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Operation Guardian of the Walls: The Legal Angle

Pnina Sharvit Baruch

Following Operation Guardian of the Walls, Israel now faces a new legal front and legitimacy campaign. The establishment of a Commission of Inquiry by the UN Human Rights Council in its resolution of May 27 and remarks by the Prosecutor of the International Criminal Court that the ICC might investigate potential war crimes committed by the parties in the recent operation are evidence of this additional campaign. Critics have stated that the sheer scope of the destruction of civilian infrastructure in Gaza is proof that Israel has acted unlawfully. Such claims, however, are based on a misunderstanding, at best, or a deliberate distortion, at worst, of the law.

While the 11-day military campaign between Israel and the Hamas government controlling the Gaza Strip has ended, the legal front and the campaign over legitimacy with regard to the recent operation is far from over.

There is little doubt that Hamas initiated the fighting by launching rockets at Jerusalem, Israel's capitol, with no prior action by Israel. This, and the widespread recognition that Hamas is a terrorist organization, provided Israel with relatively broad international support and understanding about the need to take action to stop Hamas's rocket fire in the initial stages. However, once images of civilian victims and severe destruction in the Gaza Strip began appearing in the international media, increasing allegations portrayed Israel as using excessive force. Israel was cast, once again, as the powerful Goliath smashing the weak and defenseless Palestinians.

The arguments against Israel are clothed in legal terminology. It is claimed that Israel carried out war crimes, and the sheer scope of the widespread destruction of civilian infrastructure in Gaza is proof that Israel has acted unlawfully. This analysis, however, is based on a misunderstanding, at best, or a deliberate distortion, at worst, of the law.

While there is no doubt that Hamas's indiscriminate rocket fire at the civilian population in Israel is an unequivocal war crime, this does not lessen Israel's obligation to act in accordance with binding international rules, as there is no principle of reciprocity in the Laws of Armed Conflict (LOAC – also known as International Humanitarian Law, IHL).

LOAC includes two relevant fundamental principles: distinction and proportionality. In addition, there is an obligation to take precautions to minimize harm to civilians. Did Israel breach these principles?

According to the principle of distinction, military attacks should be aimed only at military targets and enemy combatants – including civilians taking direct part in hostilities – and thus targeting uninvolved civilians or civilian objects is prohibited. LOAC acknowledges that civilian objects lose their immunity and become legitimate military targets for attack if "by their nature, location, purpose or use" they make an effective contribution to military action and their destruction offers a definite military advantage. Almost the entire Hamas and Islamic Jihad military infrastructure is located in civilian structures, including homes, schools, and mosques. This includes, inter alia, command and control posts, weapons storehouses, firing posts, and hiding places for military operatives. For example, according to the IDF, in the al-Jalaa tower, which housed the Associated Press and al-Jazeera offices, as well as civilian apartments, Hamas positioned military equipment intended to hamper IDF operations. By such use, seemingly civilian objects become lawful military targets, and targeting them is in conformity with the principle of distinction.

For an attack to be considered legal it must also comply with the principle of proportionality, which prohibits an attack expected to cause collateral damage to civilians and civilian objects that will be excessive compared to the direct and concrete military advantage anticipated. The law does not demand avoiding harm to civilians completely. To fulfill the principle of proportionality, the expected military advantage from an attack must be assessed and then balanced against the anticipated harm to civilians and civilian objects. This is naturally a subjective test, and there is no precise formula for determining what is proportional. LOAC sets the standard as that of a "reasonable military commander." It is also acknowledged that the examination should be conducted on the basis of the information in the commander's possession at the time the decision is made, while taking into account the uncertainty that exists in combat, and not based on the actual result.

In addition, there is an obligation to take feasible precautions in order to minimize harm to civilians and civilian objects. One main kind of precaution is issuing advance warnings prior to attacks. Warnings are not required by the law when surprise is essential to the success of the attack, for example, when the attack is aimed against a person, such as a high-level military operative. It has been reported that the IDF issued extensive warnings prior to most attacks. For example, all the multi-story buildings that were targeted received prior warnings and were evacuated. According to IDF reports, this enabled Hamas and Islamic Jihad to evacuate the buildings and remove military material from the facilities before they were struck. Therefore, as some experts have pointed out, these

warning appear to have exceeded that required by LOAC because they involved some sacrifice of military advantage by the IDF.

One of the recurring arguments made is that the ratio of casualties between the warring sides indicates *prima facie* that Israel's use of force was disproportionate. However, according to LOAC, fulfillment of the principle of proportionality is not assessed by comparing the number of casualties or level of destruction on each side. The legal standard refers to "excessive" collateral damage and not to "extensive" collateral damage. There are numerous precedents of military operations carried out by Western militaries where most of the damage was incurred by only one side.

This argument reflects a more nuanced contention that due to the limited threat caused by Hamas attacks to the lives of Israeli civilians, the military advantage gained by Israel from each attack against Hamas was limited, and therefore does not justify higher levels of collateral damage to civilians and civilian objects in Gaza. This line of reasoning assumes that the complete disruption of life in certain areas of Israel and significant disruption in the rest of the country, the severe economic consequences, and the psychological effects of being under constant rocket attacks, not to mention the continuous breach of sovereignty and territorial integrity of the state, are not ample justifications for a state to try to stop attacks from rockets and mortars, unless these same attacks lead to a significant loss of life.

Accepting such an argument also means that a state's investment in defensive capabilities – such as Israel's investment in the Iron Dome missile defense system and other protective measures, which were the very reason Israel suffered only a small number of civilian casualties – would lead to negating its ability to protect itself through offensive measures. This is not a logical reflection of the Law of Armed Conflict and is not supported by existing practice.

As in previous operations, reports criticizing Israel's military campaign will undoubtedly follow, for example by the Commission of Inquiry established by the UN Human Rights Council in its resolution of May 27, 2021. Such reports will ultimately be used as another tool in the political campaign to delegitimize Israel. In addition, these reports will reach the Office of the Prosecutor of the International Criminal Court (ICC), who has already indicated that potential war crimes committed by the parties in the recent operation might be examined as part of its investigation into the situation in "Palestine."

The main way for Israel to confront allegations, and especially potential criminal proceedings, is to carry out independent investigations that are thorough, effective, fast, and transparent. This will enable it to rely on the principle of complementarity, whereby international proceedings and foreign judicial intervention are not appropriate when the

state concerned carries out a genuine and effective investigation on its own. They will also enable better presentation of the Israeli case in other forums and diplomatic channels.

Israel must arrive at the legal campaign against it armed with factual and legal material. It is important to allow maximum transparency, including revelation of relevant intelligence when possible. This will enable Israel to present its point of view and demonstrate the complexity and challenges of the campaign. The legal campaign is an uphill battle, but it is wrong to view it as destined to fail.