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The International Legal Front in a Military Campaign

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Alongside the military campaign on the physical battlefield is a concomitant campaign in the international arena dominated by considerations of legality and legitimacy. This campaign directly impacts the political results of the military campaign. Israel often finds itself accused by international organizations, the global media, and civil society organizations of war crimes. As a result, it faces international pressure to take action to restrain the IDF, which would thereby reduce its operational freedom. This article analyzes the primary charges against IDF activity regarding the use and application of force, explains the main principles of the laws of armed conflict, and distinguishes between the legality of actions and their legitimacy in public opinion. In addition, it describes the excessive focus on Israel by UN institutions and the investigation opened by the International Criminal Court regarding Israel. The article ends with recommendations for Israel as it confronts the international legal campaign.

Keywords: international law, laws of armed conflict, legitimacy, IDF, UN, political campaign

Introduction

Alongside any military campaign by Israel on the physical battlefield, a concomitant campaign occurs in the international arena, which directly affects the political results of the military campaign. In this campaign, considerations of legality and legitimacy play a central role, whether directly, as part of legal tools aimed against Israel and those acting on its behalf, or indirectly, in their influence on the positions of the various actors in the international arena with respect to Israel's military activity. Even if these actors' conduct derives first and foremost from their interests and ideology and not from legal considerations per se, it also takes into account public opinion in their country and the extent to which this public perceives the IDF's military activity as legal and legitimate.

This article presents the types of claims leveled in the international legal campaign against IDF activity in combat operations, while highlighting the distinction between legality and legitimacy. It then briefly describes the excessive focus by UN institutions on Israel's affairs and looks at the investigation opened by the International Criminal Court (ICC) regarding allegations of crimes committed as part of the Israeli-Palestinian conflict. Finally, it provides recommendations to improve how Israel copes with this campaign.

The Claims against Israel

When Israel engages in military activity, and in particular takes action that causes harm to civilians and civilian infrastructure on the other side, accusations are frequently sounded that Israel committed war crimes. These accusations appear in [the global media](#), in [reports of various organizations](#), and in [statements by international figures](#). They seep into the public discourse and are used as proof of the common claim in the international arena that Israel is a lawless country that systematically violates international law. Following these claims, international pressure is placed on Israel to

take action to restrain the IDF, which would thereby reduce its operational freedom.

The laws of armed conflict (the modern term for the laws of war) in international law define what is permitted and what is forbidden in times of war. They include two sets of laws: laws on the use of force (*jus ad bellum* – JAB), which determine the situations and conditions in which it is permissible to use force between states; and the laws of warfare (*jus in bello* – JIB), which regulate how force is used. Israel does not deny that it must respect these rules, and they are anchored in operational orders. In contrast with a common assumption, the laws of armed conflict do not impose restrictions that cannot be met; rather, they are rules that have developed through the practice of fighting armies, and they reflect the needs of military campaigns. Nor are these rules relevant only to classic wars between countries; rather, they are living and breathing rules that can also be applied, with the necessary adjustments, to asymmetric conflicts with terrorist organizations and with non-state groups. An illustration of this can be found in the detailed [manual by the United States Department of Defense](#) on the application of the laws of armed conflict by US forces fighting in a variety of conflicts.

Nevertheless, there are those in the international arena who advocate a more expansive interpretation of the restrictions of the laws of armed conflict, attempting to define rules that tie the hands of the fighting armies. This was expressed explicitly by the General Counsel of the US Department of Defense, [in his speech](#) in 2019 at a conference of the Military Advocate General in Israel. Therefore, the legal rules that obligate Israel must be distinguished from these expansive interpretations, which do not reflect applicable law. Furthermore, there is a gap between what is legally permissible and what is seen as legitimate by the international community. Therefore, while an action that is illegal will also likely be illegitimate, there are cases in which an action that is legal from the perspective of international law does not pass

the test of international legitimacy and leads to serious criticism. The gap between what is legal and what is legitimate relates to questions of the very use of force (JAB), as well as how force is applied (JIB).

The Use of Force (JAB)

A state has the right to defend itself when it is attacked. From a legal perspective, when there is an ongoing conflict, such as in the case of Israel and Hamas, there is no need to examine anew each time the existence of conditions for exercising the right to self-defense. Israel has a strong argument whereby the various rounds of fighting in Gaza are the continuation of the same armed conflict. Against Hezbollah too, it can be claimed, although less emphatically, that Israel is in an ongoing conflict that has never ended. However, on the practical level the world examines “who started.” Thus, when Israel ignites a round of fighting through initiated action, it could be presented as having worsened the situation and be accused of the unjustified use of force, thus impairing the international legitimacy for action.

Another question relates to the extent of the use of force. From a legal perspective, the exertion of force in self-defense must be proportionate to the threat. It is permitted for a country to defend its sovereignty and territorial integrity, and proportionality is not assessed according to the number of casualties on each side. Nevertheless, in practice world public opinion compares the number of casualties. In most of the campaigns that have involved Israel over the past few decades, there has been a relatively low number of civilians killed on the Israeli side. In contrast, on the other side there are hundreds and even thousands of people killed, some of whom are civilians, including children. Israel emphasizes, rightly, the serious harm to its daily life, the ever-present threat, and the fact that its investment in defensive capabilities such as Iron Dome and protective measures—thanks to which there are few casualties—should not be held against it. It also

emphasizes that not only do its enemies, such as Hamas and Hezbollah, not ensure the protection of their civilians; they even intentionally place them in the line of fire, as they operate under their cover and in their midst. Nonetheless, in the battle for global public opinion, it is difficult to contend with the grim pictures of civilian fatalities, including children, and of extensive damage to civilian infrastructure. Pictures of Israeli children running to shelters do not serve as much of a counterweight.

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The Use of Force (JIB)

When it comes to [the legal aspects of the use of force](#), the laws of warfare include [four main principles](#): the principle of military necessity, the principle of humanity, the principle of distinction, and the principle of proportionality. The latter two principles constitute the basis for assessing the legality of military attacks. Furthermore, there is an [obligation to take precautions](#) to reduce damage to civilians. The fact that the other side in the fighting knowingly and explicitly violates the laws of warfare does not detract from Israel’s obligation to continue to respect these laws. There is no principle of mutuality in the laws of armed conflict.

As with the case of the JAB, regarding the application of JIB by the IDF, there is a gap in the international community between the legality of a certain action, when it is analyzed according to the applicable law, and the question of the legitimacy that the action and its results receive.

[According to the principle of distinction in the laws of warfare](#), it is permissible to aim an attack at military targets and enemy combatants, and forbidden to aim an attack at civilians and civilian objects. The laws of armed conflict recognize that a [civilian object could](#)

lose immunity from attack and be considered a military target if it is used for military needs, or if its objective or location could serve a military purpose. Israel's enemies, as a matter of routine, make use of civilian structures, including residential buildings, schools, mosques, and hospitals, to launch attacks, store weapons, and pursue other military uses. This means that such structures lose their immunity and an attack can be aimed at them. Furthermore, from a legal perspective, a civilian who takes a direct part in hostilities loses his or her status as a civilian and may be a target of an attack, even if it is an elderly person, woman, or youth.

In the realm of legitimacy, the pictures that are broadcast in the global media are of destroyed civilian structures and dead civilians. Even though from a legal perspective the legality of the decision is determined on its merits, according to the intention of the person that conducted the attack and the information at his or her disposal, in the arena of legitimacy, it is often difficult after the fact to show that the structure or the person that was attacked was connected to essentially belligerent activity. As a result, the attack could be presented as a strike that aimed to intentionally harm civilians and civilian objects.

According to the principle of proportionality, even when attacking a legal target, it is forbidden to launch the attack if the collateral damage to civilians or civilian objects that is expected from the attack is excessive relative to the military advantage that is expected from the attack. This means that when deciding to attack a target, it is necessary to assess the expected damage to civilians and civilian objects, and to maintain a balance. The civilians that are expected to be at the site of the target must be considered, even if a warning has been provided but the civilians have not vacated the area. Nevertheless, the fact that civilians could be harmed does not make the attack illegal, if the military advantage is such that achieving it makes the expected collateral damage proportional. There is no precise measure of what is considered

proportional damage. The laws of warfare define a benchmark of "a reasonable military commander." In addition, the assessment is made according to the information that the commander had when making the decision, while taking into consideration the uncertainty that exists in circumstances of warfare, and not according to the result in practice.

Yet here legitimacy differs from legality, and despite the legal justification, in practice a large number of civilian casualties is not acceptable in the international arena. The gap between the legal situation and the realm of legitimacy is especially prominent in this area and is expressed in several ways: first, in the mistaken assumption that if civilians were harmed then this was the aim of the attack, and then this is a war crime of an intentional attack on civilians; second, in not accepting the principle that it can be justified to harm civilians when the target is legitimate, and in the mistaken conception that any such harm is by definition disproportionate; and third, in judging according to the results and not accepting claims that the damage caused in practice was unexpected or stemmed from a mistake. The high-level technological capabilities of the IDF create an illusion that the military system is all-knowing and error-free, and that any harsh result is thus intentional. In this context, statements by senior figures in and outside of the army, from which it could be implied that Israel will act in a "disproportionate" manner, could cause serious damage through their being presented as a prior intention to operate illegally.

Furthermore, the claims against Israel's military activity in the Palestinian arena in particular connect to a more general conception that Israel is the aggressor and the Palestinians are the victim. The continuation of the conflict is presented as Israel's responsibility, as Israel ostensibly holds the key to ending it. The violence from the Palestinian side is sometimes presented as the last resort of an oppressed people suffering ongoing occupation, with no other way to fight for its basic rights.

The UN Focus on Israel

Israel is not the only country, nor the only Western country, accused of violating the laws of war. The [United States](#), [the UK](#), and [other countries](#) have found themselves subject to similar charges. Nevertheless, Israel is the object of excessive attention from bodies in the international arena, especially bodies related to the UN, and from the international media, which is deployed widely in Israel.

The excessive focus on Israel and the Israeli-Palestinian conflict is especially prominent in two UN bodies: the UN General Assembly, where decisions against Israel are taken on a different scale than against any other country;¹ and the UN Human Rights Council, which dedicates an entirely disproportionate amount of attention to Israel, while it is supposed to discuss the human rights situation in the entire world.² In addition, special monitoring and supervision mechanisms have been established with respect to Israel, chiefly the [special rapporteur](#) “on the situation of human rights in the occupied Arab territories, including Palestine.”

Moreover, [over the years](#) Israel has found itself under the scrutiny of international commissions of inquiry established to investigate its military activities. Thus, for each of Israel’s military operations in recent years, a commission of inquiry has been established to examine possible violations of international law and war crimes carried out during the operation. The reports published following the [Second Lebanon War](#) in 2006, [Operation Cast Lead](#) in 2009, and [Operation Protective Edge](#) in 2014 included harsh criticism and accused IDF forces of war crimes. A commission of inquiry was also [established](#) by the Human Rights Council after Operation Guardian of the Walls in May 2021. Unlike the previous commissions, no end date was defined for this commission of inquiry, such that it can also be used as an ongoing commission, e.g., for examining allegations in future events. Moreover, the commission is supposed to relate to the situation that led

to the events, including within the territory of the State of Israel.

The reports of the rapporteurs and commissions of inquiry, which usually include severe accusations against Israel, are used as an effective factual and legal basis for attempts to take tangible steps against Israel and its forces in the realm of international law.³

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The International Criminal Court (ICC)

From Israel’s perspective, the most significant element in the international legal campaign regarding its military activity is the International Criminal Court, located in The Hague. This is a court that began to operate in July 2002 and is authorized to prosecute those suspected of war crimes, crimes against humanity, genocide, and aggression. The Court’s jurisdiction applies to crimes carried out within the territory of a country that is a member of the court or by a citizen of a member country. ICC members number 123 countries, including most of the Western countries, but notably absent is the United States. The Court has power, as it is authorized to issue arrest warrants against suspects. These warrants are transmitted through the undercover channels of international law enforcement bodies, and all the countries that are members of the court are obligated to respect them, arrest suspects located in their territory, and turn them over to the Court. The arrest warrants are not publicized, such that a suspect could be unaware that an arrest warrant has been issued against him or her.

Israel is not a member of the ICC. Nevertheless, in March 2021, an investigation was opened at the Court that relates to suspicions of crimes committed in the West Bank, East Jerusalem, and Gaza Strip since

June 13, 2014. This followed a [decision](#) by the former ICC prosecutor, Fatou Bensouda, and by a [majority of the judges](#) in a pre-trial chamber of the Court, that “Palestine” is a member state of the Court, that its territory comprises these areas, and that it is entitled to refer crimes committed in its territory to the Court for investigation. The Palestinian request referred to all crimes committed since June 13, 2014, without a defined end date. The investigation relates to suspicions of the commission of crimes by all sides involved, including allegations of war crimes committed during the conflicts in the Gaza Strip, starting with Operation Protective Edge in 2014, and as part of military actions in the West Bank and in East Jerusalem. Furthermore, the investigation relates to policy on the settlements, given that “the direct or indirect transfer of parts of the population of an occupying territory into occupied territory” is defined as a war crime in the Rome Statute that established the Court.

It is too early to speculate how the investigation, which is in its initial stages, will develop. [It appears](#) that the court’s new prosecutor, Karim Khan, who was appointed in June 2021, tends to place a low priority on this investigation, and at this stage it does not seem that he is taking significant related investigatory steps. Even if the investigation intensifies, it is not at all clear that it will lead to arrest warrants or other proceedings against specific suspects, in light of the difficulty proving the factual and legal components of the crimes attributed to Israeli figures. Furthermore, a central principle at the court is the [principle of complementarity](#), whereby the court’s jurisdiction complements the jurisdiction of states, and consequently it must only deal with incidents that are not addressed by the state in question. By virtue of this principle, as long as it is possible to point to genuine and serious investigations and inquiries in Israel regarding the incident in which there are accusations against IDF forces, the court is supposed to refrain from addressing this incident.

Nonetheless, it is important to treat the ICC investigation seriously and be aware of the possibility that it will gain momentum, especially if Israel finds itself at the focus of international criticism—for example following an operation that leads to many casualties on the other side, or following reports published by those who accuse it of committing severe crimes.

To complete the picture, there is also a possibility that criminal proceedings will be carried out, as well as civil proceedings on behalf of victims, against Israeli figures at courts in various countries in which internal legislation contains a suitable source of jurisdiction for such proceedings. Such criminal proceedings are also subject to the principle of complementarity, whereby there is no reason to conduct them if Israel conducts genuine and serious investigations regarding these incidents.

Recommendations for Israel in the International Legal Campaign

Below are ten recommendations that can assist Israel on the legal front. Some focus on how to act internally, and some on how to act externally.

1. *Respecting the Law*

The legal campaign in the international arena is directly affected by how IDF forces act. As explained, even an action that is in accordance with the law cannot prevent accusations based on a distortion of the law or of the facts, nor can it address criticism that focuses on the ostensible illegitimacy of the course of action, despite its legality. Nevertheless, an illegal action is by definition very difficult to defend in the international arena. When it comes to bodies that have professional standards, defending a legal action has a chance of succeeding, even if this cannot be fully guaranteed. It is much more difficult to defend an illegal action.

Furthermore, in light of the importance that various states attribute to respect for the law, the legal discussion often constitutes

part of the political discourse, and it should not be underestimated. Representatives of countries and organizations that are also involved in conflict situations can understand the challenge of operating in accordance with the law in a belligerent reality, and are capable of distinguishing claims that are based on the law and on facts from baseless claims. It is possible to work to receive the support of countries for actions that can be legally justified, while it is very difficult to receive support with respect to actions that constitute a clear violation of the law.

2. *Familiarity with the Relevant Legal Rules*

In order to ensure the complete internalization of the law in the framework of operational activity, and in so doing, inter alia, to strengthen the legitimacy of military actions, it is necessary to improve the familiarity and understanding of the law among military personnel at all levels, and in particular among the ranks of those involved in combat. It is essential to improve training in the legal sphere and to integrate specific lessons that explain the rules that apply in complex situations in which soldiers are supposed to operate, and also to include legal aspects in exercises and training. In this way, soldiers will not be wary of “legal restrictions” and will relate to the law as they would to any other professional aspect of their activity.

Furthermore, to improve the application and the internalization of the law in operational activity, legal advisors should be integrated that can advise in cases that include legal dilemmas. To allow the legal advisors to do their job properly, it is important that there be a direct connection and an atmosphere of trust between them and the commanders. It is also necessary that these legal advisors receive designated training to familiarize them with the operational aspects, the relevant terms, and military thinking.

3. *Taking Legal Considerations into Account when Making Decisions*

Just as it is clear that strategic and political considerations must be assessed when making operational decisions, legal considerations and considerations relating to the international legitimacy of decisions should also be assessed when taking decisions. While illegality is an almost absolute barrier to a certain action, except in especially unusual situations, the aspect of legitimacy is only one of the considerations, and is not necessarily the decisive factor. Nevertheless, when a certain course of action is examined, the considerations should also include its consequences for legal claims that would arise in the international arena, and an informed decision should be made that also takes this aspect into account.

4. *Investigations and Inquiries*

In any case in which claims are made that accuse IDF forces of committing war crimes, it is of great importance to conduct thorough and professional investigations and inquiries. This is necessary, as mentioned above, in order to establish the claim of complementarity and to block the possibility of criminal investigations against Israeli decision makers at the ICC and at courts in other countries. Moreover, investigations into incidents and criminal or disciplinary treatment, when suitable, strengthen Israel’s standing as a law-abiding country and make it easier to respond to charges and defamation in the international arena.

5. *Maintaining an Independent and Professional Legal System*

The strength and professionalism of the Israeli legal system, which includes advisory, enforcement, and judicial bodies, constitute an essential tool in the international legal campaign. In this campaign, the prestige that the Israeli Supreme Court enjoys in the international arena is of special importance, along with the fact that it performs judicial review of government decisions. If the court

were to give in to military or political pressure and approve legally problematic decisions, its prestige would be undermined, and the ability to rely on its decisions in the international legal campaign would be significantly reduced. There is special importance in the existence of a proper system of investigation and enforcement in and outside of the army.

6. *Responsible Rhetoric*

Public statements by figures in government or in the political and military establishment, including senior military officers, are of great significance. Statements that seem to imply contempt or disregard for legal limitations are used to strengthen the conception that Israel is a lawless country that does not respect the rules of the game of the international community, and are used against it in the legal debate. Furthermore, they can even be used as evidence in criminal cases, when attempting to establish the basis of an intent to commit a forbidden act.

In order to prevent a distortion of the truth regarding Israel's actions, it is necessary to invest efforts in obtaining and presenting credible documentation of the facts in real time (or soon after the events), and especially of facts relating to combat incidents.

For example, even if the IDF operates legally while respecting the relevant laws, statements made by senior figures about the possibility of disproportionate action or collective punishment, or statements whereby the law is irrelevant, create real damage even if they do not reflect the prevailing policy. While the rhetoric may be intended for enemy ears and its purpose is to deter it and convey to the population on the other side that it should pressure the enemy force not to attack Israel, this does not change the result. It seems that the damage from such statements outweighs the potential benefit in serving as a possible deterrent factor.

Furthermore, to maintain and strengthen international legitimacy, it is necessary for military commanders and senior state officials, including government ministers, to speak clearly and emphatically about the importance that all the frameworks in Israel attribute to respecting the law in general and the laws of armed conflict in particular. It is not enough to spout slogans such as “the IDF is the most moral army in the world”; instead, it must be emphasized explicitly that everyone who serves in the IDF must respect the laws of war based on an ethical and moral worldview, and that this is Israel’s national interest. To this end, it is also necessary to provide complete and unequivocal backing to the office of the Military Advocate General when it examines suspicions of deviations from the rules.

7. *Orderly Presentation of the Factual and Legal Position*

In order to prevent a distortion of the truth regarding Israel’s actions, it is necessary to invest efforts in obtaining and presenting credible documentation of the facts in real time (or soon after the events), and especially of facts relating to combat incidents. Clear footage, credible testimony of those involved in incidents, and evidence of the distortions and falsifications of the other side must all be collected professionally and quickly. It is necessary to train eloquent spokespeople, to improve the messages conveyed, and to attempt to lower the classification level of intelligence information in order to provide credible and convincing information as soon as possible.

The orderly publication of documents that present Israel’s factual and legal positions is important in coping with the media and public campaign. Furthermore, it is of special importance vis-à-vis judicial arenas, and there is no doubt that such documents are included in the materials that are examined by the Office of the ICC Prosecutor when making decisions on opening concrete proceedings against a suspect. Members of the academic world may

also be influenced by such documents, which can be quoted in studies and articles and thus impact the continued discourse on the issue.

8. *Proactiveness in the International Legal Arena*

International law is in essence a dynamic normative system that evolves in accordance with changes in reality, and it is possible to influence its development. This means that Israel can influence, directly or through its allies, the formulation and interpretation of the provisions of international law. This arena is important especially in cases in which the existing legal situation is ambiguous or controversial, such as in the case of warfare against non-state actors, or for example in shaping the rules that apply to the cyber realm. This influence can be created through active participation in meetings of experts and forums in which reports and documents that purport to reflect the applicable law are produced, as well as through professional publications in these fields. There is special importance to official publications by the state that clarify the way it interprets the law that applies to it. These have a direct impact on the development of the law, since international customary law is based on the practice of states, along with the way they explain their conduct from a legal perspective (*opinio juris*).

9. *Decisions regarding Cooperation with Examinations by International Bodies*

In theory, Israel has an interest in cooperating with international bodies, and it is preferable to avoid a situation in which Israel boycotts them. By cooperating Israel may influence the findings and conclusions of the proceedings. On the other hand, such cooperation could grant legitimacy on Israel's part to the conduct of the body and its results and harm Israel's arguments and positions, especially in cases in which it is clear in advance that the body that has been established and the examination that it will conduct are biased and one-sided,

or when Israel rejects the jurisdiction of the body. In light of this, Israel should continue the existing policy and decide separately in each individual case whether and to what extent to cooperate with such investigations, balancing between the costs and benefits inherent in such cooperation.

10. *Striving to Settle the Israeli-Palestinian Conflict*

It is impossible to sever the international legal campaign from the political reality of the conflict between Israel and the Palestinians and the rest of its neighbors. While even a full settlement of the conflict would not necessarily prevent continued claims and defamation against Israel in situations where it uses force, the more Israel is seen as the side that is primarily responsible for the continuation of the conflict, the more such claims will receive a sympathetic ear in the international arena. Therefore, in the realm of legitimacy, there is importance to clear statements by Israel regarding its willingness and desire to settle the conflict, and to take steps to advance a political solution, to the extent possible.

Conclusion

Israel is fighting against enemies that do not respect the law, is exposed to international criticism that is often unfair, and often finds itself unjustly on trial in the court of global public opinion. There is also concern that Israeli figures will find themselves facing criminal proceedings in the international arena and be subject to arrest warrants that are enforceable in most of the world. However, certain measures can be taken in the international legal campaign. First and foremost, it is necessary to recognize the relevant rules of international law that apply in combat situations and to respect these laws. In the case of claims of violations, thorough and professional investigations and inquiries should be conducted. Moreover, it is necessary to be proactive in the international arena and to allocate financial resources and personnel

to this end. Investment in clarifying Israel's positions, from a factual and legal perspective, and attempts to influence the way international law develops, are important efforts that will help advance the State of Israel's strategic objectives.

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Notes

- 1 According to [UN Watch figures](#), in 2021, 14 decisions against Israel and four decisions against the rest of the world were taken at the General Assembly.
- 2 On the Council's permanent agenda, which has ten items, there is a permanent item (number 7) that discusses Israel and the human rights situation in Palestine and in the territories, while the human rights situation in all the rest of the world is discussed in the rest of the items. According to [UN Watch figures](#), as of June 2022, since its establishment (in 2006) the Council has condemned Israel 99 times, and the rest of the world 116 times.
- 3 Along with these reports, there are critical reports by non-governmental human rights organizations such as Amnesty International and Human Rights Watch, which also bear a lot of weight in the international arena.