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The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives

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I. Introduction

The round of fighting between Israel and Hamas that began at the end of 2008, officially known in Israel as "Operation Cast Lead," raises several questions regarding the applicability and contents of International Humanitarian Law ("IHL").¹ This article will deal with only one such question: the issue of proportionality in IHL. I begin by outlining the major claims that have arisen with regards to legality of the use of force, by both Israel and Hamas, emanating from the requirements of proportionality. The second part of this paper will delineate the existing debate as to the correct interpretation of the proportionality norm in IHL. In the third part, I will suggest the appropriate requirements of proportionality in modern armed conflicts.

II. Background and Major Claims

A. Operation Cast Lead

The historical specifics of operation Cast Lead necessitate an extended discussion, which is beyond the scope of this paper. For present purposes, all that is required is a short summary of the operation's background and course. The area known as the Gaza Strip constitutes a short area of land situated adjacent to the southern part of Israel. Conquered by Israeli forces during the course of the Six Day War in June 1967, the Strip remained under Israeli control until 2005. In the summer

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¹ For these and many other legal questions raised by this operation see U.N. Human Rights Council, *Human Rights Situation in Palestine and Other Occupied Arab Territories*, U.N. Doc. A/HRC/10/20 (Mar. 17, 2009) (prepared by Richard Falk), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.20.pdf> (claiming that Israel should be investigated for suspicions of committing war crimes during Operation Cast Lead).

of 2005 the Israeli government implemented what it termed its Disengagement Plan, in accordance with which all Israeli settlers and military personnel were withdrawn from the Gaza Strip to the so-called "green line" which delineates the pre-1967 Israeli-Egyptian border.²

Hamas is a radical Muslim-Palestinian organization whose declared aim is to create a Muslim state in the entire area covered by British mandatory Palestine.³ Hamas refuses to recognize the right of the State of Israel to exist even within the "green line."⁴ Hamas advocates the resort to violence, including terrorism, in order to achieve its goals.⁵ Subsequent to the elections held by the Palestinian Authority in 2006, a government headed by Hamas took administrative control over the Gaza Strip. Thereafter, in June 2007, members of Hamas perpetrated a military coup, forcibly taking military control over the Strip and replacing many supporters of the more moderate El-Fatah faction in the Palestinian Authority.⁶ Thus, the Gaza Strip became a Hamas controlled enclave on Israel's border.

In subsequent years, Hamas exploited its control over the area to support terrorist activities, and especially to fire rockets and mortar shells into Israel.⁷ Israel, for its part, imposed a blockade around the Gaza Strip,⁸ and in response to specific rocket and mortar barrages, resorted to a policy of what it termed "economic sanctions," which involved limiting the supply of electricity, oil, and other products to the Gaza region.⁹ As from the beginning of November 2008, an increasing number of rockets and mortars were fired from the Strip into Israel and Israel upgraded its threat to respond.¹⁰

After several warnings and false starts, Israel ultimately decided on a harsh response. On December 27, 2008, the Israel Air Force (IAF) attacked targets within the Gaza Strip,¹¹ probably in

² For more detailed discussions, which also ask whether the occupation has ended, see Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement*, 8 Y.B. OF INT'L HUMANITARIAN L. 369, 373 (2005) (claiming that the Gaza Strip is not occupied by Israel); Mustafa Mari, *The Israeli Disengagement from the Gaza Strip: An End of the Occupation?*, 8 Y.B. OF INT'L HUMANITARIAN L. 356, 366 (2005); Nicholas Stephanopoulos, *Israel's Legal Obligations to Gaza After the Pullout*, 31 YALE J. INT'L L. 524, 525-26 (2006); Susan Martin & John Warner, *Palestinian Refugees in Gaza*, 28 FORDHAM INT'L L. J. 1457, 1464 (2005) (claiming that the Gaza Strip is still occupied territory).

³ The Covenant of the Islamic Resistance Movement, art. 11 & 15, Aug. 18, 1988 (English translation), available at <http://www.mideastweb.org/hamas.htm> (last visited May 10, 2009).

⁴ *Id.*

⁵ Program on Humanitarian Policy and Conflict Research at Harvard University, *Transnational and Non-State Armed Groups: Legal and Policy Responses, Harakat al-Muqawama al-Islamiyya (HAMAS)* (2008), <http://www.armed-groups.org/6/section.aspx/ViewGroup?id=57> (last visited May 11, 2009).

⁶ Glenn Robinson, *The Fragmentation of Palestine*, 106 CURRENT HIST. 421 (2007).

⁷ *E.g.*, INTELLIGENCE AND TERRORISM INFORMATION RESEARCH CENTER AT THE ISRAEL INTELLIGENCE HERITAGE & COMMEMORATION CENTER (IICC), *ANTI-ISRAELI TERRORISM IN 2007 AND ITS TRENDS IN 2008* 4 (May, 2008), available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/terror_07e.pdf.

⁸ Even after the disengagement, Israel maintained control of almost all land, air and sea borders of the Gaza Strip, hence the claims that Israel still maintains control of the region, and is the occupying power. See, e.g., Gisha: Legal Center for Freedom of Movement, *Disengaged Occupiers: The Legal Status of Gaza* (2007), available at <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf>.

⁹ Some of these sanctions were discussed, and declared legal, by the Israeli Supreme Court. See HCJ 9132/07 Jabbar El-Bassouini v. The Prime Minister [2008] available at <http://www.mfa.gov.il/NR/rdonlyres/938CCD2E-89C7-4E77-B071-56772DF79CC/0/HCJGazaelectricity.pdf>. On the legality of the economic sanctions, see Amichai Cohen, *Economic Sanctions in IHL- Suggested Principles*, in 41 ISR. L. REV. (forthcoming 2009) (claiming that IHL has very little to say about economic sanctions, and that new rules should be adopted).

¹⁰ See, e.g., Ethan Bronner, *Hamas Fires Rockets into Israel*, N.Y. TIMES, Nov. 15, 2008, at A7, available at <http://www.nytimes.com/2008/11/15/world/middleeast/15gaza.html>.

¹¹ Nidal al-Mughrabi, *Israel Kills Scores in Gaza Air Strike*, REUTERS, Dec. 27, 2008, available at <http://www.reuters.com/article/newsOne/idUSLR1342320081227>.

accordance with a menu of objectives prepared some time in advance, thereby initiating Operation Cast Lead.¹² At a second stage, Israeli ground troops entered the Gaza Strip and some even penetrated as far as Gaza City itself. The operation continued until Israel implemented a unilateral ceasefire on January 18, 2009.¹³

The number of casualties is debated. Figures released by a Hamas audit claim that 1,417 Palestinians were killed; of whom 236 were combatants, 255 were members of the Hamas security forces, and 926 were civilians. A further 5,300 Palestinians were wounded.¹⁴ A report issued by the Israel Defense Forces (IDF) speaks of 1,166 Palestinian fatalities, of whom at least 709 were combatants and 295 uninvolved civilians. The remainder are listed as undetermined.¹⁵ On the Israeli side there were 13 fatalities: ten soldiers and three civilians.¹⁶

A simple statistical count of the numbers of Israelis and Palestinians killed and wounded cannot capture the full effects of the conflict on both sides. The war left large parts of the Gaza Strip destroyed, including many homes.¹⁷ During its course, a significant portion of Gaza,¹⁸ and to a lesser degree, southern Israel, became unfit for normal civilian life.¹⁹ Within the Strip, supplies of electricity, water and food were irregular.²⁰ In the later stages of the operation, the IDF implemented a policy of unilateral humanitarian cease-fires, in accordance with which Israeli forces halted all offensive operations for limited periods.²¹

B. Claims of Violations of IHL in Operation Cast Lead

During and after the conflict, several NGOs issued statements declaring a number of actions taken during the conflict to be “war crimes,” or at least demanded that some incidents should be investigated on suspicion of violating IHL.²² Several episodes attracted particular media attention in this context, amongst them the Hamas missile strikes against civilian targets in Israel, which clearly

¹² Ian Black, *Six Months of Secret Planning - Then Israel Moves Against Hamas*, GUARDIAN, Dec. 29, 2008, at 6, available at <http://www.guardian.co.uk/world/2008/dec/29/israel-attack-hamas-preparations-repercussions>.

¹³ *Israel Declares Cease-fire in Gaza*, BBC NEWS, Jan. 18, 2009, http://news.bbc.co.uk/2/hi/middle_east/7835794.stm.

¹⁴ Press Release, Palestinian Centre for Human Rights, *Confirmed Figures Reveal the True Extent of the Destruction Inflicted Upon the Gaza Strip* (Mar. 12, 2009), available at <http://www.pchrgaza.org/files/PressR/English/2008/36-2009.html>.

¹⁵ Israel Defense Force, *Majority of Palestinians Killed in Operation Cast Lead: Terror Operatives*, Mar. 26, 2009, <http://dover.idf.il/IDF/English/News/today/09/03/2602.htm>.

¹⁶ Defence for Children Int'l, *Operation Cast Lead: Legal and Political Background*, Apr. 16, 2009, <http://www.dci-pal.org/english/display.cfm?DocId=962&CategoryId=1>.

¹⁷ See Quil Lawrence, *Destruction and Frustration in Gaza*, BBC NEWS, Jan. 20, 2009, http://news.bbc.co.uk/2/hi/middle_east/7839029.stm.

¹⁸ See U.N. Office for the Coordination of Humanitarian Affairs, *Gaza Humanitarian Situation Report* (Jan. 2, 2009), available at http://www.ochaopt.org/documents/ocha_opt_gaza_situation_report_2009_01_02_english.pdf.

¹⁹ See, e.g., Heather Sharp, *Rocket Attacks Plague Israeli Towns*, BBC NEWS, Dec. 28, 2008, http://news.bbc.co.uk/2/hi/middle_east/7802276.stm.

²⁰ See, e.g., *Gaza Clashes Spark 'Major Crisis'*, BBC NEWS, Jan. 6, 2009, http://news.bbc.co.uk/2/hi/middle_east/7813671.stm.

²¹ See Israel Defense Forces, *IDF Provides Temporary Cease Fire to Gaza Strip Civilians*, Jan. 7, 2009, <http://dover.idf.il/NR/exeres/B4B7D1BD-460E-4BE6-A6AF-E1E185E24EFD.htm>; Ibrahim Barzak & Matti Friedman, *Israel Halts Campaign for 3 Hours to Let in Aid*, ASSOCIATED PRESS, Jan. 7, 2009, available at <http://www.webcitation.org/5deNCBMYH>.

²² See B'TSELEM, *GUIDELINES FOR ISRAEL'S INVESTIGATION INTO OPERATION CAST LEAD 5* (2009), available at http://www.btselem.org/Download/200902_Operation_Cast_Lead_Position_paper_Eng.pdf.

breached the norm of distinction.²³

Several reports, emanating from Palestinian sources, NGOs, and the UN, raise specific claims against Israel's use of force:

On December 27th, Israeli planes fired on participants in a graduation ceremony of the Palestinian Police officers' course held in Gaza.²⁴ Israel claimed that it had attacked legitimate targets, since the Palestinian police in Gaza is controlled by Hamas.²⁵ However, some NGO's claim that the police personnel concerned were traffic officers.²⁶

Later that same day the IDF raided a mosque, where Israel claims ammunition was stored.²⁷ Subsequently, Israeli tanks were said to have fired shells in the vicinity of a UN school where, according to reports, 43 civilians were killed (though according to Israeli sources the claims and figures were totally inaccurate).²⁸

In yet another incident, Israeli tanks were accused of firing on a hospital in the Gaza Strip.²⁹

Moreover, a report published by Human Rights Watch – which Israel rejected – claims that Israel's use of screening shells, which include phosphorous elements, was indiscriminate and illegal.³⁰

However, by far the most frequent claim made against Israel by human rights organizations is the accusation of resorting to excessive force, and of using improper weapons in urban warfare, thereby endangering the lives of innocent civilians.³¹ In essence, it is the claim that Israel used disproportional force. The IDF rejected those charges, claiming that the steps it took to protect civilians, if anything, exceeded the requirements laid down by IHL. Despite Israel's denials, the claim of disproportional use of force persists. It is on this issue that I would like to focus.

²³ It is not important whether Hamas knowingly and intentionally directed the missiles towards civilian populations, or simply disregarded the fact that it was unable to control the missiles in a way that avoided hitting civilians. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I) art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Protocol I*]. "Indiscriminate attacks are prohibited. Indiscriminate attacks are: . . . (c) those which employ a method or means of combat the effects of which cannot be limited as required by this protocol . . ." *Id.*

²⁴ Stephen Lendman, *Global Human Rights Groups Protest Slaughter in Gaza*, CENTRE FOR RESEARCH ON GLOBALIZATION, Jan. 5, 2009, <http://www.globalresearch.ca/index.php?context=va&aid=11616> .

²⁵ *See id.*

²⁶ *See* Karma Nabulsi, *Land, Sea, Sky: All Will Kill You*, GUARDIAN, Jan. 3, 2009, at 28, *available at* <http://www.guardian.co.uk/world/2009/jan/03/israel-palestinians-gaza-attacks>.

²⁷ *See* Israel Ministry of Foreign Affairs, *Behind the Headlines: Israel Expands Operation Cast Lead*, Jan. 4, 2009, http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Israel_expands_Operation_4_Jan_2009.htm.

²⁸ Amos Harel, *UN backtracks on claim that deadly IDF strike hit Gaza school*, HAARETZ, Feb. 3, 2009, <http://www.haaretz.com/hasen/spages/1061189.html>.

²⁹ Kim Sengupta, *Outrage as Israel Bombs UN*, INDEP., Jan. 16, 2009, <http://www.independent.co.uk/news/world/middle-east/outrage-as-israel-bombs-un-1380407.html>.

³⁰ HUMAN RIGHTS WATCH, *RAIN OF FIRE: ISRAEL'S UNLAWFUL USE OF WHITE PHOSPHOROUS IN GAZA 4-5* (2009), *available at*, <http://www.hrw.org/sites/default/files/reports/iopt0309web.pdf>. For the Israeli rejection, see Israel Defense Forces, *During Operation Cast Lead, IDF Use of Munitions Legal*, Mar. 25, 2009, <http://dover.idf.il/IDF/English/News/today/09/03/2502.htm>. Screening shells are artillery shells that contain a chemical substance called white phosphorous, and are used primarily to obscure military operations on the ground. *See* HUMAN RIGHTS WATCH, *supra* at 2.

³¹ For these and other general claims *see* AMNESTY INT'L, *THE CONFLICT IN GAZA: A BRIEFING ON APPLICABLE LAW, INVESTIGATIONS AND ACCOUNTABILITY* (2009), *available at*, <http://www.amnesty.org/en/library/asset/MDE15/007/2009/en/4dd8f595-e64c-11dd-9917-ed717fa5078d/mde150072009en.pdf>.

This article will not seek to determine the veracity of the claims made by Hamas and Israel.³² Neither will it discuss the preliminary legal question of whether IHL actually applies to the conflict in Gaza, and even if so, whether it falls under the rules of *international*, or of *non-international armed conflict*. I will assume that IHL applies, and that the requirements of proportionality are applicable to the conflict regardless of how the conflict is characterized. Within that framework, I shall seek to explain the limits that the rules of IHL, and especially the rule of proportionality, place upon fighting forces in a situation similar to that of Operation Cast Lead.

III. Proportionality and its requisites

A. What is proportionality in IHL?

IHL is the branch of international law limiting the use of violence in armed conflicts towards combatants and civilians.³³ It has its origins in the “practices of armies, as they developed over the ages and on all continents.”³⁴ IHL has evolved considerably in recent decades through developments in both treaty law and in customary international law.³⁵ According to Marco Sassoli and Antoine Bouvier, the basic principles of IHL are: humanity, necessity, proportionality, distinction, and the prohibition on causing unnecessary suffering.³⁶ The focus of this article is the principle of proportionality.

Although the term 'proportionality' does not explicitly appear in any IHL treaty,³⁷ it boasts a

³² It seems that there were at least some cases in which Hamas actually operated from within civilian houses, mosques, etc. Amnesty International, *Gaza Civilians Endangered by the Military Tactics of Both Sides*, Jan. 8, 2009, <http://www.amnesty.org/en/news-and-updates/news/gaza-civilians-endangered-military-tactics-both-sides-20090108>; Rory McCarthy, *Israeli warplanes destroy Gaza houses and mosque as air strikes continue*, GUARDIAN, Jan 2, 2009, <http://www.guardian.co.uk/world/2009/jan/02/israel-gaza-attacks>. On the other hand, although there is no independent evidence that Israel deliberately targeted civilian populations, there is evidence from Israeli soldiers that reckless shootings hurt uninvolved civilians and that shots were fired without a sufficient basis for suspicion. Amos Harel, ‘*Shooting and crying*’, HAARETZ, Apr. 28, 2009, <http://www.haaretz.com/hasen/spages/1072475.html>. There are accounts of soldiers who told of some of these acts. See, e.g., Ethan Bronner, *Soldier's Accounts of Gaza Killings Raise Furor in Israel*, N.Y. TIMES, Mar. 19, 2009, <http://www.nytimes.com/2009/03/20/world/middleeast/20gaza.html>. The IDF's General Advocate later declared that these testimonies were hearsay and urban myths, and closed the investigation. Anshel Pfeffer & Amos Harel, *IDF Ends Gaza Probe, Says Misconduct Claims Are 'Rumors'*, HAARETZ, Mar. 30, 2009, <http://www.haaretz.com/hasen/spages/1074981.html>.

³³ MARCO SASSOLI & ANTOINE A. BOUVIER, 1 HOW DOES LAW PROTECT IN WAR? 81 (2nd ed. 2006). In this article I shall use the term “IHL”. Traditionally, the laws of war were called the Laws of Armed Conflict. Amichai Cohen, *Rules and Standards in the Application of International Humanitarian Law*, 41 ISR. L. REV. 41, 48 (2008). This signifies their general goal – to regulate armed conflicts according to pre-agreed forms. See *id.* During the second half of the 20th century, the terms were changed and the name of this area of law became International Humanitarian Law. MALCOLM N. SHAW, INTERNATIONAL LAW 1054-56 (5th ed. 2003). This change also changed the focus of the area of law from agreement between armies to protection of civilians. See Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 82-83 (2006).

³⁴ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *Introduction to Customary International Humanitarian Law*, at xxv (2005).

³⁵ FRITZ KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 15 (3rd ed. 2001), available at [http://icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0793/\\$File/ICRC_002_0793.PDF](http://icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0793/$File/ICRC_002_0793.PDF)

³⁶ SASSOLI & BOUVIER, *supra* note 33, at 139, 141-42.

³⁷ Note that this is not a mere oversight since there was a serious attempt, which failed, to include the term proportionality in the First Additional Protocol to the Geneva Conventions. W.J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 102-07 (1982). One may note, however, that the term 'proportionate'

long pedigree within the laws of war.³⁸ Indeed, the linkage between justified ends, means, and effects instituted by the principle can be found in articles 51(5)(b) and 57(2) of the First Additional Protocol of 1977 ("Protocol I"),³⁹ as well as in some other specific IHL norms.⁴⁰ Article 51(5) of Protocol I states:

5. Among others, the following types of attacks are to be considered as indiscriminate [and therefore prohibited]:

....

(b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive⁴¹ in relation to the concrete and direct military advantage anticipated.⁴²

This article is innovative. It makes the balance between military necessity and humanitarian interests horizontal rather than vertical. It does not posit military necessity as a justification for causing damage to civilians. Rather, the article orders the attacking power to audit his proposed operation, comparing the foreseeable damage to the civilian population with the expected military advantage.⁴³ It requires the army to relinquish 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

is used in the ICC Statute as a limit on the grounds for excluding criminal responsibility. *Rome Statute of the International Criminal Court*, July 17, 1998, art. 31(1)(c), 2187 U.N.T.S. 90 [hereinafter ICC Statute].

³⁸ In fact, some scholars claim that the concept was already present in the Christian medieval corpus of the laws of war, which posited that war could be deemed to be just, and hence legitimate, only if its gains exceeded the horrors that it wrought. Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 394-95 (1993).

³⁹ *Protocol I*, *supra* note 23. 164 states are party to this protocol. Israel, the United States, India, Pakistan and some other states have not ratified it. On the status of ratification of Protocol I, see the ICRC website at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>.

However, the specific norm of proportionality in the protocol is considered customary international law, and hence obligatory upon all states. See HENCKAERTS & DOSWALD-BECK, *supra* note 34, at 46-47.

⁴⁰ See, e.g., *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, 29 November / 11 December 1868, available at <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument> (condemned the "employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable."). Similarly, article 35(2) to Protocol I explicitly forbids the use of these arms. *Protocol I*, *supra* note 23; see Gardam, *supra* note 38, at 406 ("This provision codifies the preexisting customary principle and is also based on proportionality"); see also MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICT: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 195-97* (1982); *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 401-02* (Claud Pilloud et al. eds., 1987).

⁴¹ The term in the original ICRC draft submitted to the conference in 1974 states "disproportionate," yet the final wording used the term "excessive." JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* 94 (2004). It seems that it was inserted to respond to the claims of those worried that the term "proportional" is too open-ended, and hence open to several interpretations. *Id.* However, the term "excessive" has proved to be no less unclear.

⁴² *Protocol I*, *supra* note 23, art. 51(5).

⁴³ Moshe Cohen-Eliya, *The Formal and Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence*, 38 ISR. L. REV. 262, 288-89 (2005) (detailing the use of proportionality in the decisions of Israel's Supreme Court).

requires the commander to use very delicate calculations in the middle of war, has generated much confusion and controversy.⁴⁴

The principle of proportionality is further muddled because it is often lumped with and confused with the principle of distinction, which outlaws indiscriminate military attacks. Framers of international agreements did not help this situation by including the two concepts within the same article in Protocol I.⁴⁵ The IHL principle of distinction requires an attacking army to limit its offensive to military objectives, targets, etc.⁴⁶ The principle of proportionality is more intrusive. It states that even when an attack is *directed* against a military target (and hence not prohibited by the principle of distinction), the attack might still be prohibited if the attack would cause greater harm to civilians than the military advantage gained by the attack.⁴⁷ This scenario might occur where civilians are in danger because they are around or within the military target. Such an attack would violate the principle of proportionality, though it would have satisfied the rule of distinction. Hence, distinction and proportionality are two separate concepts, with proportionality limiting the scope of attacks that are otherwise permissible.⁴⁸

B. Understanding Proportionality

The principle of proportionality and its use in Protocol I has raised many questions as to the exact content of the rule. Hence, before dealing with the normative questions with regards to proportionality (i.e., whether we think it is good policy) we must first understand what proportionality in IHL means. As already noted, proportionality appears in article 51 and its corollary article 57 in Protocol I.⁴⁹ In both articles, the concept of proportionality is explicitly used in its most radical sense – the requirement that parties forgo some actual military advantage if the incidental civilian suffering would exceed the military gains.

In the abstract, the concept of proportionality is commendable. It seeks to limit the sufferings of civilians in times of war, and does so by limiting the attacks which parties are allowed to use. The sources of this concept are ancient, and are deeply embedded in international law.⁵⁰ However, in practice this principle raises many questions.⁵¹

First, the concept of proportionality suffers from a fault inherent in any attempt to balance

⁴⁴ In adopting articles 51 and 57 of Protocol I, states were fully aware of the ambiguity of the concepts they were adopting. See Fenrick, *supra* note 37, at 106.

⁴⁵ Protocol I, *supra* note 23, art. 51(5).

⁴⁶ GARDAM, *supra* note 41, at 93.

⁴⁷ See Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 TEX. INT'L L. J. 370, 401 (2007).

⁴⁸ See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 230-31 (1994).

⁴⁹ Protocol I, *supra* note 23. Article 57 states:

2. With respect to attacks, the following precautions shall be taken:

. . . .

(b) An attack shall be cancelled or suspended if it becomes apparent . . . that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

⁵⁰ GARDAM, *supra* note 41, at 2.

⁵¹ For a more detailed analysis of debates concerning the application of the rule of proportionality see GARDAM, *supra* note 41, at ch. 4.

rights and interests – the concepts are incomparable.⁵² What value should one assign to each of the competing variables?⁵³ In particular, how should one measure military advantage against human lives? How should one assess the worth of human lives on both sides of the conflict? Are the parties entitled to protect their own citizens or soldiers at the cost of endangering uninvolved enemy civilians, and if so, at what ratio?⁵⁴

Second, these moral dilemmas are compounded by practical difficulties, since the proportionality test is applied *ex ante*, the military and humanitarian effects of the attack, as well as the harm it was designed to prevent, are merely speculative and ultimately depend on subjective risk assessments.

Lastly, the interpretations of the different variables of the formula of proportionality are unclear. The term “attack” in the formula of article 51(5)(b) is undefined. Does it refer to a specific operation or does it also include a wide scale military campaign? Also, the term “military advantage” in the same article lacks clarity. The practice of several states reveals that the military advantage taken into consideration should be that which results from the action as a whole, and not simply from one of its isolated or particular components.⁵⁵ On the other hand, the protocol attempts to limit the types of military advantages considered in the balancing test to those that are ‘concrete and direct’. According to the International Committee of the Red Cross (ICRC) commentary this means that the advantage should have a “substantial and relatively close” causal relationship to the contemplated military action.⁵⁶ This means that advantages that are very general and have no clear causal connection to the military action should be disregarded in the balancing of military advantages against civilian casualties. This limitation seems to exclude several major military operations of the recent past.⁵⁷ Hence, the formula of proportionality in article 51(5)(b) of Protocol I remains quite ambiguous and difficult to implement. Because of this ambiguity, a clear answer to all the questions posed above as to the correct contents of the concept of proportionality cannot be offered.

In sum, the special report to the prosecutor of the International Criminal Tribunal of Yugoslavia summarized the difficulty in applying the principle of proportionality to the NATO campaign in Yugoslavia as follows: “[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.”⁵⁸ In fact, one may argue that the inability to offer more precise guidelines derives from the very nature of the principle of proportionality – an open-ended legal standard designed to protect civilians while accommodating an indefinite number of changing circumstances. One thing is for certain; it is not a hard and fast set of rules.

⁵² Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. OF MIL. ETHICS 3, 22 (2005).

⁵³ W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, 12 EUR. J. INT'L L. 489, 499 (2001).

⁵⁴ See Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 92-93 (2006).

⁵⁵ See HENCKAERTS & DOSWALD-BECK, *supra* note 34, at 49 (noting the practice of Australia, Belgium, Canada, France, Germany, Italy, Netherlands, New Zealand, Spain, United Kingdom, United States).

⁵⁶ COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 40, at 684.

⁵⁷ GARDAM, *supra* note 41, at 101. Judith Gardam suggests that the application of this construction would probably have made illegal the American defoliation campaign in the Vietnam War. *Id.* at 102. In this campaign the US Army destroyed several of Vietnam's forests so as to prevent the Vietcong from using them as cover. *Id.* In that case the military advantage was to be achieved only in the long term, and even then only in a piecemeal manner. *Id.*

⁵⁸ *International Criminal Tribunal for the Former Yugoslavia (ICTY): 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, 1271 (2000) [hereinafter *NATO Final Report*].

The ambiguity inherent in the notion of proportionality is well accepted by states and commentators alike, and was acknowledged by state representatives even when the terms of the Protocol I were drafted.⁵⁹ Moreover, judicial decisions and formal declarations interpreting this article are scarce. Those that exist have contributed very little to the clarification of the issue.

One possible exception is the decision of the Israeli Supreme Court sitting as the High Court of Justice (HCJ) in its decisions in the *Targeted Killing* case.⁶⁰ In this case, the court declared that the policy of targeted killings of terrorists is legal under some specific conditions.⁶¹ One of the main limits the court put on the use of this policy is the need to minimize the 'collateral damage' sustained by civilians not taking a direct part in hostilities (referred to by the HCJ as "innocent civilians")⁶² in the course of targeted killing operations. The court realizes that much uncertainty surrounds the application of the test:

[O]ne must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed [citation omitted]. The hard cases are those which are in the space between the extreme examples⁶³

With relation to 'hard cases', the Court offered only limited guidance, referring again to ambiguous or subjective considerations: 1) the desired military advantage has to be both "direct and anticipated";⁶⁴ and 2) a balance has to be maintained between the "state's duty to protect the lives of its soldiers and civilians" and its "duty to protect the lives of innocent civilians harmed during attacks on terrorists."⁶⁵

While this part of the decision is of little help in clarifying the parameters of proportionality, the Court's judgment introduced a requirement for investigation that seems to highlight another perspective of the concept of proportionality. 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 held that a "meticulous examination" of every case potentially giving rise to collateral damage is required prior to the attack.⁶⁶ This requirement seems to correspond to the precautionary obligations introduced by article 57 of Protocol I.⁶⁷ Barak also introduced a requirement for *ex post* review in the *Targeted*

⁵⁹ Fenrick, *supra* note 37, at 106.

⁶⁰ HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006], available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf [hereinafter *Targeted Killing* case].

⁶¹ *Id.* ¶ 64.

⁶² *Id.* ¶ 45.

⁶³ *Id.* ¶ 46.

⁶⁴ *Id.* This legal standard appears to derive from the language of article 51(5)(b) of Protocol I. *Protocol I, supra* note 23, art. 51(5)(b).

⁶⁵ *Targeted Killing* case, ¶ 46.

⁶⁶ *Id.*

⁶⁷ Protocol I requires parties to:

(i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the

Killing case – a review process that is ultimately subject to judicial supervision.⁶⁸

Hence, it seems that for the Israeli Supreme Court the solution to the ambiguity of the term “proportionality” lies in investigations, both before and after the attack.⁶⁹ 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 made? In the next part of this article I shall take on these questions, and attempt to describe what is meant by ex ante and ex post review.

IV. Proportionality as Reasonableness

A. 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, which the reasonable commander must apply in accordance with his knowledge of the field.⁷⁰ This, of course, is a very general standard, and one that is very hard to implement.⁷¹ Does there exist a gauge that would facilitate an estimate of what a reasonable commander would decide?

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 experts in their field of operation, and courts are reluctant to dispute the decisions of the agencies when they act within their field of expertise. Instead, when courts review decisions of a governmental agency, they ask whether the agency's decision was reasonable.⁷² The test for reasonableness is mainly a procedural test.⁷³ Courts analyze whether the agency followed the

meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Protocol I, *supra* note 23, art. 57(2)(a).

⁶⁸ *Targeted Killing* case, ¶ 54.

⁶⁹ See Amichai Cohen & Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 J. INT'L CRIM. JUST. 310, 317 (2007).

⁷⁰ Fenrick, *supra* note 53, at 499.

⁷¹ See Amichai Cohen, *Rules and Standards in the application of IHL*, 39 ISR. L. REV. 41 (2008).

⁷² E.g., Stephen Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 833 (1978).

⁷³ I do not intend to go into a full discussion of American administrative law regarding the correct parameters of judicial review of administrative agencies. Suffice it to say that it seems that even after the Supreme Court's decisions of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm*, 463 U.S. 29, 43 (1983), procedural review is still the Court's main tool of review for administrative actions.

correct procedures, possessed all of the relevant data, and held the appropriate hearings.⁷⁴ In asking whether the agency's actions were reasonable, courts give deference to the substance of the agency's decision.⁷⁵

I suggest that a substantively similar process takes place with regards to proportionality in IHL. Currently, the law merely asks whether the commanders in the field, when making their decisions, took into account the likelihood that civilians would be hurt. IHL can not judge whether a commander's decisions were correct; courts do not possess all the required information, and even if courts could gather all of the facts, it would be too difficult to know which parameters to apply. IHL only judges a commander's *decision-making process*.

Naturally, then, *ex ante* review is required. An investigation into the extent of civilian collateral damage should precede the initiation of a military operation. Of course, this requirement carries different meanings in different contexts. In a large scale pre-planned attack, it mandates gathering all available information and subjecting the planned operation to in-depth analysis. By contrast, once an operation is already under way, commanders should be held to a different standard for ad hoc military decisions when time and resources are lacking to gather and analyze information regarding the potential results of their actions. Hence, once an operation is underway, the primary responsibility for the review lies with the commander on the ground. Since this commander has limited resources (such as time and operational intelligence) his obligations are of a more limited nature. He only has to ask the questions that we can expect a reasonable commander in such a situation to ask. He can only arrive at decisions according to the knowledge he possesses.⁷⁶

Ex ante review is an important facet of any military operation, especially when there is a potential for civilian casualties. *Ex ante* review is one of the basic requirements of Protocol I, and it seems that most armies in the West are using legal advisors to verify that such a review is undertaken.⁷⁷ Whatever the context, states must be able to verify that their militaries conducted an *ex ante* proportionality review prior to a military operation. Under the present regime, the decisions made by military commanders are treated like those of administrative agencies and are subject to a reasonableness review.

B. *Ex ante* Review is Not Enough

⁷⁴ On judicial review of governmental agencies' procedures *see generally* RICHARD PIERCE ET. AL., ADMINISTRATIVE LAW AND PROCESS (3rd ed. 1999). For a critical position, *see* JERRY L. MASHAW, GREED, CHAOS & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 155-80 (1997).

⁷⁵ In the United States, the discussion revolved around the "hard look" view. William Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699 (1979). The "Hard Look" doctrine in administrative matters requires a court to understand and scrutinize the data and methodology used by the agency, even in complicated scientific issues. *Id.* at 704. Courts, judges and academics alike usually reject this view. For an extended discussion, *see* PIERCE, *supra* note 74, at 386-93.

⁷⁶ *See, e.g.*, the reservation of the United Kingdom to its ratification of Protocol I, July 2, 2002, *available at* <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> ("Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time."); *see also* the reservation of Canada to its ratification of Protocol I, Nov. 20, 1990, *available at* <http://www.icrc.org/ihl.nsf/NORM/172FFEC04ADC80F2C1256402003FB314?OpenDocument>, ("It is the understanding of the Government of Canada that, in relation to Articles 48, 51 to 60 inclusive, 62 and 67, military commanders and others responsible for planning, deciding upon or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant time and that such decisions cannot be judged on the basis of information which has subsequently come to light.").

⁷⁷ *See* Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 2 CHI. J. INT. L. 445 (2003) (discussing legal advisors in modern military conflicts).

Commanders, however, are not equivalent to administrators. They perform different functions. Officials who work in administrative agencies service their own communities and deal with citizens of their own country. An assumption that they will behave reasonably is entirely 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. Administrative agencies are subject to judicial review both before and after the agency pursues a course of action. Courts, therefore, ensure and then verify that administrators ask the appropriate questions prior to embarking on a course of action. In contrast, military operations are not subject to the same degree of review. Courts are reluctant to intervene in military operations before they are initiated.⁷⁸ Courts are aware that their knowledge of military affairs and strategy is inferior to that of military commanders. In addition, courts are afraid to postpone the timing of a military operation in order to review a military battle plan to ensure that the action taken will be proportional.⁷⁹ Finally, courts do not want to shoulder the responsibility for whatever damage a delay might cause.⁸⁰ Therefore, the *ex ante* review of military operations is very limited.

Even the Israeli Supreme Court, which has shown a unique and unprecedented willingness to intervene in military matters, has tended to avoid intervening in specific military operations when they are taking place, and has limited its review to general comments about appropriate courses of action.⁸¹ In sum, therefore, it must be concluded that *ex ante* review cannot provide assurance that the action taken complied with the requirements of proportionality. There exists no guarantee that commanders are acting reasonably, and that the actions are subject to adequate judicial review prior to their initiation. What is required is an additional layer of review.

In the following paragraphs, I examine two possible alternative methods for reviewing military operations to ensure that the principles of proportionality are satisfied: *ex post* investigations and criminal adjudication.

C. Alternative I - Ex Post Review

Ex post review ensures that a judicial body will eventually examine the actions of a military commander. A commander who is aware that his actions will be monitored after the fact is likely to give due consideration to all possibilities when reaching a decision to act. *Ex post* review can mean several things, but usually, armies use internal investigations as a means of evaluating the effectiveness of their mission. In many cases, armies employ the same method in order to investigate allegations of war crimes. However, if the investigators of the commander are part of the same chain of command, there is little chance that the investigation will yield trustworthy results.

⁷⁸ 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).

⁷⁹ For a detailed discussion and criticism of this claim and in general the attitude of courts towards national security issues see HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 134 (1990).

⁸⁰ *Id.*

⁸¹ Menachem Hofnung & Keren Weinshall-Margel, *Judicial Rejection as Substantial Relief: The Israeli Supreme Court and the War on Terror* (Dec. 24, 2008) (paper presented at the Annual International Conference of the Israeli Law and Society Association, Jerusalem) (on file with the author).

In cases involving accusations of human rights violations, several courts have expressed opinions as to how an investigation should be conducted. The most expansive description is that of the European Court of Human Rights in the *Isayeva* case,⁸² which concerned the death of several hundred Russian-Chechnyan civilians during the armed conflict in that region. The European Court of Human Rights decided that the death of civilians provided *prima facie* grounds for claiming violation of the right to life, and deemed the internal Russian investigation that exonerated all participants to have been insufficient.⁸³ The court specified that in order for an investigation in these matters to be considered adequate, four criteria had to be met:

1. The formal and practical independence of the investigators from the persons whose actions they were examining;
2. The ability of the investigation to lead to effective remedies including, where appropriate, criminal investigations;
3. The promptness of the investigation; and
4. The availability of public scrutiny.⁸⁴

There exists no clear international rule that declares these to be the only possible criteria. Neither is there a precise formula as to their respective weight and how they are to be applied. However, they do provide the general basis for the type of investigation that should be initiated into operations involving civilian casualties.⁸⁵ These types of investigations will ensure that militaries adhere to the rules of IHL. An *ex post* investigation conducted in accordance with the guidelines set in the *Isayeva* case is likely to force soldiers and commanders to consider an operation's impact on 'collateral damage' and its compliance with the requirements of proportionality when they plan or carry out an attack. Moreover, it seems that in order for such an investigation to be effective, the members of the investigative team should include military personnel capable of assessing the reasonableness of the actions undertaken by the attacking force.⁸⁶

D. Alternative II - Criminal Review

Judicial review of military actions takes place almost exclusively in the sphere of criminal justice after a soldier has been charged with violating a law of war. Only a few criminal trials have involved the violation of the principle of proportionality. There have been so few of these trials because there is a lack of certainty as to when a violation of the norm has taken place. Criminal law requires this type of certainty, but courts can never be certain when proportionality has been violated because it is an inherently ambiguous concept. Indeed, courts have been noticeably unwilling to convict soldiers for taking disproportionate action in battle. There is only one major

⁸² *Isayeva v. Russ.*, App. No. 57950/00, Eur. Ct. H.R. (2005).

⁸³ *Id.* ¶¶ 215-24.

⁸⁴ *Id.* ¶¶ 209-14.

⁸⁵ Contrary to some claims made by NGOs, there are no specific requirements for an international investigation, though such an investigation would seem to be more independent. I know of only one incident of loss of life where a government appointed a committee of investigation that included international members – the Saville inquiry formed by the British government in 1998 to investigate the events of Bloody Sunday in 1972. See *Bloody Sunday Inquiry, The Tribunal: Seeking the Truth*, BBC NEWS, Mar. 24, 2000, http://news.bbc.co.uk/2/hi/in_depth/northern_ireland/2000/bloody_sunday_inquiry/670704.stm.

⁸⁶ Indeed, such is the practice of commissions of inquiry appointed by the UN. E.g., the commission of the UN appointed to investigate the Qana incident in Lebanon in 1996 was headed by a retired General. See The Secretary-General, *Report of the Secretary's General Military Advisor Concerning the Shelling of the United Nations Compound at Qana on 18 April 1996*, U.N. Doc. S/1996/337 (May 1, 1996).

case in the entire corpus of judgments of the International Criminal Tribunal for Former Yugoslavia where a conviction was secured on the count of disproportionate action, and even then it was in a very extreme case where the disproportionality rose to the level of an indiscriminate attack.⁸⁷

In the International Criminal Court (ICC), there seems to be a high threshold for proving a violation of the principle of proportionality under international criminal law. Article 8(2)(b)(iv) of the ICC Statute requires that the humanitarian consequences of a reviewed attack be “clearly excessive.”⁸⁸ In non-international armed conflicts the Statute of the ICC does not even contain a prohibition on disproportionate attack.⁸⁹ Clearly, the drafters of the ICC Statute were looking for a clearer norm of proportionality, one that would be appropriate for application by a criminal court. Failing to find a clear definition of the norm of proportionality, they opted for limiting the application of the ICC Statute by adding the term “clearly,” which denotes a high threshold. This high threshold makes it unlikely that there will be any convictions of proportionality at the ICC.

Perhaps the requirement for investigations suggested in this article might be useful to the criminal justice system in determining a violation of proportionality requirements. A well established *ex ante* decision-making process should produce better information on the possible military gains and civilian casualties of attacks. Commanders exposed to this information would be unable to claim ignorance if their actions result in disproportionate damage to civilian populations. In other words, the criminal trial court will ask whether the attackers considered questions relating to proportionality. Similarly, the existence of an *ex post* investigation process might encourage commanders to better understand the implications of specific targeting strategies. An *ex post* investigation process would limit the ability of commanders to claim that the results of their actions were unforeseen. If past actions are reviewed properly, then the consequences of certain types of attacks would be better understood.

I believe that making investigations the focal point of the concept of proportionality will also serve to better distribute criminal responsibility between commanders and soldiers. Convicting a commander for acts of his subordinates is a major problem in international criminal law. Commanders can use the fact that they do not shoot guns themselves to transfer responsibility to their subordinates.⁹⁰ A requirement for investigations might be helpful in defining the responsibility of commanders for the acts of their subordinates.⁹¹ Article 28 of the ICC Statute imposes

⁸⁷ Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment of Trial Chamber, ¶ 507 (Mar. 3, 2000), available at <http://www.un.org/icty/blaskic/trialc1/judgement/index.htm> (It appears the court in *Blaskic* attempted to show that the attack on Vitez was undeniably *directed against civilians*. In order to prove this intention, the court cited the staggering number of civilian casualties, and especially the almost complete absence of military casualties. Hence, the real claim of the court appears to be that the violation was based on the principle of distinction; proportionality was used here only as an additional proof for this assertion).

⁸⁸ Article 8(2)(b)(iv) of the ICC Statute forbids

[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be *clearly excessive* in relation to the concrete and direct overall military advantage anticipated.

ICC Statute, *supra* note 37, art. 8(2)(b)(iv) (emphasis added); see also NATO Final Report, *supra* note 58, ¶ 21 (“The use of the word ‘clearly’ ensures that criminal responsibility would be entailed only in cases where the excessiveness of the incidental damage was obvious.”).

⁸⁹ See ICC Statute, *supra* note 37, art. 8(c)-(f).

⁹⁰ WILLIAM A. SCHABAS, AN INTRODUCTION TO INTERNATIONAL CRIMINAL COURT 219 (3rd ed. 2007).

⁹¹ On command responsibility in general, see Yuval Shany & Keren R. Michaeli, *The Case against Ariel Sharon: Revisiting the Doctrine of Command Responsibility*, 34 N.Y.U. J. INT’L L. & POL. 797, 816-67 (2002); see generally M. Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 9 TULSA J. COMP. & INT’L L. 1 (2001); A.D. Mitchell, *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV. 381 (2000).

responsibility on commanders who did not prevent international crimes from occurring, when “owing to the circumstances at the time” they “should have known” about their occurrence.⁹² That being the case, a robust *ex ante* review could significantly extend the exposure of commanders to 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 also criminalizes failures on the part of commanders to punish soldiers for violations that 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 an investigation might serve in itself as the basis for criminal liability.

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 belief that their actions were indeed proportional.⁹³ The existence of *ex post* review should ensure that the enlarged responsibility on commanders would not lead to lower ranking soldiers avoiding the application of proportionality when they are required to do so.

VI. Conclusion and application to Operation Cast Lead

The application of the principle of proportionality in military operations is ambiguous, and very hard to verify. It is almost impossible to generally establish the actual contents of the principle of proportionality without the presence of concrete facts. Instead, IHL should expect military commanders to apply their military expertise in a manner that reasonably considers the effects of their conduct on the civilian population. For such a requirement to be enforced, it is necessary that commanders examine their actions both before they give an order to attack and after the operation is over. Using the standards discussed above, the IDF appears to have satisfied some of the requirements of proportionality, while failing to satisfy other requirements.

Ex ante review: According to newspaper and oral reports the IDF did require commanders to take humanitarian law into account in the planning stages of the operation.⁹⁴ Moreover, legal advisors were involved in the planning of many operations, and provided advice regarding specific targets.⁹⁵ Whether or not the results achieved were correct or reasonable remains open to debate. Even so, the decision making process does appear to me to have been in conformity with the suggested norm.

Ex post review: The situation is completely different with regards to *ex post* determination. The IDF's position is that the only investigations that will take place are internal military commissions, and criminal investigations by the IDF's Chief Legal Advisor.⁹⁶ In fact, the IDF did

⁹² ICC Statute, *supra* note 37, art. 28(a)(i).

⁹³ *Id.* art. 33(1). Note that according to the Elements of Crime, the soldiers in the field are expected to make a value judgment on the proportional effects of their acts on the basis of the information available to them. International Criminal Court, *Elements of Crimes*, n.37, U.N. Doc. PCNICC/2000/1/Add.2 (2000), <http://202.54.104.236/intranet/eip/legislation/uploads/International%20Criminal%20Court,%20Elements%20of%20Crimes.pdf>.

⁹⁴ E.g., Yotam Feldman, *Operation Cast Lead: The Military Advocates Let the IDF Win*, HAARETZ, Jan. 23, 2009, (Hebrew), available at <http://www.haaretz.co.il/hasite/spages/1057768.html>.

⁹⁵ *Id.*

⁹⁶ Letter of Senior Assistant to the Attorney General to the Association of Civil Liberties in Israel (Feb. 24, 2009) (on file with author).

conduct such investigations, and their conclusions were that the IDF acted according to International Law in operation Cast Lead.⁹⁷ In my opinion, such an investigation *does not* satisfy the requirements of *ex post* investigation set out by international courts. IDF commissions are not independent, and cannot be so.⁹⁸ Moreover, there is no hint that the mandate of these commissions included the authority to recommend any sanctions.⁹⁹ Criminal investigations are problematic for several other reasons. First, the legal advisors unit of the IDF was involved in many of the decisions that require investigation;¹⁰⁰ second, the legal advisor is not completely independent;¹⁰¹ and third, a criminal investigation is always (and always should be) about the rights of the accused, not necessarily about learning the truth.

In this article I attempted to base the requirement for investigation on the principle of proportionality in IHL. The application of the principle of proportionality as proposed in this article requires armies to create a mechanism for independent *ex post* investigations, which will ensure that the inquiries are not conducted by the armed forces. This requirement is justified for many reasons, which were not discussed in this article. For example: the need to assure the public that indeed the IDF acted legally in Gaza, and to provide adequate and trustworthy answers to international criticism of the IDF's actions in Operation Cast Lead.

This is not to suggest that the investigation needs to be conducted by persons who are not government employees (though that might be advisable); neither does it imply the necessity for an international committee. It does, however, require armies to conduct full, independent and true investigations of their actions, and where possible, to make the findings of these investigations public.

These requirements apply to all armies. It is also incumbent on the IDF.

⁹⁷ On April 22, 2009, the IDF spokesperson released the conclusions of 5 teams of investigators appointed by the IDF to look into specific incidents in Operations Cast Lead. These investigations concluded that throughout the fighting in Gaza, the IDF operated in accordance with international law. The IDF maintained a high professional and moral level while facing an enemy that aimed to terrorize Israeli civilians whilst taking cover amidst uninvolved civilians in the Gaza strip and using them as human shields. Notwithstanding this, the investigations revealed a very small number of incidents in which intelligence or operational errors took place during the fighting. These unfortunate incidents were unavoidable and occur in all combat situations, in particular of the type which Hamas forced on the IDF, by choosing to fight from within the civilian population.

IDF Announcement: Findings from Cast Lead Investigations, ISRAEL DEFENSE FORCE SPOKESPERSON, Apr. 22, 2009, <http://idfspokesperson.com/2009/04/22/idf-announcement-findings-from-cast-lead-investigations/>.

⁹⁸ *Cf. id.* The announcement claims that the officers were independent, and that they were not part of the chain of command in Operation Cast Lead. *Id.* In my mind, independence means not only being formally independent, but also disconnected from the investigated institution. Such, of course, is not the case with the investigating officers appointed by the IDF, who are officers in active service in the IDF, and there is nothing in the announcement to suggest that they will not continue to be so. *See id.*

⁹⁹ The full reports were not released, so one cannot be sure. Regardless, even in cases where the reports found "mistakes", the IDF's spokesperson announcement does not mention any sanctions. *Id.*

¹⁰⁰ Colonel, Advocate Pnina Sharvit-Baruch (retired), former IDF chief legal advisor for international law, Lecture at Tel Aviv University (Feb. 2, 2009).

¹⁰¹ The Legal Advisors unit is a military unit, headed by the IDF's chief attorney. The IDF's chief attorney is appointed by the Minister of Defense according to the recommendation of the IDF's chief of staff. Military Adjudication Law, art. 177 (1955) (Isr.).