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This most recent wave of rocket attacks on Israeli population centers serve as a reminder that asymmetric warfare poses a fundamental challenge to Israel's national security, international standing, and democratic character. For a democracy like Israel, finding a way to defeat terrorist organizations within the bounds of the rule of law is essential for three reasons: first, no independent government can tolerate a threat that sends masses of its citizens to the shelters at a moment's notice; second, no society can long remain free if it continually sacrifices its liberties on the altar of national security; and third, no democracy can maintain its standing among the family of enlightened nations if it does not adhere to the international norms of armed conflict.

Twelve years ago, in the midst of a deadly wave of suicide attacks, the leadership of IDI established the National Security and Democracy Program. Born out of a dialogue with the leadership of the Israel Defense Forces, this flagship program seeks to help Israeli decision makers develop effective counterterrorism policies that strike a balance between national security, civil liberties and the rule of law.

To help concerned parties in Israel and around the world understand the legal aspects of this extraordinary conflict, the leaders of IDI's National Security and Democracy Program have put together a brief outlining the basic legal concepts involved and the boundaries of permissible action according to standard interpretations of existing international law. The authors of this brief are internationally recognized experts on the legal aspects of asymmetric warfare and counterterrorism. They offer an analysis, rooted in international law, of the practical challenges facing Israel in Gaza. They assess Israeli practices and underscore the need to balance between national security considerations and the fundamental obligation of every government to protect the lives of their citizens on the one hand, and considerations of human rights, the rule of law, and the obligation to minimize the risk to Palestinian civilians on the other. These scholars are available for consultation and interviews upon request.

With wishes for security and peace from Jerusalem,



Yohanan Plesner
President



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Legal Opinion

OPERATION PROTECTIVE EDGE AND INTERNATIONAL LAW

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INTRODUCTION

Over the past few days, the intensity of the conflict between Israel and Hamas in Gaza has increased. In the lines that follow, we will review the rules of international law relevant to Israel's use of force in the current operation, focusing on three areas: target selection, proportionality, and the duty to give advance warning.

At the outset, it must be clearly stated beyond any doubt: The actions of Hamas in the fighting of recent days constitute war crimes. Rocket attacks against unprotected Israeli civilians who do not pose a concrete military threat are a clear violation of international law and impose individual criminal responsibility on the perpetrators of the launchings. In addition, deliberately hiding among a civilian population and using civilians—including women and children—as human shields is also a war crime.

In this review, we will explore the restrictions incumbent on the State of Israel as a democratic state in this complex situation, irrespective of the war crimes committed by Hamas.

It is important to note that the purpose of this document is to present an introduction to the principles and rules of the law of war that are relevant to the current situation and to derive from them what is permitted, what is forbidden, and what should be taken into consideration during the decision-making process. It is not intended to be a discussion of whether the military operation itself is justified, as there is insufficient distance in time and a lack of detailed information about the events of the operation. This review is also not intended to assess the legality of the various actions of the IDF in the current conflict, as this too cannot be undertaken in the absence of comprehensive and reliable information about the events of the operation.

1. TARGET SELECTION

The most basic principle of the law of war is the principle of distinction. According to this principle, those engaging in attacks must distinguish between civilian targets and military targets. While military objectives are legitimate objects of attack, it is strictly forbidden to direct attacks towards civilian targets.

A. OBJECTS (STATIONARY TARGETS)

Any target being used for military purposes may be attacked (even if it is used for both military and civilian purposes), subject to the principle of proportionality as set forth below. Accordingly, a mosque being used to store weapons is a legitimate target during combat, provided that there is convincing evidence that the mosque is being used for a clear military purpose that is aiding Hamas.

Targets cannot be destroyed solely to intimidate a civilian population. Homes that are not being used for military purposes cannot be fired upon, and there certainly can be no attacks on homes that belong to the family members of terrorists (who themselves are not present at the time) just to frighten the family members and civilian population.

With regard to infrastructure, it is prohibited to attack facilities essential to the survival of the civilian population (e.g., water infrastructure, food storage facilities), except if the enemy uses them for military purposes to support military activities. Even in such a case, it is prohibited to destroy these facilities if the result will be the starvation of the civilian population.

B. HUMAN TARGETS

As stated, the rule of international law is that combatants are legitimate targets during combat and civilians must be protected from attack. Hamas operatives are not "combatants" as defined by international law; rather, they are "civilians taking direct part in hostilities." In other words, when Hamas fighters engage in actual combat activities (including shooting, planning, commanding, etc.), they are legitimate targets. The majority opinion among legal experts (including the International Committee of the Red Cross) is that there is no need to prove that a terrorist is actively engaged in terrorist activity at the specific point in time in which he is being targeted. It is sufficient to have proof showing that he regularly and continuously engages in combat action, in order to consider him a legitimate target at all times.

A civilian taking a direct part in hostilities constitutes a legitimate target for attack only when there is evidence that he is connected to a military activity and is making a substantial contribution to it. Civilian organizations (e.g., providers of medical services), traffic police, individuals involved in transferring funds, food providers, and the social welfare institutions of Hamas are not legitimate targets if there is no concrete evidence that the people providing these services are taking a direct part in hostilities against Israel. The fact that a person is engaged in religious or public activities, of course,

does not mean that he is not also taking direct part in military operations when he is not engaging in those activities. Each case must be decided on its own merits according to the available information.

2. PROPORTIONALITY

Even when there is a chance that citizens will be injured as a result of military action, there is no absolute prohibition against taking such action, as long as the target being attacked is a legitimate military target. The prohibition against such an attack applies only when the collateral damage to civilians is likely to be **excessive** in relation to the anticipated direct military advantage of destroying the military objective.

In recent years, Western armies, including the Israel Defense Forces, have made substantial progress in adhering to the principle of proportionality. Modern weaponry allows for considerable precision in attacking targets. Visual intelligence and advanced visualization tools enable identification and verification of the number of people located near targets very close to the time of the attack. Procedures and norms that have been incorporated into the practices of the armed forces guarantee that commanders have an unprecedented degree of awareness of potential collateral damage and prevent such damage in many cases. Indeed, during the current conflict, the IDF has released a series of videos that demonstrate that bombing missions were aborted when individuals who looked like civilians were identified in the vicinity of the target. In practice, the IDF does not consider civilians to be combatants, whether they volunteered to act as human shields or they were forced to do so; the IDF treats them as civilians for the purpose of the principle of proportionality. This approach, in which the army holds itself to extremely strict standards, is derived from both legal caution and concern for potential international reactions.

Commanders must always take into account the degree of harm to civilians and must ask themselves whether the operation could be executed in a way that would cause less harm and whether the anticipated harm to civilians is justified. Endangering the lives of civilians, including civilians on the opposing side, must be a major consideration in decisions made by commanders. Decisions regarding the proportionality of an attack can only be made at the time of the attack, on the basis of concrete data available at that time, and can sometimes be assessed after the fact with an eye towards determining whether the decisions that were made were reasonable based on the information that was available at the time. The fact that a great deal of information can be obtained by means of modern technology obligates the army to obtain this information and to use it to reduce civilian casualties.

3. THE DUTY TO GIVE ADVANCE WARNING

There is duty to give effective advance warning before an attack that may cause damage to civilians, unless circumstances prevent such warning.

The alert or warning may be given in any method that has been proven to be effective.

It is important to remember that the warning is not intended to allow indiscriminate bombing of a particular area without having to ascertain that there are no civilians in the vicinity. The goal of the warning is to minimize harm to civilians and to allow them to escape from the area of combat. The fact that Hamas does not allow civilians to leave the area does not release Israel from its responsibility to protect civilians from harm to the best of its ability. It is also not clear if the residents of a place like Gaza have a place to go, especially when a large number of residents are being asked to evacuate their homes. For this reason, in each case, it is necessary to examine the realities on the ground after the warning and to take steps that will reduce the damage to the civilian population.

CONCLUSION

Israel's actions during Operation Protective Edge are subject to the international laws of war. The fact that terrorist organizations abuse and violate international law does not exempt Israel from abiding by it, nor does the fact that certain countries in Europe and elsewhere abuse international law by prosecuting Israeli leaders and commanders for alleged violations. Continuing to comply with the rules of the international laws of war is vital both to enable Israel to preserve its legal and moral advantage over terror organizations and to ensure the international legitimacy of Israel's actions, which remains essential.

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