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### Proportionality and War Crimes in Gaza under the Laws of Armed Conflict\*

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#### I. Introduction

There is no one who was not pained by the disturbing images coming out of Gaza at the end of December 2008 and in January 2009.<sup>1</sup> Moreover, there is no question that one of the main concerns if not “[t]he principal charge”<sup>2</sup> leveled against Israel’s actions in Gaza at that time relates to the proportionality of Israel’s three-week response<sup>3</sup> to almost a decade of incessant barrages of

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<sup>1</sup> See, e.g., *Behind the Headlines: Israel holds its fire* (Isr. Ministry of Foreign Aff.), Jan. 18, 2009, available at <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Israel+holds+fire+18-Jan-2009.htm>; Haviv Rettig Gur, *Law professor: Hamas is a war crimes 'case study'*, THE JERUSALEM POST, Jan. 13, 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1231866576202&pagename=JPArticle/ShowFull>.

<sup>2</sup> Thomas Darnstädt and Christoph Schult, *Did Israel commit war crimes in Gaza?*, DER SPIEGEL, Jan. 27, 2009, available at [http://www.salon.com/news/feature/2009/01/27/war\\_crimes/index.html](http://www.salon.com/news/feature/2009/01/27/war_crimes/index.html).

<sup>3</sup> See, e.g., Amnesty International, *UN URGED TO EXTEND GAZA INVESTIGATION*, Feb. 13, 2009, available at <http://www.amnesty.org/en/news-and-updates/news/un-urged-extend-gaza-investigation-20090213>; UN News Centre, *Ban calls for immediate ceasefire in Gaza*, Dec. 31, 2008, available at <http://www.un.org/apps/news/story.asp?NewsID=29446&Cr=gaza&Cr1=palestin#>; Amira Hass, *Arab League probes Israel for 'war crimes' committed in Gaza*, HAARETZ, Mar. 2, 2009, available at

thousands of rockets and mortar shells fired by Gaza-based terrorists<sup>4</sup> at Israeli civilians,<sup>5</sup> and whether the reaction of Israel to this bombardment constituted war crimes<sup>6</sup> as has been alleged.<sup>7</sup>

But does relevant international law, as applied to the facts that have thus far emerged from the three weeks of combat in Gaza, support contentions of the commission of war crimes asserted against Israel for allegedly acting in a disproportionate fashion? The answer is “no.” In other

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<http://www.haaretz.com/hasen/spages/1067727.html> (last updated Jan. 3, 2009); Ben Hubbard and Alfred De Montesquiou, *Rights groups say laws of war violated in Gaza*, ASSOCIATED PRESS, Feb. 9, 2009, available at <http://abcnews.go.com/International/WireStory?id=6800758&page=3>.

<sup>4</sup> While terrorist acts against Israel are perpetrated by various rival terrorist organizations operating from the Gaza Strip, the attacks on Israeli civilians have predominately been carried out by Hamas, the acronym in Arabic for “The Islamic Resistance Movement” (*Harakat al-Muqawamah al-Islamiyya*). Hamas (2009), Jewish Virtual Library, available at <http://www.jewishvirtuallibrary.org/jsource/Terrorism/hamas.html> (last visited Sept. 26, 2009). The dominant political power in Gaza, Hamas, took over the control of Gaza from the Palestinian Authority in 2007 following the Palestinian Authority unity government’s collapse and the violent expulsion of rival Fatah, which is still in control in the West Bank. Sebastian Rotella, *International Criminal Court to consider Gaza investigation*, L.A. TIMES, Feb. 5, 2009, available at [http://www.americantaskforce.org/daily\\_news\\_article/2009/02/25/1235593300\\_8](http://www.americantaskforce.org/daily_news_article/2009/02/25/1235593300_8). Hamas, which since Sept. 2000 has perpetrated countless terrorist attacks against Israel, in a variety of different forms including through infiltrations into Israeli communities, causing hundreds of Israeli civilian casualties, Hamas (2009), *supra*, has been responsible for many of the deadliest suicide bombings in Israel. Hamas, N.Y. TIMES, Apr. 9, 2009, available at <http://topics.nytimes.com/topics/reference/timestopics/organizations/h/hamas/index.html>.

The Hamas and other terrorist organizations operating against Israel such as the Palestinian Islamic Jihad Terror Organization, *The Palestinian Islamic Jihad Terror Organization 2006-2007* (Isr. Ministry of Foreign Aff.), June 5, 2008, available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups/The%20Palestinian%20Islamic%20Jihad%20Terror%20Organization%202006-2007>, and the Popular Front for the Liberation of Palestine, *The Popular Front for the Liberation of Palestine (PFLP) 2006-2007* (Isr. Ministry of Foreign Aff.), June 5, 2008, available at [http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups/The%20Popular%20Front%20for%20the%20Liberation%20of%20Palestine%20\(PFLP\)%202006-2007](http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups/The%20Popular%20Front%20for%20the%20Liberation%20of%20Palestine%20(PFLP)%202006-2007), among others, are designated as “terrorist” organizations by many countries including the United States, see *State Department Issues List of Foreign Terrorist Groups*, Apr. 10, 2008, available at <http://www.america.gov/st/texttrans-english/2008/April/20080410111249xjsnommis0.111355.html> and the European Union. See *Council Common Position 2009/67/CFSP of 26 Jan. 2009 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2008/586/CFSP*, L 23/42 OFFICIAL JOURNAL OF THE EUROPEAN UNION, Jan. 27, 2009, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:023:0037:0042:EN:PDE>. Hamas and other Palestinian terrorist organizations are forming tactical and conceptual ties with al-Qaeda, and they are aggressively preparing to conduct mega-terror attacks on Israel. Louis René Beres, *Understanding Gaza Pain and Perfidy Under International Law*, Jan. 28, 2008, available at [http://www.mythsandfacts.com/article\\_view.asp?articleID=99&order\\_id=9](http://www.mythsandfacts.com/article_view.asp?articleID=99&order_id=9).

<sup>5</sup> See, e.g., *Summary of rocket fire and mortar shelling in 2008* (Intelligence and Terrorism Info. Ctr. at the Isr. Intelligence Heritage & Commemoration Ctr. (IICC)), Jan. 1, 2009, available at [http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/pdf/ipc\\_e007.pdf](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_e007.pdf); Alan M. Dershowitz, *Israel’s actions are lawful and commendable*, THE JERUSALEM POST Jan. 4, 2009, available at [http://cgis.jpost.com/Blogs/dershowitz/entry/israel\\_s\\_actions\\_are\\_lawful](http://cgis.jpost.com/Blogs/dershowitz/entry/israel_s_actions_are_lawful).

<sup>6</sup> See, e.g., Darnstädt and Schult, *supra* note 2.

<sup>7</sup> E.g., Amnesty International, *Growing calls for investigations and accountability in Gaza conflict* (Jan. 14, 2009), available at <http://www.amnesty.org/en/news-and-updates/news/growing-calls-investigations-and-accountability-gaza-conflict-20090114> (last visited Sept. 26, 2009); George E. Bisharat, *Israel Is Committing War Crime, Hamas’s violations are no justification for Israel’s actions*, THE WALL STREET J., Jan. 10, 2009, available at <http://online.wsj.com/article/SB123154826952369919.html> (last visited Sept. 26, 2009); United Nations High Commissioner for Human Rights, Statement by Prof. Richard Falk, United Nations Special Rapporteur for Human Rights in the Occupied Territories (Dec. 27, 2008), available at <http://www.unhchr.ch/huricane/hurricane.nsf/view01/F1EC67EF7A498A30C125752D005D17F7?opendocument> (last visited Sept. 26, 2009); Stephanie Nebehay, *U.N. rights chief calls for Gaza war crimes probe* (Jan. 9, 2009), available at <http://uk.reuters.com/article/UKNews1/idUKTRE50851M20090109?pageNumber=1&virtualBrandChannel=0> (last visited Sept. 26, 2009).

words, under applicable international law Israel did not carry out war crimes in this regard.

Since 2001, terrorism<sup>8</sup> from Gaza has taken the form of more than 8,000 rockets and mortar shells<sup>9</sup> indiscriminately fired<sup>10</sup> at Israel's southern region, causing many casualties.<sup>11</sup> This region contains nearly one million Israelis (about 15% of the total population of Israel) who were thus literally held hostage by these attacks.<sup>12</sup> In 2006, the year following Israel's disengagement, withdrawal, and evacuation of Israeli forces and civilians<sup>13</sup> from Gaza, rocket fire against Israelis actually increased sharply -- by more than 500% -- from 179 to 946 rockets.<sup>14</sup> Despite diplomatic efforts by Israel aimed at trying to halt the relentless torrent of rocket fire,<sup>15</sup> the unremitting onslaught against Israel from Gaza nevertheless continued. Over 3,250 rockets and mortar shells,<sup>16</sup> in fact, were fired last year (2008) alone from Gaza at Israeli civilians and civilian structures like homes, schools, hospitals, shops, and even retirement homes.<sup>17</sup>

Among the numerous Israeli casualties caused by this unrelenting terrorist offensive were an untold number who suffered from long-term anxiety, shock, and trauma<sup>18</sup> as a result of the accumulated psychological impact<sup>19</sup> on the hundreds of thousands of Israelis living within range of the terrorists' rockets and missiles, and particularly on children,<sup>20</sup> the elderly, and the disabled. The daily threat of rocket and mortar shell attacks caused the population of Israel's southern region to live in fear<sup>21</sup> and destroyed the residents' well-being, daily routine, and sense of security.<sup>22</sup>

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<sup>8</sup> Global-security environment and international terrorism expert, Bruce Hoffman, defines terrorism as "the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change." BRUCE HOFFMAN, *INSIDE TERRORISM* 43 (1998), cited in Kim Cragin and Peter Chalk, *Terrorism & Development: Using Social and Economic Development to Inhibit a Resurgence of Terrorism*, RAND (2003), available at <http://www.questia.com/PM.qst?a=o&d=102597763> (last visited Sept. 26, 2009).

<sup>9</sup> See, e.g., *Summary of rocket fire and mortar shelling in 2008*, *supra* note 5, at 5.

<sup>10</sup> See *Behind the Headlines: Rockets rain down on southern Israel* (Isr. Ministry of Foreign Aff.), Dec. 25, 2008, available at [http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Behind\\_the\\_Headlines\\_Rockets\\_on\\_southern\\_Israel\\_Dec\\_2008.htm](http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Behind_the_Headlines_Rockets_on_southern_Israel_Dec_2008.htm) (last visited Sept. 26, 2009).

<sup>11</sup> See, e.g., *Summary of rocket fire and mortar shelling in 2008*, *supra* note 5, at 2, 3.

<sup>12</sup> See *Rockets rain down on southern Israel*, *supra* note 10.

<sup>13</sup> See *Responding to Hamas Attacks from Gaza - Issues of Proportionality, Background Paper* (Isr. Ministry of Foreign Aff.), Dec. 2008, available at [http://www.mfa.gov.il/NR/rdonlyres/A1D75D9F-ED9E-4203-A024-AF8398997029/0/Responding\\_to\\_Hamas\\_Attacks\\_from\\_Gaza\\_december\\_2008.pdf](http://www.mfa.gov.il/NR/rdonlyres/A1D75D9F-ED9E-4203-A024-AF8398997029/0/Responding_to_Hamas_Attacks_from_Gaza_december_2008.pdf) (last visited Sept. 26, 2009).

<sup>14</sup> See, e.g., *Summary of rocket fire and mortar shelling in 2008*, *supra* note 5, at 5; Dore Gold, *Did Israel Use 'Disproportionate Force' in Gaza?* (Dec. 28, 2008), 8/16 Jerusalem Center for Public Affairs, available at [http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=1&DBID=1&LNGID=1&TMID=111&FID=378&PID=0&IID=2808&TTL=Did\\_Israel\\_Use#](http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=1&DBID=1&LNGID=1&TMID=111&FID=378&PID=0&IID=2808&TTL=Did_Israel_Use#).

<sup>15</sup> See, e.g., Amos Harel, Barak Ravid, and Avi Issacharoff, *Mubarak calls Livni to Cairo to discuss renewing Gaza cease-fire*, HAARETZ, Dec. 24, 2008, available at <http://www.haaretz.com/hasen/spages/1049045.html> (last visited Sept. 26, 2009).

<sup>16</sup> See, e.g., *Summary of rocket fire and mortar shelling in 2008*, *supra* note 5, at 2.

<sup>17</sup> See, e.g., UN, *Red Cross Halt Deliveries to Gaza* (Jan. 8, 2009), available at [http://www.nypost.com/seven/01082009/news/worldnews/leb\\_missiles\\_hit\\_israel\\_149223.htm](http://www.nypost.com/seven/01082009/news/worldnews/leb_missiles_hit_israel_149223.htm) (last visited Sept. 26, 2009).

<sup>18</sup> See, e.g., Mijal Grinberg, *Study: Majority of Sderot children exhibit symptoms of post-traumatic stress*, HAARETZ, Jan. 18, 2008, available at <http://www.haaretz.com/hasen/spages/945457.html> (last visited Sept. 26, 2009); *Summary of rocket fire and mortar shelling in 2008*, *supra* note 5, at 3.

<sup>19</sup> See, e.g., *Summary of rocket fire and mortar shelling in 2008*, *supra* note 5, at 3.

<sup>20</sup> See, e.g., *Rockets rain down on southern Israel*, *supra* note 10; Dershowitz, *supra* note 5.

<sup>21</sup> See, e.g., *Indiscriminate Fire*, HUMAN RIGHTS WATCH (June 30, 2007), available at <http://www.hrw.org/en/node/10911/section/3>, <http://www.hrw.org/en/node/10911/section/6>, and <http://www.hrw.org/en/node/10911/section/7> (last visited Sept. 26, 2009); *Hamas Exploitation of Civilians as Human*

Israel reluctantly<sup>23</sup> engaged in a three-week military operation commencing on December 27, 2008, to finally put an end to this unbearable and intolerable situation<sup>24</sup> which was perpetuated and fueled by the smuggling of weapons,<sup>25</sup> predominantly from Iran and Syria, into Gaza via dozens of clandestine tunnels built underground.<sup>26</sup>

## II. The Legal Framework of War

### A. General Background

The main legal connotation of the existence of a state of armed conflict between Gaza and Israel is the applicability of rules recognized as the laws of armed conflict,<sup>27</sup> otherwise known as the laws of war. Following the determination that a situation of armed conflict exists, and that the body of relevant rules for the examination of the situation is the laws of armed conflict (*jus in bello*), considerations regarding the legality of the use of force in the first place (*jus ad bellum*) are no longer relevant.<sup>28</sup> Yet despite the focus herein on an examination of the proportionality of Israel's actions in Gaza in light of the laws of war, it nevertheless bears mention that to the extent that *jus ad bellum* would be relevant, Israel, just as any other State, is permitted to exercise its inherent right of self-defense,<sup>29</sup> and indeed has the duty to thwart attacks against its citizens<sup>30</sup> and to rid itself of any threat

*Shields* (Intelligence and Terrorism Info. Ctr. at the Isr. Intelligence Heritage & Commemoration Ctr. (IICC)), Jan. 2009, available at

[http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/html/hamas\\_e028.htm](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e028.htm) (last visited Sept. 26, 2009).

<sup>22</sup> See, e.g., *Summary of rocket fire and mortar shelling in 2008*, *supra* note 5, at 3.

<sup>23</sup> See, e.g., Amos Harel, Avi Issacharoff and Barak Ravid, *Hamas declares end to cease-fire, Israeli gov't sources fear violence is unavoidable*, HAARETZ, Dec. 21, 2008, available at <http://www.haaretz.com/hasen/spages/1048055.html> (last visited Sept. 26, 2009).

<sup>24</sup> See, e.g., *Rockets rain down on southern Israel*, *supra* note 10; *Israel strikes back against Hamas terror in Gaza* (Isr. Ministry of Foreign Aff.), Jan. 21, 2009, available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Israel+strikes+back+against+Hamas+terror+infrastructure+Gaza+27-Dec-2008.htm> (last visited Sept. 26, 2009).

<sup>25</sup> See, e.g., David Schenker, *Ceasefire hinges on Egypt closing smuggling routes*, NEW YORK DAILY NEWS, Jan. 12, 2009, available at [http://www.nydailynews.com/news/us\\_world/2009/01/12/2009-01-12\\_ceasefire\\_hinges\\_on\\_egypt\\_closing\\_smuggl-3.html](http://www.nydailynews.com/news/us_world/2009/01/12/2009-01-12_ceasefire_hinges_on_egypt_closing_smuggl-3.html).

<sup>26</sup> See, e.g., *Israel holds its fire*, *supra* note 1.

<sup>27</sup> See Antonio Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law 2*, in the matter concerning HCJ 769/02 The Public Committee Against Torture v. The Government of Israel (2003), available at <http://www.stoptorture.org.il/files/cassese.pdf> (last visited Oct. 12, 2009); Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995), available at <http://www.adh-geneva.ch/RULAC/pdf/Decision-on-the-Defence-Motion-for-Interlocutory-Appeal-on-Jurisdiction.pdf> (last visited Oct. 12, 2009); U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, para. 15.3.1 (2004).

<sup>28</sup> See, e.g., Iain Scobbie, *Words My Mother never Taught Me – "In Defense of the International Court,"* 99 AM. J. INT'L L. 76, 83-84 (2005).

<sup>29</sup> Specifically, when terrorists attack a State, the State is permitted to exercise force to protect itself pursuant to its inherent right of self-defense pursuant to Article 51 of the United Nations Charter that stipulates: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter, art. 51 (1945).

<sup>30</sup> See e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J., sec. 141 (July 9), available at <http://www.icj-cij.org/docket/files/131/1671.pdf> (last visited Sept. 26, 2009).

caused by the terrorists.<sup>31</sup>

A dreadful and lamentable consequence of all armed conflicts is that they necessarily entail unavoidable and tragic civilian casualties, suffering, sorrow, and destruction as an inevitable result of their devastating nature.<sup>32</sup> It is therefore through the laws of war that the international community endeavors to bring some measure of order to the conduct of hostilities between States.<sup>33</sup> The horrendous consequences of war consequently were not lost on the drafters of basic international instruments regulating international armed conflict.<sup>34</sup> These include the Regulations to the 1907 Fourth Hague Convention,<sup>35</sup> which reflect binding and obligatory customary international law,<sup>36</sup> the 1949 Fourth Geneva Convention,<sup>37</sup> the 1977 Protocol I,<sup>38</sup> and the 1998 Rome Statute of the International Criminal Court.<sup>39</sup> While the latter two international agreements are not binding as such on Israel, or the United States, because they are not parties to them, certainly though any customary international law principles contained in them are indeed obligatory and binding.<sup>40</sup>

<sup>31</sup> *E.g.*, Israel's Response in the matter concerning HCJ 4825/04 Aljan et al. v. Prime Minister et al., para. 168 [2005] (in Hebrew, on file with author).

<sup>32</sup> *E.g.*, William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 92 (1982); W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 205 (1990); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 1 (2004); *see id.* at 16.

<sup>33</sup> *See* MALCOLM N. SHAW, *INTERNATIONAL LAW* 1164-90 (6<sup>th</sup> ed. 2008).

<sup>34</sup> *See id.* at 1169-70. An international convention or treaty binds only those parties to it. *E.g.*, SHAW, *supra* note 33, at 95; *see* North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment 1969 I.C.J. secs. 25-29 (Feb. 20, 1969), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cc&case=52&code=cs2&p3=4> (last visited Sept. 26, 2009). Thus, if a State is not a party to the convention, it is under no obligation to abide by it, barring the case in which the treaty embodies customary international law since it then "reflects" obligatory and binding customary international law. *E.g.*, SHAW, *supra* note 33, at 95; *see* North Sea Continental Shelf Cases, *supra*, at sec. 69.

<sup>35</sup> Regulations concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention respecting the Laws and Customs of War on Land (1907), available at [http://avalon.law.yale.edu/20th\\_century/hague04.asp](http://avalon.law.yale.edu/20th_century/hague04.asp) (last visited Sept. 26, 2009).

<sup>36</sup> *See, e.g.*, Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 1, 24 (Dieter Fleck ed., 1995); U.K. MINISTRY OF DEFENCE, *MANUAL*, *supra* note 27, at para. 16.27; DINSTEIN, *supra* note 32, at 10; SHAW, *supra* note 33, at 1169. Specifically, the Regulations annexed to the Fourth Hague Convention, *supra* note 35, were held by the Nuremberg International Military Tribunal, *The High Command Case*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 532 (Oct. 1946-Apr. 1949), available at [http://www.loc.gov/rr/frd/Military\\_Law/NTs\\_war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html) (last visited Sept. 26, 2009), and by the International Military Tribunal for the Far East in Tokyo in 1948, *see, e.g.*, DINSTEIN, *supra* note 32, at 10, to be customary international law and "remain of the utmost importance", Greenwood, *supra*, at 24, 25, since they continue to constitute the foundation of the contemporary rules of the law of armed conflicts. SHAW, *supra* note 33, at 1169.

<sup>37</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), available at <http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument> (last visited Sept. 26, 2009). Israel and the United States are both parties to the Fourth Geneva Convention.

<sup>38</sup> Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims in International Armed Conflicts (Protocol I) (1977), available at <http://www2.ohchr.org/english/law/protocol1.htm> (last visited Sept. 26, 2009).

<sup>39</sup> Rome Statute of the International Criminal Court (1998), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm> (last visited Sept. 26, 2009).

<sup>40</sup> While many of the provisions contained in Protocol I, *supra* note 38, are reflective of customary international law, Theodor Meron, *Customary Law, Crimes of War, a-z guide*, available at <http://www.crimesofwar.org/thebook/customary-law.html> (last visited Sept. 26, 2009), it is not binding per se on States that are not parties to it, *see* SHAW, *supra* note 33, at 95, 1170, such as Israel and the United States. *See, e.g.*, Kenneth Anderson, *Proportionality in jus in bello* (July 21, 2006), available at

Nevertheless, since military considerations obviously play a crucial and vital role in any armed conflict situation,<sup>41</sup> the architects of these international conventions realized that military necessity, however problematic, is a legitimate and essential consideration. As the Fourth Hague Convention's Preamble reveals, military necessity has been taken into account in the drafting of its provisions, being "inspired by the desire to diminish the evils of war, *as far as military requirements permit . . .*"<sup>42</sup> While rules are imposed that require participants to carry out hostilities in as humane a fashion as is practical and to protect the victims of war during the course of conflict,<sup>43</sup> these same rules attempt to preserve, in the process, a fine and sensitive balance between humanitarian concerns and military necessity.<sup>44</sup>

Thus, while the freedom of action of belligerents certainly is restricted, they nevertheless retain a great deal of latitude in the conduct of their military activities. The aim of the laws of war then is, in the words of the 1868 St. Petersburg Declaration, to alleviate "as much as possible the calamities of war."<sup>45</sup> The idea is not the total elimination of war's tragedies but rather the attenuation of the effect of war's hardships "as much as possible" within the context of each side's natural and obvious desire to prevail over the enemy.<sup>46</sup> Belligerents fight wars in order to win,<sup>47</sup> and as Louise Doswald-Beck and Sylvain Vite point out, the rules "are fashioned in a manner that will not undermine the ability of the army in question to win the war."<sup>48</sup> Of the fundamental principles according to which war is to be conducted and that prescribe the means that can be used to conduct

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<http://kennethandersonlawofwar.blogspot.com/2006/07/proportionality-in-jus-in-bello.html> (last visited Sept. 26, 2009). Hence those provisions appearing in Protocol I that are not part of customary international law therefore do not obligate States that are not parties to the Protocol. See, e.g., SHAW, *supra* note 33, at 1170. Similarly the Rome Statute, *supra* note 39, as such does not reflect customary international law. See, e.g., Richard G. Wilkins, *Ramifications of The International Criminal Court for War, Peace And Social Change* 2, 3 (2002), available at [http://www.lifesitenews.com/warofamily/icc/ICC\\_Ramifications.pdf](http://www.lifesitenews.com/warofamily/icc/ICC_Ramifications.pdf) (last visited Sept. 26, 2009). Therefore, it is not binding in and of itself on States that are not parties to it, see SHAW, *supra* note 33, at 95, including Israel and the United States, except of course for any principles contained therein that may mirror customary international law. The terrorists of course are bound by these legal principles as well. Any other conclusion would mean that terrorists as illegal combatants could hold a better status or enjoy greater immunities than would be the case if they were part of an army of a State and fighting in a war as legal combatants.

<sup>41</sup> See, e.g., D. W. Greig, *The Underlying Principles of International Humanitarian Law*, 9 AUSTL. Y.B. INT'L L. 46, 53 (1985).

<sup>42</sup> Fourth Hague Convention Respecting the Laws and Customs of War on Land, preamble (1907), available at [http://avalon.law.yale.edu/20th\\_century/hague04.asp](http://avalon.law.yale.edu/20th_century/hague04.asp) (last visited Sept. 26, 2009) (emphasis added).

<sup>43</sup> See SHAW, *supra* note 33, at 1169-71, 1184.

<sup>44</sup> See *id.*, at 1184, 1187; MYRES S. MCDUGAL and FLORENTINO P. FELICIANO, THE INTERNATIONAL LAW OF WAR, TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER 82 (1961, 1994); Yoram Dinstein, *The International Law of Inter-State Wars and Human Rights*, 7 ISRAEL YEARBOOK ON HUMAN RIGHTS 139, 146 (1977); DINSTEIN, *supra* note 32, at 17.

<sup>45</sup> Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight preamble (1868), available at <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument> (last visited Sept. 26, 2009).

<sup>46</sup> Dinstein, *Inter-State Wars*, *supra* note 44, at 139, 146; DINSTEIN, *supra* note 32, at 17; see L. OPPENHEIM, II INTERNATIONAL LAW: A TREATISE 225 (H. Lauterpacht ed., 7th ed. 1952); Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 876-877 (1947); *The Hostage Case*, TRIALS OF WAR CRIMINALS, *supra* note 36; U.S. DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE (Field Manual No. FM27-10, perm. ed., rev. vol. 1976), para. 3(a); U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 2.2.

<sup>47</sup> E.g., U.S. DEPARTMENT OF THE ARMY, LEGAL SUPPORT TO OPERATIONS (Field Manual No. FM27-100), paras. 5-1 and 5-2 (2000); DINSTEIN, *supra* note 32, at 1-2; see *id.* at 17.

<sup>48</sup> Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 293 INTERNATIONAL REVIEW OF THE RED CROSS 94, 100-01 (1993), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMRT> and <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList141/E59EC039BC5A8EE4C1256B66005985F0>; see Fenrick, *supra* note 32, at 126.

it,<sup>49</sup> and which today continue to form the framework for the international laws of armed conflict,<sup>50</sup> paramount among them is the military necessity principle.<sup>51</sup>

The “practical application of the principle of military necessity,” as outlined in paragraph 2.2.3 of the 2004 British law of armed conflict manual,<sup>52</sup> referencing the judgment of the Nuremberg Military Tribunal in the *Hostage Case*, is that

[m]ilitary necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. . . . It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war. . . . The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law.<sup>53</sup>

## B. Protection of Property during Armed Conflict

While understandably no rigid and inflexible tenet can dictate the circumstances of a situation of necessity,<sup>54</sup> a sound and logical standard regarding the determination of “military necessity” for the destruction and seizure of property during armed conflict is the following: Would a reasonably prudent military commander conducting himself in accordance with the laws of armed conflict and under like conditions have permitted the seizure or destruction?<sup>55</sup> “In applying such a test,” writes Morris Greenspan, “due latitude should be allowed for the stress under which men make their decisions in conducting military operations, and they should be judged according to the conditions under which they operated, rather than whether they would have made the same decision looking back on the matter from the unhurried calm of court-room proceedings.”<sup>56</sup>

<sup>49</sup> MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 313 (1959).

<sup>50</sup> U.K. MINISTRY OF DEFENCE, *MANUAL*, *supra* note 27, at para. 2.1.

<sup>51</sup> GREENSPAN, *supra* note 49, at 313.

<sup>52</sup> U.K. MINISTRY OF DEFENCE, *MANUAL*, *supra* note 27, at para. 2.2.3. Military law of war manuals typically reflect principles of customary and treaty international law. They can serve an important role as State *opinio juris* evidence, Noam Neuman, *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality*, 7 *YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW* 79, 99 n. 105 (2004), being indicative as to how international legal principles are to be interpreted and applied in practice. *See, e.g.* U.K. MINISTRY OF DEFENCE, *MANUAL*, *supra* note 27, at *Forward* and *Preface*; Parks, *supra* note 32, at 38. Moreover, legal principles appearing in the manuals, if accepted in an adequately uniform fashion, may also be viewed as a source of international law under the International Court of Justice Statute’s “general principles of law recognized by civilized nations.” Statute of the International Court of Justice, art. 38(1)(c), available at [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II) (last visited Sept. 26, 2009). Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 *A.F. L. REV.* 1, 140-42 (2000); Neuman, *supra*, at 99 n.105.

<sup>53</sup> *The Hostage Case*, *supra* note 46, at 1253-1254; GREENSPAN, *supra* note 49, at 313-314. The U.S. Army Field Manual on *The Law of Land Warfare* similarly defines “military necessity” as “that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.” U.S. DEPARTMENT OF THE ARMY, *LAND WARFARE*, *supra* note 46, at para. 3(a); *see* U.K. MINISTRY OF DEFENCE, *MANUAL*, *supra* note 27, at para. 2.2; Fenrick, *supra* note 32, at 93.

<sup>54</sup> GREENSPAN, *supra* note 49, at 285, citing THE WAR OFFICE [UK], *THE LAW OF WAR ON LAND BEING PART III OF THE MANUAL OF MILITARY LAW* chap. xiv, para. 434 (1958).

<sup>55</sup> GREENSPAN, *supra* note 49, at 279-80.

<sup>56</sup> *Id.*

International law will not condone destruction of property as a goal,<sup>57</sup> yet when “imperatively demanded by the necessities of war” such destruction will indeed be deemed to be lawful,<sup>58</sup> as specifically prescribed in the Regulations of the Fourth Hague Convention.<sup>59</sup> While there must exist a certain rational correlation between the property’s destruction and prevailing against the forces of the enemy,<sup>60</sup> “[i]t is lawful to destroy . . . any . . . property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations,” according to the *Hostage Case* Nuremberg Military Tribunal judgment<sup>61</sup> and as restated by the 2004 British law of armed conflict manual.<sup>62</sup> After the Second World War, courts held admissible in various cases tactics that included resorting to a “scorched earth” policy, with the systemic destruction by occupying forces of entire areas that was carried out with the withdrawal of the forces upon the enemy’s approach when required by military considerations and conducted in special instances solely for “legitimate military reasons.”<sup>63</sup> The Charter of the International Military Tribunal lists as a war crime “the wanton destruction of cities, towns or villages, or devastation *not justified by military necessity*,”<sup>64</sup> and the Fourth Geneva Convention includes as a grave breach “extensive destruction and appropriation of property, *not justified by military necessity* and carried out unlawfully and wantonly.”<sup>65</sup> Under the 1998 Rome Statute of the International Criminal Court,<sup>66</sup> the destruction of enemy property is accordingly not deemed to be a war crime if this destruction is “imperatively demanded by the necessities of war,”<sup>67</sup> and even *extensive* destruction and appropriation of property are only considered to be war crimes if they are “*not justified by military necessity* and carried out unlawfully and wantonly.”<sup>68</sup> This then implies that military necessity *will* indeed justify large-scale damage<sup>69</sup> that is carried out lawfully and not wantonly.

An illustrative case in point was that of the judgment of the Nuremberg Military Tribunal concerning the Nazi Generaloberst Lothar Rendulic<sup>70</sup> who, as Commander in Chief of the 20th Mountain Army in October 1944 “issued an order, to troops under his command and jurisdiction, for the complete destruction of all shelter and means of existence in, and the total evacuation of the entire civilian population of, the northern Norwegian province of Finnmark. . . . [T]his order

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<sup>57</sup> See, e.g., U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 2.2.3; *The Hostage Case*, *supra* note 46, at 1253-54; Fenrick, *supra* note 32, at 93.

<sup>58</sup> U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 2.2.3; *The Hostage Case*, *supra* note 46, at 1253-54; International and Operational Law Department, the Judge Advocate General’s School, LAW OF WAR HANDBOOK 165 (2005).

<sup>59</sup> Regulations annexed to the Fourth Hague Convention, *supra* note 35, at art. 23(g).

<sup>60</sup> *The Hostage Case*, *supra* note 46, at 1253-54; see GREENSPAN, *supra* note 49, at 278, 281, 283; U.S. DEPARTMENT OF THE ARMY, LAND WARFARE, *supra* note 45, at paras. 56, 58; U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at paras. 2.2.3, 11.75, 11.78.

<sup>61</sup> *The Hostage Case*, *supra* note 46, at 1253-54.

<sup>62</sup> U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 2.2.3.

<sup>63</sup> JEAN S. PICTET, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 302 (1952).

<sup>64</sup> Charter of the International Military Tribunal, art. 6(b) (1945), available at <http://avalon.law.yale.edu/imt/imtconst.asp#art6> (last visited Sept. 26, 2009) (emphasis added); Pictet, *supra* note 63, at 302.

<sup>65</sup> Geneva Convention (IV), *supra* note 37, at art. 147 (emphasis added); Pictet, *supra* note 63, at 302.

<sup>66</sup> Rome Statute, *supra* note 39.

<sup>67</sup> See *id.* at art. 8(2)(b)(xiii).

<sup>68</sup> See *id.* at art. 8(2)(a)(iv) (emphasis added).

<sup>69</sup> See GREENSPAN, *supra* note 49, at 285-86 n.37; *The Hostage Case*, *supra* note 46, at 1296-97; U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 2.2.3.

<sup>70</sup> *The Hostage Case*, *supra* note 46, at 770, 1295.



was effectively and ruthlessly carried out.”<sup>71</sup> At his trial, Rendulic contended that “in view of the military situation as it then appeared to him” military necessity had required that in his retreat<sup>72</sup> he carry out a “scorched earth” policy in the Norwegian province of Finmark<sup>73</sup> that brought about total devastation: “Villages were destroyed . . . A complete destruction of all housing, communication, and transport facilities took place . . . The destruction was as complete as an efficient army could do it.”<sup>74</sup> The Nuremberg Tribunal found that while indeed “[a]n examination of the facts in retrospect can well sustain”<sup>75</sup> the conclusion

that there was no military necessity for this destruction and devastation. . . . we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist . . . . It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.<sup>76</sup>

Understandably, military objectives must always be distinguished from civilian objects, and operations may be directed only against military objectives,<sup>77</sup> which may be attacked by lawful combatants with all the consequent destruction and casualties.<sup>78</sup> The obligation for curtailing the risk to civilian objects has traditionally been placed “squarely in the hands of the party who could best control it, i.e., the defender,” explains W. Hays Parks. Although the attacker has “a clear obligation to avoid the intentional attack of any of these objects,” the defender’s responsibility extends to the taking of action “to minimize risk to their damage (or injury to protected persons within them) incidental to lawful military operations by an attacker” as well as “to avoid use of any of these protected objects as a shield for military operations.”<sup>79</sup>

Thus, under the laws and customs of war, civilian presence may not be used to render certain points or areas immune from military operations.<sup>80</sup> In particular Protocol I stipulates that the civilian population or individual civilians may “not be used . . . in attempts to shield military objectives from attacks or to shield, favour or impede military operations” nor may “the movement of the civilian population or individual civilians” be directed “in order to attempt to shield military objectives from attacks or to shield military operations.”<sup>81</sup> It is therefore deemed a war crime under

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<sup>71</sup> *Id.* at 770.

<sup>72</sup> *Id.* at 1295.

<sup>73</sup> *Id.* at 1296, 1297.

<sup>74</sup> *Id.* at 1296.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1296-97.

<sup>77</sup> Protocol I, *supra* note 38, at art. 48; *see, e.g.*, Fenrick, *supra* note 32, at 93.

<sup>78</sup> DINSTEIN, *supra* note 32, at 27; Parks, *supra* note 32, at 177.

<sup>79</sup> Parks, *supra* note 32, at 59; *see* DINSTEIN, *supra* note 32, at 121; Gur, *supra* note 1.

<sup>80</sup> Geneva Convention (IV), *supra* note 37, at art. 28; Protocol I, *supra* note 38, at art. 51(7); *see* U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 5.22.

<sup>81</sup> Protocol I, *supra* note 38, at art. 51(7); *see* U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 5.22.

the Rome Statute to utilize a civilian's presence "to render certain points, areas or military forces immune from military operations."<sup>82</sup>

### C. Protection of Civilians during Armed Conflict

In view of the fact that it is a supreme obligation under international humanitarian law during armed conflict to protect innocent civilians, the laws of war plainly prescribe that civilians may not be the object of attack.<sup>83</sup> These rules therefore dictate that the paramount precept in this regard is the distinction between civilians and combatants, according to which combatants must at all times be distinguished from civilians.<sup>84</sup> As the U.K. Ministry of Defence's 2004 law of armed conflict manual makes clear, "[t]he law of armed conflict protects members of the civilian population by making a distinction between combatants, who take part in the fighting, and non-combatants, who do not take part in the fighting and who must be shielded, as far as possible, from its effects."<sup>85</sup> Each of the two classes, combatants and non-combatants, "has distinct rights and duties," explains the U.K. military manual, and "[a]n individual who belongs to one class is not permitted at the same time to enjoy the privileges of the other class."<sup>86</sup>

Just as military objectives (a term which incidentally can include military personnel<sup>87</sup>) may be legitimately attacked, combatants of the enemy may be attacked by lawful combatants with all the consequent death and injury.<sup>88</sup> Every combatant, in fact, may be legitimately targeted, including those who may not even actually be involved in the combat as such.<sup>89</sup> "[T]he general directing operations miles from battle," explains Michael Schmitt, "is as valid a target as the commander leading his troops into combat."<sup>90</sup> Once one is a combatant, he is a legitimate target under the laws of war.<sup>91</sup> However a civilian may not simultaneously be a combatant, fighting against the enemy while retaining a civilian status, nor is he permitted to move back and forth between the two categories.<sup>92</sup> Accordingly, as long as they are not taking a direct part in the conduct of hostilities, civilians may not legitimately be attacked.<sup>93</sup> Yet, if civilians do actively engage in combat, their civilian status is consequently revoked.<sup>94</sup> The purpose of this fundamental distinction is to make certain that only combatants will take part in the war.<sup>95</sup> If the combatant is not distinguished from the civilian, the situation produced will create a danger that civilians erroneously will be considered

<sup>82</sup> Rome Statute, *supra* note 39, at art. 8(2)(b)(xxiii); DINSTEIN, *supra* note 32, at 130.

<sup>83</sup> Protocol I, *supra* note 38, at art. 51(1); *see, e.g.*, Fenrick, *supra* note 32, at 92; Parks, *supra* note 32, at 150, 225; LAW OF WAR HANDBOOK *supra* note 58, at 170.

<sup>84</sup> Protocol I, *supra* note 38, at art. 48; *see, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 2004 I.C.J. Reports, sec. 78 (July 8, 1996), available at <http://www.icj-cij.org/doCKET/files/95/7495.pdf> (last visited Sept. 26, 2009); U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at paras. 2.5 and 2.5.1; DINSTEIN, *supra* note 32, at 82, 255.

<sup>85</sup> U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 4.1.

<sup>86</sup> *Id.* at para. 4.1.1.

<sup>87</sup> DINSTEIN, *supra* note 32, at 84-85; *see* Protocol I, *supra* note 38, at art. 52(2).

<sup>88</sup> DINSTEIN, *supra* note 32, at 27.

<sup>89</sup> *Id.* at 94; *see* Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 674 (1993).

<sup>90</sup> Schmitt, *supra* note 89, at 674.

<sup>91</sup> *See id.*

<sup>92</sup> DINSTEIN, *supra* note 32, at 28.

<sup>93</sup> U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 4.1.

<sup>94</sup> DINSTEIN, *supra* note 32, at 27.

<sup>95</sup> *Id.* at 27; *see id.* at 113.

combatants.<sup>96</sup> Thus, any civilians who take a direct part in the hostilities lose their protected status as civilians and therefore may be targeted. Anyone who claims the privileges of the laws of war and wishes to benefit from them is obligated to respect them.<sup>97</sup>

A military objective may be attacked regardless of its location.<sup>98</sup> Not only will civilian presence not render a military objective immune from military operations,<sup>99</sup> but it is in fact deemed a war crime to utilize a civilian's presence to achieve that end.<sup>100</sup> Any other conclusion, observes Parks,

would encourage a defender to leave his civilian population in place rather than evacuate them from the vicinity of a military objective, as required by article 48 [of Protocol I], or use his civilian population as a shield from attack in violation of article 51(7) [of Protocol I]. It also would permit him to 'cost out' a high-value target by surrounding a target with so many civilians that the effects of the attack would be disproportionate to the perceived value of the attack. . . . While an attacker facing a target shielded from attack by civilians is not relieved from his duty to exercise reasonable precautions to minimize the loss of civilian life, neither is he obligated to assume any additional responsibility as a result of the illegal acts of the defender. Were an attacker to do so, his erroneous assumption of additional responsibility with regard to protecting the civilians shielding a lawful target would serve as an incentive for a defender to continue to violate the law of war by exposing other innocent civilians to similar risk.<sup>101</sup>

The obligation to prevent collateral civilian casualties under customary international law is principally that of the defender, since civilians typically are under the defender's sole control, meaning the attacker cannot control their movement or location and is typically unaware of their exact location.<sup>102</sup> Any casualties then that occur as a consequence of the defender's unlawful actions are therefore the responsibility of the defender,<sup>103</sup> assuming that reasonable precautions have been exercised to mitigate civilian casualties.<sup>104</sup> It is after all the defender's illegal act that has put innocent civilians in potential danger brought about by the legitimate attack on a lawful military target.<sup>105</sup> If the rules were otherwise, a defender could not only gain a military advantage by exploiting innocent civilians, but the standing of the laws of war might be placed in jeopardy.<sup>106</sup>

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<sup>96</sup> U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 4.4.1; *see, e.g.*, Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AM. U. INT'L L. REV. 419, 425 (1987).

<sup>97</sup> DINSTEIN, *supra* note 32, at 43; *see* Parks, *supra* note 32, at 118.

<sup>98</sup> Parks, *supra* note 32, at 177; DINSTEIN, *supra* note 32, at 27.

<sup>99</sup> Protocol I, *supra* note 38, at art. 51(7); U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 5.22.

<sup>100</sup> Rome Statute, *supra* note 39, at art. 8(2)(b)(xxiii); DINSTEIN, *supra* note 32, at 130.

<sup>101</sup> Parks, *supra* note 32, at 163, 177; *see id.* 181-82.

<sup>102</sup> *See id.* at 153, 182.

<sup>103</sup> *See id.* at 153, 162, 168, 176, 181, 182; DINSTEIN, *supra* note 32, at 131; Gur, *supra* note 1.

<sup>104</sup> *See* Parks, *supra* note 32, at 162-63.

<sup>105</sup> *See id.* at 163.

<sup>106</sup> *See id.* at 154, 177.

### III. Palestinian Terrorist Modi Operandi

The relentless onslaught of terrorist attacks from Gaza for close to a decade in the form of thousands of rockets and mortar shells that have rained down on Israeli civilians and civilian facilities in an indiscriminate fashion constitutes clearly unacceptable and foreseeable targeting of innocent civilians with ensuing civilian casualties and property damage. By violating the most elementary proscriptions and by intentionally targeting civilians and civilian objects and thereby willfully “causing death or serious injury” by “making the civilian population or individual civilians the object of attack,”<sup>107</sup> and launching countless indiscriminate attacks that affect the civilian population or civilian objects,<sup>108</sup> the terrorists have thereby committed grave breaches of the laws of armed conflict. According to the Rome Statute of the International Criminal Court, such “[w]illful killing” of civilians is considered a “war crime,”<sup>109</sup> just as, for example, are “[i]ntentionally directing attacks against . . . objects which are not military objectives”<sup>110</sup> or “against the civilian population as such or against individual civilians not taking direct part in hostilities,”<sup>111</sup> and “[d]estroying . . . the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war.”<sup>112</sup> Moreover, the terrorists’ “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited” under Protocol I.<sup>113</sup>

Gaza terrorists maintained their facilities and infrastructure in densely populated areas,<sup>114</sup> often lured civilians to stand on building roofs so that Israeli fighter jets would not bomb them,<sup>115</sup> and typically perpetrated their attacks from within civilian Palestinian population centers, deliberately firing their missiles and mortars from their midst.<sup>116</sup> Rockets and mortar shells, specifically targeting Israeli civilians, were fired by terrorists from within Palestinian towns and villages, from schools, apartment buildings, mosques, hospitals, other humanitarian facilities,<sup>117</sup> and even from buildings housing foreign media outlets.<sup>118</sup> United Nations buildings were also used as launch pads.<sup>119</sup> These

<sup>107</sup> Protocol I, *supra* note 38, at art. 85(3)(a).

<sup>108</sup> *See id.* at art. 85(3)(b).

<sup>109</sup> Rome Statute, *supra* note 39, at art. 8(2)(a)(i).

<sup>110</sup> *Id.* at art. 8(2)(b)(ii).

<sup>111</sup> *Id.* at art. 8(2)(b)(i).

<sup>112</sup> *Id.* at art. 8(2)(b)(xiii).

<sup>113</sup> Protocol I, *supra* note 38, at art. 51(2). Article 7 of the Rome Statute of the International Criminal Court furthermore classifies acts such as murder, Rome Statute, *supra* note 39, at art. 7(1)(a), as well as “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health,” *id.* at art. 7(1)(k), as “crimes against humanity” when they are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” *Id.* at art. 7(1).

<sup>114</sup> *See, e.g., Indiscriminate Fire, supra* note 21; *Hamas Exploitation of Civilians as Human Shields, supra* note 21; Dershowitz, *supra* note 5.

<sup>115</sup> *See* Steven Erlanger, *Gaza War Full of Traps and Trickery*, N.Y. TIMES, Jan. 10, 2009, at A1, available at <http://www.nytimes.com/2009/01/11/world/middleeast/11hamas.html> (last visited Sept. 26, 2009).

<sup>116</sup> *See, e.g., Responding to Hamas Attacks from Gaza, supra* note 13; *Hamas Exploitation of Civilians as Human Shields, supra* note 21.

<sup>117</sup> *See, e.g., Erlanger, supra* note 115; *Using civilians as human shields: launching rockets at Israel from locations close to buildings and schools* (Intelligence and Terrorism Info. Ctr. at the Isr. Intelligence Heritage & Commemoration Ctr. (IICC)), Jan. 20, 2009, available at [http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/html/hamas\\_e044.htm](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e044.htm) (last visited Sept. 26, 2009); *Hamas Exploitation of Civilians as Human Shields, supra* note 21; *Behind the Headlines: The truth about Hamas crimes in Gaza*, Feb. 13, 2009, available at [http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Hamas\\_crimes\\_in\\_Gaza\\_29-Jan-2009.htm](http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Hamas_crimes_in_Gaza_29-Jan-2009.htm) (last visited Sept. 26, 2009).

<sup>118</sup> *See, e.g., Using civilians as human shields, supra* note 117; *The truth about Hamas crimes in Gaza, supra* note 117.

attacks continued even after Israel had halted its military operation and declared a ceasefire.<sup>120</sup> Terrorists set up their headquarters in apartment buildings, hid out in hospitals<sup>121</sup> and humanitarian facilities, and shot at Israelis from them.<sup>122</sup> Weapons were manufactured and stockpiled in homes, schools, universities, and mosques.<sup>123</sup> The terrorists violated the laws of war<sup>124</sup> by using civilian facilities in this manner, shooting and launching missiles from them and manufacturing and stockpiling weapons in them. They in essence turned innocent civilians into “human shields” which not only endangered them but by doing so the terrorists also committed war crimes.<sup>125</sup>

By impersonating civilians and fighting in civilian clothes,<sup>126</sup> or thereby hiding, terrorists exploited Palestinian civilians and their civilian status and further endangered civilian lives in the process. Terrorists, for instance, donned the uniforms of medical personnel<sup>127</sup> in order to camouflage themselves, which was itself a flagrant breach of the laws of war, as indicated by Protocol I dictating that “the feigning of civilian, non-combatant status” is considered to be an example of perfidy which is a forbidden, treacherous act that invites “the confidence of an adversary to lead him to believe that he . . . is obliged to accord . . . protection under the rules of international law applicable in armed conflict, with intent to betray that confidence. . . .”<sup>128</sup> By not distinguishing themselves from the civilian population, the terrorists violated the paramount precept of distinction, which requires that combatants always be distinguished from civilians.<sup>129</sup> Moreover, although “[m]edical units shall be respected and protected at all times and shall not be the object of attack,” they may not “be used in an attempt to shield military objectives from attack.”<sup>130</sup> The

<sup>119</sup> See, e.g., ‘Maximum 600 Palestinians died in Gaza’, THE JERUSALEM POST, Jan. 22, 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1232292938156&pagename=JPost%2FJPArticle%2FShowFull> (last visited Sept. 26, 2009).

<sup>120</sup> See, e.g., *Israel says arms flow into Gaza*, L.A. TIMES, Mar. 30, 2009, available at <http://articles.latimes.com/2009/mar/30/world/fg-gaza30> and <http://www.latimes.com/news/nationworld/world/la-fg-gaza30-2009mar30.0.296717.story> (last visited Sept. 26, 2009).

<sup>121</sup> See, e.g., Erlanger, *supra* note 115; Ethan Bronner and Taghreed El-Khodary, *No Early End Seen to ‘All-Out War’ on Hamas in Gaza*, N.Y. TIMES, Dec. 29, 2008, available at <http://www.nytimes.com/2008/12/30/world/middleeast/30mideast.html>; Gur, *supra* note 1.

<sup>122</sup> See, e.g., *Evidence of the Use of the Civilian Population as Human Shields: Hamas operatives detained during Operation Cast Lead related that weapons were situated in schools, mosques and residential dwellings, that operatives shot from within residential neighborhoods, and that Hamas operatives stole the humanitarian aid for their own use* (Intelligence and Terrorism Info. Ctr. at the Isr. Intelligence Heritage & Commemoration Ctr. (IICC)), Feb. 4, 2009, available at [http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/html/hamas\\_e055.htm](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e055.htm) (last visited Sept. 26, 2009).

<sup>123</sup> See, e.g., Erlanger, *supra* note 115; *Use of the Civilian Population as Human Shields*, *supra* note 122.

<sup>124</sup> See Protocol I, *supra* note 38, at art. 51(7); U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 5.22.

<sup>125</sup> See Rome Statute, *supra* note 39, at art. 8(2)(b)(xxiii); DINSTEIN, *supra* note 32, at 130.

<sup>126</sup> See, e.g., Erlanger, *supra* note 115.

<sup>127</sup> See, e.g., *Maximum 600 Palestinians died in Gaza*, *supra* note 119; Gur, *supra* note 1.

<sup>128</sup> Protocol I, *supra* note 38, at art. 37(1). This principle is basically considered a reflection of customary international law. See Regulations annexed to the Fourth Hague Convention, *supra* note 35, at art. 23(f); Protocol I, *supra* note 38, at arts. 38(1), 85(3)(f); Anthony Dworkin, *Guerrilla War, “Deadly Deception,” and Urban Combat*, CRIMES OF WAR PROJECT, Mar. 26, 2003, available at <http://www.crimesofwar.org/special/Iraq/brief-guerrilla.html> (last visited Sept. 26, 2009). Moreover, “[k]illing or wounding treacherously individuals belonging to the hostile nation or army” is also deemed a war crime. Rome Statute, *supra* note 39, at art. 8(2)(b)(xi).

<sup>129</sup> Protocol I, *supra* note 38, at art. 48; see, e.g., *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 84, at sec. 78; U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at paras. 2.5 and 2.5.1; DINSTEIN, *supra* note 32, at 82, 255.

<sup>130</sup> Protocol I, *supra* note 38, at art. 12(4). This principle is considered to be a reflection of customary international law. See, e.g., Dworkin, *supra* note 128.

commandeering of ambulances by terrorists<sup>131</sup> for perpetrating terrorist activities and tactical purposes, and to ride to safety,<sup>132</sup> also exemplifies the terrorists' underhanded and prohibited use of emblems of the Red Cross.<sup>133</sup> Protocol I proscribes the "improper use of the distinctive emblem of the red cross, red crescent or red lion and sun . . ." and also forbids the deliberate "misuse . . . in an armed conflict [of] other internationally recognized protective emblems, signs or signals. . . ."<sup>134</sup> Moreover, "[t]he perfidious use . . . of the distinctive emblem of the red cross, red crescent or red lion and sun" is deemed a "grave breach" of Protocol I.<sup>135</sup>

Palestinian terrorists would often plant explosive charges and booby-traps in Palestinian private homes<sup>136</sup> and civilian facilities such as schools<sup>137</sup> and gas stations,<sup>138</sup> or under structures using tunnels,<sup>139</sup> rigging them to explode when Israeli soldiers entered. These illegal acts<sup>140</sup> were performed regardless of whether Palestinian civilians may have occupied the structures at the time, thereby cynically exploiting Israel's policy not to destroy, to the extent possible, civilian facilities from the air or by tank or artillery fire but rather to send Israeli soldiers inside searching for terrorists and weapons and missile supplies. In light of the strict obligation under the laws of war to distinguish between civilian objects and military objectives, it is "especially forbidden" under international law<sup>141</sup> to engage in such perfidious acts as the booby-trapping of civilian facilities rigged to explode upon entry.<sup>142</sup>

Likewise, the cynical use Palestinians made in Gaza of waving white flags as if in a sign of surrender or non-involvement in combat so as to avoid being attacked, behind and under cover of which terrorist military operations would actually take place, exploited Israel army instructions to its personnel to respect anyone waving them,<sup>143</sup> and further put innocent civilians at greater risk. Under the customary laws of war, as reflected in the Hague Regulations,<sup>144</sup> it is forbidden to improperly make use of a flag of truce or surrender, and Protocol I also deems "the feigning of an intent to negotiate under a *flag of . . . surrender*" an illegal act of perfidy.<sup>145</sup>

<sup>131</sup> See *Maximum 600 Palestinians died in Gaza*, *supra* note 119; Gur, *supra* note 1.

<sup>132</sup> See, e.g., *The truth about Hamas crimes in Gaza*, *supra* note 117.

<sup>133</sup> Regulations annexed to the Fourth Hague Convention, *supra* note 35, at art. 23(f).

<sup>134</sup> Protocol I, *supra* note 38, at art. 38.

<sup>135</sup> *Id.* at art. 85(3)(f); Gur, *supra* note 1.

<sup>136</sup> See, e.g., *Civilians as human shields: additional evidence from various sources demonstrating the use made by Hamas of civilian houses for military purposes during Operation Cast Lead – file no. 5* (Intelligence and Terrorism Info. Ctr. at the Isr. Intelligence Heritage & Commemoration Ctr. (IICC)), Feb. 18, 2009, available at [http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/html/hamas\\_e062.htm](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e062.htm) (last visited Sept. 26, 2009); Ya'acov Amidror, *The Inquiry Work Must Stay in Zabal's Hands*, ISRAEL HAYOM, Apr. 23, 2009, at 13 (in Hebrew, on file with author).

<sup>137</sup> See, e.g., *Israeli Air Force Film Clips and IDF Spokesman Pictures Show Use the Hamas Made of a School for Military Purposes during Operation Cast Lead File No. 4* (Intelligence and Terrorism Info. Ctr. at the Isr. Intelligence Heritage & Commemoration Ctr. (IICC)), Feb. 16, 2009, available at [http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/html/hamas\\_e060.htm](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e060.htm) (last visited Sept. 26, 2009).

<sup>138</sup> Erlanger, *supra* note 115.

<sup>139</sup> Military Advocate General's Corps, Israel Defense Forces, *Operation "Cast Lead" -- Legal Talking Points* 10 (Jan. 2009) (on file with author).

<sup>140</sup> See, e.g., U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 6.7.

<sup>141</sup> See Regulations annexed to the Fourth Hague Convention, *supra* note 35, at art. 23(b).

<sup>142</sup> See Protocol I, *supra* note 38, at art. 37; Regulations annexed to the Fourth Hague Convention, *supra* note 35, at art. 23(b).

<sup>143</sup> See Amira Hass, *Under a white flag, darkly*, HAARETZ, Feb. 19, 2009, available at <http://www.haaretz.com/hasen/spages/1063768.html> (last visited Sept. 26, 2009).

<sup>144</sup> Regulations annexed to the Fourth Hague Convention, *supra* note 35, at art. 23(f).

<sup>145</sup> Protocol I, *supra* note 38, at art. 37.

Moreover, the illegal use that terrorists made specifically of mosques, hospitals,<sup>146</sup> schools, universities, and certain other civilian facilities in which to hide, manufacture weapons or store them, or from which to shoot or launch missiles, resulted in the removal of what otherwise would have been special protection for such structures.<sup>147</sup>

Waging their armed conflict from the midst of innocent Palestinian civilians in Gaza, the terrorists violated the most sacred principle of the laws of war, the principle of distinction, in every way possible by refusing to distinguish between combatants and non-combatants as objects of their attacks and by refusing to distinguish themselves as combatants from civilians and refusing to distinguish military objectives from civilian objects which would have avoided the unintentional harming of innocent people and destruction of property. This typical terrorist mode of operation<sup>148</sup> was designed to blur the distinction between legitimate military targets and innocent civilians and civilian objects, making it impossible to direct military operations against legitimate military objectives without injuring civilians or damaging civilian objects. When this distinction between military objectives and civilian objects is not maintained by the terrorists, innocent civilians are put unnecessarily at risk. Thus, when the terrorists used homes, hospitals, mosques,<sup>149</sup> schools, and universities in support of their military effort such as by hiding in them and using them as a place to manufacture and store weapons, as well as from which to fire them, their illegal actions thereby resulted in senselessly endangering any civilians in their vicinity. Consequently, while the presence of civilians does not “shield military objectives from attacks” or “shield, favour or impede military operations,”<sup>150</sup> and the use of civilians in such a manner constitutes a war crime,<sup>151</sup> any ensuing casualties as a result of such illegal actions executed by the defender would not be the responsibility of the attacker but rather the responsibility of the defender since it was he who put the civilians at risk in the first place,<sup>152</sup> assuming that reasonable precautions were taken to alleviate civilian casualties.<sup>153</sup> Therefore it plainly was the terrorists, and not Israel, who were responsible for any consequent civilian casualties.<sup>154</sup>

#### IV. The Israel Defense Force’s Adherence to High Ethical Standards

Israel’s military operations in Gaza were directed against legitimate military objectives, as required by the laws of armed combat.<sup>155</sup> At the same time, Israel scrupulously made exceptional and unparalleled efforts<sup>156</sup> to preclude civilian casualties,<sup>157</sup> taking considerable care and caution in

<sup>146</sup> See, e.g., Bronner and El-Khodary, *supra* note 121.

<sup>147</sup> See Regulations annexed to the Fourth Hague Convention, *supra* note 35, at art. 27; Rome Statute, *supra* note 39, at art. 8(2)(b)(ix); *The Hostage Case*, *supra* note 46, at 1253-54; U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at paras. 2.2.3 and 5.25.3.

<sup>148</sup> See, e.g., *Indiscriminate Fire*, *supra* note 21.

<sup>149</sup> See, e.g., Bronner and El-Khodary, *supra* note 121.

<sup>150</sup> See Protocol I, *supra* note 38, at art. 51(7); U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 5.22.

<sup>151</sup> See Rome Statute, *supra* note 39, at art. 8(2)(b)(xxiii); DINSTEIN, *supra* note 32, at 130.

<sup>152</sup> Parks, *supra* note 32, at 153, 162, 168, 176, 181, 182; DINSTEIN, *supra* note 32, at 131.

<sup>153</sup> See Parks, *supra* note 32, at 162-63.

<sup>154</sup> Gur, *supra* note 1.

<sup>155</sup> See, e.g., Protocol I, *supra* note 38, at art. 52(2).

<sup>156</sup> Cf. Parks, *supra* note 32, at 166.

<sup>157</sup> See, e.g., *Responding to Hamas Attacks from Gaza*, *supra* note 13.

order to avoid as much as possible under the prevailing circumstances the causing of unnecessary civilian injury or damage.<sup>158</sup>

The basic ethical doctrine of the Israel Defense Force (IDF), incorporating among other things the concepts of “human dignity,” the “recognition of the supreme value of human life,” and “purity of arms” which allows the use of force “only to the necessary extent,” is as follows in relevant part:

The Spirit of the IDF and the guidelines of operation resulting from it are the ethical code of the IDF. The Spirit of the IDF will be applied by the IDF, its soldiers, its officers, its units and corps to shape their mode of action. They will behave, educate and evaluate themselves and others according to the Spirit of the IDF. . . . The IDF and its soldiers are obligated to protect human dignity. Every human being is of value regardless of his or her origin, religion, nationality, gender, status or position. . . . The IDF servicemen and women will act in a judicious and safe manner in all they do, out of recognition of the supreme value of human life. . . . The IDF servicemen and women will use their weapons and force only for the purpose of their mission, only to the necessary extent and will maintain their humanity even during combat. IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity and property.<sup>159</sup>

The Geneva Conventions of 1949 are an integral part of the IDF General Commands, and IDF Military Law School personnel lecture soldiers about and instill in them the principles of international law regarding hostilities and the law of armed conflict. Junior and senior officer training courses include lessons on international law and behavior during hostilities,<sup>160</sup> as well as computer-based tutorials on the laws of armed conflict and international law. Pocket-guides regarding proper behavior during hostilities are distributed to combat soldiers.<sup>161</sup> Operational legal advisors regularly take part in IDF general exercises in order to prepare and enhance the legal counsel apparatus during hostilities. The legal advisors observe combat soldier training, giving supervision regarding legal issues that develop.<sup>162</sup> Instruction pertaining to the laws of armed conflict is obligatory in all ground force training programs.<sup>163</sup>

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<sup>158</sup> See, e.g., *id.* Moreover, even during the height of Israel’s military operation in Gaza, Israel undertook great efforts to make sure that the civilian population’s humanitarian needs were met by assisting in the transfer of fuel, food, medicine and other essential goods. See, e.g., *id.* Despite the fact that the terrorists had hijacked, see, e.g., *Operation “Cast Lead,” supra* note 139, at 17, hundreds of tons of aid meant to reach Palestinian civilians, see, e.g., *Hamas Raids U.N. Warehouse*, CBN NEWS, Feb. 4, 2009, available at <http://www.cbn.com/CBNnews/534716.aspx> (last visited Sept. 26, 2009), thousands of tons of humanitarian aid, see, e.g., *Thousands of Tons of Humanitarian Aid Transferred to Gaza City* (Jan. 20, 2009), available at <http://dover.idf.il/IDF/English/News/today/09/01/2002.htm> (last visited Sept. 26, 2009), nevertheless were reaching local Gaza Palestinians, see, e.g., *Israeli forces Advance into Gaza City as Cease-fire Talks Continue* (Jan. 15, 2009), FOX NEWS, available at <http://www.foxnews.com/story/0,2933,479914,00.html> (last visited Sept. 26, 2009), throughout the entire Operation Cast Lead. See *Unprecedented Humanitarian Aid Efforts*, ISRAEL DEFENSE FORCES, Jan. 21, 2009, available at <http://dover.idf.il/IDF/English/News/today/09/01/2101.htm> (last visited Sept. 26, 2009).

<sup>159</sup> Israel Defense Forces - Ethics Doctrine, ISRAEL DEFENSE FORCES <http://web.archive.org/web/20060620022728/www1.idf.il/dover/site/mainpage.asp?sl=EN&cid=32> (last visited Sept. 26, 2009).

<sup>160</sup> *Operation “Cast Lead,” supra* note 139, at 4.

<sup>161</sup> *Id.* at 5.

<sup>162</sup> *Id.* at 6.

<sup>163</sup> *Id.* at 7.



The IDF is respected and admired worldwide for following the ethical code of conduct,<sup>164</sup> which is considered to be very strict.<sup>165</sup> The IDF Military Advocate General's Corps, the Israel army lawyer branch equivalent of the United States Armed Forces Judge Advocate General's Corps, is well-versed in the law of armed combat and advises the IDF appropriately<sup>166</sup> up the entire command chain, making the legal determinations prior to undertaking military operations.<sup>167</sup> Military Advocate General's Corps legal advisors regularly staff IDF command and headquarter levels and take part in operational planning stages including targeting decisions and provide legal counsel to the IDF pertaining to the laws of armed conflict.<sup>168</sup> IDF legal advisors are dispatched to the division levels in crisis situations and participate in daily situation meetings at the headquarters. A situation center is opened and staffed 24 hours a day, seven days a week to ease the access to legal advisors, and they are thus available to provide commanders responses in "real-time" to legal issues that arise.<sup>169</sup>

As British Army Colonel Richard Kemp, former commander of British Forces in Afghanistan and senior advisor on army issues to the British Government, explained in a BBC television interview relating specifically to the Israeli military operation in Gaza, "I don't think there's ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza."<sup>170</sup> Indeed the ratio achieved by the IDF in the Gaza fighting of only about one out of every four deaths being a Palestinian civilian is historically unprecedented for this type of warfare.<sup>171</sup>

Obviously the IDF does not instigate, plan, or sanction misbehavior that may be perpetrated by individuals during armed conflict situations.<sup>172</sup> That is not to say that there might not be some individual soldiers who do indeed commit isolated illegal acts in time of war. In the rare instances where there are deviations<sup>173</sup> of individual soldiers<sup>174</sup> from the high standards, principles, and morals

<sup>164</sup> See, e.g., *BBC News: Military Analysis*, available at <http://www.bicom.org.uk/videos/bbc-news--military-analysis> (interview with Richard Kemp, British Army Colonel, former commander of British Forces in Afghanistan and senior advisor on army issues to the British government); Herb Keinon, *Analysis: The crucial morality of the IDF's cause*, THE JERUSALEM POST, Mar. 19, 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1237461630293&pagename=JPost%2FJPArticle%2FShowFull> (last visited Sept. 26, 2009); *Israeli military to probe Gaza campaign allegations*, CNN, Mar. 20, 2009, available at <http://edition.cnn.com/2009/WORLD/meast/03/19/israel.gaza.idf/index.html?iref=newssearch> (last visited Sept. 26, 2009); Yaakov Lappin, *Ashkenazi: IDF most moral army in world*, THE JERUSALEM POST, Mar. 23, 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1237727511150&pagename=JPost%2FJPArticle%2FShowFull> (last visited Sept. 26, 2009); *Responding to Hamas Attacks from Gaza*, *supra* note 13.

<sup>165</sup> Kemp, *supra* note 164.

<sup>166</sup> See Geoffrey S. Corn, in Anderson, *supra* note 40. Geoffrey S. Corn was the former Head of the United States Army Judge Advocate General's Corps Law of War Branch. *Id.*

<sup>167</sup> See, e.g., *Responding to Hamas Attacks from Gaza*, *supra* note 13.

<sup>168</sup> *Operation "Cast Lead," supra* note 139, at 2.

<sup>169</sup> *Id.* at 3.

<sup>170</sup> Kemp, *supra* note 164.

<sup>171</sup> See *Galant: Cast Lead death ratio an achievement*, THE JERUSALEM POST, Mar. 24, 2009, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1237727530093> (last visited Sept. 26, 2009).

<sup>172</sup> See, e.g., Ethan Bronner, *Israel Disputes Soldiers' Accounts of Gaza Abuses*, TIMES DAILY.COM, Mar. 28, 2009, available at <http://www.timesdaily.com/article/20090328/ZNYT03/903283014?Title=Israel-Disputes-Soldiers-x2019-Accounts-of-Gaza-Abuses> (last visited Sept. 26, 2009).

<sup>173</sup> See, e.g., Herb Keinon, *'Isolated vandalism isn't a war crime'*, THE JERUSALEM POST, Apr. 7, 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1238562926502&pagename=JPost%2FJPArticle%2FShowFull> (last visited Sept. 26, 2009).

that the IDF is determined to preserve and to uphold,<sup>175</sup> investigations are conducted and dealt with by the proper Israeli authorities,<sup>176</sup> and if found guilty of transgressions, the guilty individuals are punished accordingly.<sup>177</sup> The High Court of Justice/Supreme Court of Israel, with very permissive rules regarding standing and accessibility for both public and private petitioners,<sup>178</sup> in fact is often called upon to examine the legality of responses of the IDF to terrorism,<sup>179</sup> hearing petitions during the course of hostilities and even during specific military operations at times within hours of the filing of a petition.<sup>180</sup> Three such petitions in fact were filed and heard by the High Court during the Gaza military operation.<sup>181</sup> The Court incidentally does not always find for the government.<sup>182</sup>

It is noteworthy that the extent of civilian casualties and concomitant damage was not far greater than it was, particularly given the incredibly dense urban environment of the tiny land area of Gaza.<sup>183</sup> This demonstrates that the intent of Israel, when combined with the ability, sophistication, technology including recurrent use of guided precision military capability and strategies,<sup>184</sup> and training and indoctrination of the Israeli officers and soldiers,<sup>185</sup> was to place, in accordance with IDF ethical doctrine, the supreme value on human life and specifically target terrorists. Had Israel not been so preoccupied with the ultimate ideal of preserving human life and therefore constantly endeavoring to aim only at military targets, certainly it could have quickly razed the entire Gaza Strip. In light of the destructive capacity of modern armaments and munitions, the civilian casualty rate could without a doubt have been countless times higher and the consequent property damage could have been much worse had Israel's attacks in fact been conducted in an indiscriminate and disproportionate fashion and had Israel's intention in reality been to conduct direct attacks against civilians and non-military objects. Israel's actions attest to the contrary.

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<sup>174</sup> See, e.g., Amos Harel, *IDF in Gaza: Killing civilians, vandalism, and lax rules of engagement*, HAARETZ, Mar. 19, 2009, available at <http://www.haaretz.com/hasen/spages/1072040.html> (last visited Sept. 26, 2009); Keinon, 'Isolated vandalism isn't a war crime,' *supra* note 173; Clancy Chassay and Julian Border, *Guardian investigation uncovers evidence of alleged Israeli war crimes in Gaza*, GUARDIAN, Mar. 24, 2009, available at <http://www.guardian.co.uk/world/2009/mar/23/israel-gaza-war-crimes-guardian> (last visited Sept. 26, 2009).

<sup>175</sup> See, e.g., Ashkenazi: 'Claims of IDF war crimes unfounded,' THE JERUSALEM POST, Apr. 5, 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1238562915224&pagename=JPost%2FJPArticle%2FShowFull> (last visited Sept. 26, 2009).

<sup>176</sup> See, e.g., Kemp, *supra* note 164; Howard Schneider, *Israeli Military Probes Possible Troop Misconduct in Gaza War*, WASH. POST, Mar. 20, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/19/AR2009031900150.html> (last visited Sept. 26, 2009); *Israeli military to probe Gaza campaign allegations*, *supra* note 164; Yaakov Lappin, *IDF source: Charges of civilian shootings false*, Mar. 25, 2009, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1237727539851> (last visited Sept. 26, 2009).

<http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1237727539851>

<sup>177</sup> See, e.g., Amos Harel, *IDF soldier demoted for shooting Gaza woman in legs*, HAARETZ, Mar. 26, 2009, available at <http://www.haaretz.com/hasen/spages/1074077.html> (last visited Sept. 26, 2009).

<sup>178</sup> See *Operation "Cast Lead," supra* note 139, at 18.

<sup>179</sup> See, e.g., HCJ 7957/04 Mara'abe et al. v. The Prime Minister of Israel [2005] (Barak, C.J.), available at [http://elyon1.court.gov.il/files\\_eng/04/570/079/A14/04079570.a14.htm](http://elyon1.court.gov.il/files_eng/04/570/079/A14/04079570.a14.htm) (last visited Sept. 26, 2009).

<sup>180</sup> *Operation "Cast Lead," supra* note 139, at 18.

<sup>181</sup> *Id.* at 19.

<sup>182</sup> See, e.g., HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel [2004] (Barak, C.J.), available at [http://elyon1.court.gov.il/files\\_eng/04/560/020/A28/04020560.a28.htm](http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.htm) (last visited Sept. 26, 2009).

<sup>183</sup> See, e.g., Tim Butcher, *Gaza has been hit hard but has it made any difference?*, DAILY TELEGRAPH, Jan. 20, 2009, available at <http://www.telegraph.co.uk/comment/personal-view/4300408/Gaza-has-been-hit-hard-but-has-it-made-any-difference.html> (last visited Sept. 26, 2009).

<sup>184</sup> See, e.g., *Hammas Exploitation of Civilians as Human Shields, supra* note 21; Dershowitz, *supra* note 5.

<sup>185</sup> See, e.g., *Responding to Hammas Attacks from Gaza, supra* note 13.

The IDF strives to avoid or minimize civilian casualties<sup>186</sup> by ensuring that its attacks are directed against legitimate military targets and that in conducting its operations, incidental injury to civilians is minimized.<sup>187</sup> All potential military operations are specifically analyzed to make certain that they accord to the principles of proportionality and distinction.<sup>188</sup> In practice this means that many proposed military operations are rejected when it appears that there may be a strong likelihood of a high level of collateral damage to civilians and civilian objects.<sup>189</sup>

In order to avoid civilian casualties in its military operations in Gaza,<sup>190</sup> Israel, as it typically has done during past operations,<sup>191</sup> took remarkable measures to notify Palestinian civilians in advance of impending IDF operations. Israel constantly and repeatedly gave warnings in advance to the extent possible so as to afford civilians the opportunity to depart from the vicinity where a military objective was located before it was to be attacked.<sup>192</sup> Israel normally would airdrop and distribute leaflets warning of the impending attacks,<sup>193</sup> and also would telephone Gaza residents<sup>194</sup> with recorded and live messages, text message, as well as make radio<sup>195</sup> and megaphone<sup>196</sup> announcements, containing warnings to evacuate before engaging in attacks on military objectives when there were civilians in the vicinity,<sup>197</sup> although there is no legal requirement to do so if it might jeopardize the military operation's success.<sup>198</sup> The IDF procedure of giving advance warning of impending attacks or bombardments actually saved the lives of civilians by notifying them in advance of impending military operations, thus enabling them to find alternative shelter, even at the expense at times of sacrificing strategic advantage<sup>199</sup> and endangering Israeli soldiers who were thereby put at greater risk by the relinquishing of the military benefit of the element of surprise.<sup>200</sup>

These advance warnings were in essence an implementation of the customary laws of war as reflected in the Regulations of the Fourth Hague Convention<sup>201</sup> to the effect that before a bombardment is commenced, the commander of an attacking force must "do all in his power" to

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<sup>186</sup> See, e.g., Kemp, *supra* note 164; *Responding to Hamas Attacks from Gaza*, *supra* note 13.

<sup>187</sup> See, e.g., *Responding to Hamas Attacks from Gaza*, *supra* note 13.

<sup>188</sup> *Responding to Hamas Attacks from Gaza*, *supra* note 13; see *Operation "Cast Lead," supra* note 139, at 9-10.

<sup>189</sup> See, e.g., *Indiscriminate Fire*, *supra* note 21; *Responding to Hamas Attacks from Gaza*, *supra* note 13, at 4-5; Gold, *supra* note 14.

<sup>190</sup> See, e.g., *Indiscriminate Fire*, *supra* note 21.

<sup>191</sup> See, e.g., Parks, *supra* note 32, at 166.

<sup>192</sup> See, e.g., *Responding to Hamas Attacks from Gaza*, *supra* note 13; *IDF issues warnings to the civilians of Gaza* (Isr. Ministry of Foreign Aff.), Jan. 7, 2009, available at [http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF\\_warns\\_Gaza\\_population\\_7-Jan-2009.htm](http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF_warns_Gaza_population_7-Jan-2009.htm) (last visited Sept. 26, 2009).

<sup>193</sup> See, e.g., *IDF issues warnings*, *supra* note 192; *Israeli troops advance on Gaza City*, AL JAZEERA, Jan. 11, 2009, <http://imeu.net/news/article0015369.shtml> (last visited Sept. 26, 2009).

<sup>194</sup> See, e.g., *Responding to Hamas Attacks from Gaza*, *supra* note 13; *IDF issues warnings*, *supra* note 192; *The truth about Hamas crimes in Gaza*, *supra* note 117.

<sup>195</sup> See, e.g., *Responding to Hamas Attacks from Gaza*, *supra* note 13.

<sup>196</sup> See, e.g., *The truth about Hamas crimes in Gaza*, *supra* note 117.

<sup>197</sup> See, e.g., Erlanger, *supra* note 115. Cf. DINSTEIN, *supra* note 32, at 128.

<sup>198</sup> *Operation "Cast Lead," supra* note 139, at 12.

<sup>199</sup> See, e.g., Charles Krauthammer, *The Necessity of Israel*, Jan. 2, 2009, available at [http://townhall.com/columnists/CharlesKrauthammer/2009/01/02/the\\_necessity\\_of\\_israel?page=full&comments=tr](http://townhall.com/columnists/CharlesKrauthammer/2009/01/02/the_necessity_of_israel?page=full&comments=tr) (last visited Sept. 26, 2009); *Operation "Cast Lead," supra* note 139, at 11-12.

<sup>200</sup> Krauthammer, *supra* note 199.

<sup>201</sup> See Regulations annexed to the Fourth Hague Convention, *supra* note 35; DINSTEIN, *supra* note 32, at 127-128.

warn of the impending attack<sup>202</sup> and were also in compliance with Protocol I,<sup>203</sup> which requires that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”<sup>204</sup>

There obviously were unfortunate civilian casualties in the Gaza fighting, not because Israel specifically targeted civilians, as it did not, but rather because for among other reasons the terrorists conducted their operations from behind civilian human shields.<sup>205</sup>

## V. Proportionality in Armed Conflict

### A. General Background

Even though civilians or civilian objects as such are not lawful targets, “the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime,” writes Luis Moreno-Ocampo, the Chief Prosecutor of the International Criminal Court. “International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur.”<sup>206</sup> Unavoidable incidental civilian casualties and damage, occurring as a result of legitimate attacks on military objectives, are not rendered illegal. However, the proportionality principle dictates that these casualties and damage may not be excessive in relation to the direct and concrete anticipated military advantage.<sup>207</sup> Therefore, the principle of proportionality tempers, and must be considered together with, the principle of military necessity.<sup>208</sup> In other words, civilians and civilian objects are exposed to the wide-ranging risks inherent in war, since attacks on military objectives could cause incidental damage as it is not always possible to restrict the outcome entirely to the attacked objective. There is accordingly no responsibility on the armed forces for such damage if the anticipated military benefit is proportionate to the accrued damage.<sup>209</sup> In fact, even widespread civilian casualties resulting from an attack are not, according to the Statute of the International Criminal Court, considered to be war crimes in and of themselves. In the words of the Statute, “[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” will not be considered a war crime unless it “would be *clearly excessive* in relation to the concrete and direct overall military advantage anticipated.”<sup>210</sup>

<sup>202</sup> Regulations annexed to the Fourth Hague Convention, *supra* note 35, at art. 26; *see* DINSTEIN, *supra* note 32, at 127-28.

<sup>203</sup> Protocol I, *supra* note 38.

<sup>204</sup> *Id.* at art. 57(2)(c); DINSTEIN, *supra* note 32, at 127.

<sup>205</sup> *See, e.g.,* Kemp, *supra* note 164; *Responding to Hamas Attacks from Gaza*, *supra* note 13.

<sup>206</sup> Letter from Luis Moreno-Ocampo, the Office of the Prosecutor, International Criminal Court (Feb. 9, 2006), *available at* [http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_Feb\\_2006.pdf](http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_Feb_2006.pdf) (last visited Sept. 26, 2009).

<sup>207</sup> Protocol I, *supra* note 38, at arts. 51(5)(b), 57(2)(a)(3), 57(2)(b); *see, e.g.,* U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at paras. 2.4.2, 2.6, 5.32, 5.33; LAW OF WAR HANDBOOK *supra* note 58, at 166; Fenrick, *supra* note 32, at 92, 93-94; Parks, *supra* note 32, at 151.

<sup>208</sup> *See* Parks, *supra* note 32, at 168.

<sup>209</sup> A.P.V. Rogers (Major General, former Director of British Army Legal Services), *Command Responsibility under the Law of War 3*, *available at* <http://www.lcil.cam.ac.uk/Media/lectures/doc/COMDRESP.doc>; *see* Neuman, *supra* note 52, at 89, 102; U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 2.4.2.

<sup>210</sup> Rome Statute, *supra* note 39, at art. 8(2)(b)(iv) (emphasis added).

## B. Applying the Principle of Proportionality to the Fighting in Gaza

When evaluating the role that responsibility plays in the proportionality analysis, it would be erroneous and misleading to hold the attacker accountable for every casualty and for all property damage that occurred during the time of the attacker's military operation.<sup>211</sup> The first issue to examine then in making any proportionality assessment during armed conflict is the actual casualty count and amount of damage sustained. Any "official" Palestinian total casualty count must be viewed with at least a certain element of skepticism,<sup>212</sup> especially in light of revelations according to which Hamas has likely exaggerated the actual numbers of those killed in Gaza<sup>213</sup> as well as in light of past assertions and allegations based on embellished casualty numbers and erroneous Palestinian narratives which later proved to be spurious and disingenuous. For example, according to the United Nations Secretary-General's report following Israel's Operation Defensive Shield which was waged in April 2002 to root out terrorists from the West Bank Palestinian city Jenin and its refugee camp<sup>214</sup> following a surge of attacks against Israeli civilians by Palestinian terrorists emanating from a terrorist infrastructure there unprecedented in extent,<sup>215</sup> "[a]llegations by Palestinian Authority officials . . . that 500 or more persons were killed in Jenin camp were not substantiated by the evidence that subsequently emerged."<sup>216</sup> In fact only some 50 people were killed.<sup>217</sup> Moreover, at least half<sup>218</sup> if not more<sup>219</sup> of those were actually found to have been armed.<sup>220</sup> According to data relating to the Gaza military operation compiled by the IDF Defense Intelligence Research Department, hundreds fewer Palestinians had died than for whom Palestinian figures can

<sup>211</sup> See Parks, *supra* note 32, at 177-184.

<sup>212</sup> See, e.g., Amos Harel, *IDF: 600 Hamas men, 309 civilians died in Gaza offensive*, HAARETZ, Mar. 26, 2009, available at <http://www.haaretz.com/hasen/spages/1073770.html> (last visited Sept. 26, 2009). Cf. Parks, *supra* note 32, at 179, 180.

<sup>213</sup> See Lorenzo Cremonesi, *dubbi sul numero delle vittime: potrebbero essere 600 e non 1.300, "Così i ragazzini di Hamas ci hanno utilizzato come bersagli"* CORRIERE DELLA SERA, Jan. 22, 2009, available at [http://www.corriere.it/esteri/09\\_gennaio\\_21/denuncia\\_hamas\\_cremonesi\\_ac41c6f4-e802-11dd-833f-00144f02aabc.shtml](http://www.corriere.it/esteri/09_gennaio_21/denuncia_hamas_cremonesi_ac41c6f4-e802-11dd-833f-00144f02aabc.shtml) (last visited Sept. 26, 2009); *Gazan doctor says death toll inflated*, Jan. 22, 2009, available at <http://www.ynetnews.com/articles/0,7340,L-3660423,00.html> (last visited Sept. 26, 2009); Khaled Abu Toameh, *Analysis: Trumpets of victory strike false note*, THE JERUSALEM POST, Jan. 19, 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1232292909104&pagename=JPost%2FJPArticle%2FShowFull> (last visited Sept. 26, 2009).

<sup>214</sup> See, e.g., *Report of the European Union [on the events in Jenin and in other Palestinian cities]*, attached to the *Note verbale dated 7 June 2002 from the Permanent Mission of Spain to the United Nations addressed to the Secretary-General*, appearing as *Annex IV* of *Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/10* (Aug. 1, 2002), available at <http://www.un.org/peace/jenin/index.html> (last visited Sept. 26, 2009).

<sup>215</sup> Neuman, *supra* note 52, at 80.

<sup>216</sup> *Report of the Secretary-General on Recent Events in Jenin, Other Palestinian Cities*, Press Release SG2077 (Aug. 1, 2002), available at <http://www.un.org/News/Press/docs/2002/SG2077.doc.htm> (last visited Sept. 26, 2009); see *Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/10*, para. 56 (Aug. 1, 2002), available at <http://www.un.org/peace/jenin/index.html> (last visited Sept. 26, 2009); *Report of the European Union*, *supra* note 207; see also, e.g., Richard Roth, U.N.: *No evidence of Israeli massacre at Jenin* (Aug. 1, 2002), CNN, available at <http://archives.cnn.com/2002/WORLD/meast/07/31/un.jenin.report/> (last visited Sept. 26, 2009).

<sup>217</sup> *Report of the Secretary-General on Recent Events in Jenin, Other Palestinian Cities*, *supra* note 216; *Report of the European Union*, *supra* note 214; Roth, *supra* note 216; see also, e.g., Cremonesi, *supra* note 213; *Gazan doctor says death toll inflated*, *supra* note 213.

<sup>218</sup> See *Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/10*, *supra* note 216, at para. 57; *Report of the Secretary-General on Recent Events in Jenin, Other Palestinian Cities*, *supra* note 216; Cremonesi, *supra* note 213; *Gazan doctor says death toll inflated*, *supra* note 213.

<sup>219</sup> See *Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/10*, *supra* note 216, at para. 57.

<sup>220</sup> See *id.*; *Report of the European Union*, *supra* note 214.

account.<sup>221</sup> The Palestinian casualty count likely included individuals who had died of any causes whatsoever at the time of the Israeli military operation in Gaza, including natural causes.<sup>222</sup> The exact total number of casualties thus remains in dispute.<sup>223</sup>

The next issue to consider is whether the death, injury, and damage caused were excessive *civilian* death, injury, and damage relative to the military advantage. In other words, for the proportionality assessment to work, it must be determined how many non-civilian casualties indeed actually occurred. The inherent difficulties, complexities, and uncertainties involved in any war,<sup>224</sup> the combat confusion,<sup>225</sup> create great obstacles to determining just who may be characterized as civilians and thus to ascertaining the exact civilian casualty number. A Palestinian human rights organization contended that roughly 500 of the 1,417 who allegedly had died in Gaza were not civilians.<sup>226</sup> Palestinian figures are typically without question relied on, with little regard for their accuracy, by media<sup>227</sup> and humanitarian organizations.<sup>228</sup> Listed in the Palestinian figures as children who had allegedly been killed by the IDF, for instance, were the commander of Hamas police as well as the personal assistant to the chief of the military contingent of Hamas.<sup>229</sup> The IDF Defense Intelligence Research Department, however, after methodically checking and cross-referencing each of the names submitted on the Palestinian casualty lists, verified that over 700 terrorists were killed during the course of the operation while some 295 civilians had died,<sup>230</sup> which in essence represents a ratio unparalleled in military history for combat of this kind.<sup>231</sup> Whatever the precise number comprising the *military* (i.e., terrorist) element, for the proportionality analysis every military casualty must be eliminated from the computation assessing the total *civilian* casualties.<sup>232</sup> Therefore, if according to the figures that have thus far been verified, terrorist casualties amount to say three-quarters of the total casualties, then obviously this “military” 75% of the total casualties must be disregarded when comparing the incidental *civilian* casualties to the overall military advantage for the proportionality appraisal. Moreover, any Palestinian “civilians” who took a direct part in the hostilities, or any terrorists who impersonated civilians, which were classic *modi operandi* for Gaza

<sup>221</sup> See *Majority of Palestinians Killed in Operation Cast Lead: Terror Operatives*, ISRAEL DEFENSE FORCES, Mar. 26, 2009, available at <http://dover.idf.il/IDF/English/News/today/09/03/2602.htm> (last visited Sept. 26, 2009).

<sup>222</sup> See, e.g., Bronner, *supra* note 172.

<sup>223</sup> See, e.g., Karen Laub, *Rights group names 1,417 Gaza war dead*, WASH. TIMES, Mar. 19, 2009, available at <http://www.washingtontimes.com/news/2009/mar/19/rights-group-names-1417-gaza-war-dead-1/> (last visited Sept. 26, 2009).

<sup>224</sup> See Parks, *supra* note 32, at 178, 181, 182, 183, 196; Kemp, *supra* note 164.

<sup>225</sup> See Parks, *supra* note 32, at 180, 201.

<sup>226</sup> See Laub, *supra* note 223.

<sup>227</sup> See, e.g., *Gaza: Humanitarian situation*, BBC NEWS, Jan. 30, 2009, available at [http://news.bbc.co.uk/1/hi/world/middle\\_east/7845428.stm](http://news.bbc.co.uk/1/hi/world/middle_east/7845428.stm) (last visited Sept. 26, 2009).

<sup>228</sup> See, e.g., Statement by John Homes, Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator, Briefing to the Security Council on the situation in the Middle East, including the Palestinian question (Jan. 27, 2009), available at <http://www.webcitation.org/5eVPe7S1A> (last visited Sept. 26, 2009).

<sup>229</sup> See Harel, IDF: 600 Hamas men, 309 civilians died in Gaza offensive, *supra* note 212.

<sup>230</sup> See *Majority of Palestinians Killed in Operation Cast Lead*, *supra* note 221. Earlier Israeli reports stated somewhat different figures. See, e.g., Hanan Greenberg, IDF: Only 250 of Gaza fatalities were civilians (Jan. 26, 2009), available at <http://www.ynetnews.com/articles/0,7340,L-3661940,00.html> (last visited Sept. 26, 2009); Galant: Cast Lead death ratio an achievement, *supra* note 171; Harel, IDF: 600 Hamas men, 309 civilians died in Gaza offensive, *supra* note 212; Anshel Pfeffer, Israel challenges Palestinian claim on Gaza war dead, HAARETZ, Apr. 10, 2009, available at <http://www.haaretz.com/hasen/spages/1074227.html> (last visited Sept. 26, 2009). Whatever the figures, though, Israeli sources clearly indicate that while a few hundred non-combatants were killed during the fighting, the overwhelming majority of those killed were terrorists.

<sup>231</sup> Galant: Cast Lead death ratio an achievement, *supra* note 171.

<sup>232</sup> See Parks, *supra* note 32, at 174.

terrorists, have under international law either lost their protected status as civilians or clearly were never really “civilians” in the first place, and obviously must be factored out of any “civilian” casualty count.<sup>233</sup>

Furthermore, if the civilian ramifications of the attack were the result of something not under the control of the attackers, the attack would not be deemed to have been indiscriminate<sup>234</sup> or disproportionate. For instance, Israel would not be responsible for casualties occurring in those attack situations in which the terrorists, using civilians as human shields and unknown to the IDF, forced innocent civilians either to remain in or come to the vicinity of the military objective to be attacked following advance warnings given by Israel to evacuate the area.

The numerous executions and injuries perpetrated by Hamas of rival terrorist organization members as part of its deliberate killing and maiming campaign waged against its Palestinian opponents<sup>235</sup> during this same period under cover of Israel’s Gaza military operation must as well be removed from the calculation of civilian casualties, obviously since Palestinians, and not the IDF, were responsible for them.

A similar evaluation should be undertaken regarding the destruction of property in Gaza. The extent of total property damage remains in dispute. Tim Butcher, writing for the London Daily Telegraph, portrayed the damage that had occurred in Gaza in the following way:

I knew Gaza well before the attacks, so . . . on the day the ceasefire was announced, I was able to see for myself. One thing was clear. Gaza City 2009 is not Stalingrad 1944. There had been no carpet bombing of large areas, no firebombing of complete suburbs. Targets had been selected and then hit, often several times, but almost always with precision munitions. . . . [I]n most the cases, I saw the primary target had borne the brunt. . . . [F]or the most part, I was struck by how cosmetically unchanged Gaza appeared to be.<sup>236</sup>

Whatever the precise magnitude of total damage incurred as the result of Israel’s military operation in Gaza, the destruction of Hamas infrastructure, complexes, buildings, training facilities, warehouses, and the like of course may not be included in the *civilian* property damage assessment. It should be borne in mind as well, that from a military perspective it may be important to prevent the enemy’s use of a certain location or even destroy it if a definite military advantage could accrue from that action based on the specific prevailing circumstances.<sup>237</sup> Any civilian property used for a military purpose must also therefore be eliminated from the civilian damage calculation. Moreover,

<sup>233</sup> Cf. *id.* at 178.

<sup>234</sup> U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at 68 n. 94.

<sup>235</sup> See, e.g., *Amnesty: Hamas eliminating opponents*, THE JERUSALEM POST, Feb. 10, 2009, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1233304741040> (last visited Sept. 26, 2009); Bronner and El-Khodary, *supra* note 121; Khaled Abu Toameh, 'Hamas torturing Fatah members in Gaza', THE JERUSALEM POST, Mar. 24, 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1232292907998&pagename=JPArticle%2FShowFull> (last visited Sept. 26, 2009); *Gazans Tell of Hamas's Abuse*, CBN NEWS, Feb. 2, 2009, available at <http://www.cbn.com/CBNnews/533166.aspx> (last visited Sept. 26, 2009); *Document - Palestinian Authority: Hamas' deadly campaign in the shadow of the war in Gaza: Media Advisory* (Feb. 10, 2009), AI Index: MDE 21/001/2009, Amnesty International, available at <http://www.amnesty.org/en/library/asset/MDE21/001/2009/en/9f210586-f762-11dd-8fd7-f57af21896e1/mde210012009en.html> (last visited Sept. 26, 2009); *The truth about Hamas crimes in Gaza*, *supra* note 117.

<sup>236</sup> Butcher, *supra* note 183.

<sup>237</sup> U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at 55 n. 20 and para. 5.4.4.

the placing of an equivalent value on the protection of civilian property as on civilian lives is not part of customary international law.<sup>238</sup> Since the supreme obligation in armed conflict is the protection of life, any life, doubts may be raised as to the humanitarianism as well as to the validity and practicability of an emphasis on protecting civilian *objects* as such from collateral damage relative to the loss of combatant life by associating a privileged position to a non-living civilian object at the expense of a living human being.<sup>239</sup>

Ensuing civilian casualties and property damage from Palestinian terrorist practices such as setting booby-trap are likewise not relevant to the proportionality analysis since any such casualties and damage were caused by Palestinians, not by Israel.

Innocent civilians were obviously put in serious danger when terrorists turned them into “human shields,”<sup>240</sup> but by using civilian facilities from which to shoot and launch missiles and to manufacture and stockpile weapons, and/or by perfidiously placing explosive charges or booby traps in or under them, the terrorists consequently not only turned these facilities into legitimate military objectives,<sup>241</sup> and as such they must be eliminated from the civilian damage calculation, but when these facilities were attacked and exploded, they consequently created devastating secondary explosions which significantly increased the civilian damage effect and casualty count, thereby distorting the proportionality analysis.<sup>242</sup>

The next issue is that the test for a war crime in this regard is, under Protocol I,<sup>243</sup> the causing, in comparison with the “military advantage anticipated,” of *excessive* civilian casualties or damage to civilian objects, and under the Rome Statute of the International Criminal Court,<sup>244</sup> the test is the causing of “*clearly excessive*” civilian casualties or damage vis-à-vis “the *overall* military advantage anticipated.” Consequently, the greater the concrete and direct anticipated military goal, the more civilian casualties and damage will be considered to be within acceptable limits.<sup>245</sup>

A further aspect that may be taken into account in favor of the attackers when evaluating whether attacks on legitimate military objectives are legal, despite civilian presence in them or in their vicinity, is the fact that civilians have been situated by the defenders in the vicinity of military objectives or military objectives have been located by them in the midst of the civilian population or objects.<sup>246</sup> This illegal activity by the defender may thus be taken into consideration regarding the proportionality assessment of the anticipated military advantage vis-à-vis incidental civilian damage or loss.<sup>247</sup> Bearing in mind as well that terrorists typically do not distinguish themselves from civilians and that military objectives are purposefully and callously located by them in amongst the civilian population, when evaluating the proportionality of the anticipated military advantage vis-à-vis incidental civilian casualties and damage, such illegal activity by the terrorists as utilizing civilians

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<sup>238</sup> See Parks, *supra* note 32, at 146, 147, 149.

<sup>239</sup> See *id.* at 137, 148, 149, 152 n. 456.

<sup>240</sup> See, e.g., Kemp, *supra* note 164; Amidror, *supra* note 136, at 13.

<sup>241</sup> See Parks, *supra* note 32, at 153, 173, 177.

<sup>242</sup> See, e.g., Operation “Cast Lead,” *supra* note 139, at 10.

<sup>243</sup> Protocol I, *supra* note 38, at art. 85(3)(b).

<sup>244</sup> Rome Statute, *supra* note 39, at art. 8(2)(b)(iv) (emphasis added).

<sup>245</sup> See DINSTEIN, *supra* note 32, at 121, 122-23.

<sup>246</sup> U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 2.7.2.

<sup>247</sup> *Id.* at para. 5.22.1.



as a human shield may therefore be factored into the equation in favor of Israel.<sup>248</sup> If not, the defender would have an incentive to create a human shield out of his civilians in an attempt to protect him from being attacked which would as well allow him to surround an important military target with so many innocent people as to render the civilian consequences of the attack on it out of any proportion to its apparent worth.<sup>249</sup> Thus even a high number of civilian casualties occurring as a result of this terrorist tactic logically may not necessarily be indicative of “*excessive*” civilian casualties<sup>250</sup> or damage vis-à-vis the anticipated military advantage (under Protocol I<sup>251</sup>) and certainly not of “*clearly excessive*” civilian casualties or damage when taking into consideration the “overall military advantage anticipated”<sup>252</sup> (under the Rome Statute<sup>253</sup>).

Needless to say, unavoidable tragic mistakes do indeed remorsefully sometimes occur in combat,<sup>254</sup> war being what it is after all,<sup>255</sup> yet these miscalculations are not considered war crimes. The laws of war do not make criminal such unintended and inadvertent errors since they lack the requisite element of intent.<sup>256</sup> As the Rome Statute of the International Criminal Court makes clear, it is the “[*w*]illful killing” of civilians<sup>257</sup> or “[*i*]ntentionally directing attacks against” civilians<sup>258</sup> or civilian objects<sup>259</sup> that are considered war crimes. It is likewise the *intentional* launching of “an attack *in the knowledge* that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” that would constitute a war crime.<sup>260</sup> The requisite intent for the determination of the commission of a war crime is also readily apparent in additional Rome Statute terminology such as “[*w*]illfully causing great suffering, or serious injury to body or health”<sup>261</sup> and “[*i*]ntentionally directing attacks against buildings dedicated to religion, education [and] . . . hospitals . . .”<sup>262</sup> Thus, in the *Hostage Case* in the matter of General Rendulic,<sup>263</sup> the Nuremberg military Tribunal held that, even though “[a]n examination of the facts in retrospect can well sustain” the conclusion

that there was no military necessity for this destruction and devastation. . . . we are obliged to judge the situation as it appeared to the defendant at the time . . . . [E]ven though the

<sup>248</sup> See *Responding to Hamas Attacks from Gaza*, *supra* note 13; Gold, *supra* note 14.

<sup>249</sup> Parks, *supra* note 32, at 177; *see id.* at 181.

<sup>250</sup> See Louise Doswald-Beck, *The Civilian in the Crossfire*, 24 JOURNAL OF PEACE RESEARCH 251, 257 (1987); DINSTEIN, *supra* note 32, at 131.

<sup>251</sup> Protocol I, *supra* note 38, at arts. 57(2)(a)(3), 57(2)(b).

<sup>252</sup> See DINSTEIN, *supra* note 32, at 122-123.

<sup>253</sup> Rome Statute, *supra* note 39, at art. 8(2)(b)(iv).

<sup>254</sup> See e.g., Kemp, *supra* note 164; Parks, *supra* note 32, at 3, 53; DINSTEIN, *supra* note 32, at 126; Rory McCarthy, *Israeli army says shelling of house where girls died was reasonable* (Feb. 5, 2009), THE GUARDIAN, available at <http://www.guardian.co.uk/world/2009/feb/05/israel-military-civilian-deaths-gaza> (last visited Sept. 26, 2009);

Butcher, *supra* note 183.

<sup>255</sup> See, e.g., Kemp, *supra* note 164.

<sup>256</sup> See, e.g., LAW OF WAR HANDBOOK *supra* note 58, at 168, 206; DINSTEIN, *supra* note 32, at 115, 186, 244.

<sup>257</sup> Rome Statute, *supra* note 39, at art. 8(2)(a)(i) (emphasis added).

<sup>258</sup> *Id.* at art. 8(2)(b)(i) (emphasis added). Causing death or serious bodily injury by *willfully* “making the civilian population or individual civilians the object of attack” is also regarded as a war crime under Protocol I. Protocol I, *supra* note 38, at arts. 85(3)(a), 85(5).

<sup>259</sup> Rome Statute, *supra* note 39, at art. 8(2)(b)(ii).

<sup>260</sup> *Id.* at art. 8(2)(b)(iv) (emphasis added).

<sup>261</sup> *Id.* at art. 8(2)(b)(xiii) (emphasis added).

<sup>262</sup> *Id.* at art. 8(2)(b)(ix) (emphasis added).

<sup>263</sup> See text accompanying *supra* notes 70-76.

conclusion reached may have been faulty, it cannot be said to be criminal. . . . [T]he defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist . . . .<sup>264</sup> [T]he defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.<sup>265</sup>

Hence, inevitable though such unintended mistakes are during armed conflict, they are not as such considered violations of the laws of war,<sup>266</sup> and the civilian consequences of them should therefore be excluded from the proportionality analysis.

The term “military advantage” must also be examined. It is not the concept of just a military advantage as such that must be factored into the proportionality equation, but rather, if the analysis is based on the Rome Statute of the International Criminal Court,<sup>267</sup> the relation between the anticipated “concrete and direct *overall* military advantage” and the incidental civilian casualties or damage that is to be taken into consideration when making the determination of the amount of clear excessiveness necessary for the commission of a war crime.<sup>268</sup> While Protocol I<sup>269</sup> does not specifically mention the word “overall” in relation to the military advantage, the practical implication indeed is that concrete and direct *overall* military advantage does actually attach to its relevant provisions as well,<sup>270</sup> in the sense of the making of a contribution that would be considered to be relevant to the overall operation’s success<sup>271</sup> and assessed from a general strategic perspective and not solely as relating to military benefits accruing to a particular tactical circumstance at one specific point in time.<sup>272</sup> The military advantage does not have to be an immediate one,<sup>273</sup> the standard for measuring it being the military advantage expected to accrue from the military campaign as a whole, which the attack is a part of, and not solely the military advantage of each isolated or specific component of the military operation or campaign.<sup>274</sup> In other words, the overall war strategy or operational plan is an integral part of the “military advantage” component of the proportionality analysis.<sup>275</sup>

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<sup>264</sup> *The Hostage Case*, *supra* note 46, at 1296.

<sup>265</sup> *Id.* at 1297.

<sup>266</sup> *Cf.* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, paras. 90 and 91, available at [http://www.ess.uwe.ac.uk/Kosovo/Kosovo-International\\_Law18.htm](http://www.ess.uwe.ac.uk/Kosovo/Kosovo-International_Law18.htm) (last visited Sept. 26, 2009) [hereinafter Final Report NATO Bombing Campaign].

<sup>267</sup> Rome Statute, *supra* note 39, at art. 8(2)(b)(iv).

<sup>268</sup> See Neuman, *supra* note 52, at 100.

<sup>269</sup> See Protocol I, *supra* note 38, at arts. 51(5)(b), 57(2)(a)(3), 57(2)(b), 85(3)(b).

<sup>270</sup> See Fenrick, *supra* note 32, at 106-107, 111-112; U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at 87 n. 214 and paras. 5.4.4 and 5.20.5

<sup>271</sup> See KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 172-173 (2002); U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 5.33.5; Fenrick, *supra* note 32, at 106-107, 111-112; FREDERIC DE MULINEN, HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES 92 para. 389 (1987); Horst Fischer, *Proportionality, Principle of*, Crimes of War, a-z guide, available at <http://www.crimesofwar.org/thebook/proportion-principle.html> (last visited Sept. 26, 2009); *Responding to Hamas Attacks from Gaza*, *supra* note 13.

<sup>272</sup> DINSTEIN, *supra* note 32, at 86, 123; Anderson, *supra* note 40; Fenrick, *supra* note 32, at 107; Parks, *supra* note 32, at 172.

<sup>273</sup> U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 5.4.4.

<sup>274</sup> Final Report NATO Bombing Campaign, *supra* note 266, at para. 52; Neuman, *supra* note 52, at 83, 98, 98 n. 103, 99.

<sup>275</sup> Neuman, *supra* note 52, at 100, 112; see *id.* at 110, 111.

The assessment of a military situation must be based on the facts as the commander perceived them at the time of the operation and not as they appeared retrospectively.<sup>276</sup> Consequently, any analysis that pertains to proportionality during an armed conflict should be made through the eyes of a reasonable military commander<sup>277</sup> on the ground in the heat of battle at the time who uses his most reasoned consideration and judgment in order to evaluate all the pertinent aspects,<sup>278</sup> not least of which is the security of his own force.<sup>279</sup>

Evaluations of proportionality, military advantage, or military necessity, then, must take into account the security of the military commander's own forces.<sup>280</sup> As the Nuremberg Military Tribunal in the *Hostage Case* held,<sup>281</sup> and as the 2004 British law of armed conflict manual reiterates,<sup>282</sup> military necessity generally "sanctions measures by an occupant *necessary to protect the safety of his forces and to facilitate the success of his operations.*" In pondering the issue whether "a nation would be required to sacrifice commando units rather than employ bomber aircraft in attack of military objectives where there is a risk of collateral civilian casualties," Parks reaches the conclusion that "[n]o such obligation exists in the law of war." After all, he writes, "the law of war is not a suicide pact. It does not require that an attacker employ the most discriminate force available to him"<sup>283</sup> by augmenting the peril to his own forces<sup>284</sup> or in other words by increasing the risk to the lives of the soldiers so as to minimize civilian consequences.<sup>285</sup> In fact expending the least possible number of lives, which certainly includes a commander's own forces, and resources in order to obtain the enemy's submission as quickly as possible is the object of war, and the principle of military necessity justifies the use of the type and quantity of force necessary to achieve it.<sup>286</sup> Military necessity is thus tied into "military advantage" in the sense that losing as few combatants as possible would provide an advantage militarily to accomplishing that end of submission of the enemy as quickly as possible.<sup>287</sup> The "military advantage" element of the proportionality analysis therefore includes force protection.<sup>288</sup>

<sup>276</sup> See Fenrick, *supra* note 32, at 109; GREENSPAN, *supra* note 49, at 279-280, 286 n.37; Parks, *supra* note 32, at 137, 172; U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at 67 n. 79 and paras. 5.3.4 and 5.20.4; LAW OF WAR HANDBOOK *supra* note 58, at 167.

<sup>277</sup> See, e.g., GREENSPAN, *supra* note 49, at 279-80; Parks, *supra* note 32 at 137, 172; Fenrick, *supra* note 32, at 125; Final Report NATO Bombing Campaign, *supra* note 266, at para. 50; DORMANN, *supra* note 271, at 165, 172-73.

<sup>278</sup> See, e.g., U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 5.3.4; GREENSPAN, *supra* note 49, at 279-80; Parks, *supra* note 32, at 172.

<sup>279</sup> See, e.g., U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 5.3.4; M. BOTHE, K. PARTSCH, AND W. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 324 (1982).

<sup>280</sup> See U.S. DEPARTMENT OF THE ARMY, LEGAL SUPPORT, *supra* note 47, at para. 8.2.5; Neuman, *supra* note 52, at 91, 91-92 n. 74.

<sup>281</sup> *The Hostage Case*, *supra* note 46, at 1253-1254 (emphasis added).

<sup>282</sup> U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 2.2.3 (emphasis added).

<sup>283</sup> Parks, *supra* note 32, at 54; see *id.* at 169-70.

<sup>284</sup> See, e.g., U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at paras. 2.7.1 and 5.3.4; Fenrick, *supra* note 32, at 121, 123; W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860, 861 (1999).

<sup>285</sup> See Final Report NATO Bombing Campaign, *supra* note 266, at paras. 56, 69, 70; Neuman, *supra* note 52, at 82-83, 94, 95, 107 n. 138, 111; Parks, *supra* note 32, at 54.

<sup>286</sup> See U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at paras. 2.2 and 2.2.3; *The Hostage Case*, *supra* note 46, at 1253-1254; GREENSPAN, *supra* note 49, at 313-314; U.S. DEPARTMENT OF THE ARMY, LAND WARFARE, *supra* note 46, at para. 3(a); Fenrick, *supra* note 32, at 93.

<sup>287</sup> Neuman, *supra* note 52, at 91.

<sup>288</sup> *Id.* at 93 n. 81.

Mention should be made as well of the fact that the expected military advantage need not itself in reality ever materialize since the assessment is based on the *anticipated* “military advantage” under Protocol I, or on the “*overall* military advantage” that is “*anticipated*,” under the Statute of the International Criminal Court. Whether or not the military goal or advantage is actually achieved is immaterial for this analysis. Accordingly, although terrorists were still firing missiles and rockets on Israel and the smuggling of weapons into Gaza was accelerating following the end of Israel’s military operation and even after a ceasefire had taken effect,<sup>289</sup> the successful outcome of the military operation and the actual achievement of the military goal or advantage have no bearing on the proportionality issue. What matters is the *expectation* of the military advantage, or of the *overall* military advantage that was thought to have existed at the outset of the launching of the military operation.<sup>290</sup>

The IDF makes every effort to adhere to high ethical standards and has thus adopted the proportionality principle together with other basic law of armed combat principles, enshrining them in IDF orders, training, and operational planning.<sup>291</sup> As a matter of policy, the army doctrine of Israel obliges an evaluation of both the military goal that is anticipated and possible collateral damage as well as compels refraining from the launch of an attack which may be anticipated to cause civilian damage in excess of the military objective that is anticipated.<sup>292</sup> The IDF has thus adopted this relevant principle appearing in Protocol I<sup>293</sup> by instilling in its officers and soldiers the concept of weighing military advantage vis-à-vis the civilian repercussions and by incorporating this evaluation into its rules of engagement and in all-embracing discussions and deliberations at both the command and the operational level in its training programs.

### C. Inherent Lack of Clarity in Applying the Proportionality Principle

While the proportionality principle that dictates refraining from attacking even legitimate military targets if the likely result will be civilian damage and casualties that are excessive to the military gain anticipated<sup>294</sup> has generally been accepted<sup>295</sup> -- although it is far from uncontroversial<sup>296</sup> -- as reflecting international law, “its precise meaning remains elusive, in part because of the inherent

<sup>289</sup> See, e.g., *Israel says arms flow into Gaza*, *supra* note 120; *Israel debating military response to Hamas after renewed rocket attacks*, WORLD TRIBUNE, Feb. 2, 2009, available at [http://www.worldtribune.com/worldtribune/WTARC/2009/me\\_israel0094\\_02\\_02.asp](http://www.worldtribune.com/worldtribune/WTARC/2009/me_israel0094_02_02.asp) (last visited Sept. 26, 2009); Amy Teibel and Ibrahim Barzak, *Israel to pull out of Gaza by Obama inauguration*, Jan. 19, 2009, available at [http://news.yahoo.com/s/ap/20090119/ap\\_on\\_re\\_mi\\_ea/ml\\_israel\\_palestinians](http://news.yahoo.com/s/ap/20090119/ap_on_re_mi_ea/ml_israel_palestinians) (last visited Sept. 26, 2009).

<sup>290</sup> See DINSTEIN, *supra* note 32, at 121.

<sup>291</sup> See, e.g., *Responding to Hamas Attacks from Gaza*, *supra* note 13.

<sup>292</sup> *Responding to Hamas Attacks from Gaza*, *supra* note 13; see Gold, *supra* note 14; Dershowitz, *supra* note 5.

<sup>293</sup> Protocol I, *supra* note 38, at art. 57(2)(b).

<sup>294</sup> *Id.* at arts. 57(2)(a)(3), 57(2)(b).

<sup>295</sup> *International Law and the Politics of Urban Air Operations*, 8 n. 14, available at [www.rand.org/pubs/monograph\\_reports/MR1175/MR1175.chap2.pdf](http://www.rand.org/pubs/monograph_reports/MR1175/MR1175.chap2.pdf) (last visited Sept. 26, 2009) [hereinafter *Politics of Urban Air Operations*]; Neuman, *supra* note 52, at 88, 88 n. 5.

<sup>296</sup> See, e.g., Parks, *supra* note 32, at 173; Fenrick, *supra* note 32, at 123, 125, 125-26. In fact, according to one of the foremost and preeminent scholars of the laws of war, the threshold of the proportionality principle has historically been placed at a very high level, “condemning only collateral civilian casualties so excessive as to be tantamount to the intentional attack of the civilian population or to a total disregard for the safety of the civilian population.” W. Hays Parks, *Linebacker and the Law of War*, AIR UNIVERSITY REVIEW (Jan.-Feb. 1983), available at <http://www.airpower.au.af.mil/airchronicles/aureview/1983/jan-feb/parks.html> (last visited Sept. 26, 2009); Fenrick, *supra* note 32, at 123; see Parks, *supra* note 32, at 173.

difficulties in measuring, and then weighing, expected military gain and civilian harm.<sup>297</sup> That is, there is no agreement as to how to apply the principle,<sup>298</sup> particularly due to the inherent difficulty of evaluating the benefit of an attack on a military objective vis-à-vis the value of innocent civilian lives.<sup>299</sup> The concept is too vague and lacks a clear, reasonable standard for determining what is permitted and what is forbidden.<sup>300</sup> Intrinsic uncertainties, which are not easily resolved since people will naturally approach them from different backgrounds and perspectives, arise that must be determined regarding the application of the proportionality principle, such as the comparative values attached to civilian casualties and objects and the anticipated military goal, who and what may be eliminated from the calculations, how are the measurements to be determined, as well as the amount and level of risk to which armed forces must be subjected so as to mitigate civilian damage, injury, or death.<sup>301</sup> For instance, a trained, veteran military field commander would probably attach a different comparative standard to “overall military advantage anticipated” vis-à-vis civilian casualties than would an expert in international human rights. Even combat commanders themselves coming from dissimilar military backgrounds, training, and experience would probably also have different opinions regarding this military-civilian relationship in certain cases.<sup>302</sup> Thus, elucidates Kenneth Anderson,

[t]he proportionality calculation is therefore inherently open-ended, imprecise and subjective. Moreover, it is a calculation that must take place constantly up and down the chain of command, in strategic matters as well as tactical matters, in the general’s headquarters as well as in the mind of the junior officer on the move in the field. . . . By reason of this inherent subjectivity and imprecision, people with different backgrounds and in different circumstances can easily reach different but equally legitimate conclusions on exactly the same facts. . . . Even from the standpoint of a reasonable military commander, commanders with the same training are likely to come to varying conclusions on the same facts. For this reason, the law of war has traditionally vested very great discretionary powers with commanders to make these determinations. . . . Such discretion is a constant of the laws of war.<sup>303</sup>

In the end, since the quantities being evaluated are such disparate factors, it would be extremely complex and difficult, if not altogether an impossible process, to determine some sort of impartial way to fairly and adequately measure the civilian casualties and damage and the military advantage, or to set up a precise proportional relationship between the two aspects,<sup>304</sup> particularly in advance of a military operation.<sup>305</sup> Since there exists no concrete way to objectively evaluate the constituent and integral elements of the proportionality equation, the determination of proportionality remains basically a subjective issue.<sup>306</sup> What would be considered “excessive” (or

<sup>297</sup> *Politics of Urban Air Operations*, *supra* note 295, at 8 n. 14; *see Parks*, *supra* note 32, at 171, 173-74, 175.

<sup>298</sup> Anderson, *supra* note 40; *see Parks*, *supra* note 32, at 172, 173-174; U.K. MINISTRY OF DEFENCE, MANUAL, *supra* note 27, at para. 2.7.1; Fischer, *supra* note 271.

<sup>299</sup> Final Report NATO Bombing Campaign, *supra* note 266, at para. 48; *see Fenrick*, *supra* note 32, at 93-94, 102 (1982); Parks, *supra* note 32, at 181.

<sup>300</sup> *See Parks*, *supra* note 32, at 173, 173-74 n. 527; DINSTEIN, *supra* note 32, at 122.

<sup>301</sup> Final Report NATO Bombing Campaign, *supra* note 266, at paras. 49 and 50; *see DINSTEIN*, *supra* note 32, at 122; Neuman, *supra* note 52, at 89 n. 62.

<sup>302</sup> Final Report NATO Bombing Campaign, *supra* note 266, at para. 50.

<sup>303</sup> Anderson, *supra* note 40.

<sup>304</sup> Fenrick, *supra* note 32, at 102; *see id.* at 107, 126.

<sup>305</sup> *See Parks*, *supra* note 32, at 197.

<sup>306</sup> *See Fenrick*, *supra* note 32, at 126; DINSTEIN, *supra* note 32, at 122.

“clearly excessive”) civilian casualties and damage in light of the “military advantage” (or “overall military advantage”) is not quantifiable in any objective fashion due to tremendously incongruent assessments of the relevant components of proportionality.<sup>307</sup>

Consequently, reasons Anderson,

the question of proportionality is generally satisfied by those commanders making a genuine attempt to determine both sides of this proportionality calculation and to weigh them against each other. Once a good faith attempt has been made to weigh these risks and benefits, it is recognized that this judgment of proportionality should be respected, absent some showing of truly extraordinary disregard for undertaking proportionality calculations at all – that is, disregard so egregious that it would have been palpable and obvious to anyone that it crosses the line into intentional depravity.<sup>308</sup>

Therefore, he concludes,

States have been profoundly unwilling to turn otherwise honorable soldiers into mass murderers by the second guessing of a court after the fact; state practice has required, instead, obvious intentional depravity, an utter indifference even to making a calculation of proportionality.<sup>309</sup>

Courts have consequently hardly ever, if at all, based trial proceedings for war crimes on the issue of proportionality.<sup>310</sup>

As Françoise Hampson, a member of the International Committee of the Red Cross expert committee on customary law and Governor of the British Institute of Human Rights reasons,

State practice recognizes that judgments about military necessity often require subjective evaluations with incomplete information on the battlefield and imperfect knowledge of where the failure to take action might lead. For this reason, great discretion has always been attached to commanders’ judgments, especially those made under battlefield conditions. Rarely, if ever, is the judgment of a field commander in battle -- balancing military necessity and advantage -- subject to legal challenge, let alone criminal sanction.<sup>311</sup>

Examined in this fashion, writes Knut Dörmann, “[t]here is probably no doubt that a court will respect judgments that are made reasonably and in good faith on the basis of the requirements of international humanitarian law.”<sup>312</sup>

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<sup>307</sup> DINSTEIN, *supra* note 32, at 122.

<sup>308</sup> Anderson, *supra* note 40.

<sup>309</sup> *Id.*

<sup>310</sup> See Fenrick, *supra* note 32, at 112, 125; Anderson, *supra* note 40.

<sup>311</sup> Françoise Hampson, *Military Necessity*, in CRIMES OF WAR, WHAT THE PUBLIC SHOULD KNOW 251 (Roy Gutman and David Rieff eds., Kenneth Anderson, legal ed., 1999); see Fenrick, *supra* note 32, at 112; Anderson, *supra* note 40.

<sup>312</sup> DÖRMANN, *supra* note 271, at 165; see *id.* at 172-73.

## V. Conclusion

The incongruity and disparity between the basic attitudes and manner in which the two sides conducted themselves in conflict<sup>313</sup> depicts the type of complicated and convoluted environment that Israel, like other States combating terrorism, must conduct its military operations. It is also in this surrealistic environment that civilians in Gaza lamentably paid a heavy price in casualties and damage to property for the terrorists' callous and ruthless disregard for any human life or property, Palestinian or Israeli.

Natural confusion that occurs during combat,<sup>314</sup> the typical intricacies and uncertainties, the complicated, convoluted nature<sup>315</sup> of any war,<sup>316</sup> all form tremendous impediments to properly evaluating the correct amount of civilian property damage and casualty numbers, who may be considered as civilians, and what may be characterized as civilian objects. This makes the ascertainment of the civilian costs in relation to the military advantage,<sup>317</sup> when combined with the subjectivity and multitude of possible perspectives, a daunting task at best.<sup>318</sup>

Neither Protocol I<sup>319</sup> nor the Statute of the International Criminal Court<sup>320</sup> are binding as such on Israel, or for that matter on the United States, since they are not parties to them.<sup>321</sup> Accordingly, Israel and the United States are not bound by principles contained in them that do not comport with customary international law. Yet assuming the relevant principles were obligatory for Israel and the United States, it is apparent that to a reasonable military commander acting in good faith, even a large amount of damage to civilian objects or even considerable civilian casualties in fact would be considered acceptable if the anticipated overall military advantage or value or goal were great.<sup>322</sup> The anticipated overall military goal or advantage for Israel was evident -- to ensure enduring security of its citizens, to put an end once and for all, after eight years and thousands of rocket and mortar attacks, to the holding hostage of close to one million of its citizens living in southern Israel by the perpetual terrorist rocket and mortar fire and to the smuggling into Gaza of weapons, particularly from Iran and Syria, via numerous clandestine underground tunnels.<sup>323</sup>

While the term "proportionality" does not appear as such in either Protocol I,<sup>324</sup> the International Criminal Court Statute, the Fourth Geneva Convention<sup>325</sup> or the Hague Regulations, and it is not just a simple calculation of one side's casualties and damage sustained in comparison with those of the other,<sup>326</sup> the issue is whether there would be excessive civilian repercussions vis-à-

<sup>313</sup> See, e.g., Erlanger, *supra* note 115; *Responding to Hamas Attacks from Gaza*, *supra* note 13.

<sup>314</sup> See Parks, *supra* note 32, at 180.

<sup>315</sup> See *id.* at 182, 183.

<sup>316</sup> E.g., Kemp, *supra* note 164.

<sup>317</sup> See Parks, *supra* note 32, at 181.

<sup>318</sup> See Hampson, *supra* note 311, at 251.

<sup>319</sup> Protocol I, *supra* note 38.

<sup>320</sup> Rome Statute, *supra* note 39.

<sup>321</sup> See *supra* notes 34 and 40.

<sup>322</sup> See, e.g., DINSTEIN, *supra* note 32, at 121, 122-23.

<sup>323</sup> See, e.g., *Israel holds its fire*, *supra* note 1.

<sup>324</sup> See Fenrick, *supra* note 32, at 106; Corn, *supra* note 166; DINSTEIN, *supra* note 32, at 120.

<sup>325</sup> See Neuman, *supra* note 52, at 88.

<sup>326</sup> See, e.g., Jim Hellis, Chairman, Department of National Security and Strategy, U.S. Army War College, Remarks on National Public Radio – Morning Edition, Jan. 7, 2009, *transcript available at* <http://www.npr.org/templates/transcript/transcript.php?storyId=99071510> (last visited Sept. 26, 2009); Dershowitz,

vis the anticipated military advantage, under Protocol I, or “clearly excessive” repercussions in relation to the *overall* anticipated military advantage under the International Criminal Court Statute. Unfortunately, though, there exists no convenient arithmetic formula for determining what would be considered an “allowable” level of incidental non-combatant casualties and ensuing damage relative to the anticipated overall military advantage.<sup>327</sup> For this determination, the importance of the overall military advantage or objective,<sup>328</sup> which logically would also include the security of the armed forces themselves,<sup>329</sup> must of course be taken into account by the reasonable military commander and juxtaposed with the civilian losses.

It is immaterial to the proportionality analysis that despite their rhetoric the terrorists have not caused more damage than they have actually caused.<sup>330</sup> In other words, the terrorists’ failure to achieve their goal of annihilating Israel is irrelevant to the magnitude of Israel’s response.<sup>331</sup> There is no obligation under the laws of war to treat the enemy “fairly” by limiting the use of technological superiority, manpower, or firepower.<sup>332</sup> There is likewise no prohibition under the laws of war on utilizing a “preponderance of power” against the enemy.<sup>333</sup>

Were there civilian casualties and damage that ensued as a result of the Israeli military operation in Gaza? Unfortunately there were. There were regrettably even many civilian casualties and severe damage. But were they “excessive,” or “clearly excessive,” civilian casualties and damage in relation to the anticipated “military advantage,” or to the anticipated “overall military advantage?” Based on the relevant international law regarding proportionality in war as applied to the actual facts on the ground, the answer to that last question is “no.” The applicable laws of armed conflict will not support war crimes allegations asserted against Israel for supposedly acting disproportionately during its three week Gaza military campaign.

Moreover, “[i]f Israel, and Israel alone among democracies fighting defensive wars,” declares Alan Dershowitz,

were ever to be charged with ‘war crimes,’ that would mark the end of international human rights law as a neutral arbitrator of conduct. Any international tribunal that were to charge Israel, having not charged the many nations that have done far worse, will lose any remaining legitimacy among fair-minded people of good will, [sic] If the laws of war in particular, and international human rights in general, are to endure, they must be applied to nations in order of the seriousness of the violations, not in order of the political unpopularity of the nations. If the law of war were applied in this manner, Israel would be among the last, and certainly not the first, charged.<sup>334</sup>

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*supra* note 5; Kevin Jon Heller, *Dershowitz on Israel and Proportionality*, available at <http://opiniojuris.org/2009/01/03/dershowitz-on-israel-and-proportionality/> (last visited Sept. 26, 2009).

<sup>327</sup> See, e.g., DINSTEIN, *supra* note 32, at 122.

<sup>328</sup> See, e.g., *id.* at 122-23.

<sup>329</sup> See text accompanying *supra* notes 279-288.

<sup>330</sup> See Heller, *supra* note 326.

<sup>331</sup> See *id.*

<sup>332</sup> See Parks, *supra* note 32, at 169-70.

<sup>333</sup> See *id.* at 170; DINSTEIN, *supra* note 32, at 116.

<sup>334</sup> Alan Dershowitz, *The Phony War Crimes Accusation Against*, THE HUFFINGTON POST, Jan. 22, 2009, available at [http://www.huffingtonpost.com/alan-dershowitz/the-phony-war-crimes-accu\\_b\\_160050.html](http://www.huffingtonpost.com/alan-dershowitz/the-phony-war-crimes-accu_b_160050.html) (last visited Sept. 26, 2009).



The “violence in Gaza is the result of Hamas’ decision to launch rocket attacks on Israeli civilians and Israel has a right to defend itself,” President Barack Obama said last year. “Hamas . . . bears responsibility for these events.”<sup>335</sup> Later Obama elaborated, explaining that “I don’t think any country would find it acceptable to have missiles raining down on the heads of their citizens. The first job of any nation state is to protect its citizens. And so I can assure you that if . . . somebody was sending rockets into my house where my two daughters sleep at night, *I’m going to do everything in my power to stop that. And I would expect Israelis to do the same thing.*”<sup>336</sup>

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<sup>335</sup> *White House calls for end to Mideast violence*, REUTERS, Mar. 2, 2008, available at <http://www.reuters.com/article/vcCandidateFeed2/idUSN02288639> (last visited Sept. 26, 2009).

<sup>336</sup> *Transcript, Obama’s Speech in Sderot, Israel*, N.Y. TIMES, July 23, 2008, available at <http://www.nytimes.com/2008/07/23/us/politics/23text-obama.html> (last visited Sept. 26, 2009) (emphasis added).