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ANALYSIS OF PRECAUTIONARY MEASURES DEPLOYED BY ISRAEL DEFENSE FORCES DURING OPERATION PROTECTIVE EDGE IN 2014 IN THE LIGHT OF INTERNATIONAL HUMANITARIAN LAW

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Analysis of Precautionary Measures Deployed By Israel Defense Forces During Operation Protective Edge in 2014 in the Light of International Humanitarian Law

2014 “Koruyucu Hat Operasyonu” Sırasında İsrail Savunma Kuvvetleri Tarafından Uygulanan Saldırı Önlemlerinin Uluslararası İnsancıl Hukuk Işığında Değerlendirilmesi

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ABBREVIATIONS

AP I	Additional Protocol I to the 1949 Geneva Conventions (1977)
AP II	Additional Protocol II to the 1949 Geneva Conventions (1977)
CCWC	Convention on Certain Conventional Weapons
CIL	customary international law
GC IV	Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War
GSs	Geneva Conventions
HCJ	Israeli High Court of Justice
IAC	international armed conflict
IAF	Israeli Air Force
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of The Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israel Defense Forces
IHL	international humanitarian law
LOAC	law of armed conflict
MAG	Military Advocate General
NIAC	non-international armed conflict
PLO	Palestine Liberation Organization
PNA	Palestinian National Authority
UN	United Nations

ABSTRACT

The thesis analyzes the conduct of the Israel Defense Forces (IDF) during the 2014 operation in Gaza in the context of International Humanitarian Law (IHL). The author specifically focuses on the principle of precautions in attack which obliges the fighting sides to apply all feasible precautions to avoid or, in any case, minimize incidental loss of civilian life. The first chapter examines the legal definition of "Precautionary measures", its sources in the conventions and in the jurisprudence of international criminal courts and its links with other categories of IHL. It also examines Israel's international legal obligations at the time when the conflict in Gaza took place. The second chapter uses diverse sources of information to reconstruct IDF's factual conduct of the 2014 operation and identifies patterns in its approach towards applying precautionary measures. The third chapter is an attempt of a legal assessment of the IDF's conduct of hostilities in the light of its obligations to apply precautions in attack. In the conclusion the author offers his own perspective on the problem.

ÖZET

Tezin amacı, İsrail Savunma Kuvvetleri'nin (IDF) 2014 yılında Gazze'de yürüttüğü operasyonu Uluslararası İnsancil Hukuk (IHL) ışığında değerlendirmektir. Yazar, özel olarak, sivil can kaybını önlemek veya her durumda en aza indirmek için savaşan tarafları mümkün olan tüm önlemleri almaya zorlayan „saldırı önlemleri" ilkesine odaklanmaktadır. Birinci bölüm, "saldırı önlemlerin" yasal tanımını, onun sözleşmelerdeki ve uluslararası ceza mahkemelerinin içtihatlarındaki kaynaklarını ve diğer IHL kategorileriyle olan bağlantılarını incelemektedir. Ayrıca, Gazze'deki çatışmanın yaşandığı sırada İsrail'in yürürlükte olan uluslararası yasal yükümlülüklerini de incelemektedir. İkinci bölüm, IDF'nin 2014 operasyonundaki fiili davranışları incelemek için çeşitli bilgi kaynaklarını kullanmakta ve saldırı önlemleri uygulamaya yönelik yaklaşımındaki kalıpları tespit etmektedir. Üçüncü bölüm, saldırı önlemleri uygulama yükümlülükleri ışığında, IDF'nin Gazze operasyonunu yürütmesini hukuki değerlendirme girişimidir. Sonuç bölümünde yazar soruna kendi bakış açısını sunmaktadır.

INTRODUCTION

Sarajevo, Grozny, Fallujah, Baghdad, Mosul, Gaza, Aleppo, Donetsk, Tripoli, Aden, Mogadishu – within the last three decades all of these urban centers, and many others, turned into battlefields where conflicting sides targeted each other not only with direct fire, but also with artillery and in some cases airstrikes. The civilian population – caught between the fighting sides – paid the heaviest price with tens of thousands getting killed in result.

Sadly, this is just a part of a much wider trend. As world population increasingly moves to urban centers also the modern wars are increasingly fought in densely populated areas[1]. Furthermore, not only is there nothing to suggest that this tendency could be reversed, but the general expectation is that it will accelerate. As Stephen J. Townsend, a four star US general, put it: "We're going to see battle in megacities and there's little way to avoid it"[2].

The trend of armed conflicts moving from battlegrounds where armies would face each other in the open into urban areas where ordinary people live and work has catastrophic humanitarian consequences. As ICRC President Peter Maurer pointed out, an overwhelming percentage of people killed or injured in the course of fighting in populated areas are civilians not military targets[3]. From the point of view of the International Humanitarian Law (IHL) – also known as the Law of Armed conflict (LOAC) or the Laws of War – which seeks to restrict and regulate the means and methods of warfare with a view to protecting non-combatants this situation poses a serious challenge.

A section of the IHL provisions which becomes increasingly relevant in this context are the rules on the protection of the civilian population, in particular the

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[1] International Committee of The Red Cross. (2015, June). EXPLOSIVE WEAPONS IN POPULATED AREAS HUMANITARIAN, LEGAL, TECHNICAL AND MILITARY ASPECTS (ref. 4244). p. 2. https://shop.icrc.org/expert-meeting-explosive-weapons-in-populated-areas-pdf-en

[2] As cited in Evans, R. (2019, May 6). Urban Legend: Is Combat in Cities Really Inevitable? War on the Rocks. https://warontherocks.com/2019/05/urban-legend-is-combat-in-cities-really-inevitable/

[3] Maurer, P. (2017, May 4). War in cities: what is at stake? Icrc.Org. https://www.icrc.org/en/document/war-cities-what-stake-0

ones relating to the prevention and mitigation of civilian loss. These obligations are found both in the treaty and customary IHL and are referred to jointly as the obligations of precautions[4].

The present work will focus on the question of precautions in attack in the context of the 2014 armed conflict in Gaza. More specifically, it will examine whether the conduct of hostilities by the Israel Defense Forces (IDF) complied in this regard with Israel's obligations under the IHL. In the author's view the answer to this question is relevant not only in the narrow context of the Jewish – Arab conflict in historic Palestine, but also in the context of a much broader and general question about the IHL's ability to protect civilian lives in the situation of hostilities in densely populated areas.

In an age where most of the armed conflicts are either non-international or fall into a legally grey area and where much of the fighting is done by non-state armed groups whose commitment to international humanitarian law is questionable at best the 2014 conflict in Gaza stands out for a number of reasons.

First, the IDF is an armed force of a developed, democratic state which is based on the rule of law, which declares compliance with all its obligations under international law and which cares for its international image. Second, the IDF is one of the most technologically advanced militaries in the world possessing unique capabilities not only in terms of weaponry, but also in terms of intelligence and reconnaissance. This – at least in theory – gives it an almost unparalleled capability to calibrate its conduct of hostilities so as to minimize civilian casualties. Third, the Israeli – Palestinian conflict is not only one of the most divisive problems of modern international affairs politically, but also a conflict whose legal aspect is of particular importance with both sides using international law as a means of delegitimizing the opponent. Fourth, because of the interest of the international public opinion in the situation in Gaza the actions of the IDF

[4] van den Boogaard J.C., Vermeer A. (2019) Precautions in Attack and Urban and Siege Warfare. In: Gill T., McCormack T., Geiß R., Krieger H., Paulussen C. (eds) Yearbook of International Humanitarian Law, Volume 20, 2017. Yearbook of International Humanitarian Law, vol 20. T.M.C. Asser Press, The Hague. p. 164. https://doi.org/10.1007/978-94-6265-264-4_5

were closely observed and scrutinized which provided the Israeli side with an additional incentive to comply with the provisions of the IHL.

In the light of the above, one could believe that the IDF's conduct of hostilities should have been beyond reproach. Examining whether that was indeed the case should not only tell us something about that particular round of fighting in Gaza, but also should give us an idea regarding the ability of the IHL to protect civilians in conflicts of a similar kind. Ultimately, should the IHL prove powerless in regulating the conduct of hostilities by a state-actor like Israel, the hopes for it shaping the conduct of non-state armed groups should not be very high.

This work focuses on analyzing the conduct of hostilities by only one side of the 2014 conflict. This is so for three reasons. First, the present thesis is not a moral or a political evaluation of the IDF's conduct, but rather a case study in how a modern military of a developed state approaches its obligations under the IHL in conditions of an asymmetric armed conflict fought in densely populated areas. Second, in line with Rule 140 of the customary IHL the obligation to respect the provisions of the international humanitarian law does not depend on reciprocity. Consequently, the conduct of hostilities by Israel's adversaries does not in any way alter Israel's legal obligations. This remains so even in case Israel's allegations regarding the Palestinian side's war crimes were to be 100% accurate. Third, analyzing the conduct of hostilities by organizations such as Hamas or the Palestinian Islamic Jihad which are classified as terrorist by both the EU[5] and the US[6] would lead to predictable conclusions and seems neither interesting nor having much relevance beyond the narrow context of the Israeli – Palestinian conflict.

The thesis consists of three chapters. The first chapter examines the history and definition of the notion of precautions in attack, its sources in both treaty and

[5] THE COUNCIL OF THE EUROPEAN UNION. (2009, June 16). COUNCIL COMMON POSITION 2009/468/CFSP of 15 June 2009 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2009/67/CFSP. Https://Eur-Lex.Europa.Eu/. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009E0468&qid=1412596355797&from=EN

[6] Foreign Terrorist Organizations. (2020, July 17). United States Department of State. https://www.state.gov/foreign-terrorist-organizations/

customary IHL and its links with other notions of IHL. It also examines Israel's international legal obligations with regard to precautions. The second chapter uses diverse sources of information to reconstruct IDF's factual conduct of the 2014 operation and identify patterns in its approach towards applying precautionary measures. The third chapter is an attempt of a legal review of the IDF's conduct of hostilities. In the final part the author offers his own perspective on the problem.

1. PRECAUTIONS IN ATTACK AND LAW APPLICABLE TO ISRAEL

The contemporary understanding of the principle of precautions in attack was defined by Article 57 of the 1977 Additional Protocol I to the Geneva Conventions of 1949, which conceptualized precautions as a whole set of closely intertwined principles and requirements (partly also codified in other articles of the AP I) for those who plan or decide upon an attack.

These included most importantly the requirement of constant care to spare the civilian population, the principle of distinction between military objectives and civilian objects, the requirement to minimize incidental loss of civilian life, the principle of proportionality between the anticipated concrete and direct military advantage and the expected loss of civilian life and the requirement to issue an effective advance warning.

Article 57 marked a breakthrough in the process of development of international humanitarian law, as it was the first treaty in which precautions were defined in such a clear, comprehensive and – perhaps most importantly – universal way. However, this doesn't mean, that certain elements of what is contemporarily understood under precautions were not present in the law of war before. Indeed, the idea of obligating or at least incentivizing the attacking party to avoid or minimize harm to civilian life and infrastructure is as old as the modern attempts to codify the laws of war themselves.

In this chapter I will, first, discuss the historic development of the concept of "precautions in attack" and other related principles of the law of war. Then I will examine the legal sources of the principle today. Finally, I will conclude the chapter by examining Israel's obligations regarding distinction, proportionality and precautions.

1.1. PRECAUTIONS IN ATTACK AND RELATED PRINCIPLES IN THE TREATY LAW OF ARMED CONFLICT

1.1.1. 1863 Lieber Code

In 1863 in the midst of the American Civil War the US president Abraham Lincoln issued an order to the US Union Forces (known today as the "Lieber Code") with the aim of instructing the troops as to the proper conduct in wartime. Although not a treaty and although with no legal effect beyond USA, it has nevertheless had a tremendous impact not only on the first Geneva Conference which started in the second half of the same year, but also on subsequent efforts to codify the laws of war.

A number of articles of the Lieber Code contained principles which were then crucial to the development of the modern law of war, including with regard to precautions. These included most importantly the doctrine of military necessity (Articles 14 and 15), the issuing of warnings before an imminent artillery strike (article 19), distinguishing between combatants and "private individuals" (article 22) and sparing the latter (articles 22 and 23). Interestingly enough, although the Lieber Code itself declared these stipulations to be manifestations of the superiority of the "modern civilized nations" over the "barbarous armies" of the "uncivilized people", their actual application in the field of combat was still considered optional. In other words, the unarmed citizens were not to be killed only "as much as the exigencies of war will admit".

1.1.2. 1968 St. Petersburg Declaration

In the winter of 1868 at the initiative of the Imperial Cabinet of Russia a group of countries including all major powers of the time adopted in Saint Petersburg the "Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight". Although focused on regulating what munitions may be legitimately used in warfare the Declaration stipulated also that "the only

legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy".

This marked the first codification of the principle of limited warfare, a rule crucial to the entire modern law of armed conflict worded in the 1907 Hague Convention (IV) as: "the right of belligerents to adopt means of injuring the enemy is not unlimited".

What follows from this single sentence is not only the prohibition to use weapons causing unnecessary suffering, but also the sparing of disabled or wounded adversaries, a distinction between combatants and civilians and even the possible saving of the latter[7]. The sub-principles that have developed from the principle of limited warfare include both modern regulations of means and methods of warfare (laid down in Part III of the AP I) as well as, implicitly, provisions regarding the protection of the civilian population (Part IV of the AP)[8].

1.1.3. 1907 Hague Conventions (IX) and (IV)

A direct obligation to undertake precautions to spare the civilian population and infrastructure was first codified in Article 2 the 1907 Hague Convention (IX).

Article 1 of the Convention prohibits the bombardment by naval forces of undefended ports, towns, villages, dwellings or buildings.

Article 2 deals with a situation when military necessity dictates the need to attack a military target that is located within an area enjoying protection under Article 1. It stipulates that such a target may be destroyed with artillery after issuing a warning followed by "a reasonable time of waiting". If local authorities fail to destroy the target themselves, the attack may commence.

However, Article 2 also stipulates that if for military reasons immediate action is necessary and no delay can be allowed to the enemy, it is permitted to carry out

[7] See Herczegh, G. (1984). Development of International Humanitarian Law. Akadémiai Kiadó. p. 28.

[8] See Oeter, S. (2008). Methods and Means of Combat' in Fleck, D. (ed.) (2008). The Handbook of Humanitarian Law in Armed Conflicts (2nd ed, pp. 401 - 479). Oxford University Press. pp. 127 – 128.

the attack, however the commander is obligated to "take all due measures in order that the town may suffer as little harm as possible".

In terms of the advance warnings article 6 of the Convention stipulates that provided that the military situation permits "the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities".

This provision is present also in a similar, but stricter form in the Hague Regulations which are an annex to the 1907 Hague Convention (IV). Article 26 of the Regulations requires that: "The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities".

Thus, whereas Article 6 of the Hague Convention (IX) envisaged a possibility of a general derogation ("if the military situation permits") the Hague Regulations made it possible only in cases of assault (cases where an element of surprise is required)[9].

1.1.4. 1949 Geneva Conventions

In spite of being a milestone in the process of development of international humanitarian law the four Geneva Conventions contributed little to regulating the methods and means of warfare and to strengthening the protection of the civilian population against the dangers of hostilities. Consequently, the relevant rules remained in both regards more or less unchanged since the Hague Conventions of 1907 leaving the questions of distinction and collateral damage largely unregulated.

The only clause of the GC IV relevant in the context of the development of the principle of precautions in attack is included in Article 19 (1) dealing with the circumstances in which the protection of a civilian hospital maybe discontinued. The article provides that the protection may cease if a hospital is used to commit,

[9] See Bothe, M., Eaton, M., Solf, W. A., & Partsch, K. J. (2013). New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949: Vol. 2nd ed. Brill | Nijhoff, p. 410.

outside of its humanitarian duties, acts harmful to the enemy and a due warning giving a reasonable time limit was issued by the attacking party and remained unheeded.

1.1.5. 1977 Additional Protocol I relating to the Protection of Victims of International Armed Conflicts

The 1977 Additional Protocol I rectified many of the shortcomings of the 1949 GCs in terms of strengthening the protection of civilians against the dangers of hostilities in IAC and established the modern standard for defining some of the key IHL principles, including the one of precautions. After 43 years since its adoption with 174 state parties the AP I is among the most widely accepted international instruments, although it is still short of the nearly universal acceptance of the 1949 GCs. Its innovative value consists in a combination of reaffirming, clarifying or codifying the preexisting legal norms, as well as introducing entirely new provisions[10].

Among other things the AP I laid down definitions of civilians and civilian population (Article 50), of protection of the civilian population (Article 51) and of civilian objects (Article 52), reaffirmed the principle of distinction (Article 48), codified the requirement of proportionality (Article 51) and – most importantly in the context of the present thesis – expanded and clarified the principle of precautions in attack (Article 57). It also formulated the principle of precautions against the effects of attacks (Article 58).

1.1.5.1. Precautions in attack in AP I

Article 57 "Precautions in attack" consists of 5 points. Much of their content restates the provisions contained in other articles (in particular 48, 51, 52 and 54)

[10] See Kellenberger, J. (2002, September). International Humanitarian Law at the Beginning of the 21 Century. Keynote address at the 26th Round Table in San Remo on Current Problems of International Humanitarian Law.
https://www.icrc.org/en/doc/resources/documents/statement/5e2c8v.htm

or may be logically deduced/construed from them. However, the fact that the obligation to take precautions was codified systematically in a separate article clearly reinforced its status. Also, in contrast to previous instruments such as 1907 Hague Conventions which foresaw precautions only in specific situations, AP I introduced it as a universal rule to be observed continuously at all times during all attacks executed within an international armed conflict.

The structure of the Article is the following: Article 57 (1) formulates the general rule of precautions: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects". Article 57 (2) defines what types of precautions are to be applied. Most importantly it restates the principle of distinction, instructs the attacking party to take all feasible precautions in the choice of means and methods of attack, restates the principle of proportionality contained in Article 51 (5) and obligates the attacking party to issue an effective advance warning.

Cumulatively these provisions constitute a multistage test determining whether a given target may be attacked lawfully. For as Ian Henderson put it "not only must the target of an attack be lawful but lawful targets must be attacked lawfully"[11].

The first stage of the test is the verification whether the potential target is a "military objective". In line with Article 52 (2) in order to be considered a "military objective" a target needs to meet two conditions, first: by its nature, location, purpose or use, it must make an effective contribution to military action and second: its total or partial destruction, capture or neutralization offers a definite military advantage in the circumstances ruling at the time.

If the potential target meets both requirements the next stage is the test of proportionality. Article 57 (2) (a) (iii) sets forth that the attacker shall refrain from executing 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". Article 51 classifies such attacks as indiscriminate and therefore

[11] Henderson, I. (2009). The Contemporary Law of Targeting: [military Objectives, Proportionality and Precautions in Attack Under Additional Protocol I]. Brill | Nijhoff, p. 157.

prohibited. Article 85 (3) (b) defines a breach of the rule of proportionality as a "grave breach" of the AP I and consequently a war crime.

The test of proportionality constitutes an additional limitation on the discretion of combatants to launch attacks even if the selected target is in itself lawful. If civilian casualties or damage may be expected, the principle of proportionality raises the requirement of a "definite military advantage" found in the principle of distinction to the more restrictive standard of a "concrete and direct military advantage"[12]. In line with the 1987 ICRC Commentary advantages which are hardly perceptible and those which would only appear in the long term should be disregarded[13].

The final leg of the test is related to the issuing of warnings giving civilians the chance to protect themselves. Article 57 (2) (c) sets forth that an "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit".

The AP I establishes a universal and unequivocal obligation to warn. In other words, it is the default to issue a warning and a failure to do so that requires explanation[14]. At the same time, however, compared to the Hague Regulations AP I is more lax when it comes to derogations from the requirement ("except in cases of assault" vs. "unless circumstances do not permit" respectively)[15].

The 1987 ICRC commentary emphasizes that the warnings must be given in good faith and it would be unacceptable if they were to be applied as ruses of war with the aim of deceiving the population[16].

It is also not permitted (in line with Article 51 (2)) to use warnings with the objective of inducing terror among the civilian population.

Finally, Article 57 (5) sets forth that no provision in the article may be construed as authorizing any attacks against the civilian population, civilians or civilian

[12] See Supra note 9. p. 403.
[13] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987). International Review of the Red Cross. p. 2209.
[14] See Dil, J. (2014). Israel's Use of Law and Warnings in Gaza, Opinio Juris blog. http://opiniojuris.org/2014/07/30/guest-post-israels-use-lawwarnings-gaza/. Accessed 15 July 2020
[15] See Supra note 9. p. 409.
[16] See Supra note 13. p. 2225.

objects. Thus, for example the issuing of warnings does not affect the status of persons or objects as civilian and does not annul the requirement for the test of proportionality.

1.1.5.2. Criticism of the relevant provisions of AP I

All of its historical importance notwithstanding the AP I has also in some of its aspects been surrounded by controversy and a number of its provisions became a target of criticism both at the time of its adoption and today when its limitations became exposed by the military conflicts of the 1990s and 2000s. An exhaustive analysis of the disputes around specific provisions of the Protocol would go far beyond the scope of this work. I will, however, present a handful of critical voices whose arguments will be useful in the context of analyzing the main topic of this thesis – Israel's conduct of hostilities in Gaza in 2014.

1.1.5.2.1. Principle of proportionality

In his book of 1984 Geza Herczegh, a Hungarian legal scholar (and future International Court of Justice judge 1993 – 2003), who took part in the negotiations of the text of the Protocol raised a number of issues with regard to AP I which are of interest to us. His remarks will be presented not for their uniqueness but, on the contrary, for their representativeness of the critical voices that transpired both in the course of the travaux préparatoires and after the AP I was adopted.

The main target of Herczegh's criticism was the principle of proportionality (and its inclusion in Article 57). In his view not only does it seek to compare and weigh things that are incomparable in nature, but it also introduces vague concepts such as "military advantage" unknown to the 1949 Geneva Conventions which only used the notion of "military considerations". According to him the result of this situation is dangerous relativism. In his view: "soldiers strive, first of all, after military success ... As a consequence, they are inclined to attribute greater weight

and significance to the advantages anticipated than to the losses caused among the civilian population and to the damage done to civilian property, which they often have neither time nor opportunity to consider thoroughly amidst the conditions of armed conflict. The vague concept of military advantage is a blank sheet for the commanders to fill in with an authorization at their discretion… Reality demands the formulation of unambiguous rules which leave no doubts in the soldiers' minds and the implementation of which does not depend on complicated subjective considerations"[17].

A theoretical tool designed in the beginning of the 21st century to mitigate the problem of relativity in assessing compliance with the rule of proportionality is the standard of a "reasonable military commander"[18] postulated by the International Criminal Tribunal for the former Yugoslavia. In its judgment on the Galić case the ICTY defined it as follows: "In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack"[19].

However, in spite of the "reasonable commander" standard and the fact that many advanced militaries have developed tools assisting officers in assessing proportionality and incorporated these tools into military manuals, doctrines and rules of engagement[20], the decisive proportionality assessment and the responsibility for it remains with the individual military commander. For this reason, the principle of proportionality and the notion of military advantage still

[17] Herczegh. p.157.

[18] Formulated first in: International Criminal Tribunal for the Former Yugoslavia (ICTY). (2000, June). Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia. https://www.icty.org/x/file/Press/nato061300.pdf

[19] International Criminal Tribunal for the former Yugoslavia. (2003, December 5). Galić (IT-98-29) International Criminal Tribunal for the former Yugoslavia. P. https://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf

[20] See Gillard, E-Ch. (2018). Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment. International Law Programme, Chatham House Research Paper. https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incidental-harm-gillard-final.pdf

belong to the most debated concepts of the IHL and many of the questions raised by the early critics, such as Herczegh, remain valid.

As Stefan Oeter rightly points out: "Assessing proportionality always has been a contextual judgment. In principle all seems clear if you look into the usual handbooks and manuals …. But in practice the yardsticks are not that clear"[21]. The problems that are contemporarily typically raised in this context are the definition of the military advantage or the question whether the security of attacker's own troops may be calculated into the proportionality equation and, in result, justify higher collateral damage[22]. Another question, that often transpires specifically in the context of Israel's asymmetric conflicts, concerns the impact of defensive systems on determining military advantage. In particular, should a diminished military advantage be seen in attacking the offensive capabilities of the adversary if these capabilities are less likely to reach their target due to one's own effective active defense measures[23].

1.1.5.2.2. Principle of precautions in attack

In mid 2000s, professor Michael N. Schmitt raised another problem created by the provisions of AP I, this time directly related to the principle of precautions in attack. Schmitt admits that in the light of AP I the legal standard that applies to belligerents is a constant. He argues however that the duty on the part of the attacker to do everything feasible to verify that the target is not immune from attack and to take all feasible precautions, results in a situation when militaries with more capabilities in terms of C4ISR (Command, Control, Communications,

[21] Oeter S. (2007) Comment: Is the Principle of Distinction Outdated?. In: von Heinegg W.H., Epping V. (eds) International Humanitarian Law Facing New Challenges. Springer, Berlin, Heidelberg, p. 57.

[22] A concise catalogue of the pending questions with regard to the rule of proportionality was presented for example by professor Torsten Stein in: Stein T. (2007) Collateral Damage, Proportionality and Individual International Criminal Responsibility. In: von Heinegg W.H., Epping V. (eds) International Humanitarian Law Facing New Challenges. Springer, Berlin, Heidelberg.

[23] See Katzir, R. (2018), Four Comments on the Application of Proportionality under the Law of Armed Conflict, 51 Vand. J. Transnat'l L. 857 (2018) / Vanderbilt Journal of Transnational Law, Vol. 51, Issue 3 (May 2018), pp. 857-866.

Computers, Intelligence, Surveillance and Reconnaissance) are effectively held to a higher standard for the simple reason that more precautionary measures are available to them. In his view this situation will lead to a growing "normative relativism" as the disparity in technical capabilities between belligerents will continue to grow[24]. According to Schmitt the situation when the legal standards in terms of taking precautions in attack are not objective, but subjective (a belligerent is required to do what is feasible and feasibility depends on the available capabilities) is dangerous for the reason that: "states comply with the law of armed conflict in part due to reciprocity, i.e. they agree to be bound because their opponents shoulder identical obligations… With precautions in attack, however, the law itself, interpreted in a completely neutral manner, imposes dissimilar duties"[25]. This in Schmitt's view may cause dissatisfaction of the belligerent bearing the greater burden of the legal obligation and, consequently, lead to the marginalization of the IHL.

1.1.6. 1977 Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts

In spite of the high hopes accompanying the negotiations of the text of AP II for establishing a similar standard of protection for the civilian population in NIAC as the one set forth by AP I the adopted text offers only minimal safeguards as it was reduced to a minimum in the final hours of the 1977 Diplomatic Conference. Article 13 (1) of the AP II stipulates that the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. Article 13 (2) sets forth that the civilian population as such, as well as individual civilians, shall not be the object of attack. Additionally, one of the clauses of the Preamble recalls that "in cases not covered by the law in force, the

[24] Schmitt M.N. (2007) Asymmetrical Warfare and International Humanitarian Law. In: von Heinegg W.H., Epping V. (eds) International Humanitarian Law Facing New Challenges. Springer, Berlin, Heidelberg. pp. 33 – 38.
[25] Schmitt, M. N. (2006). War, Technology and the Law of Armed Conflict, In A. M. Helm & Naval War College (U.S.). (2007). The law of war in the 21st century: Weaponry and the use of force. Newport, RI: Naval War College. pp. 163 – 164.

human person remains under the protection of the principles of humanity and the dictates of the public conscience" (the Martens Clause as formulated in the 1907 Hague Conventions).
The principles of proportionality and precaution present in AP I are therefore absent from the text and may only be construed from the concepts of "general protection", the Martens Clause, as well as the rules of customary international law.

1.1.7. Amended Protocol II to the 1980 Convention prohibiting Certain Conventional Weapons

The relevance of the Amended Protocol II to the CCW Convention in the context of the present historical overview stems not as much from the content of its provisions, but rather from the scope of its applicability for it applies to both types of conflicts.
In Article 3 the Amended Protocol spells out (in a language modeled after relevant provisions of the AP I) basic requirements of distinction (para. 7), proportionality (para. 8), precautions in attack (para. 10) and advance warning (para. 11) with regard to the use of mines, booby-traps and other devices. Consequently, in the context of NIAC it provides a higher standard of protection than the general provision of the AP II (albeit in a specific context).

1.1.8. Rome Statute of the International Criminal Court

In articles 8 (2) (b) (iv) and 8 (2) (b) (v) the Rome Statue of the ICC declares intentional violations of the principles of proportionality and distinction committed in the context of an IAC to be war crimes falling within the jurisdiction of the Court. With regard to proportionality the war crime would consist in causing collateral damage "clearly excessive in relation to the concrete and direct overall military advantage anticipated". The wording of the article is very close to that of Article 51 (2) (b) and 57 (2) (a) (iii) of the AP I. However, the usage of the

word “clearly” (absent AP I) effectively sets a higher threshold for a violation to be internationally prosecuted.

1.2. PRECAUTIONS IN ATTACK AS CUSTOMARY INTERATIONAL HUMANITARIAN LAW

The statute of the International Court of Justice determines in Article 38 (1) (a) that the international custom “as evidence of a general practice accepted as law” is a source of international law and shall be applied by the Court in deciding disputes along with other sources such as international conventions and the general principles of law accepted by civilized nations.

The existence of a rule of customary IHL may be determined by examining whether a relevant state practice exists (*usus*) and whether it is being followed by the states from a sense of legal obligation (*opinio juris*). As the ICJ found in the North Sea Continental Shelf Case for a rule of customary IHL to be established the state practice (including that of states whose interests are specially effected) has to be both “extensive and virtually uniform”, as well as “show a general recognition that a rule of law or legal obligation is involved”[26].

1.2.1. International Criminal Tribunal for the former Yugoslavia, Kupreškić and Others Case

On 14 January 2000 the ICTY issued a judgment in the case of 6 HVO (Croatian Defence Council) soldiers charged with crimes against humanity and violations of the laws or customs of war in connection with their alleged role in the April 1993 attack on the Ahmici village in central Bosnia, which resulted in a massacre of 116 inhabitants of the village.

The judgment is relevant to our subject for it contained several findings regarding the customary character of the rules of proportionality and precautions in attack.

[26] ICJ, North Sea Continental Shelf cases, Judgement, 20 February 1969, Para. 74, ICJ Reports 1969, p. 43.

Most importantly the Court found that the principle of the international law prescribing that in the case of attack on military objectives reasonable care must be taken so that civilians are not needlessly injured, as well as the principle of proportionality were a part of customary international law "not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol"[27].

1.2.2. ICRC Study of Customary International Humanitarian Law

In 1995 the 26th International Conference of the Red Cross and Red Crescent tasked ICRC to prepare a report on customary rules of IHL applicable in international and non-international armed conflicts. As a result, in 2005 the ICRC published an extensive study on the subject in which it identified the existence of a total of 161 customary rules of IHL.

Importantly for our topic, Rules 14 and 15 – 21 of the study deal with the principles of proportionality and precautions in attack respectively. In short, the ICRC study found all 7 Rules (formulated in the language of the relevant provisions of AP I even if not always identically structured) to have the status of customary IHL in both IACs and NIACs.

This determination suggests that regardless of both Additional Protocols there exists a parallel regime of customary IHL which effectively makes the requirements identical to those of AP I universally applicable to all states (regardless whether they are parties to the APs) and both kind of conflicts.

Importantly, Israel was among the States whose practice the ICRC examined[28].

[27] ICTY, Kupreškić case, judgment (§§ 524), See https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf (accessed 3 August 2020)

[28] See International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, 2005, Volume II: Practice, pp. 297 – 366.

1.2.2.1. Criticism of the ICRC Study

Despite all appreciation the ICRC Study became also a target of serious criticism, including by the US government[29] and prominent scholars such as Yoram Dinstein[30].

In its official response to the Study the US government pointed to serious methodological flaws such as the cited state practice frequently falling short of the "extensive and virtually uniform" threshold set by the ICJ, overreliance on written materials published by States as opposed to their actual operational practice, undue importance attached to statements of NGOs (including those of the ICRC itself) and, finally, failure to pay due regard to the practice of specially affected States, i.e. the ones with extensive history of participation in armed conflicts. The US government was also concerned by the apparent blurring of the distinction between the tests of state practice and *opinio juris*. In the opinion of the US the result of these flaws were two erroneous assertions on the part of the ICRC. First, that a significant number of rules contained in the APs have achieved the status of customary international law and became therefore applicable to all States. Second, that certain provisions of the GCs and APs pertaining to IACs have also become binding as customary international law in NIACs[31].

The US government provided 4 examples of principles contained in the Study which it explicitly believed to have been groundlessly raised to the level of customary international law.

For the subject of the present thesis it is important to note that rules related to proportionality and precautions were not among them and their status as customary law has also not been disputed by any other state.

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[29] Bellinger, John B. III; Haynes, William J. II (June 2007). "A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law". International Review of the Red Cross.

[30] See Dinstein, Y. (2006). The ICRC Customary International Law Study. In. A. M. Helm & Naval War College (U.S.), The law of war in the 21st century: Weaponry and the use of force. Newport, RI: Naval War College.

[31] See supra note 29, pp. 445 – 448.

1.3. LAW OF ARMED CONFLICT APPLICABLE TO ISRAEL AND ISRAEL'S POSITION ON ITS OBLIGATIONS

In its 2002 judgment in the case of Physicians for Human Rights v. The Commander of IDF Forces in Gaza the Supreme Court of Israel remarked: "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"[32].

In terms of IHL treaties Israel is a party to the four Geneva Conventions of 1949 and to the 1980 Convention Prohibiting Certain Conventional Weapons and its Protocols. Israel did not, however, become a party to the key instruments relating to the protection of victims of armed conflicts, namely the Additional Protocols I and II to the GCs.

In light of the above, Israel's legal obligations regarding the requirements of proportionality and precautions stem primarily from customary international law, as well as domestic regulations both of which will be examined below. I will also examine Israel's position vis-à-vis the ICC resulting from the fact of Palestine's accession to the Rome Statue in 2015.

1.3.1. Israel's position on the customary IHL

Israel considers customary international law a part of its national law, unless a given provision contradicts domestic legislation, in which case the latter takes precedence. This is the consistent position of the Supreme Court of Israel[33].

[32] Supreme Court of Israel, The Public Committee against Torture in Israel et al. v. The Government of Israel et al., Supreme Court of Israel, 14 December 2006, HCJ 769/02, http://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=D14F3F94989B702FC12572D80043927B (accessed 6 August 2020)

[33] See Supreme Court of Israel, Abd al Nasser al Aziz v. Commander of IDF Forces, 4 October 1988, HCJ 785/87. https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\87\850\007\Z01&fileName=87007850_Z01.txt&type=4 (accessed 6 August 2020)

In its official report on the 2014 Gaza conflict Israel declares recognition of and compliance with all rules of customary international humanitarian law, including rules embodied in conventions to which it is not party. According to the document this applies both to the 1907 Hague Convention (IV) and the 1977 Additional Protocols I and II, which Israel views as binding inasmuch as they reflect rules of customary international law[34].

Hence, the question arises which provisions of both APs Israel considers customary. In their 2015 article Michael N. Schmitt and John J. Merriam listed (based on a source in the IDF's International Law Department) at least five provisions of the AP I which the IDF does not consider customary in character. These are related to the protection of natural environment in Articles 35 (3) and 55 (1), the prohibition of perfidy 37 (1), the definition of IAC in 1 (4) and the status of combatants wearing civilian clothes in 44 (3)[35]. Additionally, Israel also openly objects to the customary status of the principle enshrined in Article 51 (3) which sets forth that civilians taking a direct part in hostilities may be legitimately targeted only while they are taking a direct part in hostilities. From the Israeli standpoint the rejection of this rule was an important premise for proving the lawfulness of IDF's targeted killings campaign against the high-ranking members of Hamas and other armed Palestinian groups[36].

Israel's general position on the customary character of the provisions of the AP I was characterized by the IDF's then Military Advocate General Avichai Mandelblit in his appearance before the Public Commission to Examine the Maritime Incident of 31 May 2010 (the Turkel Commission) in April 2011. In his testimony Mandelblit remarked that Israel accepts that the substantive provisions of the AP I such as the prohibition of indiscriminate attacks are of a customary nature. What Israel does not accept however are some procedural provisions that extend the application of the substantive provisions to places Israel does not find

[34] See The State of Israel. (2015, May). The 2014 Gaza Conflict: Factual and Legal Aspects. p. 6. https://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf

[35] Schmitt, M. N., & Merriam, J. J. (2015). The tyranny of context: Israeli targeting practices in legal perspective. University of Pennsylvania Journal of International Law, 37(1). pp. 96 -102.

[36] See supra note 32.

correct mainly because this gives greater power to non-state actors at the expense of military forces. Consequently, Israel's position is that "everything that is not a substantive norm in the First Additional Protocol is not binding"[37].

In conclusion, although Israel's recognition of the rules of AP I as customary IHL is not complete and although Israel never released a definite summary of its position on the Protocol, the number of provisions it openly rejects is fairly limited and none of them concern the rules of distinction, proportionality or precautions. Also, the available official documents (even if they are few in numbers and the status of some is disputed) testify to Israel's acceptance of these rules as customary and binding[38]. The official Israeli report on the 2014 conflict declared that the IDF specifically directed that all its operations accord with the fundamental rules of the Law of Armed Conflict such as distinction, proportionality and precautions[39].

Additionally, the structure of the IDF's targeting process[40], as characterized by Schmitt and Merriam, which includes a multi-stage verification of the lawfulness of a planned attack in terms of proportionality and precautions also suggests that these principles have indeed been "integrated into IDF directives, operational procedures, training and education"[41].

1.3.2. Israel's domestic regulations

Although there is little doubt as to Israel's recognition of the requirements of the principles of proportionality and precautions as binding, its domestic regulations in this regard are scarce. The ones cited in the ICRC CIHL include military

[37] The Public Commission to Examine the Maritime Incident of 31 May 2010 (The Turkel Commission). (2013, February). Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law, p. 56. https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_b1-474.pdf

[38] See the ICRC's database of Israel's state practice pertaining to respective rules of the Customary IHL: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_il (accessed 4 August 2020)

[39] See supra note 34. p. xv – xvi.

[40] In the context of this thesis targeting will be understood as "The deliberate process followed by a military commander in deciding against which objectives he or she will apply force and the means that will be used to apply force. To be distinguished from attacking a target, which is the actual application of force", see supra note 11, p. xix.

[41] See supra note 34. p. 215.

manuals and the judgments of the Supreme Court of Israel sitting as the High Court of Justice.

1.3.2.1. Military Manuals

ICRC cites two IDF Military Manuals of 1998 and 2006. The status of the first as a normative document with a binding or authoritative standing was questioned by Prof. Dinstein who called it "not a genuine manual"[42]. It is unclear whether this applies also to Manual of 2006 (Dinstein wrote his article before it was published), but considering that it is the second edition of the 1998 Manual it is a probability[43]. In short, the Manual seems to include provisions that are mostly reflective of the specific provisions of Article 57 of the AP I, especially with regard to distinction, proportionality, choice of means and methods of warfare, control during the execution of attacks and advance warning.
However, a clause that seems to be lacking from the Manual is the general rule of precautions in attack obligating the attacking party to take constant care and apply all feasible precautions to save civilians and civilian objects.

1.3.2.2. Case Law of the Supreme Court of Israel

1.3.2.2.1 Adalah et al. v. GOC Central Command, IDF et al.

In its judgment on the subject whether solicitating local residents' aid by the IDF to warn a person who was to be arrested (to avoid violence during the arrest) was legal the Supreme Court stated that "to the extent that it does not frustrate the military action intended to arrest the wanted person, the army is permitted – and at times even required – to give the wanted person an early warning". The Law

[42] See supra note 30. p. 103.
[43] Author's efforts to obtain a copy of the Manual proved unsuccessful, therefore the following remarks rely on the excerpts available in the ICRC Internet data base: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_il

invoked in this context was the Article 26 of the Hague Regulations and article 57 (2) of the AP I[44].

1.3.2.2.2. The Public Committee against Torture in Israel et al. v. The Government of Israel et al.

In its judgment on the legality of the so called targeted killings, the Supreme Court made a number of remarks regarding the customary nature of the principle of proportionality and its applicability to IDF's operations. The Court stated as follows: "Customary international law regarding armed conflicts protects "civilians" from harm as a result of the hostilities…. From that follows also the duty to do everything possible to minimize collateral damage to the civilian population during the attacks on "combatants"" (§§ 26). It stated further that "the principle of proportionality applies in every case in which civilians are harmed at such time as they are not taking a direct part in hostilities" (§§ 43). Finally, it remarked that "when the damage to innocent civilians is not proportionate to the benefit of the attacking army, the attack is disproportionate and forbidden" (§§ 45)[45].

1.3.3. Israel vis-à-vis the International Criminal Court

In line with Article 12 of the Rome Statue, the International Criminal Court may exercise its jurisdiction in the case when one or more of the following states accepted it: the state on whose territory a crime was committed (a) and/or the state of which the person accused of the crime is a national (b).

On 31 December 2000 Israel signed the Rome Statue but has subsequently not ratified it and in result did not become a state party to it. Palestine, however, did. It became a party on 2 January 2015 (as the State of Palestine) and its government

[44] Supreme Court of Israel, Adalah et al. v. GOC Central Command, IDF et al., 6 October 2005, HCJ 3799/02, p. 10. https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/7ffdda5378172c9cc12573870052330f (accessed 6 August 2020)

[45] See Supra note 32.

accepted the jurisdiction of the ICC over alleged war crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014"[46]. Palestine's accession resulted in a preliminary examination by the Prosecutor of the ICC with the aim of determining whether the criteria of admissibility, jurisdiction and interests of justice are met in order for an investigation to be launched. Palestine also separately referred the situation to the Prosecutor on 22 May 2018.

On 20 December 2019 the Prosecutor of the ICC, Fatou Bensouda announced that the preliminary examination determined that the requirements of admissibility and interest of justice have been met. The Prosecutor found also that the Court has the necessary territorial jurisdiction over the situation in the Palestinian territories. In concluding so she referred to Palestine's status as a State Party to the Rome Statute and its status of a UN "non-member observer State." (since 29 November 2012).

However, although not required to do so by the Rome Statue, before launching the investigation the Prosecutor requested from the Court a pre-trial ruling regarding the scope of territorial jurisdiction of the ICC in Palestine, as "the question of Palestine's Statehood under international law does not appear to have been definitively resolved"[47].

In her request the Prosecutor noted that there is a reasonable basis to believe that war crimes were committed in the context of the 2014 hostilities by both the Israel Defense Forces (IDF) and Hamas. Among the three categories of the supposed IDF war crimes one was the launching of disproportionate attacks on at least three occasions[48].

Israel responded to the ICC Prosecutor's announcement with a memorandum of the Attorney General of the State of Israel, Avichai Mandelblit, arguing

[46] See State of Palestine. Preliminary examination. See: https://www.icc-cpi.int/palestine Accessed 15 July 2020.

[47] See SITUATION IN THE STATE OF PALESTINE. Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine p. 5, See https://www.un.org/unispal/wp-content/uploads/2020/01/ICCANNEX_201219.pdf (accessed 16 July 2020)

[48] Ibid. p. 53.

extensively for the Court's lack of jurisdiction over the "so called 'situation in Palestine'". Israel's principal argument was that the ICC's jurisdiction does not stem from the principle of universal jurisdiction but rather from the jurisdiction delegated to it by sovereign states which are parties to the Rome Statue. As Israel is not a party to the ICC and Palestine does not meet the criteria for statehood under the international law (most notably it is not sovereign) effectively no jurisdiction has been delegated to the Court. The Memorandum maintained also that Palestine's "purported accession" to the Rome statue was merely a "technical act" which did not determine the existence of a sovereign State of Palestine and, consequently, its ability to delegate jurisdiction. Israel emphasized furthermore that Palestinians' recognized right to self-determination was not to be conflated with statehood. In Israel's view, the recognition of the right of the Palestinians to self-determination is not tantamount to recognition of an already existing sovereign Palestinian State and cannot of itself establish one[49]. A number of States Parties to the Rome Statute such as Germany, Austria, Hungary, Czechia, Australia, Brazil and Uganda acting as *amici curiae* submitted to the Court their observations supporting Israel's position.

On 5 February the ICC's Pre-Trial Chamber I decided, by majority, that the Court's jurisdiction extends to "the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem". In its sixty page-long decision the Court decided not to dwell upon the issue of whether the State of Palestine fulfils the prerequisites of statehood under general international law. Instead, the Court decided the matter by determining that the reference to "the State on the territory of which the conduct in question occurred" (found in article 12 (2) (a) of the Rome Statute which defines the Court's jurisdiction *ratione loci*) must be understood as a reference to a State Party to the Statue. Having, next, determined that Palestine's accession to the Statute in January 2015 was

[49] STATE OF ISRAEL OFFICE OF THE ATTORNEY GENERAL. (2020, December 20). THE INTERNATIONAL CRIMINAL COURT'S LACK OF JURISDICTION OVER THE SO-CALLED "SITUATION IN PALESTINE" [Press release]. https://mfa.gov.il/MFA/PressRoom/2019/Documents/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20%E2%80%9Csituation%20in%20Palestine%E2%80%9D%20-%20AG.pdf

procedurally correct and legally effective the Court consequently confirmed that all provisions of the Statute shall be applied in the same manner to Palestine as to any other State Party[50].

Following the Court's decision, on 3 March 2021 Fatou Bensouda announced the official opening of the investigation into the situation in the State of Palestine[51] and – apparently – notified Israel about the launching of the probe and its planned scope[52].

The further course of the investigation is difficult to predict. Fatou Bensouda will leave her office in June 2021 and will be replaced by a British lawyer, Karim Khan and it is not yet clear how the successor will decide to go about the probe. Additionally, the investigation is bound to face a very strong political opposition from Israel[53] and, more importantly, the US[54] aimed at thwarting, impeding or redirecting its course.

However, unless the investigation will be discontinued altogether Israel's conduct of the 2014 hostilities will at some future point most likely be examined against the provisions of the Rome Statute regardless of Israel not being a state party to it.

1.3.4. The classification of the Gaza hostilities under IHL

The distinction between international and non-international armed conflicts is fundamental for the IHL as both types of conflicts are governed by separate sets of international law (at least with regard to treaty law).

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[50] ICC Pre-Trial Chamber I issues its decision on the Prosecutor's request related to territorial jurisdiction over Palestine. (2021, May 2). Https://Www.Icc-Cpi.Int. https://www.icc-cpi.int/Pages/item.aspx?name=pr1566

[51] Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine. (2021, March 3). Https://Www.Icc-Cpi.Int/. https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine

[52] Israel said to receive formal letter from ICC informing of war crimes probe. (2021, March 18). The Times of Israel. https://www.timesofisrael.com/israel-said-to-receive-formal-letter-from-icc-informing-of-war-crimes-probe/

[53] See e.g. the website developed by the Israeli Ministry of Strategic Affairs: https://iccjurisdiction.com/

[54] The United States Opposes the ICC Investigation into the Palestinian Situation. (2021, March 4). United States Department of State. https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/

Classifying the Israeli – Palestinian conflict in general and the hostilities in Gaza in particular along these lines is probably one of the most difficult problems of the IHL and the conflict has historically been assigned to both categories by different bodies at different times.

Debating this issue would go far beyond the scope of this work and would inevitably end without a clear conclusion. Fortunately for the author, deciding the issue is not necessary for at least two reasons. First, as presented in the previous sections, the law applicable to the Gaza hostilities in terms of proportionality and precautions is not the treaty law which in most cases clearly distinguishes between two types of conflicts, but the customary IHL where the distinction is blurred and with regard to the rules in question virtually non-existent. Second, both parties to the conflict and all of the relevant international bodies and organizations seem to be in agreement that the body of laws applicable to the IDF's conduct in the context of hostilities in Gaza is the customary IHL paralleling the rules of the AP I. This has also been the consistent position of the Supreme Court of Israel. In its judgment in the case of Physicians for Human Rights v. Prime Minister of Israel of 19 January 2010 (HCJ 201/09) the Court stated as follows: "The normative arrangements that govern the armed conflict between the State of Israel and the Hamas organization are complex… Nevertheless, in a string of judgments we have regarded this conflict as an international conflict"[55].

Considering that classifying the Gaza hostilities as either IAC or NIAC does not seem to be essential for the subject of this work, I am not going to engage in examining the matter in any more detail.

1.3.5. The Asa Kasher Doctrine on the Military Ethics of Fighting Terror

In 2005 a renowned Israeli professor of Ethics and Philosophy from the Tel Aviv University, Asa Kasher who in the 1990s led the drafting process of the IDF's

[55] See Supreme Court of Israel, Physicians for Human Rights v. Prime Minister of Israel, 19 January 2010 (HCJ 201/09), (§§ 14). Cf. Public Committee against Torture in Israel et al. v. The Government of Israel et al., 14 December 2006 (HCJ 2056/04) and Al-Bassiouni v. Prime Minister, 27 January 2008 (HCJ 9132/07).

code of ethics ("The spirit of the IDF") co-authored with a senior IDF general Amos Yadlin an article titled "Military Ethics of Fighting Terror: An Israeli Perspective"[56].

In the article the authors laid down a proposed new doctrine of military ethics which should govern the activity of a democratic state when faced with terror. The doctrine, which is not a legal text and which, as one may assume, intentionally mostly avoids the language of the IHL and only very loosely refers to it offers a very far reaching and in some areas complete redefinition of basic IHL concepts such as military necessity, distinction and proportionality.

The need for the formulation of such a new doctrine stemmed, in the authors' opinion, from the fact that missions of fighting terror are significantly different from those of fighting armies or law enforcement and as such require a new set of ethical guidelines[57].

The area in which the new doctrine most drastically departs from the IHL standard is with regard to the principle of distinction. Whereas the IHL distinguishes between civilians and combatants possessing diverging yet inherent and universal sets of rights regardless of the side of the front line they are on, Kasher offers an approach in which the weight of a state's duty to protect the life and wellbeing of a certain group of individuals varies depending on the nature of the relationship between the state and that group. In simple terms this means that the stronger the bond between a given state and a given group of individuals the stronger the state's duty to care for its safety.

This approach leads to the emergence of an entirely new and openly hierarchical concept of distinction. Persons who – in the light of Kasher's doctrine – are entitled to the highest standard of protection are the ones finding themselves under the effective control of the state (its citizens and residents of a territory under belligerent occupation). The second category for whose safety the state does bear responsibility but not as absolute or - in the authors' own terms - "significantly lighter" are persons not involved in terror but finding themselves beyond the

[56] Kasher, A., & Yadlin, A. (2005). Military Ethics of Fighting Terror: An Israeli Perspective†. Journal of Military Ethics, 4(1). pp 3–32.
[57] Ibid., p.7.

effective control of the state. The diminished standard of protection stems from the fact that while injury to bystanders of a military operation is not intended, the state does not have effective control over the fact that persons involved in terror operate in the vicinity of persons who are not and it does not have to shoulder responsibility for it. The final two groups that to authors identify are persons indirectly and directly involved in terror. The "packages of duties" of a state with regard to these groups are "very light" and are mostly reduced to protecting their human dignity.

The authors also not only openly rejected but also dubbed "immoral" the standard IHL conception of non-combatants having preference over combatants. They argue that "a combatant is a citizen in uniform… His blood is as red and thick as that of citizens who are not in uniform. His life is as precious as the life of anyone else"[58]. Consequently the state's duty to protect the life of its combatants takes precedence over the duty to protect the lives of civilians finding themselves beyond the state's effective control for "jeopardizing combatants rather than bystanders during a military act against a terrorist would mean shouldering responsibility for the mixed nature of the [non-terrorists'] vicinity for no reason at all"[59].

As a result the suggested hierarchy of groups whose rights the state has a duty to protect is the following: own non-combatant citizens, non-citizens not involved in terrorism being within the state's effective control, the state's combatants, persons not involved in terror but being beyond the effective control of the state, persons indirectly involved in terrorist activity, persons directly involved in terrorist activity.

Kasher emphatically restated his position in a press article on the 2014 Gaza Operation in which he declared that "no state has or should shoulder as much responsibility for the safety of enemy civilians as it does for its own people.

[58] Ibid., p. 17.
[59] Ibid., p. 18.

Special duties belong to the essence of relationships within a family, a community, and a state"[60].

Although Kasher's article of 2005 is a text of an academic nature having officially no connection to the Government of Israel or its Defense Forces, there is reasons to believe that ideas contained therein have influenced the thinking of the IDF's leadership and that during the three operations in Gaza the Israeli military has interpreted some aspects of its obligations under IHL in the spirit of Kasher's approach[61].

It is probably for this reason that Kasher's position on the Operation Protective Edge and especially the usage of the term "enemy civilians" was noted by the independent commission of inquiry established by the UN Human Rights Council for the examining of the 2014 Gaza Conflict and it was referred to it in its report[62].

[60] Kasher, A. (2014, October 14). The Ethics of Protective Edge. Jewish Review of Books. https://jewishreviewofbooks.com/articles/1104/the-ethics-of-protective-edge/

[61] Harel, A. (2009, February 6). The philosopher who gave the IDF moral justification in Gaza. Haaretz.Com. https://www.haaretz.com/1.5071578

[62] UN Human Rights Council. (2015, June). Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1 (A/HRC/29/CRP.4). p. 103. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/132/95/PDF/G1513295.pdf?OpenElement

2. APPLICATION OF PRECAUTIONARY MEASURES BY ISRAEL DEFENSE FORCES DURING THE 2014 GAZA CONFLICT – THE FACTUAL ASPECTS

2.1. THE HISTORICAL AND LEGAL BACKGROUND OF THE 2014 CONFLICT

The political and armed conflict between Jewish and Arab nationalisms in historic Palestine has been going on for more than a century now. An examination of its history, origins and nature goes beyond the scope of this work both thematically and in terms of available space. The following section is but a brief and of necessity simplistic overview of Gaza's history providing the necessary factual context for examining the 2014 conflict[63].

The territory of today's Gaza Strip was conquered by the Ottomans in the 16th century and until World War I remained mostly under Turkish rule with a brief Egyptian intermission in the 19th century. In November 1917 it was captured by the British and later incorporated into the British Mandate of Palestine under whose administration it remained until the Mandate was repealed in May 1948. In the aftermath of the ensuing Arab-Israeli war the Strip found itself under the Egyptian control which remained in place until June 1967 when the territory was seized by Israel during the so called Six Day War. Israeli permanent military presence in Gaza lasted nearly 40 years and was marked by rising tensions between the Palestinian population on one side and the Jewish settlers and the Israeli occupation forces on the other. These tensions erupted violently in the form of the First and Second Intifadas (lasting 1987 – 1991 and 2000 – 2005 respectively) which took place both in the Gaza Strip and in the West Bank. The result of the first Intifada were the two Oslo Accords signed between the Government of Israel and the Palestine Liberation Organization (PLO) which paved the way for the establishment of the Palestinian National Authority (PNA),

[63] Unless indicated otherwise the following paragraphs are based on Pappe, I. (2006). A History of Modern Palestine: One Land, Two Peoples (2nd ed.). Cambridge University Press.

a limited Palestinian self-governance body in parts of the West Bank and the Gaza Strip. The two crucial consequences of the Second Intifada were the involvement of Hamas (an armed political organization merging Palestinian nationalism with political Islam) in the political process in the PNA and Israel's unilateral disengagement from Gaza in August of 2005.

Despite no permanent military or civilian presence within the Strip after this date, Israel retained control over Gaza's airspace, maritime area and the external land perimeter and consequently over the movement of persons and goods in and out of the territory. It also reserved the right to reenter militarily at its discretion. Additionally, Gaza remained dependent on Israel in terms of electricity supply, currency, telephone networks as well as issuing IDs and permits to enter end leave the Strip.

On 25 January 2006 Hamas unexpectedly won the elections to the legislature of the PNA narrowly defeating Fatah, the largest faction within the PLO. A brief period of cohabitation between Mahmoud Abbas of Fatah as President of the PNA and Ismail Haniya of Hamas as Prime Minister ended with an armed standoff between the two factions in June 2007. In result, Hamas won full control over the Gaza Strip and the PNA effectively split into two entities – parts of the West Bank under the control of Fatah and Gaza controlled by Hamas.

Following the Hamas's takeover of Gaza the number of rockets and mortar shells fired from the Strip into Israel's territory rose tangibly[64]. In response Israel started on 27 December 2008 a 22 day long operation codenamed "Cast Lead" involving air and ground forces with the objective of degrading Hamas's military capacity and reducing the rocket risk for southern Israel[65]. The operation took a heavy toll in human lives and resulted in UN Fact-Finding Mission finding Israel responsible of numerous violations of the IHL including with regard to the principles of distinction, proportionality and precautions. Most importantly however, the

[64] See International Crisis Group. (2009, January). Ending the War in Gaza (Middle East Briefing N°26). p. 4. https://d2071andvip0wj.cloudfront.net/b26-ending-the-war-in-gaza.pdf

[65] Cohen, R. S., Johnson, D. E., Thaler, D. E., Allen, B., Bartels, E. M., Cahill, J., & Efron, S. (2017). From Cast Lead to Protective Edge: Lessons from Israel's Wars in Gaza. RAND Corporation. p. 25. https://www.rand.org/pubs/research_reports/RR1888.html

Mission also found Israel responsible of grave breaches of the Geneva Conventions such as willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, and extensive destruction of property, not justified by military necessity. Additionally, Israel was found responsible for the use of human shields constituting a war crime under the Rome Statute of the International Criminal Court[66]. The findings were immediately rejected by the government of Israel as politically motivated, biased, factually wrong and deliberately disregarding or downplaying the scale and seriousness of the threat posed to Israel's security by Hamas[67].

The ceasefire ending "Cast Lead" and backed by the UNSC Resolution 1860 remained mostly in place until March 2011 when the violence resumed in the form of multiple Israeli airstrikes on Gaza and 125 missiles fired at Israel. From there on the violence escalated gradually over the course of 2011 and 2012 and finally resulted in the second Israeli operation codenamed "Pillar of Defense" conducted by the Israeli air force between 14 and 21 November 2012[68] with the stated strategic objective of "reestablishing deterrence" achieved in result of the Cast Lead[69]. Also this time Israel's conduct of hostilities was met with criticism by many international bodies (albeit by far not as severe as in the case of "Cast Lead"), most notably the UN High Commissioner for Human Rights who raised

[66] United Nations Human Rights Council. (2009, September). Report of the United Nations Fact-Finding Mission on the Gaza Conflict (A/HRC/12/48). p. 416 – 417. https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf

[67] Israel Ministry of Foreign Affairs. (2009, September). INITIAL RESPONSE TO REPORT OF THE FACT FINDING MISSION ON GAZA ESTABLISHED PURSUANT TO RESOLUTION S-9/1 OF THE HUMAN RIGHTS COUNCIL. https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GoldstoneReportInitialResponse240909.pdf

[68] International Crisis Group. (2012, November). ISRAEL AND HAMAS: FIRE AND CEASEFIRE IN A NEW MIDDLE EAST (Middle East Report N°133). https://d2071andvip0wj.cloudfront.net/133-israel-and-hamas-fire-and-ceasefire-in-a-new-middle-east.pdf

[69] Israel Ministry of Foreign Affairs. (2012, November 14). Pillar of Defense-Statement by DM Ehud Barak [Press release]. https://mfa.gov.il/MFA/PressRoom/2012/Pages/Pillar_of_Defense-Statement_DM_Barak_14-Nov-2012.aspx

multiple concerns with regard to IDF's respect of the IHL's principles of distinction, proportionality and precautions[70].

2.1.2. The question of occupation

The question whether Israel's continuous extensive control over the life of the Gaza Strip after its unilateral withdrawal in 2005 amounts to an occupation from the point of view of the IHL is a difficult one and opinions on this issue among scholars vary considerably.

For the subject of the present thesis the determination whether the state of occupation exists and whether Israel bears the obligations of an occupying power vis-à-vis the Strip is not crucial, as it would not in any way alter Israel's obligations related to rules of the IHL which are the focus of this work. However, considering the overall importance of the issue for Gaza it seems appropriate to include a brief overview of the two dominating positions on this matter.

Many international bodies and institutions such as the UN General Assembly[71], the Prosecutor of the International Criminal Court[72] and the International Committee of the Red Cross[73] as well as numerous authoritative legal scholars are of the opinion that despite no permanent presence on the ground the State of Israel maintains effective control over the Gaza Strip and consequently the law of occupation as defined by the Hague Regulations (articles 42 through 56) and the 1949 Geneva Convention (IV) applies. The advocates of this position cite the doctrine established by the United States Military Tribunal at Nuremberg in the trial of Wilhelm List and others (1948) as well as by the ICTY in the trial of

[70] Office of the United Nations High Commissioner for Human Rights. (2013, March). Addendum to the Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1 (A/HRC/22/35/Add.1). https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.35.Add.1_AV.pdf

[71] See UNGA resolutions A/Res/64/92, A/Res/64/94, to be read jointly.

[72] See The Office of the Prosecutor of the International Criminal Court. (2020, November). Situation on Registered Vessels of Comoros, Greece and Cambodia, p. 6. https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf

[73] See Maurer, P. (2012b). Challenges to international humanitarian law: Israel's occupation policy. International Review of the Red Cross, 94(888), 1503–1510. https://international-review.icrc.org/sites/default/files/irrc-888-maurer.pdf

Naletilić (2003). In the latter case the ICTY held that the law of occupation also applies in areas where a state maintains "capacity to send troops within a reasonable time to make its power felt"[74].

Israel on its part maintains that since the unilateral disengagement in 2005 it has not only not exercised effective control over Gaza but also that it does not have the capacity of reinstating such a control within a reasonable time without having to face considerable armed resistance. Consequently, it may not be considered an occupying force or bear any obligations that such a status entails. Besides numerous official documents of the executive branch of the Israeli government this position was reflected in the judgments of the Supreme Court of Israel as well as in the report of the Turkel Commission of 2010[75].

From Israel's perspective the restrictions that it imposes on Gaza in terms of trade and travel are legitimate sanctions resulting from Hamas's hostile activity against the State of Israel and consequently Gaza's status as "hostile territory" as declared by Israel's Security Cabinet on 19 September 2007[76].

2.2. THE OVERVIEW OF THE 2014 CONFLICT

The IDF codenamed the 2014 conflict in Gaza Operation Protective Edge. It started 20 months after the end of the Pillar of Defense, lasted 51 days (from 8 July till 26 August 2014) and was the longest, bloodiest and most intense out of the three military campaigns that Israel conducted in Gaza since 2007[77]. The fighting took place largely in urban, densely populated areas with a heavy use of aerial strikes, artillery and other explosive weapons with wide-area effects.

[74] ICTY, Prosecutor v. Naletilic and Martinovic, IT-98-34-T, Judgement of 31 March 2003, para. 217.

[75] See Jaber al-Bassiouni Ahmad et al. v. The Prime Minister and the Minister of Defense, HCJ 9132/07 12 (2008) and The Turkel Commission, Report – Part One, January 2010, p. 50-53.

[76] Israel Ministry of Foreign Affairs. (2007, September 19). Security Cabinet declares Gaza hostile territory [Press release]. https://mfa.gov.il/mfa/pressroom/2007/pages/security%20cabinet%20declares%20gaza%20hostile%20territory%2019-sep-2007.aspx

[77] See Cohen, R. S., Johnson, D. E., Thaler, D. E., Allen, B., Bartels, E. M., Cahill, J., & Efron, S. (2017). From Cast Lead to Protective Edge: Lessons from Israel's Wars in Gaza. RAND Corporation. p. 69. https://www.rand.org/pubs/research_reports/RR1888.html

According to the official information the IDF carried out more than 6000 airstrikes during the operation[78]. Additionally, the IDF is supposed to have fired 14 500 tank shells and 35 000 other artillery shells[79].

The report of the independent commission of inquiry established by the UN Human Rights Council put the death toll among the residents of Gaza at 2 251 persons with 1 462 being civilians. According to the same report 11 231 people were injured[80]. On the Israeli side 67 soldiers and 6 civilians lost their life[81]. According to the data collected by the UN's satellite program UNOSAT 6761 structures within Gaza's territory were entirely destroyed and another 3565 severely damaged as a result of the conflict[82].

The Operation was launched in response to the intensification of barrage from Gaza in the spring and early summer of 2014 and the rising threat coming from the cross border tunnels enabling Hamas and other Palestinian armed groups to penetrate into the Israeli territory. The Operation was conducted in three phases – the air campaign (7 to 17 of July), the ground operation (17 July to 5 August) and the air-dominated final phase (5 to 26 August).

During the first phase the Israeli Airforce (IAF) conducted over 1700 strikes. It targeted weapons storage and manufacturing facilities, rocket launch sites, command and control centers, training and military compounds, military administration facilities, government buildings as well as individual members of Hamas and Palestinian Islamic Jihad[83]. Due to Hamas's change of tactics and moving of a large part of its infrastructure and military assets underground the IAF has exhausted its bank of preplanned and authorized targets (around 1000) within the first days of the campaign[84].

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[78] Supra note 34. p. 6.

[79] B'Tselem. (2015, January). Black Flag: The legal and moral implications of the policy of attacking residential buildings in the Gaza Strip. Summer 2014. p. 56. https://www.btselem.org/sites/default/files/sites/default/files2/201501_black_flag_eng.pdf

[80] Supra note 62. p. 153 – 154.

[81] Supra note 34. p. xi.

[82] United Nations for Training and Research (UNITAR). (2014, September). Impact of the 2014 Conflict in the Gaza Strip. UNOSAT Satellite Derived Geospatial Analysis. p. 9.

[83] Supra note 60. p. 91-92.

[84] Ibid. p. 95.

In the second phase of the operation the Israeli ground troops entered about 3 km deep into the Gazan territory with the objective of locating the tunnels and destroying them. While in some parts of the Strip the IDF did not meet much resistance in others heavy fighting ensued. One of the fiercest and most controversial battles of this phase was fought between July 19 and 20 in Shuja'iya (a residential neighborhood within the Gaza City) from where rockets have been fired into Israel and where the IDF expected to find the entrances to a number of cross-border tunnels. After warning the local residents about the imminent incursion, the IDF entered the territory on 19 July. After the infantry encountered strong resistance the Israeli artillery fired 600 rounds and the IAF dropped about 100 one-ton bombs on the area[85]. The heavy death toll of the two days of fighting and the sheer scale of the firepower used triggered strong negative reactions of the international community, including from the then UN Secretary General Ban Ki-moon[86] and the US State Secretary John Kerry. The other significant battlegrounds of the conflict included the village of Khuza'a in the outskirts of Khan Yunis (where the IDF operated 20 July – 1 August) and the city of Rafah (1 – 3 August) both located in the south of the Gaza Strip.

By August 5 the IDF had neutralized most of the cross-border tunnels (32 according to the official data) and withdrew from the Strip. The last phase of the operation was a series of multiday, coordinated cease-fires interrupted by repeated outbreaks of violence.

[85] Ibid. p. 107.

[86] Opening remarks to the press with Minister of Foreign Affairs of Qatar. (2014, July 20). [Press release]. https://www.un.org/sg/en/content/sg/speeches/2014-07-20/opening-remarks-press-minister-foreign-affairs-qatar

2.3. THE CONDUCT OF HOSTILITIES BY THE IDF IN THE LIGHT OF THE AVAILABLE SOURCES

2.3.1. The available sources

Unsurprisingly, the author of this work was not in a position to make any independent determinations as to the facts of the 2014 conflict. Consequently, any references to facts made in this work are based on information from open sources which will be presented and examined below.

The overall situation with the available sources on the 2014 conflict is that of both overabundance and shortage. On one hand, there is a multitude of reports and papers released by international organizations, international and local NGOs, diverse advocacy groups, and finally by one of the parties to the conflict – the State of Israel. There is also a virtually endless number of press materials from both print and digital media.

On the other hand however, the access to primary sources of information on the facts of the conflict is limited for a number of reasons. Many of them such as the fact that Israel did not disclose its internal documents on the operation are universal. No country voluntarily does that. Also, even in the case of a relatively short conflict lasting less than 2 months no commission of inquiry – even hypothetically operating with the full endorsement of all involved parties – would be physically capable of examining every single shot fired and every single situation that took place during such a conflict. This is why even the best available sources of information are by definition partial and focused on a number of selected cases. Additionally, there is the "fog of war" which often continues to cloud the battlefield even long after the fighting had stopped.

However, there are also limits to our knowledge on the 2014 conflict that are quite specific. The primary one is Israel's non-cooperation with the independent commission of inquiry established pursuant to UN Human Rights Council resolution. Israel did not grant the commission access to the Palestinian territories

or answer its questions relating to specific incidents and legal and policy issues[87]. Also international human rights organizations such as Amnesty International or Human Rights Watch were denied access to the Gaza Strip. Additionally, some Israeli digital sources that were made public during the operation and sometime thereafter have since been deactivated (such as the websites www.protectiveedge.gov.il or www.idfblog.com).

In the following sections I am going to examine the available sources with the aim of reconstructing (to the degree possible) the IDF's factual conduct of hostilities in terms of the principles of distinction, proportionality and precautions in attack. For that I am going to rely on three types of sources: the report of the UN independent commission of inquiry, the official Israeli documents and the reports of independent organizations (Israeli and international) such as Breaking the Silence, B'Tselem, Amnesty International, Human Rights Watch, the Action on Armed Violence (AOAV), the Independent Medical Fact-Finding Mission and others. Each of the three categories will be examined separately.

2.3.2. Report of the UN independent commission of inquiry

With regard to the air campaign the independent commission of inquiry examined 15 cases of strikes on residential buildings in which a total of 216 people lost their life, including 115 children and 50 women. In 9 cases indications of a possible military targets emerged. In the remaining 6 there is no information as to why a *prima facie* civilian object was targeted and what was the military advantage sought[88]. In only 2 cases the Commission was able to confirm that an advance warning was issued, in another 2 it is possible that there was one. The Commission found that in many instances the attacks were executed with the use of munitions with "highly destructive potential" and expressed doubt whether

[87] Israel Ministry of Foreign Affairs. (2014, November 13). Israel will not cooperate with UNHRC investigative committee. Https://Mfa.Gov.Il/. https://mfa.gov.il/MFA/PressRoom/2014/Pages/Israel-will-not-cooperate-with-UNHRC-investigative-committee-13-Nov-2014.aspx

[88] Supra note 62. p. 59.

weapons with such a powerful impact allow their operators to upkeep the principle of distinction when used in densely populated areas. Additionally the Commission determined that in a number of cases the attacks were conducted at a time when it could be expected that many family members would be at home – in the night (4 cases), early morning (2) or at the time of the Ramadan meal in the evening (2)[89]. The commission remarked that the timing of an attack is of particular importance if the target was an individual who could have also been targeted at another time or location[90].

With regard to the ground operation the commission focused on the events in Shuja'iya, Khuza'a and Rafah in which a combined number of at least 150 civilians was killed. Examining the events in Shuja'iya the commission established that prior to launching the operation the IDF issued warnings (via leaflets, radio and TV broadcasts as well as phone calls and text messages) to the inhabitants of the area informing them of the attack and instructing them to move to the center of Gaza City. As to the active phase of the operation – which according to the UN Protection Cluster resulted in 55 civilian deaths[91] - the report focuses on 3 incidents. In the first one that took place on 20 July at 3 a.m. two neighboring buildings belonging to brothers of the Al Helo family were targeted. In result 11 persons died (including 4 women and 4 children). One of the survivors testified that the first of the strikes could have been a "knock on the roof" but he was not certain. The Commission found no indication of a military objective. In the second, which took place on 20 July at 6.30 a.m.11 members of the Ayyad family (including 5 women and 4 children) were killed in the street while they were trying to flee their house during an intense shelling of their neighborhood. The Commission found no information regarding a possible advance warning. The report suggests that the types of munitions used could have been the 155 mm high explosive artillery shells designed to cause as much

[89] Ibid. p. 57 – 58 and Gaza prayer times in July. (2014). Https://Timesprayer.Com/. https://timesprayer.com/en/list-prayer-in-gaza-2014-7.html
[90] Ibid. p. 64.
[91] Ibid. p. 76.

damage as possible to people being out in the open[92]. In the third case 10 people of two families were killed in the same street during an intense shelling in the early morning on 20 July. 4 members of the Al Jamal family were killed in the street during an attempt to flee the area, while 6 members of the Al Sheikh Khalil family were killed in their house which has been hit by at least 5-6 mortar shells.

With regard to the events in Khuza'a the Commission confirmed that the operation was preceded by warnings mostly in the form of flyers dropped from airplanes but also – in an unknown number of cases – by prerecorded telephone messages. Most of the witnesses who spoke to the Commission confirmed that the warnings reached them and that about 70 percent of the population had left Khuza'a before the operation started on 20 July. After it started nobody was allowed to move in or out and the village existed in a *de facto* state of a siege – isolated from surrounding communities and fragmented internally. Targets in the village were attacked by the IDF with the use of both airstrikes and artillery, in particular between 22 and 25 July. According to the Commission Khuza'a became "a zone of active fighting and everything in it was turned into a target"[93]. 68 persons including at least 14 civilians were killed[94]. The Commission also received information as to the possible attacks on civilians trying to leave the area on 23 July.

With regard to the events in Rafah the Commission examined the events from Friday, 1 August when the IDF's Givati Brigade launched a major operation in the city in response to the killing of 2 IDF soldiers and the capture of Lt. Hadar Goldin. During the operation – which was launched at least in part after the UN and US brokered 3 day cease-fire went into effect at 8 a.m. and people started returning to their homes, the IDF sealed off parts of Rafah to block movement in and out, presumably to prevent the captured soldier being removed from the area. The Commission cited information from the Israeli outlet "Haaretz" regarding over 1000 shells being fired by the IDF within 3 hours and over 40 bombs being dropped. The reason for applying such intense firepower was the supposed

[92] Ibid. p. 73.
[93] Ibid. p. 81.
[94] Ibid.

activation of the "Hannibal directive" designed to prevent the capture of Israeli soldiers and said to allow for a very expansive definition of military objectives[95].

2.3.3. The reports of the non-governmental organizations

2.3.3.1. Amnesty International (AI)

In its report of November 2014 Amnesty International examined 8 cases in which the IDF targeted residential buildings[96]. 111 people lost their lives in result of these attacks out of which – according to AI's estimates – 104 were civilians. In case of several buildings the number of the occupants was inflated by the presence of family members who fled from other parts of the Strip. 4 of the cases included in the report were later also examined in other reports presented in this chapter (the ones of the independent commission of inquiry, of B'Tselem or both). According to the AI in none of the cases did the IDF issue warnings before the attack. Also, in none of the examined incidents did the Israeli side provide any information as to why a nominally civilian structure was targeted. However, unlike in most other reports, in four cases the AI was able to determine the presence of at least one member of Palestinian armed groups (mainly Palestinian Islamic Jihad's Al-Quds Brigade) on the site at the time of the attack. Also, in the case of the attack on the al-Dali building in Khan Yunis in which the IDF dropped a large aerial bomb which demolished the entire structure killing 36 people the AI was able to determine that one of the occupants, a member of the engineering corps of the Al-Quds Brigade had in the building "a small room with a lot of electronics and computers and used to work on the computer and internet all the time"[97]. Additionally, in 3 further cases the AI was able to find indications of possible military objectives in the targeted buildings (such as the past use of an

[95] Ibid. p. 95.
[96] Amnesty International. (2014, November). FAMILIES UNDER THE RUBBLE: ISRAELI ATTACKS ON INHABITED HOMES (MDE 15/032/2014). https://www.amnesty.org/download/Documents/MDE150322014ENGLISH.PDF
[97] Ibid. p. 21.

empty apartment in the building by the members of the Hamas's al-Qassam Brigades).

2.3.3.2. B'Tselem

In its report of January 2015 the Israeli human rights organization B'Tselem who specializes in monitoring the conduct of the IDF in the West Bank and Gaza presented the results of its research regarding the IDF's practice of targeting residential buildings during the 2014 conflict[98]. The organization examined 70 incidents in which a total of 606 people got killed. The report presents 13 of these cases in detail (5 of them were later also included in the report of the independent commission of inquiry). Out of 179 people who lost their life in those strikes 75% were minors, women or men over the age of 60 and therefore likely non-combatants. In most cases the organization was not able to establish why a given building was attacked although in 3 instances it was able to determine that among the persons killed there were operatives of either Hamas or the Palestinian Islamic Jihad. According to the collected testimonies only in one out of 13 cases the attack was preceded by a warning missile ("knock on the roof") in others the witnesses stated that there wasn't one or the relevant information is not available (e.g. due to the fact that everybody in the building got killed).

On a general level the report points to the fact that the IDF provided very little information as to why it classified residential buildings as military objectives. With the exception of a single press release from the first day of the operation in which the IDF seemed to have indicated that four residential buildings were targeted based on the sheer fact that they belonged to Hamas operatives, the Israeli military maintained throughout the operation that residential buildings are being targeted as parts of "operational infrastructure", "command and control infrastructure" or "terror infrastructure".

[98] B'Tselem. (2015, January). Black Flag: The legal and moral implications of the policy of attacking residential buildings in the Gaza Strip. Summer 2014. https://www.btselem.org/sites/default/files/sites/default/files2/201501_black_flag_eng.pdf

2.3.3.3. The Independent Medical Fact-Finding Mission

While the hostilities were still ongoing a group of 3 Palestinian and 1 Israeli human rights organizations invited 8 international medical experts to form an independent fact-finding mission with the aim of gathering evidence and drawing conclusions regarding types, causes and patterns of injuries inflicted during the conflict. The Mission visited Gaza three times between 19 August and 12 November 2014. It interviewed a total of 68 patients and completed site visits to Khuza'a. In its report the Mission made a number of relevant determinations as to the IDF's conduct of hostilities[99].

The vast majority of the interviewed patients stated that they received no warning of the attack in which they were injured. Out of 68 persons only 5 reported prior warnings (one of these was a telephone message and three a "knock on the roof"). Furthermore, the mission found that a part of the population did receive a warning but did not follow the instructions out of a sense that there was no safe place to go[100]. With regard to the operation in Khuza'a the report describes a situation from the 23 July (later also mentioned by the report of the independent commission of inquiry) in which the IDF stopped an organized attempt of several hundred residents (carrying white flags) who stayed in the village to leave the zone of active fighting. According to the witnesses the IDF stopped the column and directed it back to the village and later opened fire to the crowd leaving about 31 people wounded.

[99] Al Mezan, PCHR, Physicians for Human Rights. (2015, January). Gaza, 2014. Findings of an independent medical fact-finding mission. https://reliefweb.int/sites/reliefweb.int/files/resources/gazareport_eng.pdf

[100] Ibid., p. 39.

2.3.3.4. Action on Armed Violence (AOAV)

In its report published in December 2014 the AOAV examined Israel's artillery policies in the regional wars it fought since 2006[101]. With regard to the 2014 conflict the report made a number of determinations relevant for this work. First, the report found that despite public declarations regarding reducing its reliance on "statistical weapons"[102] the IDF actually continues to rely heavily on unguided artillery with wide-area effects. In this context the report pointed to the fact that for the 155mm self-propelled "Doher" howitzer – one of the artillery systems most commonly used in the IDF – it is considered a "hit" if the shell lands within a 46 meter radius of the target. The report suggested that the IDF's continuous reliance on such systems allowing for shelling targets at great ranges is linked to the fact that the IDF is an army of conscripts and that Israel's political and military leadership is under strong internal pressure to minimize own losses[103].
Compared to the Operation Cast Lead in 2009/2009 (23 days) – the previous operation in Gaza involving artillery – during Operation Protective Edge (51 days) the IDF launched 533% unguided high-explosive munitions more[104]. The report did also find a clear increase in the use of guided missiles between 2008/2009 and 2014 (from 26 to 250 throughout both conflicts) but it concluded that due to their high cost and limits in applicability the traditional artillery is still by far the favored option. Additionally the report determined that after 2005 the regulations regarding the safety distance for firing artillery near residential buildings were changed from 300 m to 100 m. Also according to the AOAV's own estimates 94% of the incidents of Israeli shelling recorded during the 2014 conflict took place in or near a populated area[105].

[101] Action on Armed Violence. (2014, December). Under fire. Israel's artillery policies scrutinised. https://aoav.org.uk/wp-content/uploads/2015/03/AOAV-Under-Fire-Israels-artillery-policies-scrutinised.pdf
[102] „Statistical weapon" is a term used to describe unguided explosives with wide-area effect.
[103] Supra note 96. p. 11.
[104] Ibid. p. 13.
[105] Ibid. p. 16.

2.3.3.5. Breaking the Silence

One of the most insightful publications on the IDF's conduct of hostilities during the 2014 conflict is "This is How We Fought in Gaza" published by an Israeli NGO "Breaking the Silence" established by a group of IDF veterans[106]. It is a collection of anonymized testimonies from over 60 IDF soldiers from the rank of a sergeant to that of a major who were actively involved in the conduct of the "Protective Edge". A number of assertions made by the testifiers regarding Israeli troops' approach towards the principles of distinction, proportionality and precautions recur consistently throughout the publication and give grounds for believing that certain behaviors were dictated by policy rather than individual decisions. Most importantly, many testifiers spoke of a working assumption conveyed to them by the commanders that after the IDF's warnings the civilian population had left the areas that the Israeli ground forces were entering and anybody located within the zone of the operation is to be presumed a combatant and therefore a legitimate target (e.g. testimonies 2, 16, 17, 22, 40, 56, 59, 68, 75, 81). Based on that the soldiers received instructions (formal or not) to shoot to kill at whoever they spotted in the combat zone. The authorization to open fire was given at a very low level. Many testifiers spoke also of a very liberal definition of military objectives. In result, any object or structure within the troops' sight considered in any way "suspicious" could be targeted (e.g. testimonies 32, 34, 43, 53, 63, 85). In the soldiers' own words the overarching rationale for such an approach was the "minimum risk policy" summarized by one of the testifiers as: "The lives of our soldiers come before the lives of enemy civilians" (testimony 67). In at least one instance the testifier spoke of targeting civilians without any military rationale (testimony 38). With regard to artillery fire the testifiers spoke about the massive use of statistical weapons against residential neighborhoods not with the intention of hitting any specific target but rather as a part of a "softening"

[106] Breaking the Silence. (n.d.). This is How We Fought in Gaza. Soldiers′ testimonies and photographs from Operation "Protective Edge" (2014). https://www.breakingthesilence.org.il/pdf/ProtectiveEdge.pdf

policy against an area that the IDF was about to enter (testimonies 62, 96), "harassment" procedure against an area constituting a threat (23) or deterrence (29, 46). In terms of proportionality the testifiers spoke of three levels of "firing policy" used by the IDF in combat to determine the acceptable levels of collateral damage. At first level avoiding harm to civilians receives top priority whereas the third means "don't concern yourselves with that at all" (testimony 104). The level does not stay fixed throughout the operation and the decision to move from one to the other comes from high command (testimony 104, 107, 109). According to several testifiers the levels of firing policy and consequently the coefficients of acceptable collateral damage increased as the operation progressed and the IDF was running out of preplanned and vetted targets (64, 95, 107, 109). Interestingly, two pieces of testimony (numbered 19 and 97, possibly by the same person) refer to the coefficient of acceptable collateral damage in the case if the target is an enemy combatant with the rank equivalent to that of a deputy battalion commander. According to the testifier/(-s) in such a case the attack is considered proportional if the number of civilian fatalities stays in the single digits[107].

2.3.4. The official documents of the State of Israel

In May 2015 the State of Israel released its own comprehensive official report on the conflict entitled "The 2014 Gaza Conflict: Factual and Legal Aspects". While being an invaluable source for understanding the Israeli perspective on the conflict, it is not particularly useful as a factual source as it tends to discuss the operation in fairly general terms and does not provide details of specific situations that took place during the conflict. This is in line with Israel's general policy of not disclosing the circumstances of individual attacks. Another official Israeli source which provides a lot of insight into the political and administrative context of the Operation Protective Edge, but little information on the actual conduct of hostilities is the report by the State Comptroller and Ombudsman of Israel

[107] Ibid. p. 60 and 209.

published in March 2018[108]. A source that is more useful in this regard are the press releases of the IDF's Military Advocate General (MAG) regarding his decisions on opening (or not) an investigation into incidents in which the IDF was alleged to have violated the laws of armed conflict. In six updates published between September 2014 and August 2018 the MAG presents his decisions on nearly 80 cases[109]. In some instances, MAG's press releases shed some new light on incidents covered by the reports of the UN independent commission of inquiry and the NGOs. The author was able to identify at least 7 such incidents. Several of them are presented in detail below.

In an incident of 21 July a home of the Al-Qasas/Al-Qassas family in the Gaza City was bombed and 9 people died in result. The UN independent commission of inquiry did not identify any military target in the building. The MAG denied that the IDF ever targeted the structure and suggested a detonation of a homemade explosive device[110].

In an incident of 23 August a home of the Abu Dahrouj family in Al-Zuwayda was bombed and 5 members of the family died in result. The report by the Amnesty International suggested that the target of the attack could have been a member of the PIJ's al-Quds Brigades who was present in the building. The MAG concluded however that the bombing of the house was a result of an "unforeseen

[108] The State Comptroller and Ombudsman of Israel. (2018, March). Operation "Protective Edge" - IDF Activity from the Perspective of International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons. https://www.mevaker.gov.il/he/Reports/Report_622/3cdfbe36-04fc-4ff2-b2df-33ce258ae838/dabla-eng.pdf

[109] See Operation Protective Edge Legal Updates. (n.d.). Israel Defense Forces. Retrieved September 22, 2020, from https://www.idf.il/en/minisites/military-advocate-generals-corps/releases-idf-military-advocate-general/operation-protective-edge-legal-updates/

[110] See UN Human Rights Council. (2015, June). Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1 (A/HRC/29/CRP.4). pp. 34 – 35. And IDF Military Advocate General. (2018, August 15). Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation "Protective Edge" – Update No. 6. [Press release]. pp. 23 – 24. https://www.idf.il/media/40288/examination_and_investigation_of_exceptional_incidents_from_operation_protective_edge.pdf

technical failure" due to which the bomb which was intended for a weapons cache located 100 m away from the building "diverged from its original trajectory"[111].

In two incidents, namely the attack on the Al-Salam office building in the Gaza City (21 July, 12 people killed) and the attack on the Al-Dali residential building in Khan Yunis (29 July, 36 people killed) the MAG admitted that the high number of people killed resulted from the fact that the IDF was not aware of the presence of civilians in the buildings. At the same time however according to the MAG the high number of persons killed does not affect the legality of the attacks because at the time when they were executed the principle of proportionality was respected (in the light of the available information). MAG's position seems particularly noteworthy with regard to the second structure which was residential and where the attack resulted in a single highest number of people killed in one attack during the entire conflict[112]. This incident will be discussed in more detail in the next chapter.

In an incident of 24 July the IDF attacked a residential building in Tel Al-Za'atar as a result of which 5 members of the Abu Aytah/Abu Itta family residing in the neighboring building died. The report by B'Tselem describing the case suggested that the building was attacked because it belonged to a member of the Hamas's military branch. The witnesses the organization spoke to indicated that warnings (a warning missile) were given by the IDF before the strike but the local residents could not understand which home was fired at and who was meant to evacuate[113]. According to the information disclosed by the MAG the objective of the attack

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[111] See Amnesty International. (2014, November). FAMILIES UNDER THE RUBBLE: ISRAELI ATTACKS ON INHABITED HOMES (MDE 15/032/2014). pp. 33-35 https://www.amnesty.org/download/Documents/MDE150322014ENGLISH.PDF And IDF Military Advocate General. (2015, March 18). Decisions of the IDF Military Advocate General regarding Exceptional Incidents during Operation "Protective Edge" – Update No. 3 [Press release]. https://www.idf.il/media/40280/operation-protective-edge-mag-corps-press-release-update-3-march-2015.pdf

[112] See IDF Military Advocate General. (2018, August 15). Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation "Protective Edge" – Update No. 6. [Press release]. pp. 24 – 26. And IDF Military Advocate General. (2015, June 11). Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation "Protective Edge" – Update No. 4. [Press release]. pp. 3-4.

[113] B'Tselem. (2015, January). Black Flag: The legal and moral implications of the policy of attacking residential buildings in the Gaza Strip. Summer 2014. p. 18-19.

was a weapons cache located in the targeted building. Prior to the attack warnings were supposed to have been given by telephone and by a "knock on the roof" to the residents of the neighboring buildings. Consequently, in MAG's opinion the attack complied with the requirements of proportionality and precautions[114].

3. APPLICATION OF PRECAUTIONARY MEASURES BY ISRAEL DEFENSE FORCES DURING THE 2014 GAZA CONFLICT – THE LEGAL ASPECTS

The aim of the following chapter and indeed of this entire work is examining Israel's conduct of hostilities during the 2014 conflict in the light of its legal obligations to apply precautions in attack. However, the author's ability to complete this task in a full and comprehensive manner is constrained by a number of factors most importantly the shortage of available information.

The legal review of the actions of a given military should be conducted on a case by case basis and take into account not only the factual aspect of a given incident (what actually happened) but also a number of subjective factors related to the situation of the given belligerent at the time when the decision about the attack was made. As already mentioned in the previous chapter, in the case of the 2014 conflict in Gaza much of the necessary information is unavailable.

This situation poses a direct limitation to the author's ability to analyze Israel's conduct of hostilities. For instance, the lack of reliable information on the status of the persons killed in an attack (as civilians or combatants) or – in case of combatants – on their rank within a given organization makes it virtually impossible to determine whether the attacking party respected the principles of distinction and proportionality. The same applies to the situation when it is not known who or what exactly was the intended target of a given attack. Furthermore, the lack of clarity as to the target of an attack makes it virtually

[114] IDF Military Advocate General. (2015, March 18). Decisions of the IDF Military Advocate General regarding Exceptional Incidents during Operation "Protective Edge" – Update No. 3.

impossible to determine whether the employed means and methods of warfare were legitimate particularly with regard to the choice of munitions and timing. Without this information an attempt of analysis of Israel's conduct of hostilities is by definition subject to limitations and shortcomings.

Having said that, what follows is an attempt to review Israel's conduct of hostilities in the light of the information that is available. It will be focused on three selected elements constituting the requirement to take precautions, namely the principles of distinction, proportionality and the obligation to issue advance warnings. The author found that assessing IDF's compliance with the remaining requirements related to the choice and means of attack, cancelling or suspending the attack or choosing between several available objectives was not possible without access to information on the IDF's operational situation at the time of the conflict.

3.1. DISTINCTION

As discussed in chapter I, the rule of distinction is a fundamental rule of the IHL enshrined in article 52 of the AP I and the customary IHL. The official Israeli report on the 2014 conflict declares that the IDF "scrupulously observed" the principle of distinction. According to the document the Israeli military only targeted persons where there was reasonable certainty that they were members of organized armed groups or civilians directly participating in hostilities, and only targeted structures where there was reasonable certainty that they qualified as military objectives[115]. The following sections will attempt to examine the accuracy of this assertion with regard to two types of situations – airstrikes against residential buildings and the conduct of the ground operation.

[115] Supra note 34. p. 155.

3.1.1 Targeting residential buildings

Residential buildings are *prima facie* civilian objects and consequently should not be attacked. However, in line with article 52 of the AP I if a nominally civilian structure is being used to make an effective contribution to military action and its destruction offers a definite military advantage the structure losses its protected status and may be lawfully targeted provided that other requirements of the IHL are met. Consequently, a residential building used as an arms depot, a hospital used to fire rockets or a civilian vehicle used to transport combatants may under certain conditions be lawfully attacked. However, in case of doubt the presumption is that the civilian status remains in place.

During the 2014 conflict the IDF carried out more than 6 000 airstrikes. These included also repeated attacks against residential structures in which many civilians died. According to the UN report these attacks resulted in 742 fatalities and 142 Palestinian families had three or more members killed in such incidents[116].

According to the official Israeli report residential buildings were attacked because they were used for "military operational purposes" most often as command and control centers or as arms depots[117]. The report describes in detail a specific incident of 8 July in which a residential building belonging to a certain Ibrahim al-Shawaf, a senior military commander in the Palestinian Islamic Jihad, was attacked. The report explains that the structure was considered a legitimate military target not because al-Shawaf lived there but because large quantities of weapons were stored inside and that it was also used as an "operational planning site". Another example is an incident of 9 July in which the house of Ahmad Randur, the commander of Hamas's Northern Brigade, was struck. According to the report Randur used the building for "planning, directing and executing military operations"[118].

[116] Supra note 62. P. 32.
[117] Supra note 34. p. 152.
[118] Ibid. p. 161.

Both incidents are representative of the way how Israel typically justified targeting residential structures during the 2014 conflict. Namely, they were attacked not merely because of the presence of one or several enemy combatants but because they were being used as parts of "operational infrastructure", "command and control infrastructure" or "terror infrastructure".

The problem is, that the IDF never explained what these terms mean and what sort of activity was specifically carried out in each of the targeted buildings. While it is perfectly conceivable that Hamas or PIJ could have used private homes in a way which effectively stripped these structures of their protected status, this should be demonstrated on a case by case basis rather than by applying umbrella terms with no clear definition. For example, if a house was used for making telephone calls or holding meetings, this does not automatically mean that it made an effective contribution to military action and could be lawfully attacked. This is especially so since the calls and the meetings could have been held elsewhere and the military advantage from destroying the given building could in this context hardly be considered definite.

The burden of proof in this situation is on the IDF which should demonstrate that the way how the residential buildings were used met the requirements set forth by article 52 of the AP I. Otherwise a legitimate suspicion arises that the terms such as "terror site" or "operational infrastructure" were to lend an air of legality to attacks whose legitimacy under the IHL was doubtful.

3.1.2. Ground operation

As already mentioned in Chapter I article 57 (5) of the AP I stipulates that no provision of the article on precautions in attack may be "construed as authorizing any attacks against the civilian population, civilians or civilian objects". Consequently, the issuing of warnings does not mean that the civilians who for one reason or another remained in the area where the fighting takes place lose their protected status. In line with article 51 (3) of the AP I the only way for a civilian to lose his protection from attack is by taking a direct part in hostilities.

Also, providing warnings does not release the attacker from his other obligations under the IHL.

The official Israeli report on the 2014 conflict declared a strict compliance with this standard. The IDF "did not assume that a relevant site or area had been evacuated" after providing a warning and the provision of a warning "never, on its own, affected a proportionality assessment"[119].

However, the testimonies of the Israeli soldiers collected by "Breaking the Silence" and discussed in the previous chapter seem to strongly contradict these claims in particular in the context of the ground operation. The soldiers interviewed by "Breaking the Silence" testified repeatedly that they were told by their commanders that within the area of the operation "there's no such thing… as a person who is uninvolved" (testimony 2), that "anyone who dared poke his head out was a terrorist" (16) and that "anything still there is as good as dead" (22). Such briefing was apparently accompanied by a blanket authorization to shoot to kill anybody upon identification (testimony 22). Also, as already discussed in the previous chapter many testifiers spoke of a very liberal definition of military objectives. Any object or structure considered "suspicious" could be targeted.

Another aspect of the same problem seems to be the heavy use of artillery against residential neighborhoods during the ground operation in places like Shuya'ija or Khuza'a. Testimonies numbered 23, 29, 46, 62 and 96 suggest a deliberate and consistent policy of covering entire areas with artillery fire without specific targeting or respect for the principle of distinction. A senior U.S. military source was supposed to have said in the context of the Shuja'iya operation that the "IDF commanders were not precisely targeting Palestinian military formations as much as laying down an indiscriminate barrage aimed at cratering the neighborhood"[120].

With regard to targeting individuals the UN independent commission inquiry found that issuing instructions classifying anyone inside the combat zone as an

[119] Supra note 34. p. 177.

[120] Perry, M. (2014, August 27). Why Israel's bombardment of Gaza neighborhood left US officers 'stunned.' Al Jazeera America. http://america.aljazeera.com/articles/2014/8/26/israel-bombing-stunsusofficers.html

enemy or a person engaging in terrorist activity "contributes to creating an environment conducive to attacks against civilians"[121].

With regard to the operation in Shuja'iya the commission concluded that the methods and means employed by the IDF could not be directed at a specific military target and could not be compliant with the principle of distinction. Consequently, the commission found strong indications that the IDF's conduct in Shuja'iya violated the prohibition of indiscriminate attacks and may amount to a war crime. The commission also found indications that a number of other IHL provisions could have been violated, namely the prohibition of treating several distinct individual military objectives as a single objective (CIHL Rule 13 "Area bombardment"), the principle of proportionality, the imperative to cancel or suspend an attack if it becomes apparent that it may violate the principles of distinction or proportionality, and finally the general rule of precautions saying that in the conduct of military operations constant care shall be taken to spare the civilian population, civilians and civilian objects[122].

Also, with regard to the operation in Khuza'a the commission found indications that IDF's actions may qualify as direct attacks against civilians and civilian objects and may thus amount to a war crime. The commission observed in this context that while it is not in a position to verify the extent of the use by armed groups of the buildings in Khuza'a for military purposes, it appears highly unlikely that all 740 buildings that were either destroyed or damaged made "an effective contribution to the military action"[123].

The author generally shares the position of the independent commission of inquiry, although with regard to targeting individuals identified in the combat zone it seems that if the testimonies collected by "Breaking the Silence" are genuine one can speak not of creating a "conducive environment" but of a deliberate and consistent policy of disregard for the principle of distinction

[121] Supra note 62. p. 106.
[122] Ibid. p. 78-79.
[123] Ibid. p. 89.

3.2. PROPORTIONALITY

As discussed in Chapter I, along with the principle of distinction the principle of proportionality is a fundamental requirement of the IHL enshrined in two articles of the AP I, as well as in the rules of the customary IHL. The universally binding character of this obligation is undisputed.

Having said that, a review of the IDF's conduct during the 2014 conflict in terms of compliance with this obligation is difficult for at least three reasons. First, because of the relative factor present in the principle itself (the incidental loss of human life may not be "excessive" in relation to the concrete and direct military advantage anticipated). Second, because the proportionality test is based not on the collateral damage that actually occurred as a result of a given military action but on the damage that could have been expected at the time when it was launched. Finally, because the information essential for such a review remains in the exclusive possession of the State of Israel.

The questions that would need to be answered before formulating any conclusions are: What military advantage did the IDF seek in each of the attacks? What information did it have – or should have had – regarding civilian presence at the site of attack? Could this military advantage have been achieved by other means? Without these answers the determination whether a given attack may be considered proportionate is practically impossible.

Israel's official communications during the conflict as well as after if it ended repeatedly declared IDF's strict compliance with the rule of proportionality. The official Israeli report on the conflict emphasized in this context that "the excessiveness of collateral damage is not measured using absolute numbers"[124], that the "violations of the Law of Armed Conflict cannot be inferred solely from the outcome of a particular incident" and that any legal assessment must "avoid the bias of hindsight or the convenience of effects-based condemnations"[125].

[124] Supra note 34. p. A-2
[125] Ibid. p. XX.

However, in spite of such protestations (which are generally in line with both the letter and the spirit of the relevant provisions of the IHL) Israel's conduct of hostilities in Gaza became a target of international criticism also because of the supposed breaches of the principle of proportionality. The UN Secretary General Ban Ki-moon observed in this regard that destruction in Gaza has left deep questions about proportionality and the need for accountability[126].

The two aspects of the operation that were most heavily criticized in the context of proportionality were the attacks on residential buildings and the ground operation where the IDF used heavy artillery against residential areas. With regard to the airstrikes against residential buildings the UN independent commission of inquiry found that in the light of the high civilian losses and the military advantage anticipated by the IDF being in most cases unclear, there were strong indications that these attacks could be disproportionate, and therefore amount to war crime[127]. Also reviewing IDF's conduct during the battle of Shuja'iya the commission found that the intense shelling, combined with the use of a large number of one-ton bombs, raised serious concerns about the respect for the principle of proportionality[128].

With the author of this work not being able to assess Israel's conduct in term of proportionality in any holistic way, the following sections will focus on the selected aspects of the problem.

3.2.1. The case of the attack on the Al-Dali building in Khan Yunis

The attack resulting in the single highest number of civilian deaths during the entire conflict was the strike against the Al-Dali apartment building in Khan Yunis on the 29 July. It was briefly mentioned in the previous chapter in the

[126] Secretary-General's remarks to Security Council briefing on the. (2014, October 21). [Press release]. https://www.un.org/sg/en/content/sg/statement/2014-10-21/secretary-generals-remarks-security-council-briefing-situation

[127] Supra note 62. p. 60.

[128] Ibid. p. 79.

context of the report of Amnesty International and the decisions of the IDF Military Advocate General.

The strike happened just after 7.30 in the morning when an Israeli aircraft dropped a large aerial bomb on the building causing its total destruction and the death of 36 people including 16 members of the Abu Amer family, 7 of the Breika family, 7 of the al-Najjar family, and 4 of the Mu'ammar family. One member of the al-Ramlawi family and one member of the Abu Sitta family died in a neighboring building[129].

According to the information disclosed by the IDF MAG the target of the attack was a senior commander of the PIJ who was present at the building. During the planning stages the IDF decided that the attack must be carried out against the entire building and could not be limited to a particular part of it. It was also found that in order for the attack to be successful no warnings could be issued. Crucially, on the basis of intelligence and other checks the IDF assessed that no civilians were present inside. Consequently, the IDF MAG called the death of civilians "difficult and regrettable" but found no violation of the principle of proportionality[130].

For a number of reasons, the attack on the Al-Dali building is an interesting case for examining the IDF's conduct in terms of proportionality. Primarily, because of the contrast between the exceptionally high number of deaths and the IDF's claim of not having known about the presence of 37 people in the building.

On one hand, there is a consensus among the IHL scholars that the notion of feasible precautions means that the duty to take precautionary measures is not absolute and that it does not impose an obligation of result. Rather, "it is a duty to act in good faith to take practicable measures, and persons acting in good faith

[129] Amnesty International. (2014, November). FAMILIES UNDER THE RUBBLE: ISRAELI ATTACKS ON INHABITED HOMES (MDE 15/032/2014). p. 19-22. https://www.amnesty.org/download/Documents/MDE150322014ENGLISH.PDF

[130] IDF Military Advocate General. (2018, August 15). Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation "Protective Edge" – Update No. 6. [Press release]. p. 26.

may make mistakes"[131]. Consequently, a precautionary measure that turns out unsuccessful does not automatically mean that a given obligation was violated. In this spirit, the tragic result of the attack on the Al-Dali building does not automatically mean that the principle of proportionality has been violated. This is especially so considering that the attack was launched three weeks into the operation when – as mentioned in Chapter II – the bank of IDF's preplanned and vetted targets has already been emptied. Consequently, the senior commander of the PIJ who was supposedly the target of the attack was most likely an "emerging target" where the attacking side had considerably less time for applying precautionary measures.

On the other hand however, the idea that the IDF with its impressive capabilities in terms of intelligence, surveillance and reconnaissance could have simply missed the presence of 37 persons in the building (17 of them below the age of 12) seems very difficult to imagine and, consequently, raises legitimate doubts as to the "good faith" of the military commander who decided upon the attack.

These doubts are reinforced by a report by B'Tselem which identified a pattern of IDF discovering in retrospect that the information available to it had not been accurate[132]. This was the case in 13 out of 15 cases involving Palestinian fatalities examined by the MAG until fall 2016 when the report was published. In 9 cases the intelligence turned out inaccurate, in 4 other cases the military did not have the ability to distinguish the presence of civilians in the object in real time[133]. In none of these cases did the MAG find any violations of the law of armed conflict.

B'Tselem argues that if errors point to substantive limitations in the military's technological and intelligence capabilities, then this factor should be included in the proportionality assessment. If, however past experience is knowingly

[131] Fenrick, W. J. (2001). Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia. European Journal of International Law, 12(3), p. 501. https://doi.org/10.1093/ejil/12.3.489

[132] B'Tselem. (2016, September). Whitewash Protocol: The So-Called Investigation of Operation Protective Edge. p. 22. https://www.btselem.org/download/201609_whitewash_protocol_eng.pdf

[133] Ibid. p. 22.

disregarded, then the proportionality assessment becomes "hollow and worthless"[134].

Such a recurring pattern of inadequate precautions is – to an extent – reminiscent of the Kupreskić case in which the ICTY found that the cumulative effect of attacks repeatedly "falling within grey area between indisputable legality and unlawfulness" is that they may not be in keeping with the international law[135].

3.2.2. Force protection

The analysis of tactics employed by the IDF during the 2014 conflict reveals a clear preference for indirect fire including by artillery, mortars and air strikes[136]. This, in turn, suggests a high value put on the protection of own troops. As already discussed in the previous chapter, Israeli soldiers interviewed by "Breaking the Silence" repeatedly spoke of the IDF's "minimum risk policy" summarized by one of the testifiers as "the lives of our soldiers come before the lives of enemy civilians". The writings of professor Asa Kasher (discussed in the first chapter), dubbed "the IDF ethicist"[137], whose works supposedly have a lot of influence on the thinking of the higher echelons of the IDF, provide a suitable theoretical framework for such an approach.

With the IDF being an army of conscripts, it is easy to understand why the Israeli political and military leadership would prioritize the protection of own troops. On the other hand, such an approach results in a preference for means and methods of combat with a potential of causing higher levels of collateral damage. The following section will attempt to analyze the IHL dimension of the problem.

A crucial theoretical question that needs to be answered in this context is whether and to what extent the concern for the safety of own troops may be legitimately

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[134] Ibid. p. 24.

[135] ICTY, Kupreškić case, judgment, para. 526. https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf (accessed 29 September 2020)

[136] Cf. Action on Armed Violence. (2014, December). Under fire. Israel's artillery policies scrutinised. https://aoav.org.uk/wp-content/uploads/2015/03/AOAV-Under-Fire-Israels-artillery-policies-scrutinised.pdf

[137] See Wagner, B. M. (2006, December 28). IDF ethicist: Restraint policy is legit. The Jerusalem Post | JPost.Com. https://www.jpost.com/israel/idf-ethicist-restraint-policy-is-legit

factored into or, indeed, prioritized within the proportionality assessment (effectively at the expense of the safety of civilian population on the other side of the front line).

Unfortunately, the IHL does not have a clear answer. Indeed, the question was intentionally left unresolved in the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia[138].

However, despite the absence of a clear answer within the body of IHL it is still possible to make several important determinations. First, among the states there seems to be little (or no) opposition to the idea that force protection is a relevant tactical gain qualifying as military advantage. Some states such as Australia[139] made declarations supporting such an extended interpretation of the notion of military advantage upon the ratification of the AP I. Others, such as the US, include similar provisions in their military manuals[140]. Finally, no state has ever objected to such an interpretation.

Similarly, there seems to be a consensus that only the advantages that are truly military in nature may be considered. For example the Manual on International Law Applicable to Air and Missile Warfare published by the Humanitarian Policy and Conflict Research at Harvard University (the HCPR Manual) sets forth that the ”military advantage does not refer to advantage which is solely political, psychological, economic, financial, social, or moral in nature”[141].

With these two determinations in mind – namely that “force protection” qualifies as military advantage and that the notion of military advantage should be

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[138] See Supra note 18. para. 48 (d).

[139] “In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the "military advantage" are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack and that the term "military advantage" involves a variety of considerations including the security of attacking forces.” Available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=10312B4E9047086EC1256402003FB253

[140] Navy, T. D. U. S. O. F., & Corps, M. U. S. (2020). The Commander’s Handbook on the Law of Naval Operations: Manual NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A. Cosimo Reports. p. 8-1.

[141] Harvard School of Public Health. (2013). HPCR Manual on International Law Applicable to Air and Missile Warfare. Cambridge University Press. p. 36.

interpreted in stricter rather than broader terms – the question arises when and to what extent may the force protection become a factor in the proportionality assessment.

A possible answer to this problem was formulated by Robin Geiss in his article of 2012[142]. In line with the wording of articles 51 (5) (b) and 57 (2) (b) of the AP I Geiss suggests that force protection could be factored into the proportionality calculus if the military advantage expected from it is sufficiently "concrete and direct". Consequently, protection of soldiers who are coming under attack and are at the risk of being annihilated by the adversary clearly passes the test. Saving a given number of troops and military assets that would otherwise be almost certainly destroyed clearly qualifies as concrete and direct military advantage. On the other hand, protecting soldiers of the attacking force from being exposed to hypothetical dangers does not – in Geiss's view – pass the bar. For example, in case when the attacking side opts for an air campaign instead of a more risky ground operation the advantage secured and the disadvantage avoided are merely hypothetical. In Geiss's words "they emerge only by comparing a given attack with a hypothetical, less protective form of attack" and are consequently too vague to be factored into the proportionality calculus[143]. Geiss distinguishes in this context between "force protection" which is concrete and direct and "protectiveness" which is abstract and hypothetical. The latter – although understandable – should not be relevant to the proportionality analysis.

When applied to the 2014 conflict this distinction reveals that with the exception of specific situations such as the battle of Shuja'iya on the 19 July when the Israeli ground forces came under direct fire and lost 13 soldiers the IDF's overall posture may be characterized as "protectiveness" rather than "force protection". It seems also that it is political and cultural rather than strictly military factors that influence the IDF's reliance on indirect fire. Consequently, including "force protection" as a factor when assessing IDF's compliance with the rule of proportionality does not seem legitimate.

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[142] Geiss, R. (2012). The Principle of Proportionality: 'Force Protection' as a Military Advantage. Israel Law Review, 45(1), 71-89. doi:10.1017/S002122371100001X

[143] Ibid. p. 88.

The UN independent commission of inquiry found in this context that during the operations in Shuja'iya and Rafah the protection of soldiers was for the IDF a consideration "overruling and, at times eliminating, any concern for the impact of its conduct on civilians"[144]. Furthermore, the commission was under the impression that in situations when soldiers' lives were at stake or there was a risk of capture, the IDF disregarded the principles of distinction, proportionality and precautions. The commission reminded in this context that under IHL members of the armed forces have the right to directly participate in hostilities and consequently may also be lawfully attacked by the adversary. Therefore, it is inherent in any armed conflict that members of armed forces are put in danger[145].

3.3. EFFECTIVE ADVANCE WARNINGS

The obligation to provide an effective advance warning to the civilian population is one of the key elements of the requirement to take precautions in attack as defined by the relevant provisions of AP I and the rules of the customary IHL. The warnings are therefore not "acts of charity"[146] but a duty on the part of the attacking party. In the following sections I will try to analyze whether warnings issued by the IDF during the 2014 conflict generally complied with this obligation and whether the "knock on the roof" – a specific method of delivering warnings – maybe considered legitimate under IHL.

3.3.1. Scope of warnings

The official Israeli report on the 2014 conflict states that in order to notify civilians of impending IDF operations and to instruct civilians how to avoid harm,

[144] Supra note 62. p. 102.
[145] Ibid. pp. 102-103.
[146] Dill, J. (2014, July 30). Guest Post: Israel's Use of Law and Warnings in Gaza. Opinio Juris. http://opiniojuris.org/2014/07/30/guest-post-israels-use-law-warnings-gaza/

the IDF employed a "comprehensive advance warnings system, with multiple, overlapping notification procedures"[147].

Indeed, there is little doubt as to the fact, that the IDF delivered warnings extensively and by diverse means. The general warnings to the inhabitants of areas that were to be become subject to the IDF ground operation were delivered by leaflets, radio messages, telephone calls and text messages, whereas warnings of specific attacks were usually delivered by phone calls and/or a "knock on the roof". This effort earned Israel appreciation not only from its allies such as the US[148] but also from the independent commission of inquiry who found that "issuing of warnings concerning specific air strikes… is a good practice"[149]. In this context the commission also took note of the fact that over 200 airstrikes on residential buildings in Gaza did not result in civilian casualties and acknowledged that the general warnings that instructed people from entire neighborhoods to evacuate saved many lives[150].

However, in the same way as a high number of civilian casualties does not, in itself, point to a violation of the rule of proportionality, the extensive issuing of warnings does not automatically mean that they were adequate or that the party issuing them complied with its legal obligations.

The fact that with the exception of some cases reviewed by the IDF's Military Advocate General Israel did not disclose information on the details of individual attacks, makes any comprehensive analysis of the patterns in which the warnings were delivered impossible.

However, the three most thorough independent sources on the conflict, namely the reports of the UN independent commission of inquiry, the Amnesty International and B'Tselem, suggest that out of a total of 33 attacks that these bodies examined only in 3 instances warnings were issued (in 2 further cases it is a possibility).

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[147] The 2014 Gaza Conflict (7 July - 26 August 2014): Factual and Legal Aspects, May 2015, State of Israel, p. 170.

[148] U.S. Gen. Martin Dempsey, praised Israel for its efforts to avoid civilian casualties in Gaza. (2015, February 26). [Video]. YouTube. https://www.youtube.com/watch?v=QAsutHJGGo8&feature=youtu.be

[149] Supra note 62. p. 65.

[150] Ibid. p. 105.

Also, the Independent Medical Fact-Finding Mission reported that out of 68 persons it interviewed only 5 testified that the attacks were preceded by warnings. Obviously, these numbers in themselves may not serve as a proof of anything. The persons who received the warnings could have misinterpreted them or could have been killed in the attacks, the surviving witnesses could have – deliberately or not – misled the interviewers, finally, all of the cases in which the warnings were not delivered could have theoretically fallen into the category where the circumstances did not permit do so. However, it seems legitimate to consider these numbers an indicator that the IDF did not provide warnings as extensively, consistently and effectively as the official reports suggest.

3.3.2. Effectiveness

The IHL does not have a single universally recognized definition of "effectiveness" in the context of advance warnings. An often cited definition comes from the United Kingdom's military manual of 2004 which states that "the object of the warning is to enable civilians to take shelter or leave the area... To be effective the warning must be in time and sufficiently specific and comprehensive to enable them to do this"[151]. The UN independent commission of inquiry for the 2014 conflict concluded, in turn, that the requirements for a warning to be considered effective are (1) that it must be crafted in a way that will be understood by those to whom it is addressed and (2) that it can be acted upon, meaning that what the warning requires can be realistically complied with[152].

In the context of the 2014 conflict many human rights organizations such as the Human Rights Watch and Amnesty International pointed out that especially in the case of generalized warnings delivered by the IDF to the residents of entire areas of the Strip, the warnings were too vague in the sense that they did not specify

[151] UNITED KINGDOM MINISTRY OF DEFENCE. (2004). THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT. p. 84. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf

[152] Supra note 62. p. 28.

where it is safe to flee and which way to choose. Consequently, these organizations found such warnings ineffective[153]. Some authors critical of Israel's actions in Gaza went as far as to suggest that since the warnings issued by the IDF were inherently ineffective and couldn't have been acted upon they could be potentially regarded as acts or threats of violence the primary purpose of which is to spread terror among the civilian population and which are prohibited under article 51 (2) of the AP I[154].

Also the UN independent commission of inquiry found that while the generalized warnings did help to save lives they cannot be considered entirely effective as they failed to consider that in many cases the population of the areas that the IDF wanted to see evacuated did not have any safe place to go (either due to the overpopulation of the central part of Gaza or to IDF's other operations in the area)[155].

Considering the overall shortage of information regarding the facts of the "Protective Edge" the author of this work is not in a position to formulate any definite opinions with regard to the warnings being effective or not. It does seem, however, that the standard to which Israel is being held by the human rights organizations and – in part – by the independent commission of inquiry is exceptionally high when it comes to the expected level of clarity and specificity of the warnings.

In this context it is worth referring to some arguments made by Professor Pnina Sharvit Baruch in her 2011 article on advance warnings[156]. Professor Sharvit Baruch points to the inherent uncertainty of armed conflict situations, in which circumstances are constantly changing and are therefore unpredictable. In her

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[153] Cf. Israel/Gaza conflict: Questions and Answers. (2014, July 25). Amnesty International. https://www.amnesty.org/en/latest/news/2014/07/israelgaza-conflict-questions-and-answers/ AND Middle East Eye. (2014, July 16). Human Rights Watch's Bill Van Esveld discusses Gaza evacuees [Video]. YouTube. https://www.youtube.com/watch?v=aAC_9ggfrwM&feature=youtu.be

[154] Dill, J. (2014, July 30). Guest Post: Israel's Use of Law and Warnings in Gaza. Opinio Juris. http://opiniojuris.org/2014/07/30/guest-post-israels-use-law-warnings-gaza/

[155] Supra note 62. p. 105 - 106.

[156] See Sharvit Baruch, P., & Neuman, N. (2011). Warning Civilians Prior to Attack under International Law: Theory and Practice. International Law Studies, 87(International Law and the Changing Character of War). p. 388. https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1086&context=ils

view this reality has implications on what may be considered an effective warning. Sharvit Baruch argues also that although the aim of warnings is providing civilians with a chance to protect themselves, the review of their effectiveness "cannot disregard the realities of the situation and the concerns and constraints of the military forces involved"[157]. To do so would amount in her opinion to a "human-rights dominated approach" which focuses on the rights of the individual without giving due weight to the military concerns of the belligerents. Sharvit Baruch also points out that there is no universal consensus as to how specific the warnings should be. In this context she refers to the US Army's Operational Law Handbook of 2010 which states that "warnings need not be specific as to time and location of the attack, but can be general"[158]. Finally, Professor Sharvit Baruch makes a very interesting argument in the context of the Report of the United Nations Fact-Finding Mission on the 2009 Gaza Conflict (so called Goldstone commission) which found the warnings issued by the IDF insufficient. She points out that since the advance warnings issued by the IDF had no precedent in terms of both scope and specificity there may not be a customary IHL requirement of an even higher standard of conduct, as there is neither state practice nor *opinio juris* to support it. Israel's practice alone cannot create a new legal norm, not only because an extensive state practice is necessary, but also because Israel employed the warnings not only out of a sense of a legal obligation but also out of moral and policy concerns.

The author accepts many of the points made by Sharvit Baruch and finds that also in the context of the 2014 conflict the warnings issued by the IDF may not be *a priori* dismissed as ineffective simply on the grounds that they did not include all conceivable information. At the same time, the author believes that a case by case review could reveal that in some (or many) situations the warnings were indeed ineffective. However, such a review would require access to information which remain exclusively in the hands of the Israeli authorities.

[157] Ibid. p. 382.
[158] Ibid.

3.3.3. Knock on the roof

One of the methods of delivering warnings frequently used by the IDF during the 2014 conflict (as well as during the two previous operations in Gaza) was the so called "knock on the roof" which is a non-explosive or low explosive projectile fired at the roof of the designated target to warn the civilian population of an incoming more powerful strike.

The official Israeli report on the 2014 conflict describes the "knock" as a method deployed to give civilians a last opportunity to seek safety before an attack is launched when other types of warnings were unheeded or unfeasible. From the Israeli standpoint the knock on the roof is a "progressive precaution that went beyond the requirements of international law" and proved highly effective, preventing many civilian injuries and deaths[159].

However, the "knock on the roof" raises also a lot of controversy with regard to both its overall legitimacy under IHL and its effectiveness as a method of delivering warnings.

In terms of general legitimacy, the Goldstone commission pointed to the fact that the knock on the roof "constitutes a form of attack against the civilians inhabiting the building"[160] and consequently rejected the idea that "an attack, however limited in itself, can be understood as an effective warning"[161]. A similar opinion was also repeatedly expressed by human rights organizations both Palestinian and international. For example, a representative of the Gaza based Al Mezan Center for Human Rights stated: "The sending of a missile cannot be considered a warning. It is the targeting of civilians with a weapon, regardless of how small, and it is a violation of the Geneva conventions"[162].

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[159] Supra note 34. p. 180.

[160] UN HUMAN RIGHTS COUNCIL. (2009, September). Report of the United Nations Fact-Finding Mission on the Gaza Conflict (A/HRC/12/48). p. 19. https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf

[161] Ibid. p. 132.

[162] Abdelaziz, B. C. T. L. A. S. (2014, July 15). Israeli military's "knock on roof" warnings criticized. CNN. https://edition.cnn.com/2014/07/15/world/meast/mideast-israel-strike-warnings/index.html

The idea that the "knock on the roof" is *per se* illegitimate under the IHL was persuasively refuted by professor Michael N. Schmitt who pointed to the fact that even if warning shots such as "knock on the roof" were to be considered an attack it would be incorrect to view them as an attack on civilians. Instead, they should be viewed as an attack against a lawful military objective that is to be imminently targeted with a more powerful missile. If the target does not pass the test of distinction, then the whole attack is unlawful and not solely the knock on the roof[163].

However, a legally controversial situation arises when the warning missiles are being dropped – as it systematically happened during Protective Edge – not only on the structure that is to be attacked but also on neighboring buildings in order to warn their residents of a potential danger. The problematic aspect of this situation consists in the fact that the neighboring buildings remain civilian objects and consequently targeting them even with a low explosive missile could be reasonably interpreted as a breach of the principle of distinction.

This situation of a clash between two legal norms – the imperative to protect civilian lives and the prohibition of targeting civilian objects – is not easily solvable. In his article of 2010 Jeroen C. van den Boogaard suggested that in a very limited number of cases, and under strict conditions, the illegality of the use of the knock on the roof against a civilian object could arguably by temporarily set aside by the obligation to provide effective warning. These conditions are, that the warning must be expected to be effective because it is accompanied by other types of warnings. Also, it must be reasonably expected to save lives as well as be in conformity with other IHL principles. He admits however that any conduct that may amount to setting aside the prohibition to target civilians must be viewed with suspicion[164].

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[163] Schmitt, as cited in Sharvit Baruch, P., & Neuman, N. (2011). Warning Civilians Prior to Attack under International Law: Theory and Practice. International Law Studies, 87(International Law and the Changing Character of War). p. 388. https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1086&context=ils

[164] van den Boogaard J.C. (2018) Knock on the Roof: Legitimate Warning or Method of Warfare?. In: Gill T., McCormack T., Geiß R., Krieger H., Paulussen C. (eds) Yearbook of International

The other controversial point often raised in the context of the "knock on the roof" is the question whether the method meets the requirement of "effectiveness". Answering this question is of a crucial importance, for it is only if the warning is "effective", that the obligations of the attacking side may be considered met.

The issue of the "knock's" effectiveness was raised in the context of all three Israel's military operations in Gaza. In 2009 the Goldstone commission remarked that "in the context of a large-scale military operation including aerial attacks, civilians cannot be expected to know whether a small explosion is a warning of an impending attack or part of an actual attack"[165]. Also with regard to the 2014 conflict the UN independent commission of inquiry determined that in many cases the persons concerned did not understand that their house was hit by a warning missile, especially if they were in the lower floors of the building or if there were other attacks taking place at the same time in their vicinity[166]. Consequently, the commission found the "roof-knocking" to be ineffective as a method of warning, in particular if not combined with other specific warnings[167].

In conclusion, on the point of legitimacy, while the author of this work finds no reason to find the "knock on the roof" inherently illegitimate, there is no easy answer to the question whether its systematic deployment against civilian objects by the IDF may be considered legitimate. The test suggested by van den Boogaard could be a way out, but it would necessitate an individual analysis of each case in which the "knock on the roof" was used and require information on the specific circumstances of each attack.

On the point of effectiveness, the main doubt raised in this context by Israel's critics is with regard to the ability of the intended recipients of the warning to distinguish which building was "knocked on" and interpret the warning correctly. The author finds that these doubts concern more the way in which the "knock on the roof" is applied in individual situations than the inherent flaws of the method

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Humanitarian Law Volume 19, 2016. Yearbook of International Humanitarian Law, vol 19. T.M.C. Asser Press, The Hague. p. 207. https://doi.org/10.1007/978-94-6265-213-2_7

[165] UN HUMAN RIGHTS COUNCIL. (2009, September). Report of the United Nations Fact-Finding Mission on the Gaza Conflict (A/HRC/12/48). p. 131

[166] Supra note 62. p. 65.

[167] Ibid., p. 66.

itself. As van den Boogaard rightly points out a knock on the roof employed in isolation without a prior explanation of its meaning to the civilian population and without further warnings would indeed in many cases fail to meet the requirements of the IHL. If, however, the "knock" is announced and explained and is accompanied by other warnings, there is no reason why the practice would not be understood as an effective warning[168].

It is the author's opinion, there is no grounds to find the "knock on the roof" inherently ineffective, although there is no doubt that the method may be applied in an ineffective way. Verifying whether the "knock on the roof" was used effectively during the 2014 conflict would, however, again necessitate a case by case review including a detailed analysis of the circumstances of each attack and the presence (or absence) of other warnings.

[168] van den Boogaard J.C. (2018) Knock on the Roof: Legitimate Warning or Method of Warfare?. In: Gill T., McCormack T., Geiß R., Krieger H., Paulussen C. (eds) Yearbook of International Humanitarian Law Volume 19, 2016. Yearbook of International Humanitarian Law, vol 19. T.M.C. Asser Press, The Hague. p. 193.

CONCLUSION

There are two starkly contrasting narratives regarding IDF's compliance with its IHL obligations during the 2014 conflict. The first one, represented by Israel itself and its likeminded allies – many of them high ranking military men or IHL scholars with a background in the military, claims that the IDF did "extraordinary things" to limit civilian casualties[169] and that it not only met but often exceeded its obligations under the Law of Armed Conflict at significant tactical cost[170]. The other narrative, found mainly in the report of the UN independent commission of inquiry and the reports of human rights organizations, speaks of repeated violations of the IHL and possible war crimes.

Having examined, to the extent possible, the IDF's conduct of hostilities during the 2014 conflict, the author finds both of these narratives inadequate.

There is no doubt that concern for the IHL on the part of Israel for reasons of both legal and political nature was a major constraining force stopping the IDF from striking its adversaries even nearly as powerfully as it could. Similarly, there is no doubt as to the genuine effort made by the IDF in practical terms to minimize civilian casualties. Not only was the legal assessment structurally integrated into the targeting process, but also military lawyers were deployed at various levels of the IDF's command to provide advice in real time[171]. Also, the system of advance warnings put in place by the IDF during the conflict was extensive and no doubt in many instances helped to save civilian lives. The author is not in a position to verify Israel's claim as to the majority of its 6000 airstrikes resulting in no civilian casualties[172] but the UN commission confirmed that in over 200 attacks on

[169] U.S. Gen. Martin Dempsey, praised Israel for its efforts to avoid civilian casualties in Gaza. (2015, February 26). [Video]. YouTube. https://www.youtube.com/watch?v=QAsutHJGGo8&feature=youtu.be\

[170] HIGH LEVEL MILITARY GROUP. (2015, October). AN ASSESSMENT OF THE 2014 GAZA CONFLICT. p. 11. http://www.high-level-military-group.org/pdf/hlmg-assessment-2014-gaza-conflict.pdf

[171] Supra note 34. p. 140 AND pp. 138 – 149.

[172] Ibid. p. 6.

residential buildings no civilians were killed[173]. This number may serve as an indicator of the effectiveness of the IDF's precautionary measures.

At the same time, however, as demonstrated in the previous chapters the IDF systematically targeted residential buildings on doubtful grounds, effectively instructed its soldiers to disregard the test of distinction when in the combat zone and applied the test of proportionality in a very liberal way.

The author's interpretation of the obvious contradiction emerging from the juxtaposition of these two realities is that the IDF's ability, readiness and commitment to applying precautionary measures prescribed by the IHL was limited by at least two factors.

The first one is connected to the character of Israel's adversaries. The conflict in Gaza is clearly an asymmetric one. Members of Hamas and PIJ intermingle with civilian population, use civilian objects for military purposes and consistently expose the civilian population to dangers resulting from military operations. Confronting such an enemy required from the IDF striking a difficult balance between compliance with its IHL obligations and achieving the military objectives of the operation.

The other and in the author's view more important factor was subjective or self-imposed and therefore much more relevant for the review of the legality of the IDF's actions. It was the IDF's "minimum risk policy". In the light of the available information it seems legitimate to say that for the IDF the protection of Palestinian civilians was secondary to protecting its own soldiers. Consequently, it was ready to comply with the IHL requirements but only to the extent that it didn't result in exposing its forces to the levels of danger above the ones that were absolutely necessary from the purely military point of view. In the context of precautions in attack it is possible to say that the IDF did take all feasible precautionary measures but only if "feasible" is understood as "feasible with the minimum risk policy in place". Incidentally, such approach exactly mirrors the ethical doctrine developed by Prof. Asa Kasher which may be summed up in his

[173] Supra note 62. p. 64.

own words as “if it's between the soldier and the terrorist's neighbor, the priority is the soldier”[174].

In summary, Israel’s efforts to minimize harm to civilians were genuine and substantial and should not be easily dismissed, at the same time however in many instances they fell markedly below the standard of protection envisaged by the IHL. Furthermore, the consistent prioritization of the life of own forces at the expense of civilian population effectively undermines the entire paradigm of distinction established by the law of armed conflict and in the light of the IHL provisions in place cannot be justified.

The conclusion emerging from these two determinations is that during the 2014 conflict (an possibly during the two previous conflicts in Gaza as well) Israel effectively unilaterally established and followed its own standard of protection of non-combatants which in some aspects complied with and in others clearly fell short of the one established by the IHL.

The question that may arise in this context and namely whether the IDF’s approach differs in this regard from the approach of any modern military is no doubt legitimate but answering it goes beyond the scope of this work. In any case, however, should the sort of an *à la carte* approach to the IHL displayed by Israel become a norm among the states the future of the law of armed conflict seems bleak.

[174] Amos Harel, “The Philosopher Who Gave the IDF Moral Justification in Gaza,” Haaretz.com (Haaretz.com, January 12, 2018), https://www.haaretz.com/1.5071578.

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