and those who decide whom to attack, while making use of the technological means at their disposal, when to attack, how to attack, and how much collateral damage they cause. Death is an incidental result of the action, but it is not left to chance.

In the past, the fog of war allowed one to direct fire at an abstract enemy without knowing the names and identities of the people involved. In this sense, anyone who was part of the army, anyone wearing a uniform, was a legitimate target. This uncertainty evaporates thanks to technology that allows the attacker to make such decisions after careful thought and deliberation. There is a situation of control, and the law is now asked to regulate and supervise the use of the power of control by those in possession of that power.

The laws of warfare have essentially remained unchanged, but they must adapt to the reality of the power of control. What are the effects? The most basic and fundamental rule of warfare remains in place: it is mandatory to distinguish between combatants and non-combatants, and it is mandatory to minimize collateral damage to non-combatants. It is not enough to intend to avoid harming the civilian population; rather, it is mandatory to engage actively in avoiding harm to civilians. This obligation applies as long as one operates in an environment of civilians affected by the use of force. The obligation is to try to reduce the harm as much

as possible. The obligation is to weigh alternatives to the action in which civilians are liable to be harmed, and even find alternatives to targeted killings. The obligation is to make sure that the process of decision making on such issues, like any other regulatory process, is subject to a clear, open, and reasoned procedure, for which the decision maker is accountable. In addition, the obligation is to undertake a subsequent review to see that the action was in fact carried out in accordance with the rules.

All of the above is based not on Red Cross regulation but on rulings handed down by the Israeli Supreme Court. In this context, one should mention the Supreme Court ruling issued in August 2011 and cite an excerpt written by then-Chief Justice Dorit Beinisch. She referred to the IDF's obligations towards the civilian population in the Gaza Strip, which according to the Court's ruling is not occupied territory. Nonetheless, she wrote:

> Even in this state of affairs, laws of warfare and international humanitarian law apply to the actions of the security forces in the area. In the context of their actions, the forces must, to the extent possible given the conditions of the actions, avoid harming civilians who are not involved in combat...Indeed, it is a difficult task to protect the enemy's civilians when the enemy itself hides among them. Nevertheless, the difficulty created by the circumstances and terrorist elements does not decrease the IDF's obligation to distinguish between terrorists and Palestinian civilians who are not involved in combat, and to act so that as much as is required and possible is done to harm only the former and protect the latter from harm that is not absolutely necessary. (Supreme Court Ruling 9594/03, B'Tselem versus the Military Advocate General)

The law is not the same as morality, and the laws of warfare are not identical to or completely congruent with morality. In the past, those who legislated the laws of warfare were jurists aided by generals, and those generals had a decisive impact on the formulation of these laws. Today the situation is different. An analysis of the rulings of the International Criminal Tribunal for Yugoslavia (ICTY) regarding war crimes perpetrated in Yugoslavia shows that since 1995, the ICTY was the one to formulate the laws of warfare. The law it has created has dealt with internal conflicts, a field that was undeveloped when compared to international conflicts. Today, it is the International Criminal Court that has the ability to develop

the laws of warfare. This is something that needs to be taken into account when discussing international law and morality.

The existing laws of warfare pose real evidentiary challenges for international courts, to which they have no good response and which cause them to reach decisions that may be flawed. This should worry decision makers in armed forces in general and the IDF in particular, and also worry anyone who serves as a consultant to the IDF.

The problem that lies at the core of the decision about legitimate harm to civilians concerns the question of proportionality. The idea of proportionality, the idea of balancing interests, is one that is common in internal law, especially internal public law, because in many cases the legislators have a hard time deciding ahead of time how to behave and therefore authorize the executive branch of government to make decisions, as long as they are "proportional." Thus, the Knesset cannot decide ahead of time what is the limit, the line between what is permissible and what is not, and it authorizes the decision makers to set this limit. This authorized body may be a government minister. The assumption about all decision makers is that they are unbiased, i.e., that the decisions they make are for the good of society as a whole and they have the skills to make such decisions. All of this makes it possible for us as a society to rely on their decision. In cases in which we doubt their decisions or do not trust them completely, the public relies on the court and assumes that the court is free of biases and will make the right decisions for society.

When international law lays the responsibility on the military commander to consider proportionality and balance, it ignores the fact that military commanders are not unbiased: they want, above all, to complete the mission with minimal casualties among their soldiers. In addition, they can use the fog of battle to claim that they didn't mean to violate the law, but they simply weren't skilled enough to comply with all its requirements. This problem is then exacerbated by the question of review: If one appeals to a foreign or an international court to analyze the considerations of military commanders, can that court be relied upon as being free of biases? Does the court have the data to analyze the commanders' reasoning? How can one identify the commanders who properly weighed the considerations and properly balanced interests, when one cannot believe them to be free of biases?

The answer supplied by the international courts is often unsatisfactory due to insufficient evidence as to the appropriateness of the commander's motivation: Did he intend to cause harm to civilians? Was she trying her best to limit civilian casualties? Often it is impossible to know whether commanders took proper considerations into account, and therefore courts use all sorts of methods and hints to ferret out the intentions of the commanders under the conditions in which they were operating. The courts look at how the commanders arrived at their decisions, the procedures used to arrive at the decision, whether or not the decisions were accompanied by reasoning, and if they fulfilled what was required of them. As a result, the courts are likely to err in many cases because they attribute intention to the commanders for the results of their actions.

An example of such an error was an April 2011 ICTY ruling in the matter of a Croatian general, Ante Gotovina. Gotovina planned and commanded the Croatian army's operation (called "Operation Storm") in which Serbians were expelled from the Krajina region of Croatia. The general was indicted for having instructed artillery to be fired on targets in a populated area. In his defense – and his defense is *prima facie* plausible – he claimed that he had ordered fire on specific military and hence lawful targets. He did not intend to kill civilians and did not want to cause the flight of the civilian population. When shells are fired from a distance of 40 km they are liable to stray off course and damage civilian targets. What could the judges have known about this deviation: was it intentional or, as Gotovina claimed, an error? In cases such as this, the court cannot determine what actually happened, and therefore it looks into the circumstances. In Gotovina's case, the court was presented with the minutes of a meeting in which Operation Storm was planned. The meeting was attended by the Croatian president, who demanded the expulsion of all Serbs from the country. General Gotovina was present at that meeting. His attendance at the meeting was, from the court's point of view, proof that Gotovina meant to take part in the plan and that the purpose was to direct attacks on the civilian population in order to cause it to flee. Consequently, the court did not believe that the shelling had been accidental and convicted the General.

What conclusion can be drawn? If one wants to convince judges, who only have indirect information about commanders' intentions in attacks and about their actions, it is not enough to tell them that there was no intention to fire on civilians. One has to supply persuasive evidence

that the result does not reflect the intention. One must act in a way that ensures transparency, and this can be done by providing an account of a structured decision making process aimed at minimizing harm to civilians, preparations that include the identification of the targets, the types of weapons to be used, and more, and the use of critical oversight mechanisms to ensure compliance with the law before the action, during it, and afterwards.

Just as Gotovina's participation in the meeting that preceded the attack led to his conviction, so statements by various IDF spokespeople or consultants showing contempt for international law could affect the decisions of international courts in the future. Even though the IDF does not admit to having acted so, these statements endanger commanders and soldiers who are liable to be put on trial. Such statements are liable to endanger the IDF's freedom of action and reduce it in future fighting. Such statements are liable to create the impression that Israel has little regard for international law because the law is neither relevant nor moral. Therefore the IDF must completely and unambiguously wash its hand of any statements that are not in line with the IDF's obligations as required by international law, and it must adopt the approach that the Israeli Supreme Court has upheld.

Legal Dilemmas in Fighting Asymmetrical Conflicts

Pnina Sharvit Baruch

What legal rules apply to armed confrontations against non-state elements in areas populated by civilians? What rules apply when the enemy does not honor the basic laws of warfare – does not distinguish itself from the local population, and even uses it for shelter and as a base of operations? This essay, which presents my position on the issue, refers to such confrontations as "asymmetrical conflicts."

In the discussion about the rules that apply to asymmetrical conflicts, two contrary types of claims are raised. The first is that existing rules are unsuited to these conflicts because they allow a disproportionate use of force liable to harm the civilian population. According to this argument, when fighting in densely populated areas against a side that is militarily and technologically weaker, one must impose *more* restrictions on the use of force. This argument is based on the contention that the laws of warfare, which were created for wars between armies and on the basis of an understanding of mutuality between the warring sides, are not suited to these situations because they do not take the needs of the civilians into sufficient consideration; therefore, the laws must be adjusted and more restrictions on the use of force must be imposed. It is also argued in this context that the laws of warfare assume that each side cares for the welfare of its civilians. Therefore, in places where there is no organized state that is capable of protecting its citizens, but rather non-state elements that do not place the welfare of their population as their first priority, either because they lack the will or the ability to do so, it becomes the obligation of the other side to exercise particular caution with regard to that population.

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From the other side, it is argued that existing rules are unsuited to asymmetrical conflicts because they impose too many restrictions on the military's freedom of action, to the point of preventing effective fighting. According to this argument, when fighting in densely populated areas against non-state elements, especially those that do not honor the basic rules of war and do nothing to distinguish themselves from the civilian population, *fewer* restrictions should be imposed on the use of force. The reasoning of this argument is that the laws of war, which were created for wars between armies and based on an understanding of mutuality between the warring sides, were meant to be applied to situations in which both sides honor the rules – not for conflicts between an army and a non-state element, especially if the latter uses the civilian area for shelter and the population as human shields so as to limit the army's ability to use massive means of war, and in light of the fact that the non-state element itself ignores the rules. According to this argument, the existing rules are irrelevant and should be ignored, or at least their restrictions should be lifted, because otherwise one side must fight with one hand tied behind its back.

In my opinion neither argument is acceptable; rather, the existing rules of the laws of warfare are the correct and appropriate system even when dealing with asymmetrical conflicts. (The term "laws of warfare" refers in this context to the rules of the *jus in bello*, which are part of the laws of armed conflict in international law.) Clearly, the application of the rules, like the application of any law, must be made on the basis of the relevant reality, but what is applied are the existing principles and rules of the laws of warfare that are part of international law.

Although the two arguments are diametrically opposed, their starting point is similar, i.e., that when the laws of warfare were created they were not meant to apply to asymmetrical conflicts. Therefore, new rules, or at least a significant adaptation of the existing one to the relevant reality, must be made. Here is where the two arguments diverge, with one claiming more restrictions are needed and the other calling for fewer restrictions.

I do not accept this underlying assumption. First of all, in the past too there were confrontations between states and non-state elements and not just between nations. In the past too there were confrontations in which one side failed to honor the rules. Nonetheless, the laws of warfare were applied to these conflicts. Moreover – and this is the key point – the rules

of the laws of warfare, as of other areas of international law, are part of customary international law. While most of the rules are to a great extent incorporated in the First Additional Protocol of the Geneva Conventions of 1977, the reason they are binding – certainly for nations such as Israel and the United States that are not parties to the Protocol – is the fact that they are customary international law. Customary international law develops on the basis of practices of nations and the way in which they explain their conduct, as well as on the way other nations and relevant elements relate to their actions.

The implication is twofold. First, we are not talking about theoretical, rigid rules formulated by ivory tower academics and applied thereafter on the ground, rather about rules created by the nations themselves, which have a genuine interest that the rules are practical and adapted to reality. The second point is that by the very nature of the process, the practice develops in accordance with the changes in the reality in which the fighting is taking place. Therefore, the laws of warfare, which are part of customary international law, are inherently flexible and suited to the changing nature of the conflict. Thus, for example, when aerial warfare began there were naturally no rules about it, but over time states acted in a certain manner and explained their activities referring to a certain set of rules of conduct; guidebooks and instructions were then written and on this basis the relevant rules were formulated. These rules were based on the principles and rules of the laws of warfare that were already in existence regarding fighting on land and at sea, with the necessary adaptations made to them. Similarly, today there is much discussion of the regulation of cyber warfare. Experts all over the world are discussing the rules that should apply. Here too, the new rules are based on existing ones and adapted to this new realm.

In the same way, with regard to asymmetrical conflicts, there are already existing principles and rules that can and should be applied in a way that takes into account the particular reality of such conflicts.

This can be demonstrated by showing how the Israel Defense Forces (IDF) legally addresses the fact that the enemy does not comprise soldiers who can easily be identified on the battlefield. The question that arises is: how can one of the most basic principles of the laws of warfare – the principle of distinction – be applied, if at all? This principle makes a dichotomous distinction between combatants and military targets on

the one hand, constituting legitimate targets for attack, and civilians and civilian objects on the other, that must not be the object of attack.

In "classical wars," there is a relatively sharp distinction between combatants and civilians. Soldiers are the combatants and are considered legitimate targets (as are various guerilla elements who meet certain conditions), while civilians (i.e., those who are not soldiers) are not considered legitimate targets. However, what does one do when on the enemy's side there are no soldiers, rather armed civilians, at various levels of organization, who do not necessarily fight all the time and who are difficult to distinguish from the rest of the population? In such a situation, should one say – on the basis of the principle of distinction – that anyone fighting on the non-state side and is not a soldier in a regular army is a civilian, and hence that there are combatants on only one side of the conflict while on the other side everyone is a civilian? Or should the principle of distinction and the rationale at its core lead not to differentiation between those who wear a uniform and those who do not, but rather to a differentiation between those who belong to the fighting forces and those who do not? According to this option, members of organizations who fight without being part of a nation's military forces should not be considered civilians but as combatants whom one is allowed to attack.

According to the laws of warfare, civilians who are not part of the armed forces of either side of the conflict lose their immunity from attack if they directly participate in hostilities. Still, as the IDF's legal advisors, we felt that it is incorrect to view all members of the armed organizations as civilians directly participating in hostilities; it would be more appropriate to define those who are part of the enemy's fighting forces and have functions that are parallel to those of soldiers in a regular army as combatants who have no immunity against attack as long as they belong to these forces.

Today this is the prevalent position: those who comprise the armed forces of any side to the conflict, even if that side is a non-state element, are not civilians; rather, they are combatants, analogous to regular soldiers, in terms of the application of the principle of distinction. This, for example, is the accepted understanding by the US Army and NATO forces. The International Committee of the Red Cross (ICRC) convened a working group of experts to analyze this issue. The group included legal advisors of various militaries, academics, and representatives of human rights organizations. I was privileged to be part of this group. In

this forum there was basic agreement supporting this position, i.e., not only military personnel but also participants in the armed forces of non-state organizations are not civilians and it is permitted to attack them. Some questions were left unsettled, such as who precisely is included under the rubric of armed forces, and how to regard members of such organizations who are in supportive roles (such as trainers, weapon manufacturers, etc.). There were disagreements on other questions too. However, the existence of these disagreements does not detract from the fact that there was agreement that the existing rules must be adapted to the current situation even though there may be different approaches about their precise application.

This example shows the general way in which international law develops in this sphere. The principles and rules of the laws of warfare are relied upon and applied to the relevant situation while making the appropriate adjustments. Sometimes Israel finds itself in the position of being ahead of the curve, whereupon the rest of the world often joins in; sometimes other states mark the way and Israel follows.

One should note that adjustment of the rules to the relevant situation can cut both ways. On the one hand, because one is operating in a densely populated area that is weak and defenseless there might be more restrictions or an obligation to use more precautionary measures; on the other hand, because the enemy does not distinguish itself from the population and operates under the protection of civilians, it could be that there would be room for greater flexibility, allowing for greater freedom of action. Both arguments presented above assume that the adjustments and changes needed to the rules are necessarily unidirectional; that assumption, too, strikes me as erroneous. The adjustments necessary can go in both directions.

To sum up thus far, I find the starting assumption of both arguments, whereby the laws of warfare were not meant to be applied to asymmetrical conflicts, to be unfounded. I also find the conclusion, that there are no rules or that the existing rules are totally inappropriate to conflicts of this type, to be similarly unacceptable.

I shall now refer to each argument separately and present my reservations about it. The argument that more restrictions should be imposed in asymmetrical fighting in densely populated areas is based on the assumption that the normal rules of the laws of warfare do not lend

sufficient weight to human rights, and first and foremost to the basic right to life. To ensure this right, the contention is that the state is under an active duty to take all measures needed to reduce the harm to the enemy's civilians to a minimum and even to actively protect them.

This starting assumption is questionable. Without entering into the legal aspects of the contentious issue regarding the relationship between the laws of warfare and human rights laws, it is incorrect to state that the laws of warfare do not lend sufficient weight to protecting civilians' right to life and bodily integrity. The main objective of the laws of war, certainly in their modern form, is to protect civilians who do not participate in combat as much as possible. The presence of civilians in war-torn areas is not a new phenomenon. Civilians have always been there. Even the situation in which civilians do not have a state to protect them and safeguard their rights during the fighting is not new. In the past too there were conflicts with non-state elements. Beyond this, in many cases, even when the conflict was between two states, it was not always necessarily possible for both states to protect their civilians effectively during the fighting, whether since enemy airplanes were bombing the civilians or where enemy ground forces had reached their doorstep. The rules of the laws of warfare were created against this very background. The laws of warfare were meant to protect civilians from the outcome of war as much as possible. However, these laws recognized that in situations of ongoing fighting it was impossible to completely avoid any harm to civilians.

The laws of warfare thus include the obligation of warring armies to take the presence of civilians on the battlefield into account and try to minimize the harm to them. The guiding principle in this matter, in addition to the principle of distinction, is the principle of proportionality. According to this principle, an attack on a military target is permitted only if the collateral damage expected to civilians and civilian infrastructures is not disproportionate vis-à-vis the military benefit expected from the attack. According to this principle, the attacker must analyze the expected ramifications for the civilian population before making the decision to attack or use any other force during the fighting and weigh the expected harm against the military advantage expected from the attack.

How is the principle of proportionality applied? There may be different opinions about the weight one must give to each component in the equation and about what is considered disproportionate. There is no precise formula.

Nonetheless, the laws of warfare have defined the standard as being that of "a reasonable military commander." This is evidence of the fact that the tone is supposed to be set by those who are actually fighting and who understand the complexity of the situation. When one analyzes the actions of "a reasonable military commander," one has to take into account the inherent uncertainty that exists during fighting and the other constraints on decision making in battle.

However, one cannot conclude that everything is totally open to question. Thus, for example, one cannot accept a situation in which the presence of civilians on the battlefield is not taken into account at all. It must always be taken into account, but in accordance with existing circumstances. One example is the question of how to behave if civilians are warned and they have the opportunity to leave the area before the attack; should those who remain still be taken into account? The answer is yes: one must consider the possibility that there are civilians in the area. They cannot be ignored. Nevertheless, in the equation one must consider the fact that they had a real opportunity to leave. If one knows that civilians have remained or have arrived of their own initiative in order to defend the target from being attacked, namely, as voluntary human shields, it is possible that in such a case it would not be necessary to take them into account in the test of proportionality. However, even in a situation such as this one, one must take into account that there may be children (who are always deemed innocent civilians) or other people about whom there is doubt whether they are there of their own free will or under duress. With regard to all of these, in case of doubt the scales tip in their favor.

Another question is: what is the relationship between the expected harm to civilians and the risk to soldiers' lives? Some contend that one should always give precedence to civilian lives over soldiers' lives. Others say that the consideration of preventing risk to soldiers' lives outweighs protecting enemy civilians. In my opinion, neither approach is acceptable. Here too the answer lies in the middle road: balancing the risk to soldiers' lives against the expected harm to civilians. Therefore, on the one hand, it is permissible for the risk to soldiers' lives to be one variable in the equation and one must not, as some would have it, sweepingly prefer enemy civilians over soldiers; on the other hand, one must forbid the other extreme, whereby soldiers' lives are to be preferred over any number of

casualties to enemy civilians. It is necessary to strike a balance as required by the test of proportionality.

As there in no absolute formula, there is inherent flexibility in the application of the principle of proportionality, and therefore in every case it will depend on the particular circumstances of the situation. This intrinsic flexibility in applying the laws of warfare is an additional answer to the argument whereby the existing rules are not suited to asymmetrical conflicts and that therefore they need to be changed.

In addition, the laws of warfare include explicit rules on the obligation to take precautions prior to attack designed to reduce harm to civilians during fighting. These include undertaking an orderly process before making decisions about an attack and choosing the timing, direction, and means of attack, so as to minimize harm to civilians. When there are a number of attack alternatives, one must choose the one that will minimize civilian casualties. In addition, warnings to civilians prior to attack must be made when feasible. Applying these precautionary measures must be done in accordance with the particular circumstances of the situation. Therefore, taking these steps is an additional way to adapt the rules of the laws of warfare to the unique needs of protecting civilians in asymmetrical conflicts.

Nevertheless, in a situation of fighting one cannot demand steps that ignore military needs or the situation's complexity. So, for example, Israel issued warnings, unprecedented in scope and level of detail, before attacks, using personal phone calls, low flights by the attacking planes, warning shots, drones to make sure that civilians had in fact left, and repeated warnings as was deemed necessary. Nonetheless, the IDF was criticized for not having done enough; i.e., an even higher standard was being demanded of it. Significantly, military legal advisors of other countries expressed their astonishment at the scope of warnings issued by Israel and stated that these were above and beyond what is called for by the law or practiced by their militaries.

From the above it emerges that the laws of warfare have many rules designed to protect civilian populations from the results of war. These rules are based on an understanding that the situation is complex and that there is a difference between it and a situation of law enforcement in the context of police work. Any attempt to impose more restrictive rules not

based on this understanding will lead to the establishment of unsuitable rules, which will be impossible to implement.

When analyzing the actual adjustments suggested by those claiming that the rules do not sufficiently restrict the use of force, one can identify two levels of suggested restrictions on military activity. According to the more extreme stance, it is forbidden to attack under any circumstance in which civilians are liable to be harmed. This is in essence a rejection of the principle of proportionality, which recognizes that such an attack could be legal if the expected harm to civilians is proportional vis-à-vis the military advantage anticipated from the attack. Such an approach completely ignores the reality of combat situations that formed the background to the creation of the principle of proportionality to begin with. Its significance is that it would be illegal to use force anywhere one could expect collateral damage to civilians, i.e., there would be no possibility whatsoever to use any force in populated areas without seriously transgressing the laws of warfare. This approach is either naïve in the extreme or conceals a political attempt to make warfare illegal altogether. It is clear that as long as populated areas serve as the base for undertaking violent activities that cannot be thwarted without the use force, such a rule cannot be applied.

According to the more moderate stance, it is necessary to establish rules that would lead to the imposition of more restrictions on warfare and increase the obligations towards the civilian population. Thus, for example, more precautions are called for, such as by those who demanded even more detailed and explicit warnings than the ones Israel issued. Again, precautions are in any case dependent on the situation in actuality and on the practical possibility of taking them without damaging the mission. Adding restrictions and requirements beyond those already in place from the laws of warfare is liable to lead to the creation of inapplicable rules that ignore the reality of battle conditions. The setting of inapplicable rules would ultimately cause military forces to ignore them. Moreover, it could cause nations fighting asymmetrical conflicts in densely populated areas also to ignore the basic rules they observed prior to this, having concluded that if they are not going to be able to operate legally anyway, there is no point in adhering to any set of rules. Thus, at the end of the day, there would be greater harm done to the civilians whom this approach is seeking to protect.

The opposite argument states that the existing rules are too restrictive of armies' freedom of action as these try to conduct asymmetrical conflicts, and therefore new and less restrictive rules should be established. The rationale of those supporting this argument is that according to the existing rules, it is impossible to win in an asymmetrical conflict because the state has to fight with one hand tied behind its back. Sometimes claims are made that removing some of the existing restrictions and allowing a more free use of force might shorten the duration of the battle and this would in turn benefit all involved, including the civilians of the other side. Another point raised by those in favor of this argument is that it is unfair to demand from one side to the conflict to honor the rules while the other side willfully ignores them.

Regarding mutuality, when the laws of warfare were formulated, they were based in part on notions of chivalry and fair play, and mutuality was a relevant principle. However, with the passage of time, the stress shifted to protecting non-involved civilians from the outcome of war. Therefore, it would be incorrect to claim that the laws of warfare are based on the rationale of mutuality and that in its absence the very basis for their application has been undermined.

Should the rules be changed because they prevent the state from "winning" the battle? First, one wonders what constitutes a victory in this type of conflict and if it is at all attainable – but this is beyond the scope of the present discussion. Further, one may wonder what bending of the rules its proponents seek to achieve. There is already great flexibility in applying the principles and rules and adapting them to the nature of the conflict and the identity of the parties involved. If the demand is to undermine the application of the basic rationale of the laws of warfare – the prohibition on causing intentional harm to civilians and restricting the expected harm to civilians to proportional harm relative to the military advantage of the attack – this is patently problematic.

Above all, violating these principles would damage the basic values of our state and our definition of ourselves as a law-abiding country and of our soldiers as moral, ethical people with values. This is a choice that the State of Israel made upon its establishment. These are the values on which we were raised since the War of Independence and even before. If one wants to deviate from these values, one must make the conscious decision to change the nature of the state. As long as no such decision

has been made – and I very much hope that no such decision will ever be made – that is the foundation upon which we operate.

This is also the answer to the argument about mutuality. Indeed, the other side does not honor the rules, and even uses them cynically against us in a campaign over public opinion in Israel and around the world. However, we cannot allow ourselves to sink to that level without inflicting damage on our own values. One cannot justify our harming innocent civilians as a response to the illegality and immorality of the other side.

Beyond this, on the instrumental level, at a time when states cannot function if they are isolated from the world, international public opinion bears great weight, particularly public opinion in allied nations. The more Israel is portrayed as being disdainful of the basic rules, its allies will not stand alongside it, and Israel is liable to find itself shunned and isolated. Arguments that the other side is also breaking the rules do not persuade public opinion around the world.

Again, applying the existing rules, while adapting them to the relevant situations, enables proper fighting and sufficient freedom of action even in asymmetrical conflicts in densely populated areas.

In light of the above, it is unfortunate when statements are made by public officials, including senior figures, suggesting that "the rules are inappropriate and new ones must be formulated." First of all, such statements are incorrect. In addition, such statements are liable to create the impression that Israel has ignored the laws of warfare since it deemed them to be "inappropriate rules." Thus we find ourselves in a situation in which on the one hand we act on the basis of the rules even when this means imposing restrictions on ourselves, and on the other hand we are accused of ignoring them, in part on the basis of such statements. Moreover, it is unclear what the people who claim that "new rules must be formulated" are expecting. Do they really think that it is possible to convene the representatives of all the nations in the world and agree on a new convention that would grant greater freedom of action to armies in asymmetrical conflicts? This expectation is totally out of touch with international reality. It is also unnecessary, because as explained, this is not how international law develops in these spheres; rather, it develops as the result of formulating practices and adapting the rules to changes in reality.

In conclusion, international law provides all the tools necessary to confront asymmetrical conflicts by means of applying existing laws of

warfare and adapting them to relevant situations, as was always the case through the ages. The rules apply even when the other side fails to honor them. There is no need for new rules that would expand the freedom of action. There is also no room for new rules that would add restrictions that do not take into account the current reality and present an impossible threshold for application.

Lawfare: The Legal Front of the IDF

Avihai Mandelblit

Lawfare is closely linked to the theme of this issue of *Military and Strategic Affairs*: the challenges facing the regular armies of law-abiding nations engaged in asymmetrical confrontations in densely populated civilian urban areas. Therefore, as part of its preparations for the challenges it may have to face in the future, particularly in this type of fighting, the IDF must give the proper weight to the legal front that is likely to develop as an integral part of the same confrontation.

For several years it has been customary to speak of four fronts that must be considered in a confrontation, two traditional and two relatively new. It is clear, however, that an army cannot win a battle without preparations and significant achievements on each of the four fronts. The traditional fronts are the military and the political. On the military front, it is obvious that successes are achieved by fire and maneuvers related to targets. Clearly, military achievements must be translated into political achievements in order to serve the political objective. Today, however, this is not enough. It is also necessary to prepare for attaining achievements on the two new fronts: the media/consciousness front and the legal front.

There are many examples that demonstrate the importance of the media/consciousness front. During the Second Lebanon War, for example, the IDF identified long range rocket fire coming from a vehicle-borne rocket launcher that had taken shelter under a building in Qana, a small Shiite village in southern Lebanon, most of whose civilians had been evacuated early in the war. They relocated north of the Litani River after the IDF called on the villagers to leave, so that the fighting could concentrate on Hizbollah terrorists and, to the extent possible, prevent collateral, unintentional harm to civilians. Once the vehicle was identified, the building under which it

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had taken shelter was attacked. The intelligence assessment at the time had been that there were no civilians there (in part because the IDF had warned them and urged them to leave the village). Afterwards, it became known that civilians were in the building and that more than twenty were killed in the attack. Even though the attack was entirely legal in terms of the laws of warfare, Hizbollah rushed to leverage the incident with the media all over the world by presenting a fictitious number of victims (at first, Hizbollah claimed that over eighty civilians had died) and distributing horrific photographs of bodies and body parts and even burned toys they brought to the location. Following the event, then-US Secretary of State Condoleezza Rice came to Israel, and it was decided to suspend aerial attacks for 48 hours. In effect, Israel was subject to heavy pressure, to the point that the fighting almost ended. This is only one of many examples of the impact of the media/consciousness front: although much attention may be paid to the legality of an action, a media-related move can stop the fighting altogether and decide the confrontation as a whole.

As for the legal front, clearly the IDF, like any army of a law-abiding nation in the West, is committed to scrupulous observance of the requirements of the laws of warfare. However, at present there are increasing attempts to make fundamental changes to the laws of warfare, along with manipulative arguments that the IDF does not operate according to the law. Such attempts do not target the IDF exclusively. All Western armies fighting terrorism operating on the basis of the rule of law suffer from similar manipulative arguments that attempt to undermine the legitimacy they need both at home and abroad.

The attempts intensify especially in cases of asymmetrical confrontations against terrorist organizations, and even more so when the fighting takes place in urban zones densely populated with civilians. What is asymmetrical warfare? The asymmetry under discussion does not concern one side being militarily stronger (a regular army with advanced aerial, naval, and ground forces) than the other (a guerilla organization); rather, the asymmetry is between one side that is totally committed to the observance of the laws of warfare (a regular army of a law-abiding nation in the West, e.g., the IDF) and another side that is not only not committed to the laws of warfare and flagrantly violates them but also abuses them for its own ends (usually a terrorist organization or a terrorist army). Thus, while committing gross violations of the laws of warfare – intentionally

firing rockets from the heart of areas densely populated with civilians at civilian targets of the enemy – this side finds itself in a win-win situation: if one avoids returning fire at the populated areas from where the rockets were fired, the organization scores an advantage, and if one returns fire and unintentionally harms civilians, the organization also scores an advantage (on the media/consciousness front, as in the Qana incident). Terrorist organizations intentionally attempt to draw regular armies into operating in asymmetrical arenas, especially urban ones, hoping that many civilians will be harmed, whereupon it will be possible to attack the regular army with instruments of lawfare and damage the latter's legitimacy to act, even to the point of deciding the campaign as a whole.

Not only the IDF, but all regular armies in the West must confront this threat. The problem was discussed by Charles Dunlap, the former Deputy Judge Advocate General of the US Air Force:

> Lawfare describes a method of warfare where the law is used as a means of realizing a military objective... There are many dimensions to lawfare, but the one more frequently embraced by U.S. opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather than seeking battlefield victories, *per se,* challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions. A principle [sic] way of bringing about that end is to make it appear that the U.S. is waging war in violation of the letter of or the spirit of LOAC.[1]

This challenge of lawfare – grappling with the attempt to undermine the legitimacy of regular armies – is highly significant, and requires early preparation to provide an appropriate response on each of the fronts. Even when there is total commitment to the requirements of the laws of warfare and attempts are made to reduce the number of civilians harmed, e.g., by using advanced technologies, still any fighting takes place in the fog of war. Therefore, as long as fighting takes place in densely populated urban areas civilians will unfortunately be harmed, whereupon the media/consciousness front and legal front are opened, and the battle accelerates. The other side raises charges that the regular army is guilty of war crimes and intentionally targets civilians (or at least harms them to a disproportionate degree), and therefore public opinion at home and

abroad (world public opinion, UN institutions, and other organizations) must stop the fighting and even punish the "war criminals" of the regular army, even though the real war criminals are without a doubt to be found on the other side.

One can well illustrate the challenge through Operation Cast Lead. Israel withdrew from the Gaza Strip as part of the disengagement plan. Even after the disengagement, the terrorist organizations there continued to shell Israeli citizens with increasing intensity, mostly from the heart of urban zones. Israel did not hurry to respond and, thanks to the restraint it showed, Israel gained legitimacy for a large operation against Hamas. The IDF went into battle after having been directed to do so by the political echelon. All the echelons gave the forces involved clear instructions to operate on the basis of the laws of warfare and try to reduce collateral damage to civilians to a minimum. Although this was first of all a moral consideration, it was also a legal one, given the IDF's commitment as the army of a nation that abides by the laws of warfare. Finally, it was also an operative consideration, because it was clear that if civilians were hurt, even unintentionally, the time for fighting might be curtailed.

However, even during the fighting there were increasing charges, intensified by the lawfare campaign waged against Israel and the IDF all over the world, about the illegitimate use of force. Claims were made that the IDF used exaggerated and disproportionate force. Subsequently there were challenges to the IDF's entering the Gaza Strip altogether, completely ignoring the reason – continuous, intentional shelling of Israeli citizens even though Israel had withdrawn from the area. Finally, there was an attack on the very legitimacy of Israel's existence, with an attempt to ostracize it from the family of nations, isolate it, and turn it into a pariah, much like Slobodan Milošević's Serbia or South Africa at the time of apartheid. From here, it was but a small step to publish the distorted Goldstone Report, to try to drag Israel before international tribunals and use universal authority to claim that Israel's political and military leaders had committed war crimes. The response was to prove the IDF's mode of action by means of examining the arguments, providing appropriate responses, and presenting before the world, with emphasis on friendly nations, the incidents mentioned by, for example, the Goldstone Report, with the actual facts, rather than manipulations, and proving the claims that the IDF did indeed act on the

basis of the laws of warfare and in accordance with international norms to which it is committed.

In addition, as part of the same legal front, a battle over the laws of warfare is currently underway in the world. In its context, some contend that regular armies should be given more freedom of action when facing terrorist organizations and change the traditional laws of warfare, as these are unsuited to the challenges of the new asymmetrical confrontations. These are not the dominant voices. Rather, more prevalent is the opposite trend, i.e., the drive to restrict the capabilities of regular armies and provide more power and protection to "liberation organizations." Thus there is a movement to restrict significantly the possibility of using cluster bombs. For example, as the result of one particular event in Gaza (damage to UNRWA's al-Fakhura school), one UN committee sought to establish a new rule in the laws of warfare whereby it is forbidden to respond to fire coming from a UN site with fire, thus creating full protection of the organization's facilities.

However, the greatest threat is the attempt to implant norms taken from the sphere of human rights into clear-cut situations of war. These norms are not at all suitable to a situation involving an armed confrontation in an area that is not under army control. Even the European Court of Human Rights in Strasbourg does not feel that it would be proper to apply them to clear situations of war. This attempt is highly dangerous, one with which all regular armies of law-abiding nations must contend. The demand to uphold the laws of warfare is rational and necessary, but there is absolutely no justification for changing them in such a way that would further impede regular armies that must also operate in complex environments in light of the changes in warfare discussed above. The attempt to impose extreme requirements on regular armies is liable to lead to the very opposite result – a general ignoring of all rules. Therefore it is necessary to maintain the existing, traditional rules of laws of warfare and apply them fully while providing an interpretation that is suitable to the challenges of asymmetrical fighting.

This is the IDF's response in practice (and to a large extent also that of other armies in the West) to the lawfare campaign waged against it, a response provided through close cooperation between the Military Advocate General's office and commanders. For this reason a system was constructed within the Military Advocate Unit of legal consulting for
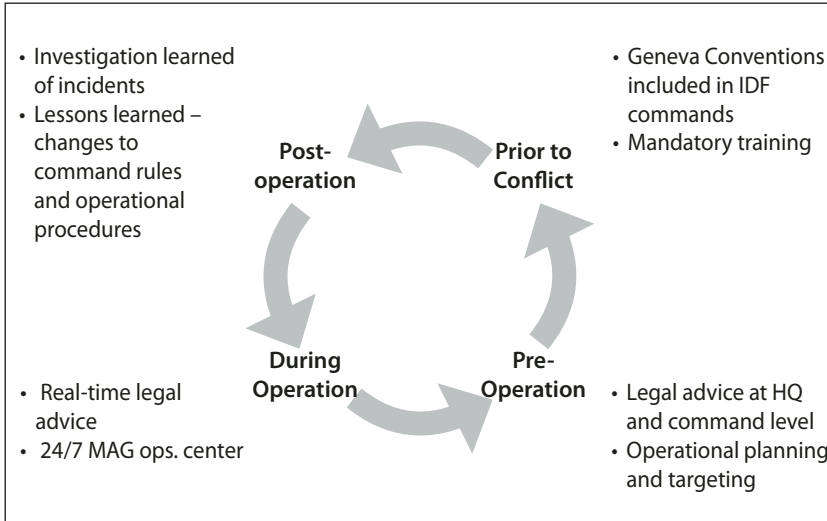
- Investigation learned of incidents
- Lessons learned – changes to command rules and operational procedures

Post-operation

Prior to Conflict

- Geneva Conventions included in IDF commands
- Mandatory training

During Operation

Pre-Operation

- Real-time legal advice
- 24/7 MAG ops. center

- Legal advice at HQ and command level
- Operational planning and targeting

Figure 1. Legal Input in IDF Operations

operative purposes, providing operative legal counsel to commanders down to the division level (figure 1). Before a confrontation, commanders are trained in the rules of the laws of warfare with particular emphasis placed on the challenges of asymmetrical confrontations. During the fighting jurists cannot be everywhere, and therefore commanders must know their obligations based on the laws of warfare. In addition, the army integrates the obligations according to international law into its commands and operative plans. This is also done in preparation sessions and exercises. During a confrontation, there is ongoing legal consultation at all levels, from the command centers to the relevant forums, down to the division level. To the extent it is needed, legal information and explanations are also disseminated in Israel and internationally to clarify that the IDF operates according to its obligations based on the laws of warfare. After the operation, there are investigations, in keeping with the IDF's policy of investigating incidents of every credible claim about violations of the rules of warfare, and subsequently the necessary answers are given. If needed, criminal tools are used if it becomes clear that in a concrete event there is suspicion that a crime was committed, certainly when what is at stake is a suspicion that a war crime was committed. Furthermore, at this stage additional legal information is provided and the necessary lessons learned

so that the IDF is better prepared for the next confrontation and the legal front that is a part of it. The lessons are assimilated in the army's standing orders and the operative plans for the next confrontation.

In conclusion, it is necessary to recognize that lawfare will be a part of every confrontation in the future, with special emphasis on asymmetrical confrontations in urban zones densely populated with civilians. The legal front is a central front for which one must prepare well ahead of time and to which one must respond correctly during the confrontation and afterwards. It is impossible to win an asymmetrical confrontation without also winning the legal battle interwoven within it.

Notes

1   Charles J. Dunlap, Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts," 2001. See http://www.hks. harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/ Dunlap2001.pdf.

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