

JUSTICE

Spring-Summer 2015

No. **56**

The magazine of the International Association of Jewish Lawyers and Jurists

Dedicated to Meir Rosenne

International Human Rights
& International Politics

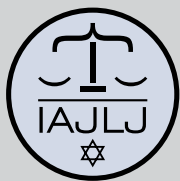
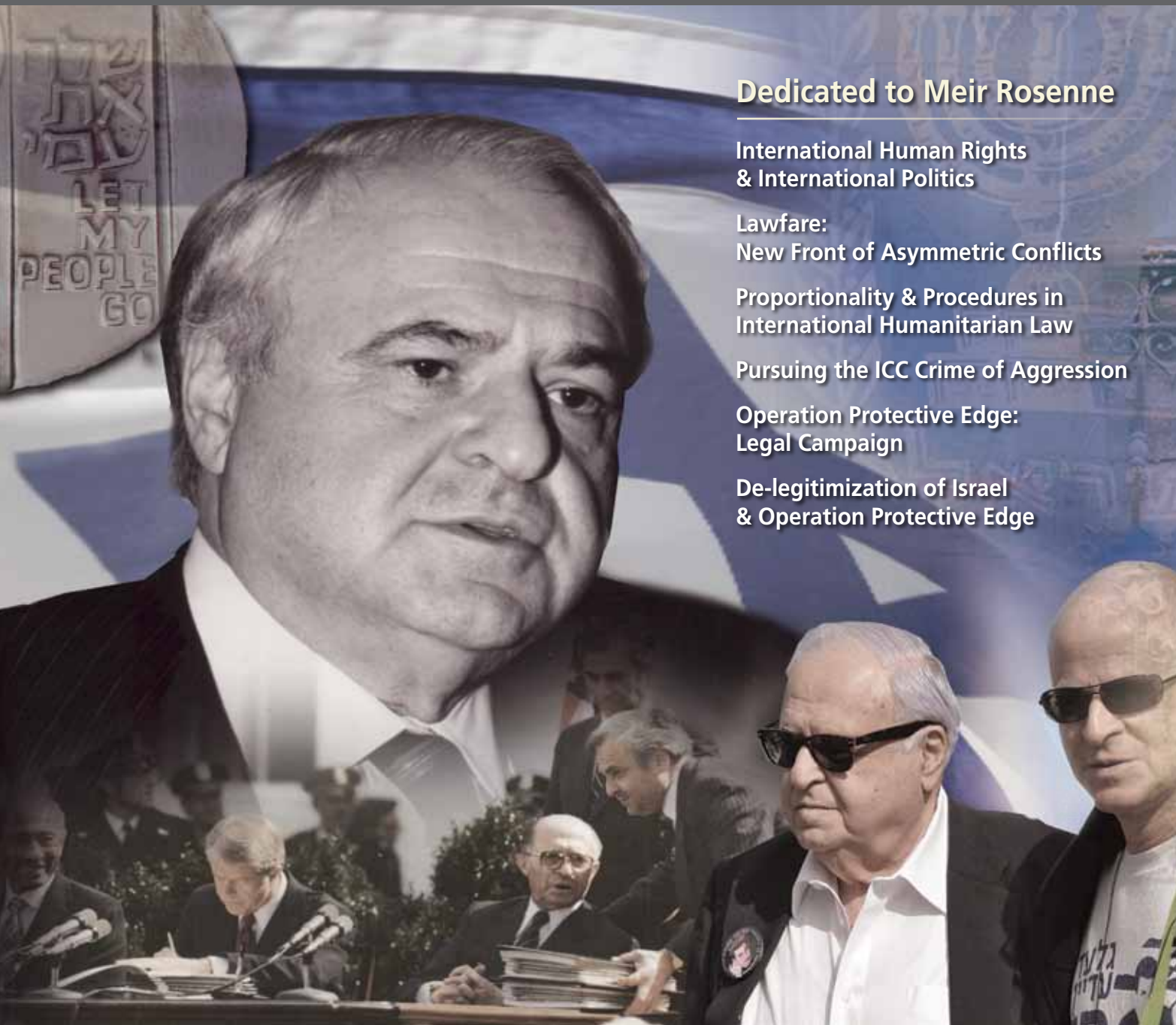
Lawfare:
New Front of Asymmetric Conflicts

Proportionality & Procedures in
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Pursuing the ICC Crime of Aggression

Operation Protective Edge:
Legal Campaign

De-legitimization of Israel
& Operation Protective Edge



הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר)
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President's Message

Israel experienced a difficult period during Operation Protective Edge in the summer of 2014. The Human Rights Council appointed the international jurist William Schabas to head a commission examining the conduct of the IDF during that conflict. The commission's mandate was particularly one-sided and constituted an incriminating verdict even before the commission had convened. The government of Israel consequently decided not to cooperate with the commission, and prevented it from visiting Gaza.

The IAJLJ decided that given its international status, it would try to present the commission with witnesses who were wounded during the conflict. The rationale behind this decision was that to fill the void, it was necessary to clarify to the commission what Israeli citizens experienced during Operation Protective Edge. IAJLJ lawyers interviewed several witnesses from kibbutzim and settlements on the Gaza Strip border. The testimonies were evaluated and in consultation with professionals, it was decided who would be sent to Geneva.

The appearance of these witnesses, headed by Attorney Gidron-Zemach, before the commission aroused strong reactions in Israel, with encouraging support in light of the desire to present to this commission the experiences of Israeli citizens during the conflict.

The commission's report was published in June 2015. During its writing, the commission's head, Schabas, resigned after it was discovered that he provided Hamas with legal counsel but did not reveal this information at the time of his appointment.

Judge Mary McGowan Davis was appointed as the commission's chair following Schabas' resignation, and she is to present the report at the next meeting of the Human Rights Council. I intend to be present in order to respond to the report's contents within the framework of the limited time available to us.

Since the last issue of Justice, elections took place in Israel. The result clearly shows Israel as divided in two. A narrow government was formed, making governance difficult. During the elections, we witnessed many acts of racism, often towards Israel's Arab sector. IAJLJ decided to take action on this matter and linked up with a group of Israeli Arab lawyers for the purpose of establishing a joint committee to fight racism. The event was held at the residence of Israel's President, who devotes much of his

activity to bringing people of diverse backgrounds closer together. The event was very moving. Both sides addressed the need for shared work which we hope will advance cooperation with lawyers from the Arab sector.



President Rivlin spoke from his heart, after deciding to deviate from his prepared speech. He mentioned the tragedy of two nations upon both of which it is decreed to share the same land, and added that until we know how to live in peace among ourselves and with the Arab sector in Israel, we will not be able to realize our dream of peace. I believe this, too, with my whole heart. In June 2015, the IAJLJ is holding a meeting with the representative of the Arab lawyers group, during which we will decide on joint activities.

The BDS (Boycott, Divestment, Sanctions) phenomenon is part of the decision made by the Palestinian Authority to fight Israel non-violently (a decision which draws a good deal of admiration). Part of this approach involves turning to the International Criminal Court, as well as to various other international organizations. Various groups worldwide are organizing themselves in the framework of this ban. In many instances, the attempt at upholding a ban has failed, as occurred in France where specific legislation exists against BDS. The ban also failed in several instances in the UK.

Nonetheless, it is very disturbing to see the phenomenon spread to various places in the world and reach groups in university campuses, financial organizations, and cultural organizations, all stepping into the intellectual discourse on civilian society, and more.

In Israel, and internationally, preparations are expanding towards taking action against this ban, and the IAJLJ will also relate to it.

The IAJLJ in March 2015 held a side event in the Human Rights Council on human rights in Hamas. The IAJLJ representative in Geneva, Tom Gal, helped a great deal in organizing the event, in which legal representatives from various council delegations took part.

The IAJLJ panel included the journalist Henrique Cymerman, who serves as the Pope's Peace Ambassador to the Middle East; Palestinian human rights activist Bassem Eid, and lawyer Calev Myers from the IAJLJ. The goal purposely was not to present Hamas in any connection with Israel, but it is possible to gain impressions of what is happening there as far as human rights is concerned. This event produced especially

positive reactions, and there is no doubt that, as we were told, it would be worth having this panel appear in various locations worldwide, but that would involve a greater budget.

I believe that you will find much interest in the articles in the current issue. Many of them are based on lectures given at the most recent IAJLJ conference and I have no doubt that they can assist in explaining and understanding the current situation facing us in the Middle East.

The next issue of Justice will not appear in its usual

format, but will be digital. IAJLJ is joining a long list of publications now appearing in this format, in seeking to reduce expenses while reaching wider audiences. We hope that you will continue to enjoy the material, which as always is of the highest professional standard. Other than the publication format, Justice will not undergo any changes in editorial policy.

Irit Kohn
IAJLJ President

Prepared Statement by Irit Kohn, IAJLJ President, to the Human Rights Council*

General Debate - 34th Meeting, 29th Regular Session, Item 7- Human rights situation in Palestine and other occupied Arab territories, June 29, 2015

The International Association of Jewish Lawyers and Jurists cooperated with the Commission by providing documentation and by bringing a group of Israeli witnesses to testify before it in Geneva. We therefore state the following:

1. The Report ignores the thousands of rockets launched by Hamas against Israel's civilian population in the years preceding the 2014 conflict, particularly the increase of rockets launched in the months preceding this conflict, thus ignoring this crucial backdrop to the 2014 Gaza Conflict.
2. The Report's legal analysis and conclusions strongly suggest a double standard when analyzing the conduct of the parties. It cites explicit statements by Hamas that it was targeting Israeli civilians (para. 90) while ignoring Hamas's practice of embedding its military infrastructure among its civilians.
3. Israel is committed to its obligations under international law, including the obligation to investigate allegations of misconduct by its forces. The same cannot be said of Hamas and other Palestinian armed groups for obvious reasons. The Report criticizes Israel on this matter despite its comprehensive investigative mechanisms. We submit that this encourages terrorist organizations to continue to disregard and exploit international law, thus undermining efforts to fight terrorism.
4. We find it strange that the Commission could not "conclusively determine" that the purpose of Hamas's tunnels was also to attack Israeli civilians, since the Report acknowledged that some tunnel openings were a mere kilometer away from civilian homes, that Hamas intentionally launched rockets at Israeli civilians, and the Hamas Charter states the organization's intent to exterminate all Jews and destroy Israel.
5. As with previous military operations in the Gaza Strip, information is publicly available regarding Israel's humanitarian efforts during the conflict, such as deploying a field hospital (which Hamas prohibited its population from taking advantage of), and supplying food and water to Gaza. Yet the Report ignored this. Neither did the Report make mention of Hamas's cease-fire violations to which Israel agreed for humanitarian purposes.
6. Finally, we reiterate our concern with the Human Rights Council's bias against Israel as reflected in its Agenda Item 7, devoted to Israel, the only country to be singled out for scrutiny by the Council, as evidenced by the Commission's mandate and Report.

*At the last moment, the President of the IAJLJ did not read this statement but spoke extemporaneously to the Council.

Meir Rosenne – In Memoriam

Eulogy by Irit Kohn, IAJLJ President, at the Funeral of Meir Rosenne z"l, April 15, 2015

Dearest Meir,

I stand here because of the gaping void that comes from you leaving us. I wish to say a few words on behalf of all your friends in the International Association of Jewish Lawyers and Jurists, in which you were so actively involved for so long, and especially during the past few years.

After wording the notification and informing all our friends worldwide, phone calls began to flow in from everywhere imaginable, calls from stunned friends who loved and admired you, and who knew what you meant to me in an everyday context.

The wonderful advice and support I received from you on the many matters we delved into, and are still working on, were worth more than their weight in gold. Your rich experience in so many areas, your common sense, your fairness, and always accompanied by humor and a smile, were such significant support for me.

We planned to be in Paris together, at the ambassador's residence, meeting with local lawyers. Then we were to be at the Geneva offices of the Human Rights Council attending an event we were holding there. While these events were unfolding, you were already in hospital, and very much missed.

The Zionist spark connected us, Meir, our love of Israel, and the Jewish people. Yes, for me you represent the beauty of Israel, and whenever I asked that you join us, your answer was an immediate "yes." Little wonder that we found our way into the offices of so many ambassadors representing countries supporting UNRWA, and met with such a diversity of personages tied to our work in which we so deeply believed.

In the latest elections, when I asked you to continue as an executive member, you mentioned your uncertainty over continuing to commit at your age. And I answered that I cannot begin to imagine myself working without you alongside me.

Looking back at the last conference we held in Eilat, and remembering how we sang Shabbat songs after the Sabbath meal, and how happy you were... that is how I will remember you, and think of your heritage to us as being without a doubt the continuation of our work. That is what we shall do.

Today is a symbolic Holocaust day. We spoke a great deal about your life before you came to Israel, and none of it was simple. Against that background you said how deeply you thank Israel for making it possible to achieve all you achieved.

Now Israel thanks you, Meir, for all you have done. You will be greatly missed. May you rest in peace.

And to you, Vera, and your daughters, our deepest heartfelt condolences.

Meir Rosenne – In Memoriam

Eulogy for Dr. Meir Rosenne מ"ו, by Justice Elyakim Rubinstein, Deputy President of the Supreme Court of Israel, April 15, 2015, 26 Nissan 5775

Tearfully I write these lines. I loved Meir deeply, a dear and wonderful man, a public personage of unparalleled loyalty who did much for Israel, a devoted family man, a close friend, a "mentsch."

I was privileged to meet Meir some forty years ago in the mid-1970s, when he served as the much respected Legal Advisor to the Israel Foreign Ministry while I served in the Ministry of Defense. His reputation was already well known by then in Israeli government circles. In his forties at the time, he had already accrued stellar breakthrough achievements in the struggle on behalf of Jews of the then-USSR – in Israel, in Paris, where he and Vera, may she be blessed with long life, met and married, in New York and elsewhere. Despite opposing views that did not support an overt struggle for the right of Jews to aliya, Meir, with his usual enthusiasm, believed in taking actions that would publicly manifest the struggle, an approach that proved correct and eventually led to the gates' opening.

Issues relating to Jewish existence were deeply rooted in Meir's soul, in his DNA, ever since his own childhood aliya at bar mitzvah age from Iasi, Romania, at the height of the Holocaust. His appointment as Legal Counsel to the Atomic Energy Commission reflected the trust bestowed upon him by the heads of state regarding this highly sensitive area. Subsequently, as Legal Advisor to the Foreign Ministry, he spearheaded numerous actions, first and foremost among them the negotiations with Egypt relating to all agreements forged since the Yom Kippur War, the jewel in the crown being the Camp David Accords and the Peace Treaty with Egypt, to which his contribution was immense and historic.

Meir and I worked closely together on these issues in the Foreign Ministry during the decisive years of 1977 to 1979. (At Camp David, Meir and I, together with Aharon Barak, may he be blessed with long years, shared the same small room.) I can testify to the fact that both the Prime Minister at that time, Menachem Begin, and Foreign Minister Moshe Dayan, both of blessed memory, were strong admirers of Meir and expressed their gratitude in various ways: Dayan, in his memoir, wrote: "I appreciated the depth of his knowledge on the topic, his thoroughness and his insightfulness." Meir's proficiency in international law, his professionalism and his courage in standing up for his views were typical of his character. He would work day and night, drafting the texts, sending out memos, providing good counsel to the political leadership, fearlessly and without bias.

In 1979, Meir was appointed as Israel's Ambassador to France, where he had studied and where he began his government service career. Meir and Vera represented Israel with great dignity, being familiar with the culture, French political leaders, and heads of the Jewish community. His next appointment, in 1983, an expression of the trust of both Prime Minister Menachem Begin and Foreign Minister Yitzhak Shamir, was to possibly the highest level Foreign Ministry position as Israel's Ambassador in Washington, where Meir served until 1987. I was privileged then to work for a period alongside him as Minister, Deputy Chief of Mission. It was a complex period because Israel's unity government at the time was lacking in unity and manifested itself through two

foreign policy tracks between which the embassy functioned. It was a period of great concern for Meir, but his unique personality made it possible for him to pave pathways to the senior political leadership in the United States (such as Vice President, and later, President George Bush Sr., who visited Meir in hospital following a medical procedure), to Senate and Congress members, and leading Administration figures. He successfully opened doors to high ranking foreign diplomats such as the USSR Ambassador, at a time when no diplomatic relations existed between Israel and the Soviet Union.

Meir's very soul was closely tied to the Jewish community and its branches and organizations. He would travel to, and lecture at, countless locations. His speeches were always characterized by his clear approach as a voice for Israel, liberally sprinkled with his wonderful and incomparable sense of humor. On a personal note, I would add that throughout years of serving together, never a bad word passed between us, and warm ties of friendship connected Vera and Meir to Miriam and myself.

Shortly after his return to Israel, when he served as International Chairman of Shaare Zedek Medical Center, Meir was recruited as President of Israel Bonds in New York, a role he filled for five productive years, and during which his skills and ability to work with people in the Jewish community and the business community proved themselves repeatedly.

On completing his public service roles some twenty years ago, Meir returned to private practice as a lawyer in the large firm of Balter, Guth, Aloni & Co. Yet his heart would not let him abandon the public arena, and his voice was frequently heard in media and diverse organizations in Israel and overseas, where his vast experience, his Jewish national sentiment and his deeply devoted commitment in Israel and the future of its people, were at the fore. Tirelessly he explained Israel's position, in his persistent skilled manner, including in the International Association of Jewish Lawyers and Jurists.

I mentioned Meir's well known sense of humor, which raised a smile on the lips of anyone who met him, and often led to hearty laughter. Meir was an endless spring of jokes and humorous anecdotes, and much like all our discussions, our last conversation, when I congratulated him on his 84th birthday just two weeks before the tragic event that led to his hospitalization, was a humor-intensive half hour.

Last but far from least, Meir was a devoted, loving family man, a wonderful husband to Vera, father to Michal and Dafna, grandfather to grandchildren he loved with all his heart, and so proud when his oldest grandson married. His love for them, as well as for his sister and brother, and his parents when they were alive, were the foundation of his life. To his friends, he was always a true comrade. We do not know the reckonings on high, but it is a great pity to us that he was taken from us after suffering. We had hoped he would survive, as he had other illnesses and difficulties, but Heaven chose otherwise. It is perhaps symbolic that Meir was laid to rest on Holocaust Memorial Day, since the Holocaust played such a consequential role in his service on behalf of Israel. How deeply sorrowful is his passing. Israel has lost a front ranking public servant, a leader who left his mark, a dedicated Jew, and a man devoted to his family and many friends. He will be missed by us all. Miriam and I embrace you, Vera and your family, with the deepest love. May his soul be bound in the bonds of life, and may he advocate on behalf of his family and us all.

Can't Live With, Can't Live Without: International Human Rights and International Politics

Yuval Shany

Introduction

The politicization of human rights is a topic that stirs much interest in recent years and has been the subject of multiple publications,¹ public statements² and conferences.³ Such a discourse appears to presume that law and politics in general, and international human rights law and international politics in particular, could and should be divorced from one another, and that the values reflected in international human rights law would be better served by insulating this body of law from the vicissitudes of world politics. The present article seeks to cast doubt on the feasibility and desirability of separating international human rights law from international politics. Instead, I claim that there exists a complex and delicate – at times, even symbiotic – interplay between human rights and politics, that renders it nearly impossible to separate them neatly. Hence, we ought to try to develop nuanced standards for criticizing the excessive politicization of international human rights law, without “throwing out the baby with the bathwater” – that is, without depriving international human rights law of the political context it needs for its operation.

Human Rights as a Normative Constraint on Politics

The first point of contact between international human rights and politics occurs at the domestic level. Human rights operate, as Nozick suggested, as a normative side constraint on possible outcomes that the political process within the state may generate.⁴ Constitutional and administrative law, which informs and is informed by international human rights law, gives effect to human rights within domestic law, constraining the power of domestic legislation and the domestic executive from infringing upon them. This structural interplay between day-to-day domestic politics that generates specific acts of legislation and governmental decisions, and the more principled and long-term oriented human rights norms,

supports the legitimacy and propriety of domestic politics. In particular, by serving as side-constraints, human rights norms ensure that domestic politics do not lead to gross injustices through neglecting or downplaying the interests of certain groups in society which are marginalized from the political decision making process – i.e., the notorious “tyranny of the majority” phenomenon.⁵ International human rights law complements domestic human rights standards by further constraining the ability of domestic politics from infringing upon human rights. It requires states to adopt laws and policies consistent with international



1. See, e.g., Raffaele Marchetti and Nathalie Tocci (eds.), *CIVIL SOCIETY, CONFLICTS AND THE POLITICIZATION OF HUMAN RIGHTS* (2011); Rosa Freedman, *FAILING TO PROTECT: THE UN AND THE POLITICIZATION OF HUMAN RIGHTS* (2014); Don A. Habibi, *Human Rights and Politicizes Human Rights: A Utilitarian Critique*, 6 *JOURNAL OF HUMAN RIGHTS* 3 (2007).
2. See, e.g., Press Release, UN General Assembly, Speakers Warn Against Politicization of Human Rights Issues on United Nations Agenda, as Third Committee Continues Wide-Ranging Debate, Oct. 28, 2008, available at www.un.org/press/en/2008/gashc3929.doc.htm (last visited Feb. 23, 2015); China opposes politicizing human rights issues, Xinhuanet Dec. 12, 2014, available at news.xinhuanet.com/english/china/2014-12/19/c_133867087.htm (last visited Feb. 23, 2015); Iran FM raps political approach to human rights, PressTV June 3, 2014, available at www.presstv.ir/detail/2014/06/03/365388/iran-raps-politicization-of-human-rights (last visited Feb. 23, 2015).
3. See, e.g., International Association of Jewish Lawyers and Jurists, Conference on International Human Rights and Israel: A Politicization of a Complex Reality (Nov. 19-22, 2014); Berkley Center for Religion, Peace, and World Affairs at Georgetown University, Conference on Religion and the Global Politics of Human Rights (March 15-16, 2007).

human rights law and, more significantly, exerts pressure on them against possible attempts to circumvent domestic legal constraints – e.g., constitutional amendments or overrides intended to dilute human rights protections or weaken domestic courts. In this respect, international human rights law provides a partial cure to the age-old problem of *qui custodiet ipsos custodes*.

To the extent that international politics represent the extension of domestic politics – e.g., in the field of international cooperation against the threat of terrorism – they too may be constrained by international human rights. Domestic measures of implementation of international political decisions may be constrained by international human rights law,⁶ and, at times, international organizations themselves may be constrained in their operation by such law.⁷

The constraining effect of human rights upon politics implies that – at some level – human rights are normatively superior to politics and human rights law is superior to domestic law. This normative hierarchy is sometimes captured by the treatment of human rights as “pre-political” – i.e., moral principles existing independently of any political institutional or power configuration and not subject to the vagaries of daily politics.⁸ Still, as a matter of positive law-making, the very decision to include a human rights norm in an international human rights law treaty, or to generate state practice consistent with such a norm (forming over time part of customary international law), is a political decision ultimately taken by politicians. Thus, like other exercises in law-making, the creation of international human rights law cannot take place without the alignment of a critical mass of political power behind moral principles.

Given the relationship between politics and law-making, it is therefore not surprising that much of the academic criticism that has been directed against the international human rights movement was directed against international human rights law being regarded as a form of political power, through which developed countries have imposed their value preferences on weaker developing countries in ways conducive to their own political and economic interests.⁹ Such criticism is sometimes couched in language that has resonance within the human rights movement – that is, through recognizing the right of self-governing societies to independently identify appropriate conceptions of the “good” and the superficial nature of the pretention that certain universal values can be applied in the same way, notwithstanding the different social and political context in which human welfare ought to be realized. This is, by and large, the cultural relativism objection to human rights that seeks to reverse the distrust that mainstream human rights law demonstrates towards

traditional loci of social power, such as the family, religion and indigenous social arrangements and practices.¹⁰

The Politics of Enforcing Human Rights

Another important interface between human rights and politics can be found in the field of law enforcement. Since the decision to enforce international human rights law implies the allocation of the necessary resources for that purpose – e.g., time, money, labor, attention, etc. – it is influenced by political considerations governing resource allocation. This is, however, not unique to international human rights law. In domestic law too, the decision which parts of the law to prioritize in enforcing (e.g., violent crime) and which to under-enforce (e.g., purchase of drugs for personal consumption) or to enforce through relatively lenient sentences (e.g., certain tax offenses) is ultimately a political decision.

Viewed from this perspective, one may claim that having a political body such as the Human Rights Council to enforce international human rights law is thus, overall, a very good thing. The Human Rights Council serves as a global forum to which attention to human rights problems in any specific country can be easily directed, and which can concentrate and deploy enforcement resources.¹¹ Moreover, in the current state of international affairs, where most states have been reluctant to subject

4. Robert Nozick, *ANARCHY, STATE AND UTOPIA* (1974), at ix.
5. See, e.g., Alexis de Tocqueville, *DEMOCRACY IN AMERICA* (2003 ed.), at 287.
6. See, e.g., *HM Treasury v. Ahmed*, [2010] UKSC 2.
7. See, e.g., *Kadi v. Council*, Joined Cases C-402/05 and C-415/05, [2008] ECR I-6531.
8. See, e.g., Charles R. Beitz, *THE IDEA OF HUMAN RIGHTS* (2009), at 55-57; Alain de Benoist, *BEYOND HUMAN RIGHTS: DEFENDING FREEDOMS* (2011), at 25.
9. Filip Spagnoli, *HOMO DEMOCRATICUS: ON THE UNIVERSAL DESIRABILITY AND THE NOT SO UNIVERSAL POSSIBILITY OF DEMOCRACY AND HUMAN RIGHTS* (2003), at 208; Damien Kingsbury, *Universalism and Exceptionalism in Asia*, in *HUMAN RIGHTS IN ASIA: A REASSESSMENT OF THE ASIAN VALUES DEBATE* (Leena Avonius and Damien Kingsbury eds., 2008), at 19, 26.
10. R.J. Vincent, *HUMAN RIGHTS AND INTERNATIONAL RELATIONS* (1986), at 37-39; Jack Donnelly, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (3rd ed., 2013), at 108-110.
11. See, e.g., G.A. Res. 60/251 U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/251, para. 10 (Apr. 3, 2006) (requiring support of one third of the membership of the Council for convening a special session).

their human rights records to review by international courts capable of generating enforceable judgments, the principal tool that the international human rights movement has developed for promoting compliance with human rights law is the “public shaming” of human rights violators,¹² which can harm the reputation of states that violate their international human rights obligations. The Human Rights Council, whose sessions are attended by almost all states and attract considerable media coverage, is potentially an ideal venue for public shaming, since criticism by the Council of a state’s human rights record attracts global attention. The political nature of the Council offers another important advantage. It symbolizes the strong connection between human rights and international politics, thus exposing violating states to the risk that reputational harms they might incur in the field of human rights would spill over to other areas of international politics and adversely affect their general political standing in the world. It is partly because of the high political stakes that are involved, that the reports and deliberations of the Council attract much more attention than those of the expertise-driven UN treaty bodies, which lack both legal powers to make binding decisions and political clout.

The “bitter that comes with the sweet” problem that may arise in this regard, however, is that once a political mechanism has been created for harnessing international politics to law enforcement, a risk of abuse and role reversal presents itself: Instead of international politics being used to enforce human rights, human rights might be used to promote international politics. This is what happened, essentially, to the late UN Human Rights Commission, which has lost all credibility due to the excessive politicization of its sessions.¹³ To some extent, the problem of abuse and role-reversal also afflicts the Commission’s successor – the Human Rights Council – most notably, in matters involving Israel (a problem manifesting itself in the application of double standards,¹⁴ selectivity¹⁵ and political settling of scores¹⁶). Note that there are some additional “generic” concerns related to law interpretation, law application and law enforcement by a political body, such as the Human Rights Council, including lack of legal expertise and administrative inefficiency. For instance, the many special procedures and mandate holders, which work alongside the Council and provide it with a factual and legal input,¹⁷ exemplify the tension between the political impulse of Council member states to underscore a human rights problem through appointing experts to monitor it, and the practical difficulty for the UN as an organizational framework for funding, supporting and coordinating the work of so many separate bodies purporting to determine the state of international human rights law around the world.

Still, I would submit that the picture with respect to the politicization of the Council is somewhat more complex than what its harshest critics acknowledge, and that, as a result, the outcome of the cost benefit analysis of its utility for promoting human rights is not as clear-cut as it may appear from Jerusalem’s vantage point. Among some of the positive signs of decreasing politicization in the Council, one may note the successful campaigns against the election to the Council of gross human rights violators, such as Belarus¹⁸ and Syria,¹⁹ and the ejection

12. See, e.g., Kenneth Roth, *What Are Human Rights For? Three Personal Reflections*, in *INTERNATIONAL HUMAN RIGHTS LAW* (Daniel Moeckli et al., eds., 2010), at 7-8; Amartya Sen, *THE IDEA OF JUSTICE* (2009), at 387.
13. Secretary-General’s Address to the Commission on Human Rights, Apr. 7, 2005 available at www.un.org/sg/statements/?nid=1388 (last visited Feb. 26, 2015) (“the Commission’s ability to perform its tasks has been overtaken by new needs, and undermined by the politicization of its sessions and the selectivity of its work. We have reached a point at which the Commission’s declining credibility has cast a shadow on the reputation of the United Nations system as a whole, and where piecemeal reforms will not be enough”).
14. See, e.g., Carmen Marquez Carrasco and Ingrid Nifosi Sutton, *From the Commission on Human Rights to the Human Rights Council*, in *INTERNATIONAL HUMAN RIGHTS LAW IN A GLOBAL CONTEXT* (Felipe Gomez Isa and Koen de Feyter, eds., 2009), at 237, 266 (“the outcomes of the first three emergency sessions of the HRC highlight the recurring problem of politicization and double standards”).
15. See, e.g., Human Rights Watch’s assessment of the Council’s engagement on Israel / Occupied Palestinian Territories (“The ‘situation in Palestine and other Occupied Arab Territories’ remains the Council’s only standing agenda item on a particular location, making the Council’s focus on Israel disproportionate. Human Rights Watch has repeatedly stressed that it objects not to the Council addressing human rights violations by Israel, which it should, but to the way it addresses them”), available at votescount.hrw.org/page/Israel%20Palestinian%20Occupied%20Territories (last visited Feb. 26, 2015).
16. See, e.g., Freedman, *supra* note 1, at 131.
17. Currently, the Council is aided by 53 different mandate holders or expert working groups.
18. Jo Becker, *CAMPAIGNING FOR JUSTICE: HUMAN RIGHTS ADVOCACY IN PRACTICE* (2012), at 62-65.
19. Barbara Plett, *Syria “Pulls Out” of Race for UN Rights Council Spot*, BBC News, May 10, 2011.

of Libya from the Council,²⁰ as well as the abandonment by Islamic member states of the annual “defamation of religion” resolution²¹ and the firm position taken by the Council on the need for international investigation of alleged war crimes in Sri Lanka.²² Even with respect to Israel, it appears that the Council’s approach has become slightly less politicized – for instance, the proportion of special sessions devoted to the “human rights situation in the Occupied Territories” has decreased from 80% in the first two years of the operation of the Council to less than 25% in the next seven years (which is, of course, still indicative of the Council’s disproportionate focus on Israel). When adding to this slight positive trend and the relatively smooth operation of the UPR (Universal Periodic Review) process, it is no longer clear whether international human rights law would be better off without the Council as an enforcement body. The answer to this question may depend, ultimately, on whether we can imagine other alternative world stage forums for publicly shaming all states, and whether one can be hopeful about the long-term prospects of fixing the system: In particular, can states with poor human rights records be prevented from hijacking the direction of the work of the Council?

Politicization in the Work of the Treaty Bodies

Many of the tensions between human rights and politics also present themselves in connection with the work of the UN treaty bodies. This is despite the fact that the ten treaty bodies are comprised of independent experts who are entrusted with the professional task of monitoring legal compliance with respective treaty texts. Certainly, my own experience with the Human Rights Committee confirmed my view of the Committee as a professional body, whose decisions are insulated from direct political pressures.

Still, at some level, the work of the treaties bodies is not completely divorced from politics. First, like other human rights enforcing bodies, decisions taken by the treaty bodies sometimes demarcate the space left for domestic politics to run their course. So, for instance, when the Human Rights Committee has been discussing the compatibility with the International Covenant on Civil and Political Rights of the legal regime in Ireland governing abortions – which has been approved in a popular referendum – it placed, in effect, concrete limits on the power of the majority to take political decisions that infringe on the country’s international obligations.²³

Second, the powers of the treaty bodies to enforce the treaties they monitor are determined by international politics. One is hard pressed to accept that the treaty bodies’ almost total lack of binding legal powers is a historical accident, and not a planned outcome intended

by the member states.²⁴ In the same vein, it may be speculated that reluctance on the part of states to empower the treaty bodies explains some of their structural weaknesses – e.g., the part-time and non-remunerated basis of membership on UN committees and their understaffing and under-budgeting. I will go further and suggest that the reason why there are ten part-time treaty bodies as opposed to one full time body may be political—a “divide and rule” approach, which opposes the creation of a single powerful human rights entity.²⁵ A recent reform process, culminating in a General Assembly Resolution (Res. 68/268),²⁶ where it was decided to allocate more resources to reduce backlogs, improve coordination of different committee procedures and increase transparency in the work of the committee, but not to undertake a radical reconfiguration of the system, merely underscored the existence of strict limits on what reforms are politically feasible.

Third, international politics influence the success prospects of the treaty bodies. The effectiveness of the various committees depends, largely, on their ability to mobilize political support at the national and international level.²⁷ Such support may be generated through publicly shaming violating states – an outcome that may depend on their political standing and on the efforts they put into minimizing their perception by the committees as rights violators.²⁸ Furthermore, the work of the treaty bodies

20. Errol P. Mendes, *GLOBAL GOVERNANCE AND INTERNATIONAL LAW: COMBATING THE TRAGIC FLAW* (2014), at 27.

21. Brett G. Scharffs, *International Law and the Defamation of Religion Conundrum*, 11 *THE REVIEW OF FAITH & INTERNATIONAL AFFAIRS* (2013), at 66, 69.

22. H.R.C.Res. 25/1, UN Doc. A/HRC/RES/25/1 (Apr. 9, 2014).

23. Human Rights Committee, *Concluding Observations: Ireland*, U.N. Doc. CCPR/C/IRL/CO/4 (Aug. 19, 2014), at para. 9.

24. See, e.g., Srini Sitaraman, *STATE PARTICIPATION IN INTERNATIONAL TREATY REGIMES* (2009), at 141.

25. See, e.g., Nigel Rodley, *The Role and Impact of Treaty Bodies*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* (Dinah Shelton ed., 2013), at 645.

26. G.A. Res. 68/268, UN Doc. A/RES/68/268 (Apr. 9, 2014).

27. Beth A. Simmons, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009), at 16.

28. The need to improve their reputation in the eyes of the treaty bodies creates significant incentives for states to appear before the committees with large, well-prepared and high level delegations.

and that of the more political Charter bodies could be mutually reinforcing, since issues raised by the Council may be taken up and legally analyzed by the professional treaty bodies, and issues raised by treaty bodies may benefit from the larger “megaphone” afforded by the Council. Examples of such mutual reinforcement may include the 2014 call by the Human Rights Committee on Sri Lanka to cooperate with the Council Fact Finding process,²⁹ and the Council citing in 2011 a general comment of the Human Rights Committee in its resolution on juvenile justice.³⁰

National politics are also an important variable influencing the ability of the treaty bodies to mobilize domestic actors. The ability of the expert committees to affect domestic politics often depends on the relative political fortunes of local agents – NGOs, courts, political parties, etc. The participation of civil society in the work of the treaty bodies is thus extremely valuable, not only because it provides the committees information on the state of human rights, locally, but also because it informs them which contribution would be most valuable for domestic actors. For instance, the Human Rights Committee was recently seized by some of the groups involved in public protests in Hong Kong against restrictions on the right to be elected³¹ and was able to weigh in on the debate, thereby empowering local agents for change interested in harnessing the Committee's report to their own human rights agenda.

Israel before the Human Rights Committee

In the remaining section of this article, I shall use the last review of Israel by the Human Rights Committee – undertaken in October 2014³² – as a case study for the role of politics in what are, relatively speaking, non-politicized proceedings aimed at examining the country's human rights record. Like most other countries involved in a constructive dialogue with the Committee, Israel treated its reporting obligations seriously, and invested considerable resources in trying to impress upon the Committee its achievements in implementing the Covenant on Civil and Political Rights: It sent a large high-level delegation (thirteen members, headed by the Director-General of the Ministry of Justice), which was clearly very well prepared to address the Committee's questions. Israel also demonstrated a spirit of cooperation and good will by volunteering to participate in an innovative Committee procedure – the List of Issues Prior to Reporting process, in which the traditional general periodic report is substituted with more focused responses to a list of questions. More significantly, Israel was able to provide to the Committee some interesting examples of compliance with previous treaty body recommendations, including

changes in investigation policies in security cases, investment of more resources than before in promoting equality for the Arab sector in Israel and raising the age of legal majority in the West Bank.³³ It also invoked decisions by the Israel Supreme Court, such as those striking down laws on detaining asylum seekers,³⁴ which greatly impressed the Committee, both in their substantive holding, and also in demonstrating that a strong human rights enforcement infrastructure exists in Israel.³⁵

Such efforts by Israel were intended, no doubt, to avoid harsh concluding observations that would publicly shame Israel, but also – perhaps – to utilize the intensive engagement with the Committee for creating a momentum for human rights reforms inside Israel that certain government ministries are interested in. In any event, the efforts made to show compliance with the Covenant are reflective, I believe, of the political significance in the eyes of the Israeli government of maintaining a positive human rights reputation, on the one hand, and of the potential of the treaty bodies to bring about through political means a change in state practice, notwithstanding their legal weakness.

Still, one aspect of Israel's engagement with the Committee remained quite problematic. Pursuant to its long-standing objection to the applicability of the Covenant in the West Bank and the Gaza Strip, Israel refused to respond in writing to questions presented to it by the Committee relating to human rights in these areas. Instead, it addressed such questions during the oral session before the Committee. This political limit on the constructive dialogue with the Committee adversely affected the conduct of the proceedings (time, which could have been spent on more thorough investigation of the Israeli written report, was spent on an initial presentation of the human rights situation in the Territories). It may also have

29. H.R.C., Concluding Observations: Sri Lanka, U.N. Doc. CCPR/C/LKA/CO/5 (Nov. 21, 2014), at para. 14.

30. H.R.C. Res. 18/12, U.N. Doc. A/HRC/RES/18/12 (Oct. 14, 2011), preamble.

31. H.R.C. Rep. on Follow-Up to Concluding Observations, U.N. Doc. CCPR/C/112/2 (Dec. 8, 2014), at para. 22.

32. As is the practice of the Committee, the author did not participate in the proceedings pertaining to his state of nationality.

33. H.R.C. Summary Record of 3115th Meeting, U.N. Doc. CCPR/C/SR.3115, (Oct. 20, 2014), at para. 5, 20.

34. HCJ 7146/12, *Adam v. Knesset*, Judgment of Sept. 16, 2013; HCJ 7385/13, *Eitan v. Knesset*, Judgment of Sept. 22, 2014.

35. *Supra* note 33, at para. 8.

conveyed the wrong impression that Israel is interested in avoiding scrutiny of some of its more controversial human rights practices.

Did Israel's overall positive attitude towards the Committee pay off? Arguably, it paid off only to some extent. The concluding observations issued after the session do cite some positive developments in Israel's human rights record and extended the period for the next report from three to four years³⁶ – an indication that the situation in Israel on the whole has somewhat improved.³⁷ Still, the Committee did issue twenty recommendations dealing with what it considered to be serious human rights issues, many of which deal with the human rights conditions in the West Bank and Gaza. The Occupied Territories thus continue to cast a long shadow on the dialogue between Israel and the Human Rights Committee (as well as on the dialogue between Israel and other treaty bodies). This is partly because the situation in these areas is particularly worrisome from an international law perspective, and partly because Israel's strategy of not reporting on the Occupied Territories may have backfired and directed more attention to them, than would otherwise have been the case. It can also be speculated that the Committee felt institutionally compelled to provide support to other efforts taking place at the international level with regard to the Occupied Territories. If this is indeed the case, it may imply that the need to promote an international political agenda, involving "high politics" issues with a human rights dimension, such as the Gaza blockade, the West Bank settlement and the separation barrier, could take priority in treaty body proceedings over the need to prioritize other issues in relation to which Israeli civil society can be more easily mobilized (e.g., problems of discrimination of minority members and the treatment of migrants within Israel).

Conclusions

It appears that for a country like Israel, which is facing a hostile international political environment, substantive engagement with the professional UN treaty bodies is, on the whole, more useful than engagement with the much more politicized Human Rights Council. Although it is

unlikely that the treaty bodies would uncritically accept all of Israel's legal positions and factual assertions, it is still more likely that the outcome of their process will reflect the complexity of the situation that Israel is facing and its mixed record of achievement, than the one-sided approach demonstrated up until now towards Israel by the Council. The Human Rights Committee's 2014 concluding observations on Israel reflect this complexity and mixed record of achievement to some extent.

The dialogue of the Human Rights Committee with the Israeli delegation also made clear that many of Israel's problems of non-implementation stem from a common source – the limited internalization of the norms propagated by the Covenant by the relevant political elites, on the one hand, and by the public, on the other hand. A prime example of this dissonance can be seen in the mistreatment of asylum seekers – an issue on which the Human Rights Committee and the Israeli Supreme Court took the same principled legal position (that is, that no-one can be detained for a prolonged period of time without establishing his or her individual risk or liability), but the political elites with the support of the general public took a different position. Ultimately, politics would have to run its course in order to effectuate a change of social preferences, and the concluding observations of the Committee could be one element to support efforts by domestic social change agents, such as local courts and NGOs, and other international actors, to bring about such a political change. ■

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36. H.R.C., Concluding Observations: Israel, U.N. Doc. CCPR/C/ISR/CO/4 (Nov. 21, 2014), at para. 3, 26.

37. Tovah Lazaroff, *UNHRC to Israel: Probe Gaza, Start Working on Settler Evacuation*, JERUSALEM POST, Oct. 31, 2014 (the Chair of the Committee commented that Israel's human rights issues are serious, but perhaps not the most serious).

Lawfare: The New Front of Asymmetric Conflicts

Avihai Mandelblit and Gil Limon*

Asymmetric Conflicts and the Phenomenon of "Opposite Asymmetry"

Asymmetric armed conflicts, conducted between states and non-state actors, are not a new phenomenon in the international arena. The term "asymmetric conflicts," first coined in 1975,¹ was meant to express the inherent advantage of the state party to the conflict given the stronger military force at its disposal, its advanced weaponry and the economic advantage it has over the non-state party. However, at the same time, recent changes in the character of asymmetric conflicts undermine the validity of this inherent advantage.



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Firstly, technological advancements available to all, alongside the blurring of international borders, have given non-state organizations the ability to deal the opponent state a powerful blow. This ability can often be equal to that of regular state militaries. The terrorist attacks of September 11, the prolonged fight against al-Qaeda and the battle currently being conducted against the Islamic State organization (ISIS) are all examples of this significant development.

Another characteristic of modern conflicts between states and non-state organizations is the lack of symmetry in the commitment of the parties to uphold the international norms applicable to armed conflicts. This is especially noticeable in conflicts in which terror organizations are involved. States that participate in such conflicts—and this is certainly true in regard to democratic countries—act out of a basic commitment to the Laws of Armed Conflict. For this purpose, those states exercise internal mechanisms intended to assure obedience to the laws governing warfare *ex ante*, and to enforce violations of these laws *ex post*. Terrorist organizations, on the other hand, systematically and intentionally violate the Laws of Armed Conflict. When attacking, they direct their military actions against the civilians and civilian targets of the state they are fighting, with the goal of spreading terror among the civilian population.² In the defensive

sphere, they hide behind their civilian population and exploit the protection afforded to civilians and sensitive facilities in the Laws of Armed Conflict.³ The systematic violation of the Laws of Armed Conflict on the part of terrorist organizations provides them with significant tactical advantages on the battlefield that states do not have, as they are obligated to obey these laws.

A third important characteristic is the expansion of the campaign between states and non-state organizations to additional arenas in which the state does not always enjoy the theoretical advantage it normally has in the military arena.

When considering asymmetric conflicts in the 21st century,



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* The opinions and conclusions expressed in this article are those of the authors and do not necessarily reflect the views of the government of Israel.

1. Mack Andrew, *Why Big Nations Lose Small Wars: The Politics of Asymmetric Conflict*, 27 *WORLD POLITICS* 175 (1975).
2. See Protocol Additional to the Geneva Conventions of Aug. 12, 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (hereinafter: "API"), Art. 51(2): "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."
3. See API, *supra* note 2, Art. 51(7): "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."

four parallel fronts are generally discussed: the military front in which the armed conflict actually takes place; the diplomatic front, which includes various international forums, first and foremost the United Nations (including the UN Human Rights Council); the media, which has for several years also included the internet and social networks; and the legal front. The combination of the last three fronts – the diplomatic front, the media and the legal front – define the new battlefield of asymmetric conflicts: *the battle for legitimacy*.

While the state for the most part still has the advantage over non-state organizations on the military front, in the three fronts of the battle for legitimacy, the state that is fighting terrorism is often in a defensive position. With regard to the effect on diplomatic relations, economic ties and international image, one can certainly say that states are much more vulnerable to actions taken against them when compared to non-state organizations. As a result, a “victory” on the military front may eventually turn out to be a “defeat” in the battle for legitimacy and may eventually lead the state to bear the political costs for which it went to war.

All these changes in the characteristics of armed conflicts occurring in the 21st century between states and non-state organizations have led to a situation that can be described as “opposite asymmetry.” In other words, the existing reality allows the non-state organization to benefit from inherent advantages because of its lack of obligation to the Laws of Armed Conflict (*vis-à-vis* the state's obligation to obey these laws), as well as because of its low level of vulnerability to criticism on the diplomatic front, in the media and on the legal front. The state, on the other hand, must conduct a combined campaign wherein taking expansive action on the military front will increase pressure on it on the diplomatic front, in the media and on the legal front. A terrorist organization cognizant of the pressures imposed on states in these areas seeks to use this leverage to achieve the strategic purpose of fighting, i.e. realizing its political interests *vis-à-vis* the state it fights against.

It should be noted that while the state confronts the armed organization on the military front, on the remaining fronts the state stands against actors external to the armed conflict, some of whom represent legitimate bodies in the international arena, including international organizations and non-governmental organizations (NGOs). These actors base their actions on the reality created on the military front in order to advance their interests *vis-à-vis* the state. The legal front presents a special challenge because the law plays a central role in creating international legitimacy on the one hand, as well as in efforts to delegitimize the state on the other. The use of the legal front as part of the

battle between a state and a non-state organization is also known as “lawfare.”

What Is Lawfare?

Academic writing includes a broad discussion of how to define the term “lawfare.”⁴ The first person to use the phrase was Major General Charles Dunlap, who in an article in 2001 described the phenomenon as “a method of warfare where law is used as a means of realizing a military objective.”⁵ In a later article in 2008, Dunlap determined that it was “the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.”⁶ Finally, in 2011 Dunlap wrote that it was “the strategy of using – or misusing – law as a substitute for traditional military means to achieve a war fighting objective.”⁷

These three references reflect the evolution of the understanding regarding the importance of lawfare and its strength. The first definition from 2001 referred to a very narrow aspect of lawfare limited to the battlefield itself, which is manifested by achieving a tactical military advantage through exploiting protections awarded to civilians and civilian facilities under the Laws of Armed Conflict (i.e. the phenomenon known as “human shields”). The second definition begins to expand the understanding to activities outside the battlefield that are intended to achieve operational advantages, for instance – initiating legal proceedings with the goal of preventing certain methods of warfare solely under the state's control (such as the use of drones for targeted killings). It is the third definition that reflects the broadest perception of using the law to achieve operational goals, i.e. goals that are strategic by nature, such as the withdrawal of a state from

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4. See, for instance, the series of articles published in 43 CASE W. RES. J. INT'L L. (2010).
 5. Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts*, Prepared for the Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, Nov. 29, 2001, available at <http://people.duke.edu/~pfeaver/dunlap.pdf> (last visited March 4, 2015).
 6. Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, YALE J. OF INT'L AFFAIRS 146 (2008).
 7. Charles J. Dunlap, Jr., *Lawfare Today...and Tomorrow*, INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR (Raul A. "Pete" Pedrozo & Daria P. Wollschlaeger, eds., 2011) 315 (87 US NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES).

territory it controls or preventing the use of military force by the state.⁸

An additional conclusion that can be drawn from these references is that the term “lawfare,” perhaps in contrast to intuitive understanding, is not necessarily a negative one. Indeed, similar to war itself which can serve legal and legitimate purposes (such as wars waged to realize the right of self-defense) or illegal purposes (in other words, a war of aggression), lawfare is an essentially neutral term. There is nothing to prevent the state itself from initiating and leading lawfare efforts as part of the battle it is conducting against terrorist organizations – and as will be clarified later it may even be desirable that states do so. This possibility gains importance in light of the above discussion regarding the modern attributes of asymmetric conflicts.

The understanding that lawfare is a neutral term leads to a distinction between the defensive steps taken by a state regarding actions in the field of lawfare directed against it (“defensive lawfare” or “negative lawfare”) and actions initiated by the state in the field of lawfare (“offensive lawfare” or “positive lawfare”). Regrettably, to date the bulk of actions taken by states in the field of lawfare, and the State of Israel is not unique in this regard, have been in the defensive sphere. As will be shown below, a state has many important tools at its disposal in the offensive realm as well.

Levels of Action in Lawfare

One way to describe the phenomenon of lawfare is by examining the various levels in which it is conducted. There are three central levels in this context: the tactical level, the strategic level and the legal level, which refers to the fight over the law that regulates asymmetric conflicts.

Lawfare on the Tactical Level:

The tactical level of lawfare takes place on the actual battlefield. At this level, the state directly faces the non-state organization, while the latter exploits the state's obligation to uphold the Laws of Armed Conflict in order to achieve operational advantages against the state in the fighting. Indeed, the phenomenon of “human shields” is not a new one in armed conflicts (and the prohibition against human shields has been part of the laws of armed conflicts going back to the Fourth Geneva Convention in 1949).⁹ However, over the past several years, the embedding of non-state organizations into civilian infrastructures as a cloak for their fighting activities has become an integral part of the warfare strategy of those organizations.

For example, during Operation Protective Edge, which

took place in the Gaza Strip during July and August 2014, dozens of cases were recorded in which terrorist organizations fighting Israel fired rockets and mortars from densely populated areas, where command and observation posts were established in hospitals and launching sites were placed therein.¹⁰ A medical clinic was booby-trapped and blown up when IDF forces conducted a search there.¹¹ Weapons were hidden in private homes, mosques, and even in UN facilities, and there was rocket and mortar fire from areas adjacent to all these sensitive sites.¹² The operational purpose of these actions was explained in the “Urban Warfare Manual” prepared by the military wing of Hamas, a copy of which was captured by the IDF during the operation.¹³ According to the manual: “The soldiers and commanders (of the IDF) must limit their use of weapons and tactics that lead to the harm and unnecessary loss of life and [destruction of] civilian facilities. It is difficult for them to get the most use out of their firearms, especially of supporting fire [e.g. artillery].”

From the terrorist organization's perspective, embedding itself in civilian infrastructure during fighting puts it in a win-win situation vis-à-vis the state: Either the state avoids attacking in order to prevent the harming of civilians and sensitive facilities, thereby preserving the organization's military strength so that it can continue conducting terrorist attacks against the state; or the state chooses to carry out an attack, but it will have to cause incidental and unintended harm to civilians and sensitive facilities, thereby exposing it to international criticism (the state is still criticized even if, in terms of the Laws of Armed Conflict, the attack is legal).

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8. See also the discussion below regarding the levels of action of lawfare.
 9. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 287, Art. 28.
 10. For a detailed account, see *The 2014 Gaza Conflict, 7 July - 26 August 2014, Factual and Legal Aspects* (May 2015), available at <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>, Chapter IV: “Violations of the Law of Armed Conflict, War Crimes, and Crimes Against Humanity Committed by Hamas and Other Terrorist Organisations During the 2014 Gaza Conflict (last visited June 15, 2015).
 11. *Id.* at 78.
 12. *Id.* at 73-97.
 13. *Id.* at 153

Indeed, the activities described above carry a risk that the terrorist organization will be accused of committing war crimes. However, as aforementioned, because of their very nature, terrorist organizations are hardly deterred, if at all, by such claims, given that their offensive actions intentionally target the state's civilians, which is in and of itself a war crime. And certainly this risk is negligible when compared with the considerable advantages in their fight against a state, both on the tactical level – if the state chooses to avoid attacking, and on the strategic level – if the state attacks and harms civilians and sensitive facilities, thereby exposing itself to international criticism and public pressure to end the fighting.

Lawfare at the Strategic Level and the Process of Lawfare:

While the tactical level of lawfare focuses primarily on the battlefield, the strategic level plays out in forums far from the battlefield itself: in international organizations and legal bodies. These forums are used, and sometime abused, in order to delegitimize the actions of the state by defining them as unlawful, with the long term purpose of deterring the state from resorting to forceful activity in the future. The actors the state is facing at the strategic level are not terrorist organizations, but rather legitimate actors in the international arena: other states, non-governmental organizations, local and international prosecutors etc., who seek to introduce a change in the state's policy, based on the outcome of the fighting. These forums can be divided into three categories: political, legal and mixed political-legal. Each of them contributes to the “process of lawfare” (it should be noted that the same process is implemented also with regard to the two other levels of lawfare, though it is more common on the strategic level).

The first phase of the “process of lawfare” takes place in the **political bodies** of international organizations, such as the various UN organizations (the Security Council, the General Assembly, the Human Rights Council, etc.). These bodies (with the exception of the Security Council) are not authorized to make decisions that are binding on a state. Nevertheless, alongside the possibility of recruiting them to condemn the actions of a state fighting terrorism, as has occurred many times with regard to Israel,¹⁴ they serve as a platform to drive processes in international **legal bodies** with binding legal authority. To that end, **mixed political-legal bodies** are established by the political bodies, i.e. various investigatory committees mandated to examine the conduct of the state. The findings of these committees and their conclusions are meant to serve as the basis for initiating legal steps in international courts and local courts exercising universal jurisdiction.

The possible manipulation of this process can clearly be seen in an examination of the lawfare waged against the State of Israel as a result of Operation Cast Lead. During the operation, the Human Rights Council (**the political body**) passed a biased resolution condemning the State of Israel for its actions which, according to the resolution, constituted a violation of the Laws of Armed Conflict and Human Rights Law.¹⁵ The resolution called for the establishment of an international fact-finding mission – the Goldstone Commission (**a mixed political-legal body**). Its mandate was formulated in such a way as to predetermine the desired results: “[T]o investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression.”¹⁶ Although the chairman of the committee, Richard Goldstone, also decided to examine the actions of the Hamas organization during the fighting,¹⁷ the committee's conclusions against the State of Israel were unequivocal: The Goldstone Report determined that the State of Israel committed war crimes because of its intentional policy to harm the civilian population in the Gaza Strip and to punish it for its support of Hamas.¹⁸ The report further determined that the legal system in Israel was not interested or capable of effectively and reliably investigating the war crimes committed during the operation,¹⁹ and therefore recommended that legal steps be taken both in the International Criminal Court and in local courts with universal jurisdiction statutes (in other words, in **legal bodies**).²⁰ In the end, because of a series of steps taken

14. Since its establishment in 2006, the Human Rights Council has held seven special sessions concerning Israel (out of 22 special sessions held so far), and adopted 44 resolutions condemning Israel (35% of its country-specific resolutions).

15. H.R.C. Res. S-9/1, The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly Due to the Recent Israeli Military Attacks against the Occupied Gaza, U.N. Doc. A/HRC/RES/S-9/1 (Jan. 12, 2009).

16. *Id.* para. 14.

17. H.R.C. Report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc.A/HRC/12/48 (Sep. 25, 2009), para.1 (hereinafter: “Goldstone Report”).

18. Goldstone Report, *id.* para. 74.

19. Goldstone Report, *id.* para. 122.

20. Goldstone Report, *id.* paras. 1965-1966.

by Israel in the framework of “defensive lawfare,”²¹ the Goldstone Report recommendation was not adopted. The Palestinian application to accept the jurisdiction of the International Criminal Court pursuant to Article 12(3) of the Rome Statute was rejected by the ICC prosecutor because at the relevant point in time, the Palestinian Authority was not considered a state as was required by the Statute.²² Meanwhile, Richard Goldstone published an editorial in which he repudiated some of the report's conclusions.²³

The process described above – of an action initiated in a political body,²⁴ moving through a mixed political-legal body²⁵ and intended to end in steps taken by a legal body²⁶ – was also taken against Israel with regard to the events surrounding the takeover of the Turkish flotilla in May 2010.²⁷ A similar process is currently taking place with regard to Operation Protective Edge after the Human Rights Council adopted a unilateral resolution condemning Israel and ordering the establishment of an international Commission of Inquiry.²⁸

In this last case, there are clear indications that the Commission is designed to establish legal procedures against Israel. Firstly, William Schabas, who was chosen to head the Commission, has previously said that the Prime Minister of Israel needed to stand trial in the ICC.²⁹ In February 2015, Schabas had to resign after it was revealed that several years ago, he did advisory work for the Palestinians regarding their effort to join the ICC.³⁰ In addition, the Commission's mandate states that it must determine which individuals are responsible for the war crimes committed during Operation Protective Edge.³¹ Finally, the Commission's mandate refers to the events which took place only beginning on June 13, 2014, the day after three Israeli teenagers were kidnapped and murdered in Gush Etzion, an event which led to Operation Brother's Keeper, which in turn led to Operation Protective Edge. This is also the date that appears on the Palestinians' current attempt to accept ICC jurisdiction pursuant to Article 12(3) of the Rome Statute.³²

The Palestinian lawfare campaign against Israel taken after Operation Protective Edge is meant to deeply harm Israel's international standing and to place it on equal footing with pariah states that regularly violate international law, like Sudan. This step has far-reaching political and economic implications. By taking this action, the PA intends to put international pressure on Israel that, at the end of the day, will advance its interests vis-à-vis the Israeli-Palestinian conflict in lieu of the track accepted by the international community, that of bilateral negotiations.

The Struggle over the Law Applicable in Asymmetric Conflicts

While lawfare in the tactical and strategic levels is aimed

at a specific state, the current sphere – i.e. the struggle over the law that applies to asymmetric conflicts and specifically in reference to the fight against terrorism – is applicable to all states involved in such conflicts and influences them all. This is the broadest sphere in lawfare and it has the most serious implications, as it can pose a very real risk to the states' ability to fight terrorism effectively. These states stand against a coalition of players who act to shape international law while reducing the leeway at the disposal of the states fighting terrorism.

21. For “defensive lawfare” in the context of the Goldstone Report, see *The Operation in Gaza: Factual and Legal Aspects* (2009), available at http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf (last visited March 4, 2015).
22. International Criminal Court, Office of the Prosecutor, Situation in Palestine (Apr. 3, 2012), available at www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf (last visited March 4, 2015).
23. Richard Goldstone, *Reconsidering the Goldstone Report on Israel and war crimes*, WASH. POST Apr. 1, 2011, available at articles.washingtonpost.com/2011-04-01/opinions/35207016_1_drone-image-goldstone-report-israeli-evidence (last visited March 4, 2015).
24. H. R. C.I Res. 14/1, The grave attacks by Israeli forces against the humanitarian boat convoy, U.N. Doc. A/HRC/RES/14/1 (June 23, 2010).
25. H.R.C. Report of the Int'l Fact-Finding Mission to Investigate Violations of Int'l Law, Including Int'l Humanitarian & Hum. Rts. Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, U.N. Doc. A/HRC/15/21 (Sep. 27, 2010).
26. *Id.* paras. 258-259.
27. In this case, Israel responded with two main “defensive lawfare” actions:
 - a. Establishment of an investigatory committee, headed by Supreme Court Justice Jacob Turkel (The Public Commission to Examine the Maritime Incident of 31 May 2010 (The Turkel Commission) – Report, Part I (January 2011), available at www.turkel-committee.gov.il/files/wordocs//8707200211english.pdf) (last visited March 4, 2015);
 - b. Participation in the Panel of Inquiry established by the UN Secretary General, headed by former Prime Minister of New Zealand, Geoffrey Palmer (Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, Report (Sep. 2011), available at www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf) (last visited March 4, 2015).

One of the most prominent examples of this phenomenon is the Goldstone Report, which is laced throughout with an interpretive reduction of the Laws of Armed Conflict and which does not leave the state fighting against terrorism with any effective ability to act in the battlefield. Thus, for example, with regard to **the destruction of private property** during fighting, the report determines that it will be considered legal only if there is a concrete threat to the fighting forces from the building to be destroyed.³³ This is despite the fact that the Laws of Armed Conflict allow for the destruction of private property for much broader considerations, i.e. whenever it is imperatively demanded by the necessities of war,³⁴ as well as when the structure meets the definition of a military target because of its nature, location, designation or use.³⁵ With regard to the **principle of proportionality**, the report imposes a standard of “unacceptable harm,”³⁶ a standard that does not exist anywhere in the Laws of Armed Conflict and which refers to the actual results of the fighting. This is instead of examining the relation between the intended military advantage of the action and the expected amount of incidental harm, as required in the Laws of Armed Conflict.³⁷ With regard to the obligation for **advance warning**, the Goldstone Report ignores the fact that the laws governing the conduct of hostilities determine a general obligation unless circumstances do not permit,³⁸ and rather it imposes strict standards on the state.³⁹ In the report, the meeting of these standards is examined according to the results, as opposed to that which is customary in the Laws of Armed Conflict.⁴⁰

Alongside this tendentious and mistaken interpretation of the Laws of Armed Conflict, the Goldstone Report includes another legal distortion, one with far-reaching implications. We refer to the mistaken application of Human Rights Law in a manner that obligates states involved in armed conflicts to act according to standards intended for situations related to law enforcement. This is a complex legal issue, and this is not the place to discuss it in depth. However, even if we assume that Human Rights Law applies to fighting by the State of Israel in the Gaza Strip (which is doubtful from the perspective of the current state of international law), the customary legal test for regularizing the interaction between this legal system and the Laws of Arm Conflict is the principle of *lex specialis*. According to this interpretative principle, with regard to the conduct of hostilities, the Laws of Armed Conflict are those that regulate the fighting, while Human Rights Law may only serve to complement gaps that exist in the former’s legal system.⁴¹ In the Goldstone Report, on the other hand, a cumulative approach is implemented according to which a state must uphold the rules set out in both systems of laws. In action, this means

that a state involved in an armed conflict with a terrorist organization must uphold the stricter standards outlined in human rights laws.⁴²

28. H.R.C. Res. S-21/1, Ensuring Respect for International Law in the Occupied Palestinian Territory, including East Jerusalem, U.N. Doc. A/HRC/RES/S-21/1 (July 24, 2014).
29. William Schabas, “My Favorite Would Be Netanyahu in the Dock of the International Criminal Court,” available at <https://www.youtube.com/watch?v=0EgykgqpgQY> (last visited March 4, 2015). See also William A. Schabas, Gaza, Goldstone and Lawfare, 43 CASE W. RES. J. INT’L L. 307 (2010) at 308: “If one had to think of the single individual most likely to threaten the survival of Israel, surely Netanyahu himself would be a better candidate.”
30. Thomas Escritt, *Head of U.N. Inquiry into Gaza Conflict to Quit over Israeli Bias Claim*, REUTERS (Feb. 2, 2015), available at uk.reuters.com/article/2015/02/02/uk-un-israel-gaza-idUKKBN0L628B20150202 (last visited March 4, 2015).
31. H.R.C. Res. S-21/1, *supra* note 28, para. 13.
32. Declaration Accepting the Jurisdiction of the International Criminal Court, Dec. 31. 2014, available at www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf (last visited March 4, 2015). In addition to this document, the Palestinian Authority acted to accede to the Rome Treaty and to gain full membership in the Court (see treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf) (last visited March 4, 2015).
33. Goldstone Report, *supra* note 17, para. 1005.
34. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (Oct. 18, 1907), Art. 23(g).
35. AP I, *supra* note 2, Art. 52(2).
36. Goldstone Report, *supra* note 17, paras. 437, 703.
37. AP I, *supra* note 2, Art. 51(4)(b). See also Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2nd ed., 2010), at 130; Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, available at www.icty.org/sid/10052 (last visited March 4, 2015).
38. AP I, Article 57(2)(c).
39. Goldstone Report, *supra* note 17, paras. 531-536.
40. In general, see Pnina Sharvit Baruch & Noam Neuman, *Warning Civilians Prior to Attack under International Law: Theory and Practice*, 87 US NAVAL WAR COLLEGE INT’L L. STUDIES 359 (2011).
41. See Cordula Droegge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310 (2007).
42. See Laurie Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, 12 Y.B. OF INT’L HUMANITARIAN LAW 347 (2009) at 396-397.

The most prominent example of this legal distortion is the attack on the al-Daya family house. In this case, the State of Israel said that because of an operational mistake, an attack that was targeting a structure serving as a weapons store unintentionally struck the adjacent house. In light of this, the Goldstone Report determined that there was no violation of the Laws of Armed Conflict.⁴³ However, the report did determine that the IDF was responsible for the results of the action given that the attack did not meet the highest requirements determined in Human Rights Law.⁴⁴ This conclusion demonstrates the danger every state fighting terrorism faces in implementing the strict standards outlined in the Goldstone Report, which do not suit the unique reality of fighting terrorist organizations in armed conflicts.

Conclusion

The above description demonstrates the complexity of lawfare with which states involved in armed conflicts must contend. It is a front conducted in a number of spheres (tactical, strategic, the question of which law is applicable) and forums (the battlefield itself, international organizations, courts), and vis-à-vis a range of actors (terrorist organizations, foreign states, non-state organizations, international commissions of inquiry). It also continues for a prolonged period after the end of fighting on the battlefield. The armed conflicts in which states are involved in the 21st century pose new challenges to those same states, both in the battlefield itself but

perhaps no less importantly – outside the battlefield. The battle for legitimacy, and lawfare as a part of that, can transform what appears to be a tactical victory on the battlefield into a national loss on the strategic level. It is important that states be aware of the changing nature of these conflicts and that they learn to prepare themselves to properly deal with these new challenges. This campaign should include both “defensive lawfare” and “offensive lawfare” in order to weaken the terrorist organizations. ■

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43. Goldstone Report, *supra* note 17, para. 861.

44. Goldstone Report, *supra* note 17, paras. 865-866.

The Principle of Proportionality and Procedures in International Humanitarian Law

Amichai Cohen

Introduction and Main Claim

Many recent armed conflicts, including those in which Israel participated, follow the same pattern: a state is involved in an armed conflict with a non-state actor – a terrorist organization, a militia, or an organized armed band.¹ The non-state actor embeds itself within the civilian population and its fighters dress as civilians.² These combatants hide their weapons and equipment in civilian houses and in places of worship; they launch rockets from schools.³ Moreover, these combatants deliberately fight from within the civilian population. Every time they are attacked, they seek protection by surrounding themselves with civilians (who voluntarily or under duress participate in these actions).⁴



Armed conflicts of this type have sometimes been termed “asymmetrical”⁵ – an adjective used principally with reference to the fact that the protagonists are on one side, a state, with all its might and force, and on the other side, an organization with few heavy arms and a limited number of fighters. But as we described earlier, such conflicts are also asymmetrical in a more formal sense: they are fought between a state, motivated by sound reasons for abiding by the Laws of Armed Conflicts (LOAC) or International Humanitarian Law (IHL),⁶ and a high incentive and organizational obligation to do so,⁷ on the one hand, and on the other hand, an organization that almost never follows these rules and has very little incentive to do so.⁸

States involved in these conflicts mostly attempt to follow, or are expected by the international community to follow, IHL as detailed in customary international law,⁹ in the Geneva Conventions, and in other sources of applicable international law. However, it has become increasingly difficult to abide by these laws, mainly because of the novel nature of the problems that constantly arise.

Consideration of these and similar issues has motivated some scholars and politicians to call for the redefinition

or reinterpretation of the rules of armed conflict.¹⁰ The Geneva Conventions and their protocols, runs their argument, were framed in an era of more “classic” military engagements, when wars were fought between nations and by armies that observed the rules of armed conflict. The norms that may have been suitable in such situations are not suited to modern armed conflicts.¹¹

My main claim here is that the solution to these challenges that armed forces of liberal democracies adopted is mainly in the area of procedures – armed forces developed very complex mechanisms in order to deal with dilemmas arising from the application of IHL. These have moved the discussion towards areas in which there is very little legal knowledge and tradition, and that the main developments in IHL is now in the area of procedure.

1. Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities*, 43 CASE W. RES. J. INT'L L. 707 (2011).
2. This action violated the principle of distinction, an underlying rule of International Humanitarian Law. For discussion relating to this principle, see Jean-Marie Henckaerts & Louise Doswald-Beck, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2006), Rule 1: The Principle of Distinction between Civilians and Combatants.
3. For discussion relating to protection of objects not of a military nature, see Zeray Yihdego, *Reflections on a Decade of International Law: International Legal Theory: Snapshots from a Decade of International Legal Life: The Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding*, 13 MELBOURNE J. OF INT'L L. 158 (2012).
4. For discussion relating to the misuse of civilian population during hostilities, and specifically when dealing with human shields, see Nada Al-Duaij, *The Volunteer Human Shields in International Humanitarian Law*, 12 OR. REV. INT'L L. 117 (2010).

In this article, I shall give one example for the use of procedures – in the application of the principle of proportionality. I will demonstrate how and why procedures are important in understanding the principle of proportionality, and what the effects of the use of this model are.

Proportionality and its Requisites

Proportionality in IHL is a difficult concept for field commanders, legal experts and philosophers to analyze, and much more so to accept.¹² On the one hand, it permits military personnel to kill innocent civilians – provided that the intended targets of the operation were enemy forces and not civilians.¹³ Not even advance knowledge that civilians might be hurt outlaws an operation – unless the estimated civilian casualties are excessive relative to the military advantage that the prospective attack seems likely to confer. On the other hand, the principle of proportionality limits military action even when a legitimate military target is attacked, when the attack may cause excessive injury to civilians.¹⁴ Hence, an exact understanding of the norm is required.

The principle of proportionality requires the army to relinquish the effort to gain a military advantage if its attainment threatens to cause disproportionate harm to the civilian population. Damage to the civilian population becomes prohibited once it is seen to be excessive in relation to the military advantage. This equation, which requires the commander to carry out extremely delicate calculations in the heat of battle, has generated much confusion and controversy. The reason is that the content of the principle of proportionality is very hard to ascertain:

First, what is the definition of “attack”? Does it relate to the specific military operation or to the entire military campaign? Perhaps it refers to one move within an operation?¹⁵

Second, what is the meaning of “military advantage”? The ICRC interpreted the term “concrete and direct military advantage” to mean “substantial and relatively close,”¹⁶ but this is highly debatable.¹⁷

Third, it is unclear which civilians should be taken into account. There is disagreement whether civilians who were forced or volunteered to serve as “human shields” are to be considered part of the civilian population for the purpose of application of the principle of proportionality.

Fourth, how does one measure the excessiveness of civilian casualties with regard to possible danger to the life of soldiers? In other words, does the protection of the lives of one’s soldiers constitute a permissible criterion in the equation? How much weight should be given to the protection of the other party’s civilian population? Are casualties to be measured on a precise one-to-one

basis? What about the lives of one’s own civilians? How should they be measured against the lives of the enemy’s civilian population?

The result of this situation is that, as the special report to the prosecutor of ICTY (International Criminal Tribunal for Former Yugoslavia) regarding the NATO campaign in Yugoslavia pointed out: “[i]t is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances.”¹⁸ In fact, one may argue that the inability to offer more precise guidelines derives from the very nature of the principle

5. David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 ISR. L. REV. 8 (2009).
6. Some, especially in the U.S., use these two terms (LOAC and IHL) synonymously.
7. For discussion, see *supra* note 5.
8. Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U.L. REV. 916 (1994).
9. *Supra* note 2.
10. See, e.g., Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. OF LEGAL ANALYSIS 115 (2010).
11. For discussion on suitability of IHL to modern battlefields, see Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VANDERBILT J. OF TRANSNATIONAL L. 295 (2007).
12. See Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SEC. J. 145 (2010).
13. See, e.g., Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201 (2011).
14. For discussion concerning the application of this principle in IHL, see *supra* note 2, Practice Relating to Rule 14. Proportionality in Attack available at www.icrc.org/customary-ihl/eng/docs/v2_rul_rule14 (last visited March 15, 2015); Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VANDERBILT J. INT’L L. 683 (2009).
15. For discussion on the proper application and interpretation of proportionality, see Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 39 I.L.M. 1257 (2000).
16. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Y. Sandoz, C. Swinarski and B. Zimmermann eds.), (1987), at 684.
17. Judith Gardam, *HUMANITARIAN LAW* (1999), at 101.
18. *Supra* note 15.

of proportionality. It is an open-ended legal standard designed to accommodate an indefinite number of changing circumstances, not a hard and fast set of rules.

As a result of these unclear responses, there is very little agreement on the exact contents of the principle of proportionality. What has emerged is a procedural model of proportionality – the procedural requirements for a commander implementing the principle of proportionality. I call this “the administrative model of proportionality.”

The Administrative Model of Proportionality

1. The Targeted Killings Case

The decision of the Israel Supreme Court sitting as the High Court of Justice (HCJ) in the *Targeted Killings Case* constitutes one of the very few exceptions to the rule of judicial silence regarding proportionality. In this case, the court declared the targeted killing of terrorists to be legal under certain specific conditions. Principal among the limitations placed by the court is the need to minimize the “collateral damage” sustained during the course of targeted killing operations by civilians not taking direct part in hostilities (referred to by the HCJ as “innocent civilians”). The court appreciates that the application of the test is riddled with uncertainty.¹⁹

With relation to substantive contents of proportionality, the court offered only limited guidance. Far more useful are the institutional elements that the court introduced in those of its judgments that appear to relate to the application of the proportionality principle. Justice Aaron Barak (then President of Israel’s Supreme Court) posited in his judgment that targeted killing operations ought to be made subject to *ex ante* and *ex post* examination or investigation. With relation to *ex ante* review, Barak required that prior to the attack a “meticulous examination” be conducted of every case that potentially could give rise to collateral damage. This requirement seems to correspond to the precautionary obligations introduced by Article 57 of the First Additional Protocol.²⁰ Even more significant is Barak’s introduction of the concept of *ex post* review in the *Targeted Killings Case* – a review process that is ultimately subject to judicial supervision.

Hence it seems that for the Israel Supreme Court, the solution to the ambiguity of the term “proportionality” lies in investigations, both before and after the attack. This, however, seems to be problematic – what use are investigations if the parameters of proportionality are not clear? What should be investigated when it is not clear how the decision should have been taken?

2. Proportionality as Reasonableness

Investigations and Reasonable Commanders

Proportionality, like many other open-ended terms in

law, is concerned with reasonableness. Most states that have expressed opinions on this matter seem to assume that there exists some standard of proportionality that the reasonable commander must apply in accordance with his knowledge of the field. This, of course, is a very general standard and one which is very hard to implement.²¹ Does there exist a gauge that would facilitate an estimate of what a reasonable commander would decide?²²

Clearly the answer is negative. However, this question is neither novel nor unique. Similar issues commonly arise whenever courts review the actions of administrative bodies. Most governmental agencies are expert in their field of operation, and the courts are reluctant to dispute the decisions of the agencies in their areas of expertise. Instead, when courts review decisions of governmental agencies, the question that they ask is whether the decisions taken deserve to be considered reasonable. The test for reasonableness is in the main procedural: Did the agency follow the correct procedure? Was it in possession of all the relevant data? Did it give a proper hearing to all views? This is the only way courts can decide whether the actions of the agency were reasonable. It is the usual practice of administrative courts to give at least some deference to the substance of the agency’s decision.

A substantively similar process takes place with regards to proportionality in IHL. What we really want to know is whether the commanders in the field, when making their decisions, took into account the likelihood of civilians being hurt. We cannot possibly judge whether the decision ultimately taken was correct; we do not possess all the required information, and even if we did, we would not know which parameters to apply. The best we can do is judge the decision-making process.

Naturally, then, *ex ante* review is required. A military operation should be initiated only if we can be sure that an appropriate investigation as to the amount of collateral damage to civilians will be carried out. Of course, this

19. HCJ 769/02, *Public Committee against Torture in Israel, et al. v. Government of Israel, et al. (The Targeted Killings Case)*, (Dec. 11, 2006), at para. 46.

20. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, June 8, 1977, 1125 UNTS 3.

21. Amichai Cohen, *Rules and Standards in the Application of International Humanitarian Law*, 41 ISR. L. REV. 41 (2008).

22. Amichai Cohen, *The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives*, 35 RUTGERS L. REV. 23 (2009).

requirement carries different meanings in different contexts. In a pre-planned large scale attack, it mandates gathering all available information and subjecting the planned operation to in-depth analysis. By contrast, should an immediate decision be required during the course of an operation already under way, an entirely different level of both information gathering and decision-making would be applied.

Ex Ante Review

Ex ante review is a most important facet of any military operation, and especially so when civilian casualties are involved. This is one of the basic requirements of the First Additional Protocol, and it seems that most armies, in the West at least, indeed rely on legal advisors exactly in order to verify that such a review is undertaken. Whatever the context, the important point to verify is that the question was asked. If we apply the same assumptions to military commanders as to administrators, and hence approach them as reasonable persons, that is the most we can ask.

3. *Ex Ante* Review Is Not Enough

Commanders, however, are not equivalent to administrators. Obviously, this is because of the differences in their functions. Officials who work in administrative agencies service their own communities and deal with citizens of their own country. Hence, an assumption that they will behave reasonably is, so to speak, reasonable. Field commanders are different; their function is to fight the enemy. Hence, we should be much more careful in assuming that they take the interests of the lives of enemy civilians into account.

Second, even those commanders who are “reasonable” will only reach a reasonable answer if they ask the correct questions. How can we be sure that such is indeed the case?²³ In matters pertaining to administrative law, that is precisely the task of the courts; by subjecting many administrative issues to judicial review both before and after their occurrence, it is assured that the courts verify that the administrators did indeed ask the correct questions prior to embarking on a course of action. However, courts are reluctant to intervene in military operations prior to their initiation.²⁴ After all, judicial review takes time and could involve a postponement in the timing of the action. And no court is happy to shoulder the responsibility for whatever damage a delay might cause. Moreover, judges are noticeably hesitant to intervene in military matters even after the fact, since they consider their knowledge of the situation to be inferior to that of military commanders.

Ex Post Review

Ex post review ensures that the actions of the commander will eventually be examined. As such, it constitutes an additional influence on his decision-making process prior to the operation. A commander who is aware that his actions will be monitored after the fact is likely to take care that he gives due consideration to all possibilities when reaching a decision to act.²⁵ I will not be able to detail the conditions of *ex post* examination in this article.²⁶ Very briefly, these conditions include: *Independence*: The formal and practical independence of the investigators from the persons whose actions they were examining; *Effectiveness*: the ability of the investigation to lead to effective remedies including, where appropriate, criminal investigations; *Promptness* of the investigation, and availability of public scrutiny.²⁷

Hence, the administrative model of proportionality requires commanders to follow specific procedures in order for the attack to be legal. Moreover, because of the imprecise nature of the principle of proportionality, members of the armed forces look at procedures as the main gauge of the legality of their actions. The main question facing commanders is whether the review (both *ex ante* and *ex post*) was done correctly.

Implications of the Administrative Model of Proportionality

The level of review suggested here is actually that of administrative review. It stems from the view that in many respects, the armed forces are similar to any other administrative agency. It relies on the idea that a review of what soldiers do is necessary, and is possible, but it does not mean that the rule of law should interfere with military operations. The administrative model for

23. For further discussion, see *supra* note 22.

24. Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HAST. L.J. 441 (2005) (describing the deference administrative courts give to the military, and criticizing it).

25. For discussion on the duty to investigate under international law, see Eliav Liebllich, *Show us the Films: Transparency, National Security and Disclosure of Information Collected by Advanced Weapon Systems under International Law*, 45 ISR. L. REV. 459 (2012).

26. See Amichai Cohen & Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, 14 Y.B. OF INT'L HUMANITARIAN L. 37-85 (2012).

27. *Id.*, paras. 209-214.

proportionality, or for any military action, as a matter of fact, as detailed here, focuses on the professional soldier as the ultimate decision-maker on questions of proportionality. It is based on several foundations:

The Importance of Asking the Questions: The assumption underlying the administrative model is that if a commander asks himself the correct question, this would provide better results in terms of protecting innocent lives. The assumption is that the ethics of the military profession require that armed conflict will be mainly directed against soldiers and combatants. Hence, if the decision is left to be taken by soldiers, with a review of the decision-making process, the results would tend to protect human lives.

The Importance of Understanding the Effects: The suggested model is compatible with the general aims of the military. It is based on the fact that the commander ordering an attack should have an understanding of the results of his actions.

Command Responsibility: A very important application of the institutional ingredient of proportionality may be felt not in cases alleging direct responsibility of soldiers and commanders, but rather in command responsibility cases.²⁸ Article 28 of the ICC Statute imposes responsibility on commanders who did not prevent international crimes from occurring, despite the fact that “owing to the circumstances at the time” they “should have known” about their occurrence.²⁹ That being the case, a robust *ex ante* review could significantly extend the exposure of commanders to such negligence-based responsibility (in addition to the knowledge-based responsibility discussed above). In fact, where circumstances so warrant, it can be argued that commanders should insist upon effective *ex ante* review and might incur criminal liability for failing to do so. Furthermore, since Article 28 of the ICC Statute also criminalizes failures on the part of commanders to punish soldiers for violations that had already occurred, improved *ex post* investigations could introduce significant pressures on commanders to order criminal prosecutions of subordinates involved in attacks entailing “clearly excessive” consequences. Here again, failure to order investigation might serve in itself as the basis of responsibility in appropriate circumstances.

Taking Responsibility into Account: As mentioned earlier, responsibility is an integral part of the proportionality equation. In applying proportionality to a specific case, the commander may ask himself who is responsible for the possible incidental loss of lives. If indeed it is the enemy who is responsible, then this might allow the commander more flexibility in the application of the principle of proportionality. This relates to an important question that recently arose with regard to “human shields.” The current debate revolves around the question

of whether “human shields” should be considered as innocent civilians for the purpose of the application of the principle of proportionality, or not. Some scholars claim that civilians who were forced to protect enemy combatants, and certainly those who participated in doing so, should not be considered as civilians for the purpose of the application of the principle of proportionality.³⁰ The ICRC suggested that even civilians who volunteer to protect combatants should be considered as civilians for the purpose of the application of the principle of proportionality.³¹ My view is that the correct way to approach this issue is through the lenses of the procedure of proportionality. Even when civilians are used as human shields, the commander should still take into account the possible incidental loss of civilian lives. The balance that the commander has to strike is between avoiding the danger that the enemy would turn civilians into human shields, on the one hand, and that too many innocent civilians will be killed, on the other. Naturally, in these cases, the result of this balance might certainly be more damage to the civilian “human shields,” but still, their fate should be taken into consideration by the commander.³²

Proportionality and Criminal Responsibility: The institutional elements of proportionality developed here might be useful in determining a violation of proportionality requirements in the criminal law context too. The quality of any *ex ante* review might be relevant in ascertaining the mental state of soldiers and commanders carrying out military operations, in the sense that an improved decision-making process might seriously curtail the ability of the commanding ranks involved in the review process or exposed to its findings to claim ignorance of the anticipated disproportional consequences

28. On command responsibility in general, see Yuval Shany and Keren Michaeli, *The Case against Ariel Sharon: Revisiting the Doctrine of Command Responsibility*, 34 N.Y.U. J. INT'L L. & POL. 797 (2002), at 816-867; Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 9 TULSA J. COMP. & INT'L L. 1 (2001).

29. Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90.

30. Yoram Dinstein, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT*, (2004), at 129-131.

31. Nils Melzer, *INTERPRETATIVE GUIDANCE OF THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* (2009), at 56-57.

32. For a more detailed application of this point, see *supra* note 22.

of their actions. In other words, the criminal trial would inquire whether the attackers asked themselves questions relating to proportionality. At the same time, low-ranking soldiers in the field engaged in military operations could, perhaps, rely on their knowledge that an effective review process exists in maintaining the reasonableness of their understanding that their actions were indeed proportional.

Conclusion

The main claim of this article is that the correct interpretation of the principle of proportionality should be a procedural one. In order for the actions of a military decision-maker to be legal, he must follow specific procedures. Once these procedures are followed, the commander is accorded the deference granted to any administrator.

However, the principle of proportionality is not the sole area of international law where procedures have

become important in IHL. Proportionality is only one example of the many norms of IHL that are ambiguous, and their interpretation is best understood as procedural. This bureaucratization of armed conflicts is indeed one of the main characteristics of modern warfare. In many areas of international law, targeting, investigations and precautions, to name just a few procedures, have become an extremely important part of the way modern armed forces fight. Legal scholarship, however, has hardly given these procedures any attention. In order to understand the modern law of war, we should focus more on these procedures: How should they be defined? Who should follow them? And what should be their goals? ■

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Pursuing the ICC Crime of Aggression: Law or Politics?

Geert-Jan Alexander Knoops

Introduction

As of 2017, there is a possibility that leaders of “aggressor states” – that acceded to the Rome Statute – will face a new type of prosecution before the International Criminal Court (“ICC”); that of the crime of aggression, which presumes an act of aggression. The definition of the crime of aggression was adopted during the 2010 review conference in Kampala (Uganda) and is defined in Article 8 *bis* of the Rome Statute, which will enter into force after at least 30 States Parties have ratified the amendments on the crime of aggression and after a separate decision is taken, no sooner than 2017, by the States Parties which will activate the Court’s jurisdiction.¹ The crime of aggression finds precedent in the crime against peace which was at the heart of the post-World War II prosecution of Nazi leaders before the International Military Tribunal (“IMT”) sitting at Nuremberg.² Yet, the crime of aggression under the ICC differs from its predecessor, both as to its definitional scope and as to its procedural mechanism for bringing this type of crime before the court. The crime of aggression requires an “act of aggression,” which is “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”³ Furthermore, the crime of aggression is a leadership crime, which means that the act of aggression must have been planned, prepared, initiated or executed, “by a person in a position effectively to exercise control over or to direct the political or military action of a State.”⁴

Some of these procedural thresholds inherently contain the danger of blurring the line between law and politics. An example thereof may be the gravity requirement under Article 17(1)(d) of the Rome Statute, reading that the Court shall declare a case inadmissible where: “The case is not of sufficient gravity to justify further action by the Court.”

This condition calls therefore for a determination by the ICC prosecutor of the gravity of a certain “act of aggression.” Which act of aggression may be “grave” enough to justify an ICC intervention? How is this to be ascertained? Is the firing of ten rounds of artillery fire by

the forces of state A on the territory of state B sufficient or should the amount necessary to meet the gravity threshold be 50 rounds? Is the destruction of a few buildings on the territory of a neighboring state absent human casualties an act of aggression? Is the entering by one of its naval vessels into the territorial waters of another state without approval such an act? The examples may be numerous; what they have in common is arbitrariness in terms of the answers. Moreover, neither the Statute nor the explanatory note to the text of Article 8 *bis* enlightens the potential causal relationship between this crime and the gravity threshold. The gravity threshold pertaining to war crimes appeared, though, in the *Mavi Marmara* case. On

November 6, 2014, the ICC Office of the Prosecutor (“OTP”) declined to open an investigation into the IDF’s interception of a humanitarian aid flotilla bound for Gaza Strip in May 2010, which resulted in the death of ten Turkish nationals. The OTP concluded that it was likely that war crimes had been committed, but that the crimes were of insufficient gravity to justify further action by the Court.⁵ The gravity threshold also raises the question as to whether its threshold of Article 17(1)(d) of the Rome Statute is to be subsumed by the definitional element of



1. Conditions for action by the ICC, The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, available at crimeofaggression.info/role-of-the-icc/conditions-for-action-by-the-icc/ (last visited Apr. 30, 2015).
2. Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARVARD INTERNATIONAL LAW JOURNAL 357 (2012).
3. Rome Statute of the International Criminal Court, Art. 8 *bis* (2).
4. *Id.*, Art. 8 *bis* (1).
5. Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, ICC Office of the Prosecutor, Nov. 6, 2011.

gravity of Article 8 *bis*? This article discerns the potential legal flaws that may be created by the newly invented crime of aggression and its consequences for state actors.

Procedural Mechanisms to Prosecute the Crime of Aggression

The existing referral mechanisms for the crimes within the jurisdiction of the Court do not apply equally to the crime of aggression. Crimes against humanity, war crimes and genocide may come within the purview of the ICC after a UN Security Council referral, after a State Party referral or at the Prosecutor's own initiative (*proprio motu*).⁶ The crime of aggression can be investigated and prosecuted following a UN Security Council referral. State Party referrals or *proprio motu* investigations require the consent of a State Party.⁷ This is the result of the Kampala review conference, where the delegates could not agree on a jurisdictional system for the crime of aggression similar to the other three crimes within the ICC's jurisdiction.

ICC States Parties have the possibility to "opt-out" the ICC's jurisdiction over the crime of aggression. Even though States Parties that have ratified the 1998-version of the Rome Statute accepted the ICC's jurisdiction over a yet to be defined notion of the crime of aggression,⁸ the possibility to opt-out was nevertheless introduced. States Parties may lodge a declaration thereto with the ICC Registrar.⁹

Another limitation pertaining to the crime of aggression is that the ICC cannot exercise jurisdiction over such a crime if states – both victim and aggressor – that are not party to the Rome Statute are involved. Moreover, if a victim state has ratified the amendments on the crime of aggression and has not opted out, while the aggressor state has ratified the amendments but opted out on the crime of aggression, the ICC cannot exercise jurisdiction. Conversely, if the victim state has not ratified the amendments, while the aggressor state has ratified the amendments and has not opted out, the ICC is allowed to exercise jurisdiction.¹⁰

As stated, the ICC may not exercise jurisdiction over the crime of aggression if the aggressor or victim state is a non-state party to the Rome Statute.¹¹ This differs from the jurisdictional regime for genocide, crimes against humanity and war crimes, as, according to Article 12(2), nationals of non-states parties may be prosecuted before the ICC if the said crimes have been committed on the territory of States Parties. Likewise, Article 12(3), which allows non-state parties to accept the ICC's jurisdiction on an ad hoc and case by case basis by lodging a declaration with the ICC registrar, does not apply to the crime of aggression.¹² These limitations on the jurisdictional system for the crime of aggression do not

apply in case of a UN Security Council referral.¹³

The crime of aggression is, by definition, a leadership crime. Article 8 *bis* criminalizes the "planning, preparation, initiation or execution" of an act of aggression. The liability modes encapsulated in Article 25, will be expanded with Article 25 (3)(*bis*), reading: "In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State."

This clause ensures that persons who "participate in the crime in a less direct manner, such as through aiding and abetting, will only be held responsible by the Court if they too fulfil the leadership requirement."¹⁴

Once all procedural mechanisms to prosecute the crime of aggression have been fulfilled, the ICC will have to determine the admissibility of a case. A crime will be declared inadmissible, if it is being or has been investigated or prosecuted at a national level, unless the national State is (or has been) "unwilling or unable to genuinely carry out the investigation or prosecution."¹⁵ Another requirement that has to be met in order to justify further action by the ICC is that the case must be of "sufficient gravity."¹⁶ This requirement also stems from the preamble to the Rome Statute proclaiming that "the most serious crimes of concern to the international community as a

6. *Supra* note 3, Art. 13 (a)-(c).

7. *Supra* note 3, Art. 15 *bis*; *supra* note 1.

8. *Supra* note 3, Art. 5(1) on "Crimes within the jurisdiction of the Court" reads that the Court has jurisdiction with respect to "the crime of aggression." Sub (2) provides that "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

9. *Supra* note 1.

10. *Id.*

11. Handbook Ratification and implementation of the Kampala amendments to the Rome Statute of the ICC, Liechtenstein Institute on Self-Determination, at 10, available at crimeofaggression.info/documents/1/handbook.pdf (last visited Apr. 30, 2015); *see also* Art. 15 *bis* (5).

12. *Id.*

13. *Id.* at 11.

14. *Id.* at 12.

15. *Supra* note 3, Art. 17(1)(a), (b) and (c).

16. *Supra* note 3, Art. 17(1)(d).

whole must not go unpunished.” What is “sufficient gravity”? How should this be determined?

The Interaction between Gravity and the Crime of Aggression

As noted, the act of aggression implicitly assumes a type of gravity by virtue of the term “a manifest violation of the Charter of the United Nations.” The maxim “manifest” suggests that the infraction has reached a certain level of gravity. This also follows from the preceding words “which by its character, **gravity**, and scale” (emphasis added). The precise level is, however, yet to be defined.

The inclusion of the crime of aggression within the jurisdictional and admissibility system of the ICC confronts the ICC Prosecutor with the gravity threshold of Article 17(1)(d), especially now that the word “gravity” is used in Article 8 *bis*. Hence, the crime of aggression – the contents of which are already vulnerable to political interpretative mechanisms – faces susceptibility to interpretation based on *realpolitik*.

Bearing in mind the quantitative and qualitative element of the “ordinary” gravity test under Article 17,¹⁷ it will be hard to draw clear lines where one “act of aggression” may meet these elements and another act does not fulfill them. The gravity test of Article 17 is also applicable to the other crimes within the Court’s jurisdiction; yet, the definitions of genocide, war crimes, and crimes against humanity do not include the word “gravity.” The definitions nevertheless include certain elements of gravity. Article 8(1), for example, stipulates that “the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes,” which is deemed to be the gravity element for war crimes.¹⁸ The ICC’s case law on gravity has outlined the contours of the gravity threshold *vis-à-vis* war crimes and crimes against humanity. It is yet to be determined whether gravity raises similar issues for the crime of aggression; however, when taking into account the potential diverging views as to what constitutes an act of aggression, it might become a point of concern.

A. Origin of the Gravity Threshold under the Rome Statute

The admissibility test under Article 17 – which must be fulfilled to have the Court operating complementary to national jurisdictions – includes the following criterion in Section (d): “The case is not of sufficient gravity to justify further action by the Court.”

The drafters of the Rome Statute left it open to the prosecution and ICC Pre-Trial Chamber to determine the

gravity on a case-by-case basis. Yet the contours of “gravity” were delineated by different Pre-Trial Chambers and the Appeals Chamber.

The concept of the gravity threshold arose during the debates concerning the jurisdiction of the Court. The countries involved in the drafting of the Statute were concerned that the ICC might become overburdened by “less serious crimes.”¹⁹ This led to the inclusion of the principle that the Court was “intended to exercise jurisdiction only over the most serious crimes of concern to the international community.”²⁰ The International Law Commission (“ILC”) drafters apparently made a distinction between the existence of jurisdiction and the actual exercise of jurisdiction, which could be limited by the gravity threshold.²¹

After receiving the ILC Draft Statute, the United Nations General Assembly established the ad hoc Committee on the Establishment of an International Criminal Court. During the meetings of the ad hoc Committee, the subject-matter jurisdiction of the ICC was limited to a few “core crimes.” The gravity threshold as proposed by the ILC continued to receive broad support.²² The principle of a gravity threshold was maintained by the Preparatory Committee during the remainder of the negotiation process.²³ Article 17(1)(d) of the Rome Statute is nearly identical to the language of Article 35 of the Draft Statute of the ILC.²⁴ As concluded by several scholars: “the Statute

17. See, for example, *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, Pre-Trial Chamber I, Case No. ICC-02/05-02/09, 8 Feb. 2014, at 30.

18. *Supra* note 3, Art. 8(1); *supra* note 5, at 137.

19. ILC 44th Session Report, A/47/10 (1992), at 66, 58 (“In the case of some conventions defining offences which are frequently committed and very broad in scope, it may be necessary to limit further the range of offences which fall within the court’s jurisdiction *ratione materiae*. Otherwise there may be a risk of the court being overwhelmed with less serious cases, whereas it is intended that it should only exercise jurisdiction over the most serious offences, namely those which themselves have an international character.”)

20. Yearbook of the ILC, Report of the Commission to the General Assembly on the work of its forty-sixth session, A/CN.4/SER.A/1994/Add.1 (Part 2).

21. Susana SáCouto and Katherine A. Cleary, *The Gravity Threshold of the International Criminal Court*, 23 AMERICAN J. OF INT’L LAW 5, 807 (2008), at 820.

22. *Id.* at 821.

23. *Id.* at 822.

24. *Id.*

has always had threaded through it the idea of gravity – that the Court should hear only the most serious cases of truly international concern.”²⁵

However, neither the Rome Statute nor the Rules of Procedure and Evidence (“RPE”) define the principle of gravity; yet, in its case law, the Court has delineated the contours of the gravity threshold.

B. ICC Case Law on Gravity

The first interpretation of the gravity threshold of the International Criminal Court was given by the Pre-Trial Chamber I (“PTC I”) in the case of Mr. Lubanga Dyilo. PTC I held that it was necessary to discuss the admissibility of a case at the stage of the issuance of the arrest warrants, for which reason the gravity threshold was also applied to the case.²⁶

Lubanga was charged with enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities and with a pattern of enlisting and conscripting children under the age of fifteen.²⁷

PTC I determined three components of the gravity threshold. Firstly, the conduct which is the subject of the case must be either systematic (pattern of incidents) or large-scale.²⁸ Isolated instances of criminal activity are insufficient to meet the gravity threshold. Secondly, when assessing the gravity of the conduct, the Pre-Trial Chamber also needs to consider the social alarm such conduct causes in the international community.²⁹ Thirdly, the gravity threshold is intended to ensure that only the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court are prosecuted by the ICC.³⁰

The Appeals Chamber rejected the three-prong test for the gravity threshold of PTC I. Firstly, the Appeals Chamber held that the conduct does not need to be systematic or large-scale, as this requirement would blur the line between the specific requirements for the crimes and the gravity threshold.³¹ Secondly, the notion of a social alarm would be too subjective in practice. Thirdly, limiting the admissibility of cases to the most responsible senior leaders would undermine deterrence.³² Judge Pikis wrote a separate and partly dissenting opinion, contending that the gravity threshold for admissibility should be interpreted very narrowly, such that only the most insignificant war crimes are excluded.³³

After the Appeals Chamber decision, the gravity threshold did not receive serious consideration for several years. In the Confirmation of Charges Decision in the case of *Abu Garda*, the PTC confirmed the charges against him; whilst the gravity threshold was debated again. In this case, PTC I took a quite flexible approach to the gravity

threshold. PTC I held that the gravity of crimes should be assessed according to both quantitative and qualitative factors.³⁴ The quantitative element refers to the sheer number of victims and the qualitative element concerns the “issues of nature, manner and impact” of the crimes.³⁵ The quantitative analysis takes place by “considering the number of victims.”³⁶

In the case of *Abu Garda*, the Prosecutor held that *Abu Garda* was individually criminally responsible as a co-perpetrator or as an indirect co-perpetrator for the killing of twelve African Union Mission in Sudan (“AMIS”) peacekeeping personnel and the attempted killing of eight AMIS peacekeeping personnel. According to the Prosecutor, the fact that the attacks were directed at peacekeeping personnel that were not taking an active part in the hostilities, was an aggravating factor. In the end, the Pre-Trial Chamber did not confirm the charges against Mr. Garda due to a lack of evidence.

The qualitative component was explained in light of the Rules of Procedure and Evidence, which considers “the extent of damage caused, in particular, the harm

25. Leila Nadya Sadat and S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEORGETOWN L. J. (2000), at 419.

26. Situation in the Democratic Republic of Congo in the case of *Prosecutor v. Lubanga Dyilo*, Decision Concerning Pre-Trial Chamber I’s Decision of 10 Feb. 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Pre-Trial Chamber I, Case No. ICC-01/04-01/06, Feb. 24, 2006.

27. Situation in the Democratic Republic of Congo in the case of *Prosecutor v. Lubanga Dyilo*, Document Containing the Charges, Article 61(3)(a), Pre-Trial Chamber I, Case No. ICC-01/04-01/06, Aug. 28, 2006, at 25-40.

28. *Supra* note 26, at 46.

29. *Id.* at 46.

30. *Id.* at 50.

31. Situation in the Democratic Republic of Congo, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled - Decision on the Prosecutor’s Application for Warrants of Arrest, Appeals Chamber, Case No. ICC-01/04-169, July 13, 2006, at 72.

32. *Id.* at 73-79.

33. Margaret M. DeGuzman, *The International Criminal Court’s Gravity Jurisprudence at Ten*, 12 GLOBAL STUDIES L. REV. 475, (2013), at 480.

34. *Supra* note 17, at 30.

35. *Id.* at 31.

36. *Id.*

caused to victims and their families, the nature of the unlawful behavior and the means employed to execute the crime.”³⁷ This flexible concept of the gravity threshold suggests that a case can easily be admitted to the jurisdiction of the Court.

When the Prosecutor requested the Court’s authorization to start an investigation into the situation of Kenya, PTC II was again called upon to apply the gravity threshold. PTC II held that the gravity threshold means that a case requires something additional to the gravity inherent in the crimes within the jurisdiction of the Court, to prevent “peripheral cases” from being brought before the Court.³⁸ PTC II furthermore held that it should not only evaluate whether a situation meets the gravity threshold but should also decide whether a particular **case** that arises from a **situation** meets the gravity threshold.³⁹ Lastly, PTC II developed a two-prong test to decide whether a case could meet the gravity threshold. The first prong was rather similar to the test developed in the *Abu Garda* case and was based on weighing the quantitative and qualitative components of the case.⁴⁰ The qualitative dimension concerns not the number of victims but rather the existence of some aggravating or qualitative factors attached to the commission of the crimes, which would make the crimes grave.⁴¹ The second prong encompasses the question whether the individuals investigated in the situation included those who bear the greatest responsibility for the alleged crimes.⁴² Factors that are “of relevance” to the qualitative dimension of the gravity assessment “are listed in rule 145(1)(c) of the Rules, relating to the determination of sentence,” such as “the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime.”⁴³

On the basis of the above-mentioned cases, one can conclude that the assessment of the gravity of a case requires a two-prong test. The Pre-Trial Chamber should examine the quantitative as well as the qualitative components of the case, while additionally, the accused should be the one who bears the most responsibility for the crimes committed.

C. Assessing the Gravity of Aggression

In the Rome Statute, the crime of aggression is defined as the “planning, preparation, initiation or execution ... of an act of aggression.”⁴⁴ Such an act of aggression must “by its character, gravity and scale” constitute a manifest violation of the UN Charter.⁴⁵ If the UN Security Council refers a particular act of aggression to the ICC, it seems that, by definition, the “gravity” element has already been taken into consideration. The Understandings drafted by the Special Working Group on the Crime of Aggression

attached to the amendments on the crime of aggression state:

It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.⁴⁶

The ICC judge, who has to determine the admissibility of a case under Article 17(1)(d), seems confronted with a *fait accompli*, as the gravity element of an act of aggression will have been assessed by the Security Council prior to referring it to the ICC. Only in cases of a grave violation with serious consequences will the illegal use of force amount to aggression.⁴⁷ It will not be easy for a bench to depart from the UN Security Council’s determination by declaring the case inadmissible because the gravity threshold is not met. This would mean that the defense is *de facto* barred from pursuing one of the legal avenues within the Rome Statute system, namely to challenge the admissibility of a case. On the other hand, Articles 15 *bis* (9) and 15 *ter* (4) indirectly stipulate that any determination by the UN Security Council is not binding on the ICC judges.

37. Rules of Procedures and Evidence of the ICC, Rule 145(1) (c).

38. Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in the Situation of Kenya, Pre-Trial Chamber II, Case No. ICC-01/09, March 31, 2010, at 56.

39. *Id.* at 58.

40. *Id.* at 62.

41. *Id.*

42. *Id.* at 60.

43. *Id.* at 32.

44. *Supra* note 3, Art. 8 *bis*.

45. *Id.* Art. 8 *bis*.

46. Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, Resolution RC/Res.6, Annex III, June 11, 2010.

47. See also Dapo Akande, *What Exactly Was Agreed in Kampala on the Crime of Aggression?* EJIL: Talk, June 21, 2010, available at <http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> (last visited Apr. 30, 2015).

Another problem surfaces when the ICC prosecutor deems the particular situation of insufficient gravity to pursue it before the ICC. Is the particular “victim” State Party empowered to prosecute the leader of the “aggressor state” before its domestic courts? Or *vice versa*: is the “victim State Party” authorized to prosecute a leader of an “aggressor state” domestically, averring that it is able and willing to do so? Does international criminal law not enter into the obscure world of politics instead of law? Or, what if the judge declares a case inadmissible? This would leave the prosecution of the crime of aggression up to national jurisdictions. This might be problematic, because the crime of aggression is, by definition, a leadership crime. If one state prosecutes the political leader of another state, it will automatically judge upon the other state’s policy.

In conclusion, it can be said that the ICC jurisprudence on gravity (see Section B above) will most likely play an important role when the provision on the crime of aggression enters into force, particularly now that Article 8 *bis* directly refers to “gravity.”

D. Aggression and Warfare

The crime of aggression may elevate international criminal law to the diffuseness of the distinction between wars of self-defense and wars of aggression. For one state, a certain armed intervention is perceived as self-defense, whilst for the other state the same act or operation will qualify as aggression. The same holds true for other justified uses of force, such as, for example, humanitarian intervention, anticipatory self-defense (although the legality thereof is subject to discussion), reprisals, protection of nationals abroad, and defense against non-state actors.

The 1998 bombing of the Sudanese pharmaceutical factory (al-Shifa) by the U.S. was justified by reasons of self-defense pertaining to the attack on two U.S. embassies in Nairobi and Dar es Salaam (Tanzania), whereby 224 people were killed and more than 4500 wounded.⁴⁸ The U.S. held Osama Bin Laden responsible for the embassy bombings and decided to launch missiles on installations said to be part of Osama Bin Laden’s infrastructure in Afghanistan. One of the targets was the al-Shifa factory in Sudan, which, according to the U.S., produced chemical weapons as part of Osama Bin Laden’s infrastructure of international terrorism.⁴⁹ The al-Shifa factory was totally destroyed; twelve workers were killed in the attack, and two nearby food processing factories were damaged.⁵⁰ As soon as it became apparent that the U.S. was mistaken about the factory’s activities, the U.S. raised several claims to justify the attack, such as:

The al-Shifa plant was making precursors to the VX nerve gas, namely a compound

known as Empta; that the al-Shifa factory did not produce any medicines or drugs; that the al-Shifa factory was a high security facility guarded by the Sudanese military; and that there were weapons of mass destruction technology links between Sudan and Iraq.⁵¹

The U.S. claimed that it had acted out of self-defense. The British Prime Minister, Tony Blair, backed this claim, stating that: “A country like the United States, when its citizens are under attack in this way and when they are at risk, must have the right to defend itself and we support our allies in this cause.”⁵²

Sudan perceived this act of “self-defense” as an “act of aggression.” Several hours after the attack, President Omar al Bashir of Sudan announced that the government of Sudan would file an official complaint against the U.S. before the UN Security Council, and that he would ask the Council to establish a commission to “verify the nature of the activity of the plant.”⁵³

The German Ambassador to Sudan, Werner Daum, condemned the U.S. attacks, stating that: “One can’t, even if one wants to, describe the Shifa firm as a chemical factory.”⁵⁴ The Associated Press reported: “There are no signs of secrecy at the plant. Two prominent signs along the road point to the factory, and foreigners have been

48. James Astill, *Strike One*, THE GUARDIAN, Oct. 2, 2001, available at www.theguardian.com/world/2001/oct/02/afghanistan.terrorism3 (last visited Apr. 30, 2015); 1998 U.S. Embassies in Africa Bombing: Fast Facts, CNN, Oct. 6, 2013, available at edition.cnn.com/2013/10/06/world/africa/africa-embassy-bombings-fast-facts/ (last visited Apr. 30, 2015).

49. The Al-Shifa bombing: September 1998 “Confused, inconclusive and contradictory”: An assessment and analysis of the American Government’s “Evidence” for the cruise missile attack on Sudan, The European Sudanese Public Affairs Council, Sep. 1998, available at www.espac.org/al_shifa_pages/al-shifa_1.asp (last visited Apr. 30, 2015).

50. *Id.*

51. American claims about the Al-Shifa factory put to the test, The European Sudanese Public Affairs Council, 1998, at 1, available at www.espac.org/pdf/4%20alshifa%204.pdf (last visited Apr. 30, 2015).

52. *Supra* note 49, at 26.

53. *Id.*

allowed to visit the site at all hours.”⁵⁵

The attack on the al-Shifa factory is not the only example where an act would be determined as an “act of aggression” by one state, while the other state would qualify it as the legitimate resort to armed force. What to think of, for example, the 1976 Entebbe raid by Israeli special forces which led to the rescue of 102 hostages, but also resulted in the death of all the hijackers, 45 Ugandans and three hostages. Several members of the United Nations Security Council, including the Soviet Union, condemned the operation as being an act of aggression.⁵⁶ Furthermore, the U.S. intervention in Iraq in 2003, without UN Security Council approval, triggered the same discussion. The U.S. claimed that Saddam Hussein had weapons of mass destruction; yet, these were never found. Similarly, the NATO intervention in Kosovo in 1999, which supposedly prevented a “humanitarian catastrophe,” was conducted without UN Security Council approval.

Most recently, the ICC OTP, on November 6, 2014, declined to open an official investigation into the May 31, 2010 interception of a humanitarian aid flotilla bound for Gaza strip.⁵⁷ Six vessels in the flotilla were boarded and taken over by the IDF. The operation resulted in the death of ten Turkish nationals, all passengers of the Mavi Marmara.⁵⁸ Three of the eight vessels in the flotilla were registered in States that were a party to the Rome Statute, namely the Union of the Comoros (the Mavi Marmara), Cambodia (the Rachel Corrie) and Greece (the Eleftherie Mesogios Sofia). On May 14, 2013, the OTP received a referral on behalf of the Union of the Comoros, which led to a preliminary investigation. Importantly, the OTP, despite its conclusion that there was a reasonable basis to believe that war crimes under the jurisdiction of the ICC were committed on the Mavi Marmara (when the IDF intercepted the flotilla), held that: “the potential cases that would likely arise from an investigation of the situation concerning the flotilla incident would not meet the required gravity threshold, pursuant to article 17(1) (d) of the Statute.”⁵⁹

The OTP emphasized that the assessment of complementarity and gravity shall take place “in relation to the most serious crimes alleged and as a rule, to those who appear to bear the greatest responsibility for those crimes within the context of potential cases that are likely to arise from an investigation of the situation.”⁶⁰ Any crime that falls within the Court’s jurisdiction is serious, but the determinative criterion is whether it is of sufficient gravity to justify further action. The PTC I has determined that the single fact that a case addresses “one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.”⁶¹ As noted, the potential cases that would arise from an

investigation into the situation, form part of the gravity test.⁶²

The Mavi Marmara incident also illustrates the divergent views on an “act of aggression.” After the attack, the Turkish Foreign Minister proclaimed that “Israel has once again clearly demonstrated that it does not value human lives and peaceful initiatives through targeting innocent civilians” and called upon the UN Security Council to condemn Israel’s “act of aggression.”⁶³ Prime Minister of Israel Benjamin Netanyahu, on the other hand, called the incident a “clear case of self-defense” and said that the State of Israel was the victim of international hypocrisy.⁶⁴

In most cases, the UN Security Council will be endowed with the task to determine whether an act of aggression took place. It is unlikely that permanent members, such as the U.S., Russia or China would ever qualify one of its own acts or one of the acts of its allies as an act of aggression.

54. *Supra* note 51, at 8.

55. *Questions Remain, but Some Sudanese Claims on Factory Prove True*, BOCA RATON NEWS, Aug. 24, 1998, available at news.google.com/newspapers?nid=1291&dat=19980824&id=x0FUAAAAIBAJ&sjid=XI4DAAAIBAJ&pg=6673,2488632 (last visited Apr. 30, 2015).

56. Excerpts from United Nations Security Council Debate on the Entebbe Incident, 13 UN Monthly Chronicle (August-September 1976), available at www.tjls.edu/slomansonb/Entebbe.html (last visited Apr. 30, 2015).

57. *Supra* note 5.

58. *Id.* executive summary, at 12.

59. *Id.* at 148.

60. *Id.* at 133; *supra* note 3, preamble at 4, Arts. 1 and 5.

61. *Id.* at 134; Situation in Darfur, Sudan, *The Prosecutor v. Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, Feb. 8, 2010, at 30.

62. *Supra* note 5, at 134.

63. Carol Migdalovitz, *Israel’s Blockade of Gaza, the Mavi Marmara Incident, and Its Aftermath*, CONGRESSIONAL RESEARCH SERVICE, June 23, 2010, at 5 referring to: Turkish Minister Speaks at the UN Security Council, (text) Anatolia, May 31, 2010, Open Source Center Document GMP20100601017001.

64. Barak Ravid, *Netanyahu: Raid on Gaza flotilla was necessary to protect Israel*, HAARETZ, Jan. 23, 2011, available at www.haaretz.com/news/diplomacy-defense/netanyahu-raid-on-gaza-flotilla-was-necessary-to-protect-israel-1.338760 (last visited Apr. 30, 2015); We face international hypocrisy, The JERUSALEM POST, Feb. 6, 2010, available at www.jpost.com/Home/We-face-international-hypocrisy (last visited Apr. 30, 2015).

The Future of the Crime of Aggression

With the creation of the ICC crime of aggression, the ICC drafters pursued their goal to end impunity of military and political leaders for international crimes. Yet, it can be questioned whether this goal is not overstretched with the advent of this new crime. Both the substantive elements of the crime of aggression and the underlying procedural implications introduce the risk of politicizing the Court. This might discourage States Parties to ratify the particular amendment, or it might lead them to sign an opt-out agreement, which would make the amendment redundant.

One solution could have been to leave the triggering of the Court's jurisdiction thereto solely in the hands of the Security Council, abstracting it from the interpretative powers of the prosecutor.

On the other hand, this would attribute a political organ of the UN with the powers to ultimately act as a "prosecutor." The other solution is to delete the crime of aggression from the Rome Statute on the basis of the argument that the legal flaws this crime introduces outweigh its potential goal.

The behavior of states in terms of political feasibility – no matter how desirable it may be – is not to be ascertained by international criminal law once the legal deficiencies of such supervision are shown to potentially weaken the system.

In fact, it is hard to argue that the "crime of aggression" is an individual crime; rather it is artificial to construe the crime of aggression of an individual leader through

the notion of an act of aggression which is to be performed by a state. In fact, an act of aggression most often reflects a state policy so that the crime of aggression is de facto nothing more than a "crime" of the state. As states cannot be prosecuted for international crimes before the ICC, the construction of the crime of aggression raises the question whether dogmatically this crime puts state action per se before the Court through a prosecution of one of its individual "leaders."

The ICC was designed to hold individuals criminally accountable for the most heinous crimes of concern to the international community. Yet, is it possible to hold individuals accountable for the acts of a state? Is an individual – albeit being a leader – able to direct the acts of a state? What about the geopolitical playing field? This will certainly not always be within the powers of an individual. It seems, though, that this may be reversed to the detriment of the individual once he or she is charged with the ICC crime of aggression. This dogmatically rather ambiguous situation may complicate an ICC prosecution for the crime of aggression, once an act of aggression has been determined. ■

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Operation Protective Edge: The Legal Campaign

Pnina Sharvit Baruch

Operation Protective Edge, the moniker given to the latest round of fighting between Israel and Hamas in the Gaza Strip, ended more than six months ago. However, the only thing that ended was the actual fighting on the battlefield. On July 23, 2014, while the Operation was still underway, the United Nations Human Rights Council established an international commission of inquiry to investigate violations of the law of armed conflict and human rights law during the campaign.¹ Another separate board of inquiry was established by the UN Secretary General to examine the damage to UN facilities located in Gaza during the Operation.² Moreover, the Prosecutor of the International Criminal Court has opened a preliminary examination into alleged war crimes committed in the Palestinian territories since June 13, 2014.³ Thus, while at this stage the military campaign has ended, the legal battle over Operation Protective Edge is only just beginning.



Did Israel commit war crimes? Should Israel be worried by these various investigations, examinations and reports? The answer to the first question does not necessarily answer the second. The reason is that even if Israel acted in accordance with the law—hence did not commit any war crimes—its actions still might be subject to *allegations* of wrongdoing. These might be based on both legal and factual arguments, as will be explained below. Furthermore, on the diplomatic front, even actions which any honest legal expert would define as legal – might still be considered illegitimate by parts of the international community.

The General Legal Framework

International law regulates the conduct of hostilities through the Laws of Armed Conflict (LOAC), also known as International Humanitarian Law (IHL). These rules are relevant to the conflict between Israel and Hamas, whether it is viewed as an international or as a non-international armed conflict. At the outset, it is important to note that while there is no doubt that Hamas' intentional and indiscriminate rocket fire at Israel's civilian population

and its use of Palestinian civilians as human shields are indisputable war crimes,⁴ this does not lessen Israel's obligation to adhere to the law. Israel remains obligated to abide by the laws of armed conflict even when the other side does not.

The laws of armed conflict are based on a number of fundamental principles. The most pertinent ones for purposes of this article are *distinction* and *proportionality*. There is an inherent difficulty in applying these principles in conflicts where one side is a non-state actor (like Hamas), whose fighting forces do not distinguish themselves from the civilian population and whose entire military structure and activity is carried out from within densely populated civilian areas. This difficulty does not relieve a state of its obligation to adhere to these principles, but it should be borne in mind when analyzing its actions and evaluating their legality.

1. Human Rights Council Res. 21/1, U.N. Doc. A/HRC/RES/S-21/1 (July 24, 2014), Art. 13, available at www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session21/Pages/21stSpecialSession.aspx (last visited Apr. 12, 2015).
2. See the statement attributable to the Spokesman for the Secretary-General on the Gaza Board of Inquiry, available at www.un.org/sg/statements/index.asp?nid=8179 (last visited Apr. 12, 2015).
3. Press Release, ICC, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine (Jan. 15, 2015), available at www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx (last visited Apr. 12, 2015).
4. A fact acknowledged also by human rights NGOs, such as Amnesty International; see Amnesty Int'l, *Unlawful and Deadly: rocket and mortar attacks by Palestinian armed groups during the 2014 Gaza/Israel conflict* (2015), available at www.amnesty.org/en/documents/mde21/1178/2015/en/ (last visited Apr. 12, 2015).

The Principle of Distinction

According to the principle of distinction, military attacks are to be directed only at military objectives and enemy combatants (including civilians taking a direct part in hostilities), and targeting civilians or civilian objects is prohibited.⁵

Distinction - Persons

The principle of distinction raises a number of complex legal questions when confronting a non-state actor. For instance, there is a debate whether those fighting on behalf of a non-state actor should be considered as “combatants” or as “civilians,” who can be targeted only if, and for such time as, they are taking direct part in hostilities. Today the leading opinion, acknowledged also by the International Committee of the Red Cross (the ICRC), is that non-state actors can indeed have “armed forces,” the members of which are considered combatants for targeting purposes.⁶ Questions still remain as to who within the organized armed group of the non-state party is considered a member of the armed forces of that party, and whether a direct link to actual fighting is necessary. There has been extensive debate on these issues. Interestingly, most legal experts with backgrounds as military lawyers tend to have similar opinions in this regard, while academics and human rights lawyers usually share a different point of view. Accordingly, there might be certain persons—for example members of an organized armed group who have supporting roles, such as training or providing logistical support – who would be viewed by the Israel Defense Forces (IDF) (and many other Western military forces) as members of the armed forces of the enemy and thus lawful targets for attack. Others, however, might regard them as civilians who may not be targeted.⁷

The factual aspect of the principle of distinction is even more complicated, especially when analyzed *ex post facto*. How does one assess after the fighting has ceased whether someone killed or injured was a combatant or a civilian directly participating in hostilities and therefore a lawful target, or a civilian who was forbidden to target? Hamas fighters, as is common with other armed forces belonging to non-state actors, do not usually fight in uniform or otherwise distinguish themselves from civilians. This explains why the number of civilian casualties in Operation Protective Edge (as was the case also with previous rounds of fighting) proves so highly controversial. Israel estimates that approximately 50% of all casualties were civilians, while the United Nations and some Palestinian and human rights NGOs estimate that number to be closer to two-thirds.⁸ In an attempt to clarify the discrepancies, the Israel-based Intelligence and Terrorism Information Center (ITIC) has initiated a process to examine the names of the

Palestinians killed in Operation Protective Edge. Their goal is to determine which of the fatalities were affiliated with Hamas (and the other armed groups) and which were not, and to then examine the ratio between them. Even this in-depth research, however, will be unable to reveal if someone was a non-involved civilian who took direct part in hostilities prior to being killed. That said, the findings of their investigation as of this writing (based on an examination of approximately 61% of the names of the deceased) suggest that fatalities affiliated with the

5. Additional Protocol I to the Geneva Conventions of 1977, (hereinafter the Protocol), Art. 48. *See also* Art. 51(2) of the Protocol. The State of Israel is not a party to the Protocol, but insofar as these provisions reflect customary international law, they also apply to it. Any provisions quoted in this article are considered customary law.
6. These questions were explored by a team of legal experts convened by the International Committee of the Red Cross, who subsequently published its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (May 2009), available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (last visited Apr. 12, 2015).
7. For the different opinions, *see* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697 (2010), available at nyujilp.org/wp-content/uploads/2012/04/42.3-Schmitt.pdf (last visited Apr. 12, 2015); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010), available at nyujilp.org/wp-content/uploads/2012/04/42.3-Parks.pdf (last visited Apr. 12, 2015); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641 (2010), available at nyujilp.org/wp-content/uploads/2012/04/42.3-Watkin.pdf (last visited Apr. 12, 2015); Bill Boothby, "And for Such Time As": The Time Dimension to Direct Participation in Hostilities, 42 N.Y.U. J. INT'L L. & POL. 741 (2010), available at nyujilp.org/wp-content/uploads/2012/04/42.3-Boothby.pdf (last visited Apr. 12, 2015); Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831 (2010), available at nyujilp.org/wp-content/uploads/2012/04/42.3-Melzer.pdf (last visited Apr. 12, 2015).
8. *See* Anthony Reuben, *Caution needed with Gaza casualties figures*, BBC NEWS Aug. 11, 2014, available at www.bbc.com/news/world-middle-east-28688179 (last visited Apr. 12, 2015).

organizations (i.e. Hamas, Palestinian Islamic Jihad and others) constitute approximately 49% of the names that have been identified, and non-involved civilians constitute approximately 51%. (This ratio may vary in the future.)⁹

Distinction - Objects

As far as objects are concerned, according to the principle of distinction, military objectives may be the target of an attack, while it is forbidden to intentionally target civilian objects. The laws of armed conflict do acknowledge, however, that civilian objects lose their immunity from attack and become legitimate military targets if "by their nature, location, purpose or use" they make an effective contribution to military action and their destruction offers a definite military advantage.¹⁰ During Operation Protective Edge, many seemingly civilian objects were targeted, including private houses, schools, mosques and so on. In order for attacks on these objects to be legal, they must have served a military-related function and be used, for example, as command and control posts, weapons storehouses, firing posts, or hiding places for Hamas operatives. There might be some legal dilemmas about the classification of certain objects as a military objective, for example, objects that contribute to the military capabilities of the enemy, but are not directly linked to the fighting.¹¹

However, the main problem faced by Israel in this regard concerns the factual aspect. The determination that an object is a military objective that can be targeted is made on the basis of intelligence and/or real-time assessment (for example when a rocket has been fired from a certain location). It is very difficult to prove, after the fact, that objects were indeed used for military purposes. Revealing intelligence to do so might lead to the loss of capabilities or to the exposure of human sources.¹² And if the basis for attack was a real-time assessment that a certain civilian object was used for military purposes, how can one prove this so long after the fact and at the time of the examination? The Goldstone Report,¹³ which followed Operation Cast Lead in 2009, is a telling example. By the time the commission of inquiry visited Gaza, the fighting had ended and all that remained was destruction and damage to what were apparently civilian objects. The military use of these objects was impossible to see or determine *ex post facto*. The commission, basing itself on the testimonies of residents of the Gaza Strip (given in the presence of Hamas representatives), who claimed that no military activities took place from their property, concluded that Israeli attacks were aimed at purely civilian locations, therefore amounting to a war crime of intentionally attacking civilian objects.¹⁴ It is unknown whether a similar analysis will follow Operation Protective

Edge. Hopefully those investigating and analyzing this operation will not disregard the fact that Israel was under a constant barrage of over 4500 rockets and mortars for over 50 days, all emanating from the densely populated civilian areas of the Gaza Strip. This means that, at the

9. Examination of the names of Palestinians killed in Operation Protective Edge - Part Ten, The Meir Amit Intelligence and Terrorism Information Center (Feb. 19, 2015), available at www.terrorism-info.org.il/Data/articles/Art_20774/E_020_15_614553775.pdf (last visited Apr. 12, 2015).
10. Art. 52(2) of the Protocol.
11. This might also be linked to the controversy over war sustaining objectives. See analysis in report of Expert Meeting "Targeting Military Objectives," University Center for International Humanitarian Law, Geneva (May 12, 2005), available at www.geneva-academy.ch/docs/expert-meetings/2005/1rapport_objectif_militaire.pdf (last visited Apr. 12, 2015), and in Agnieszka Jachec-Neale, *THE CONCEPT OF MILITARY OBJECTIVES IN INTERNATIONAL LAW AND TARGETING PRACTICE* (2015) 82-100.
12. A tragic demonstration of this danger is the fact that after Operation Protective Edge, Hamas summarily executed suspected collaborators, see: Hamas kills 21 suspected informers, *THE GUARDIAN*, Aug. 22, 2014), available at www.theguardian.com/world/2014/aug/22/hamas-executes-suspected-infomers-gaza (last visited Apr. 12, 2015); Hamas executes suspected collaborators, Israel Ministry of Foreign Affairs (Aug. 24, 2014), available at mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/Hamas-executes-suspected-collaborators-24-Aug-2014.aspx (last visited Apr. 12, 2015).
13. Rep. of the U.N. Fact-Finding Committee on the Gaza Conflict, Hum. Rts. Council, U.N. Doc. A/HRC/12/48 (Sep. 25, 2009), (hereinafter "The Goldstone Report").
14. *Id.*, at paras. 1883-1884. It should be mentioned that the Goldstone Report went even further to make the scandalous accusation that Operation "Cast Lead" was based on an intentional policy directed against the people of Gaza, with the aim of punishing them for their apparent support for Hamas. For critiques of the Goldstone Report see: Laurie R. Blank, Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare, 43 CASE W. RES. J. INT'L L. 283 (2010); Laurie R. Blank, The Application of IHL in the Goldstone Report: A Critical Commentary, 12 Y.B. OF INT'L HUM. L. 347 (2009); Israel Ministry of Foreign Affairs, The Goldstone Report: Articles from the World Press, available at www.mfa.gov.il/MFA/ForeignPolicy/Terrorism/GazaFacts/Pages/The-Goldstone-Report-Articles-world-press.aspx (last visited Apr. 12, 2015).

very least, all such launching sites used by Hamas and the other armed groups operating in Gaza were military objectives that could have been lawfully attacked, even if it is difficult to identify them as such after the fact.

The Principle of Proportionality

In order for an attack to be considered legal, it is not sufficient that it comply solely with the principle of distinction. It must also comply with the principle of proportionality, which prohibits an attack expected to cause collateral damage to civilians and civilian objects that will be excessive compared to the direct and concrete military advantage anticipated.¹⁵ In other words, to satisfy the principle of proportionality, the expected military advantage from an attack must be assessed and then balanced against the anticipated harm to civilians and civilian objects. There are no precise formulas for determining what is considered proportionate. The laws of armed conflict state that the standard is that of a “reasonable military commander.”¹⁶ It is also acknowledged that the examination should be conducted on the basis of the *information in the commander’s possession at the time the decision to attack is made*, while also taking into account the uncertainty that exists in combat, and not based on the actual result.¹⁷

Military commanders are under a legal obligation to take precautions to evaluate the extent of the damage anticipated from a planned attack, but the laws of armed conflict recognize that these must be measures that are feasible under the particular circumstances.¹⁸ Therefore, before executing a pre-planned attack against a known military target, a more thorough evaluation of the anticipated collateral damage is required than prior to carrying out an urgent and immediate strike. It is also self-evident that the intelligence possessed by ground forces is more limited and uncertain, thus they usually cannot be expected to conduct an analysis of the potential collateral damage on the same level as the commanders at the headquarter level.

The laws of armed conflict recognize that an attack that results in harm to civilians could be considered lawful as long as the harm is proportionate when compared to the military advantage or if the actual harm was unexpected. In other words, there is no legal requirement to completely avoid harm to civilians. Nevertheless, in recent decades, there has been a spillover of perceptions originating in human rights law to the analysis of situations or armed conflict (in particular, when the examination is conducted by human rights institutions). In the world of human rights law—a body of law that was developed to govern situations of law enforcement, and not armed conflict—civilian casualties should be

completely avoided (except in very rare situations). In other words, under the human rights law paradigm, lethal force should only be used as a last resort. Thus, under the human rights paradigm, when a civilian is killed, the first assumption is that a prohibited action has taken place that requires a criminal investigation.¹⁹ This standard, however noble, is divorced from the realities of warfare, which involves high levels of lethal force employed in confusing, shifting and often life-threatening circumstances. Furthermore, in armed conflict, using force in the first instance is the accepted norm. Accordingly, the laws of armed conflict, while requiring combatants to take all feasible precautions to avoid or minimize harm to civilians and civilian objects, do acknowledge that such harm might be inevitable and lawful.

In addition to the different legal concepts applied, human rights institutions also tend to deal with the facts

15. Art. 51(5)(b) of the Protocol. *See also* Art. 57(2)(a)(iii) and Art. 57(2)(b) of the Protocol.

16. ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (2008), para. 50, available at www.icty.org/sid/10052 (last visited Apr. 12, 2015).

17. ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. II: Practice, (Jean-Marie Henckaerts and Louise Doswald-Beck, eds., 2005), Ch. 4, para. 195 (noting Austria’s statement that “with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative” for judging proportionality in attack) (emphasis added). Numerous other states have made similar declarations. *See id.* paras. 196-205. As Germany stated forcefully, “the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight.” *Id.* para. 199 (emphasis added).

18. Art. 57 of the Protocol.

19. On this matter, *see* The Public Commission to Examine the Maritime Incident of May 31, 2010 (Second Report – The Turkel Commission), *Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict according to International Law* (henceforth: the second Turkel report), Chap. A, Sec. D, The Grounds for Carrying Out the Obligation to Examine and Investigate (“When to Investigate?”), at 91-96, available at www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website%20-%20hebrew.pdf (last visited Apr. 12, 2015).

of a particular situation in a manner that does not coincide with situations of armed conflict. Investigations based on human rights law and performed by human rights professionals often judge situations according to the results and thus reject claims that the damage was unanticipated or the result of an error.²⁰ However, mistakes do happen. For example, mistakes could be made with regard to the nature of the target – erroneously identifying a person or an object as a lawful military target. There could also be a mistake made in estimating the level of collateral damage anticipated from the attack – being unaware of the presence of civilians or miscalculating the impact of the particular weapon used. Mistakes can also happen during the execution of the attack, such as hitting the wrong target. These are only some examples. The advanced technological precision capabilities of the IDF (and other western militaries) tend to create the illusion that Israel will not make errors and that any results to the contrary are therefore intentional. This notion disregards the inherent uncertainties of situations of armed conflict, which also affect the more sophisticated militaries.

One of the more popular and recurring arguments made with regard to Operation Protective Edge is that the ratio of casualties between the warring sides indicates *prima facie* that Israel's use of force was disproportionate.²¹ This stems from the fact that the number of Israeli casualties resulting from attacks by Hamas was relatively very low, while Israeli attacks in the Gaza Strip caused extensive harm to civilians and civilian objects. Therefore, the argument goes, the disparity between the casualty numbers means that the damage caused by Israel is excessive and thus disproportionate. This contention has no legal basis. According to the laws of armed conflict, the principle of proportionality is not assessed on the basis of comparing the number of casualties or level of destruction committed on either side.²² The legal standard refers to "excessive" collateral damage and not to "extensive" collateral damage. There are numerous precedents of military operations carried out by western militaries, in which most of the damage was caused only to one side. A noteworthy example is the NATO operation in Kosovo in 1999, where there were around 500 Yugoslav civilian casualties and almost no casualties to NATO forces.²³

This argument also reflects a more nuanced contention, that due to the limited threat caused by Hamas attacks to the lives of Israeli civilians, the military advantage gained by Israel from each attack against Hamas was limited, and therefore does not justify higher levels of collateral damage to civilians and civilian objects in Gaza. This line of reasoning assumes that the complete disruption of life in certain areas of Israel and significant disruption in the rest of the country, the severe economic

consequences and the psychological effects of being under constant rocket attacks, not to mention the continuous breach of sovereignty and territorial integrity of the state, are not ample justifications for a state to try to stop attacks from rockets, mortars and underground tunnels, unless these same attacks lead to a significant loss of life. Accepting such an argument also means that a state's investment in defensive capabilities – such as Israel's investment in the Iron Dome missile defense system and other protective measures, which were the very reason Israel only incurred a very small number of civilian casualties – would lead to negating its ability to protect itself through offensive measures. This is not a logical reflection of the law of armed conflict and is not supported by existing practice.

Force Protection

Another point concerning the principle of proportionality which has drawn much attention is the notion of *force protection*. There have been claims that excessive weight was given by the IDF to protecting the lives of its soldiers and to preventing its soldiers from being abducted. According to the laws of armed conflict, the lives of one's own soldiers do not deserve more weight than the lives of enemy civilians, as some seem to suggest.²⁴ That said, considerations of force protection are relevant when military commanders are

20. See, for example, the Goldstone Report, *supra* note 13, paras. 861 and 865.

21. There are also those who argue that Israel should not have used force at all, due to the limited threat Hamas poses. This article does not deal with the legality of using force in the first place (the *Jus ad Bellum* aspect); however, it is worth noting that the conflict with Hamas is an ongoing conflict and that Operation Protective Edge was only one more round in this conflict and therefore this body of law is irrelevant.

22. Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities*, 43 CASE W. RES. J. INT'L L. 707 (2011).

23. See Civilian Deaths in the NATO Air Campaign, HUMAN RIGHTS WATCH (Feb. 1, 2000), available at www.hrw.org/reports/2000/nato/; see also A.P.V. Rogers, *Zero-Casualty Warfare*, 837 IRRC 165 (2000), available at www.icrc.org/eng/resources/documents/misc/57jqcu.htm (last visited Apr. 12, 2015).

24. See analysis in Eliav Lieblich with Owen Alterman, *Transnational Asymmetric Armed Conflict under International Humanitarian Law: Key Contemporary Challenges*, INSS (2015), at 139-147.

determining their different modes of operation and do affect the judgment on feasible precautions that should be taken to minimize harm to civilians.²⁵ Force protection is a relevant consideration in the proportionality assessment, since there is considerable military advantage to be gained by keeping one's own soldiers from being killed, injured or abducted. This is due not only to the desire to protect the soldiers themselves, but because such protection is also directly linked to mission accomplishment.²⁶ Therefore, in situations where soldiers are in mortal danger, significant force may be used, when necessary, to extract the forces. Of course, even in these situations, an attempt must be made to minimize the harm to civilians.

Advance Warning

The laws of armed conflict also stipulate that there is a duty to issue advance warning prior to launching attacks that might cause harm to civilians, when such warnings are feasible or unless circumstances do not permit. The IDF has developed an extensive system of issuing both general as well as specific warnings prior to an attack. Interestingly, even this robust system has been subject to criticism, on both a legal and factual basis. Claims were made that the advance warnings are not precise enough and fall short of what is required by the law, since they do not always include clear instructions as to what should be done. This is an odd argument, since the level of specificity in the warnings issued by the IDF goes far beyond the current practice of any other military in the world. As a matter of fact, the common view among experts in IHL is that Israel's practice in issuing advance warning is significantly more elaborate than is required by law.²⁷ On the factual level, allegations are sometimes made that the aim of the warnings issued by the IDF are not to provide early warning to civilians to get out of harm's way, but to terrorize them. These claims seem to disregard the fact that these same warnings were in fact followed by actual military operations and that heeding the warnings likely saved many lives.²⁸ The law of armed conflict requires that the advance warning be effective, which explains the strong wording used by the IDF.²⁹ Under the law, the prohibition on terrorizing the civilian population applies only when there is a "specific intent to spread terror among the civilian population" and that this "was principal among the aims" of the act.³⁰ Genuine warnings, even when worded in an intimidating way, cannot possibly be considered to be anything else, since their "primary purpose" is to get civilians out of the area for their protection, not to terrorize them.

Aspects of Criminal Law and Burden of Proof

Various reports criticizing Israel and the IDF with regard

to Operation Protective Edge will likely be used as another tool in the political campaign to delegitimize the state. In addition, they could possibly lead to attempts to initiate criminal proceedings in state courts throughout the world on the basis of universal jurisdiction. There is also the possibility of investigations and even criminal proceedings in the International Criminal Court (ICC), if a decision is made to open an investigation following the preliminary examination.³¹

In this context, and especially with regard to potential criminal investigations, an important question that will need to be addressed is what happens in the event of doubt – doubt regarding the exact content and correct interpretation of the law, as well as doubt regarding the facts. Much can be said about the way uncertainty surrounding the scope of the criminal legal norms should be addressed in international criminal courts that is not

25. Michael N. Schmitt, *Fault lines in the Law of Attack* in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW (Susan Breau & Agnieszka Jachec-Neale, eds., 2006), at 297; Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 445 (2005), at 462.
26. Alan Craig, INTERNATIONAL LEGITIMACY AND THE POLITICS OF SECURITY: THE STRATEGIC DEPLOYMENT OF LAWYERS IN THE ISRAELI MILITARY (2013), at 91-94.
27. For an analysis see Pnina Sharvit Baruch and Noam Neuman, *Warning Civilians Prior to Attack under International Law: Theory and Practice*, 87 INT'L L. STUD. 359 (2011), at 372.
28. It should be noted that all civilians who might be harmed must be taken into account. Therefore, if civilians were given a warning but did not evacuate the area even though they had the opportunity to do so, they still must be taken into consideration in examining the proportionality of the action.
29. See *How is the IDF Minimizing Harm to Civilians in Gaza?*, Israel Defense Forces (July 16, 2014), available at www.idfblog.com/blog/2014/07/16/idf-done-minimize-harm-civilians-gaza/ (last visited Apr. 12, 2015).
30. *Prosecutor v. Galic*, Case No. IT-98-29-A, Judgment, (ICTY Nov. 30, 2006), para. 104.
31. An investigation by the ICC might only be opened if it is deemed that the state is not carrying out genuine investigations, under the notion of complementarity. See Art. 17 of the 1998 Rome Statute of the International Criminal Court, which anchors the principle of complementarity, available at legal.un.org/icc/statute/rome.htm (last visited Apr. 12, 2015). The notion of complementarity is not analyzed in this article.

addressed in this short article. When it comes to the facts, the issue of doubt relates to the question of who has the burden to prove or disprove alleged wrongdoings in a criminal case. The accepted view is that the burden of proof rests on the prosecution and that doubt should carry favor for the accused. In Israel's experience, this is not usually the case when it comes to the "court" of international public opinion. Yet, one should hope that within the professional system of criminal courts – if those acting on behalf of Israel find themselves facing criminal charges – this basic notion will be upheld.

Operation Protective Edge is only one example of an armed conflict between a state and a non-state actor taking place in a densely populated urban civilian area. Other

states have faced such challenges in the past, and might unfortunately face similar ones in the future. The way the actions of Israel and its military forces are examined and evaluated therefore has a direct bearing on other militaries of other states. Accordingly, making sure that the correct law is applied in such examinations and that facts are assessed in a fair and reasonable manner is a common interest that goes beyond just the Israeli case. ■

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The De-legitimization of Israel and Operation Protective Edge¹

Boaz Ganor

For years, the State of Israel has been facing a complex, multi-dimensional battle — composed of a military dimension, a psychological-media dimension, and a legal dimension — that is being waged against it simultaneously. Palestinian and Shi'ite terrorist organizations, aided by terror-supporting states such as Iran, have attempted to defeat Israel on the military battlefield, through a campaign of de-legitimization, and in international legal tribunals. The military threats facing Israel in the south from the Gaza Strip and Sinai Peninsula, in the north from Lebanon, and in the east from Syria and even Iran, are accompanied by a well-synchronized and well-publicized international campaign designed to isolate Israel, impose sanctions on the country and reduce its capacity for self-defense. This campaign, which is aimed at solidifying Israel's de-legitimization and forming negative international public opinion, is based on lies, half-truths, and anti-Israel propaganda, which sometimes cross over to anti-Semitic incitement.

Israel's harshest critics — those who go out into the street and hold protests that are often violent and full of extreme hatred toward Israel — can be divided into two major groups: conscious Israel haters and terrorism supporters, and simply naive persons. The first major group constitutes the hard-core and violent basis of anti-Israel demonstrations and is composed of two sub-groups. The first sub-group includes modern anti-Semites, who are essentially no different from the classic anti-Semitic individuals and groups that hated, persecuted and murdered Jews throughout history while blaming them for all of the world's injustice. These modern anti-Semites added to their racist hatred of Jews an extreme hatred of the Jewish State. It therefore does not matter to them who they support — be it dictators who perpetrate crimes against humanity or terrorist organizations — as long as the entities they support seek the destruction of the Jewish State. The second sub-group of Israel haters is composed of Islamic fundamentalists who are inherently opposed to the very existence of a Jewish State and, in a consistent



manner, support Palestinian and Shi'ite terrorist organizations that are dedicated to the destruction of Israel. These two sub-groups seek out any opportunity to attack Israel and undermine its standing in the western

world as the only liberal democracy in the Middle East. With the generous assistance of petrodollars that flow into the coffers of these terrorists, they are able to operate in an organized and networked manner in order to denounce Israel at every possible opportunity. As an Israeli and a Zionist who believes in one's right to live and raise children in security and peace in this region where my ancestors and I were born, I have no discourse with this group of Israel haters. Anything that Israel says or does, any fact presented to these Israel

haters, will not shake their blind faith according to which the Jews are guilty and have no right to exist, neither as an ethnic national group in a Jewish State nor as individuals. Therefore, this article is not intended for modern anti-Semites and Islamic fundamentalists. Rather, it was written for members of the second major group— persons who I consider to be naive in their harsh criticism of Israel for its self-defense counter-terrorism activities. These people are my contemporaries and my peer group. They are people who believe in the values of democracy, liberalism, humanity, human rights, civil society, minority rights and, above all, the right of all civilians to live in security and peace regardless of religion, race or gender. This article was written for such liberal persons who are imbued with positive values and brotherly love and find themselves shocked and full of criticism of Israel when they see photos of destruction and injuries from the Gaza Strip broadcast on their television screens. These people are exposed to one-sided anti-Israel messages and commentaries by different media networks operating in the Gaza Strip that face threats,

1. An earlier version of this article was published by the International Institute for Counter-Terrorism (ICT) - <http://www.ict.org.il/Article/1191/The-Gaza-Wake-Up-Call>.

censorship and biased editing by Hamas, or that receive permission to broadcast from the Gaza Strip only after proving their sympathy and loyalty to the terrorist organization.

Had fate led me to be born not in Tel Aviv, but rather in San Francisco, Montreal, Oslo or another western city, I am certain that I would have found myself to be part of this group, since I too believe in the values of humanity, liberalism and democracy. Members of this group, who adhere to an admirable and respectable value system, deserve to hear the facts beyond Hamas's propaganda and the distorted accounts of various media outlets. The fact is that during the summer of 2014, Israel found itself under a sustained attack by a terrorist organization that was targeting the Israeli civilian population.

This terrorist organization, Hamas, was established in 1987 as the military wing of the Palestinian Muslim Brotherhood. Its stated goal is the destruction of the State of Israel and the establishment of an Islamic caliphate in its place. In this regard, Hamas is no different from the Islamic State (ISIS), Al-Qaeda or other Islamic fundamentalist organizations in the Middle East who, through the use of terrorist attacks and the systematic and cruel murder of civilians, seek to overthrow existing regimes and replace them with Islamic caliphates to be ruled according to Islamic law. The goal of the destruction of Israel is not merely a symbolic clause in the Hamas charter, which was written about 30 years ago. On the contrary, this goal constitutes a supreme value and the guiding force behind Hamas's battle waged from Gaza against Israel and its civilians. Thus, in an interview with the leader of Hamas, Khaled Mashal, that was conducted by CBS's Charlie Rose in Qatar in the summer of 2014, Mashal reiterated Hamas's refusal to recognize Israel's right to exist, even if a Palestinian state were to be established in the future. In response to the question of whether he would be willing to co-exist alongside the State of Israel and recognize Israel as a Jewish State, Mashal answered simply – "No."

Hamas is a hybrid terrorist organization that carries out terrorist attacks against civilians under the pseudo-legitimate guise of a political organization and welfare movement. This terrorist organization cynically and dangerously exploits the fundamental values of the democratic-liberal world. Despite the fact that it is actively opposed to this value system, the organization seeks to integrate itself into the world political system and participate in local elections. Without abandoning terrorism, the organization's leaders and supporters demand that the democratic-liberal world treat the terrorist organization as a legitimate political movement. Hamas and Hezbollah are clear examples of hybrid terrorist

organizations that have managed to deceive the western world. For instance, the European Union made an absurd decision that created an artificial distinction and identified Hezbollah's military wing, which carries out terrorist attacks on European soil, as a terrorist organization, but excluded the organization's other wings and leadership from this categorization. This decision was contrary to the uncompromising and justified position of the British government with regard to such movements in the past, as it had been unwilling to provide legitimacy to the IRA until it ended its involvement in terrorist attacks.

During the 2014 operation in Gaza, Israel was once again forced to defend itself from another round of violence imposed upon it by this terrorist organization. Hamas is an organization that clearly seeks the destruction of Israel. It receives enormous financial support to that end from various countries, including Iran and Qatar, as well as support from media outlets at its disposal, such as Al-Jazeera. Hamas operated in the 1990s as an agent of Iran to topple the Oslo Accords that were signed between Israel and the Palestinians. It did this by carrying out dozens of suicide attacks in Israel, and it was forced to find a new method of terrorist attacks after Israel successfully thwarted suicide attacks from the Gaza Strip. Hamas found the solution in the development of a vast array of thousands of rockets and missiles that were either smuggled to the Gaza Strip or manufactured in Gaza with Iranian supervision and assistance. In this way, while Hamas struggled to carry out suicide attacks by sending out young Palestinians strapped with explosives belts to murder civilians in Israel, it sought to use high-trajectory fire to create explosions on Israeli soil. Thousands of Hamas missiles and rockets were aimed at the Israeli heartland, with the intention of striking many Israeli civilians. Hamas did not take pains to achieve precision in its rocket striking capability. On the contrary, the rocket hits were meant to be random. Nevertheless, Hamas – aided by Iran and Hezbollah – invested in the development of a relatively primitive rocket system, but one larger than those of most countries in the world. In addition to the increase in the number of rockets at its disposal, Hamas also spent recent years working on increasing the range of their rockets. Therefore, on the eve of the 2014 operation in the Gaza Strip, Hamas had at its disposal approximately 10,000 rockets and missiles that covered most of Israel's territory. This arsenal forced approximately five million Israeli civilians (out of a population of approximately seven million) to live under the immediate and tangible danger of rocket attacks and conduct their lives in a manner that enabled them to reach bomb shelters in a span of time ranging from ten seconds (in the south of Israel) to two minutes (in the north of Israel) from the

moment the rocket was launched in Gaza.

Looking back in time, Israel's Prime Minister, Ariel Sharon, decided in 2005 on the Gaza Disengagement Plan, which entailed unilateral evacuation of Israel's military forces, as well as Israeli settlements from the Gaza Strip. Hamas, which won the Palestinian Legislative Council elections in January 2006, quickly took control of the Gaza Strip and used extreme violence against members of Fatah, some of whom were imprisoned, tortured and killed by Hamas militants. For the first time in Palestinian history, Hamas had the opportunity to improve conditions for the residents of the Gaza Strip with the hundreds of millions of dollars that it received from Qatar, Iran and other countries in order to build a prosperous political entity in Gaza. However, blind hatred of Israel, coupled with Hamas leaders' Islamist religious fervor and hunger for power, led them to direct most of the economic resources to the unprecedented construction of offensive and defensive military systems throughout the Gaza Strip. These military systems included, among other things: thousands of rockets and missiles and hundreds of launchers, the development of an underground system interconnecting most of the Gaza Strip and specifically located under densely populated areas (the construction of tunnels to enable the secure movement of Hamas militants and allow the organization's leadership to hide, as well as dozens of attack tunnels to enable Hamas militants to penetrate Israeli territory and carry out terrorist attacks on Israel's home front), as well as hundreds of deep launch pits for firing rockets and missiles from within and near civilian structures, hospitals, mosques, schools and UNRWA shelters. Instead of investing the aid money that it received to establish civilian infrastructure for health, education, transportation and communication, these petrodollars were invested in military systems on an unprecedented scale. Hamas, which pretends to represent the interests of the Palestinian people, wasted a huge amount of money that could have helped improve the welfare of the Palestinians and transform the Gaza Strip into a prosperous political entity. It did this in a cynical and deliberate manner that enabled it to drag Israel into a military confrontation and forced it to cause collateral damage to Palestinian civilians living in proximity to Hamas's launchers and military facilities in its attempt to stop the rocket fire into Israeli territory. Furthermore, Hamas also imposed terror and fear among the Palestinian residents of the Gaza Strip, executed suspected "collaborators" with Israel, and adopted a strategy of using Palestinian civilians as human shields, whether voluntarily or by force.

Hamas exploited the Palestinian civilian population in its attempt to protect its launch systems, military

headquarters, weapons depots, command and leadership. Hamas is well aware of the values and moral limitations that Israel imposes upon itself in its military operations in densely populated civilian territories, and this is precisely the reason why Hamas developed its entire combat strategy in an attempt to neutralize Israel's military and intelligence superiority, even if in doing so it commits war crimes against its own people. Hamas's strategy changed an asymmetric war between a terrorist organization and a country to a war of reverse asymmetry; a war in which the Israeli "Goliath," in possession of tremendous military capabilities and resources, had to fight with bound hands and feet against a terrorist organization that pretends to be "David," while exploiting the rules of war and Israel's moral inhibitions, and hides behind the Palestinian civilian population.

In its attempt to defend itself from the unprecedented threat of thousands of rockets and missiles from Hamas and other terrorist organizations, Israel developed an advanced anti-missile technology – the "Iron Dome." The Iron Dome does the seemingly impossible, and managed to neutralize the vast majority of rockets and missiles fired from the Gaza Strip that endangered the Israeli home front. So while Israel invested large sums of money in the development of a missile system to protect its civilian population, Hamas invested in the development of underground systems so the Palestinian civilian population would protect its missiles.

In general, terrorist organizations view civilians (both enemy civilians as well as their own civilians) as nothing more than a means to achieve their goals. As the Iraqi ISIS enjoyed significant military achievements in 2014 while committing the mass slaughter of Iraqi and Syrian civilians, including the beheading of civilians who did not accept its authority, and the rape of women and the maiming of children, Hamas executed Palestinians and forbade others from evacuating buildings adjacent to the rocket launchers. Hamas wired civilian structures with explosive devices, even while Palestinian civilians still inhabited them, and positioned ammunition depots and missile bases in civilian structures and carried out ambushes against IDF forces while firing from within or next to UNRWA facilities, in order to draw counter fire that could injure civilians. Hamas knew that it could not defeat Israel militarily and, therefore, its terrorist strategy was aimed at bringing about Israel's diplomatic submission under international pressure. In this respect, the suffering of Palestinian civilians in the Gaza Strip only served Hamas's ultimate goal.

Hamas did not hesitate to publish exaggerated casualty figures and lie about the number of civilian casualties, refer to military clashes and ambushes as a massacre, or

conceal the identity and military role of terrorists who were injured and killed in battle, claiming that they were Palestinian civilians. In addition, Hamas refused to observe ceasefires and it violated humanitarian breaks in fighting that were unilaterally initiated by Israel — ceasefires intended to alleviate the suffering of the Palestinian population. From Hamas's perspective, what their rockets and missiles were unable to achieve could be accomplished by the horrific images of dead Palestinian children. When there is a shortage of such photos, gruesome images from other areas of conflict, such as the civil war in Syria, can be recycled and attributed to Gaza.

While Hamas tried to drag Israel into a situation in which it caused unintentional harm to Palestinian civilians, the IDF waged a complex battle in combat zones located in booby-trapped and fortified civilian areas, while making unprecedented efforts to evacuate Palestinian citizens before attacking Hamas targets and missile launchers adjacent to civilian buildings. To that end, Israel carried out various procedures to provide early warning to the Gaza civilian population, including scattering leaflets from the air, sending text messages, making phone calls and even firing warning shots just before the actual attack.

Despite Israel's efforts, it seems that Hamas's propaganda war worked well. Any moral person in the western world (including in Israel) is horrified by the photos of Palestinian civilians, especially children, who have been injured and killed in the fighting. Very few people in the world understand that when a modern army like the Israel Defense Forces (IDF) mounts a justified defensive war in crowded civilian territory, which Hamas spent years fortifying with booby-traps, and when the terrorist organization cynically exploits its civilians as human shields, Palestinian civilian casualties are impossible to avoid.

When presented with photos of injured civilians, it is difficult to explain the real significance of the number of Palestinian casualties. After a month of fighting in one of the most densely populated regions in the world, when the enemy exploited civilian areas to fire over 4,300 rockets at Israel and the IDF carried out approximately 5,000 attacks against Hamas targets, the deaths of 2,127 Palestinians (at least half of whom were known terrorists) does not indicate a lack of proportionality, as many people believe, despite the regret over any loss of innocent life. On the contrary, the number of Palestinian casualties actually reflects Israel's selectivity and restraint. The fact is that the number of Palestinian casualties in the 2014 summer Gaza hostilities under the above-described conditions is approximately the same number of casualties in one day of fighting in the Syrian civil war or in Iraq.

The difference in world reaction reveals the hypocrisy and double standard of the civilized western world. While Israel waged another round in the ongoing existential war in Gaza against a terrorist organization supported by hundreds of millions of Islamic fundamentalists who seek its destruction, the civilized world has no problem criticizing and railing against Israel in the United Nations and other international organizations, while ignoring the crimes against humanity being committed by Israel's fundamentalist enemies on a daily basis.

Every soldier who ever took part in urban warfare understands all too well the challenges and dilemmas faced by IDF soldiers in the battle against Hamas in Gaza. He or she also knows that any other army in the world fighting under the same conditions would cause a much higher number of casualties among the Palestinian civilian population. However, instead of praising the restraint and selectivity exercised by Israel under difficult fighting conditions, many people around the world accuse Israel of disproportionate action in Gaza. In most cases, critics do not accuse Israel of intentionally harming civilians, but they justify their claims against Israel by asserting that "only" 72 Israelis were killed in the summer 2014 hostilities in Gaza, versus 2,127 Palestinians. Of course, this argument has no basis in reality. According to the rules of war and international conventions, proportionality is not measured by comparing the total number of casualties on both sides during a war, but rather by comparing the operational advantage of a certain military action versus the collateral damage that it is liable to cause. The injustice in accusing Israel of disproportionate action can be illustrated in the following scenario: if Israel conducted itself in exactly the same manner as it did during the recent operation in Gaza, but if the Iron Dome defense system that it developed did not exist or was not as effective and the 3,500 rockets and missiles that were fired at Israel led to 2,000 Israeli civilian deaths, would those critics who claim disproportionate action still make this false accusation against Israel?

Israel is forced to pay a high price for its selectivity and restraint during the hostilities in Gaza. In the rules of combat dictated by Hamas in the Gaza Strip, Israel's policy of restraint does not deter Hamas from continuing its war against Israel and does not prevent the renewal of fighting after a ceasefire is ended. While the Hamas leadership has been almost entirely unharmed during the month-long battle as they hid deep underground, underneath hospitals and civilian structures, the damage that Israel is capable of causing to Hamas is, at best, tactical or operational, but not strategic and not a deterrent. Paradoxically, Israel's restraint prolonged the state of hostilities in Gaza, as well as the suffering of the

Palestinian and Israeli populations.

In conclusion, Israel is not free from mistakes. Just as in previous wars and military operations, the IDF started to investigate its actions after the 2014 operation in Gaza came to an end. However, critics of Israel should also examine themselves; they should avoid falling into the manipulative trap of terrorist organizations and their supporters in the future. Critics should internalize the fact that Israel's battle against the hybrid terrorist organization, Hamas (as well as Hezbollah in Lebanon), is nothing more than a microcosm of the global international battle taking place in recent years between Islamist-jihadist terrorist organizations, and the culture of the west and of the democratic-liberal world. Israel once again found itself to be the vanguard of the western world, as it was forced to cope with new methods of terrorism that will eventually threaten other western countries.

This happened during the 1960s and 1970s, when Israel was confronted with hijackings, after which the entire world faced this type of terrorist act. In the 1980s and

1990s, Israel had to thwart suicide attacks, a method that became widespread throughout the world in the years that followed; and again nowadays, as Israel faces a hybrid terrorism that exploits and abuses liberal democratic values and will pose a challenge to many other countries in the future.

The new nature of multi-dimensional warfare that was forced on Israel over the last decade, and which dictates the need for simultaneous victory on the three battlefronts – military, psychological-media and legal, is going to become the norm for many more countries in the future. Additional countries will be forced to cope with terrorist attacks on their own soil and with terrorist organizations that are embedded and operate from within dense civilian populations. ■

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Editor's Note: On March 25, 2015, IAJLJ held a Side Event at the UN in Geneva on "Terrorism and Human Rights." The author of the following summary participated as a speaker at the event.

IAJLJ SIDE EVENT AT THE UN IN GENEVA

Henrique Cymerman

"We feel terrible about everyone who gets hurt from the Israeli side or in Gaza. But our sense is that there are countries which confuse freedom fighters with terrorists. It is necessary to find out how Hamas treats its own people," declared **Irit Kohn**, President of the International Association of Jewish Lawyers and Jurists, and a past director of the International Department in the Israel Ministry of Justice.

Kohn moderated a side event that took place at the end of March 2015 at the UN Human Rights Council in Geneva, under the title: "Terrorism and Human Rights – The Case of Hamas." The event was attended by NGO representatives as well as delegates from approximately 50 countries.

The founder of the Palestinian Human Rights Monitoring Group, **Bassem Eid**, expressed his concern about extremism in Palestinian schools in the West Bank and more so, in Gaza. "Peace starts from the school syllabus, and if it holds so much hate, what awaits us within one generation is a disaster." Eid criticized the human rights situation in Gaza under Hamas, but insisted that even in the West Bank under the Palestinian Authority, the situation also was never ideal. "I myself was arrested by Chairman Arafat in January 1996, on the eve of the first elections, and released only thanks to the U.S. Secretary of State's intervention."

As for operation "Pillar of Defense," in the summer of 2014, the Palestinian activist related that at the beginning of the operation, Israel uncovered attack tunnels prepared by Hamas, and asked civilians in Beit Hanun, north of Gaza, to evacuate their houses to avoid being struck. "Hamas members intervened and forced the people to return to their homes despite the danger, while calling those who wanted to leave 'collaborators'."

Henrique Cymerman, an Israeli and international journalist, spoke about Hamas in the first person, after interviewing most of its leaders several times throughout his career. Cymerman talked about Ahmed Yassin, the

founder of Hamas, his follower, Abdel Aziz Rantissi, and about the current Hamas leadership – Mahmoud Al Zahar and Hassan Youssef, all of whom he interviewed.

During the interviews it was established that the Hamas leadership all agree with Yassin's policy, that it is impossible to separate between the political and military wing of the organization, as Hamas is one organic group.

Until today, Hamas' purpose is to establish an Islamic state governed by Shari'a laws in the entire region, including the territory of the State of Israel, the West Bank and Gaza.

Cymerman reminded the audience that many western countries as well as those in the Arab world, define the military wing of Hamas as a terrorist organization. These countries include Canada, Australia, Japan, Israel, Egypt, the United Kingdom, the United States and Jordan. Among the countries that do not consider Hamas a terrorist organization are Iran, Russia, Turkey, China and Qatar.

Calev Meyers, IAJLJ Board Member and founder of the Jerusalem Institute of Justice, maintained that Hamas is undoubtedly the worst thing that has happened to the Palestinian people. In his opinion, any recognition of Hamas as an international player would be extremely negative, and would actually constitute a reward to terrorist activity.

Meyers pointed out that Gaza and the West Bank are separate territories, and that since the revolt that brought Hamas to power in Gaza, in June 2007, Palestinian President Mahmoud Abbas cannot visit Gaza due to threats to his life. "Al-Fatah in the West Bank has an undefined territory, and diplomatic ties with various countries. Hamas in Gaza has a defined territory, and no formal diplomatic ties outside the Strip. In Hamas's opinion, this is why they tried time and again to establish a unity government, but in practice, the hatred is so tremendous that there is a civil war going on."

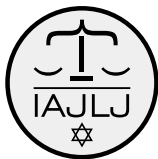
The Jerusalem-based lawyer maintained that in order to be pro-Israeli, you do not have to be anti-Palestinian. And in order to be pro-Palestinian, you do not have to

be anti-Israeli.

At the end of the event, some of the participants posed questions that demonstrated an understanding of the issues presented. One of the Swiss representatives challenged the argument that money should not be transferred to Gaza via Hamas. He maintained that "If we wish to assist the population that suffered the Israeli attacks of last summer, it is necessary to do so through Hamas, just as if we wished to assist Israel, we would do it through the Israeli Government." Cymerman responded

to this by saying: "Even with humanitarian support to civilian population, every dollar must be monitored, because it is most probable that at the end of the process, the Swiss money would contribute to the manufacture of rockets, or the digging of attack tunnels resulting in civilian casualties on the Israeli side, including children."

Irit Kohn summarized the event, stating: "Some in the UN Human Rights Council have a very deformed picture of the reality on the ground. We Israelis make numerous mistakes, but on the other hand, we have a free press." ■



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צדק

ENGLISH: 1. justness, correctness. 2. righteousness, justice. 3. salvation. 4. deliverance, victory. [**ARAMAIC:** צדק (he was righteous), **SYRIAC:** זדק (it is right), **UGARITIC:** *šdq* (= reliability, virtue), **ARABIC:** *šadaqa* (= he spoke the truth), **ETHIOPIC:** *šadaqa* (= he was just, righteous)] Derivatives: **צדקה** **POST-BIBLICAL HEBREW:** alms, charity. Cp. **ARAMAIC** **צדקתה** (= justice). **PALMYRENE** **צדקתה** (= it is right). **צדק** 1. just, righteous. 2. pious.

After Ernest Klein, A Comprehensive Etymological Dictionary of the Hebrew Language for Readers of English. 1987: Carta/University of Haifa

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