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THE TYRANNY OF CONTEXT: ISRAELI TARGETING PRACTICES IN LEGAL PERSPECTIVE

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1. INTRODUCTION

Israel's security challenges are manifold, complex, and existential. The country has been at war with every State on its borders–Syria, Egypt, Jordan, and Lebanon–at least once since its establishment in 1948.[1] More distant foes, including Iran, continue to directly or indirectly support non-State organized armed groups that seek its destruction and, in some cases, the creation of a Palestinian State.[2] Two of these, Hezbollah and Hamas, field forces that are especially well organized and equipped.[3]

Over the years, the Israel Defense Forces ("IDF") have launched thousands of strikes against their enemies. Some have been isolated surgical attacks, whereas others have been integral components of major military campaigns. Human rights organizations have often criticized the operations on the basis of the law of armed conflict ("LOAC"), also known as international humanitarian law or the law of war.[4] Such criticism raises the question of whether the IDF

[1] *See generally* Ian J. Bickerton & Karrla L. Clausner, A History of the Arab-Israeli Conflict (6th ed. 2010) (describing the nature of the Arab-Israeli conflict); Mark Tessler, A History of the Israeli-Palestinian Conflict (2009).

[2] *See* YAAKOV KATZ & YOAZ HENDEL, ISRAEL VS. IRAN: THE SHADOW WAR 4 (1st ed. 2012) (overviewing Iran's support of Hezbollah in Lebanon and Hamas in the Gaza Strip); Carol J. Williams, *Iranian Officials Say They Have Armed Hamas for Fight With Israel*, L.A. TIMES (Aug. 4, 2014), http://www.latimes.com/world/middleeast/la-fg-israel-gaza-hamas-iran-20140804-story.html (explaining the material support Hamas receives from Iran).

[3] *See* Jeffrey D. Feltman & Daniel Benjamin, *Assessing the Strength of Hizballah*, U.S. DEP'T ST. (June 8, 2010), http://www.state.gov/p/nea/rls/rm/142857.htm (warning of Hezbollah's weapons and hostility as a threat to peace); Jeffrey White, *The Combat Performance of Hamas in the Gaza War of 2014*, CTC SENTINEL (Sept. 2014), *available at* https://www.ctc.usma.edu/posts/the-combat-performance-of-hamas-in-the-gaza-war-of-2014 (explaining the growing threat that Hamas constitutes as the result of its new tactics).

[4] *See, e.g.*, *Families Under the Rubble: Israeli Attacks on Inhabited Homes*, AMNESTY INT'L 37–42 (Nov. 5, 2014), https://www.amnesty.org/en/documents/MDE15/032/2014/en/ (describing Amnesty International's views that the targeting of family homes by Israeli air strikes during Operation Protective Edge was a violation of international humanitarian law); *Israel: In-Depth Look at Gaza School Attacks*, HUM. RTS. WATCH (Sept. 11, 2014), http://www.hrw.org/news/2014/09/11/israel-depth-look-gaza-school-attacks (detailing three separate attacks on school housing in the Gaza Strip which Human Rights Watch considers to violate international law); Jutta Bachmann et al., *Gaza, 2014: Findings of an Independent Medical Fact-finding Mission*, PHYSICIANS FOR HUMAN RIGHTS-ISRAEL 98–99 (2014), https://gazahealthattack.files.wordpress.com/2015/01/gazareport_eng.pdf

systems and processes for engaging in attacks promote compliance with the LOAC. Moreover, it raises concerns regarding the legal standards that the IDF apply.

This article examines both issues. The findings set forth herein are derived in great part from a December 2014 research trip to Israel by the Authors and from a second visit by one of them in February 2015. The IDF granted them unprecedented access that included a "staff ride" of the Gaza area, inspection of an Israeli operations center responsible for overseeing combat operations, a visit to a Hamas infiltration tunnel, review of IDF doctrine and other targeting guidance, and briefings by IDF operators and legal personnel who have participated in targeting. The Authors also conducted extensive interviews of senior IDF commanders and key IDF legal advisers.[5]

Although the approach might be perceived as leading to a pro-Israeli bias, the sole purpose of the project was to examine Israeli targeting systems, processes, and norms in the abstract; no attempt was made to assess targeting during any particular conflict or the legality of individual attacks. With respect to the resulting

(analyzing the results of the Israeli offensive in the Gaza Strip from a medical standpoint and finding the results indicative of violations of international humanitarian and human rights laws); *Nothing is Immune: Israel's Destruction of Landmark Buildings in Gaza*, AMNESTY INT'L. 21–25 (Dec. 9, 2014), https://www.amnesty.org/en/ documents/mde15/0029/2014/en/ (finding the destruction of civilian buildings by the IDF to be, under the opinion of Amnesty International, a war crime); *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles*, HUM. RTS. WATCH (June 30, 2009), http://www.hrw.org/reports/2009/06/30/precisely-wrong-0 (presenting evidence about six drone attacks carried out by Israel that resulted in civilian injuries and deaths and recommending Israel begin an independent inquiry into its use of aerial drones); *Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza*, HUM. RTS. WATCH (Mar. 25, 2009), http://www.hrw.org/reports/2009/03/25/rain-fire (listing six instances of the use of white phosphorus weapons by the IDF in populated areas of Gaza and recommending investigation of the IDF's use of white phosphorus based on Human Rights Watch's opinion that it was being used in a manner that violates the law of armed combat;) *White Flag Deaths: Killings of Palestinian Civilians during Operation Cast Lead*, HUM. RTS. WATCH (Aug. 13, 2009), http://www.hrw.org/reports/2009/08/13/white-flag-deaths-0 (outlining seven examples of Israeli soldiers attacking and killing civilians during "Operation Cast Lead" and criticizing Israel for its failure to investigate these occurrences, as it is obligated to do by international law).

[5] Much of the material in this article is based directly on the interviews with members of the IDF and other Israeli government agencies; individual interviewees are not identified. Additionally, the Authors draw on their own personal experience and training for much of the background material on military operations and law.

observations and conclusions, note that the Authors combine extensive academic and operational experience vis-à-vis targeting and therefore were in a unique position to assess the credibility and viability of Israeli assertions.[6] The result was a highly granular and exceptionally frank dialogue.

The article is in four parts. Part I describes the unique operational environment in which Israeli forces engage in targeting operations. As every conflict is different, it is essential to understand the operational environment before assessing the extent to which targeting systems and processes facilitate LOAC compliance. Moreover, although LOAC norms are not conflict specific, the operational environment influences the legal issues that arise during an armed conflict.

In Part II, the targeting process itself is surveyed. This process is determined in great part by the operational environment described in the previous Part. Discussion focuses on how the IDF organize for, and engage in, operations involving attacks on enemy forces. As they differ significantly, ground and air targeting systems are scrutinized separately.

Part III narrows the focus by examining those aspects of the Military Advocate General Corps' (MAG) organization, responsibilities, and activities that are relevant to the issue of Israeli targeting. As will become clear, legal advisors, including the Military Advocate General himself, comprise an integral facet of the process by which IDF operations unfold.

Israeli positions on the LOAC are surveyed in Part IV. Treaty and customary norms that govern targeting are set forth, as well as Israel views as to how they apply to its operations. Some of the norms are the subject of international and scholarly disagreement regarding their precise contours and interpretation. To the extent that the IDF representatives were willing to discuss them, Part IV sets forth the Israeli positions on these matters, together with the Authors' assessment of those positions. The article concludes with a general assessment of Israeli targeting.

[6] One author is a retired U.S. Air Force targeting officer and judge advocate, the other an active duty Army judge advocate with extensive experience in targeting in current conflicts. Both have also addressed targeting from an academic perspective.

2. OPERATING ENVIRONMENT

In his masterpiece of military theory, Carl von Clausewitz observed that all war is inherently an interaction: "it is not the action of a living force upon a lifeless mass . . . but always the collision of two living forces."[7] This interaction between adversaries, as well as the characteristics of the wider strategic environment in which a conflict occurs, impacts the relative values placed by each adversary on particular political and military objectives and, accordingly, the manner in which combat operations are conducted to achieve them.[8] Simply put, the operating environment at the tactical, operational, and strategic levels of war determines how wars will be fought.

Like any military force, the IDF's organization, doctrine, and capabilities are adapted to deal with the specific security challenges posed by the operational environment in which it finds itself.[9] That environment includes the political objectives and military wherewithal of both Israel and its adversaries. This Part highlights those aspects of the operating environment that most directly influence IDF targeting processes and Israeli views on the LOAC. It addresses how Israel has organized to confront the threat it perceives, as well as how Israel's adversaries seek to exploit the operational environment in an effort to neutralize Israeli strengths and create favorable asymmetries.

2.1. Israel and the IDF

[7] CARL VON CLAUSEWITZ, ON WAR 77 (Michael Howard & Peter Paret, eds., trans. 1984).

[8] *See id.* at 602 (positing that "the nature of the political aim, the scale of demands put forward by either side, and the total political situation of one's own side are all factors that in practice must decisively influence the conduct of war.").

[9] *See, e.g.*, DAVID E. JOHNSON, MILITARY CAPABILITIES FOR HYBRID WAR: INSIGHTS FROM THE ISRAELI DEFENSE FORCES IN LEBANON AND GAZA 6 (RAND Corp. 2010) (describing how Israel adapted its doctrine and training following the 2nd Lebanon War in 2006). *See also* Raphael D. Marcus, *Military Innovation and Tactical Adaptation in the Israel-Hizballah Conflict: The Institutionalization of Lesson-Learning in the IDF*, 38 J. STRATEGIC STUD. 500, 506 (2014) (regarding the Israeli lessons learned process).

The single most important facet of warfare from Israel's perspective is the proximity of the threat. Israel is a small country—a mere 263 miles from north to south and an average of only 45 miles from east to west. At its narrowest point, the distance from the West Bank to the sea is 9.3 miles. Within this territory live more than eight million Israelis, spread between major cities like Tel Aviv, Jerusalem, and Haifa and hundreds of villages and towns.[10]

The Gaza Strip lies on the western edge of the country, bordered by Egypt and the Mediterranean Sea. Hamas, which has been in control of the area since 2007, launched rockets to distances of up to 93 miles during its 2014 conflict with Israel, a range that encompasses all of the country's major population centers.[11] The rocket campaign was intense. Between July 8 and August 6, 3,360 rockets were launched, 2,303 of which struck Israel.[12] To the north, Hezbollah, supported by Iran, operates freely in southern Lebanon, thereby also bringing much of Israel within rocket range.[13] The rocket threat from these two areas is presently the most significant threat to Israel.

[10] *Israel 2008*, CIA WORLD FACT BOOK (Dec. 15, 2015), https://www.cia.gov/library/publications/the-world-factbook/geos/is.html.

[11] Open-source reporting on Hamas rocket capabilities and ranges, including maps depicting range circles, are available. *See, e.g.*, Joe Burgess & Karen Yourish, *The Growing Reach of Hamas's Rockets*, N.Y. TIMES (July 13, 2014), http://www.nytimes.com/interactive/2014/07/13/world/middleeast/the-growing-reach-of-hamas-rockets.html?_r=0 (depicting the past and current range of Hamas's rocket weaponry); *HAMAS Rockets*, GLOBALSECURITY.ORG (Apr. 09, 2014), http://www.globalsecurity.org/military/world/para/hamas-qassam.htm (reporting that the Khaibar-1 M302 rocket can launch a 375-pound warhead as far as 125 miles).

[12] *Operation Protective Edge by the Numbers*, THE OFFICIAL BLOG OF THE ISRAEL DEF. FORCES (Aug. 5, 2014), http://www.idfblog.com/blog/2014/08/05/operation-protective-edge-numbers/ [hereinafter *By The Numbers*].

[13] *See generally* Patrick Devenny, *Hezbollah's Strategic Threat to Israel*, 13 MIDDLE E. Q. 31, 31–38 (2006) (demonstrating the capacity and reach of Hezbollah's operational artillery).

Figure 1: Rocket Threat to Israel[14]

On the northeastern border, the contested Golan Heights, seized by Israel in the 1967 Six-Day War, provide a buffer between Israel and Syria; control of this strategically vital highland would allow an adversary to launch artillery at the Israeli lowlands and offer an avenue of attack into Israel's heartland.[15] While the peace between Israel and Egypt and Jordan, respectively, appears stable, the occupied West Bank that Israel seized from Jordon in 1967 is a source of continuing unrest. It presents a constant low-grade military threat extending to the edge of Jerusalem. Much of the West Bank is under the generally ineffective administrative and security authority of the Palestinian National Authority. Further complicating Israel's security situations are the Israeli settlements sprinkled throughout the West Bank, an area over which Israel exercises fragile military control.

[14] Map prepared by Graphic Department, U.S. Naval War College, based on data from open sources.

[15] *See generally* ANTHONY CORDESMAN, PERILOUS PROSPECTS: THE ARAB-ISRAELI MILITARY BALANCE AND THE PEACE PROCESS 228–240 (1995), *available at* http://csis.org/publication/perilous-prospects-arab-israeli-military-balance-and-peace-process (discussing the strategic importance of the Golan Heights).

As a consequence of its geography and the nature of the threat environment, the IDF is not an expeditionary force. Unlike the United States, which relies on the forward presence of a standing force operating globally to confront threats far from its homeland, the IDF is configured to mobilize rapidly and frequently in order to deter and defeat threats on its immediate borders. Of particular concern in terms of framing military strategies and tactics is the fact that Israel enjoys no strategic depth;[16] there is literally nowhere to which the IDF may retreat. When Israeli soldiers fight, they do so within minutes, and sometimes within view, of their homes.

Israel's small size and proximity to Gaza, Southern Lebanon, and Syria do, however, afford it the advantage of what practitioners of operational art refer to as an "interior position."[17] Put simply, while being surrounded certainly creates pressing problems for a military strategist, it also has the virtue of enabling one to concentrate forces quickly and maneuver them in any direction the situation may warrant. Combat aircraft launched from anywhere in the country can be over Gaza or southern Lebanon in minutes, thereby affording the Israeli Air Force exceptional flexibility, reaction time, and loiter capability. In a relative sense, the same is true for the ground and naval forces. Moreover, ground and air assets can be quickly re-tasked to strike elsewhere as the battle situation unfolds and evolves.

These factors affect the IDF's organization, doctrine, and ethos. Their influence on the roles and missions of the Air Force and Ground Forces is particularly marked. The Air Force is Israel's strategic arm and controls all fixed wing aircraft, rotary aviation, and remotely piloted aircraft ("RPA," the so-called "drones"); in contrast to the armies and navies of many other countries, their IDF

[16] The term "strategic depth" generally refers to that part of the defenses of territory that lies beyond the immediate operational reach of the adversary; this translates into to the ability to trade space for time when defending. MILAN VEGO, JOINT OPERATIONAL WARFARE: THEORY AND PRACTICE GL–19 (2007) (Newport, RI: Naval War College, reprint 2009). The lack of strategic depth has long figured prominently in Israeli strategic doctrine. *See, e.g.*, YOAV BEN-HORIN & BARRY POSEN, ISRAEL'S STRATEGIC DOCTRINE, 26–27 (RAND Corp. 1981) (describing Israel's previous considerations of defensible borders which included the goal of creating borders that would provide a margin of safety and allow more flexibility of response).

[17] VEGO, *supra* note 16, at IV–52.

counterparts possess no aviation capabilities.[18] Thus, only the Air Force can reach distant strategic targets such as the Iraqi Osirak nuclear facility the IDF attacked in 1981[19] and the Syrian nuclear facility struck in 2007.[20] In addition to their far greater reach, air assets by their very nature are highly flexible tools in terms of reacting rapidly to a dynamic battlefield, may be easily repositioned, can confront threats from any direction, and can engage targets with great precision. Moreover, when an air force enjoys air superiority, as does the Israeli Air Force, employing air power often poses less of a risk to those conducting an attack than in the case of ground forces. Accordingly, Israel relies heavily on the Air Force to target adversaries in Gaza, Lebanon, and other areas close to its borders.

The strategic role of the Israeli Air Force, when combined with its responsibility for simultaneously conducting theater level strikes and supporting ground operations, warrants a high degree of centralized control. Ordinarily such control comes at the cost of flexibility, responsiveness, and agility. However, given Israel's small geographic size, the relative proximity of the threats it faces, and the Air Force's resultant operational reach, centralized control makes contextual sense.[21] For these and related reasons, the Israeli

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[18] *See generally* Itai Brun, *Israeli Air Power*, *in* GLOBAL AIR POWER 137, 137–172 (John Andreas Olsen ed., 2011) (outlining the history of the Israeli Air Force and how it operated within the framework of the IDF).

[19] The strike on Iraq's nuclear facility at Osirak occurred on June 7, 1981. Israel justified this strike before the UN Security Council on the basis of "its inherent right of self-defense as understood in general international law and as preserved in Article 51 of the Charter of the United Nations." U.N. SCOR, 44th Sess., 2280th mtg. at 8, U.N. Doc. S/PV.2280 (June 12, 1981). Israel launched the strike on a Sunday in order to limit collateral damage. Yehuda Z. Blum, Letter Dated June 8, 1981 from the Permanent Representative of Israel to the United Nations Addressed to the President of the Security Council, at 2, U.N. Doc. S/14510 (June 8, 1981).

[20] David E. Sanger & Mark Mazzetti, *Israel Struck Syrian Nuclear Project, Analysts Say*, N.Y. TIMES (Oct. 14, 2007), *available at* http://www.nytimes.com/2007/ 10/14/washington/14weapons.html?. The International Atomic Energy Agency later confirmed the site was in fact a nuclear reactor. Associated Press, *IAEA Chief: Syria Tried to Build Nuclear Reactor*, NBC NEWS (Apr. 28, 2011), http://www. nbcnews.com/id/42798472/ns/world_news-mideast_n_africa/t/iaea-chief-syria-tried-build-nuclear-reactor/. Note that discussion of the Syrian strike is based on open source material, not discussions with IDF personnel.

[21] "Operational reach" is defined in U.S. Joint Doctrine as "the distance and duration across which a joint force can successfully employ its military capabilities." CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0 JOINT OPERATIONS III–28 (2011), http://www.dtic.mil/doctrine/new_pubs/jp3_03.pdf. That is the sense in which it is used here.

Air Force headquarters is best positioned to marshal airborne platforms and to direct their strikes.

Conversely, the IDF's Ground Forces, consisting of infantry, armor, and supporting arms such as artillery and combat engineers, are organized for the immediate defense of the Israeli homeland, as well as for offensive operations of a relatively limited reach beyond the borders of Israel. Consequently, it operates in a decentralized fashion. Geographically, the Ground Forces are organized into three major Regional Commands, as well as a Home Front Command charged primarily with civil defense. While Israel's relatively small size and interior position allow for some repositioning of forces when necessary to undertake major ground combat, broadly speaking the Southern Command is responsible for the Gaza Strip, the Northern Command is focused on Lebanon and the Golan Heights, and Central Command confronts threats arising in the West Bank.[22] Each Regional Command in turn consists of one or more Divisions, which are further subdivided into Brigades, Battalions, and Companies.

Unlike the U.S. all-volunteer professional military, Israeli citizens are conscripted into the IDF. With a few notable exceptions, every Israeli male must serve a 32-month tour of duty upon reaching the age of 18; females serve for 28-months.[23] Following active service, Israelis remain in the reserve forces and are subject to mobilization.[24] This shared experience creates strong ties between the military and the general population and has long been viewed as "an essential rite of passage."[25]

Universal conscription affects Israeli values, which in turn influence how Israel fights. Yagil Levy has proffered a compelling argument that the practice of universal conscription shapes the perceived value of individual Israeli soldiers, thereby creating a

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[22] *See Structure of the Israel Defense Forces*, WIKIPEDIA (Feb. 14, 2009), http://upload.wikimedia.org/wikipedia/commons/f/fe/Structure_idf.png (depicting the IDF force structure).

[23] Defence Service Law, 5746-1986, 40 LSI 112 Art. 1, 13 (amended 1989) (Isr.), *available at* http://www.mfa.gov.il/mfa/mfa-archive/1980-1989/pages/defence service law -consolidated version-- 5746-1.aspx (Art. 1 defines the military age as 18, and Art. 13 authorizes the IDF to call conscripts to service).

[24] *Id.* at Art. 27.

[25] Stuart A. Cohen, *The Israeli Defense Forces (IDF): From a "People's Army" to a "Professional Military"–Causes and Implications*, 21 ARMED FORCES AND SOC'Y 237, 244 (1995).

high degree of casualty-aversion.[26] Conscription also nurtures republicanism, which "means that the state coercively mobilizes its youth in return for political and social rights accrued by the social networks that offer up their children to military service."[27] This gives the broader Israeli public a greater voice in the conduct of military affairs and adds weight to its demands that soldiers be protected and that losses be justified.[28]

This attitudinal dynamic has direct operational consequences. Levy suggests, for example, that casualty-aversion leads the Israelis to liberally apply force, particularly airstrikes and counter-battery fire, in order to "guarantee force protection."[29] He also asserts that extreme sensitivity toward the well-being of its soldiers has led Israel to negotiate prisoner exchanges with Hezbollah and Hamas in which it pays a seemingly disproportionate price.[30] For instance, in the case of Corporal Gilad Shalit, captured by Hamas in 2006, Israel agreed in 2011 to release over 1,000 Hamas prisoners, including hundreds convicted of murder. They were released to the West Bank and Gaza Strip, where many re-engaged in combat against Israel.[31] The contrast between this exchange and that undertaken by the United States for the return of Sergeant Bowe Bergdahl is stark. Bergdahl was exchanged for five Taliban prisoners who were released into custody in Qatar and thus unlikely, at least in the short-term, to return to combat against.[32]

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[26] DANIEL BYMAN, A HIGH PRICE 364 (2011); Yagil Levy, *The Paradox of Recruitment*, 14:2 DEFENCE STUDIES 216, 226 (2014).

[27] Levy, *supra* note 26, at 219.

[28] *Id*. at 221.

[29] *Id*. at 226.

[30] *See* RUTH LEVUSH, LAW LIBRARY OF CONG., ISRAEL: LEGAL ASPECTS OF PRISONER EXCHANGES 2 (2014) (observing that "[t]he rescue of those in captivity, known in Hebrew as *pidyon sheuyim*, has traditionally been considered a basic obligation under Jewish law and has been followed in Jewish communities for generations").

[31] *Id.*; Levy, *supra* note 26, at 227. *See also* Ronen Bergman, *Gilad Shalit and the Rising Price of an Israeli Life*, N.Y. TIMES MAG., Nov. 9, 2011, *available at* http://www.nytimes.com/2011/11/13/magazine/gilad-shalit-and-the-cost-of-an-israeli-life.html?pagewanted=all (detailing the history of negotiations for Israeli prisoners of war).

[32] Chuck Hagel, U.S. SEC'Y OF DEF., Transfer of Five Senior Taliban Detainees, Address Before the H. Comm. on Armed Servs., 113th Cong. (2014) (statement of Chuck Hagel, Secretary of Defense of the United States). *See also Testimony of U.S. Secretary of Defense Hagel, House Armed Services Committee*, VOICE OF AMERICA (June 11, 2014), http://www.voanews.com/content/secretary-of-defense-chuck-hagel-hearing-on-the-transfer-of-detainees-house-armed-services-committee/1934678.html (explaining the decision to transfer detainees in order to free Sergeant

Israeli sensitivity towards captured personnel also has direct operational consequences. In 1986 the IDF implemented the "Hannibal Directive," which reportedly states that "'[i]n case of capture, the main mission becomes rescuing our soldiers from the captors, even at the cost of hitting or wounding our soldiers.'"[33] The directive illustrates the extent to which the desire to deny its enemies the opportunity to leverage Israeli concern for the safety of its soldiers influences Israeli military decision-making.

The value Israel places on its soldiers is matched by acute sensitivity to the daily dangers its civilian population faces. Over six million of Israel's eight million citizens live within range of Hamas and Hezbollah indirect fire weapons. Over the last decade, suicide bombings, small arms attacks, and kidnappings have also featured prominently in operations targeting Israeli civilians. Israel's enemies, facing an overwhelmingly superior military force, have logically, albeit tragically and unlawfully, identified the civilian population as a center of gravity and regularly targeted it directly.

The perceived threat to the civilian population understandably lies at the heart of Israeli strategy and planning. To neutralize the rocket threat, Israel has invested heavily in static defenses, including the Iron Dome system that has been relatively effective at preventing rockets from impacting in Israeli population centers.[34] For instance, during the hostilities in 2014 the system intercepted 584 rockets; only 115 of the over 3,000 launched landed in populated areas.[35] As further defense against rocket attacks, Israel has constructed an early warning system and an elaborate network of hardened

Bergdahl). The U.S. Government Accountability Office issued a report to Congress that concluded this prisoner swap violated the law by failing to inform Congress as required by the Consolidated Appropriations Act, 2014, Pub. L. No. 113–76, § 8111, 128 Stat. 5, 131 (Jan. 17, 2014). SUSAN A. POLING, U.S. GOV'T ACCOUNTABILITY OFFICE, B–326013, 4–5 (2014). It resulted in a non-binding resolution from the U.S. House of Representative "condemn[ing] and disapprov[ing]" of the failure of the President to comply with the law. H.R. Res. 644, 113th Cong. (2014).

[33] Levush, *supra* note 30, at 3; Ruth Margalit, *Hadar Goldin and the Hannibal Directive*, NEW YORKER MAG. (Aug. 6, 2014), http://www.newyorker.com/news/news-desk/hadar-goldin-hannibal-directive.

[34] Steven Erlanger, *A Growing Arsenal of Homegrown Rockets Encounters Israel's Iron Dome*, N.Y. TIMES, Jul. 9, 2014, *available at* http://www.nytimes.com/2014/07/10/world/middleeast/israel-gaza-missiles-iron-dome.html?_r=0 (explaining the expense of the Iron Dome system and the cost-benefit analysis of using it).

[35] *By the Numbers*, *supra* note 12.

shelters across the country.[36] The IDF's Home Front Command also maintains evacuation plans to support the mass relocation of Israeli civilians from threatened areas, as occurred in the 2006 Lebanon War when many Israelis moved out of the northern area of the country.[37] Given the dramatically increased range of Hezbollah and Hamas rockets since then, it is an open question whether evacuation to "safe zones" remains a viable option for protecting the civilian population.

The perception that the Israeli civilian population is at constant risk likewise drives IDF targeting. Iron Dome does not intercept every rocket[38] and Hamas fighters repeatedly infiltrate the Israeli border to conduct raids and kidnappings through tunnels that are up to three kilometers long and forty kilometers deep. As a result, during Operation Protective Edge, the 2014 Israeli campaign, the IDF placed a high priority on the location and destruction of rockets, launching sites, weapons caches, and tunnels used by Hamas to infiltrate into Israel. Over the course of the operation, the IDF claims to have destroyed hundreds of rockets and much of Hamas' rocket launching infrastructure and to have discovered thirty-two tunnels.[39]

A key feature of the operating environment that bears on how the IDF fights is that it does so on terrain that it knows very well. Israel occupied the Gaza Strip until its unilateral disengagement in 2005[40] and has engaged in several operations in Gaza since then, two

[36] Israel's Civil Defense Law of 1951 requires all homes to include bomb shelters and mandates the construction of public shelters as well. Civil Defense Law, 5711-1951, 5 LSI 72 (5711-1950/51) (Isr.). The Israeli Home Front Command's public information website also details the requirements for shelter construction. *Bomb Shelters*, HOME FRONT COMMAND, http://www.oref.org.il/11154-en/Pakar.aspx.

[37] Amos Harel, *IDF Preparing for Mass Evacuations in Case of Hezbollah Missile Strike*, HAARETZ (May 20, 2010), http://www.haaretz.com/print-edition/news/idf-preparing-for-mass-evacuations-in-case-of-hezbollah-missile-strike-1.291119#!.

[38] Erlanger, *supra* note 34.

[39] *By the Numbers*, *supra* note 12.

[40] The unilateral disengagement was proposed by Prime Minister Ariel Sharon and adopted by the Israeli Cabinet on June 6, 2004. *See* ISR. MINISTRY OF FOREIGN AFF. THE CABINET RESOLUTION REGARDING THE DISENGAGEMENT PLAN (2004), *available at* http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfadocumentspages/revised%20disengagement%20plan%206-june-2004.aspx (detailing the Israeli plan for withdrawing from Gaza). *See also* Greg Myre, *Israeli Withdrawal From Gaza Proceeds Faster Than Predicted*, N.Y. TIMES, Aug. 19, 2005, http://www.nytimes.com/2005/08/19/international/middleeast/20gazacnd.ht

of which included large ground incursions.[41] Southern Lebanon was occupied by the Israelis from 1985 to 2000,[42] and Israel fought the 2006 Second Lebanon War in the terrain south of the Litani River.[43] Israel continues to occupy the West Bank and Golan Heights. In short, Israel benefits from an exceedingly high degree of situational awareness of its likely battlefields.

Israel also boasts one of the world's most technologically advanced military arsenals. It employs advanced fighter aircraft and unmanned aerial vehicles equipped with state-of-the-art sensors and the latest precision-guided munitions.[44] Additionally, Israel has access to an impressive human intelligence network. One virtue of Israel's unique history as the Jewish homeland has been its ability to draw on a diverse and multi-cultural pool of human capital; its Arab, Druse, and other ethnic and linguistic communities facilitate a deep understanding of its adversaries and enhance its ability to collect actionable intelligence.[45] As a result of these technical and intelligence advantages, Israel enjoys an impressive military edge in conventional terms over its opponents.

2.2. Hamas, Hezbollah, and the Pursuit of Asymmetries

Just as Israel seeks to comprehend its adversaries and adapt its operations to them, so too do its key opponents, especially Hamas and Hezbollah. Both organizations recognize Israeli conventional military superiority, but equally grasp what Israel values—its soldiers' well being and the security of its civilian population. The

ml?ex= 1125115200&en=d8aefb293ac0e831&ei=5070&emc=eta1 (describing the withdrawal of Israeli troops from Gaza in 2005).

41 Operation Cast Lead and Operation Protective Edge both involved ground force incursions into the Gaza Strip.

42 *See* Marjorie Miller et al., *Israel Leaves South Lebanon After 22 Years*, L.A. TIMES (May 24, 2000), http://articles.latimes.com/2000/may/24/news/mn-33497 (describing Israel's military campaign in Lebanon and its eventual withdrawal).

43 STEPHAN D. BIDDLE & JEFFREY A. FRIEDMAN, *The 2006 Lebanon Campaign and the Future of Warfare: Implications for Army and Defense Policy*, STRATEGIC STUDIES INST., 32 (Sept. 2008).

44 Brun, *supra* note 18, at 171; ANTHONY H. CORDESMAN, ARAB-ISRAELI MILITARY FORCES IN AN ERA OF ASYMMETRIC WARS 118–119 (2006).

45 CORDESMAN, *supra* note 44, at 132–33.

result is strategies of asymmetry that seek leverage over Israel by putting those values at risk.[46]

Hezbollah's tactics and strategy during 2006, for example, were characterized by a "hybrid warfare" approach that blended guerrilla tactics with conventional ones.[47] The approach was designed to neutralize Israeli air power long enough to strike at Israel's perceived weakness—the civilian population. Rather than launching small-scale harassing attacks and then melting away into a civilian population, Hezbollah chose to employ short-range rockets against Israeli population centers in the north of Israel, and then protected these easily-concealed weapons using a layered ground defense designed to deny the IDF access to the launch sites.[48] The goal was to inflict pain on Israeli society, while fostering regional and global concern over Israel's retaliatory strikes. Both strands of the strategy were intended to create pressure on Israel to yield.[49]

In this strategy, Hezbollah eschewed the use of its more powerful and longer-range rockets, because these would be vulnerable to Israeli airpower, as they are more easily located and fewer in number.[50] The Israeli air campaign that would have been required to destroy the limited number of launchers would presumably have been short, thereby depriving Hezbollah of the time needed to marshal external political pressure on Israel.[51] Instead, Hezbollah achieved asymmetry by forcing Israel into a conventional ground campaign for which it found itself ill prepared. Its infantry and armored forces, focused as it was on low-intensity conflict, had slowly lost the art of combined arms fire and maneuvering.[52] Instead, the IDF had grown reliant on precision air

[46] *See, e.g.*, *Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups' Rocket Attacks*, HUM. RTS. WATCH (Aug. 6, 2009), http://www.hrw.org/node/84868 (detailing Palestinian rocket attacks on Israel and a number of civilian deaths that have resulted from them).

[47] The term "hybrid warfare" refers to the employment of conventional, irregular, and even terrorist tactics in combination, often simultaneously. Frank G. Hoffman, *Hybrid Warfare and Challenges*, 52 JOINT FORCES Q. 34, 35 (Jan. 2009). Hezbollah has been singled-out as particularly adept at hybrid warfare. *Id*. at 37.

[48] Biddle & Friedman, *supra* note 43, at 49–50.

[49] *Id*. at 50.

[50] *Id*. at 49.

[51] *Id*. at 50 n,101.

[52] Johnson, *supra* note 9, at 2–3.

strikes and the luxury of choosing when to fight, in order to avoid casualties.

Hezbollah's strategy was simple and elegant: mitigate the effects of Israeli airpower, put up a stubborn ground defense to inflict heavy IDF casualties, and shower northern Israel with rockets that terrorize Israeli civilians.[53] As a result, Israel paid a high price in Lebanon during the intense ground fighting.[54] Many judge the conflict to have been a qualified Israeli defeat.

Hamas' tactics and strategy in the recent Gaza conflict were dramatically different, but also calculated to create asymmetry. The Gaza Strip is an almost entirely urban battlefield. Only 40 kilometers long and 10 deep, Gaza is densely packed with civilians and civilian objects.[55] Hamas exploits this reality intentionally. During every round of hostilities in Gaza since Israel's unilateral disengagement, Hamas has fought almost exclusively from among the civilian population. It employs both voluntary and involuntary (those taken to the target area or forced to remain there) human shields, conducts command and control from civilian homes, caches weapons in civilian property, often fails to wear uniforms or otherwise distinguish its fighters from civilians, prohibits or deters civilians from leaving areas likely to be targeted, and fires rockets from schools, mosques, United Nations facilities, and civilian residences.[56] It seeks to create asymmetry by using the law, which it

[53] *See generally* ANDREW EXUM, HIZBALLAH AT WAR: A MILITARY ASSESSMENT 8 (2006) (Wash. Inst. for Near E. Policy, Policy Focus No. 63, Dec. 2006) (describing Hezbollah's thought process and preparation prior to the conflict and the complexity of its tactics). *See also* BYMAN, *supra* note 26, at 256 (noting that as many as 500,000 Israelis were forced to leave their homes and another one million regularly hid in shelters).

[54] Exum, *supra* note 53, at 3.

[55] LEVY, *supra* note 26, at 193.

[56] Israel has put forth numerous claims of violations of the "LOAC" by Hamas, including deliberate rocket attacks against Israeli population centers, using civilian persons and objects to shield military operations, and misuse of protected property. *See, e.g.*, *UNRWA Strongly Condemns Placement of Rockets in School*, UNRWA (July 17, 2014), http://www.unrwa.org/newsroom/ press-releases/unrwa-strongly-condemns-placement-rockets-school (reporting on the UNRWA's condemnation of Hamas); *UNRWA Condemns Placement of Rockets, For A Second Time, in One of its Schools* UNRWA (July 22, 2014), http://www.unrwa.org/newsroom/press-releases/unrwa-condemns-placement-rockets-second-time-one-its-schools (reporting the UNRWA's further condemnation of Hamas); STATE OF ISRAEL, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS (2009), *available at* http://www.jstor.org/stable/10.1525/jps.2010.XXXIX.1.186 (reporting on Hamas' breaches of the law of armed conflict and war

often disregards, to counterbalance Israeli conventional superiority.[57]

Like Hezbollah, Hamas appreciates the enormous value Israel places on its civilian population and soldiers. To leverage these concerns to its benefit, for example, it fires rockets indiscriminately at Israeli civilian population centers to terrorize civilians and provoke an Israel military response, which the international community may perceive as heavy-handed.[58] Hamas also increasingly relies on an elaborate tunnel network. Designed to offset the IDF's reliance on air power and its employment of UAVs for observation, the group has increasingly gone underground.[59] Some tunnels are used to infiltrate into Israel to conduct attacks or to overwhelm isolated IDF positions and, in particular, take prisoners. Others are filled with explosives and detonated under IDF positions or used as "bait", that is, designed to be discovered by the IDF and then detonated while its forces are inside. Still others are used to move personnel and material within, to, and from Gaza.

The description of the Israeli operating environment is necessarily a simplification; it does not fully capture the myriad nuances of this complex and evolving conflict. The purpose was instead to identify those aspects of the operating environment that, from the Israeli perspective, may influence how IDF approaches targeting in light of LOAC requirements. The perception that the

crimes); *By the Numbers*, *supra* note 12 (publishing the numbers associated with the IDF's action against Hamas' attacks). The Human Rights Watch, other NGO's, and the United Nations have confirmed some of these allegations. *See, e.g.*, *Q&A: 2014 Hostilities between Israel and Hamas*, HUM. RTS. WATCH (Aug. 3, 2014), *available at* http://www.hrw.org/news/2014/08/03/qa-2014-hostilities-between-israel-and-hamas [hereinafter *HRW Q&A*].

[57] *See* JINSA-COMMISSIONED GAZA CONFLICT TASK FORCE, 2014 GAZA WAR ASSESSMENT: THE NEW FACE OF CONFLICT (Mar. 2015), http://www.jinsa.org/files/2014GazaAssessmentReport.pdf [*hereinafter* Gaza War Assessment] (explaining how Hamas exploited the IDF's respect for the rules of armed conflict by embedding military capabilities in densely populated civilian areas).

[58] *See id.*, at 19–20 (stating that "Hamas provoked and exacerbated the destruction caused by IDF responses that incidentally resulted in collateral damage. At best, Hamas acted with reckless disregard for the sagety of both Israeli and Gazan civilians; at worst, it deliberately sought to put civilians in harm's way.").

[59] The Israeli government has provided detailed claims about Hamas' tunnel network and its uses on the Ministry of Foreign Affairs website. *See generally Map of Rocket Launches from Gaza,* ISRAEL MINISTRY OF FOREIGN AFFAIRS (2013) http://mfa.gov.il/MFA/ForeignPolicy/FAQ/Pages/Operation-Protective-Edge-The-facts.aspx#blank.

Israeli civilian population is at constant risk, the high value placed on the security of individual IDF soldiers and the adaptive, and asymmetric nature of the threat posed by Hamas and Hezbollah, taken in combination, help explain Israel's operational dilemmas and, at least in part, its positions on the LOAC applicable to targeting.

3. IDF TARGETING PROCESSES

Since Israeli ground and air forces fulfill dissimilar roles and are accordingly organized differently, they both employ distinct approaches to the targeting process. The way in which the IDF engages in targeting in turn drives the manner in which legal advice is provided to critical decision-makers.

Before turning to the topic of targeting processes, a cautionary note is required. The procedures set forth apply to typical military strikes. However, in certain circumstances an attack (or a series of attacks) may be especially sensitive, for instance because there is likely to be high collateral damage, the target is politicized, the strike will occur on another State's territory, or it takes place during a period in which high-intensity hostilities are not underway. In these situations, the political leadership may be involved in the approval process. If so, the Attorney General or a member of her staff, the Military Advocate General or a member of the International Law Department, operations officers, and anyone else needed to explain the proposed strike may be called on to assist political leaders in assessing it prior to approval.

3.1. Ground Forces

Given their geographic focus, Israeli ground forces must excel at understanding and developing their local environment in order to engage primarily dynamic or emerging targets, called Time Critical Targets ("TCTs") in IDF parlance. These are targets that suddenly present themselves and have to be struck in real-time, as opposed to pre-planned targets identified in advance of the operation. Because Israel's enemies often fight from urban areas and civilian structures, many IDF targets are TCTs. Indeed, former MAG officers recounted

circumstances in which most of the preplanned targets were quickly exhausted in the early days of a conflict and operations came to be almost entirely dedicated to striking dynamic and emerging targets.

The Authors visited the Southern Command's Gaza Division headquarters to observe the IDF's methodology for engaging TCTs. The approach is centered on "Attack Cells" at the Division level and Regional Commands.[60] These cells provide the Division the capacity to conduct simultaneous real-time targeting in a decentralized manner that allows it to maintain speed and flexibility. The concept of a special targeting cell operating out of a tactical headquarters is not novel. In the U.S. system, each joint force commander fields some type of targeting cell in which real-time intelligence is fused and presented to a staff cell that brings together artillery, aviation, and air force officers to locate, verify, and strike multiple targets.[61] At the Brigade level and below, these generally take the form of large staff cells that process all targets to be engaged by that echelon of command.[62] The IDF has simply taken this concept and adapted it to the specific military problem it faces in the Gaza Strip. Rather than having one large targeting cell, IDF Divisions use multiple smaller Attack Cells that are task-organized to confront specific threats or take on discrete missions with a wide degree of autonomy.

The IDF would not reveal the exact number of cells that any particular Division employs, but suggested that a Division has the capability to stand up as many as needed for the particular conflict. Every cell is assigned specific missions, based on such factors as weapons platforms, operational and maneuver boundaries, or specific threats. Some cells may control weapons platforms of all types, but only for a specified area of operations, while others are charged with locating and targeting a specific enemy threat, such as rocket launchers and rocket firing positions or command and control nodes. For air assets, the cell coordinates with its targeting

[60] In the "IDF" Ground Force Division the Authors visited, these cells are colloquially known as *Fire Canopies*.

[61] The organizing principles for U.S. joint targeting cells are broadly described in CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3–60, JOINT TARGETING III-1 (2013), *available at* https://www.justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf [hereinafter *JP 3-60*].

[62] *See, e.g.*, ARMY TECHNIQUES PUBLICATION 3-60, TARGETING at 4–2 to -6 (2010), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/atp3_60.pdf (detailing the Brigade Combat Team's ("BCT") board membership, responsibilities, and guidance provided by the BCT commander.)

counterparts at the Air Force Headquarters through an air liaison officer. The mission and the operational plan will dictate how the Division organizes its cells, and how many it activates. This approach affords the IDF a flexible and potent capability.

Attack Cells may be as large or as streamlined as the mission requires, but all of them will have a certain minimum composition. Each is under the responsible command of one officer (the Attack Cell Commander), typically a Field-Grade Officer. The Commander makes the ultimate decision on a strike, so long as the rules of engagement permit the decision to be made at this level. In some circumstances and with respect to certain targets, the rules of engagement will specify higher level authorization.

The Commander of the cell is supported by a Targeting Officer capable of coordinating the specific weapons platforms needed for the strike, as well as by intelligence officers to manage the various sources of intelligence being fed to that cell. Depending on the mission and organization of a particular cell, this may include visual intelligence (VISINT), signals intelligence (SIGINT) or human intelligence (HUMINT). Operators with expertise in the weapons platforms at the disposal of the cell are also present. For instance, if the cell employs attack aviation, a pilot may be a part of the cell, while those employing counter-battery artillery will have counter-fire radar experts and artillery officers assigned. An Operations Sergeant tracks the cell's activities. Attack cells regularly receive training in the LOAC.

The most prominent characteristic of the Attack Cells is the decentralized nature of the targeting decisions. Multiple cells have the authority to coordinate and direct strikes using the available weapons platforms. Because the number, composition, and mission of these cells varies based on the operation, and because cells operate autonomously, it is essential that Cell Commanders be well-versed in the Rules of Engagement, LOAC, and any specified precautionary measures that are required before strikes are executed.

IDF lawyers directly advise the Division Commander, but not the Attack Cell commanders, a significant point in light of the decentralized nature of the targeting. To ensure compliance with LOAC rules, lawyers are heavily involved in developing targeting rules and assisting the Division Commander in overseeing Attack Cell operations. Strikes that fall outside the parameters provided to the cell have to be elevated up the chain of command to the

appropriate decision-maker, who makes the final targeting decision with the assistance of his legal advisor. As a general matter, however, IDF lawyers are not involved in individual ground force targeting decisions; in contrast, a U.S. targeting cell will always contain an embedded legal advisor.

3.2. Air Forces

Because of its strategic mission and operational reach, as well as Israel's interior position and the proximity of threats, the IDF Air Force operates in a much more centralized manner. Furthermore, in conjunction with the Regional Commands, it is responsible for developing and striking pre-planned targets.[63]

The Air Force's targeting process can roughly be broken down into several discrete steps: Target Development, Target Assessment, Pre-Strike Controls, and Strike Operations. It must be cautioned that the IDF was reluctant to reveal the specific command and control or doctrinal decision-making processes it utilizes for air strikes. Therefore, these "steps" represent the Authors' attempt to categorize the various activities performed during the deliberate targeting process, as explained by the IDF.[64]

3.2.1. Target Development

Target development is concerned with identifying *what to attack*. The central feature of the process is the "Target Bank," a master list of pre-planned targets developed by IDF commanders to achieve desired operational effects it anticipates needing. Like any other advanced military, the IDF is constantly engaged in developing war plans for a variety of future contingencies, even during peacetime.

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[63] *See generally* Harvard Program on Humanitarian Policy and Conflict Research, Manual on International Law Applicable to Air and Missile Warfare (Yoram Dinstein gen. ed. 2013) [hereinafter *AMW Manual*] (restating the law of air warfare).

[64] In actual fact, the "IDF" process employs a total of ten discrete steps, but all of them are captured under the four broad categories we describe here. *See* Gaza War Assessment, *supra* note 57, at 22(detailing the process by which IDF adheres to LOAC).

When hostilities break out, additional pre-planned targets are developed in an expedited fashion and added to the Target Bank.

The target development process begins with a review of a target in light of the mission objectives. In this phase, planners identify the desired effect they need to achieve. For instance, must the target be destroyed or merely degraded to achieve the desired effect? Or, must a line of communication such as a road or airfield be rendered permanently unusable or only taken out of use for a specific period of time? This process also determines the "uncertainty" surrounding the target. How specific is the intelligence in terms of geographic and temporal certainty? What intelligence gaps remain and how may the intelligence taskings be refined to resolve doubt? During target development, strike planners consider the specific target geometry and what would be required to achieve the desired operational effect. Planners may also outline in general terms whether a target should be struck by day or night. Finally, the time sensitivity of the target is examined. When during the campaign must the target be attacked to achieve the desired operational effect? Can the target be re-attacked later if the initial attack fails to achieve the desired effect?

IDF lawyers figure heavily in this process. Once planners identify and propose targets based on anticipated or actual missions and operational goals, lawyers from the International Law Department (ILD, discussed below) review each. When hostilities break out, the ILD is augmented by a group of additional LOAC experts, including both active duty and reserve officers; this combined entity is known as the Operational Law Apparatus (OLA) and is commanded by the head of the Department. With sensitivity to policy and operational considerations, members of the OLA first determine whether the proposed target qualifies as a "military objective," a term defined below. It is during this review, and especially for fixed targets such as command and control nodes, critical lines of communication, arms caches, or fixed military facilities, that possible proportionality concerns (also discussed below) are highlighted.

MAG officers utilize a detailed checklist to perform the legal review of the proposed strike (Appendix I). Based on this initial assessment, each target is designated as "Approved," "Conditional," or "Not Approved." "Approved" means that it is a military objective and may be struck, subject to the rule of proportionality and the taking of required precautions in attack,

legal requirements that will be developed in Part IV. A "Conditional" target is a military objective, which may be lawfully attacked provided certain precedential conditions are met.[65] For example, if the target is a road or bridge used by the civilian population, the condition may be that it only be struck at night when civilians are not present and the rule of proportionality is unlikely to be violated. Similarly, the condition may be that civilians be evacuated from the target area prior to attack to ensure the strike complies with the proportionality rule. Targets that are "Not Approved" are those that the initial review determines do not meet the military objective criteria. For instance, the OLA may decide that insufficient information exists to conclude a civilian residence is presently being used for military purposes and that, therefore, it does not qualify as a military objective. Or the OLA may conclude that the rule of proportionality will certainly be violated because the expected collateral damage is excessive to the military advantage anticipated to accrue from the attack, irrespective of how and when it is struck. Such targets may not be attacked over the objection of the legal officers.

3.2.2. Target Assessment

Whereas target development is concerned with determining *what* to attack, target assessment focuses on *how and when* to attack. The target assessment phase begins when a target enters the Target Bank and continues through the post-strike phase as Battle Damage Assessments (BDA) and debriefings are conducted. Many of the activities described in this phase may have already occurred once, in at least a rudimentary way, during Target Development. In Target Assessment, these steps are re-addressed in a refined way. Therefore, Target Assessment is less a "step" or "phase" in the targeting process than a component in a continuous loop of intelligence collection, analysis, and dissemination.

During Target Assessment, planners again identify any specially protected persons or objects under the LOAC, like medical facilities, that are in the target area and assess the likelihood of collateral damage to civilian persons or objects that may result. They also

[65] Gaza War Assessment, *supra* note 57, at 22, (referring to the "conditional" approval of a target as "qualified;" the meaning is the same).

designate "dead-space" near the target that is relatively free of civilians and important civilian property, such as an abandoned building or an open area in a depression. The dead spaces are noted for possible use during execution of the strike as a location towards which a steerable weapon such as a laser-guided missile may be diverted to limit unanticipated collateral damage. IDF lawyers in the OLA provide around-the-clock advice to planners and commanders as they refine target intelligence to ensure compliance with the LOAC.

This situational understanding informs the weaponeering process, which in the IDF is elaborate and sophisticated. Broadly speaking, "weaponeering" is the selection of the means (weapon) and method (tactic) that will be employed to attack a particular target. Effective weaponeering is as much a military art as it is a military science.[66]

During weaponeering, expert planners adjust the munition, the delivery platform, the angle of attack, and other physical variables in order to best achieve the desired military effect while complying with the LOAC requirement to minimize or eliminate collateral damage to protected persons and property. For instance, the IDF often employs specially configured smaller warheads with reduced explosive material against targets in urban areas to limit collateral damage. Other warheads have been re-engineered to generate lighter fragments upon detonation so that the fragments travel shorter distances from the point of impact. Additionally, pilots and operational planners with training in physics and aerodynamics determine the appropriate angle of attack – the vector upon which munitions will be released from attack platforms—in order to direct the blast away from nearby civilian persons or objects while achieving the desired effect. Of particular note is the fact that, whenever feasible, the IDF uses engineers alongside munitions experts and pilots to better understand the impact of an attack on structures. Operating as a team, the various participants can assess such issues as the penetrating characteristics and explosive effects of the weapons in the context of particular targets, the accuracy needed to achieve the desired destructive effect, the fusing that will ensure

[66] *See* JP 3–60, *supra* note 61, at GL–11(defining weaponeering as "the process of determining the quantity of a specific type of lethal or nonlethal means required to create a desired effect on a given target.").

warheads detonate in such a way as to contain and direct the blast, and the effects of weather and other variables.

Finally, the IDF has adapted to fight under the particular circumstances it faces – combat in urban terrain against an adversary that routinely fails to distinguish itself from the civilian population and uses that population and civilian objects to shield its forces and operations from attack. Since the IDF is not expeditionary, the IDF has been able to develop a deep understanding of the most likely theaters of operations—Gaza, Lebanon and the West Bank. For instance, its planners have a granular appreciation of such critical targeting matters as the usual pattern of civilian life in the target area, construction materials used to build homes and other structures, and the load-bearing capacity of roads and bridges. It is therefore especially well equipped to precisely identify the required destructive capacity of the weapons it employs against particular targets and the likely collateral damage that will result from an attack.

3.2.3. Pre-Strike Controls

Targets that have been developed and assessed remain in the Target Bank until the decision is made to strike a target. At that point, additional pre-strike controls are implemented. The target is re-verified – appropriate intelligence assets and other observation platforms confirm the location of the target and that it remains a valid military objective susceptible to attack. Pre-strike controls include reassessment of the initial proportionality review conducted during target development, since changes in the military situation may decrease the military advantage anticipated or the previously unidentified presence of protected persons or objects in the target area might increase expected collateral damage. Proportionality is monitored, to the extent feasible, until the moment of weapons release. If significant new intelligence surfaces, a reassessment all relevant officers involved in the targeting process, including the legal advisor, is required.

Whenever feasible, the IDF employs various precautions aimed at avoiding, or at least minimizing, the collateral damage expected from the attack. These precautions may include, for example, visual

observation by an RPA. This enables movable targets to be tracked and facilitates the identification of civilians and civilian objects that may have come into the target area unexpectedly in order to cancel, divert, or modify a strike if necessary based on legal or rules of engagement concerns. Operators also attempt to maintain observation of previously identified "dead-space" to maintain whether its use remains viable if needed.

When civilians may be affected by an attack and it is militarily feasible to do so, the IDF undertakes extensive measures to warn them.[67] Some, such as leaflet drops and general announcements to the civilian population, are common in conflicts. It typically announces that a particular area will be subject to attack and instruct the population where to go to avoid its effects. In many cases, the IDF contacts neighborhood leaders and ask them to encourage civilians to leave the area. The IDF also delivers very precise warnings of particular strikes. As described below, these include direct phone communications with civilians in the target area and so-called "knocks on the roof." Human rights organizations criticized both of the latter techniques during the recent Israeli operation in Gaza, although the Authors did not find the criticism well-grounded.[68]

To conduct the phone warnings, the IDF employs a specialized team of trained personnel who run a "phone bank" with the sole purpose of contacting individuals who might be affected by a strike. The calls are in some cases extremely precise. For instance, the warning may be that a strike will occur at a specified time. Live operators make some phone warnings, while others consist of

[67] *See, e.g.*, *How is the IDF Minimizing Harm to Civilians in Gaza?*, OFFICIAL BLOG ISRAEL DEFENSE FORCES (July 16, 2014), http://www.idfblog.com/blog/2014/07/16/idf-done-minimize-harm-civilians-gaza/ (explaining the ways that Israel warns civilians of imminent bomb attack, including: by phone, leaflets, and roof-knocking).

[68] *See, e.g.*, *Israel/Palestine: Unlawful Israeli Airstrikes Kill Civilians*, HUM. RTS. WATCH (July 16, 2014) http://www.hrw.org/news/2014/07/15/israelpalestine-unlawful-israeli-airstrikes-kill-civilians (alleging that IDF warnings were not effective because, in many cases, civilians were not given sufficient time to respond to them before the attack occurred). With respect to the "knock on the roof," Amnesty International objects, stating that "there is no way that firing a missile at a civilian home can constitute an effective warning." *Israel/Gaza: U.N. Must Impose Arms Embargo and Mandate an International Investigation as Civilian Death Toll Rises*, AMNESTY INTERNATIONAL, (July 11, 2014), http://www.amnestyusa.org/news/news-item/ israelgaza-un-must-impose-arms-embargo-and-mandate-an-international-investigation-as-civilian-death.

generic pre-recorded messages. The personnel in the warning cell speak Arabic fluently, have received cultural training on the civilian population in the target area, and whenever feasible, use all-source fused intelligence to focus on specific individuals who might be at risk. For example, understanding Palestinian culture and family structures, the warning cell may try to contact the male head of a family in a particular apartment building, knowing that he will effectively disseminate the warning to other family members. If a minor or a female answers the phone call, the warning cell attempts to speak to the head of the family. When several buildings in a particular area are targeted, the warning cell may also contact a local civilian official or an informal community leader who will be able to spread the warning effectively and insist on obedience.

The IDF developed the controversial "knock on the roof" technique for use when other warnings go unheeded or are infeasible.[69] The technique involves employing small sub-munitions that impact one corner of the roof and detonates a very small explosion that produces noise and concussion several minutes in advance of the strike. The civilians are hopefully frightened into dispersing. Once it has cleared the target area, the IDF launches the attack.[70]

3.2.4. Strike Operations

[69] This technique was heavily criticized in the "Goldstone Report." *See* Human Rights Council, *Fact Finding Mission on the Gaza Conflict, Human Rights in Palestine and other Occupied Arab Territories*, ¶¶ 532–535, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) at, *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf [hereinafter Goldstone Report] (criticizing the roof-knocking warning as ineffective because citizens should not have to guess what the warning means and may be potentially terrorized by the warning).

[70] *See* LEVY, *supra* note 26, at 196–97 (describing the knock on the roof technique). Video footage of the knock on the roof being delivered has been made publicly available. The Authors also viewed a number of these videos. In one, highlighted by the IDF as an optimal example, the IDF delivered a sub-munition in a location on the roof where it did no harm to civilians. An RPA was employed to observe each of the civilians clearing the target. Once the civilians were accounted for away, the building was destroyed. Adam Taylor, *Video: This is what an Israeli 'roff knock' looks like*, THE WASHINGTON POST (July 14, 2014), http://www.washingtonpost.com/blogs/worldviews/wp/2014/07/14/video-this-is-what-an-israeli-roof-knock-looks-like/.

Target development, target assessment, and pre-strike controls continue until the moment of attack. The final decision to strike is generally made at a high level in the Air Force Headquarters, where a robust operations center monitors each target through strike execution. Pilots retain the discretion to abort a mission if their own observation of the target indicates that the unanticipated presence of civilians or civilian objects in the target area requires the attack to be cancelled on the basis of a change in proportionality. The IDF stresses this responsibility, and the responsibility to take feasible precautions in attack, to pilots in their training.

During interviews, IDF personnel cautioned that the operations center often enjoys a better situational awareness of the target area than the pilot. Whereas the pilot is limited to onboard sensors and external feeds available in the aircraft, the operations center generally enjoys a refined and stable visual picture of the target area from RPA coverage and benefits from all-source intelligence fusion capability. Thus, unless a pilot personally observes indicators that raise doubt about the target, he or she is entitled to rely on the discretion of the operations center in executing the strike.

The ultimate measure of control for air operations lies in the senior decision-makers in the air operations center. While the IDF did not consent to public identification of the individuals who exercise this authority, it can be described as a cadre of very senior decision-makers with extensive experience, training, and robust support from intelligence analysts, weaponeering experts and legal advisors. During the Authors' interviews of senior IDF leaders, it became clear that they are acutely aware of the scrutiny their attacks receive and of their legal obligations. Indeed, in many cases they disapprove of what are clearly lawful strikes on the basis that the advantage likely to be gained is outweighed by potential negative repercussions in the public information and strategic communications arena (the so-called "CNN effect"), or based on broader policy concerns that factor heavily in their decisions.

Immediately following an attack, the pilot, as well as ground observers and other intelligence sources, conduct an assessment of the strike's effects, both in terms of Battle Damage Assessment and collateral damage. This assessment feeds a "lessons learned" process in which tactics, munitions, and the effectiveness of various intelligence sources are analyzed and, when necessary, adjusted to facilitate greater precision and better effects, as well as decreased collateral damage, in subsequent attacks.

4. THE MILITARY ADVOCATE GENERAL CORPS

Members of the Military Advocate General Corps, headed by the Military Advocate General (MAG), are integral to the targeting process.[71] The MAG consists of approximately 1000 lawyers, roughly 300 of whom are active duty. From this pool of military lawyers, several dozen are selected to form the Operational Law Apparatus, which, as described below, provides level advice during the targeting process. Therefore, the composition and functions of the MAG Corps are highly relevant to the IDF's application of, and compliance with, LOAC norms, both generally and with respect to individual strikes.[72]

Broadly speaking, the MAG Corps consists of three "professional systems." "Law Enforcement" performs military justice functions, and, of particular note with regard to targeting, includes a team specially dedicated to Operational Matters that, *inter alia*, handles incidents during combat. It advises the MAG on whether to go forward with investigations into possible LOAC violations and how their results should be handled. Should the MAG decide to indict the individual(s) involved, MAG officers assigned to the Law Enforcement system would conduct the prosecution and provide defense services. However, the military courts are not under the control of the MAG.

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[71] The purpose, structure, and functions of the Corps are set forth in Military Justice Law and in *Supreme Command Order no. 2.0613*, THE MILITARY ADVOCATE–GENERAL'S CORPS (Mar. 15, 1976) [hereinafter *SCO 2.0613*]. *See also Supreme Command Order no. 2.0201*, THE PROFESSIONAL STAFF IN THE GENERAL STAFF (Aug. 1, 1966); MAG's HEADQUARTERS' INTERNAL REGULATIONS; *and* THE ORGANIZATIONAL ORDER OF THE MAG HEADQUARTERS (July 2008) (constituting other relevant directives). An extensive discussion of the Corps is contained in *The Public Commission to Examine the Maritime Incident of 31 May 2010*, 2D REPORT, ISRAEL'S MECHANISMS FOR EXAMINING AND INVESTIGATING COMPLAINTS AND CLAIMS OF VIOLATIONS OF THE LAWS OF ARMED CONFLICT ACCORDING TO INTERNATIONAL LAW (Feb. 2013) [hereinafter *Turkel Commission Report*].

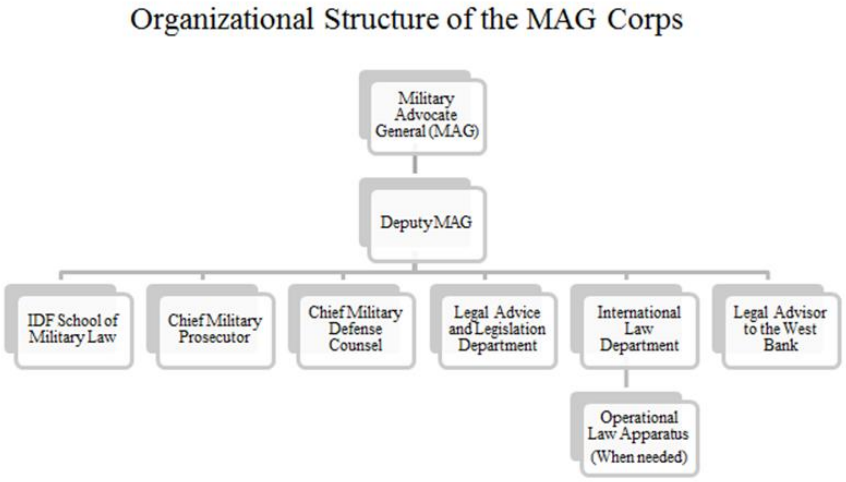
[72] With respect to the material that follows, the Authors conducted extensive interviews with MAG personnel, including the Military Advocate General, were briefed by MAG personnel, and were permitted to review various documents by the IDF. See also Turkel Commission Report, *supra* note 71, at 279–290 (discussing "the mechanisms in Israel that examine and investigate complaints and claims of violations of international humanitarian law").

The "Legal Advice" component consists of the Departments for Advice and Legislation, Judea and Samaria (West Bank), and International Law. Of these, the International Law Department (ILD) has primary responsibility for legal policy issues regarding international law, such as the use of particular weapons and tactics and the legality of particular categories of targets, as well as the interpretation and application of the LOAC during hostilities. MAG officers assigned to ILD are involved in preparing relevant operational plans, including the legal annexes thereto, and operation-specific rules of engagement (ROE). Lawyers reporting to the Chief of ILD serve with field units at the Division level and provide legal advice to the Air Force during the targeting process. As previously discussed, ILD is augmented during hostilities with additional active duty and reserve LOAC experts to create the "Operational Law Apparatus" (reservists remain subordinate to the active duty MAG officers, irrespective of rank, when rendering legal advice on operational matters). The OLA was established doctrinally in 2007 following the Second Lebanon War and first employed during Operation Cast Lead in 2009. Prior to that time, MAG officers were present only in certain units. Today, at least three legal advisers will be assigned to every Division engaged in combat. All those who serve in a supplementary role receive operational law training conducted jointly by ILD and the MAG School.

It is noteworthy that military justice and operational law functions are stove-piped; it is only at the level of the MAG that lawyers performing the two functions report to the same officer. This ensures that those providing advice to the MAG on how to handle a questionable incident are not in the chain of command of anyone involved in the situation.

The third professional system is "Training and Research." In addition to their formal academic education as lawyers, which sometimes includes postgraduate education at top tier law schools, MAG officers benefit from training at the Military Law School. The School plays a central role in the ability of the MAG Corps to provide quality legal advice during targeting operations. The School's basic curriculum provides MAG officers a heavy dose of LOAC, while specialized LOAC courses include a combination of classroom work and practical exercises. The Authors had the opportunity to meet with most members of the International Law Department regarding substantive legal issues and were struck by

their grasp of the nuances of LOAC, in particular its practical application.[73]



Treaty[74] and customary law[75] mandate LOAC training for all members of the armed forces, a requirement that is mirrored in IDF

[73] The organizational chart is based on materials provided to the Authors by the IDF.

[74] *See, e.g.*, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 47, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 48, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 127, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 144, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter *GC I, GC II, GC III, and GC IV*, respectively]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 83, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, art. 19 June 8, 1977, 1125 U.N.T.S. 609 [hereinafter *AP II*]; Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 25 May 14, 1954, 249 U.N.T.S. 240; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 30, Mar. 26, 1999, 2253 U.N.T.S. 212; *and* Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, art. 6, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter *CCW*].

[75] *See* INT'L COMM. OF THE RED CROSS ("ICRC"), CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 142 (Jean-Marie Henckaerts & Louise Doswald-Beck eds.,

regulations.[76] The MAG School provides non-MAG officers instruction in general LOAC principles, targeting, measures of special protection, enemy property, enemy civilian property, humanitarian obligations towards the civilian population, command responsibility, prisoners of war, weapons, and occupation law. As the chart below indicates, such training is tailored to rank, responsibility, and function.[77]

Course	Rank	
Division Commanders Course	BG	Ground Forces
Brigade Commanders Course	Col	
Battalion Commanders Course (inc. res.)	LTC	
Company Commanders Course (inc. res.)	CPT-MAJ	
Basic Officers Course	LT	
Tactical Command College	CPT	Military College
Command and Staff Course	LTC	
National Security College	Col	
Sea Captains Course	LT	Other
Basic Officers Course – COGAT	LT	
COGAT NCO Course	NCO	
Basic Officers Course – Spokesperson	LT	
Spokesperson NCO Course	NCO	
Combat Questioner Course	NCO	
Basic Officers Course – Intelligence	LT	

2005) [hereinafter *CIHL Study*] (outlining the commentary to Rule 6, which states "Civilians are protected against, attack, unless and for such time as they take a direct part in hostilities").

76 IDF General Staff Order 33.0133, Discipline–Acting in Accordance with International Conventions to which the State of Israel is Party (July 20, 1982), ¶¶ 6–7.

77 The chart depicting the legal training provided to IDF officers was created by the IDF School of Military Law and given to the Authors by the IDF.

The Minister of Defense appoints the Military Advocate General, a General officer in rank, based on the IDF Chief of General Staff's recommendation. A Military Justice Law designates the MAG as legal adviser to the Chief of General Staff and other senior military authorities.[78] Although subordinate to the Chief militarily, he is technically "subordinate" only to the law. His decisions bind the IDF on operational law issues, including those related to targeting, and must be implemented. In matters of law regarding IDF operations, the MAG answers only to the Attorney General.[79] This is an exceptional degree of authority over legal matters. For instance, legal opinions of judge advocates in the U.S. system do not bind those involved in the targeting process, although, of course, commanders and others who disregard the advice of their judge advocates do so at their own peril.

Independence from the operational command structure is mirrored throughout the MAG Corps. Unlike many other countries, including the United States, the chain of command for IDF lawyers lies solely within the MAG Corps. Of special significance is the fact that MAG officers are not subordinate to the military commanders they support during combat operations. Instead, they report to the International Law Department and ultimately the MAG.[80] This structure, at least in theory, affords them objectivity and independence when providing legal advice to commanders and others regarding targeting.

The near-total separation of MAG officers from the operational chain of command is striking. In the U.S. armed forces, judge advocates providing legal advice on targeting matters are typically assigned to the unit conducting or overseeing the strikes and report to the commander thereof. Unit membership is seen as enhancing their effectiveness in the fast-paced, high-stress, and deadly targeting environment. JAGs are considered team members who contribute to the commander's goals while ensuring the operations remain within legal bounds, rather than outsiders who monitor operations. Thus, commanders and other operators generally feel as comfortable being open with "their" lawyers as with any other

[78] SCO 2.0613, *supra* note 71, at ¶ 4; The Military Justice Law, 4715–1955, 9 LSI 184 (4714-1955/56 as amended) (Isr.), art. 178.

[79] SCO 2.0613, *supra* note 71, at ¶ 9(a).

[80] SCO 2.0613, *supra* note 71, ¶ 10.

staff officer. This serves to offset the fact that the decisions of U.S. JAGs do not bind their commanders.

IDF lawyers appear not to benefit to the same extent as their U.S. counterparts from this dynamic. Additionally, the Authors found the degree of confidence of the commanders interviewed, including a commander of a ground targeting cell, in their own ability to understand and apply the LOAC in one of the world's most complex operational environments somewhat surprising. Obviously, commanders need to command and must have a firm grasp of the law to do so effectively. The Authors nevertheless concluded that IDF commanders would benefit from a better grasp of the contribution MAG officers can make to mission accomplishment at all levels of warfare.

By being outside the operational chain of command, MAG officers are more immune to the periodic inclination to tell the commander "what he wants to hear." If such pressure arises, it is positive in the sense that the "boss" is a lawyer who will assess the officer on the basis of his or her effectiveness in rendering legal advice, including the accuracy of legal assessments. Moreover, the Israeli system incentivizes following the MAG officer's advice. Since the MAG is less an adviser than a staff officer who renders binding legal decisions, IDF commanders have no option but to follow the advice of their lawyers. In the event of disagreement in the field or Air Force Headquarters, the commander may elevate the issue up the chain of command. But, ultimately the MAG's decision is, subject to the Attorney General's oversight, final. This system contributes to compliance with the law even in situations in which doing so might be counter-intuitive from an operational perspective.

A further benefit of the stove-piped nature of IDF legal advice is that since MAG officers report up MAG channels, the commander can expect that potential LOAC violations will be promptly reported; in other words, the system incentivizes, rather than disincentives, the reporting of questionable incidents. Commanders cannot be oblivious to this reality. Obviously, the MAG's right to initiate investigations makes such reporting particularly meaningful.

The MAG Corps enjoys a great deal of authority over, and responsibility for, investigations and prosecutions of those suspected of LOAC violations. In light of the recent accession of the Palestinian Authority to the Rome Statute, the timeliness and quality

of this process is of critical importance due to the principle of complementarity, which may provide an effective shield against International Criminal Court prosecution of Israeli military personnel.[81]

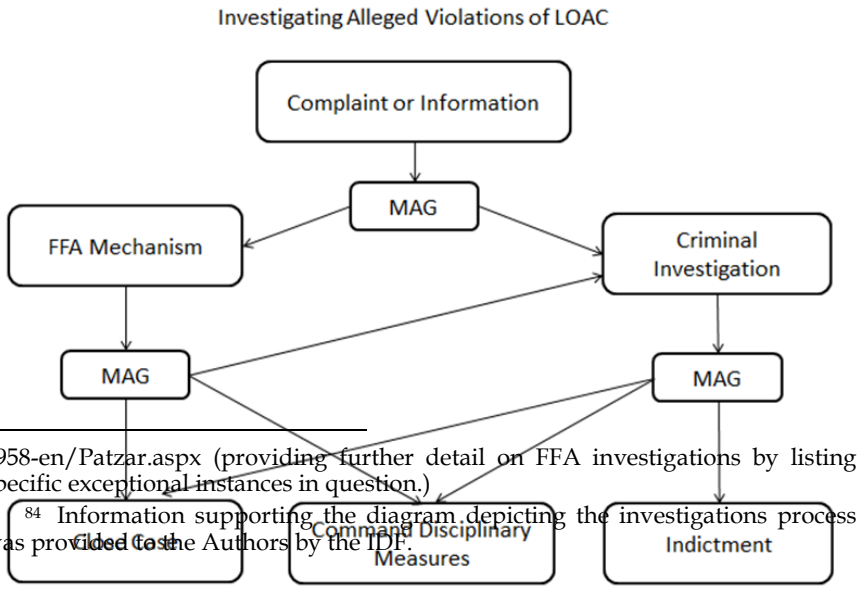
Unlike the U.S. military, in which military law enforcement officials and specified commanders perform investigative and judicial oversight functions, albeit with the advice of judge advocates, the MAG operates autonomously. As a result, in part, of the 2013 Turkel Commission report into the IDF's procedures for investigation and prosecution of LOAC violations, the IDF system has been recently revised.[82] Information regarding possible LOAC violations must be forwarded to the MAG. The MAG has three options at that point. First, he may decide there is no basis for suspicion that criminal activity has occurred and close the case. Second, the MAG may conclude there is reason to suspect that the incident involved a LOAC violation and direct a criminal investigation. The investigation's results are provided to the MAG, who then must decide to close the case, to forward the results to the command for disciplinary measures, or to indict those involved. Third, the MAG may employ a new procedure, the Fact Finding Assessment (FFA) Mechanism.[83] The purpose of the FFA is to

[81] The principle of complementarity is enshrined in the Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*], which requires the ICC to find a case "inadmissible" if a State with competent jurisdiction over the offenses has investigated and prosecuted the case, or (having investigated) has made an affirmative decision not to prosecute.

[82] The Prime Minister appointed the Turkel Commission in June 2010 to examine a May 2010 incident involving a Turkish vessel that had been forcefully boarded by the IDF in order to enforce its blockade of Gaza. Although the Commission generally sanctioned the system in its first report, the Commission continued its work to specifically address "whether the mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict . . . conforms with the obligations of the State of Israel under the forces of international law." *See* Turkel Commission Report, *supra* note 71, at ¶ 13. Accordingly, the Commission issued a second report in February 2013, which made a number of recommendations, some of which have been implemented.

[83] *See Fact-Finding Assessment: Operation Protective Edge*, OFFICIAL BLOG ISRAEL DEFENSE FORCES (Sept. 12, 2014), http://www.idfblog.com/blog/2014/09/12/idf-conducts-fact-finding-assessment-following-operation-protective-edge/ (detailing how exceptional incidents examined by the FFA are instances where the MAG requires additional informal to determine if there are reasonable grounds for a violation.) *See also Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Occurred during Operation Protective Edge – Update No. 2*, OFFICIAL BLOG ISRAEL DEFENSE FORCES (Dec. 7, 2014), http://www.law.idf.il/163-

conduct a speedy review of incidents using expeditious procedures to assess whether there may be grounds to suspect a criminal violation meriting further action by the MAG. If the MAG concludes, based on initial reports, that a violation of LOAC may have occurred but wants to clarify the situation before ordering a criminal investigation, he may direct an FFA. The FFA teams, which are led by a Major General and include primarily high-ranking reservist officers with operational and legal backgrounds, examine the circumstances of an incident (even as operations are on-going), albeit neither in the same depth as a criminal investigation, nor using formal criminal investigatory procedures. Based on the FFA report, the MAG may close the case, send the report to the command to take disciplinary measures, or direct that a criminal investigation be opened.[84]



6958-en/Patzar.aspx (providing further detail on FFA investigations by listing specific exceptional instances in question.)

[84] Information supporting the diagram depicting the investigations process was provided to the Authors by the IDF.

With respect to Operation Protective Edge, the MAG has, as of March 22, 2015, directed 126 FFAs. Sixty-five have been completed. Of the remaining 61 cases, the MAG has closed 17 reviews, criminal investigations were ordered following 6 assessments, and 38 examinations remain underway.[85] Unfortunately, the MAG has been criticized for these efforts on the basis that IDF soldiers are often conscripts with no choice but to serve in the military and that it is unfair to subject them to investigation and prosecution.[86] Such criticism is off-base from a practical point of view because a well-disciplined army is always more effective than an ill-disciplined one. It also runs counter to the commitment to the rule of law professed by Israel.

Perhaps the most noteworthy aspect of legal involvement in IDF operational matters is Israeli judicial scrutiny of ongoing operations. In most other countries, including the United States, judicial branch oversight of the executive branch's' military activities, especially in the midst of an armed conflict, is rare. To the extent such oversight exists, it usually occurs *post factum* and is seldom a consideration for field commanders engaged in combat operations.

By contrast, the Israeli Supreme Court sitting as the High Court of Justice has the power to issue decisions on the lawfulness of particular tactics.[87] This authority is especially significant given the

[85] IDF Military Advocate, *Decisions of the IDF Military Advocate General regarding Exceptional Incidents during Operation 'Protective Edge - Update No. 3* (Mar. 22, 2015), http://www.law.idf.il/163-7183-en/Patzar.aspx.

[86] *See* Associated Press, *Israeli Military Divided Over Gaza War Probes*, N.Y. TIMES (Jan. 6, 2015), http://www.nytimes.com/aponline/2015/01/06/world/middleeast/ap-ml-israel-war-probes.html?_r=0 (describing the disagreement within the Israeli military over whether or not to hold soldiers legally responsible for their actions in the hostilities in the Gaza war); Amos Harel, *Preempting The Hague: How the IDF Seeks to Avoid International Legal Action*, HAARETZ (Jan. 3, 2015), http://www.haaretz.com/news/diplomacy-defense/1.635021 (looking at how the IDF is using internal procedures to try to preclude international legal action against its soldiers).

[87] When the Supreme Court sits as the High Court of Justice ("HCJ"), it hears petitions brought against government actions. It is a court of first and last

Israeli judicial system's liberal approach to standing which extends, for instance, to public petitions by human rights organizations such as the Association of Civil Rights in Israel and B'Tselem. The Supreme Court exercises this power regularly. It has, for example, rendered numerous decisions regarding detention,[88] outlawed the use of neighbors to warn residents of homes in which terrorists are about to be arrested,[89] dealt with weapons such as artillery,[90] flechettes,[91] and white phosphorus,[92] and addressed the demolition of homes of those suspected of terrorist activities.[93]

instance. Jurisdiction of the "HCJ" is provided for in section 15 of the Basic Law: Judiciary, 5744-1984, 38 LSI 101 (1984) (Isr.). According to the Israeli doctrine of standing, individuals may petition the court when they can show that conduct by the executive branch denies them a legally protected right., HCJ 8091/14 Center for the Defence of the Individual et al. v. Minister of Defense et al. [2014]. Since Israel's occupation of the West Bank and Gaza in 1967, the "HCJ" has reviewed actions of the military authorities in these territories. A Palestinian first brought a petition against the West Bank's military commander in Stekol v Minister of Defence on 20 June 1967 (unreported). The Attorney-General did not challenge the assertion of jurisdiction. *See generally* Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262 (1971). *Christian Society for the Holy Places* is the first reported decision dealing with the legality of military actions in the occupied territories. HCJ 337/71 Christian Society for the Holy Places v. Minister of Defense [1971]. There the issue of jurisdiction was not raised. *Id.* Access to the Court for residents of the occupied territories comports with the general eradication of limitations on standing during the 1980s. *See, e.g.*, HCJ 910/86 Major (res.) Yehuda Ressler, Advocate et al v. Minister of Defence [June 12, 1988] (recognizing an exception to the general rule requiring petitioner to establishment "an interest of the past of the petitioner"). Indeed, the Court no longer requires a petitioner to demonstrate a direct interest infringed by the disputed government conduct; it is sufficient that a public interest is implicated. *Id.* The possibility of appearing before the Court based on a public interest has led to frequent petitions by Israeli non-governmental organizations such as B'Tselem. *See generally* YOAV DOTAN, LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL 34–37 (2014).

88 HCJ 3239/02 Marab v. IDF Commander in the West Bank 15 Isr. L. Rep. 173 [Feb. 5, 2003] (Isr). *See also* CA 6659/06 A and B v. State of Israel 2008 Isr. L. Rep. 273 [Mar. 5, 2007] (Isr) (holding that, in an appeal against the decisions of the Tel-Aviv-Jaffa District Court, the detention of the appellants under the Internment of Unlawful Combatants Law, 5762-2002 was lawful).

89 HCJ 3799/02 Adalah - The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF [June 23, 2005].

90 HCJ 3261/06 Physicians for Human Rights v. Minister of Defense [2011].

91 HCJ 8990/02 Physicians for Human Rights v. Doron Almog - O.C. Southern Command [Apr 27, 2003].

92 HCJ 4146/11 Yoav Hess et al v. Chief of Staff [May 13, 2013].

93 HCJ 8091/14 HaMoked - Center for the Defence of the Individual v. Minister of Defense [Mar. 12, 2014].

In some cases, the Supreme Court acts while operations are underway. For instance, it considered a petition filed during operations in Gaza seeking relief regarding such matters as the supply of electricity, food, water, and medical supplies, evacuation of the wounded, burial of the dead, permission for doctors to enter Gaza, and investigation of the alleged shelling of a civilian crowd.[94] In another case, as operations to put an end to rocket fire from Gaza were still ongoing, the Court examined claims that there were delays in evacuating the wounded to hospitals in Gaza and that the IDF was attacking ambulances and medical personnel.[95] Perhaps most well-known is the so-called Targeted Killing case, in which the Court examined preventive strikes in Gaza and the West Bank against individuals planning, launching, or committing terrorist attacks and set forth various guidelines for conducting individualized anti-personnel strikes.[96]

It must be emphasized that the Supreme Court's review is not *pro forma*. On the contrary, the Court often rejects government arguments, sometimes ruling against the government altogether. An illustration of this point involved using neighbors to warn residents of homes where arrests were about to occur. In its judgment, the Court held that "the 'Early Warning' procedure is at odds with international law. It comes too close to the normative 'nucleus' of the forbidden, and is found in the relatively grey area (the penumbra) of the improper."[97] It held as such on multiple grounds, including the prohibition on using an occupied territory's population for military purposes, the requirement to separate civilians from military activities, the probability that the actions of the neighbors was non-consensual, and the risk to neighbors who convey the warnings.[98] Similarly, in another case involving the policy of demolishing or sealing the homes of terrorists, the Court elected not to find the policy unlawful, but cautioned that it is such an exceptional measure that bringing the issue before the judiciary

[94] HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza 2004 Isr. L. Rep. 200 [May 30, 2004].

[95] HCJ 201/09 Physicians for Human Rights v. Prime Minister of Israel 2009 Isr. L. Rep. 1 [Jan. 19, 2009].

[96] HCJ 769/02 The Public Committee Against Torture in Israel v. The Government of Israel 2006 (2) Isr. L. Rep. 459 [Dec. 14, 2006].

[97] *Id*., at ¶ 25.

[98] *Id*., at ¶ 24.

on a recurring basis to ensure the continued validity of the claim of its deterrent effects would be appropriate.[99]

The risk is that such judicial activism will have a chilling effect on military operations. However, in the unique circumstances in which Israel finds itself, particularly the use by its enemies of lawfare (the use or abuse of the law by a party to the conflict in order to disadvantage the enemy),[100] such activism arguably makes operational and strategic good sense. After all, the IDF is unlikely to be defeated on the battlefield, but Israel does struggle to maintain domestic and international support, which can erode quickly if Israel is perceived to be acting unlawfully. As former President of the Court, Justice Aharon Barak, has noted,

> Israel is not an isolated island. It is a member of an international system . . . . The combat activities of the IDF are not conducted in a legal void. There are legal norms – some from customary international law, some from international law entrenched in conventions to which Israel is party, and some in the fundamental principles of Israeli law – which determine rules about how combat activities should be conducted.[101]

Finally, the Authors met with a number of senior IDF commanders to discuss targeting operations. It was apparent that they were highly sensitive to the reality of lawfare. In planning and executing strikes, the commanders and other operators understood the extent to which their opponents have adopted strategies and tactics designed to bait them into strikes that, lawful or not, can be portrayed as LOAC violations to the broader community. For this and other reasons (including operational and policy reasons), commanders sometimes refrain from conducting attacks that would

[99] HCJ 8091/14, *supra* note 93, at ¶ 28.

[100] The term "lawfare" was coined by Major General Charlie Dunlap, USAF (ret.), former Deputy Judge Advocate General of the U.S. Air Force. *See* Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, (Humanitarian Challenges in Military Intervention Conference Working Paper), http://people.duke.edu/~pfeaver/dunlap.pdf (using "lawfare" to describe international laws that may be undercutting the ability of the United States to conduct effective military interventions); Charles J. Dunlap, Jr., *Lawfare Today…and Tomorrow*, 87 INT'L L. STUD. SER. US NAVAL WAR COL. 315 (2011) (defining "lawfare" as the strategy using or abusing the law in place of traditional military means to achieve warfighting objectives).

[101] HCJ 4764/04, *supra* note 94, at 391.

be both lawful and in accordance with the rules of engagement. Indeed, although the Authors were not permitted to view the classified rules of engagement, it was clear from their discussions with IDF officers that the ROE often include attack thresholds that are more restrictive than allowed by the law. Commanders and other operators have noticeably internalized the fact that even a slight deviation from the dictates of the LOAC is not only risky personally in light of MAG Corps oversight and authority, but also operationally insensible. This makes IDF commanders remarkably open to heeding the advice of the MAG officers involved in their operations.

5. IDF POSITIONS ON TARGETING LAW

The first step in any LOAC analysis is typically to determine whether a particular situation constitutes either a non-international or international armed conflict.[102] If it is neither, international human rights law and applicable domestic legal regimes will govern hostilities. With respect to the two forms of armed conflict, the former refers to hostilities between a State and one or more organized armed groups, or between organized armed groups, that exhibit a particular level of intensity,[103] whereas the latter

[102] For a concise discussion of conflict classification, *see* Jelena Pejic, *Status of Armed Conflicts*, *in* PERSP. ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 77 (Elizabeth Wilmshurst & Susan Breau eds., 2007). *See also* Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts, in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32 (Elizabeth Wilmshurst ed., 2012) (exploring the distinction between international and non-international armed conflicts); Sylvain Vité, T*ypology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L REV. RED CROSS 69 (2009) (discussing how the different categories of armed conflict can be interpreted in light of recent developments in international legal practice by proposing a typology of armed conflicts from the perspective of international humanitarian law).

[103] Art. 3 common to GC's I–IV, *supra* note 74 [hereinafter Common Article 3 or CA3]. A non-international armed conflict involves "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Prosecutor v. Tadić, Case No. IT–94–1–I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter Tadic, Interlocutory Appeal on Jurisdiction]. *See also* Rome Statute, *supra* note 81, at art. 8(2)(f) ("[O]ther serious violations of the laws and customs applicable in armed conflicts not of an international character" applies to "armed conflicts not of an international character

encompasses conflict between two or more States.[104] Although the specific LOAC rules that pertain in the two forms of conflict vary to an extent, it is generally accepted that the bulk of those governing attacks apply in both. This is a particularly important point in the Israeli context because Israel's position on the nature of the armed conflicts in which it has recently been involved is unclear. For instance, no Israeli legal advisor the Authors interviewed was willing to definitively state whether the 2014 conflict in Gaza was international or non-international in character.[105]

Like the United States, Israel is not a party to the 1977 Additional Protocol I, the treaty that codifies the core principles of targeting law.[106] However, most of its provisions reflect customary international law that is binding on Israel. Israel is also party to a number of other treaties that govern various aspects of targeting practice. These include, *inter alia*, the four 1949 Geneva Conventions;[107] the Conventional Weapons Convention Protocols on Non-Detectable Fragments (Protocol I), Mines, Booby Traps and Other Devices (Protocol II, as amended) and Blinding Laser Weapons (Protocol IV);[108] the Geneva Gas Protocol;[109] and the

and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgement, para. 87, 135170 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) ("The Chamber is also conscious of Article 8 of the Statute of the International Criminal Court (ICC) which, *inter alia*, defines, for its purposes, war crimes committed in an armed conflict not of an international character."); Prosecutor v. Haradinaj, Case No. IT-04-84-A, Judgement, para. 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) (listing factors that have bearing on the intensity of hostilities).

104 Art. 2 common to GC's I–IV, *supra* note 74. *See also* Tadić, Interlocutory Appeal on Jurisdiction, *supra* note 103, at para. 70 ("[A]n armed conflict exists whenever there is a resort to force by States.").

105 *See* Iain Scobbie, *Gaza*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 280 (Elizabeth Wilmshurst ed., 2012) (discussing the difficulty of classifying Israeli operations against Hamas in Gaza).

106 AP I, *supra* note 74.

107 Israel became a party to all four conventions 6 Aug. 1951. GC I, GC II, GC III, and GC IV, *supra* note 74; *Id.*

108 Protocol on Non-Detectable Fragments, Oct. 10, 1980, 1342 U.N.T.S. 168 (Israel became a party on March 22, 1995); Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices, May 3, 1996, 2048 U.N.T.S. 93 (Israel became a party on Oct. 30, 2000); Protocol on Blinding Laser Weapons, Oct. 13, 1995, 1380 U.N.T.S. 370 (Israel became a party on Oct. 30, 2000).

109 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, Jun 17, 1995, 26 U.S.T.

Hague Cultural Property Convention.[110] The International Law Department also confirmed that Israel considers the provisions of the 1907 Hague Convention IV Annexed Regulations as customary law, a position consistent with the findings of the Nuremberg International Military Tribunal[111] and International Court of Justice.[112]

The basic contours of the law of targeting are well accepted.[113] Attacks may only be directed at military objectives, combatants, members of organized armed groups, and civilians who are directly participating in the hostilities,[114] and they may not be indiscriminate.[115] Such attacks must be proportionate in the sense that the expected collateral damage is not "excessive" in relation to

571, *reprinted in* 14 INTERNATIONAL LEGAL MATERIALS 49 (1975) (Israel became a party on Feb. 20, 1969).

110 Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (Israel became a party on Oct. 3, 1957).

111 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, vol. I, 1947, pp 253-54.

112 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257-58 (July 8) [hereinafter Nuclear Weapons Case]; *see also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, UN Security Council, U.N. Doc. S/25704 (1993), ¶ 35, *available at* http://www.refworld.org/docid/3ae6af0110.html (noting that Hague Convention IV has "beyond doubt become part of customary international law.").

113 *See generally* William H. Boothby, The Law of Targeting 139 (2012); Ian Henderson, The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack Under Additional Protocol I 215 (2009); Michael N. Schmitt, *Targeting in Operational Law*, *in* The Handbook of the Law of Military Operations 245–275 (Terry Gill & Dieter Fleck eds., 2010); Geoff Corn & Gary Corn, T*he Law of Operational Targeting: Viewing the LOAC through an Operational Lens,* 47 Tex. Int'l L.J. 337 (2012); Michael N. Schmitt & Eric Widmar, *"On Target": Precision and Balance in the Contemporary Law of Targeting*, 7 J. Nat'l Security L. & Pol'y 379–409 (2014); Michael N. Schmitt & Christopher Markham, *Precision Air Warfare and the Law of Armed Conflict*, 89 Int'l L. Stud. 669 (2013); Geoff Corn & Gary Corn, *The Law of Operational Targeting: Viewing the LOAC through an Operational Lens,* 47 Tex. Int'l L.J. 337 (2012); Michael N. Schmitt, *Targeting in Operational Law*, *in* The Handbook of the Law of Military Operations 245–275 (Terry Gill & Dieter Fleck eds., 2010). *See also* JP 3–60, *supra* note 61, at app. A (discussing the basic principles of the laws of war and legal considerations of targeting).

114 AP I, *supra* note 74, at arts. 48 and 51(3); CIHL Study, *supra* note 75, at r. 3, 4, 6, 7.

115 AP I, *supra* note 76, at art. 51(4); Department of the Navy & Department of Homeland Security, NWP 1–14 M/MCWP 5-12/CMODTPUB P5800.7A, The Commander's Handbook on the Law of Naval Operations (2007), ¶ 5.3.2 [hereinafter NWP 1–14]; CIHL Study, *supra* note 75, at ch. 3.

the military advantage anticipated to accrue to the attacker.[116] Even when an attack is directed at a lawful target and the results are likely to comply with the rule of proportionality, an attacker must undertake feasible measures to minimize harm to civilians.[117]

As with most legal regimes, the devil is in the details. Despite universal acceptance of the aforementioned principles, their precise interpretation and application has generated occasional disagreement and controversy. The discussion that follows highlights these "fault lines" in the law of targeting and, to the extent the IDF was willing to express one, catalogues the IDF's position thereon. As will become apparent, IDF legal positions are generally mainstream.

5.1. Additional Protocol I as Customary Law

Although not a Party to the instrument, Israel regards many of the provisions of Additional Protocol I, including most of those governing targeting, as customary in character.[118] Unfortunately, and like the United States, it has never issued a definitive article-by-article summary of its position on the Protocol. However, the International Law Department did offer comment on a number of provisions that it deems binding only on the Parties to the treaty. Interestingly, in most cases Israel's position on a particular provision tracks that of the United States, at least to the extent that the U.S. position is known publically.[119]

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[116] AP I, *supra* note 74, at art. 51(5)(b); NWP 1–14, *supra* note 117, at ¶ 5.3.3; CIHL Study, *supra* note 75, at r. 14.

[117] AP I, *supra* note74, art. 57(2); NWP 1–14, *supra* note 115, ¶ 8.3.1; CIHL Study, *supra* note 75, at ch. 5.

[118] CIHL Study, *supra* note 75, at chs. 1–6 (ICRC sets forth those general targeting principles and rules that it deems customary). *See generally* Michael N. Schmitt, *Targeting, in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 131–168 (Susan Breau & Elizabeth Wilmshurst eds., Cambridge University Press, 2007).

[119] Michael J. Matheson (then Deputy Legal Advisor, Department of State), *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987) (An unofficial, but generally deemed authoritative, summary of the U.S. views on Additional Protocol I as customary international law. Cites NWP 1–14, *supra* note 115, as the illustration of the position of a State that is, like Israel, not a Party to Additional Protocol I).

Israel does not find the two provisions on the protection of the natural environment to be customary in character. The first, Article 35(3), prohibits the employment of methods or means of warfare (tactics and weapons) that are "intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." A related provision, Article 55(1), prohibits the use of methods or means of warfare that may be expected to cause such damage and "thereby prejudice the health or survival of the population." The distinction between the two provisions is subtle. Article 35(3) protects the environment as such, whereas the latter is anthropocentric in that it protects humans from negative effects on the environment.[120] The ICRC *Customary International Humanitarian Law* study takes the position that the rule is customary in nature, although it labels the United States a "persistent objector."[121]

As to Israel, the study states that the country report prepared on Israeli practice as part of the project noted that the IDF does "not utilize or condone the use of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment."[122] In interviews with senior MAG officers, however, it was clear that Israel does not view the Additional Protocol I provisions as customary in nature. Israel's concern is that the prohibitions are absolute; so long as the requisite threshold of harm is crossed, an operation is unlawful irrespective of its importance.

Admittedly, that threshold is very high, especially in light of its cumulative character. As a general matter, therefore, the prospect of military operations generating such effects is low. Yet in the Middle East, some States rely heavily on oil production and export, making them, as illustrated during the "Tanker War" of the 1980s[123] and the 1990-1991 Gulf War, attractive targets. The region is home to a number of fragile ecosystems, especially in the Persian Gulf, that are highly vulnerable to environmental harm, such as that which inevitably results when oil facilities and transports are attacked. Therefore, while the provision may be of only peripheral

120 Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 1, 70–71 (1997).

121 CIHL Study, *supra* note 75, at commentary accompanying r. 44.

122 CIHL Study, *supra* note 75, at commentary accompanying r. 45.

123 *See generally* George K. Walker, *The Tanker War, 1980–1988*: *Law and Policy*, 74 INT'L L. STUD. 33 (2000).

significance to many States, the Authors were of the view that for Israel it looms large.

Israel believes that the environment is indirectly protected by the rule of proportionality, which prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[124] In this context, Israel takes an anthropocentric view regarding damage to the environment; it does not consider the natural environment to be an object, as that term is understood in the LOAC.[125] Rather, damage to the environment is only relevant to the extent it jeopardizes the health of civilians (by way of air pollution, drinking water pollution, etc.) or damages civilian objects, and then it will indeed factor into proportionality assessments. To illustrate, an attack against the environment itself, such as a release of oil into the Persian Gulf without military rationale, would not be a prohibited attack on a civilian object. Rather, it would be assessed based on any harm it causes to civilians or civilian objects. The Israeli approach would require an attacker to attempt to avoid environmental damage that produces collateral effects on civilians or civilian objects when conducting an attack by, for instance, considering the use of different weapons or tactics or other targets that might yield a similar desired effect on the enemy, in order to comply with the requirement to take precautions in attack.[126]

This position differs from that of the United States[127] and the Authors, who hold that the environment is an object, and thus harm to the environment as such is directly factored into proportionality calculations, together with any harm to civilians and civilian objects. In other words, in the event of collateral damage to the environment or environmental damage that incidentally harms civilians, a strike causing widespread, long-term, and severe damage to the natural environment will be lawful if such harm is not excessive to the

124 AP I, *supra* note 74, at arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b); NWP 1–14, *supra* note 115, at ¶ 8.3; CIHL Study, *supra* note 75, at r. 14.

125 NWP 1–14, *supra* note 115, at ¶ 8.3 ("Civilian objects are all objects which are not military objectives as defined in" Additional Protocol I, art. 52.2, AP I, *supra* note 74, at art. 52(1)); CIHL Study, *supra* note 75, at r. 9.

126 AP I, *supra* note 74, at art. 57(2)(a)(ii); NWP 1–14, *supra* note 115, at ¶ 8.1; CIHL Study, *supra* note 75, at ch. 5 (more fully developing the application of the requirement to take precautions in attack).

127 NWP 1–14, *supra* note 115, at ¶ 8.4.

military advantage likely to accrue to the attacker. By the same token, even if the harm to the environment resulting from an attack falls well below the threshold, the strike will be prohibited if the military advantage of the operation is itself low enough to render the collateral environmental damage excessive.

To illustrate these various approaches, consider the Iraqi release of oil into the Persian Gulf and the setting ablaze of five–hundred Kuwaiti oil wells during the 1990-91 Gulf War.[128] Some states focused on whether the harm caused by these actions qualified as widespread, long-term, and severe.[129] For the United States, the relevant question was whether the expected harm to the environment from the oil and smoke was excessive relative to anticipated military advantages, such as leveraging smoke as an obscurant against air attack or using oil to foul engines of any boats used in an amphibious assault. For Israel, by contrast, the relevant question would have probably been whether the release of oil could have been expected to cause excessive harm to the civilian population or civilian objects.

Israel also rejects characterization of the Additional Protocol I's rule on perfidy as fully reflecting customary law. Article 37(1) provides that "it is prohibited to kill, injure or capture an adversary by resort to perfidy." It defines perfidy as acts that invite "the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence."[130] The classic example is an individual who dresses as a civilian in order to get close enough to the adversary to attack without raising suspicion. The prohibition applies only if the act is motivated by a desire to exploit feigned protective status in order to wound, kill or capture; merely wearing civilian clothes does not implicate the prohibition, even when conducting attacks.

The ICRC's *Customary International Humanitarian Law* study claims that the prohibition is customary in nature.[131] There is universal consensus that the customary law prohibition includes

[128] *U.S. Department of Defense Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War*, 31 ILM 612, 636–37 (1992) [hereinafter Gulf War Report].

[129] The debate was merely illustrative of the threshold issue because Iraq did not become a party to Additional Protocol I until 2010.

[130] AP I, *supra* note 74, at art. 37(1).

[131] CIHL Study, *supra* note 75, at r. 65.

feigning protected status in order to wound or kill the enemy, that is, to conduct "attacks," a term of art in the LOAC.[132] However, Israel does not recognize feigning protected status in order to *capture* as perfidy.[133] Its position is supported by the fact that treacherous killing or wounding was proscribed in Article 23 of the Hague Regulations, a treaty that, as noted above, is considered to set forth norms that are today customary.[134] Only in Additional Protocol I was the prohibition extended to acts intended to capture the enemy. Indeed, the Rome Statute, which was adopted nearly a quarter century after Additional Protocol I, omits capture in its rendering of the war crime.[135] Recent manuals prepared by international groups of experts as restatements of the LOAC likewise omit any reference to capture in their rules.[136]

In light of the fact that Israel's enemies have a strategic objective of capturing individual members of the IDF, it is somewhat curious that Israel maintains fidelity to a formalistic analysis of the law of perfidy, unless it wishes to employ the tactic itself to capture members of the enemy forces. The United State's most recent military manual, the 2007 *Commander's Handbook on the Law of Naval Operations*, states that "[i]t is a violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of intent to surrender or by feigning shipwreck, sickness, wounds, or civilian status."[137] However, the annotated version of an earlier manual

[132] AP I, *supra* note 74, at art. 49 (defining "attacks" as "acts of violence against the adversary, whether in offence or in defence"). *See* Sean Watts, *Law-of-War Perfidy*, 219 MIL. L. REV. 106 (2014) (discussing perfidy generally).

[133] *See* Ido Rosenzweig, *Combatants Dressed as Civilians?: The Case of Israeli Mista'arvim under International Law*, THE ISRAEL DEMOCRACY INSTITUTE POLICY PAPER 8E, 45–49 (2014) (discussing capture as perfidy in the Israeli context).

[134] Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, art. 23, Oct. 18, 1907, 36 Stat. 2227 [hereinafter Hague Regulations] (making it "especially forbidden . . . to kill or wound [treacherous] individuals belonging to the hostile nation or army." Capture is not addressed.).

[135] Rome Statute, *supra* note 81, at art. 8(2)b)(xi). *See* MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: WITH COMMENTARY, ¶ 2.3.6 (International Institute of Humanitarian Law, 2006) (omitting capture in its rule on perfidy).

[136] AMW Manual, *supra note* 63, at r. 111(a); Prepared by the International Group of Experts at the invitation of the NATO Cooperative Cyber Defence Centre of Excellence, Tallinn Manual on the International Law Applicable to Cyber Warfare r. 60 (Michael N. Schmitt ed., 2013) [hereinafter Tallinn Manual].

[137] NWP 1–14, *supra* note 115, at ¶ 12.7.

containing the same provision cites to Hague Regulations Article 23(b) and Additional Protocol I Article 37(1) as authority.[138] In light of the fact that Article 23(b) makes no mention of capture, the U.S. reference to capture appears questionable as a strict matter of customary law. Even still, it would seem to be a sensible approach that will lend itself to the process of crystallization as a customary norm.

Israel has a number of undercover units (*Mista'arvim*) that are active in the West Bank and Gaza. These include the IDF's *Duvdevan* and the Israeli Border Police's *Yamas*.[139] So long as the members thereof are not wearing civilian attire for the express purpose of conducting attacks, their operations are not perfidious. At least by the Israeli position, with which the Authors agree as a matter of law, it may do so in order to capture individuals whose capture is permissible under LOAC.

Like the United States,[140] Israel opposes a number of other articles that do not directly affect its targeting operations, particularly Articles 1(4) and 44(3). The effect of the former is to extend the reach of Additional Protocol I, and by reference international armed conflict, to situations in which "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . ." It is unclear whether Israel objects on the same basis as the United States, that including conflicts with national liberation movements, a term lacking precision, within the ambit of international armed conflict "would undermine the principle that the rights and duties of international law attach primarily to entities that have those elements of sovereignty that allow them to be held accountable for their actions and the resources to fulfill their obligations."[141] This is so because in the Targeted Killing case the Israeli Supreme Court applied the law governing international

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[138] *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, 73 INT'L L. STUD. 514 (1999), n.23 [hereinafter ANNOTATED SUPPLEMENT to NWP 1–14]. *But c.f.* Matheson, *supra* note 119, at 425 (including "capture" in his unofficial explanation of those provisions of AP I that the U.S. deems customary).

[139] *See* ROSENZWEIG, *supra* note 133, at 23–24 (summarizing the creation of special undercover units as a response to failures to suppress guerilla-styled attacks against civilians).

[140] Matheson, *supra* note 119, at 425.

[141] Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. U. J. INT'L L. & POL'Y 460, 463 (1987) [hereinafter Sofaer].

armed conflict to situations involving non-State actors in which the conflict "crosses the borders of the state," as is the case of the West Bank and Gaza.[142] Further, MAG officers confirmed that uncertainty exists as to whether the recent conflict in Gaza was of an international or non-international character. However, whatever the basis of the Israeli objection, Israel definitely objects to application of the Article 1(4) approach. Although not directly bearing on the issue of Israeli targeting, note that the Israeli position deprives members of national liberation movements of any belligerent immunity for their attacks on Israeli targets, including those that qualify as military objectives.

Article 44(3) allows combatants to retain combatant status, and therefore belligerent immunity, even when wearing civilian clothes during an attack so long as they carry their weapons openly when deploying to, from, and during an engagement. The United States has objected that the provision's application will result in "increased risk to the civilian population within which such irregulars often attempt to hide."[143] In light of the extent to which Israel's enemies have adopted this tactic to frustrate IDF targeting, Article 44(3) is equally objectionable to Israel.

Interestingly, the IDF lawyers would not express an opinion on the customary nature of Additional Protocol I prohibitions on reprisals, that is, unlawful actions (including attacks) taken to compel the other side to desist in its own unlawful acts. There is general acceptance that the 1949 Geneva Conventions and Additional Protocol I prohibitions on reprisals (or other unlawful actions) against prisoners of war, interned civilians, civilians in occupied territory or otherwise in the hands of an adverse party to the conflict (and their property), those who are hors de combat, and medical personnel, facilities, vehicles, and equipment are customary in character.[144] But the Additional Protocol I, Article 51(6) and 52(1), prohibitions on reprisals against civilians and civilian objects respectively are not universally seen as customary in nature. Even some States that are Party to the instrument have set forth understandings restricting its application,[145] and when preparing

142 Targeted Killings Case, *supra* note 96, at ¶ 18.

143 Sofaer, *supra* note 141, at 463.

144 *See, e.g.*, TALLINN MANUAL, *supra* note 136, at r. 46, cmt. 4 (demonstrating the views of the International Group of Experts that prepared the manual).

145 *See, e.g.*, MINISTRY OF DEF., JSP 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, ¶ 16.19.1 (2004) [hereinafter UK MANUAL] (outlining the

the *Customary International Humanitarian Law* study, the ICRC refrained from asserting that the Articles had achieved customary status.[146] It would be surprising, therefore, if Israel adopted the position that the two provisions have crystallized into customary law. Instead, the Authors speculate that the IDF reticence to offer a view on the matter reflects the extreme sensitivity of the issue generally and Israel's unique susceptibility to lawfare specifically.

5.2. Military Objectives

Like most militaries, the IDF accepts as reflective of customary law the Additional Protocol I, Article 52(2), definition of military objectives:

> In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.[147]

Military objectives may be directly attacked, and any damage to them that collaterally occurs during an attack on another military objective has no bearing on the proportionality and precautions in attack analyses.[148]

In the Israeli context, the "purpose" and "use" criteria are especially important. A civilian object becomes a military objective whenever used for military ends, however slight the use (beyond a *de minimis* level).[149] For instance, when Hamas uses a civilian

United Kingdom's opposition to certain obligations with respect to Articles 51–55 of the Additional Protocol).

146 CIHL Study, *supra* note 75, at r. 145-48; *Id*. at r. 146, cmt.

147 *Id.*, at r. 8. *See also* NWP 1–14, *supra* note 117, at ¶ 8.2, (delineating what can and cannot be attacked as military objectives).

148 *See generally* AGNIESZKA JAHEC-NEALE, THE CONCEPT OF MILITARY OBJECTIVES IN INTERNATIONAL LAW AND TARGETING PRACTICE (2015) (Routledge Research in the Law of Armed Conflict) (exploring generally the objectives associated with war).

149 As an example of *de minimis* usage, one senior Israeli legal adviser spoke of a Hamas military leader who makes a single phone call from a building. The building does not become a military objective, although, of course, the individual is targetable.

residence as a command center, a school as a weapons storage facility, or the roof of a hospital as a location from which to launch rockets, these buildings become military objectives subject to attack by operation of the use criterion —without prejudice, of course, to the various LOAC requirements such as providing a warning to desist before an attack on a misused hospital may proceed.[150]

Application of this well-settled law in the Israeli context is sometimes difficult for outside observers to grasp. Consider tunnel construction as an example. IDF intelligence has identified a specific configuration of concrete supports that are manufactured in Gaza, the sole purpose of which is to support Hamas military tunnels. If accurate, the factory producing them is unquestionably a military objective, although a strike on the factory may be perceived as an unlawful attack on a civilian object.[151] The law may be unambiguous in its acceptance of this practice, but perceptions matter in a lawfare-intense environment.

Another issue that often surfaces in reviews of Israeli targeting practices is attacking non-military government buildings.[152] MAG officers interviewed stated that the IDF does not target such buildings based on the fact that they are used for government activities. Instead, the officers asserted that government buildings are, like any other buildings, only attacked when used for military activities or when members of the enemy force are inside. In the latter case, the individuals are the targets, not the building itself. Damage to the building is factored into the proportionality analysis described below as collateral damage if it is merely a location at which the enemy is coincidentally present.

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150 GC I, *supra* note 74, at art. 21.

151 *Compare* Tova Dvorin, *IAF Gaza Strike Targeted Hamas Terror Tunnel Construction*, ARUTZ SHEVA (Dec. 20, 2014), http://www.israelnationalnews.com/News/News.aspx/188883 (containing Defense Minister Ya'alon's defense of a recent IDF strike on these grounds), *with "I Lost Everything:" Israel's Unlawful Destruction of Property During Operation Cast Lead*, HUM. RTS. WATCH (May 2010), https://www.hrw.org/sites/default/files/reports/iopt0510webwcover_1.pdf (noting that Israel damaged many of Gaza's ready mix concrete factories despite the fact that the Human Rights Watch says "[t]here is no evidence that any of the cement and concrete factories in Gaza contributed to the military efforts of Palestinian armed groups during the fighting").

152 *See B'Tselem to Attorney General Mazuz: Concern Over Israel Targeting Civilian Objects in the Gaza Strip*, B'TSELEM (Dec. 31, 2008), http://www.btselem.org/gaza_strip/20081231_gaza_letter_to_mazuz (complaining to the Attorney General about IDF targeting practices of which B'Tselem is a frequent critic).

In the view of the Authors, this analytical framework would logically include police facilities. If the enemy's police forces are operating as a unit against the IDF, the unit may be treated as an organized armed group (see below) and its facilities therefore qualify as military objectives. However, if members of the police are involved in hostilities merely on an individual basis, a police station only becomes a military objective while used for military purposes.

Controversy has surrounded attacks on media facilities for well over a decade. This issue surfaced most prominently during Operation Allied Force, the 1999 NATO air campaign against the Federal Republic of Yugoslavia. Among the airstrikes was one against a Serbian radio and television station in Belgrade that resulted in civilian casualties. The Prosecutor of the International Criminal Tribunal for the Former Yugoslavia investigated the incident and decided not to pursue prosecution,[153] although it did form the basis for the well-known Bankovic litigation before the European Court of Human Rights.[154]

When queried on media facilities as a target, the International Law Department stated it supported the approach taken in the well-known Final Report to the Prosecutor on the NATO bombing campaign. The report states:

> [T]he attack appears to have been justified by NATO as part of a more general attack aimed at disrupting the FRY [Federal Republic of Yugoslavia] Command, Control and Communications network, the nerve centre and apparatus that keeps Milosević in power, and also as an attempt to dismantle the FRY propaganda machinery. Insofar as the attack actually was aimed at disrupting the communications network, it was legally acceptable.
>
> If, however, the attack was made because . . . the station was part of the propaganda machinery, the legal basis was more debatable. Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the "effective contribution to

[153] INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶91 (2000), *available at* http://www.icty.org/sid/10052#IVB3 [hereinafter Final Report to the Prosecutor].

[154] *Bankovic v. Belgium*, 123 Eur. Ct. H.R 335, 371 (2001).

> military action" and "definite military advantage" criteria required [in the definition of military objectives]. . . . It appears, however, that NATO's targeting of the RTS building for propaganda purposes was an incidental (albeit complementary) aim of its primary goal of disabling the Serbian military command and control system and to destroy the nerve system and apparatus that keeps Milosević in power . . . .
>
> Assuming the station was a legitimate objective, the civilian casualties were unfortunately high but do not appear to be clearly disproportionate.[155]

Based on this report, it may be concluded that, for the IDF, a media facility becomes a target only when used for military purposes. Such purposes do not include propaganda or inciting anti-Israeli fervor. It does not even include enhancing enemy morale since, according to the report, such a contribution to military action is too remote to qualify a broadcast station as a military objective. Israel's approach to this matter is quite conventional.

A number of situations the IDF faces are less settled. Of particular note is the long-standing debate in the LOAC community over so-called "war-sustaining" military objectives. There is universal agreement that objects that are "war-fighting," such as rockets, and those that are "war-supporting," like a facility in which home-made rockets are produced, qualify as military objectives. However, the United States has taken the position that objects that provide the financial basis for conducting an armed conflict also qualify.[156] The classic contemporary example is the oil export industry of a country that relies on export profits to fund its war effort.[157] Based on this war-sustaining approach, oil production, refining, storage, and shipment facilities upon which the export industry relies qualify as military objectives.

Israel's recent enemies engage in few production activities that would qualify objects as military objectives on this basis. However, an unusual issue has surfaced in the context of financing. Because of the economic situation, the lack of access to banking and funds

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155 Final Report to the Prosecutor, *supra* note 153, at ¶¶ 75–77.

156 NWP 1–14, *supra* note 115, at ¶¶ 8.2., 8.2.5.

157 ANNOTATED SUPPLEMENT TO NWP 1–14, *supra* note 138, at 403 n.11 (using cotton export during the American Civil War as an example).

transferring capabilities, and the nature of the transactions involved, much of the economic activity supporting the military operations of organized armed groups fighting Israel occurs on a cash basis. Cash is used to buy weaponry, pay fighters, and the like. In a sense, the cash "sustains" the war effort. This reality raises the question of whether the IDF may target the money when Israeli intelligence agencies physically locate it?

By the war-sustaining approach, it would seem arguable that the cash is a targetable military objective so long as a clear nexus can be established between it and the military wing of Hamas, Hezbollah, or other organized armed groups. It does not matter whether it is designated for any particular purpose, so long as there is a reliable indication that it is destined to support an armed group. This is the view of one of the Authors.

Those who reject the war-sustaining approach, including the other Author, would require that there be clear evidence that the cash is going to be used to support military operations *per se*, as in purchasing weapons or explosives. In such cases only, the money would qualify on the basis of being "war-supporting." It would not suffice that the funds are going to be used to sustain the enemy's overall war effort in the general sense.

The MAG officers with whom this was discussed did not indicate whether the IDF had taken a firm position one way or the other on the issue. However, it and both of the Authors agreed that once the cash is physically transferred to an armed group, it qualifies as a military objective by nature. Similar to the way that the money held by the military finance section of a regular armed force qualifies as a military objective by nature, it is used solely for the purposes of the armed force and without which it would be difficult for the force to operate.

There are a number of ongoing debates regarding application of the concept of military objectives regarding which the IDF would not offer a view. For instance, consider the case of two buildings in close proximity. Actionable intelligence exists that one of them is being used for military purposes that necessitate a strike, but it is unclear which is being so used. It would appear that there are two options. The first is to strike both knowing that one is a military objective; by this approach, damage to the other and any occupants thereof must factor into the proportionality and precautions in attack analyses. Because it is unknown which of them is the military objective, the one that will suffer the least collateral damage must be

treated as if it is the military objective for proportionality rule purposes. The second view is that absent definitive information that verifies the use of one of them in particular, both must be presumed to be civilian and therefore the attack may not proceed because an attack is being directed at at least one civilian object. Although the MAG officers consulted were unwilling to take a position on this very realistic scenario, they did indicate that the sensitivity of such a situation would generally lead—for policy, if not legal, reasons—to a decision to refrain from attack.

They were also unwilling to articulate the IDF's position with respect to major lines of communication. The debate concerns whether main roads, railways, and similarly important avenues of transportation qualify as military objectives by "nature" or by "purpose or use." If the former analysis is made, the lines of communication may be struck at any time irrespective of whether they are being, or going to be, used for military transportation. Conversely, if lines of communication qualify as objectives only by purpose or use, then they may only be struck when so used or when the intention to use them manifests. The Authors take the latter view, but were unable to pin the MAG officers down on this point. It is a particularly important issue in southern Lebanon, where lines of communication are critical to Hezbollah's ability to maneuver and be resupplied during hostilities.

With respect to Gaza operations, the most important lines of communication are tunnels. The legal analysis of tunnels as military objectives is somewhat sharper. As tunnels running from Gaza into Israel have only military functions, the IDF treats them as military objectives by nature. They are used solely for the transit of fighters and weapons into Israel and for the exfiltration of captured IDF personnel and Israeli civilians, thus enabling the tunnels to be targeted at any time.

By contrast, the tunnels to and from Egypt are sometimes used exclusively for civilian activities like smuggling, sometimes only for military undertakings, and sometimes for both purposes. Unless used in an exclusively military manner, they must be treated as civilian objects that become military objectives only when used for military ends, most notably smuggling rockets into Gaza. Dual use tunnels that serve both purposes on a regular basis are, like any other dual-use object, military objectives. Additionally, tunnels not currently being used for military ends may become targetable if

reliable intelligence surfaces that they are likely to be so used in the future.

5.3. Persons on the Battlefield

Israel takes the traditional binary approach to qualifying persons on the battlefield. They are either members of the armed forces or civilians. This dichotomy is, however, subject to controversial nuances regarding civilians who in some fashion take part in the hostilities. Members of the armed forces may be targeted at any time; in other words, their susceptibility to attack derives solely from their status, which provides the basis for so-called "status-based targeting." Civilians are not subject to attacks based on status. Instead, pursuant to Additional Protocol I, Article 51(3), civilians who "take a direct part in hostilities" lose their civilian protections during an international armed conflict only "for such time" as they so participate. An analogous rule applies during a non-international armed conflict.[158] Thus, their targetability depends on their engagement in acts that qualify as "direct participation" and expires once they desist in the participation. In addition to losing protection from direct attack while they participate, they are not to be treated as civilians with respect to rule of proportionality calculations or the requirement to take precautions in attack. These general rules are well accepted as reflecting customary law.[159]

The topic of direct participation was considered by a group of international experts between 2003 and 2008 convened at the invitation of the International Committee of the Red Cross.[160] When the group could not reach a consensus, the ICRC released its own report on the subject as *The Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.[161]

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[158] AP II, *supra* note 74, at art. 13.3.

[159] CIHL Study, *supra* note 75, at r. 10. *See also, e.g.*, NWP 1–14, *supra* note 115, at ¶ 8.2.2 (indicating the U.S.'s position that civilians serving in certain roles are subject to hostile attack as unlawful combatants).

[160] One of the Authors participated as an expert.

[161] *Compare* Nils Melzer, Int'l Comm. of the Red Cross, Interpretive Guidance on the Notions of Direct Participation Under International Humanitarian Law 41–68 (2009) [hereinafter ICRC Interpretive Guidance] (describing the ICRC's position

A major sticking point in the deliberations was the meaning of the phrase "for such time." Applying a restrictive interpretation, Article 51(3)'s plain text seemed to imply that members of an armed group fighting a State may be attacked only while they are engaged in combat or performing a combat related activity. This is in contrast to the general rule that all members of a State's armed forces are targetable around the clock regardless of their duties. The interpretation of 51(3) advanced by the ICRC in their 2008 Interpretive Guidance, which the United States and other States reject, clearly favored non-State groups, an incongruous result in light of the LOAC's foundational balancing of humanitarian considerations and military necessity.[162]

As the ICRC project was underway, the Supreme Court of Israel issued its 2006 opinion on the matter in the Targeted Killing case.[163] The Court held that Article 51(3) reflected customary law in its entirety.[164] It also held that a civilian who participates in the hostilities "does not lose that status," only the protections associated

on existing international humanitarian law), *and* Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. Int'l L. & Pol. 831, 914 (2010) (arguing that that Interpretive Guidance is actually the best balance of all considerations in war), *with* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. Int'l L. & Pol. 769, 829–30 (2010) (claiming that Part IX of the Interpretive Guidance is legally incorrect and inappropriate); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. Int'l L. & Pol. 697, 738 (2010) (claiming that the Interpretive Guidance does not have the best argument about civilian or temporal participation in hostilities); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 Harv. Nat'l Security J. 5, 6–7 (2010) (arguing that the internal divisions in writing the Interpretive Guidance led to a completely flawed ultimate document); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. Int'l L. & Pol. 641, 693–95 (2010) (opining that the ICRC Interpretive Guidance has failed in its goal of protecting civilians in war and applying international humanitarian law).

[162] *See generally* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,* 50 VA. J. INT'L L. 795 (2010) (exploring the balance between military expediency and humanitarian principles in war and how effective current International Humanitarian Law is at balancing the two).

[163] HCJ 769/02 Pub. Comm. Against Torture v. Gov't 2006 v. 2 Isr. L. Rep. 459 (2006).

[164] *Id.* at 501. *See also Aerial Strikes against Terrorists: Some Legal Aspects*, ISR. DEF. FORCE MIL. ADVOC. GENERAL CORPS, *available at:* http://www.law.idf.il/592-6584-en/Patzar.aspx (reviewing rules of aerial strikes undertaken by the IDF).

with it while so participating.[165] But with regard to the "for such time" issue, the Court held that:

> [A] civilian who joins a terrorist organization that becomes his home, and within the framework of his position in that organization he carries out a series of hostilities, with short interruptions between them for resting, loses his immunity against being attacked "for such time" as he is carrying out a series of operations. Indeed, for such a civilian the rest between hostilities is nothing more than preparation for the next hostile act.[166]

In other words, members of groups like those fighting Israel were to be treated as direct participants while they were engaged in a series of acts amounting to direct participation in hostilities, even when not engaging in such acts at the moment of attack.

The *Interpretive Guidance* took a different approach to resolving the impasse. Borrowing a concept from elsewhere in the LOAC, it characterized members of "organized armed group[s]" as "armed forces," not civilians, for targeting purposes.[167] By this interpretation, the "for such time" caveat does not apply to members of organized armed groups, and they are thus subject to status-based targeting. However, the ICRC went on to limit this characterization to members of the group who have a "continuous combat function," that is, duties that affect the enemy's combat capabilities or one's own.[168] This restriction has proven highly controversial.[169]

The IDF remains fully committed to the Israeli Supreme Court's judgment in the Targeted Killings case, and it applies the guidelines laid down by the Court whenever targeting civilians taking a direct part in hostilities. At the same time, the ongoing armed conflict in which Israel is engaged has increasingly illustrated the extent to which the groups it faces have become highly organized and combat effective. Furthermore, the notion of organized armed groups as

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165 HCJ 769/02 *Pub. Comm. Against Torture* 2006 v. 2 Isr. L. Rep. at 494–95.

166 *Id.* at 501–02.

167 ICRC Interpretive Guidance, *supra* note 161, at 31–32.

168 *Id.* at 33–36.

169 *See, e.g.*, Bill Boothby, "*And for Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741, 767–77 (2010) (criticizing the ICRC Interpretive Guidance as being far too restrictive with respect to the timing of acts of war).

armed forces for targeting purposes, which had its genesis in the ICRC's *Interpretive Guidance* (published after the Targeted Killings judgment was rendered), is now generally accepted as reflecting customary international law. Accordingly, the IDF believes it is more accurate to characterize certain groups, such as Hamas' military wing (Izz al-Din al-Qassam Brigades), as armed forces rather than as assemblages of civilians directly participating in the conflict. The IDF thus accepts the notion of "organized armed groups" and relies on it in its targeting operations. This position has yet to be tested in the Supreme Court but, as with other sensitive matters of legal policy, has been vetted through the inter-agency process and approved by senior officials in the Ministry of Justice.

Although now embracing the ICRC's organized armed group approach, the IDF has not followed suit with respect to the concept of continuous combat function ("CCF"). MAG officers noted that the CCF criterion creates a legal imbalance. For instance, it would countenance the targeting of a MAG officer uninvolved in targeting matters but not a lawyer serving in an identical role on the other side. The same would be true of IDF public affairs officers, finance officers, or others removed from direct involvement in the hostilities. The IDF therefore rejects the concept on the basis that it is neither an aspect of treaty law that binds Israel nor does sufficient State practice or *opinio juris* exist to support the concept's characterization as customary law. In the view of the Authors, the IDF is on very firm ground in rejecting the CCF concept.

Despite that rejection, the IDF does accept the premise that groups may consist of both military and non-military wings. All members of military wings, such as Hamas' Izz al-Din al-Qassam Brigades, are targetable at all times in the Israeli view. Yet, so long as the wings are clearly distinct and the non-military wing engages in no activities that contribute to the hostilities in any meaningful way, the IDF treats the non-military wing members as civilians who may only be targeted if and when they directly participate in the hostilities. The IDF considers the leader of groups comprising both military and nonmilitary wings to be a lawful target when that individual's duties include command and control of the military wing's activities; the fact that the individual also leads the civilian activities of the group does not affect this determination.

As important as the issue of when an individual may be targeted is that of whether the conduct he or she is engaging in qualifies as direct participation in the hostilities. The MAG has issued a list of

activities that meet this definition. The list is classified, but MAG officers interviewed acknowledged that preparing rockets for launch, launching rockets, and retreating from the location of a rocket launch all qualify.[170] MAG officers likewise indicated that religious leaders who harangue Israel and its policies are not considered direct participants. Neither are those individuals who generally incite violence, recruit for enemy organizations, or provide broad financing for enemy operations. Like the Authors, however, they opined that recruiting for a particular operation, as in recruiting a suicide bomber to attack a particular target, is direct participation, as is providing the supplies or financing for that specific operation. As a general matter, the IDF's position is that the greater the nexus between the act and a particular military operation, the more appropriate it is to characterize the activity in question as direct participation.

It would, of course, be impossible for the list to contain all possible forms of direct participation. Therefore, if the commander of an Attack Cell believes an individual is directly participating but the activity concerned does not appear on the list, the commander may elevate the matter to higher authorities for authorization to strike. Those authorities will enjoy legal advice when making their determination.

It is clear that the IDF, like the U.S. armed forces, takes a broader view of acts that qualify as direct participation than set forth in the *Interpretive Guidance*. As an example, the *Guidance* labels the production and transport of weapons and equipment as indirect participation "unless carried out as an integral part of a specific military operation designed to directly" harm the enemy.[171] By this standard, civilians who are assembling, storing, and transporting rockets meant to attack Israel retain their protection from attack. Further, if the rockets they are associated with are attacked as military objectives, any harm to those individuals is a factor in the proportionality and precautions in attack analysis that attends the

[170] In the Targeted Killing case, the Supreme Court described direct participation as including armed civilians on their way to use those arms against the enemy, those armed civilians returning from such engagements, individuals who collect intelligence for military purposes, persons who transport unlawful combatants to or from the hostilities, weapons operators, and those who supervise the use or service of weapons. HCJ 769/02 *Pub. Comm. Against Torture* 2006 v. 2 Isr. L. Rep. at 496–50.

[171] ICRC Interpretive guidance, *supra* note 161, at 53.

strike. This position is styled by proponents as analogous to the generally accepted view that workers in a munitions factory are civilians who continue to enjoy their protected status despite an activity that plainly contributes to the conflict. Along the same lines, if members of an organized armed group carry them out, the activities do not amount to a continuous combat function that would permit targeting the individuals based solely on membership in the group.

Israel and the Authors view such activity as direct participation in hostilities. This is both a principled position and a practical one in light of the fact that rockets pose a threat to Israel's civilian population, are built in or near the battle area, and are the weapon with the greatest potential for bringing those who use it success in the conflict (however success might be defined). To conclude otherwise would ignore the military necessity element underlying the LOAC and, quite simply, be illogical in light of the reality of the conflicts Israel faces. Interestingly, the MAG officers asked would not offer an opinion on whether individuals transporting weapons through the tunnels into Gaza are directly participating in hostilities. Both of the Authors would readily conclude they are so participating on the basis of the proximity to the area of combat and the immediacy of the use of the weapons.

5.4. Human Shields

The IDF regularly confronts the use of human shields by its enemies.[172] According to Additional Protocol I, Article 57(7),

> [T]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian

[172] *See, e.g.*, *Captured Hamas Combat Manual Explains Benefits of Human Shields*, THE OFFICIAL BLOG OF THE ISRAEL DEFENSE FORCES (Aug. 4, 2014), http://www.idfblog.com/blog/2014/08/04/captured-hamas-combat-manual-explains-benefits-human-shields/ (citing a Hamas instructional manual on the benefits of shielding); Michael N. Schmitt, *Human Shields and International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292 (2009) (discussing human shields generally).

> population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

Violation of the prohibition by the enemy, however, does not relieve an attacker of the requirement to take the presence of civilians into consideration when performing proportionality and precautions analyses.[173]

Although most States, including the United States and Israel,[174] accept these provisions as reflecting customary law, the interpretation thereof has been the source of significant controversy since it was highlighted during the *Interpretive Guidance* project.[175] The project's debate surrounded the distinction between individuals who voluntarily shield a target, as when individuals go to a target in order to shield it from attack, and those who shield involuntarily, as in the case of weapons placed in a school occupied by students and teachers unaware of the presence of the weapons. Israel has faced both situations. For instance, the IDF often warns individuals in a building to be attacked to leave the facility. In some cases, Hamas responds by urging people to come to the target area in order to deter the Israeli attack. More commonly used is the practice of conducting military activities, such as launching rockets, from the top of, or next to, inhabited buildings, like apartment complexes and schools.[176]

Although the dispute over the treatment of human shields is complex,[177] a review of its broad outlines will suffice here. With

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[173] AP I, *supra* note 74, at art. 51(8).

[174] *See* NWP 1-14, *supra* note 115, at ¶ 8.3.2 ("A party to an armed conflict has an affirmative duty to remove civilians under its control . . . from the vicinity of objects of likely enemy attack.")

[175] ICRC Interpretive Guidance, *supra* note 161.

[176] Human Rights Watch, a frequent critic of Israeli military operations, nonetheless has also pointedly complained about Hamas' use of densely populated urban terrain to mask its rocket attacks. *Gaza: Palestinian Rockets Unlawfully Targeted Israeli Civilians*, HUM. RTS. WATCH (Dec. 24, 2012), http://www.hrw.org/news/2012/12/24/gaza-palestinian-rockets-unlawfully-targeted-israeli-civilians ("Human Rights Watch research in Gaza found that armed groups repeatedly fired rockets from densely populated areas, near homes, businesses, and a hotel, unnecessarily placing civilians in the vicinity at grave risk from Israeli counter-fire.").

[177] ICRC Interpretive guidance, *supra* note 161, at 56–57; *see also generally* Michael N. Schmitt, *Human Shields and International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292 (2009).

respect to *involuntary* shields, Israel adopts the majority view that involuntary shields retain all civilian protection. An attacker may not directly attack them, it must consider their presence when making proportionality calculations, and it has to take feasible precautions to avoid harming them. If it is unclear whether the person shielding is acting voluntarily or involuntarily, Israel will presume that the shielding is involuntary. An alternative view that they lose protection because the enemy should not be entitled to benefit from its unlawful behavior has nearly faded away. A slight variant of the latter approach that is also on the wane is that although the involuntary shields do not lose all protection, the harm to them is somehow "discounted" when making the proportionality calculation.[178]

A persistent debate still surrounds the use of *voluntary* shields. There are two diametrically opposed positions. The ICRC is of the view, embraced by some LOAC experts, that civilians only lose their protections for such time as they are physically blocking or otherwise physically shielding a military objective, as in blocking a bridge over which troops need to pass or shielding enemy forces that are attacking by moving forward in front of them.[179] In such cases, their shielding amounts to direct participation in hostilities. However, in all other cases of voluntary shielding, the civilian retains the full protection of civilian status.

This is not the opinion of Israel or, for that matter, the United States or the Authors.[180] Israel, in a position set forth by the Supreme Court in the Targeted Killing case,[181] believes that characterizing voluntary shielding as direct participation in hostilities better reflects the balancing of humanitarian considerations and military necessity that permeates the LOAC. The logic underlying this stance is difficult to counter. After all, by the competing approach, an enemy population could effectively shield military objectives as a matter of law simply by gathering enough civilians on or near the

[178] For instance, this is the view held by Yoram Dinstein. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 155 (2d ed., 2010).

[179] ICRC Interpretive guidance, *supra* note 161, at 56–57.

[180] The U.S. view acknowledges that the law is unsettled, but that voluntary human shields "may also be considered to be taking a direct part in hostilities or contributing to the enemy's warfighting/war-sustaining capability, and may be excluded from the proportionality analysis." NWP 1-14, *supra* note 115, at ¶ 8.3.2.

[181] HCJ 769/02, *supra* note 96, at ¶ 36.

target to render the likely collateral damage excessive relative to the military importance of the target. Indeed, in an asymmetrical conflict in which one Party can, like Israel, conduct air or artillery attacks with relative impunity, the tactic may be significantly more effective than the use of defensive weapon systems. This is certainly the case with respect to operations in Gaza and, to a lesser extent, southern Lebanon.

Of course, the same dynamic attends the use of involuntary shields, but a different balancing of humanitarian considerations and military necessity is at play. In the case of involuntary shields, a Party to the conflict is placing the civilians at risk in order to enhance its military position. That Party should not be permitted to deprive civilians of the protections to which they are entitled under the LOAC. By contrast, during voluntary shielding, the individuals concerned are taking the actions that may result in loss of their civilian protections. The LOAC already acknowledges the possibility of such loss in the case of voluntary physical acts of direct participation in hostilities such as gathering tactical intelligence or conducting attacks. To allow voluntary human shields to affect military operations by exploiting the law would be to admit of a distinction without a meaningful difference in terms of either humanitarian considerations or military necessity.

The preceding analysis of shielding is purely legal. Although the IDF would not disclose its actual operational approach to situations involving shielding because doing so would enable its enemies to more effectively employ the tactic, it is fair to say that the IDF approach is much more restrictive than allowed by the law. In particular, MAG officers did not refer to any situation in which physical shielding is not involved that would merit direct targeting of the shields themselves (as distinct from the entity they are shielding).

An issue that has recently surfaced involves the refusal of civilians to leave the target area following warnings of attack. For instance, during Operation Protective Edge Israel warned Gaza's population of pending attacks and not only directed it to evacuate to areas where no attacks would occur, but also identified routes to get there that would be safe from on-going military operations. While many civilians heeded the warnings, some did not. Indeed, Hamas actively encouraged the civilian population not to evacuate. On a smaller scale, warnings of individual attacks were also sometimes disregarded.

It has been suggested that civilians who do not heed warnings should either be treated as voluntary human shields directly participating in hostilities or, the fact that they choose to remain in the target area should somehow be factored into the proportionality calculations and precautions in attack requirements.[182] The IDF rejects these arguments. Civilians have no LOAC obligation to leave the target area and thus do not forfeit any of their legal protection when remaining there. As a practical matter, they place themselves at risk of becoming injured or killed incidentally, but that is their choice. The Authors agreed that this position, albeit problematic from a military standpoint, reflects customary international law. Issuing the warning may help satisfy Israel's obligation to take precautions in attack as described below, but declining to heed the warning certainly does not result in the forfeiture of protection, absent other acts that constitute direct participation.

5.5. Placement of Fighters and Military Objectives In or Near Civilian Facilities

It is very common for Israel's enemies to use civilian facilities for military purposes or to shield their operations. The law is clear in such cases. When used for military purposes, a civilian facility becomes a military objective "by use," irrespective of the degree of use. Thus, all so-called "dual-use" targets, that is, those used for both military and civilian purposes, qualify as military objectives. Examples include storage of weapons in a school, use of a mosque as an observation point, using civilian apartments as command and control locations, and physically shielding military equipment, personnel and activities from attack with civilian structures.[183] If reliable intelligence exists that it will be employed for military

[182] This assertion was discussed, for example, at a recent conference attended by one of the Authors and conducted under the Chatham House Rule.

[183] *See, e.g.*, *UNRWA strongly condemns placement of rockets in school*, UNRWA (July 17, 2014), http://www.unrwa.org/newsroom/press-releases/unrwa-strongly-condemns-placement-rockets-school (condemning groups responsible for hiding weapons in a school); *UNRWA condemns placement of rockets, for a second time, in one of its schools,* UNRWA (July 22, 2014), http://www.unrwa.org/ newsroom/press-releases/unrwa-condemns-placement-rockets-second-time-one-its-schools (condemning the same a second time).

purposes in the future, a civilian entity becomes a military objective "by purpose" and may be attacked even before the conversion occurs.

These rules are set forth in the aforementioned Article 52(2) of Additional Protocol I and are universally considered to be customary, including by Israel.[184] Whether converted from civilian status by the use or purpose criterion, any expected damage to the entity concerned is not collateral damage in the proportionality sense and need not be considered with respect to precautions in attack. It must be cautioned that damage to unmistakably distinct aspects of an entity that has been converted in part to military use is collateral damage.

A persistent problem for the IDF is that Hamas and other organized armed groups sometimes use an apartment, floor, or particular section of a building for military purposes while the remainder is occupied by civilians or otherwise used for civilian purposes. This raises the question of which parts of the building have been converted into a military objective and therefore do not factor into proportionality calculations or precautions in attack considerations. In particular, if the IDF has the precision capability to strike a single apartment or floor within a building that is being used by the enemy, does any expected damage to the rest of the structure qualify as collateral damage?

MAG officers to whom this question was posed were quick to distinguish law from policy. As a matter of law, the IDF treats the building as a single object such that no damage to it is legally considered collateral damage. For instance, if an airstrike is planned on an apartment on the third floor, but is expected to damage apartments used for civilian purposes on the floors beneath it, the expected damage need not be factored into any proportionality analysis, nor need measures be taken to avoid causing it pursuant to the precautions in attack requirement. By this position, an attack on a building used for military purposes is lawful (subject to proportionality) even if the IDF does not know which apartment is being so used. At the same time, the MAG officers indicated that whenever such situations presented themselves, the IDF sought to avoid any damage to the components of the target that are not being used for military purposes, including by employing, whenever

[184] NWP 1–14, *supra* note 115, at ¶ 8.2; CIHL Study, *supra* note 75, at r. 7 and commentary accompanying r. 8.

feasible, precision-guided munitions. Moreover, the IDF often has refrained from attacking certain multi-story buildings even when striking them would be permissible as a matter of law.

Note that the position is limited to buildings that are a single structure. For instance, the fact that two adjacent buildings might be connected by a walkway does not render them a whole for targeting purposes. The IDF would also qualify any civilian property in the building as collateral damage. Likewise, it takes any harm to civilians into consideration when doing the proportionality assessment.

One of the Authors would come to a different conclusion. He would suggest that if an attacker possesses the means of surgically striking an apartment (or other distinct section of a building) used for military purposes in a building that is otherwise civilian in character, and if the use of that means is militarily feasible in the circumstances, then damage to the civilian aspects of the building should be included in the proportionality analysis.

This latter position will seldom affect the proportionality assessment because it only applies when the attacker is in possession of a precision weapon the effects of which are capable of being limited to a single apartment, floor, etc. Thus, most collateral damage to the rest of the building would be unanticipated and therefore not "expected." But it would affect choice of weapon pursuant to the precautions in attack requirement. For instance, assume a building will be struck at night when no civilians are present. If the entire facility is a military objective as the IDF suggests, it would be permissible to use a weapon that would drop the entire structure; no damage to it would qualify as collateral. Yet, by the alternative interpretation, if the IDF has a missile that can feasibly take out only the section of the building being used militarily, it must be employed to minimize harm to the aspects of the building that qualify as civilian in nature. The relativity introduced into the proportionality and precautions in attack analysis based on the precision capabilities of an attacker parallels the well-accepted relativity of the precautions in attack requirement. Despite this difference of opinion, both Authors found the IDF position to be reasonable; they also took note of the fact that the IDF has a policy of limiting the damage that would generally result in compliance with the more restrictive interpretation.

Such situations must be distinguished from those, frequent in the Israeli context, in which the enemy leverages the proximity of

civilian entities that have not been converted into a military objective by use or purpose. The most common example the IDF faces today is placement of mobile and other rocket launchers near civilian residences in the hope that this will either deter attack or result in collateral damage that can be exploited for lawfare purposes. In such cases, Israel's enemies are often violating the LOAC requirement to segregate civilian and military objects when feasible.[185] Nevertheless, Israel takes the position that any damage to adjacent civilian property is collateral damage that counts fully in the proportionality analysis and must be considered with respect to precautions. The IDF correctly rejects the occasional argument that the enemy's unlawful behavior relieves the IDF of its obligation to consider the damage as collateral damage.[186]

MAG officers were quick to note that the IDF only attacks a structure when the enemy is using it for military purposes or when there is reliable intelligence that it will be so used. A situation that the IDF often confronts involves a momentary use of a civilian structure for military purposes. For instance, a mortar may be fired from the roof of the building, but those firing it flee the building rapidly so as to avoid the IDF response. Since the building is not being used for military purposes at the time of the potential strike, it is no longer liable to attack absent later use or the possession of intelligence that indicates with a relatively high degree of certainty that it is going to be used again. In such a case, it would qualify as a military objective by the purpose criterion.

The exception to this rule is a structure that is repeatedly used for military purposes. According to the MAG officers interviewed, frequent repeated use of the same structure for military purposes will render it a military objective by use throughout the period involved. The classic example would be a home that is regularly used by the enemy leadership to plan and coordinate operations. Of particular note in this regard is criticism of the IDF for attacking the homes of Hamas leaders.[187] The legal validity of the criticism

[185] AP I, *supra* note 74, at art. 58; CIHL Study, *supra* note 75, at r. 23–24.

[186] In this regard, note that AP I, *supra* note 74, at art. 51(8) provides that "[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57." NWP 1–14, *supra* note 115, at ¶ 6.2.5; CIHL Study, *supra* note 75, at r. 140.

[187] *See, e.g.*, HRW *Q&A, supra* note 58 (discussing issues related to attacking Hamas leaders in their homes).

depends on whether the home in question is used on a regular basis to coordinate Hamas military activities. If not, it may only be struck when the leader is there (the attack would technically be on the leader). If so, a strike during his absence would be lawful. The Authors agreed that this approach represented a reasonable interpretation of the use criterion in the definition of military objective.

5.6. Uncertainty

Israel wields impressive intelligence, surveillance, and reconnaissance (ISR) assets, including human intelligence (HUMINT), signals intelligence (SIGINT), aerial platforms such as RPAs, cyber capabilities, and other means of verifying a target. Proximity to Israel eases the operational challenges normally associated with employing such assets. Just as importantly, the IDF knows where it is most likely to fight in the near future – Gaza and Southern Lebanon—and has carefully prepared to do so. It has operated in and occupied both areas and therefore has first hand understanding of their physical layout, patterns of life, and cultural practices. The IDF and civilian intelligence agencies work assiduously to maintain this knowledge so as not to be disadvantaged militarily by virtue of the fact that their forces are most likely to fight on their enemies' home turf. At the same time, such understanding enhances their ability to identify targets and to distinguish them from civilians and civilian objects.

Nevertheless, uncertainty often permeates the targeting process. This is especially the case with respect to urban areas such as Gaza where civilians and civilian objects are collocated with fighters and military objectives. Moreover, Israel's opponents, as described earlier, have adopted a strategy of operating near civilians and civilian objects and using civilians as human shields, both voluntarily and involuntarily. This further enhances the degree of uncertainty attendant to IDF strikes.

The IDF takes a very conservative approach towards uncertainty. It accepts the Additional Protocol I, Article 50(1), requirement that "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian" as reflective of

customary LOAC.[188] With respect to objects, the IDF affords the same status to the Article 52(3) requirement that "[i]n case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."[189] Although it does not extend the presumption to other civilian objects as a matter of law, MAG officers explained that as a matter of operational and policy good sense in an environment in which their opponents actively employ lawfare, the presumption applies as a matter of policy to all objects.[190]

The question remains, however, as to the degree of doubt that triggers these presumptions. Israel applies a "reasonableness" standard.[191] Specifically, would it be reasonable in the same or similar circumstances, after exhausting militarily feasible measures to verify the target, to proceed based on the information available and in the face of any uncertainty that remained? From a practical perspective, it is perhaps better expressed in the negative as an assessment of whether the decision to attack is unreasonable; that is, would a reasonable operator in that situation refrain from launching the attack? This standard has been adopted by many militaries and by tribunals reviewing targeting decisions made in the field.[192]

The standard of reasonableness is sometimes characterized as a threshold. By this approach, individuals may differ as to whether sufficient certainty exists to have crossed the threshold of reasonableness, but the threshold itself is a constant. This approach seeks to quantify reasonableness. For instance, at a recent

188 *See also* CIHL Study, *supra* note 75, at commentary accompanying r. 6 (restating the rule from Additional Protocol I regarding classification as a civilian in a case of doubt).

189 CIHL Study, *supra* note 75, at commentary accompanying r. 10.

190 The United States apparently does not view the latter presumption as customary in nature, although the usually cited basis for this conclusion, the Report on the Gulf War of 1990-91, is by now quite dated. *See* Gulf War Report, *supra* note 128, at 627 (critiquing the presumption on the basis of practical warfare concerns). *See also* DINSTEIN, *supra* note 178, at 98 (stating the presumption that a civilian object is serving its normally dedicated services, in order to limit exposure to attack).

191 *See generally* John Merriam, *Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters*, 56 VA. J. INT'L L. 1 (forthcoming 2015) (discussing the issue of reasonableness in targeting).

192 *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, ¶ 55 (Int'l Crim. Trib. for the former Yugoslavia Dec. 5, 2003); Final Report to the Prosecutor, *supra* note 155, at ¶ 50.

conference, one non-Israeli participant suggested that an attack is reasonable when it is "more likely than not" that the target is a military objective.

Although the IDF has taken no express position on this issue, the Authors would take a different view. For them, the degree of doubt as to status that renders unreasonable a decision to attack is highly contextual. In particular, when the anticipated military advantage is very high, as in the case of attacking an enemy leader or striking an important weapons storage area, the extent of doubt as to status that is legally acceptable increases. By contrast, when expected collateral damage is high, it decreases. Note that although military advantage and collateral damage are also factors in the proportionality analysis, here they affect the reasonableness of the determination that the target selected qualifies as a military objective or a targetable individual in the first place. Other factors may also be relevant. For example, if the target is a fleeting one unlikely to appear again, acceptable doubt increases, whereas if the target probably can be struck at a later date, the level of certainty required to render the strike reasonable will climb. Given some of the similar circumstances the U.S. armed forces and the IDF faces in this regard, the Authors would be surprised if the IDF disagreed.

5.7. Proportionality

Israel fully accepts the articulation of the rule of proportionality set forth in Additional Protocol I, which prohibits attacks "expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[193] The prohibition is especially meaningful for the IDF given an operational environment that involves an enemy operating from an urban setting employing tactics such as human shielding, placement of military objectives and fighters in and near civilian objects, and adoption of lawfare-motivated operational techniques

[193] AP I, *supra* note 74, at arts. 51, 57(2)(a)(iii), 57(2)(b). NWP 1-14, *supra* note 115, at ¶ 8.3.1; CIHL Study, *supra* note 75, at r. 14, 18, 19. *See* IDF Military Advocate General, *Aerial Strikes against Terrorists*, *supra* note 164 (confirming Israel's acceptance of the rule).

intended to draw it into causing civilian casualties and damage to civilian objects.[194]

Proportionality is also a major issue because of the sheer intensity of Israeli campaigns. For instance, during Operation Protective Edge, which lasted 50 days, the IDF conducted strikes against nearly 5,000 targets mostly in populated areas of tiny Gaza.[195] During these strikes around 2,100 Gazans were killed.[196] Israeli estimates note that around half of those killed were fighters who would not be factored into the collateral damage assessments performed for individual attacks.[197] It must be cautioned in this regard that proportionality is assessed *ex ante* and not *post factum*; the legality of a strike with respect to the proportionality analysis is based on the expected collateral damage and anticipated military advantage, rather than that which eventuates. But the point is that a high operational tempo in a small densely populated area lends itself to the unavoidable causation of collateral damage.

As noted above with respect to identifying a target, Israeli ISR capabilities are impressive, as is its deep understanding of the target area and civilian activities therein. This understanding gives it particular insight into what U.S. targeting experts call "pattern of life." In other words, the IDF has an excellent understanding of when, where, and how civilian activities normally occur in the target area, and it devotes additional resources to identify, as much as feasible, changes in these patterns during hostilities. These capabilities undeniably enhance the accuracy of likely military advantage and collateral damage estimations during the targeting process. Additionally, following general warnings to evacuate zones into which strikes will be conducted, the IDF monitors the area concerned to assess whether civilians have heeded the

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194 Noam Neuman (currently head of the IDF's International Law Department), *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality*, 7 Y.B. INT'L HUMANITARIAN L. 79 (2004) (discussing proportionality from an Israeli perspective).

195 *See supra* note 12 (reporting statistics on Operation Protective Edge).

196 *See* UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT (2014), *available at* http://www.ochaopt.org/documents/ocha_opt_sitrep_28_08_2014.pdf (stating that 2,104 Palestinians were killed).

197 Note that proportionality is calculated for individual strikes; it is not calculated for an entire conflict. It would be technically incorrect to label a campaign as disproportionate because the expected harm to civilians and civilian objects is disproportionate.

warnings to more accurately make the proportionality determination; this is also true with respect to warnings of individual strikes.

However, Israeli real time coverage of the target area not unlimited. In particular, RPA sorties to assess potential collateral damage in the target area are constrained by the competing need to search for tunnel entrances and enemy activity within Israel. As a result, air commanders have to carefully balance the requests for target area coverage designed to locate targets and monitor civilian activity against those intended to help protect the IDF and civilian population from attacks. The ability of IDF Commanders to assess expected collateral damage is neither absolute nor flawless.

Both Authors were struck by the weight accorded in the proportionality analysis to the military advantage of protecting the civilian population and individual soldiers. Although they would not label it unwarranted in light of the unique operational context in which Israel finds itself, it was clear to them that avoidance of harm to the Israeli civilian population and the protection of individual soldiers loomed large in Israeli proportionality calculations. Two examples illustrate this sensitivity.

The Iron Dome system has proven highly effective against the rocket threat to the civilian population. During Operation Protective Edge, the Iron Dome system intercepted 95% of the rockets directed against Israeli population centers. This raises the question of whether the military advantage gained by targeting rocket launchers drops when on average a rocket fired on a trajectory that places a population center at risk has only a mere 5% chance of striking its target. The effect on the proportionality calculation would be substantial if this were the case because the less the military advantage, the lower the lawful collateral damage. The math would seem unassailable.

Every Israeli government legal adviser with whom the Authors spoke rejected this approach. They proffered numerous arguments against it, most of which are reducible to condemnation as overly formalistic. First, they argue that rocket launchers, launching pads, and other offensive capabilities of the enemy possess inherent military value, which is significant enough to warrant a certain level of collateral damage. Second, they say that a State's efforts to protect its population should not undermine its ability to diminish its adversary's offensive capabilities. Third, they argue that the rocket attacks terrorize the civilian population and that the degree of terror

does not diminish in parallel with the decreased likelihood of a missile striking. Restated, the population is not 95% less terrorized because of Iron Dome's success rate. Finally, these advisers stress that the IDF does not overstate the value of rocket launchers, saying they were unaware of any cases in which civilians lost their lives in attacks against such launchers. The Authors agreed with the first three points, but they have no way to confirm the fourth. In particular, they concurred with the advisers that preventing terror among the civilian population, as distinguished from fear that is only incidental to lawful attacks, is a legitimate military objective. This is so based on the fact that the LOAC prohibits attacks, "the primary purpose of which is to spread terror among the civilian population."[198]

Nevertheless, the Authors were of the view that some decrease in the degree of terror is likely with improved defenses and that, accordingly, the military advantage of striking a rocket does diminish somewhat as the effectiveness of defenses increases. This approach creates relativity in the proportionality analysis because those parties to a conflict with the best defenses sometimes will be estopped by the rule of proportionality from launching attacks that their less well-defended enemies would be entitled to conduct in the same circumstances. However, the Authors pointed out that this is largely a theoretical problem. They also noted that in any event, relativity is already resident in the LOAC, like the relative obligations that are inherent in the precautions in attack notion of feasibility (see below) or the fact that the acceptable degree of uncertainty as to the status of a target is, as discussed, contextual.

The Israeli perspective is evident in the so-called "Hannibal Directive," which is classified. According to open sources, the IDF promulgated the directive in the aftermath of the 1986 capture of two soldiers by Hezbollah.[199] It is designed to prevent capture – both out of concern for the soldiers and to deprive the enemy of a strategic pawn. The Hannibal Directive is mostly technical, setting forth various procedures for command and control. The only

198 AP I, *supra* note 74, at art. 51(2); CIHL Study, *supra* note 75, at r. 2. *See also NWP* 1–14, *supra* note 115, at ¶ 8.9.1.2. (prohibiting "bombardment for the sole purpose of terrorizing the civilian population;" the limitation of this language to cases of "bombardment" makes sense in the context of a publication directed at naval commanders).

199 *See* Margolit, *supra* note 33 (explaining the development and purposes of the Hannibal Directive).

substantive provision it includes concerns the risk that may be actively posed to the captured IDF soldier. Essentially, the Hannibal Directive allows IDF commanders that are seeking either to prevent a soldier from being captured or to interdict an already-captured soldier before he vanishes to take aggressive measures including placing the soldier concerned at risk if necessary. Israeli legal advisers willing to discuss the directive in broad terms stated that while it may permit operations that might otherwise not be allowed under the rules of engagement in force at the time, it does not dispense with the rule of proportionality or any other LOAC norm. The fact that a directive relaxes the rules of engagement in these cases demonstrates the military advantage the IDF attributes to keeping its soldiers out of enemy hands. Interestingly, at the time this article was finalized the MAG was assessing a Hannibal Directive operation that was launched during Operation Protective Edge for compliance with LOAC and the rules of engagement; this engagement reportedly resulted in as many as 114 deaths in Rafah.[200]

Expressly allowing the imposition of risk on an IDF soldier illustrates another facet of military advantage in the Israeli context, the denial of a strategic objective to the enemy, specifically, its desire to turn the Israeli population against the conflict. As previously explained, because Israel's enemies cannot prevail on the conventional battlefield, the IDF in not in itself a vulnerable center of gravity. Instead, its enemies asymmetrically target the civilian population and individual soldiers as alternative critical vulnerabilities. Therefore, attacking rocket launchers, striking tunnels, rescuing captured soldiers, and similar activities designed to protect the population and individual soldiers have to be considered from the perspective of denying the enemy a strategic objective rather than a tactical gain. The Authors agreed that it is appropriate to consider defeat of the enemy's strategic objectives as a factor in calculating the military advantage of an attack, so long as

[200] *See* Gili Cohen, *Israeli Army Mulling Criminal Probe Into Use of Hannibal Directive in Gaza*, HAARETZ (Feb. 19, 2015), http://www.haaretz.com/news/diplomacy-defense/.premium-1.643111# (reporting on the Israeli Army's possible criminal investigation into the Hannabal Directive); Maayan Lubell and Nidal al-Mughrabi, *Did Israel's 'Hannibal directive' lead to a war crime in Gaza?*, REUTERS (Oct. 13, 2014), http://www.reuters.com/article/2014/10/13/us-mideast-gaza-warcrime-insight-idUSKCN0I20FN20141013 (describing the casualties and political effects of the Hannibal Directive).

the enemy is seeking to achieve said objectives militarily. This would differentiate it from, for instance, undermining enemy civilian morale, which is not military advantage in the legal sense no matter how much it actually affects the course of a conflict.

It is clear that when trying to rescue an individual soldier or defend in a position where one's own forces are located, rescue and survival are factors that are taken into consideration in the military advantage calculation. This is because the very purpose of the operation is to achieve those ends. There has been an ongoing debate for a number of years over the issue of whether survival of one's own forces and assets should be included in the military advantage estimate when defense of one's forces is not a central goal of the operation. The classic illustration is an aircraft that, because it is flying above the threat envelope of enemy surface-to-air missiles, is more likely to return to base than one flying within the threat envelope. The question is whether it is appropriate to consider the pilot and aircraft's safe return as an element of military advantage such that the proportionality calculation would countenance greater collateral damage.[201]

The IDF takes the position that it is appropriate, as does one of the Authors.[202] The other Author is of the view that avoidance of risk is primarily a consideration when determining the military feasibility of precautions in attack as described below.[203] For instance, flying at a lower altitude is a tactic that in some cases will enable a pilot to verify the target and identify potential collateral damage with greater accuracy. Yet, the risk of flying within an enemy air defense system's threat envelope would usually render such a tactic militarily infeasible and therefore a measure that need not be taken irrespective of any proportionality analysis.

MAG officers correctly emphasized that the rule of proportionality only prohibits an attack when collateral damage is

[201] *See generally* Ian Henderson, The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack Under Additional Protocol I, 203–206 (2009) (providing an excellent discussion of this problem and concluding that considering the preservation of one's own forces is appropriate when determining military advantage in the proportionality context).

[202] *See* Neumann, *supra* note 194, at 91.

[203] Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 (No. 859) INT'L REV. RED CROSS 445, 462 (2005). *See also* DINSTEIN, *supra* note 178, at 141–42 (describing the tension between the LOAC duty to avoid or minimize damage to civilians and a commander's military duty to minimize damage to his/her own troops).

"excessive" relative to the anticipated military advantage, as should be apparent from the plain text of the relevant articles in Additional Protocol I. The reference to "extensive" harm in the ICRC Commentary is therefore counter-textual.[204] Similarly, there is no basis for an assertion that a strict balancing test applies such that if expected collateral damage "slightly outweighs" anticipated military advantage, the strike may not be launched. Nor is excessiveness a mathematical calculation, as when the number of civilians harmed exceeds the number of combatants injured or killed. Rather, excessive "means the disproportion is not in doubt . . . ."[205] This interpretation is supported by addition of the term "clearly" in the relevant proportionality provision of the Statute of the International Criminal Court.[206]

5.8. Precautions in Attack

Even when a strike is directed at a military objective and would comply with the rule of proportionality, the attacker must take precautions in attack to verify the target is a lawful military objective and minimize harm to civilians and civilian objects. This requirement is fulfilled by using all feasible means to verify the target and by selecting the weapons, tactics and targets that can best avoid causing collateral damage without sacrificing any military advantage.[207]

Israel considers this prohibition, captured in Article 57 of Additional Protocol I, to be customary in nature.[208] MAG officers interviewed by the Authors emphasized the extent to which their

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[204] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1980 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter ICRC COMMENTARY]. *See also* DINSTEIN, *supra* note 178, at 131 (distinguishing "excessive" from "extensive" damage).

[205] DINSTEIN, *supra* note 178, at 131.

[206] *See id.* (" . . . the adverb 'clearly' is explicitly added in the Rome Statute."). *See also* Rome Statute, *supra* note 81, art. 8(b)(iv) (stating that damage which is clearly excessive in relation to the military advantage expected qualifies as a serious violation falling under the jurisdiction of the ICC).

[207] *See* Jean-Francois Queguiner, *Precaution under the Law Governing the Conduct of Hostilities,* 88:864 INT'L REV. RED CROSS 793 (2006) (discussing the general precautions required "to avoid, or at least minimize, collateral casualties and damage").

[208] NWP 1–14, *supra* note 115, at ¶ 8.1; CIHL Study, *supra* note 75, at CH. 5.

operations complied with the requirement to take precautions when conducting attacks. They cited the fact that over 2,000 "sensitive sites" were identified in Gaza that were either on a "no strike" list or that were "restricted" in the sense that an attack against them required special caution or higher-level approval than would otherwise be the case.[209] Although the lists are classified, the MAG officers cited mosques as an example of a category necessitating higher-level approval.

Additionally, the IDF carefully weaponeers each strike. For instance, during Operation Protective Edge, the vast majority of the air-delivered weapons were precision-guided munitions (PGMs). In some cases, the IDF uses weapons that have been specifically designed with such characteristics as penetration capability, low blast, no blast (inert) or low fragmentation. The IDF also considers tactics such as angle of attack, timing of the strike to occur when civilians are least likely to be in the area, or using weapons set to explode after burying into the target to minimize the collateral effects of the blast. As mentioned, RPAs, when available, are used to verify the target's status and to track targets to plan attacks when civilians are least likely to be harmed.

According to IDF operational and legal officers, the IDF also requires multiple sources to verify a target, except in those circumstances where its forces are immediately taking fire (a "troops-in contact" or "TIC" situation). These standards are set forth in classified standing IDF regulations that delineate the number and type of source required to verify particular categories of targets. Although it is rarely done, the standards may be modified by an Operations Order (OpOrd) for a specific operation based on the operational environment and objectives, but only when the individual who approved the regulations or that individual's superiors agree.

During Operation Protective Edge, criticism was leveled at the IDF for its use of artillery in an urban area.[210] As the Authors were

[209] Sensitive sites are marked on operational maps used by the IDF.

[210] *See* Amnesty Int'l, *Israel/Gaza: Attack on UN School in Gaza a Potential War Crime That Must Be Investigated* (Jul. 30, 2014), https://www.amnesty.org/en/articles/news/2014/07/israelgaza-attack-un-school-gaza-potential-war-crime-must-be-investigated/ (noting its position that "it is inevitable that the repeated use of artillery in densely populated civilian neighbourhoods will lead to the unlawful killing and injury of civilians and destruction and damage to civilian buildings, regardless of the intended target.").

unable to visit the area concerned, they can offer no comment on whether the use violated the requirement to resort to militarily feasible means of attack to minimize civilian casualties. The Authors are of the view that there is no LOAC prohibition on using artillery in urban area; rather, its use is governed by the rule of proportionality and the requirement to take various precautions in attack. As an example, it might be used to clear structures of enemy forces when ground forces are moving into a dense area from which the civilian population has evacuated, subject—of course—to the usual rules of LOAC, including proportionality. IDF officers emphasized that the decision to employ artillery fire is not based merely on the unavailability of air assets but rather on the particular characteristics of the artillery in the attendant circumstances; it can often be the superior military choice of means because of its speed, flexibility, and persistence.

IDF officers were quick to point out that the requirement to take precautions in attack is subject to the condition of feasibility. Feasible measures are those that are "practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations."[211] In some cases, feasibility may be an issue of asset availability, as in the case of RPAs. MAG officers also accentuated the fact that the capability to engage in precautions in attack is always context specific. For instance, in order to engage a fleeting target it may be necessary to task aircraft that are presently airborne. Those aircrafts may not be armed with the optimal weapons to avoid collateral damage, but if it would not be militarily feasible to task another platform against the target the airborne aircraft may engage so long as the rule of proportionality is satisfied. Human intelligence is

[211] CIHL Study, *supra* note 75, at 54. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Reservation b, June 8 1977, ICRC Treaty, *available at* https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=D9E6B6264D7723C3C12563CD002D6CE4 (statements on "feasibility" made by the United Kingdom at the time of accession to AP I); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, art. 3(4), Oct. 10, 1980, 1342 U.N.T.S. 168 (defining 'feasible precautions' as quoted in text); Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices art. 3(10), May 3, 1996, 2048 U.N.T.S. 93 [hereinafter Amended Mines Protocol] (defining 'feasible precautions' further by listing examples of circumstances that should be included in the determination of feasibility); ICRC COMMENTARY, *supra* note 204, at ¶ 2198 (explaining the adoption of the words "feasible precautions").

another contextual asset that affects feasibility. In an area such as the West Bank where the IDF presently operates, it is more likely to have human intelligence sources that can verify a target than in Gaza, from which Israeli forces withdrew in 2005. Of course, feasibility may be determined by factors as simple as foul weather that blinds certain on-board sensors of an RPA or other aircraft or interferes with the guidance of particular categories of weapons.

What distinguishes IDF precautions in attack is their approach to warnings.[212] Additional Protocol I, Article 57(2)(c), provides that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."[213] As should be apparent from the discussion above, the IDF takes exceptional measures to warn the civilian population of attacks that may affect them. Indeed, it is difficult to imagine more robust warnings during an armed conflict. However, it is essential to distinguish Israel's practice in this regard from its legal obligations.

Israel takes the position that the requirement for warnings is customary in nature. In its view, said warnings need only be effective in the sense of being communicated to civilians who may be affected by an attack and being delivered in a manner that permits those civilians to take measures to avoid harm. Effectiveness is not evaluated by how many civilians actually heeded the warning, but rather by whether or not the civilian population had sufficient opportunity to protect itself against impending attacks. When multiple types of warning are possible, there is no requirement that any particular means be employed provided that the one selected meets the threshold of effectiveness. Nor is there any requirement that all feasible means of warning civilians be employed, that redundant means be used to ensure notification, that civilians be re-warned in the event they ignore a warning, or that the attacker set forth the means of finding safety (e.g., by designating no-fire areas to which the civilians should move).

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[212] *See* Pnina Sharvit Baruch & Noam Neuman, *Warning Civilians Prior to Attack under International Law: Theory and Practice*, 87 INT'L L. STUD. 361, 361 (2011) (exhibiting the views of a former and the present head of the IDF International Law Department on warnings).

[213] NWP 1-14, *supra* note 115, at 8.9.2. (requiring warnings in advance of bombardment "when the military situation permits."); CIHL Study, *supra* note 75, at r. 20.

The MAGs interviewed stressed, correctly so, that a warning need not be issued when circumstances do not permit, as when a warning may heighten the risk to the attacker or forfeit the element of surprise.[214] In certain situations, the IDF has chosen not to warn on this basis. This is most often the case when targeting a particular individual because a warning would allow him to escape. As a practical matter then, this means that warnings of a strike on a building are usually only issued when the building itself is a target based on its use or purpose. MAG officers stressed that although a warning might not be issued in advance of a strike targeting an individual in a building, the attack would be fully subject to the rule of proportionality and the other precautions in attack requirements. Additionally, if feasible, civilians who might be affected in adjacent buildings will be warned.

Circumstances may allow for a warning, but not permit much time for the civilian population to leave. This situation will typically arise when the enemy is using the warnings to either know when and where to use human shields or take measures to prevent the civilians there from leaving. Such practices may leave only a narrow window of opportunity to strike before the number of individuals likely to be harmed in the attack rises. Therefore, a strike soon after a warning may in certain circumstances be the best means for minimizing civilian injury even when it does not afford civilians a great deal of time to leave or take shelter.

The Israeli practice of roof knocking described earlier has been criticized by human rights groups and during investigations of Israeli practices, most notably in the controversial Goldstone Report.[215] Roof knocking has been characterized as increasing the risk to the civilians being warned and as an attack on a civilian object. These criticisms are counter-factual and counter-normative. First, the technique is only used when warnings have been issued and ignored or were infeasible to begin with. In such circumstances, the target is already subject to attack at the time the roof knocking occur; thus, if the civilians leave based on the technique, risk to them will have been dramatically reduced. As to the second point, the

[214] CIHL Study, *supra* note 75, at Commentary to r. 20; ICRC COMMENTARY, *supra* note 204, at ¶ 2223.

[215] *See* Goldstone Report, *supra* note 69, at ¶¶ 532–535. *See also* Laurie Blank, *The Application of IHL in the Goldstone Report: a Critical Commentary*, 12 Y.B INT'L HUMANITARIAN L. 347 (2009) (criticizing how the Goldstone Report applied the LOAC).

technique is only used when the building has been converted into a military objective through use (such as weapons storage). The intent is to motivate civilians remaining in the lawful target to depart.

Overall, the susceptibility of Israel to offensive lawfare by its enemies drives the IDF into taking precautions in attack that far exceed those required by the LOAC. Indeed, the Chairman of the U.S. Joint Chiefs of Staff recently sent a "lessons learned" team to Israel to examine measures the IDF takes to limit collateral damage during operations in urban areas.[216] In this regard, the Authors would hasten to add that many of those taken by Israel are based on policy, not the strictures of the LOAC. Therefore, before adopting such measures, the United States and other States would be well advised to carefully consider whether the same policy concerns animate operations in which they are involved.

6. CONCLUDING OBSERVATIONS

The central finding of this project is that the unique Israeli operational context described in Part I exerts an almost tyrannical influence over the IDF's legal organization and Israel's understanding and application of the LOAC. The driving forces in this context are 1) the risk of direct attack faced by the Israeli civilian population due to geography and enemy strategy and 2) the extremely high value Israel places on the safety of its soldiers. Israel's enemies clearly understand the extent to which these two factors loom large for Israel and exploit them to offset the qualitative and technical advantages that Israel enjoys in conventional warfare. They do this by directly targeting the Israeli population, seeking to capture individual Israeli soldiers and engaging in lawfare tactics.

IDF operations are clearly well-regulated and subject to the rule of law. The IDF has extremely robust systems of examination and investigation of operational incidents, and there is significant civilian oversight, both by the Attorney General and the Supreme Court. With respect to the MAG Corps, the Authors found its officers to be exceptionally competent, highly professional, and well-trained. The extent to which MAG officers are independent of

[216] David Alexander, *Israel Tried to Limit Civilian Casualties in Gaza: U.S. Military Chief*, REUTERS (Nov. 6, 2014), http://www.reuters.com/article/2014/11/ 06/us-israel-usa-gaza-idUSKBN0IQ2LH20141106.

commanders, especially when providing legal advice during ongoing operations, is striking. For instance, the fact that the MAG officers report up the legal, rather than operational, chain of command deviates from the practice of many other countries that engage regularly in combat, including the United States. In the view of the Authors, the Israeli system generates both positive and negative consequences. It fosters compliance with the law through MAG Corps possession of a "red card" vis-à-vis individual strikes and the concentration of investigative and prosecutorial authority in the Military Advocate General. However, the system sacrifices the intangible, but very real, relationship between Commanders and their judge advocates that results from being a member of the Commander's team. This relationship is, in the personal experience of the Authors, a key factor in securing the Commander's recognition that the law can serve as an enabler of broader operational and strategic objectives, rather than an obstacle to mission accomplishment.

Despite the difference in approach, the Israeli system is arguably better suited to the unique operational and strategic context in which Israel operates. In particular, because the IDF fights enemies who intentionally employ lawfare as a tactic and strategy, it has to be extremely cautious when conducting a strike that might be exploited. In such an environment, it is sensible to grant legal advisors greater authority than they might otherwise enjoy in a more traditional combat environment.

The operational context in which Israel finds itself also drives the IDF's approach to targeting. Given the geography of Israel and the multiple potential enemies it faces, centralizing air targeting and decentralizing ground attacks makes sense. Moreover, the operational tempo of the operations merits close legal supervision, which the Operational Law Apparatus is designed to provide. It is clear that the deliberate targeting cycle process employed by the Israeli Air Force is constructed so as to identify legal issues as they crop up and to facilitate compliance with LOAC as operations are being planned, approved and executed. Doing so is, as discussed, essential to countering the specific tactics employed by Israel's opponents.

The need for caution in the face of such enemy tactics caused the Authors surprise with respect to ground targeting. In particular, the Authors found it curious that the IDF does not place legal advisers into the individual Attack Cells. Dynamic targeting, such

as that conducted in the cells, can prove highly problematic because the situation is often murky and unfolds rapidly. During preplanned targeting, by contrast, there is more time to consider a legally problematic situation and seek advice. It would seem that a MAG officer in the targeting cells would be no less valuable than those serving in the OLA for deliberate air targeting. Although the Authors found the confidence displayed by IDF ground commanders in their own ability to apply the LOAC and the rules of engagement impressive, they were concerned that this confidence, if not properly channeled and monitored by legal advisers, could become counterproductive.

In terms of the law, there were no findings that would mark Israel as an outlier with respect to any particular norm. On the contrary, in most cases Israel's legal position on its customary law obligations is in accord with the targeting laws set forth in Additional Protocol I, as the Parties thereto typically interpret them. On a number of issues, Israel takes a different approach than Additional Protocol I parties, but none of its stances is unique; in most cases other non-Parties to the Additional Protocol, such as the United States, share them. It is especially noteworthy that the IDF now applies the notion of organized armed groups as a basis for targeting, apparently on the ground that the Supreme Court's approach in the Targeting Killing case is ill suited to the contemporary operational context. Israel's rejection of the notion of continuous combat function likewise demonstrates the IDF's sensitivity to the truism that the LOAC must be understood in, and responsive to, the context in which it is applied.

Although the Israeli positions on the LOAC principles and rules governing targeting are rather orthodox, the unique operational environment in which Israel finds itself clearly affects interpretation and application. As an example, given the propensity of Israel's enemies to use human shields, it is unsurprising that Israel has taken the position that individuals *voluntarily* acting in this manner are to be treated as direct participants in hostilities. In light of its enemies' frequent failure to distinguish itself from the civilian population, it is equally unsurprising that Israel has embraced the principle of reasonableness with respect to target identification. Perhaps most noteworthy is the high value Israel places on the safety of its soldiers and its civilian population. Although impossible to quantify, both Authors were convinced these concerns significantly influenced the value judgments made by Israeli commanders as they plan and

execute military operations, value judgments that often come into play in the application of such LOAC concepts as proportionality.

In the Authors' opinion, use of lawfare by Israel's enemies likewise shapes, whether consciously or not, Israel's interpretation and application of the LOAC. In particular, Israel has adopted an inclusive approach to the entitlement to protected status, particularly civilian status. Examples include Israel's positions on doubt, its treatment of involuntary shields as civilians who are not directly participating and its view that individuals who ignore warnings retain their civilian status. Although these positions might seem counterintuitive for a State that faces foes who exploit protected status for military and other gain, such positions are well suited to counter the enemy's reliance on lawfare. In this regard, Israel's LOAC interpretations actually enhance its operational and strategic level position despite any tactical loss. Along the same lines, in many cases, the IDF imposes policy restrictions that go above and beyond the requirements of LOAC.

Ultimately, this first look inside Israeli targeting revealed a system and an approach to the law that has been carefully crafted to take account of the distinctive operational context in which Israel finds itself, a context which drives its opponents into the adoption of strategies and tactics that in turn influence the Israeli approach. In other words, the operational and legal environments are highly synergistic and evolve continuously. It remains to be seen which elements of the system described above will survive the next war.