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Operation Protective Edge: Legality and Legitimacy

Pnina Sharvit Baruch

Like all military missions, Operation Protective Edge raises several legal questions. The legal aspects of the operation are relevant to the deliberations of decision makers at the practical level as well as to the public discourse in Israel and abroad. However, issues touching on the legality of Israel's actions are not synonymous with issues concerning the legitimacy of these actions in the international arena, and legal actions may still be deemed illegitimate. It is therefore important to distinguish between the two realms and understand what divides them.

The Justification for Action

Legally speaking, there is no doubt that Israel has the right to use military force in the Gaza Strip to prevent attacks from there aimed at Israel. Operation Protective Edge is part of an ongoing campaign between Israel and Hamas, i.e., part of an existing protracted armed conflict. Therefore, in taking action, Israel does not need to rely on the right to self-defense, which is relevant only at the outset of an armed conflict. However, even if there were need to establish the claim of self-defense, Israel could definitely do so, because Hamas clearly engaged in armed attacks against Israel. Moreover, Israel tried to avoid using force, by offering "calm for calm" and by agreeing to a ceasefire. In both cases, it was Hamas that chose to continue the offensive, further supporting the legal justification for Israel's use of force.

In terms of legitimacy, the world looks at "who started" the current round. Israel has good grounds for claiming that Hamas is the one that raised the scope and intensity of fire against Israel, which in turn was compelled to respond with force in order to stop the attacks. Nonetheless, in the international arena, some are describing the justification for the operation as revenge for the murder of the three Israeli teenagers, thereby weakening Israel's legitimacy in taking action because acts of revenge are unjustifiable. In this version, Israel is presented as the one that caused the escalation. Still, Israel's agreement to a ceasefire that was rejected by Hamas strengthens the legitimacy of the Israeli operation.

The Scope of the Operation

Legally, the use of force in self-defense must be proportionate to the threat. Because this is an ongoing military campaign, rather than an act of self-defense, there is no legal obligation to scale the Israeli response proportionately in relation to Hamas's attacks. Moreover, even if such a requirement were applicable, it would be fulfilled in light of the unceasing rocket fire aimed at Israel and the hostile border infiltrations. Moreover, legally, proportionality is not determined by a comparison of the number of casualties on the two sides.

In terms of legitimacy, however, the world does compare the number of casualties. Israel has suffered relatively little loss of life and few wounded. In Gaza, there are more than 500 dead, many of them civilians. Israel justifiably stresses the severity of the situation in which most parts of the country are under a constant barrage of rocket attacks, and emphasizes that the only reason that there are so few casualties is its having invested heavily in defensive capabilities, such as the Iron Dome system and shelters. Hamas, on its part, has not only refrained from providing any shelters to the residents of the Gaza Strip, who are under its control, but in fact intentionally places them in the line of fire by operating and initiating attacks from within their midst. A pithy summary of the situation is that "Israel uses missiles to defend its citizens while Hamas uses its citizens to defend its missiles." Ultimately, however, graphic photographs of dozens of killed civilians in the Gaza Strip, including children, will always gain more international public sympathy than pictures of Israeli children huddling in bomb shelters.

The Legality of the Objectives

Legally speaking, in accordance with the principle of distinction in the law of armed conflict, a party to an armed conflict is allowed to attack military targets and enemy combatants (including civilians directly participating in hostilities). It may not direct its attacks against civilians or civilian objects. The law of armed conflict recognizes that a civilian object may lose its immunity from attack and be considered a military target if by its use, purpose, or location it effectively contributes to the military action of the enemy. In the Gaza Strip, Hamas and other terrorist organizations use civilian buildings, including apartment blocks, schools, mosques, hospitals, and the like as launch pads for attacks, weapons storage, and other military purposes. This means that these objects lose their immunity, and it is therefore legal to attack them.

In terms of legitimacy, the images broadcast by international media are of destroyed civilian structures and civilian casualties. Obviously, these pictures do not portray the former military use made by those structures. Thus while legally speaking the lawfulness of a decision to attack relates to the actual decision made by the military commander, based on the information he or she possessed at the time of the decision, in the realm of legitimacy, the burden is placed on the attacker to prove the alleged military use. If this burden of proof is not met (and it is difficult to prove military use after the fact), the attack is liable to be viewed as an intentional, and thus prohibited, attack on civilian

objects. This, for example, is what was claimed in the Goldstone Report after Operation Cast Lead.

Statements made by military and political officials about “exacting a steep toll” from the population or calls to “flatten Gaza” serve as proof of Israel’s alleged intention to harm civilians, even when those uttering the statements have no connection with or influence on IDF commands and in no way reflect the contents of those commands and the directives given in practice. Therefore, it is of the utmost importance that statements reflect the existing policy, which is based on legal and moral tenets: that the purpose of the operation is to damage Hamas, not to harm the civilians of Gaza.

The Proportionality of the Attack

Legally, according to the principle of proportionality in the law of armed conflict, even when a lawful target is attacked, it is prohibited to carry out the attack if the expected collateral damage to civilians or civilian objects is excessive in relation to the anticipated military advantage from the attack. This means that when a decision to attack a particular target is made, the military commander must first examine the anticipated harm to civilians and civilian objects, and balance this harm against the military advantage. The commander must take the civilians there into consideration, even if advance warning was given and the civilians did not evacuate. Nonetheless, the very fact that harm to civilians is expected does not make the attack illegal if the military advantage is such that achieving it renders the expected damage proportional. There is no exact formula of what is considered proportional. The law of armed conflict sets the standard of “a reasonable military commander.” The law also states that the assessment of proportionality is to be conducted based on the information available to the commander at the time of the decision, with consideration given to the uncertainty inherent in warfare (which increases in cases of ground operations), rather than according to the result in practice.

Despite the legal analysis, in practice, large numbers of civilian casualties are, in legitimacy terms, simply unacceptable in the international arena. The gap between legality and legitimacy is especially stark in this regard, and is manifested at several levels: first, in the erroneous assumption that if civilians are harmed the harm was intentional, and hence represents a war crime of intentionally attacking civilians; second, non-acceptance of the principle that there may be justification for harming civilians when the target is legitimate and the mistaken belief that any such harm is by definition disproportionate; and third, judgment based on the outcome, and a rejection of claims that the damage incurred in practice was unexpected or was the result of error. The IDF’s high technological capabilities create the illusion it is omniscient and infallible, and that therefore every outcome is intentional.

Advance Warning

Legally, there is an obligation to take feasible precautions in order to minimize the anticipated harm to civilians as a result of attack. One of the ways to do so is by warning

civilians of impending attacks, unless circumstances do not permit. The warnings Israel issues are individualized, and go beyond the scope required by law. On the other hand, the laws of war prohibit terrorizing the civilian population, so it is illegal to issue warnings without good reason. However, if a warning is issued on the basis of a genuine intention to carry out a military action or attack and it is then canceled for some reason or another, such a warning is not prohibited.

In terms of legitimacy, to the extent they reduce the number of civilian casualties, warnings are a positive contribution. Still, confusing or general warnings that are not followed by an attack are often portrayed as an action intended to frighten rather than protect the public. In many cases it is hard to prove “true intention,” and here Israel encounters suspicion and distrust.

The Illegality of Actions by Hamas and Terrorist Organizations

Legally speaking, there is no doubt that the actions of Hamas and other terrorist organizations operating in the Gaza Strip, deliberately targeting civilians in order to harm as many as possible, and using civilians in Gaza as human shields and as a base from which the military operations are conducted, are prohibited by the law of armed conflict and constitute severe war crimes. Nonetheless, this does not reduce Israel’s obligation to continue to honor the law of armed conflict.

In terms of legitimacy, the fact that Hamas’ actions are illegal is essentially not disputed, but the Palestinians are viewed as the weaker side “forced” to take such actions against the strong Israel. Moreover, the illegality of Hamas’ activity does not reduce the expectation that Israel, as a developed, democratic country, will operate on the basis of international law.

Conclusion

Legally speaking, the rules allow Israel and the IDF relative freedom of action. It is essential to adhere to these rules in order to safeguard the rule of law in Israel and the country’s democratic nature. In terms of legitimacy, Israel faces criticism regarding both the decision to react forcibly and the scope of force employed, as well as the extent of civilian casualties and damage to civilian objects, even when this criticism is not necessarily justified under international law.

