

## **ANALYSIS**

### **Responding to Hizbullah: The truth about proportionality**

#### **The Foreign Ministry's legal adviser explores the legitimacy and proportionality of Israel's current military campaign**

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The current fighting in Israel and Lebanon, and in particular the tragic death of civilians and damage to civilian property in the course of the conflict, raise important and challenging questions. What is a legitimate target in responding to a terrorist attack? How can one tell if a response is disproportionate? These are complex questions with no easy answers, but international law gives important guidance on these issues:

Military operations and  
civilian casualties

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.

This principle is also reflected in international criminal law. As the Chief Prosecutor of the International Criminal Court, Luis Moreno Ocampo has written: Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur.

He goes on to note that a crime only occurs if “there is an intentional attack directed against civilians or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage.”

As Ocampo notes, two fundamental 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?

#### **Legitimate military objectives**

The generally accepted definition of “military objective” is that set out in Article 52(2) 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 destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

This definition has been criticized by some for being too narrow, and failing to pay sufficient attention to war sustaining capability, including economic targets.

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 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.

But 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.

## **Proportionality**

The second legal requirement is that any attack be proportionate 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 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.

While the principle is clear, in practice weighing 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."

One important principle established by international law for the "reasonable military commander" seeking to make this difficult balance, is that the proportionality of a response to an

attack is to be measured not in regard to the specific attack suffered by a state but in regard to what is necessary to remove the overall threat. As Rosalyn Higgins, currently President of the International Court of Justice, has written, proportionality: cannot be in relation to any specific prior injury – it has to be in relation to the overall legitimate objective of ending the aggression.

Accordingly, the right of self-defense includes not only acts taken to prevent the immediate threat, but also to prevent subsequent attacks.

### **From theory to practice – Israel's operations in Lebanon**

Israel has adopted the principles of international humanitarian law outlined above and the Israel Defence Force has enshrined them in its Manual on the Laws of War. As regards the selection of targets, the Manual not only requires that a distinction be made between military objectives and civilian objects but also provides that “in cases where there is doubt as to whether a civilian object has turned into a military objective... one is to assume that it is not a military objective unless proven otherwise.”

Similarly, in relation to question of proportionality, the IDF Manual states: Even when it is not possible to isolate the civilians from an assault and there is no other recourse than to attack, the commander is required to refrain from an attack that is expected to inflict harm on the civilian population that is disproportionate 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 Lebanese civilians. As regards the expected military gain, it should be noted that the relevant advantage is not of that specific attack but of the military operation as a whole. As the German Military Manual points out: The term “military advantage” refers to the advantage which can be expected of an attack as a whole and not only of isolated or specific parts of the attack.

It should also be recalled that, as noted above, the relevant consideration to gauge the legitimacy of a response to an act of aggression is not the attacks which have already been committed, but the “overall objective of ending the aggression.” In Israel's case this means that its response has to be measured not only in respect of the initial Hizballah cross-border attack, or even the missiles which have already been fired at Israel’s northern towns and villages (some 2,500 at time of writing), but also against the threat of the estimated 13,000 missiles which Hezbollah still has and threatens to use against Israel.

The possibility of collateral injury to civilians must be weighed in light of these considerations. The deliberate placement of missile launchers and stockpiles of weapons in the heart of civilian centers, frequently inside and beneath populated apartment blocks, means that this risk is tragically high. This dilemma posed by this violation of the fundamental humanitarian principle of distinction between combatants and civilians has been exceptionally acute in densely populated areas in south Beirut, where Hizballah has deliberately located its headquarters and terrorist strongholds.

But the presence of civilians in the area does not stop a military objective from being a legitimate target. This is not just the law, as noted above, but also the practice of states. The Australian Defence Force Manual reflects the prevailing practice: The presence of noncombatants in or around a military objective does not change its nature as a military objective. Non-combatants in the vicinity of a military objective must share the danger to which the

military objective is exposed.

In practice Israel does not adopt the position reflected here that civilians in the vicinity of a military objective must “share the danger,” but rather takes significant efforts to avoid or minimize civilian casualties. Any such operation is considered on an individual basis in order to ensure that it meets the test of 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. On other occasions, it means that operations are conducted in such a way as to reduce the likelihood of incidental damage, in terms of the timing or operational aspects of the attack. Finally, whenever it is possible without jeopardizing the operation, Israel issues advance notice to the local residents through various media, including dropping leaflets, to distance themselves from areas in which Hizballah is operating and from places in which weaponry is stored.

IDF operations in Lebanon have also included operations directed against infrastructure and property. These have included:

Bridges and roads – The activity of terrorist groups in Lebanon is dependent on major transportation arteries, through which weaponry and ammunition, as well as missile launchers and terrorist reinforcements are transported. Damage to key routes is intended to prevent or obstruct the terrorists in planning and perpetrating their attacks. In this case it is also intended to prevent the kidnapped soldiers being smuggled out of the country.

Under international law there is widespread recognition that lines of transportation which can serve military purposes are a legitimate military target. In its Commentary on the Additional Protocols to the Geneva Conventions, the ICRC includes in its list of military objectives considered to be of “generally recognized military importance”: “Lines and means of communications (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.”

A useful practical test for gauging the military importance of lines of transportation is proposed in the US Air Force Pamphlet, which asks “whether they make an effective contribution to an adversary’s military action so that their capture, destruction or neutralization offers a definite military advantage in the circumstances ruling at the time.”

In the current situation, notwithstanding the security justifications for targeting major roads, the IDF takes pains to ensure that sufficient routes remain open to enable civilians to leave combat zones, and to permit the access of humanitarian supplies. Efforts are also made to ensure that damage to civilian vehicles is minimized.

Runways at Beirut International Airport – In the view of the IDF, rendering the runways unusable constituted the most appropriate method of preventing reinforcements and supplies of weaponry and military materiel reaching the terrorist organizations. It is also a response to reports that it is the intention of the terrorists to fly the kidnapped Israelis out of Lebanon.

Airports are widely recognized to be legitimate military targets. The Canadian Law of Armed Conflict Manual, for example, notes that “ports and airfields are generally accepted as being military objectives” while the ICRC list of generally recognized military objectives includes: “airfields, rocket launching ramps and naval base installations.”

It should be also be noted that, in its operation at Beirut Airport, the IDF was careful not to damage the central facilities of the airport, including the radar and control towers, allowing the airport to continue to control international flights over its airspace.

Al Manar TV station – Operating as the Hizballah television station, Al Manar’s was used to relay messages to terrorists as well as incite acts of terrorism. The ICRC list of accepted military objectives includes “the installations of broadcasting and television stations.” Similarly, the Committee established to review NATO bombings in Yugoslavia noted in relation to NATO attacks on radio and television stations in Belgrade: “If the media is used to incite crimes then it is a legitimate target... Insofar as the attack actually was aimed at disrupting the communications network it was legally acceptable.”

Fuel reserves – Terrorist activity is dependent, inter alia, on a regular supply of fuel without which the terrorists cannot operate. For this reason a number of fuel depots which primarily serve the terrorist operations were targeted. From intelligence Israel has obtained, it appears that this step has had a significant effect on reducing the capability of the terrorist organizations.

The legitimacy of directing attacks on fuel and power installations has been widely noted. The Canadian Law of Armed Conflict Manual, for example, lists “petroleum storage areas” as “generally accepted as being military objectives,” while the ICRC list of military objectives also includes “Installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.”

## **Conclusion**

The current military operation is taking place against a clear asymmetry with regard to the implementation of principles of international humanitarian law: Hizballah, 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.

In doing so, Israel takes pains to ensure that it directs its attacks against legitimate military targets, and that in conducting its operations incidental damage to civilians is kept to a minimum, both by ruling out attacks which would cause disproportionate damage, and by giving advance notice wherever possible. A survey of international practice suggests that the steps taken by Israel 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 civilian suffering on the Lebanese side. 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.