**Should Israel’s Leaders Fear Prosecution For The Gaza War?**

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Two weeks ago, the Palestinian minister of foreign affairs, Riad al-Maliki, [conferred](http://www.haaretz.com/news/diplomacy-defense/1.608987) with the chief prosecutor of the International Criminal Court in The Hague. The subject was the potential ratification of the Rome Statute by the Palestinian Authority in order to put the operations of the Israel Defense Forces and the prime minister of the State of Israel on trial for alleged war crimes committed by the IDF during operation Protective Edge.

How realistic is this scenario from a legal perspective? Apart from jurisdictional issues (can the Palestinian Authority now be considered a “state,” able to ratify the Rome Statute?) and apart from the risk that the Palestinian Authority might also be held responsible for potential war crimes committed by Hamas (using human shields within the context of an international armed conflict constitutes a war crime under the Rome Statute,) the ICC chief prosecutor faces numerous legal challenges.

One of these challenges pertains to the pitfall of applying “double standards.” The current policy of the ICC prosecutor, accused of selective judgment regarding whom cases are opened against, has been admonished by the African Union for its arbitrariness, especially in regard to the prosecution of particular African heads of state before the ICC.

Be this as it may, the ICC chief prosecutor faces a seemingly insurmountable legal precedent. One [report](http://www.icty.org/sid/10052), written for the International Criminal Tribunal for the former Yugoslavia, which reviewed whether NATO attacks could be seen as proportional, could be used by the chief prosecutor as a guide in this complex case. In this case, NATO’s military operation towards the end of the Yugoslavia conflict included 10,484 airstrikes in urban areas during a two-and-a-half month period (March to June of 1999,) causing the deaths of approximately 500 innocent civilians.

The air strikes included the bombing of two civilian buses, which left 56 civilians dead and another 44 wounded, the bombing of a civilian train (15 civilian casualties) and an airstrike on the village of Korisa that caused the deaths of 87 civilians and injured 60.

Notably, the allegation that the death toll of 87 civilians caused by NATO in Korisa could be seen as a war crime was refuted by NATO, which argued that all precautionary measures were taken to prevent civilian casualties. This was the case, even though prior to the NATO bombardment, many civilian refugees had unexpectedly returned to the village and were subsequently used by the Serb forces as human shields, according to NATO.

The NATO air campaign was ultimately investigated by a commission of inquiry appointed by Carla del Ponte, chief prosecutor of the International Criminal Tribunal for the former Yugoslavia.

In June 2000, the ICTY chief prosecutor [decided](http://www.icty.org/sid/7846) not to press any war crimes charges against NATO or its leaders, based on the findings of this commission; it also adopted NATO’s aforementioned argument as to the use of human shields.

For the IDF and Israel’s prime minister, these findings leave little doubt that the ICC chief prosecutor most likely has no other option but to refute a criminal complaint by the Palestinian Authority. The ICTY report on the NATO bombing campaign says that potential war crimes committed by the NATO could not be proven, notwithstanding the number of civilian Serbian casualties. It furthermore emphasizes that as long as such airstrikes are not launched “intentionally” to take civilian life, whilst the available evidence does not show criminal intent, the burden of proof for war crimes cannot be met.

More importantly, and perhaps decisive for Protective Edge, are the ICTY observations on the proportionality principle: If an airstrike remains within the ambit of “a reasonable military commander’s purview,” whilst these casualties are measured against the military advantage pursued by the operation and are not “clearly disproportional,” the airstrike cannot be presumed a war crime.

In turn, as ICTY holds, the criterion of what makes something “clearly disproportionate” cannot be judged exclusively on one specific incident or in isolation of the overall aim of the military operation at hand; rather it should be determined on an “overall assessment” of the “totality of civilian victims against the goals of the military campaign,” whereby the “strategic (overall) target” is decisive.

The IDF’s overall aim of Operation Protective Edge revolved around the survival of the State of Israel, or at the least the protection of thousands of its citizens who were subjected to thousands of rocket attacks: a powerful military objective that can potentially override every argument of alleged disproportionality to be purported by the ICC Prosecutor. This overall aim was exactly NATO’s justification for using overwhelming military force against Serbia in 1999 by conducting 10,484 airstrikes in two-and-a-half months: namely, further preventing a humanitarian catastrophe in Kosovo.

The air strikes the U.S. is currently conducting against IS (formerly ISIS) in Iraq could become the ultimate litmus test for the eligibility of Operation Protective Edge and the prime minister of Israel in terms of a potential ICC case.

As exemplified by the ICTY inquiry into the 1999 NATO campaign, professional military forces showing allegiance to the laws of war should not be fearful for a potential ICC charge. Legal fear seems unwarranted; rather, fear for double standards may well be justified.