

## **Responding to Hamas Attacks from Gaza – Issues of Proportionality Background Paper**

**Israel Ministry of Foreign Affairs  
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### **Main Points:**

- Israel is in a conflict not of its own making – indeed it withdrew every Israeli soldier and all 8000 Israeli civilians from the Gaza Strip as part of its 2005 disengagement initiative. However, Israel has been forced to act in defense of its citizens, who have been and continue to be deliberately attacked by the Hamas terrorist organization.
- Although Hamas makes no effort to comply with international law, Israel is committed to limiting itself to a lawful response. This means that, while Hamas uses civilians both as a shield and a target, Israel seeks to limit injury to civilians on both sides.
- International law recognizes that civilian deaths and injuries may occur in lawful military operations. For an operation to be lawful it must be directed at a "legitimate military objective" and be "proportionate".
- Under the Geneva Conventions, as well as customary international law, if a military objective, such as a missile launcher or weapons stockpile, is placed in the heart of a civilian area, it does not cease being a lawful military objective. The primary responsibility for civilian casualties arising from the 'shielding' lies with the party that deliberately placed civilians at risk.
- International law also requires that any military operation be 'proportionate' in the sense that expected collateral damage to civilians and civilian objects must not be excessive in relation to the military advantage anticipated. This is a complex and difficult calculation and international law relies on the best determination of the commander in the field in the heat of the conflict to weigh all relevant considerations, including the security of his own forces.
- Israel has adopted these principles of the law of armed conflict, in its military training, its operational planning and in practice. Frequently, proposed operations are cancelled because the risk of injury to civilians might not be proportional to the military goals of the operation.

## **Introduction**

The current fighting situation in Israel and in Gaza and in particular the tragic death of civilians and damage to civilian property in the course of the conflict raises important and challenging questions. What is a legitimate target in responding to a terrorist attack? How can one determine if a response is disproportionate?

These questions are particularly acute in a situation in which the Hamas terrorist organization is using civilians both as a shield and a target. Israel, for its part, seeks to limit injury to civilians on both sides: the Israeli civilians deliberately targeted by Hamas' missiles and mortars, and the Palestinian civilians within whose midst it stockpiles and shoots them.

Israel is painfully aware that the flagrant violations of international law by the terrorists it is confronting do not absolve it of its own responsibility to comply with legal principles in its response. These principles of international law do not always contain clear-cut answers, but they give important guidance on the conduct of military operations:

### **1. Military operations and civilian casualties**

A core principle of the law of armed conflict is the 'principle of distinction' - the obligation to ensure at all times that a distinction is made between combatants and civilians. Nonetheless, international law recognizes that it is a tragic fact of armed conflict that civilian deaths and injuries may occur in lawful military operations. As the legal authority Oppenheim notes:

Civilians do not enjoy absolute immunity. Their presence will not render military objects immune from attack for the mere reason that it is impossible to bombard them without causing injury to the non-combatants.<sup>1</sup>

In practice, two key questions arise in relation to the legitimacy of the planning and execution of an operation: 1) Is the target itself a legitimate military objective? and 2) Even if the target is in itself legitimate, is there likely to be disproportionate injury and damage to the civilian population and civilian property.

### **2. Legitimate military objectives**

The generally accepted definition of "military objective" is that set out in Article 52(2) of Additional Protocol I of the Geneva Conventions, which provides:

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 total or partial

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<sup>1</sup> Oppenheim, *International Law* 1952, Vol. II p.415

destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>2</sup>

If a location is a legitimate military objective, it does not cease to be one because civilians are in the vicinity. As Article 28 of the IVth Geneva Convention provides:

The presence of a protected person may not be used to render certain points or areas immune from military operations.

Clearly, the deliberate placing of military targets in the heart of civilian areas is a serious violation of humanitarian law, and those who chose to locate such targets in these areas must bear responsibility for the injury to civilians which this decision engenders. As law of war specialist W. Hays Parks points out:

The defender has the primary duty of protecting the civilian population and removing civilians from military targets, if necessary.<sup>3</sup>

And as international law expert Yoram Dinstein notes:

Should civilian casualties ensue from an attempt to shield combatants or a military objective, ***the ultimate responsibility lies with the belligerent placing innocent civilians at risk.***(emphasis added)<sup>4</sup>

Nonetheless the callous disregard of those who hide behind civilians does not absolve the state seeking to respond to such attacks from the responsibility to avoid or at least minimize injury to civilians and their property in the course of its operations. In particular this raises the complex issue of proportionality.

### 3. Proportionality

The second legal requirement is that any attack be proportionate, in the sense that incidental loss and damage expected to be caused to civilians and civilian objects must not be excessive in relation to the military advantage anticipated.

Major General A.P.V. Rogers, a former Director of British Army Legal Services, explains the rationale behind this principle:

Although they are not military objectives, civilians and civilian objects are subject to the general dangers of war in the sense that attacks on military personnel and military objectives may cause incidental damage. It may not be possible to limit the radius of

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<sup>2</sup> This definition has been criticized by some for being too narrow, and failing to pay sufficient attention to war-sustaining capability, including economic targets See e.g. W. Hays Parks, *Air War and the Law of War*, 32 *A.F.L. Rev.* 1, 135-45 1990)

<sup>3</sup> W. Hays Parks *Op Cit* 190. Hays Parks goes on to explain the logic behind ensuring that a force is not required to assume additional responsibilities as a result of the illegal acts of the defender since such an approach "would serve as an incentive for the defender to continue to violate the law of war by exposing other innocent civilians to similar risk"/

<sup>4</sup> Dinstein, *Conduct of Hostilities under the Law of International Armed Conflict*, 2004 p.131

effect entirely to the objective to be attacked... Members of the armed forces are not liable for such incidental damage, provided it is proportionate to the military gain expected of the attack.<sup>5</sup>

While the principle is clear, in practice weighing an expected military advantage against possible collateral damage can be an extremely complex calculation to make, especially in the heat of an armed conflict. In their report to the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, the Committee established to review NATO bombings in Yugoslavia highlighted the particular difficulties which arise when military objectives are located in densely populated areas:

The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants.... It is suggested that the determination of relative values must be that of the 'reasonable military commander'.<sup>6</sup>

Furthermore, in making this determination, a military commander is not required to ignore questions relating to the safety of his own forces. To the contrary, As Bothe et al note:

The concept of military advantage involves a variety of considerations including the security of the attacking force.<sup>7</sup>

#### **4. From theory to practice – Israel's operations in Gaza**

Israel has adopted the principles of international humanitarian law outlined above and the Israel Defense Force (IDF) has enshrined them in its training, operational planning and orders. As regards the selection of targets, IDF practice requires that a distinction be made between military objectives and civilian objects.

Similarly, in relation to the question of proportionality, IDF doctrine requires a commander to refrain from an attack that is expected to inflict incidental harm on the civilian population that is excessive in proportion to the expected military gain. In practice this requires the IDF and the commander in the field to assess both the expected military gain and the potential of collateral injury to civilians in the area.

Further to these measures, and where it possible to do so without compromising the effectiveness of an operation, the IDF makes strenuous efforts to give advance notice to the civilian population in the vicinity of military targets, including places used by terrorists for storing weapons and launching attacks, so that they

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<sup>5</sup> Rogers, *Command Responsibility under the Law of War* p.3

<sup>6</sup> *Final Report to the Prosecutor by the Committee established to review NATO bombings in Yugoslavia* para. 50-1

<sup>7</sup> *ibid.*

have an opportunity to leave the area. The warnings are carried out by means of the dropping of leaflets in Arabic, telephone calls and radio announcements. By encouraging civilians to leave such areas, these means have been found to be effective in saving lives.

By virtue of these and other measures, taken in accordance with the established principles of international law, Israel seeks to avoid or minimize civilian casualties. Each operation and target is considered on an individual basis in order to ensure that it meets the tests of distinction and proportionality. Frequently this means the rejection of proposed military operations when the likelihood of collateral damage to civilians and their property is considered too high.

Finally, and alongside the measures set out above, it should be noted that Israel is making major efforts, even in the context of the current hostilities, to ensure that the humanitarian needs of the civilian population in the Gaza Strip are met, by facilitating the transfer of essential supplies, such as food, medicine and fuel.

## **Conclusion**

The current military operation in Gaza is taking place against a clear asymmetry with regard to the implementation of principles of international humanitarian law: Hamas, in clear violation of these principles, deliberately targets Israeli civilians, and does so while placing its bases and stockpiles in the heart of civilian centers. Israel, on the other hand, seeks to apply the principles of humanitarian law, even against an opponent which flouts them. As Israel's Supreme Court, which is frequently petitioned to review the lawfulness of Israel's responses to terrorism, has repeatedly stressed:

This is the destiny of democracy, as not all means are acceptable to it and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand.<sup>8</sup>

Accordingly, Israel takes pains to ensure that it directs its attacks against legitimate military targets, and that in conducting its operations incidental injury to civilians is kept to a minimum. A survey of international practice suggests that the steps taken by Israel, and its approach to proportionality, correspond to, or are more stringent than, those taken by most western countries confronting similar threats.

The suffering of civilians on both sides of this conflict is tragic. Israel is making strenuous efforts to reduce this toll, both by protecting Israeli civilians and seeking to minimize injury to civilians within the Gaza Strip. Israel's efforts in this regard should not, however, diminish the ultimate responsibility of those who callously and deliberately use the civilian population as a shield for the injury that inevitably results from their actions.

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<sup>8</sup> HCJ 5100/94