

Challenges Posed by International Law in the Context of Urban Warfare

Insights from Operation Pillar of Defense

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A lively debate in international legal circles has taken place in recent years regarding urban warfare. Many diverse arguments have been raised regarding the relevance and applicability of the laws of armed conflict to asymmetrical warfare, low intensity warfare, or warfare in densely populated areas – all different labels for the complex situation Israel has faced on its southern and northern borders for many years.

The spectrum of these contentions ranges from the assertion that the current laws of armed conflict (*jus in bello*) do not adequately address situations of armed conflict between states committed to rules of international law and terrorist organizations, which not only blatantly and intentionally violate the laws of armed conflict, but also cynically abuse the other side's commitment to those laws by conducting their operations from among, and under the cover of, their own civilian populations, including by exploiting them as human shields. At the other end of the spectrum is the view that the current laws of armed conflict permit the use of disproportionate force, and that this should be restrained by introducing legal principles drawn from the international law of human rights, with a particular emphasis on the right to life.

I do not intend herein to discuss these varying opinions in any more depth. Rather, my point of departure is the assumption that the laws of armed conflict, as they currently exist, are the laws that apply and bind the

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Israel Defense Forces (IDF), and that the IDF consistently acts according to these laws.

Thus, the IDF closely adheres to the four fundamental principles of the laws of armed conflict: *military necessity* – permitting the use of force as long as it is in order to achieve a military objective; *distinction* – requiring the distinction between combatants and military targets, which may be attacked, versus civilians and civilian objects, which may not be intentionally attacked, and to the extent possible, should not be harmed during the hostilities; *proportionality* – which acknowledges the possibility that civilians and civilian objects may be harmed (as collateral damage), as long as the expected collateral damage is not excessive in relation to the concrete and direct military advantage anticipated from the attack; and *humanity* – which provides the obligation to avoid actions that are liable to cause superfluous injury or unnecessary suffering. The effects of the hostilities on the civilian population should be minimized as much as possible.

These principles, reflected in the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), from 1977, constitute customary international law. Even prior to 1977, and certainly today, the IDF saw and sees these principles as obligatory (even though statements or opinions to the contrary have been voiced from time to time, they do not reflect the position of the Military Advocate General's Corps or the IDF).

It is well understood that the security situation in the Gaza Strip and in Lebanon is highly complex and intricate. The complexity inherent in urban warfare can be seen in the numerous videos uploaded to the internet by the IDF Spokesman's Unit, which clearly demonstrate the import of fighting in densely populated areas, where the adversary carries out its hostile activities from within residential areas while concealing itself behind the civilian population.

All this notwithstanding, the IDF has contended with, and will continue to contend with, the conflicts in the north and the south in accordance with the four principles mentioned above. To do so, we invest considerable efforts and resources, to the extent that our colleagues overseas have criticized us for implementing precautionary measures that exceed the requirements of international law, and risk forming opinions that such practices are customary law or accepted practice, thereby raising the threshold of the required precautionary measures by other states. Two prominent examples

for this are the early warnings transmitted by phone and the “knock on the roof” procedure, as well as the Supreme Court’s ruling that prohibits the so-called “neighbor procedure.” We are aware of this criticism, but the IDF will continue to make every effort to limit its attacks solely to combatants and legitimate military targets. The 2006 Second Lebanon War, the operation in Gaza of 2008-2009, and Operation Pillar of Defense in 2012 proved to the civilian population in the Gaza Strip and in Lebanon that, in contrast to the Hamas and Hizbollah terrorist organizations, the IDF employs force in accordance with the aforementioned principles and is incredibly strict with its adherence to the principles of distinction and proportionality. To the best of my knowledge, the IDF’s efforts and achievements in this regard during Operation Pillar of Defense were unprecedented.

Nonetheless, the operational reality in these sectors remains complex. The terrorist organizations that we face have not been resting on their laurels. They study past events, learn lessons, and reinforce their defenses under the umbrella of the civilian population. It is therefore important to deliver the message to the residents of Lebanon and the Gaza Strip and every international agency involved in the welfare of these populations that the IDF has high quality intelligence and that it makes optimal use of it. However, intelligence alone cannot negate the possibility that civilians located near military targets may be harmed, and there is no guarantee that all future operations will be conducted in the manner of Operation Pillar of Defense. We repeatedly call on these civilians to stay away from terrorist activity and to keep their distance from buildings where missile launchers are located. The IDF will continue to observe the laws of armed conflict but it cannot ensure that collateral damage, which we always seek to minimize, will consistently remain as low as it was during Operation Pillar of Defense.

Consequently, one of the key challenges that we as legal advisors dealing with warfare face involves examining the suitability of the laws of armed conflict and the basic principles outlined above in light of the complex reality that the IDF faces. To demonstrate the nature of these challenges, one may consider a concept that is closely related to international law and the laws of armed conflict, and which has a significant influence on the behavior of states in the international arena in general and on their conduct in armed conflict in particular; namely, the concept of legitimacy. There are some who believe that legitimacy and international law are one and

the same. After all, abiding by international law would seem to bolster legitimacy, while contravening international law results in the opposite: delegitimization. But the two are not always in full accord. A clearly legal action by any interpretation may still be viewed by international public opinion as illegitimate and even serve to delegitimize the entire military operation, whereas an unlawful action may be viewed as legitimate (or at least not illegitimate, despite its unlawfulness). In contrast with international law, which may not be an exact science but is still a clearly defined and acknowledged legal discipline, “legitimacy” reflects shifting opinions and international relations. It is not rooted in tradition, it is not founded on deep moral or ethical grounds, and it can easily be swayed by media or other influences. The solutions legitimacy offers to various situations are often simple and in coherence with international law, but sometimes they are not. This is particularly true when the hostilities do not take place on the classical battlefield on the basis of which the laws of armed conflict were compiled, but on the battlefield of asymmetric warfare, in densely populated urban settings.

Some examples: International law requires that the principle of distinction also be applied to the densely populated urban battlefield, even where it is almost virtually impossible to implement. In the world of legitimacy, the attitude toward property differs from the attitude toward human life. Thus, damage to a civilian building, which may be prohibited by international law and which, in some cases, may turn into a war crime, will not necessarily be viewed as illegitimate.

On the other hand, when we examine the implementation of the principle of proportionality in the same urban battlefield, the standard that legitimacy sets is much higher when compared with that of international law. The laws of armed conflict acknowledge the possibility of harm to civilians as collateral damage resulting from a legitimate attack. The commander is required to avoid carrying out an attack only if he reaches the conclusion that the expected collateral damage would be excessive in relation to the concrete and direct military advantage anticipated from the attack. The principle of proportionality is not a mathematical rule. International law does not provide formulas to calculate the appropriate ratio between the expected collateral damage and the anticipated military advantage. The question of whether an attack conforms with the principle of proportionality is left solely to the discretion of the commander, who

reaches his decision on the basis of the information available to him at the time.

Experience has shown that, in the realm of legitimacy, the tolerance level for collateral damage – and particularly the extent and nature of such damage – is infinitely lower than the tolerance level for collateral damage set by international law. Thus, for example, an attack on a building in which, according to corroborated intelligence information, a terrorist commander is said to be hiding, will be viewed as lawful by international law even if it transpires that the terrorist commander had escaped from the building a few moments before the attack, which also incidentally caused the death of five children. The relevant terrorist organization, it may be assumed, would not miss the opportunity to use the attack so as to erode the IDF's legitimacy in continuing the military action and would broadcast images of those harmed in the attack.

In the context of urban warfare, the gap between what international law sanctions and what the legitimacy standard permits has grown wider, as evidenced in the Gaza Operation of 2008-2009 and in Operation Pillar of Defense. Tens of lawful attacks under international law, where each resulted in minimal and certainly not disproportionate collateral damage, could in total cause aggregate collateral damage to numerous uninvolved civilians. With no doubt this is a regrettable and tragic outcome, but by no means constitutes an unlawful outcome. This also applies for the attacks on the numerous mosques that served as terrorist bases and weapons caches, which, under international law, were completely lawful. In both of these cases, the high number of civilians harmed and the damage to numerous mosques occurred in the course of a campaign waged in full accordance with the laws of armed conflict; yet it was still liable to be perceived as illegitimate.

As noted above, the IDF acts in accordance with the laws of armed conflict – however, considerations of legitimacy that have crept into the international discourse now present new and additional challenges.

The most fundamental challenge is to refute the contention that legitimacy and international law are one and the same, that is, to counter the view that what international public opinion considers as legitimate is necessarily lawful, and that what such opinion considers as illegitimate is necessarily unlawful. This is an unfounded belief. International law is, as described above, a grounded and binding legal discipline, whereas

legitimacy is the product of public relations or political interests, and sometimes the relations between political powers. As a result, not every action considered “legitimate” when performed by other state militaries will necessarily be deemed legitimate when undertaken by the IDF.

Notwithstanding and despite the implied censure, it would clearly be wrong and undesirable to ignore considerations of legitimacy. The IDF should operate on the basis of the saying “don’t just be right; be smart.” This was certainly the way the IDF’s commanders operated in Operation Pillar of Defense. During that campaign, the IDF encountered many situations in which the laws of armed conflict provided extensive latitude in action, including the option of using greater force in order to achieve a greater operational outcome. However, the commanders preferred to act differently and to show greater restraint.

All of the above has generated two subsequent challenges that derive from the discrepancy between international law and legitimacy:

The first is minimizing the gap between what international law permits and what is prohibited in the legitimacy realm. We must exhaust every available channel in order to explain that the correct way to deal with terrorist organizations operating from behind the civilian population is to fight them with the entire range of tools provided by international law. Imposing restrictions based on legitimacy considerations rather than considerations of law is liable to result in damage which is twofold: On the one hand, it could erode the fundamental principles of international law; and, on the other hand, it could extend the length of hostilities and cause unnecessary harm and suffering. Thus, for example, if legitimacy considerations lead to a preference for a ground operation over an aerial operation, the potential for damage to property and people will become exponentially greater (as was evident in Operation Pillar of Defense, compared to the Gaza Operation of 2008-2009.) Moreover, if the idea that any action leading to collateral damage is illegitimate gains traction, it will serve, and indeed already does serve, as an incentive for terrorist organizations to continue to violate international law by further intertwining its operations within the civilian population and using civilians as human shields.

The second challenge concerns the gap between what international law prohibits but is nonetheless permitted according to legitimacy considerations. As mentioned above, the IDF ensures that all of its activities are carried out in accordance with international law, and refrains

from carrying out unlawful actions, even where they may not be viewed as illegitimate. The temptation exists, but we will continue to reject it. Nonetheless, and in consideration of the significance we place on the need to minimize harm to persons (IDF forces, the Israeli civilian population, and the civilian population of the adversary, all to the same degree), it behooves us to constantly examine and question the accepted interpretation of the laws of armed conflict and the practices that have been adopted over the years. On the basis of the moral principles that grant supremacy to human life over the value of property, which already underlie the laws of armed conflict, we must find ways that will be compatible with the fundamental principles of international law but will also provide effective methods for combating terrorists who take shelter behind civilians – while minimizing, or even completely preventing, collateral damage. In the same vein, we should question, from a legal and factual standpoint, the requisite level of incrimination required to determine an object, masqueraded as a civilian object, as a legitimate military target. Another question involves the weight that should be afforded to the possibility that a certain attack could accelerate the end of the campaign and consequently prevent further and unnecessary harm on both sides, when assessing the proportionality of such an attack. These are significant questions that we must examine carefully and thoroughly.

Carrying out hostilities in a densely populated urban setting against a terrorist organization that views our reverence toward international law as a weakness is, first of all, a complex operational challenge that the IDF's commanders and soldiers consistently meet with significant success, as evidenced in Operation Pillar of Defense. The legal front, which requires, *inter alia*, the development of operational legal tools, is a means of support, whose goal is to allow the IDF to achieve its mission of defeating the adversary, and, at the same time, minimize the damage and suffering caused to the civilian population. The challenges of legitimacy are a part of this legal front – in which we will continue to operate in full accordance with, and with sincere commitment to, the principles of international law.