

# **Determining Norms for Warfare in New Situations Between Military Ethics and the Laws of War**

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The ethical doctrine of the war on terror is a set of principles that reflects an orderly conception dealing with the proper ways of conducting warfare against terrorism. Such a doctrine mediates between abstract values such as the “IDF spirit,” designed to guide commanders and soldiers’ behavior in any circumstances during their operations, and regulations, ROEs, and orders given to guide their behavior in a mission of a certain kind, under specific circumstances, at a specific time, and in a specific place.

The ethical doctrine at the background of this article and the articles published in a previous issue of this journal is the ethical doctrine for fighting terror that was developed in the context of the war between Israel and Palestinian terrorist organizations during the first decade of this century. The writers of this article developed it with the help of a team at the IDF Defense College and with the participation of specialists in anti-terror warfare and IDF and academic specialists in ethics and international law. The doctrine was presented in various official forums, and was subsequently published in professional journals.<sup>1</sup> Although it has not been officially adopted as the IDF ethical code of war on terror, three chiefs of staff who were in office during the period of fighting terror and

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many other officers have expressed support for its principles on various occasions, and many regard it as the Israeli doctrine.

Inaccurate media portrayals of the doctrine triggered responses of various kinds, including opposition to one principle or another that was attributed to us as the authors of the doctrine. Such responses are also reflected in articles published in the previous issue. In the current article and its follow-up, which will be published in the near future, we shall clarify several aspects of the ethical doctrine of the war on terror as we presented it in our articles; respond to a few of the arguments raised against it; and point out a number of updates, pertaining mainly to new situations in the war on terror in the Israeli theater and in other theaters, among them the theaters in Yemen, Afghanistan, Pakistan, and Somalia.

### Discussion of the Doctrine: Background Terminology

We will first clarify our general approach to a discussion of the ethical doctrine of fighting terror.

*Practicality:* A doctrine of warfare should constitute a basis for the practical guidance of commanders and soldiers with respect to their actions in war in the form of a regulation, ROE, or an order. We are therefore interested solely in a discussion that leads to practical conclusions about the possible and proper solutions to operational problems that arise when it becomes necessary to defend the citizens and sovereignty of the state.

*Responsibility:* A discussion of an ethical doctrine from an essentially critical perspective is liable to emphasize the undesirable aspects of future situations liable to result if commanders and soldiers were to act according to the doctrine. We are interested solely in a discussion that leads to improvements, meaning a revision of the doctrine or its replacement by another, so that the new doctrine will result in fewer situations with undesirable aspects.

*Universality:* The ethical doctrine of fighting terror was formulated over years of Israeli warfare against Palestinian terror, in which one of the principal means of defense is “targeted killings.” The doctrine was designed to survive the test of time by inducing the proper behavior not only in familiar surroundings, but in other times, situations, and locations as well, such as the US campaign in Yemen, which involved the killing of an American civilian as collateral damage,<sup>2</sup> or new kinds of operations such as the US campaign in Pakistan in which Bin Laden was killed.<sup>3</sup>

*Caution:* In context of a professional or academic discussion of any doctrine, it is assumed that the participants have studied the doctrine as

it was presented, and possess a significant factual basis concerning its contents, principles, and underlying explanations. As far as the ethical doctrine on which this article is based is concerned, the requirement of familiarity with the doctrine is imperative, as frequently it was not properly observed.

### The Ethical Doctrine and International Law: An Introduction

The point of departure for the ethical doctrine of the war on terror is not international law. The difference between us and the specialists in international law is no accident and certainly not arbitrary. The reasons for this difference are fundamental and important.

First, the *moral grounds*: For us, the value of international law is not its very existence, but its contribution to the world's moral improvement as regards going to war and the conduct of warfare. Every norm of international law is subject to moral evaluation. When making such an assessment, the norm may be considered successful, or it may be considered unsuccessful, but the point of departure is a moral one.

Second, the *constitutional grounds*: Many perceive international law as a system of norms that are directly binding on the Israeli commander and soldier – a system comparable to the Israeli law that is binding on him as a citizen of the state and as a person in IDF uniform. We regard him (as does Israeli law) as subject solely to Israeli law, which binds him, inter alia, to obey international law to the extent that the state accepts it or regards it as binding and operates according to it. Before a norm of international law reaches the soldier, it must pass tests of its validity according to the law of the state.<sup>4</sup>

Third, the *historic grounds*: Consensual international law emerged through a complex historical development, based on certain conceptions regarding the nature of warfare and the restrictions the leaders and their military advisors could reasonably impose on it. These conceptions served their purpose at the time, namely, a classic conflict between states that involved the classic format of combat between two armies. The restrictions imposed on these conceptions also served their purpose at the time, insofar as there was reason to assume that the parties to the fighting would observe the norms restricting them.<sup>5</sup> The restrictions themselves were practical and even simple: the distinction between combatants and non-combatants, for example, was observed simply by distinguishing between those wearing

a given uniform and those not wearing any uniform. These assumptions underpinned the willingness of leaders to accept the norms contained in the international agreements.

None of these conceptions fits the war on terror. There is no point making assumptions on grounds of the traditional character of war; there are no grounds for an assumption concerning the existence of reciprocity in the observance of the norms restricting warfare, and there is obviously no practical way of observing the restrictions through practical and simple means such as the distinction between those wearing uniforms and those not. These changes in the situation have a negative impact on the willingness to behave according to international agreements, and there is every reason to question their applicability with respect to the new situations.

Fourth, the *rhetorical grounds*: Arguments about violations of international law are expressed through familiar propaganda means against the states fighting terror, particularly Israel, even if they are fraudulent and their factual basis is weak. The media at least in part creates or enhances the propaganda effect of such assertions, especially in Europe as well as in Israel. The overall propaganda effect includes the media portrayal as a factor that creates a negative attitude in international public opinion.

The expression “international public opinion” itself is problematic. It may reflect the opinion prevalent in certain circles that are of secondary or marginal importance in themselves but have a prominent media presence because the media has an interest in making them look good. We do not deny the need for a state to fight on this front as well, but there is no reason to ascribe decisive importance to the question of whether a certain action is portrayed in familiar media as a basis for allegations of violations of international law. Considerations of public image do not take precedence over considerations of self-defense, morality, and military ethics.

The importance we attribute to the difference between our point of departure and that of the devoted advocates of international law does not signify any contempt on our part for international law, as claimed by Eyal Benvenisti in his remarks against “various IDF spokespeople or consultants.”<sup>6</sup> In order to understand what Benvenisti regards as “contempt,” we can use his description of the danger he sees here: “Such statements are liable to create the impression that Israel has little regard for international law because the law is neither relevant nor moral.”<sup>7</sup> According

to Benvenisti, Israel must not believe that the norms in the international agreements are irrelevant to new areas such as fighting terror or cyber warfare. He argues that the relevance of international law to each situation must be a fixed principle of the state. Furthermore, Israel must not believe the norms in international agreements to be immoral and inappropriate to the moral principles underlying its democratic regime, such as the principle of maintaining human dignity. The morality of international law must be a dogmatic principle of the state.

We reject the restrictions imposed by Benvenisti on the views of the democratic state concerning the relevance or morality of the norms in international law. A state is entitled to have a critical view of the relevance or morality of one or another aspect of international law: it is entitled to sign an international agreement, to sign it while objecting to parts of it, and even to conclude that parts of it are irrelevant and require significant addenda, or that parts of it are immoral and require significant change. In the main, the ethical doctrine of the war on terror is a proposal for perfecting international law.<sup>8</sup>

A significant supplement to international law does not imply a relaxation of the rules that bind soldiers and their commanders. On the contrary: as significant examples below will demonstrate, the addendum that we propose in the doctrine sometimes necessitates making the rules more stringent, in other words, the addition of rules that require more restraint and limitations on the use of military force than the existing rules require.

### **The International Discussion: Navigating in the Fog**

The discussion of international law, its content, the extent of its general importance, and its importance from an Israeli perspective takes place on several levels simultaneously, from a very abstract level to a very concrete level. Before reviewing them briefly, the obfuscation typical of the allegations heard in Israel and elsewhere must be noted. For the most part, it is difficult to know which level is referred to by a person who advocates the importance of international law: is he referring to the abstract level, where we totally agree with what he says, or is he referring to the concrete level, where there is room for a critical approach, or even substantial disagreement? This substantial fog is evident in the words of Eyal Benvenisti and Pnina Sharvit Baruch, as well as in the margins

of Avihai Mandelblit's comments, and leads them to draw erroneous conclusions, as we shall see below.

The various levels are:

- a. The spirit of international law
- b. The international system of institutions, conventions, and customs
- c. The doctrines reflected in international conventions
- d. The interpretation of international conventions
- e. The conceptions of binding customs
- f. Applications concerning a given action, both in advance and in retrospect.

We regard the spirit of international law as worthy. It can be portrayed as the principle of an obligation to reduce the calamities of war as much as possible through certain arrangements that impose restrictions on embarking on a just war, as well as restrictions on proper actions during the combat. This principle reflects a long tradition of the "just war theory" with its known principles, such as the requirement that going to war be the last resort when trying to solve a political dispute, the requirement that a proper distinction be drawn between combatants and non-combatants, and the requirement of proportionality.<sup>9</sup> That said, these are abstract requirements, and there is much room between them and regulations, ROEs, and orders in concrete situations.

The spirit of international law has a moral character. Every democratic state should therefore reflect this in its actions because it also stands for moral principles in maintaining human dignity for all people. As a democratic state, Israel is also committed to maintaining the spirit of international law. No one among us disputes this.

The international system includes institutions such as the UN, with the Security Council at its center; international conventions that states take open themselves to observe based on diverse considerations, such as various conventions for fighting terror; and customs capable of becoming global customs of a binding character. The actions of this international system are supposed to realize the spirit of international law, and as such are morally important.

At the same time, the international system is operated by states, each of which acts according to its own considerations. The international system is therefore a political system, many of whose actions enable it to act immorally in the guise of the pursuit of peace and justice.

Two recent examples illustrate this observation. The first is the International Criminal Court (ICC), which is entitled to conduct a hearing concerning the actions of a state that is not a signatory to the convention that established it – but only if the Security Council requests that it do so. States with a power of veto in the Security Council do not permit such applications against their allies: Russia and China where Syria is involved, and the US where Bahrain and Yemen, not to mention Israel, are involved. The second example is the Global Counter-Terrorism Forum (GCTF), established at the behest of the US, which includes 29 states and the European Union, but does not include Israel,<sup>10</sup> probably because of opposition from Turkey, which serves with the US as a co-chair of the Forum. Although the international system acts to realize the spirit of international law, it does it selectively, which is inherently unfair.<sup>11</sup>

Political wisdom calls for cautious treatment of the international system: identification with its goals of promoting peace and maintaining human dignity in accordance with the spirit of international law, but also the constant exercise of judgment with respect to the extent and format of cooperation with its institutions, accession to its conventions, and acceptance of its customs. It appears that this has traditionally been Israel's general position, and presumably acceptable to all of us.

The rules that appear in international conventions, such as the parts of The Hague Convention pertaining to ground warfare (1907), reflect doctrines of war that are general and complicated conceptions concerning certain aspects of warfare. For example, the provisions of Chapter One of the Convention<sup>12</sup> constitute just such a conception of the nature of a party fighting in a war: not only is an army involved, but also quasi-military bodies fulfilling certain conditions such as a responsible command and the open bearing of arms. These rules reflect the spirit of international law (in the tradition of the just war theory) in a way that facilitates the transition from its abstract principles to the concrete level of regulations, ROEs, and orders. Insofar as the conceptions reflected in the rules help to apply the spirit of international law in practice, they are useful and morally valuable.

However these conceptions are neither simple nor harmless, because they are based on factual assumptions that may be incorrect and the practical conclusions resulting from them may be inappropriate. For example, one incorrect factual assumption posits that a distinction can be made between combatants and non-combatants by means of a "recognizable symbol that

can be discerned at a distance.”<sup>13</sup> In the circumstances of the war on terror, this assumption is incorrect, as everyone knows. For example, a practical conclusion of the rules is that every soldier who belongs to the side that is waging a just war of clear self-defense is a legitimate target for deadly attack by the side that is waging an unjust war against him. This conclusion continues to arouse trenchant, persuasive moral opposition.<sup>14</sup>

What is the appropriate attitude toward a doctrine that reflects the rules of the international convention, given the possibility that it is based on factually incorrect assumptions, or leads to inappropriate practical conclusions? On the theoretical level, the answer is simple: it is appropriate to develop an additional doctrine, based on factually correct assumptions, which leads to appropriate – or at least more appropriate – conclusions, and which also embodies the spirit of international law in the framework of the international system. This is how the ethical doctrine of the war on terror should be understood on a theoretical level, as presented in our study.

On a practical level, the answer is much more complex. Here the following question can be posed: Which policy is the most desirable with respect to a problematic doctrine that is grounded in the spirit of international law, acceptable in the framework of the international system, and expressed in a binding international convention? There is no comprehensive answer to this question because the inappropriate practical conclusions of the given doctrine are on one side of the scale and the undesirable consequences of disavowing one of the accepted elements of the international system and a binding international convention are on the other. One side of the scale does not always outweigh the other.

It is possible to act in a way that creates an undesirable impression of such a disavowal. If the given doctrine is based on a factual assumption that is incorrect under circumstances of a certain type, such as the war on terror in its current configuration, it can still be observed in circumstances of a different type, in which this factual assumption *is* correct, such as a frontal military conflict between two armies. In this way, it is possible to propose an additional doctrine and to act according to it as long as its assumptions are correct. Thus, two doctrines exist side by side that are grounded in the spirit of international law in the framework of the international system, each of which being used under different conditions, depending on the underlying factual assumptions. This format precludes any undesirable disavowal in the international theater and any use of a doctrine whose



fundamental assumptions are incorrect. This is how the ethical doctrine of the war on terror, as we have proposed it, should be understood.

Is this approach explicitly or tacitly acceptable to all of us? The point is addressed below, following a discussion of the next level – the interpretation level.

The possibility of guiding the commanders' and soldiers' conduct on the basis of the interpretation of international law is accepted among the participants in the discussion. Mandelblit writes, "Therefore it is necessary to maintain the existing, traditional rules governing the laws of warfare and apply them fully, at the same time furnishing *an interpretation that is suitable* to the challenges of asymmetrical fighting."<sup>15</sup> He does not explain what a "suitable interpretation" is, how it should be determined, or who should make it, but we shall respond to these questions later. Benvenisti writes, "The laws of warfare have essentially remained unchanged, but *they must adapt* to the reality of the power of control."<sup>16</sup>

Sharvit Baruch includes a similar sentence in her remarks, but adds examples to illustrate her point: "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."<sup>17</sup> The conception of interpretation does not appear in her essay, but there is no logical difference between an interpretation of the rules and applying them "in a way that takes into account" special aspects of the given situation in the combat.

In order to demonstrate her argument, Sharvit Baruch presents several important examples, the rules of aerial warfare among them: "When aerial warfare began, *there were naturally no rules about it.*" Over time, states engaged in aerial warfare "acted in a certain manner...and on this basis *the relevant rules were formulated. These rules were based on the already existing principles and rules of the laws of warfare regarding fighting on land and at sea, with the requisite modifications made to them.*"<sup>18</sup> Another example she gives is taken from the realm of cyber warfare: "Here too, *the new rules are based on existing ones with the requisite modifications.*"<sup>19</sup> We will soon see what these examples mean for the ethical doctrine under discussion, but first we mention another example cited by Sharvit Baruch in the area of the war on terror, which is the domain of our doctrine.

"In 'classical wars,' there was<sup>20</sup> a relatively sharp distinction between combatants and civilians. Soldiers are the combatants and are considered

legitimate targets... while civilians (that is, 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, but 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?" Here Sharvit Baruch adds several instructive points: "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."<sup>21</sup>

Here we should call a spade a spade: what the "legal advisors" like Sharvit Baruch were proposing to the IDF was a new doctrine of the war on terror in the spirit of the given international law.

No commentary appears as to what constitutes appropriate interpretation of the existing traditional rules, to use Mandelblit's terminology. Under the heading, "applied [existing principles and rules] in a way that takes into account the particular reality," to use Sharvit Baruch's terminology, there is no application of existing principles and rules. What does appear under these two headings is a new doctrine of war on terror in the spirit of the given international law, whose original subject was classic warfare. As a matter of fact, Sharvit Baruch's examples show that new rules, defined in the spirit of the existing rules, are involved. Benvenisti outdoes them all; he describes the change that is to take place following the prevalent use of sophisticated technologies that make accurate strikes possible as follows: "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...when to attack, how to attack, and how much collateral damage they cause."<sup>22</sup> These, then, are new rules in the framework of a comprehensive legal conception that can differ from its predecessor.

In other words, our ethical doctrine is not alone in proposing new rules in the spirit of the familiar international law, based on the theory of a just war; those advocates of international law who criticize us for this are doing exactly the same thing. There is no difference of principle or

practice between their treatment of the given international law and ours: we are both adding new rules to it. What, then, is the difference between their approach and ours?

We found two differences between our approach and the approach of the international law disciples in the three articles that we are discussing. The first difference is rhetorical. They wish to portray the behavior of Israel, particularly of the IDF, as conforming to the existing rules of international law. Such a portrayal is designed, both from the outset and in retrospect, to counter any hostile argument accusing Israel, especially the IDF, of violating those rules. Our ethical doctrine is worded differently: Israel and the IDF are acting in the spirit of the existing rules of international law according to new doctrines that amount to supplements to the existing rules, while conforming to the spirit of the latter. In fact, we are not the only ones doing this; other states fighting terror are also doing it. Sharvit Baruch herself refers to “the accepted understanding by the US Army and NATO forces” whereby “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.”<sup>23</sup>

The truth is that there is no way to avoid the introduction of new rules and new doctrines in the spirit of international law. Below, we cite in greater detail important examples of the new rules proposed in the spirit of international law, such as rules requiring minimizing of collateral damage, beyond the accepted rules that dictate proportionality. At this stage, we will limit ourselves to an extremely simple example. In the course of the discussion following which the articles under discussion were written, in response to our assertion that not only medical staff but also mental health officers are deserving of special consideration in the spirit of the 1<sup>st</sup> Geneva Convention, which grants medical staff special status,<sup>24</sup> a senior Red Cross representative stated that mental health officers were considered medical staff entitled to special status. The recognition of mental health officers as entitled to special status is not an “interpretation” of the term “medical staff,” nor is it the “application” of this expression to the treatment of mental health officers. It is a new rule in international law expressing a conception concerning the place of a mental health officer, who is often a social worker or a psychologist, alongside the physician, the nurse, the paramedic (and the chaplain, who is protected under the same clause),

which is in the spirit of the international law dealing with medical staff, but expands it by adding a new rule. The actual expansion of a group of people with a specific status amounts to the addition of a new rule, even if that expansion appears to be natural.

The rhetoric of “maintaining the existing rules,” while “interpreting” or “applying” them according to the special circumstances of the war on terror, may have advantages in the field of public relations, but it is important to avoid allowing the norms of propaganda, public relations, media, or psychological warfare to filter down into the professional understanding of the requisite activity. This rhetoric cannot and should not conceal the fact that what is involved is the development of new doctrines.

Furthermore, the general rhetoric of completely and absolutely “maintaining the existing rules” subverts the important decision by Israel not to ratify the 1977 Protocol 1 Supplementary Amendment to the Geneva Convention; this was designed to enforce accepted rules of behavior in classic warfare in a conflict between a state and guerilla fighters who blur the difference between non-combatants in the vicinity and themselves. Israel was not the only state to refrain from ratifying this protocol: the US did not ratify it, while Australia, the UK, Germany, France, Canada, and other states added a reservation to their ratification, stating that they did not accept some of the new rules.

The International Committee of the Red Cross (ICRC) is trying to make the rules of the supplementary protocol binding on all states, whether or not they have ratified it at all, or whether they have ratified it completely or in part. It did so in a 2005 document<sup>25</sup> asserting that the rules of the supplementary protocol constituted customary international law, namely, a system of rules that states observe in practice. This assertion is controversial;<sup>26</sup> as a state that has not ratified the protocol itself, Israel certainly does not accept it. All inclusive statements about “maintaining the existing rules” are liable to be interpreted as general assertions of a commitment to observe what Israel has not taken upon itself. This is the danger arising from the rhetoric used by the devoted advocates of international law, who in effect are pushing Israel into a diplomatic and military corner where it has decided it does not want to be. The way we are presenting the ethical doctrine does not incur such a risk.

At this point, it is appropriate to comment on the conception of the proper behavior by a state in an area in which “international law is

developing.” Sharvit Baruch believes that this expectation, that is, 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” is “totally out of touch with international reality.”<sup>27</sup> First of all, it is not clear why Sharvit Baruch believes that the substance of the international agreement is “greater freedom of action for armies in asymmetrical conflicts.” The substance is agreeing with a new doctrine that will impose restrictions in the spirit of international law (in the tradition of the just war theory) in a way that will be appropriate to the nature of the conflict with terrorists. Such a doctrine is not meant to be tested according to the freedom of action it grants as compared with the doctrine for classic warfare. It may contain new restrictions, just as it may contain provisions allowing more freedom of action. Furthermore, it is unclear why Sharvit Baruch is convinced that there is no point in any international agreement unless “all the nations in the world” are parties to it. If we omit the rhetorical “all the nations of the world” requirement and confine ourselves to democratic states involved in the war on terrorism, there is no basis in “international reality” for assuming that the acceptance by the democratic world of a doctrine of war on terror in the spirit of international law is “totally out of touch with international reality.”<sup>28</sup>

In an incidental remark, Sharvit Baruch indicated another direction for development: “The rules are practical and adapted to reality...consolidating practice in accordance with the changing reality.”<sup>29</sup> With respect to the possibility of “adapting the rules,” we have already seen above that this defensive rhetoric overlooks the fact that what is actually involved is the introduction of new doctrines regarding the “changing reality.” Furthermore, “consolidating practice” is also nothing but the formulation of a new doctrine for guiding practice. Insofar as international law is developing in the area of customs, it is obvious that we can formulate new doctrines and act according to them in the spirit of international law (in the tradition of the just war theory). At the same time, in a persistent effort to shape the practice of the democratic world in its war against terrorists, we can learn from the new doctrines of other democratic states that are also fighting terrorists. Our ethical doctrines are designed to contribute to this effort to develop customary international law.

Another difference between our approach and that of the advocates of international law is that their approach results from professional activity in

the field of international law, while ours results from professional activity in the fields of command and ethics. The rhetorical use of terminology such as “interpretation” and “application” is designed to leave the job of developing new doctrines to the international law disciples. In our opinion, this is not a legal task, just as the task of designing the values and principles that should guide the conduct of a state, an organization, a profession, or a business corporation is not entrusted to the legal advisors of these entities. The state’s values and principles are determined in the Knesset; the university’s values are determined by its academic leadership, not its legal advisors. The values of medicine were formulated in the world of the physicians, with the help of medical ethics specialists. The values of a construction company will be determined by its specialists in issues of its identity, with the help of some advisors.

In Israel, the boundaries between the realm of law and the realm of ethics are often excessively blurred.<sup>30</sup> It is unacceptable, however, to allow this confusion to create the impression that lawyers are responsible for developing new doctrines. Nor does the obligation to develop new doctrines in the spirit of existing international law require that the job be left to jurists: the spirit of international law is the just war theory, which is a set of traditional principles that continues to be a topic of discussion in philosophy, political science, history, theology, and law.

There is therefore no difference of substance between our approach and those of Benvenisti, Mandelblit, and Sharvit Baruch concerning an accurate description of the requisite activity under the current circumstances. “The IDF, like any army of a law-abiding nation in the West,” asserts Mandelblit, “is committed to scrupulous observance of the requirements of the laws of warfare.”<sup>31</sup> What are these “requirements”? Let us be forthright: these are the requirements to act in the spirit of recognized international law in the form of new rules added to it in compliance with its spirit. That is what we all know should be done. That is what we are all doing. “The existing rules of the laws of warfare are the correct and appropriate system even when dealing with asymmetrical conflicts,” Sharvit Baruch argues.<sup>32</sup> What are these “existing rules”? If they refer to the abstract principles of the spirit of international law (in the tradition of the just war theory), there is no disagreement between us. If, however, they refer to the rules expressed in the articles of the Geneva Convention, for example, then Sharvit Baruch herself does not act according to her argument, since she develops new

rules under the misleading heading of “applying” the existing rules, as if “applying” the rule about “medical staff” makes it possible to include mental health staff, which is non-medical, as part of it; as if “applying” the rule about proportionality makes it possible to require much more, such as minimizing collateral damage, and so on. A responsible description of the customary practice in the ethical and normative training of commanders and soldiers leads us out of the fog to the clear recognition of the obligation to develop new doctrines, based on the state’s ethical conceptions, particularly those of the IDF (and the Israel security agency, the General Security Service).

### Noting What is Off Target

The critical position expressed in terms of “maintaining the rules of international law as is” is correct, as far as the principles of the spirit of international law and the just war theory are concerned. It is incorrect when more detailed rules designed to guide commanders and soldiers are involved. The slogan, “maintaining the rules as is,” without any admission that significant new conceptions, doctrines, and rules are being introduced, moves those who use it to be interested in describing their position in terms that distinguish it from anything expressed in our ethical doctrine. We therefore find ourselves witnessing a series of false descriptions that attribute to us stances that have never been ours, and which we have never stated.<sup>33</sup> We will thus give several examples of these false descriptions, and clarify our stance on the issues involved in them.

Sharvit Baruch seeks to express a middle-of-the-road position: “In my opinion... the existing rules of the laws of warfare are the correct and appropriate system,”<sup>34</sup> which also means objecting to two different and opposing types of positions. “The first [position] is that existing rules are unsuited to these conflicts because they allow a disproportionate use of force liable to harm the civilian population... Therefore, in places where there is no organized state that is capable of protecting its citizens, but rather non-state elements that do not consider the welfare of their population to be their first priority, because they lack either 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.”<sup>35</sup>

According to the second position, “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...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.”<sup>36</sup> Since Sharvit Baruch does not quote or provide footnotes, we must ask where our position and arguments belong in her picture: in the first category of positions, or in the second?

If we dispense with the obfuscations that Sharvit Baruch brings to the discussion with her slogan of “the existing rules... are the correct and appropriate system,” an interesting picture emerges: insofar as the spirit of international law (or the traditional just war theory) is involved, there is no difference between Sharvit Baruch’s position and our own; this was already explained above. Once we switch to doctrines that can be used in a conflict of the current type, however, our doctrine belongs in neither Sharvit Baruch’s first category nor her second one.

Our doctrine does not belong in the first category because, among other things, we ascribe decisive importance to the question of effective control of the territory in which war is being waged. A state bears responsibility for the fate of every person in a territory over which it exercises effective control, and does not bear a corresponding responsibility to exercise “a greater obligation of caution” involving people in a territory over which it does not exercise effective control. Incidentally, this is another significant example in which our ethical doctrine is more stringent than the accepted rules of international law.

Our doctrine does not belong in the second category either because, among other things, it does not involve a claim that the “existing rules” should be “ignored,” or “their restrictions should be lifted.” When we argue that the doctrine of international law in its recognized format is inappropriate for the current conflict, we are not ignoring the rules, since we definitely wish to maintain their spirit and develop a corresponding doctrine that is appropriate to the current conflict and is based on the same principles of the spirit of international law (in the tradition of the just war theory). We did not create our doctrine in order to “ease restrictions”; we sought to define other corresponding rules suitable to the current conflict.

The rules in our doctrine frequently restrict the use of force more than the general allowances made under international law. For example, in the



spirit of the distinction principle, which is in the spirit of international law and corresponds to the general distinction between combatants and non-combatants in classic warfare, we defined a rule of graded distinction according to the risk level of the contribution to terrorist activity. Moreover, while the principle of proportionality, which is also in the spirit of international law, requires that the military benefit derived from an action liable to cause collateral damage justify such damage, or in other words, bars excessive force, our doctrine requires that an effort be made to minimize the damage. Inter alia, such an effort requires continual examination of the possibility of using sophisticated weaponry.<sup>37</sup> Since non-minimal damage can be both proportional and non-excessive, here too the rules of our doctrine restrict the use of force more than the recognized rules of international law.<sup>38</sup>

An important comparison of our doctrine with the rules of international law arises from the ruling of the High Court of Justice on targeted killings.<sup>39</sup> Although Chief Justice (ret.) of the Supreme Court Aharon Barak discusses the propriety of actions such as targeted killings on the basis of the customary international law and Israeli law, his conclusions regarding the distinction between what is permitted and what is forbidden in military operations of this type are very similar to the conclusions arising from our ethical doctrine. Two differences emerge from the comparison between his legal argument and our ethical argument. First, the norm of customary international law requires an independent retrospective examination of the action. While we do not regard ourselves as being among the enthusiastic advocates of a suspicious and distrustful attitude toward every military action, our ethical doctrine does not contradict this norm with respect to an independent and professional retrospective examination. In the future, we will include it in the presentation of the doctrine. Second, the ruling states that it is better to arrest, investigate, and judge a terrorist than to kill him, insofar as this is possible [Section 40 of Chief Justice (ret.) Barak's opinion]. This is also the conclusion that is reached from our doctrine. In this context, the ruling deals explicitly with "conditions of seizure of territory during combat in which the army controls the area where the operation is conducted," so that arrest, interrogation, and trial are "possibilities that can sometimes be realized." The ruling exempts the army from the duty to implement such a possibility when the anticipated

collateral damage resulting from it is greater than the collateral damage anticipated from killing the terrorist in a targeted killing.

Here the conclusions in the ruling differ from our conclusions. In our opinion, it is improper to act in a way that creates a real risk of collateral damage when the territory seized during combat is subject to effective control by the army, because in such a territory, the army is responsible for the protection of every person who is not a participant in hostile action. The army's ethical and legal justification for imposing restrictions on such a person does not include justification for killing him as a result of killing a terrorist.<sup>40</sup> According to our approach, there is no justification for causing any collateral damage whatsoever in territory under the effective control of the army.

Of the many examples of the discrepancy between Sharvit Baruch's reasoning and our doctrine, we will mention only one more:<sup>41</sup> "Another point raised by those in favor of this argument [of the second type] is that it is unfair to demand that one side of the conflict honor the rules while the other side willfully ignores them."<sup>42</sup> This argument is unacceptable to us, and insofar as it is directed against us, reflects an important misunderstanding of what we are saying.

The principle of reciprocity in the observance of the rules of international law is important on two counts. First, it is of military, political, ethical, and moral importance: Does the violation of the rules by one party alter the definition of "what is permissible and what is forbidden" for the other party, which is suffering from the violation? For example, if one party violates the rules by making extensive use of chemical weapons, thereby gaining a significant military advantage, should the other side continue to observe the rules in the same way, even if it thereby incurs the risk of military collapse? Many consider a positive answer to this question unreasonable and even intolerable in practice.<sup>43</sup>

This uncompromising demand is one of the innovations of the above-mentioned 1977 additional protocol. It is unacceptable to us (and to certain states, including the US). On the other hand, general permission for every possible violation of the rules after the enemy has broken them, or some of them, is both unreasonable and intolerable. The fundamental goal of reducing war calamities as much as possible without abandoning the sustained effort to achieve victory remains unaltered. Given a violation of the rules by the enemy, the question is therefore to what degree, and under

what conditions, the definition of what is permissible and what is forbidden changes. Our doctrine assumes that the terrorist enemy is violating the rules at the level of the spirit of international law (and the principles of just war theory); at the same time, it is understood that absolutely no blanket permission to ignore the rules at this level is granted.

Second, at a level that is regrettably addressed by few, the reciprocity principle plays a role in the dialogue on justification between a state and its soldiers.<sup>44</sup> A democratic state is committed to the human dignity of its citizens, including its soldiers. Because maintaining human dignity also includes preserving human life, a democratic state owes its soldiers a clear justification for any decision it makes to place them in dangerous situations. Obviously, such justification is not given to a soldier under fire; a state formulates its justification for itself in advance, and gives it to its soldiers at the appropriate time. The justification for obeying the rules of international law is based on the state's decision to undertake to behave according to these rules. The soldier is entitled to ask the state why it is imposing on him the obligation to behave according to those rules, even when this weakens its military power. The state's response will include, among other things, the political wisdom reflected in its commitment to such behavior. Part of this political wisdom is expressed in the expected implementation of the reciprocity rule: it is good for us to limit ourselves to some extent, so that our counterpart on the other side will limit himself in the same or at least in a similar way. What happens to this justification in terms of the "political wisdom" when it is clear to the soldier that the reciprocity principle is never observed at the front?

Here the state cannot avoid a basic change in the justification of its actions – from the terms of the "political wisdom" underlying the reciprocity principle to the terms of what all of us regard as "the basic values of our state."<sup>45</sup> The first principle of our doctrine states not only a state's obligation to protect its citizens, but also its obligation to do so while constantly respecting the human dignity of every person as such. Here, again, our critics are breaking and entering when the door is wide open.

In conclusion, we regard the spirit of international law as an important compass in formulating the military ethics of the war on terror. At the same time, in their current version, the rules of international law require supplements in the form of new doctrines such as our ethical doctrine for the war on terror. Democratic states, including Israel, should be supplied

with doctrines that will properly guide them when they find themselves in a hazardous conflict with an enemy – not merely in the wars that are familiar from the past, but also in the newer wars, in which the enemy is a local organization or a global network of organizations rather than a state, or in which the enemy uses terrorism deliberately and continually, or in which the conflict takes place in the cyber sphere. Doctrines like these will not be considered interpretations of existing international law; rather, they will constitute significant addenda in the spirit of the familiar and acceptable international law.

### Notes

The authors would like to thank Prof. Yaffa Zilbershats for her useful comments on the draft of this article, and an anonymous reader on behalf of this journal for important comments on the previous version of the article.

- 1 Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective," *Journal of Military Ethics* 4, no. 1 (2005): 3-32, 60-70; Asa Kasher and Amos Yadlin, "Assassination and Preventive Killing," *SAIS Review* 25, no.1 (2005): 41-57; Asa Kasher and Amos Yadlin, "The Military Ethics of Fighting Terror: Principles and Explanations," *Scales of Justice* 6 (2007): 387-419 (Hebrew translation of the first article in English); Asa Kasher, "Operation Cast Lead and the Ethics of Just War," *Azure* 35 (2009): 29-55; Asa Kasher, "Operation Cast Lead and the Ethics of Just War," *Azure* 37 (2009): 43-75 (English translation of the preceding article).
- 2 See: [topics.nytimes.com/reference/timestopics/people/a/anwar\\_al\\_awlaki/index.html](http://topics.nytimes.com/reference/timestopics/people/a/anwar_al_awlaki/index.html). The terrorist was Anwar al-Aulaqi; Samir Khan, the editor of an al-Qaeda newspaper, was killed by his side, even though he did not appear on the designated list for targeted killing. The decision by a democratic state to allow the killing of its citizen as collateral damage of an action against a dangerous leading terrorist is a questionable decision of a new kind. It is questionable because a state's obligation to its citizens is usually to protect them, and certainly not to harm them. The decision is of a new kind because no such permission had been granted up to that point. The targeted killings carried out by Israel against Palestinian terrorists caused collateral damage, but not among Israeli citizens. This problem is discussed in the follow-up article to this article.
- 3 Peter L. Bergen, *Manhunt: The Ten-Year Search for Bin Laden – from 9/11 to Abbottabad* (New York: Crown, 2012). The decision to permit the killing of Bin Laden unless "he conspicuously surrenders" is questionable. On the one hand, he could have been captured alive, even if he had not "conspicuously surrendered" but had frozen during the first few seconds of contact with US Naval Seals. On the other hand, he headed a quasi-military organization that fought against the US, and it might therefore have been permissible to kill

him in order to avoid jeopardy even if it is of low probability. This problem is discussed in the follow-up article to this article.

- 4 In this context, a question can be raised concerning the most basic norms of international law (*jus cogens*) – those that are accepted by the community of the world’s states as incontestable, binding norms, such as the ban on torture (in a specific sense of this expression). Are such norms directly binding on soldiers, or are they binding on the soldier because his state admits that they are binding on it and on those acting on its behalf? The follow-up article to this article deals with this question as well, and argues that even such basic norms are indirectly binding on the soldier through the state’s mediation, and not directly binding on him.
- 5 This is an important assumption whose moral consequences, and the policies arising from it, should be thoroughly discussed. We mention here that there are norms, such as the obligation to behave properly toward POWs, which have been honored to an impressive extent, just as there are others, such as the obligation to avoid deliberate harm to civilian population, that have been clearly violated, such as the London blitz on the one hand and the dropping of atomic bombs on Hiroshima and Nagasaki on the other.
- 6 Eyal Benvenisti, “How the Challenges of Warfare Influence the Laws of Warfare,” *Military and Strategic Affairs* 4, no. 1 (2012), p. 38.
- 7 Ibid.
- 8 If Benvenisti believes that the impression created by our statements concerning the ethical doctrine constitutes a concrete danger, perhaps he might attempt to show that this impression is erroneous. Anyone who read our work and did not rely on journalists’ impressions of them did not regard them as reflecting “contempt” of the kind attributed to us by Benvenisti. We will return to this point in the next section.
- 9 Michael Walzer’s book, *Just and Unjust Wars* (Tel Aviv: Am Oved, 1984), is a detailed and important presentation of this theory. The English-language editions of this book are occasionally revised by the addition of a preface dealing briefly with additional wars. The fourth edition of the book appeared in 2006.
- 10 See the US State Department website: <http://www.state.gov/r/pa/prs/ps/2011/09/172010.htm>.
- 11 In 2012, a concrete possibility arose of Sudan becoming a member of the UN Human Rights Council as one of the African members; however, Sudan waived the appointment. The International Criminal Court in The Hague issued two arrest warrants against Sudan President Omar al-Bashir: in 2009 for war crimes, and in 2010 for genocide. When a state can be a member of the UN Human Rights Council even when its president is wanted by the International Criminal Court for genocide, crimes against humanity, and war crimes, what degree of confidence should be accorded an international system that permits this combination?

- 12 Appendix to the Convention Concerning the Laws and Customs of War on Land, Part 1, Chapter 1, Sections 1-3.
- 13 Ibid., Section 1, Condition 2. The tendency to give an exemption from the obligation for identification by means of uniforms in order to accommodate "freedom fighters" or those fighting "for self-determination" is evidence of political currents operating in the depths of the development of international law, but we will not discuss this in detail.
- 14 For example: Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009).
- 15 Avihai Mandelblit, "Lawfare – The Legal Front of the IDF," *Military and Strategic Affairs* 4, no. 1 (2012), p. 55, emphasis added.
- 16 Benvenisti, "How the Challenges of Warfare Influence the Laws of Warfare," p. 34, emphasis added.
- 17 Pnina Sharvit Baruch, "Legal Dilemmas in Fighting Asymmetrical Conflicts," *Military and Strategic Affairs* 4, no. 1 (2012), p. 41, emphasis added. How laws of warfare are adapted is a complex issue, and will be discussed further below.
- 18 Ibid., emphasis added.
- 19 Ibid., emphasis added.
- 20 It is not clear why Sharvit Baruch here and elsewhere in the essay uses the past and not the present tense. It would appear that she, like us, contends that the laws of classical warfare are still applicable.
- 21 Sharvit Baruch, "Legal Dilemmas in Fighting Asymmetrical Conflicts," p. 42.
- 22 Benvenisti, "How the Challenges of Warfare Influence the Laws of Warfare," p. 34.
- 23 Sharvit Baruch, "Legal Dilemmas in Fighting Asymmetrical Conflicts," p. 42.
- 24 Chapter 4, Section 24.
- 25 ICRC, "Customary International Humanitarian Law," <http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/index.jsp>.
- 26 For example, see Jeremy Rabkin, "Lawfare," *Jewish Review of Books* 3, no. 2 (2012): 29-32.
- 27 Sharvit Baruch, "Legal Dilemmas in Fighting Asymmetrical Conflicts," p. 49.
- 28 Perhaps it is not superfluous to mention that even given the difficulty in achieving general international agreement, an attempt to formulate such an agreement is still useful. An important example from "the international reality" is the ongoing effort in the UN to devise a universal definition of terrorism in the framework of a comprehensive international convention for waging war against it.
- 29 Sharvit Baruch, "Legal Dilemmas in Fighting Asymmetrical Conflicts," p. 41.
- 30 See Asa Kasher, "Professional Ethics and Collective Professional Autonomy: A Conceptual Analysis," *Ethical Perspectives* 12, no. 1 (2005): 67-98; see also "Professional Ethics," in *Introduction to Ethics A*, ed. Asa Kasher (Jerusalem: Jerusalem Center for Ethics, 2009), pp. 1-20, and Yitzhak Zamir, "Ethics and Law," in *Introduction to Ethics A*, pp. 21-33.
- 31 Mandelblit, "Lawfare – The Legal Front of the IDF," p. 55.

- 32 Sharvit Baruch, "Legal Dilemmas in Fighting Asymmetrical Conflicts," p. 40.
- 33 An odd phenomenon that accompanies this tendency toward false descriptions is the absence of any reference to what was said in our articles. The reader will search in vain in the critical articles before us for any example of an argument attributed to us. Is it possible that the critics drew themselves a picture of our opinions on the basis of various newspaper stories without reading our articles themselves? In this matter, see the requirement for caution that we stipulated in Section 1.
- 34 Sharvit Baruch, "Legal Dilemmas in Fighting Asymmetrical Conflicts," p. 40.
- 35 Ibid, p. 39.
- 36 Ibid., p. 40.
- 37 On this point, Benvenisti's statements are consistent with our doctrine, which portrays technology as a focal point that characterizes the current war. See Benvenisti, "How the Challenges of Warfare Influence the Laws of Warfare," p. 34.
- 38 Section 44 of Supreme Court Chief Justice (ret.) Barak's High Court of Justice ruling on targeted killings (769/02) discusses only the "narrow meaning" of proportionality, namely, the relation "between the military target and the civilian damage," even though the existence of other elements of proportionality in international law is mentioned. Our ethical doctrine contains elements beyond the "narrow meaning," as we have just seen.
- 39 High Court of Justice Ruling 769/02 was issued on December 14, 2006, long after after our ethical doctrine was published. One of our articles in which our doctrine is presented is mentioned in the ruling.
- 40 In another place, the ruling quotes Section 27 of the 4<sup>th</sup> Geneva Convention, which requires protection of the dignity of a person who is not a participant in hostile action in a territory that has been occupied in combat, subject to limitations on the means of supervision and security [Section 23 of Chief Justice (ret.) Barak's ruling].
- 41 Another important example is the attitude toward the terrorists' non-dangerous civilian surroundings, which we will address in the follow-up article.
- 42 Sharvit Baruch, "Legal Dilemmas in Fighting Asymmetrical Conflicts," p. 48.
- 43 For an enlightening discussion of the possibilities of "combat retaliation," see Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (Cambridge: Cambridge University Press, 2010), pp. 253-60.
- 44 Asa Kasher, "The Principle of Distinction," *Journal of Military Ethics* 6, no. 2 (2007): 152-67.
- 45 Sharvit Baruch, "Legal Dilemmas in Fighting Asymmetrical Conflicts," p. 48.