ISRAELI TARGETING

A Legal Appraisal

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The Israeli-Palestinian conflict is seemingly intractable. It involves contentious issues, such as extended occupation, the status of Jerusalem, a claimed "right of return" for Palestinian refugees, and recognition of a Palestinian state. Episodic hostilities have punctuated the conflict, causing heavy civilian casualties on both sides. The tactics employed have proved highly controversial, with some, such as terrorism and the direct targeting of the Israeli population, self-evidently qualifying as war crimes.

Between June and August 2014, Israel engaged in yet another round of intense hostilities with Palestinian organized armed groups in the Gaza Strip. What began with the kidnapping and murder of three Israeli teenagers quickly escalated into full-scale conflict featuring a rain of rockets from Gaza and Palestinian raids mounted through an extensive tunnel network. The Israeli military response, dubbed Operation PROTECTIVE EDGE (OPE), included an intense air campaign against Hamas and other armed groups and an Israel Defense Forces (IDF) ground incursion that resulted in firefights across the Gaza Strip. After a series of failed cease-fires, a precarious end to hostilities was negotiated, one that presently appears to be holding.

The short but violent conflict was devastating for the civilian population and infrastructure in Gaza. The United Nations Office for the Coordination of Humanitarian Affairs estimates that over two thousand Palestinians, more than half of them civilians, died during the hostilities.[1] Israeli losses exceeded seventy, the bulk of them IDF personnel.[2] Both sides suffered hundreds of wounded. As is normally the case, the conflict generated widespread criticism of Israel by various prominent nongovernmental organizations (NGOs), including Human Rights

Watch, Amnesty International, and Israeli groups such as B'Tselem.[3] Much of the criticism centered on a perception that the Palestinian side suffered disproportionate casualties and damage.

The condemnation was not, however, universal. As the dust settled, military professionals from the United States and several other countries carefully examined Israeli practices. They found much to commend about IDF operations, particularly the extent to which the IDF exercised restraint and the highly precise manner in which it conducted strikes. The U.S. Chairman of the Joint Chiefs of Staff, General Martin Dempsey, noted that Israel "went to extraordinary lengths to limit collateral damage and civilian casualties."[4] He praised several IDF techniques that have been the source of controversy in human rights circles, such as the "knock on the roof" technique employed to warn Palestinian civilians of an impending strike.

If war is politics by other means, then the interpretation of the laws of war will necessarily reflect the political environment in which war is waged.

Operation PROTECTIVE EDGE invites an examination of one facet of international law as it applies to the conflict—the law of armed conflict (LOAC) and a particular subset thereof known colloquially as "targeting law." The analysis need not address the righteousness of either side's cause, because an important, but often misunderstood, feature of international law is a strict separation between the *jus ad bellum,* the law addressing *when* states may resort to force, and the *jus in bello,* which comprises the rules governing *how* hostilities must be conducted.[5] The latter applies equally to all parties to an armed conflict, irrespective of which is right or wrong in terms of its origins.[6] In other words, it matters not whether Israel or Hamas (and other Palestinian groups) was the aggressor; both were irrefutably bound to conduct their operations in accordance with the LOAC.

This article examines how the IDF applies the LOAC rules of targeting. Israel has long refrained from revealing many aspects of its targeting processes and precise positions on key aspects of targeting law, out of concern that transparency might be misused to subject Israel to further criticism in international forums. This approach may be changing. In late 2014, the IDF invited this article's authors, members of the U.S. Naval War College's Stockton Center for the Study of International Law, to Israel to assess its targeting practices and positions.[7] Their research comprised a visit to the Gaza Division Headquarters, including an "attack cell," and an examination of Hamas attack-tunnel infrastructure. Combat footage of Israeli strikes on Hamas rocket sites during OPE was reviewed and extensive interviews with IDF legal advisers and ground and air force commanders at all levels were conducted. The conclusions that follow are offered to elucidate

Israel's approaches to targeting law by examining the synergistic relationship between Israel's unique operational and strategic challenges and its various positions on the LOAC.

STATE POSITIONS ON THE LAW OF ARMED CONFLICT

Before turning to Israeli targeting, it is useful to briefly survey the broad contours of the LOAC. It is a body of law that seeks to maintain a delicate balance between the military imperative of defeating the enemy on the one hand and the humanitarian one of protecting civilians and other "victims of war" on the other.[8] In the context of targeting, particular principles and rules maintain this balance. Foremost among these is the principle of distinction. Distinction, one of the "cardinal principles contained in the texts constituting the fabric of [the LOAC]," and thus "intransgressible," requires that the parties to a conflict "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[9]

Rules derived from this principle prohibit the direct attack of civilians and civilian objects, as well as indiscriminate attacks, such as those launched without regard to whether they will strike combatants or civilians.[10] The rule of proportionality flows from the same animating premise as the principle of distinction. It holds that even an attack properly aimed at military objectives is unlawful if the expected collateral damage to civilians and civilian objects is excessive in relation to the anticipated military advantage to be gained.[11] Finally, the LOAC achieves balance by requiring an attacker to take certain "precautions in attack" to minimize civilian harm, including doing everything feasible in the circumstances to verify the target is a military objective and selecting targets, weapons, and tactics that will limit civilian harm so long as they do not involve sacrificing military advantage.[12] There is also a requirement to warn the civilian population of attacks that may affect them when the circumstances so permit.[13]

These principles and rules lie at the heart of targeting law. However, it must be cautioned that targeting is subject to an array of further legal limitations, such as the ban on wanton destruction; the prohibition of unnecessary suffering (which disallows use of weapons that result in unnecessary suffering or superfluous injury to combatants); and the various "special protections" that bar or restrict attacks on specified persons and objects, such as medical, religious, and cultural entities.[14]

Most such rules and principles are set forth in treaty law. The primary instrument governing targeting is the 1977 Additional Protocol I (AP I) to the four 1949 Geneva Conventions.[15] Neither the United States nor Israel is party to the protocol, but both recognize that certain aspects of the instrument reflect

customary law norms.[16] Customary norms develop through the nearly universal practice of states engaged in out of a sense of legal obligation.[17] While customary law is sometimes hard to discern since it is not enshrined in treaty text, it is no less the law.

Nonlawyers may find it surprising to learn that states harbor different views on the LOAC. Despite broad consensus regarding most core principles and rules, at a more granular level there is a great deal of room for divergence on the scope and application of the LOAC in actual combat. For instance, distinction requires that attacks be directed only against *military objectives,* but what entities qualify as military objectives? For that matter, what is an *attack* as a matter of law? What measures will satisfy the law requiring an attacker to avoid civilian harm when *feasible*? What is feasible in a given situation? How much certainty is required about the nature of a proposed target before it may be struck?[18] When are warnings required, and how must they be delivered? On these and many other matters, a variety of views—often quite divergent—exist.[19]

The positions states take on such issues are not developed in a vacuum; if war is politics by other means, then the interpretation of the laws of war will necessarily reflect the political environment in which war is waged. Indeed, if war "is not the action of a living force upon a lifeless mass . . . but always the collision of two living forces," the interaction between adversaries in a specific operational and strategic environment is going to affect how it is fought and consequently how a state will view and apply the constraints of the LOAC.[20] That is plainly the case with respect to Israel.

ISRAEL'S UNIQUE STRATEGIC AND OPERATIONAL ENVIRONMENT

To understand why Israel adopts particular interpretations of the LOAC and how the nation applies them in practice, one must comprehend the operational and strategic dilemmas it faces. First, it is constrained by geography. Israel is a small country and its enemies—chiefly Hamas in Gaza and Hezbollah in southern Lebanon, but also their state sponsors, including Syria and Iran—are close. Its foes possess arsenals of rockets capable, in the absence of an effective antirocket capability, of striking all of Israel's major population centers. When rocket attacks are launched, a nationwide network of early warning sensors triggers flight to hardened shelters and, in some cases, widespread evacuation of civilians to less-threatened regions of the country.[21]

Given the long history of warfare between Israel and these nonstate actors, as well as Israel's relative isolation in international affairs, the Israeli population often perceives itself as "under siege." This stands in marked contrast to the United States, which operates globally and from a forward presence precisely to ensure

that it can confront threats far from the homeland. Barring a "black swan" event like the 9/11 attacks, the American people have rarely felt personally at risk. For Israel, by contrast, protection of the civilian population is of paramount importance. From the perspective of its adversaries, the Israeli civilian population is consequently a center of gravity against which attacks are routinely launched.[22]

Second, unlike the U.S. all-volunteer professional military, the IDF relies on conscription.[23] Most Israeli families have therefore seen loved ones put in harm's way, whether during a period of open hostilities, when facing the constant threat of terrorism, or simply in the long-simmering and often dangerous environment attendant to the Israeli presence in the West Bank, Gaza, the Golan Heights, or Lebanon. One result is an extreme aversion to casualties coupled with a pervasive fear of IDF soldiers' being taken prisoner.[24] Once more, Israel's foes have taken notice, repeatedly launching raids to isolate and capture IDF soldiers to leverage them for massive concessions from Israel. In this way, the safety of IDF soldiers represents another center of gravity, and potential vulnerability, exploitable by its enemies. Again, it may be useful to compare the Israeli perception of these matters to that of the United States. Whereas the United States only reluctantly accepted a prisoner exchange of five Taliban fighters for the return of Sergeant Bowe Bergdahl, Israel routinely exchanges hundreds of militants for a single captured IDF soldier.[25] In some cases, the exchanges were made simply to regain the remains of fallen Israelis. It is a stark contrast.

Despite these vulnerabilities, Israel benefits from certain factors. By virtue of its interior position, it can quickly mobilize air and ground forces to defeat threats arising on its borders. It does so with a highly advanced military force that generally enjoys overwhelming conventional overmatch, particularly with respect to Hamas. Israel also enjoys the relative luxury of knowing the location of its next battlefield. Unlike the United States, which must constantly prepare for expeditionary warfare around the globe, the IDF recognizes that it will fight in Gaza, southern Lebanon, or the West Bank. This allows it to develop exceptionally precise battlefield and target intelligence—Israeli forces fight on ground that they have physically occupied in the recent past or continue to occupy to this day (the West Bank), and it is ground on which they have fought many times before.

Today, Israel's adversaries no longer engage solely in irregular warfare. Hezbollah in particular has demonstrated the capacity to fight both conventionally and irregularly in what is now styled "hybrid warfare," while Hamas is demonstrating a growing tendency in that direction.[26] Still, in the face of conventional overmatch and their opponent's sophisticated understanding of the battlefield, they cannot go toe-to-toe with the IDF. Therefore, they create favorable asymmetries that allow them to exploit Israel's vulnerabilities and mitigate its advantages; tactics for doing so include fighting from within densely populated urban terrain,

employing human shields, feigning civilian and other protected status to conduct attacks, and using civilian objects like homes, schools, and medical facilities to cache weapons and from which to launch attacks—all violations of the LOAC. In particular, Israel's foes hope to draw the IDF into strikes that cause civilian casualties and destroy civilian infrastructure so as to intensify international pressure on Israel and exacerbate its isolation. The groups also attempt to leverage the aforementioned centers of gravity. As examples, they launch indiscriminate rocket attacks against Israeli civilians using cheap, inaccurate, and widely available rockets and use tunnels and the protection provided by operating from among civilians to get close to IDF positions in the hope of overwhelming or capturing Israeli soldiers.

This operational and strategic environment undergirds the focus and nature of IDF targeting. For instance, the IDF attaches great value to destroying rocket platforms and weapons caches and to locating and destroying tunnels. In the language of the LOAC's rule of proportionality, such targets are viewed as providing a very high "anticipated military advantage." Similarly, the fact that its enemies attempt to frustrate identification by fighting in civilian clothing and from civilian structures can result in the IDF striking what to outside observers appear to be unlawful targets. Also, Israel's deep insight into its likely battlefields—especially in Gaza—may lead it to attempt such attacks with marked confidence in their precision.

These examples illustrate how strategic and operational context affects the manner in which targeting is conducted. As will be discussed, such factors equally influence the value judgments that underlie targeting, especially the exercise of such discretion as the law allows.

LOAC AND TARGETING IN THE IDF

As noted, AP I captures much of the LOAC applicable to the conduct of hostilities. Despite not being a party to the treaty, Israel (and the United States) nonetheless considers many of the specific rules in that instrument to reflect customary international law. Thus, AP I's targeting provisions serve as a logical starting point for examining IDF positions on targeting law.

Military Objectives

Given the principle of distinction's prohibition on directing attacks at other-than-military objectives, it is essential to understand what is, and is not, a lawful military objective. AP I defines military objectives as "those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[27] Israel accepts this definition as reflecting customary international law.

Simple though it may appear, applying the definition in practice can prove challenging. Of particular significance in the Israeli context is understanding what the terms "use" and "purpose" mean. An otherwise civilian object (like a home, school, medical facility, or factory) becomes a military objective by use whenever it is converted to military ends. When intended to be so converted in the future, it qualifies as a military objective by purpose. Application of this norm can be relatively uncontroversial. For instance, when Hamas uses a school to store rockets or a residence to command and control its fighters, those formerly civilian objects become lawful military objectives subject to attack.

Israeli targeting has nevertheless come under critical scrutiny with regard to its application of the military objective definition. Consider tunnels. Hamas uses purpose-built tunnels for a variety of military ends. Some run under the border to Israel proper and are devoted to launching raids in an effort to overwhelm IDF positions or to capture Israeli soldiers. Others traverse Gaza itself and are used to move fighters and weapons underground and thereby elude detection and attack by air. These tunnels are clearly military objectives; the IDF appropriately targets them on the basis of their nature.

Applying the LOAC to Hamas tunnels that run under the border between Egypt and Gaza proves more complicated. In some cases, the tunnels are sometimes used both to bring rockets and other war material into Gaza and for nonmilitary smuggling purposes. Except for those employed exclusively for transporting military matériel, such tunnels must be treated as "dual use" objects; they may be attacked only when they become military objectives through their use or purpose.

Questions have arisen about cement plants that produce what Israel alleges are specially designed concrete supports, the sole purpose of which is tunnel construction. The IDF has repeatedly struck cement plants in Gaza, leading NGOs to claim that these are unlawful attacks against clearly civilian infrastructure.[28] In the view of the authors, if the factories do in fact produce supports used for the tunnels that qualify as military objectives, they unquestionably qualify as a lawful military objective by use since they are producing "war supporting" material.

To take another example, the IDF has repeatedly attacked allegedly "nonmilitary" Hamas government buildings. It insists that it does not target such buildings solely on the basis that they are Hamas government infrastructure. Rather, the IDF avers that in some cases Hamas military leaders inside the buildings were the targets, while in others the buildings themselves had a military use irrespective of any presence therein of Hamas fighters (such as a weapons cache or a command and control facility). Both situations would render an attack on the buildings lawful.

But this does not conclude the legal analysis. When Hamas fighters in a government building are the target of an IDF attack, any damage to the building or nearby buildings, and any harm to civilians, must be included as collateral damage when determining the proportionality of the attack and deciding what precautions must be taken to minimize collateral damage. If the building is itself the target, harm to the building need not be considered in these assessments.

Environment

There is a great deal of debate about protection of the environment in the context of the LOAC. Article 35(3) of AP I prohibits using means and methods of warfare that "are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment." This article protects the environment as such. Article 55(1), on the other hand, prohibits such attacks when those effects would "thereby prejudice the health or survival of the population." Unlike article 35(3), it is anthropocentric in the sense of protecting the civilian population from negative effects on the environment, rather than the environment itself.

Since Israel is not a party to the protocol, the question arises whether the two articles reflect customary law binding on nonparties. Neither the United States nor Israel believes they do.[29] First, both reject the premise that there is any set threshold of environmental harm that would prohibit an attack, such as "widespread, long-term, and severe," irrespective of any military advantage resulting from the attack. Moreover, Israel apparently rejects the proposition that the environment is to be treated as a civilian object, such that attacks against the environment are prohibited and that environmental harm must be considered in proportionality and precautions-in-attack determinations. Rather, it is of the view that the proportionality rule requires an attacker to refrain from attacks that, by their effects on the environment, would disproportionately harm civilians and civilian objects.

The distinction is important, particularly in the Middle East where oil infrastructure plays such a prominent role and offers both a tempting target and a source of grave potential environmental damage if attacked. One need only consider the Iraqi destruction of Kuwaiti oil wells during the 1991 Gulf war to grasp this point; in a high-intensity conflict in that region of the world, it is reasonable to anticipate such conduct.[30] In this respect, the Israeli position differs from that of the United States, which is of the view that the environment is a civilian object, and thus damage to it must be factored into a targeting analysis, even if there is no ensuing harm to other civilian objects or persons.[31]

Persons on the Battlefield

Perhaps no LOAC issue is fraught with more disagreement in the modern age of irregular and hybrid warfare than that of "direct participation in hostilities."

Generally, persons on the battlefield fall into one of two categories: members of the armed forces or civilians. Members of the armed forces are clearly subject to being attacked at any time, unless they are hors de combat by virtue of wounds, sickness, or having been made prisoner.[32] They are targetable on the basis of their status. In contrast, civilians are immune from attack "unless, and for such time as, they directly participate in hostilities."[33] Those who directly participate may accordingly be targeted on the basis of their conduct rather than their status; civilians may be attacked when they engage in acts that constitute direct participation, and only "for such time as" they so participate. Defining direct participation and determining when that participation begins and ends have been the source of ongoing controversy for years.

Beginning in 2003 and concluding in 2008, the International Committee of the Red Cross (ICRC) undertook a multiyear study culminating in the release of its *Interpretive Guidance on the Notion of Direct Participation in Hostilities*.[34] The ICRC, wrongly in the view of many observers, including the United States, takes a restrictive approach to the meaning of "for such time as," effectively holding that direct participants may only be attacked during a limited window when they deploy for combat, conduct combat, and redeploy; they remain immune from attack at all other times.[35] This grants more protection to these fighters than that enjoyed by regular members of the armed forces—an unsatisfactory result.

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In an effort to address this concern, the ICRC was willing to differentiate between civilians who fight as members of an "organized armed group" (OAG) and those who do so only sporadically and on a more spontaneous or independent basis.[36] According to the ICRC, members of an OAG may be treated as members of the armed forces for targeting purposes (e.g., targetable at any time), but with an important caveat—they must perform a "continuous combat function."[37] Support personnel without duties that directly affect the combat capabilities of one side or the other would not be targetable on the basis of OAG membership. Again, this results in less favorable treatment for uniformed members of the armed forces, since all members except medical and religious personnel are undoubtedly lawful targets on the basis of mere military status.

The IDF, like the United States, accepts the concept of OAGs but rejects the continuous-combat-function limitation.[38] Thus, the IDF characterizes members of Hamas's military wing (the Izz-al-Din al-Qassam Brigades) as members of an OAG rather than as sporadic civilian direct participants. By the Israeli approach, they are targetable at any time, and it is irrelevant whether their duties qualify

as a continuous combat function. The IDF accepts the premise that groups like Hamas can have distinct military and civilian wings. It only targets the former on the basis of an OAG-membership theory and the latter on the basis of direct participation in the hostilities. A Hamas leader who has both civilian and military functions, such as command and control, may be targeted owing to his position in the military wing, notwithstanding the fact that he may also have a role in the civilian government of Gaza.

With respect to individuals who are not OAG members and thus targetable only for such time as they directly participate, both Israel and the United States reject the ICRC's restrictive view of the "for such time" phrase. Their position is that a civilian who regularly participates in hostilities may be attacked throughout the entire period of participation, not just during individual acts. Thus, a civilian who is engaging in repeated acts of participation may be attacked during periods of rest or inactivity between those individual acts. Additionally, both countries take a broader view of conduct that qualifies as direct participation than the ICRC. As an example, Israel and the United States would characterize an individual who makes homemade rockets or improvised explosive devices as directly participating in hostilities; the ICRC labels such activities as indirect participation. Similarly, whereas a Hamas member smuggling weapons into Gaza for general use would not be directly participating by the ICRC restrictive approach, Israel would label such activity direct participation, as would the United States.[39]

Human Shields

The LOAC clearly forbids the use of human shields.[40] This has not prevented many states and nonstate actors from regularly using them, since the tactic holds out the prospect of either discouraging an attack by the adversary or mischaracterizing its strike as an intentional attack on protected civilians or as one that violates either the rule of proportionality or the requirement to take precautions in attack. Given the tactics of its enemies and the urban battlefield on which it usually fights, human shielding is particularly problematic for Israel.

The issue of how to treat civilian shields as a matter of the LOAC is hotly contested. Are they to be fully considered as civilians, or are they direct participants who do not factor into the proportionality or precautions-in-attack assessments? There are a variety of positions.

First, one must differentiate between voluntary and involuntary human shields. The former are civilians who choose to place themselves on, in, or near a military objective in the hope that an attack will be deterred. The latter are coerced or forced to serve as shields; they make no voluntary choice.

Israel is of the view that involuntary human shields retain their status as protected civilians. They may not be directly attacked and are factored into proportionality and precautions-in-attack analyses. Since it is often difficult or

impossible to know whether a human shield is there by choice or has been compelled to be present (or prevented from fleeing), Israel presumes a human shield to be involuntary until it has evidence to the contrary. This is an uncontroversial and mainstream position.

When it comes to voluntary human shields, by contrast, there is broad disagreement. The ICRC view is that civilians only lose their protection when they are voluntarily *physically* shielding or blocking a specific military objective, as in obstructing passage over a bridge.[41] Israel takes a different view, one shared by the United States.[42] It asserts that voluntary human shields are direct participants and in consequence need not be factored into a proportionality or precautions-in-attack assessment as collateral damage, even when shielding against air or artillery attacks. This is vitally important to the conduct of warfare in an urban environment against a foe employing asymmetrical tactics. Otherwise, the adversary could prevent attacks by simply stationing enough voluntary human shields throughout the battlefield near military forces and objectives to render them disproportionate or require, as a matter of law, the adoption of tactics or weapons that will avoid harming them. Of course, policy and operational concerns may drive a decision to take a more restrictive approach.

Placement of Fighters near Civilian Objects

A closely related matter is the more general use of the entirety of the civilian population and infrastructure to shield military operations. Israel confronts this in every battle in Gaza, a densely populated urban environment.[43] When Hamas uses civilian objects such as homes or schools as locations from which to launch military operations, they undoubtedly become military objectives through their use. They may be attacked, and no damage to the former civilian object counts as collateral damage.

However, Hamas often makes this more complicated for Israel by converting only a part of a structure to military use; the classic example is a multistory apartment building in which Hamas fighters use only certain floors. Is the entire building thereby transformed into a military objective? Or must damage to areas other than those used for military ends be calculated as collateral damage? If the IDF possesses a precise weapon capable of striking only a part of the structure, must it be used?

The IDF takes the position that, as a matter of law, the building is a single military objective, and therefore damage to other parts of the building need not be considered as collateral damage; the weapons choice issue only comes into play if adjacent buildings will be damaged or when civilians will be harmed in the attack. It must be noted in this regard that as a matter of policy, rather than law, the IDF insists it seeks to limit damage to parts of a structure not being used for military purposes.

This is a defensible view, but one with which one of the authors disagrees. He suggests that if it is feasible to strike only the relevant part of the structure, then damage to the other parts must be considered collateral damage and the proportionality and precautions-in-attack rules apply. Application of this approach hinges on what is feasible, an important term in the LOAC. Article 57(2)(a)(ii) of AP I requires attackers to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing [collateral damage]." "Feasible" has been held by many states to mean "practicable or practically possible, including both military and humanitarian considerations."[44]

Of course, in many cases, Hamas does not convert nearby structures to military objectives. Rather, it positions its military assets—rocket launchers, for example—in close proximity to civilians and civilian objects such as schools and mosques. These retain their protection from attack and their civilian status, and Israel correctly considers damage to them in the proportionality analysis.

Uncertainty

When trying to distinguish between military objectives and protected civilians and civilian objects, the attacker is often left with some uncertainty over status. AP I, article 50(1), states, "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." As to objects, a similar presumption applies in article 52(3), although it is limited to those objects "normally dedicated to civilian purposes." Israel accepts both presumptions as reflecting customary international law, as does the United States.

This raises the question of how much doubt is required to trigger these presumptions. Although Israel often enjoys highly refined intelligence about targets in Gaza, absolute certainty is rarely present in war, no matter how solid the attacker's intelligence. But what amount of uncertainty may exist and still make a targeting decision lawful?

It is sometimes asserted that any doubt, even slight doubt, triggers a presumption of civilian status.[45] This is an unrealistic standard and most states that regularly engage in combat reject it. For instance, the United Kingdom applies the presumption only when "substantial doubt" still remains after consideration of all available intelligence.[46] The authors take the view that levels of certainty or doubt cannot be realistically quantified in any meaningful way; the targeting decision should rather be considered for its qualities—in particular, the quality of reasonableness.[47] The IDF concurs, as does the United States.[48] So too have tribunals agreed when considering whether errant strikes constituted war crimes.[49]

Reasonableness is an admittedly vague standard; what is reasonable to one observer may seem unreasonable to another. The IDF asserts that reasonableness depends on context. The value of the target, whether it is fleeting or persistently

vulnerable, the feasibility of refining the intelligence, and the effect on the wider military situation of delaying a strike to resolve doubt are, among other things, factors in determining reasonableness. While this introduces a degree of discretion into the LOAC, in the authors' view it is unavoidable and, in the final analysis, sensible. Military commanders must exercise judgment and make tough decisions in battle, and they must do so knowing that their decisions will stand up to scrutiny later. Only a reasonableness standard can viably account for these realities.

Proportionality

The rule of proportionality has been discussed above several times in different contexts. Israel accepts the AP I articulation of the rule as customary international law—that is, one may not launch an attack if the expected collateral damage would be excessive in relation to the anticipated military advantage.[50] Albeit simple and elegant, the rule frequently presents difficulties in application, because it requires a comparison between dissimilar values—avoidance of civilian harm on the one hand and military advantage on the other. Compliance requires military commanders to make value judgments, judgments that cannot be formulated mathematically.

In the conduct of its operations against Hamas, Israel takes as much criticism on proportionality as on any other point of law. During OPE, which lasted fifty days, the IDF reportedly struck over five thousand targets in Gaza, resulting in, as noted, over two thousand Palestinian deaths.[51] While many of these were undoubtedly fighters who would not be factored into a proportionality analysis, the raw numbers still strike many observers as extremely high.

The resulting criticism gains added weight when one considers the fact that the primary threat posed to Israel was rocket attacks, and the IDF employs the Iron Dome antirocket system, which may be the most effective defensive system of its kind in the world. By the conclusion of the war, only a handful of Israeli civilians had been killed by Hamas rockets. Thus, the legal question is whether the very effectiveness of the Iron Dome system should require the IDF to accept less collateral damage from its own attacks. In other words, should Iron Dome's success alter the calculation of the "military advantage" of destroying Hamas rocket launchers and weapons caches?

Every Israeli interlocutor with whom the authors engaged during the project rejected this approach. They make a four-pronged argument that is compelling but potentially controversial. First, they point to the inherent military value of destroying the enemy's primary weapons system. Rockets are deadly and have their own value that remains extant even in the face of a capable defensive system. Second, they argue that it is illogical and unfair to suggest that a state's effectiveness at defending its population from unlawful attacks should be allowed to impair its

ability to take offensive action. By such an approach, if a state determines that the optimal way to eliminate a threat is to go on the offensive, it would have to knowingly subject its population to increased risk by refraining from fielding effective defensive systems. Third, they argue that the rocket threat has a psychological component that is every bit as potent as its physical one; the fact that Iron Dome intercepts 95 percent of incoming rockets does not mean the Israeli population is 95 percent less terrorized by the attacks. Finally, those interviewed insisted that the IDF attacks on rocket launchers were precise; they were unaware of any cases of civilians being killed by IDF attacks on rocket launchers.

The authors have no way of confirming or denying the final argument and will not address it. With respect to the other prongs of the argument, they find them compelling. After all, Sun Tzu exhorts the strategist to "attack the enemy's strategy" above all.[52] Hamas has selected indiscriminate rocket attacks to terrorize the Israeli population as its strategy; a competent Israeli commander is entitled to defeat this strategy. Moreover, while Iron Dome is good, it is not perfect—some rockets get through. Nonetheless, it remains the view of the authors that the effectiveness of Iron Dome must have some limited bearing on the proportionality calculation. It does not render rocket launchers without military value, but it does decrease the value of attacking them—and if that is the case, then the acceptable collateral damage during an attack on them must correspondingly decrease to an extent. This reduction may be minor or even de minimis, but it should be a consideration.

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Proportionality valuations come into play in another respect worth noting. The IDF places an extremely high value on preventing the capture of its soldiers, and Hamas endeavors to exploit this using its attack tunnels. In response to frequent abductions over many decades, the IDF reportedly issued what is known as the Hannibal Directive, which allows specific actions in response to the capture of a soldier. Although much of the directive is technical and related to command and control, an important provision apparently authorizes robust measures, including operations that pose a significant risk to the captured soldier himself.[53] In other words, the IDF may chance the death of the captive soldier to prevent the abductors from escaping the area and being able to exert *strategic* leverage over Israel by using the prisoner.

The fact that the IDF is willing to risk the death of its soldiers to prevent capture demonstrates the high degree of military advantage it attributes to denying

the enemy the benefits of capture. This advantage must be considered when determining the value during proportionality calculations that should be assigned to targets such as tunnel entrances, cement plants, and other infrastructure that supports Hamas kidnap operations. As that value rises, the IDF may countenance a degree of collateral damage during strikes on these targets that could seem excessive to an outside observer who has not considered the strategic implications of an IDF soldier falling into Hamas hands.

Warnings

Article 57(2)(c) of AP I, which Israel accepts as reflecting customary law, requires an attacker to provide "effective advance warning" of attacks that may harm civilians, "unless circumstances do not permit." The latter clause recognizes that in many cases the element of surprise is essential to the success of an attack, and thus the warning requirement is by no means absolute. But the IDF goes to extraordinary lengths to provide warnings to civilians whenever it is feasible to do so. The manner in which this is done has, curiously, been a major point of contention.

Israel takes the position that an effective warning is one that is communicated to civilians who may be affected in a manner that permits them to take protective measures, including evacuation when possible. The "effectiveness" of warnings should not be measured by how many civilians actually take advantage of them but rather by whether they received the warnings and had the opportunity to heed them. This is especially important because Israel alleges that Hamas repeatedly instructs civilians to ignore the warnings and often actively prevents them from evacuating a target area.

This practice often places the IDF on the horns of a dilemma. If it warns well in advance of a strike, the warning may actually hamper the ability of civilians to comply because Hamas can mobilize efforts to prevent compliance. Conversely, if the IDF allows only a short time between the warning and the strike, it will be accused of failure to provide an effective warning.

The methods by which some warnings are delivered have also proved controversial. This is particularly so with the knock-on-the-roof technique.[54] The technique involves striking a target with a small submunition that detonates a minute or more before the actual destructive attack. The noise and concussion from the submunition are intended to frighten civilians into leaving the target, which is then clear to be attacked by a regular bomb or missile. In many cases, the IDF places an unmanned aerial vehicle over the target and physically counts the civilians leaving the target area before launching the destructive strike. Human rights groups are outraged by this technique, insisting that the risk to civilians is increased and that they are unlawfully terrorized.

The authors' view is that the IDF's measures to warn civilians are incredibly robust and represent a laudable effort to save lives. As the previous discussion of the law makes clear, warnings are only required when circumstances permit. Many military commanders would find it easy to decide that warnings are counterproductive, because, of course, Hamas fighters can also elude attack. While the knock on the roof may be a frightening way to deliver a warning, it is a creative, effective, and lawful means of limiting harm to civilians.

Israel's positions on targeting law are consistent with mainstream contemporary state practice. While some of them may be controversial, they are generally reasonable and in great part closely aligned with those of the United States. In the few cases where Israeli practice or positions diverge from those of the United States (or the authors), they nonetheless remain within the bounds of the broader contours of the LOAC. Differences can usually be attributed to the unique operational and strategic context in which Israel finds itself. Of particular note in this regard are the perception that the Israeli population is constantly at risk of attack and the understanding that IDF soldiers represent irresistible targets for abduction by its adversaries.

Like the United States, or any other country for that matter, Israel cannot make legal judgments in a vacuum. Rather, it must apply the law to the conflict in which it finds itself. The nature of that conflict affects the value judgments military commanders make, as well as the manner in which a state interprets its legal obligations. War and the law governing it are contextual. The Israeli case provides further evidence to support this seemingly self-evident proposition.

NOTES

The views expressed in this article are those of the authors in their personal capacity.

1. Office for the Coordination of Humanitarian Affairs, *Occupied Palestinian Territory, Gaza Emergency Situation Report* (4 September 2014), www.ochaopt.org/ [hereafter Occupied Palestinian Territory]. Various Israeli estimates were lower overall and included a greater percentage of Palestinian fighters; Meir Amit Intelligence and Terrorism Information Center, *Additional Findings in the Examination of the Names of Palestinians Killed in Operation Protective Edge: Part Eight* (29 December 2014), www.terrorism-info.org.il/.
2. Occupied Palestinian Territory.
3. Examples of such criticism abound. See, e.g., Amnesty International, *Nothing Is Immune: Israel's Destruction of Landmark Buildings in Gaza* (9 December 2014), www.amnesty.org/; Amnesty International, *Families under the Rubble: Israeli Attacks on Inhabited Homes* (5 November 2014), www.amnesty.org/; Human Rights Watch, *Israel: In-Depth Look at Gaza School Attacks* (11 September 2014), www.hrw.org/; Physicians for Human Rights–Israel, *Gaza, 2014: Findings of an Independent Medical Fact-Finding Mission* (2014), gazahealthattack.files.wordpress.com/; Human Rights Watch, *White Flag Deaths:*

Killings of Palestinian Civilians during Operation Cast Lead (13 August 2009), www.hrw.org/; Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles* (30 June 2009), www.hrw.org/; and Human Rights Watch, *Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza* (25 March 2009), www.hrw.org/.

4. Voice of America, *US Military Chief Backs Israel on Gaza Tactics* (7 November 2014), www.voanews.com/.

5. U.S. Navy Dept., *Commander's Handbook on the Law of Naval Operations,* NWP 1-14M, MCWP 5-12.1, COMDTPUB P5800.7A (Washington, D.C.: July 2007) [hereafter Commander's Handbook], paras. 5.1.1–5.1.3.

6. On the principle of equality of belligerents under the LOAC, see Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* 2nd ed. (New York: Cambridge Univ. Press, 2010), p. 3.

7. The full report, which examines the issues from a distinctly legal perspective, is at Michael N. Schmitt and John Merriam, "The Tyranny of Context: Israeli Targeting Practice in Legal Perspective," *University of Pennsylvania Journal of International Law* 37 (forthcoming 2015).

8. Dinstein, *Conduct of Hostilities,* p. 4; see generally Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance," *Virginia Journal of International Law* 50 (2010), p. 795.

9. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, 8 June 1977, 1125 U.N.T.S. 3 [hereafter AP I]; Commander's Handbook, para. 5.3.2. For "cardinal principles" and "intransgressible," Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 257 (July 8).

10. AP I, arts. 51, 52; Commander's Handbook, para. 8.3.

11. AP I, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b); Commander's Handbook, para. 5.3.3.

12. The required precautions in attack are outlined fully in AP I, art. 57; Commander's Handbook, para. 8.1.

13. AP I, art. 57(2)(c); Commander's Handbook, para. 8.9.2.

14. Special protections are extended by a variety of treaty instruments. For example, medical personnel, facilities, and units are protected by AP I, arts. 12, 15, 21–24, as well as Geneva Conventions I and II. Cultural and religious objects are protected by AP I, art. 53, and the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 U.N.T.S. 240. This list is not exhaustive. See also Commander's Handbook, chap. 8 generally. For wanton destruction, Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV art. 23(g), 18 October 1907, 36 Stat. 2227 [hereafter Hague Regulations]; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, 12 August 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 51, 12 August 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 147, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Commander's Handbook, para. 6.2.6.4.2. For unnecessary suffering or superfluous injury to combatants, Hague Regulations, art. 23(e); AP I, art. 35(2); Commander's Handbook, para. 5.3.4.

15. See AP I, endnote 9.

16. See, e.g., Michael J. Matheson, "Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions," *American University Journal of International Law and Policy* 2 (1987), p. 419.

17. Statute of the International Court of Justice art. 38(1)(b), 26 June 1945, 59 Stat. 1055, 33 U.N.T.S. 993. In the North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (February 20), the International Court of Justice explained the requirement of *opinio juris:* "Not only must the acts concerned amount to a settled practice, but they must also be such . . . as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."

18. For a discussion of certainty in targeting, see generally John Merriam, "Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters," *Virginia Journal of International Law* 56 (forthcoming 2015).
19. On targeting law, see generally Michael N. Schmitt and Eric Widmar, "'On Target': Precision and Balance in the Contemporary Law of Targeting," *Journal of National Security Law and Policy* 7 (2014), pp. 379–409.
20. For quotation, Carl von Clausewitz, *On War,* ed. and trans. Michael Howard and Peter Paret (Princeton, N.J.: Princeton Univ. Press, 1984), p. 77.
21. Israel's Civil Defense Law of 1951 requires all homes to include bomb shelters and mandates the construction of public shelters as well; Civil Defense Law, 5711-1951, 5 LSI 72 (5711-1950/51) (Isr.). See also the Israeli Home Front Command's public information website, which details the requirements for shelter construction; www.oref.org.il/10625-en/Pakar.aspx. Evacuations to safer areas of the country have been ordered in many Israeli conflicts; see, e.g., Amos Harel, "IDF Preparing for Mass Evacuations in Case of Hezbollah Missile Strike," *Haaretz,* 20 May 2010, www.haaretz.com/.
22. JINSA-Commissioned Gaza Conflict Task Force, *2014 Gaza War Assessment: The New Face of Conflict* (Washington, D.C.: Jewish Institute for National Security Affairs, March 2015) [hereafter Gaza War Assessment], p. 19, www.jinsa.org/.
23. Defence Service Law, 5746-1986, 40 LSI 112 (5746-1985/86, as amended) (Isr.), available at www.israellawresourcecenter.org/. Article 1 defines the military age as eighteen, and article 13 authorizes the IDF to call conscripts to service.
24. Yagil Levy, "The Paradox of Recruitment," *Defence Studies* 14, no. 2 (2014), p. 226; Daniel Byman, *A High Price* (New York: Oxford Univ. Press, 2011), p. 364.
25. *Statement on the Transfer of Detainees before the House Armed Services Committee, Delivered by Secretary of Defense Chuck Hagel,* 11 June 2014, docs.house.gov/; Ronen Bergman, "Gilad Shalit and the Rising Price of an Israeli Life," *New York Times Magazine,* 9 November 2011.
26. Frank G. Hoffman, "Hybrid Warfare and Challenges," *Joint Force Quarterly,* no. 52 (1st Quarter 2009), p. 35. Hezbollah has been singled out as particularly adept at hybrid warfare; ibid., p. 37. See also Andrew Exum, *Hizballah at War: A Military Assessment,* Policy Focus 63 (Washington, D.C.: Washington Institute for Near East Policy, December 2006), p. 8.
27. AP I, art. 52(2). See also Commander's Handbook, para. 8.2.
28. Human Rights Watch, *"I Lost Everything": Israel's Unlawful Destruction of Property during Operation Cast Lead* (New York: May 2010), p. 59, available at www.hrw.org/.
29. On the U.S. position, see Commander's Handbook, para. 8.4.
30. On the illegality of such attacks, see "U.S. Department of Defense Report to Congress on the Conduct of the Persian Gulf War: Appendix on the Role of the Law of War," *International Legal Materials* 31, no. 3 (May 1992), pp. 636–37.
31. Commander's Handbook, para. 8.4.
32. AP I, art. 41(2); Commander's Handbook, para. 8.2.3.
33. AP I, art. 51(3); Commander's Handbook, para. 8.2.4.
34. Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: International Committee of the Red Cross, 2009) [hereafter ICRC Interpretive Guidance].
35. Ibid., p. 65.
36. Ibid., pp. 31–32.
37. Ibid., pp. 33–35.
38. On the U.S. approach, see Commander's Handbook, para. 8.2.2.
39. On the ICRC approach, see ICRC Interpretive Guidance, p. 54.
40. AP I, art. 51(7); Commander's Handbook, para. 8.3.2. See generally Michael N. Schmitt, "Human Shields and International Humanitarian Law," *Columbia Journal of Transnational Law* 47 (2009), p. 292.

41. ICRC Interpretive Guidance, p. 56.
42. Commander's Handbook, para. 8.3.2.
43. See, e.g., "UNRWA Condemns Placement of Rockets, for a Second Time, in One of Its Schools," *UNRWA: United Nations Relief and Works Agency,* 22 July 2014, www.unrwa.org/; and Gaza War Assessment, pp. 18–20.
44. Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Leiden, Neth.: Martinus Nijhoff, for the International Committee of the Red Cross, 1987), para. 2198.
45. Ibid., para. 2195.
46. Declaration (h) made by the United Kingdom at the time of ratification of Additional Protocol I, 20 January 1998, et seq., available at www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp.
47. See Merriam, "Affirmative Target Identification."
48. Commander's Handbook, para. 8.2.2.
49. For example, the highly influential "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia," *United Nations: International Criminal Tribunal for the Former Yugoslavia,* n.d., para. 50, www.icty.org/, comments favorably on the reasonable-commander standard; see also Prosecutor v. Galic, Case No. IT-98-29-T, Judgment, paras. 51, 55 (International Criminal Tribunal for the former Yugoslavia, 5 December 2003), holding the commander to a reasonableness standard.
50. AP I, arts. 51(5)(b), 57(2)(a)(iii); Commander's Handbook, para. 5.3.3.
51. "Occupied Palestinian Territory: Gaza Emergency, Situation Report (as of 28 August 2014, 08:00 hrs)," *United Nations Office for the Coordination of Humanitarian Affairs: Occupied Palestinian Territory,* www.ochaopt.org/.
52. Sun Tzu, *The Art of War,* trans. Samuel Griffith (New York: Oxford Univ. Press, 1988), p. 77.
53. Ruth Margolit, "Hadar Goldin and the Hannibal Directive," *New Yorker,* 6 August 2014.
54. United Nations Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories,* A/HRC/12/48 (Geneva: Fact Finding Mission on the Gaza Conflict, 15 September 2009), paras. 532–35.

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