Guest Post: Israel’s Report on the 2014 Gaza Conflict

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The Israeli government released its complete [report](http://mfa.gov.il/protectiveedge/pages/default.aspx) on the 2014 Gaza Conflict (“Operation Protective Edge”) on Sunday (some chapters have been available online the past few weeks). Spanning over 200 pages, the document includes a comprehensive analysis and discussion of the conflict, the applicable law, Hamas’s conduct and tactics, the conduct of the Israel Defense Forces, the effect of the conflict on the Israeli population, and Israel’s framework and procedure for investigations.

The report is a sophisticated treatment of the legal issues inherent in contemporary conflicts and the extraordinarily difficult tactical, strategic and legal challenges in fighting against enemy forces that not only do not abide by the law of armed conflict (LOAC), but also use every opportunity to exploit and undermine the law for their own tactical and strategic gain.  The report is also a remarkable explication of legal analysis, training, and implementation by a state on the front lines of asymmetric war, lawfare, and counterterrorism — a striking contrast to the amount of information and analysis other governments (including the United States) generally provide about the legal framework for their military operations and its implementation during hostilities.  This post is not intended to provide a point-by-point analysis of the report or of the lawfulness of specific incidents, but rather to highlight what the report adds to the discourse on both the conflict and the application and implementation of LOAC during military operations in general.

One of the report’s most important contributions is the careful and detailed explanation of how Israel applies LOAC to guide its operations, from training to implementation to investigations.  Non-stop and instantaneous media and Internet coverage has spawned a culture of [effects-](https://news.vice.com/article/amnesty-says-israels-attacks-on-civilians-during-gaza-offensive-amounted-to-war-crimes)or [outcome-based analysis](http://www.unrwa.org/newsroom/official-statements/unrwa-strongly-condemns-israeli-shelling-its-school-gaza-serious) of military operations, whether drone strikes in Yemen or ground operations in the Gaza Strip. In essence, the nature and extent of civilian casualties becomes the primary, and even sole, driver of analysis about the lawfulness of military operations.  Even more problematic, an effects-based analysis incentivizes the enemy to surround itself with civilians so as to generate ever greater civilian casualties and ever greater opportunities to accuse the attacking party of LOAC violations, a strategy we see used to great effect in conflicts around the world and that was the [centerpiece](http://blogs.channel4.com/factcheck/factcheck-hamas-civilians-human-shields/18534) of Hamas’s operations last summer.

The protection of civilians and the mitigation of suffering during conflict is, of course, one of LOAC’s central goals and must remain at the center of efforts to regulate the conduct of war.  But the law does not operate by [starting with a number of civilians killed or injured](http://www.jpost.com/Middle-East/UN-says-Israels-use-of-force-against-Hamas-is-disproportionate-369503) and working back to assign blame.  Rather, LOAC’s key principles – military necessity, humanity, distinction, proportionality and precautions — provide a methodology for the planning and execution of military operations so as to maximize both the effectiveness of military operations and the protection of civilians.

An effects-based analysis either disregards or devalues any investigation or evidence of the commander’s knowledge or intent at the time of the attack—information that is central to any valid LOAC analysis.  In effect, the standard becomes strict liability by eliminating reasonableness and creating a standard of no errors.  But the law does not judge commanders based on the outcome alone, nor does it require commanders to be right in all circumstances. The legal standard in Additional Protocol I, the ICTY Statute, the ICC Statute, and customary international law is that commanders are obligated to make reasonable decisions based on the information available at the time of the attack.  Any assessment of targeting therefore must be based on the commander’s intent and whether the decision to launch the attack in question was objectively reasonable based on the information available at the time of decision, including the full range of operational execution variables that influence the actual effects of an attack.

It is in highlighting these operational variables and realities that Israel’s report offers its most important contribution.  The report brings into relief many of the considerations that are inherent in the application of LOAC — and therefore must be integral to any analysis of legal compliance and the reasonableness of the commander’s decision at the time of the action in question.  Such variables include, for example: the nature and value of the target, including as a component of broader military operations or given the exigencies of ground combat; the civilians in the area and their patterns of movement; the choice of weapons to deploy and their known or anticipated blast radius or other consequences; the availability of other opportunities to strike the target; the enemy’s movement and tactics; and a host of other factors.  In this vein, the Israeli report offers detailed descriptions of the challenges of urban warfare, such as (to name just a few):

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* “Physical infrastructure multiplies the surface areas from where adversaries may direct attacks against a military. In a single small space, adversaries may attack from within and from on top of buildings, as well as from subterranean positions. This increases the level of risk to a military and, in turn, increases the need to exercise force in order to repel attacks. Such circumstances also increase uncertainties that are inherent in all warfare, such as locating the point of origin of an attack and discerning between the positions and activity of adversary and friendly forces.”

As a result, the report effectively counters the popular perception that targeting consists merely of: (1) identifying something to attack and (2) checking to see if civilians are likely to be harmed — and, added to that extreme simplification, assuming that both answers are concrete, straightforward, and static.  As the report explains, “the success of efforts to mitigate the risk of civilian harm may be limited by the challenges of operating in an urban environment, where distinguishing between military and civilian activity is made more difficult, the presence of civilians may be concealed by physical infrastructure, and small mistakes may have substantial repercussions for the civilian population.”  Similarly, for example, Hamas’s tactics mean that “secondary explosions triggered by IDF attacks on weapons depots located inside civilian homes caused damage to the surrounding areas, while booby-trapped homes caused considerable damage to civilian structures and their surroundings.”

The complexities highlighted here and many others described in the report do not diminish the need to abide by LOAC’s precepts — in fact, they reaffirm LOAC’s importance in such conflicts.  Nor do these factors in and of themselves provide any conclusions about the legality of certain actions. Any determinations of the legality of specific incidents must rest on the detailed findings and analysis of investigations — and prosecutions where warranted.  In the meantime, Israel’s report provides welcome detailed factual information and legal analysis to help understand the events during the conflict and the IDF’s methodology for LOAC compliance. The document offers readers the tools to go beyond the numbers and understand the many variables and considerations that lie at the heart of the implementation of lawful military operations and, as a result, it provides an essential new resource for understanding the 2014 conflict in Gaza and military operations in general.