

Analysis of the U.N. Report on the 2014 Gaza Conflict: The Distorting Effects of Flawed Foundations

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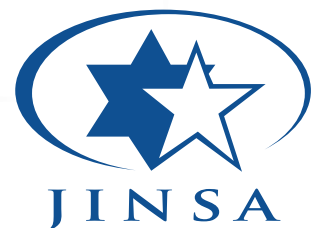


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Executive Summary

The U.N. Human Rights Commission Report on the 2014 Gaza Conflict (what the Israeli Defense Forces designated as Operation Protective Edge) includes findings that both Hamas and the IDF violated the law of armed conflict (LOAC); that the IDF violated human rights obligations; and that many of these violations appear to qualify as war crimes. Analysis of the Report indicates the findings related to Hamas LOAC violations are unjustifiably qualified, while the findings of IDF LOAC violations are not sufficiently supported by facts, expertise, or law. A summary of key concerns includes:

- A disproportionate focus on IDF alleged LOAC violations in comparison to Hamas violations.
- A failure to consider each belligerent party's *overall* commitment, or lack thereof, to LOAC compliance as a factor when assessing the credibility of allegations of individual incidents of violation.
- Numerous condemnations for violating LOAC rules that regulate the conduct of hostilities without comprehensive consideration of the tactical and operational considerations that frame implementation of these rules.
- A failure to acknowledge and consider the consequence of engaging an enemy who routinely and deliberately violates the fundamental LOAC principle of distinction by commingling with the civilian population in order to gain tactical advantage.
- A failure to analyze the weight of the presumption of civilian status in the context of a complex urban battle against an enemy that deliberately refuses to distinguish itself from the civilian population.
- A cryptic reference to “a military expert” who provided support for most of the findings, with no indication of the source of this individual’s expertise or affiliations.
- An overall failure to consider the publicly-available reviews of the conduct of IDF and Hamas operations by highly experienced experts in military operations and LOAC implementation.
- A condemnation of Israel for failure to cooperate with the Commission, with no consideration of the extensive report prepared by the IDF on the operation and made available to the public prior to release of this report.
- Reliance on erroneous interpretations of applicable LOAC rules and principles.
- Conclusions related to compliance with LOAC rules and principles unsupported by operational logic or past practice.
- A false assumption that failure by national authorities to progress from initial investigation to prosecution indicates the invalidity of the national accountability process.

Overview

This week, the U.N. Independent Commission of Inquiry on the 2014 Gaza Conflict released its report concluding that both Hamas and the Israeli Defense Forces (IDF) committed violations of the law of armed conflict (LOAC) during the Gaza conflict (what the IDF designated as Operation Protective Edge). Unfortunately, the condemnations directed against the IDF lack credibility, are often based on erroneous interpretations of the LOAC, and reflect an overall lack of competence in the relationship between the LOAC and military operations.

One might have expected that, in an effort to create the appearance of “balance,” the Commission would feel compelled to identify at least some IDF conduct of questionable legality. The routine and blatant Hamas LOAC violations – deliberately attacking civilians, using inherently indiscriminate weapons, violating the obligation to distinguish themselves from the civilian population, exploiting the presence of the civilian population to gain tactical advantage – indicated that the Commission would have to condemn Hamas.

However, it is remarkable that in a report spanning 183 pages, approximately 15 pages are devoted to analysis of Hamas’s LOAC violations, with the vast majority of the remainder of the Report devoted to a critique of IDF operations. This reflects a disparity in focus, but also a perplexing inverse relationship between the blatant nature of Hamas’s LOAC violations and the extent of analysis and critique.

This disparity also reflects an endemic flaw in the methodology of the analysis used throughout the Report: the focus on effects as the touchstone of LOAC compliance. The analysis of Hamas’s violations focuses primarily on the harmful *effects* produced by their illegal targeting, and in so doing minimizes the widespread evidence of their *effort* to produce unlawful effects – efforts that were, as the result of Israeli countermeasures, largely unsuccessful. For example, paragraph 93 of the Report indicates that “Palestinian armed groups appear to have provided advance warning in a very few instances before launching attacks *that may have killed Israeli civilians.*”

By focusing on effects, the Report minimizes what was in fact a deliberate strategy of blatantly violating the LOAC. Furthermore, because the *effects* of combat operations were largely inflicted on areas inside Gaza – a consequence of Hamas’s tactic of embedding its own military objectives amid its own civilian population – the Report devotes a disproportionate amount of analysis to IDF conduct of operations.

This is not the only manifestation of the flawed understanding and application of the LOAC that compromises the foundation of the Report. Initially, it lays out the LOAC rules and principles it purports to apply. One of these rules – one that is invoked to condemn both the IDF and Hamas – is the principle of distinction. As the Report properly notes, this principle request combatants to “distinguish” lawful objects of attack from civilians and civilian property.

What the Report fails to emphasize, or even identify, is that this principle imposes a “complementary” obligation on belligerents. As noted in the Report, it requires those conducting attacks to distinguish between lawful targets and civilians and civilian property. However, it also imposes an obligation on belligerents to distinguish themselves from civilians and civilian property. Indeed, as the report notes when it lays out controlling LOAC rules,

civilian facilities or protected sites are not absolutely immune from deliberate attack. When such property is transformed by its use, location, or purpose into a military objective, it becomes a lawful target.

It is self-evident that the IDF complied with this aspect of distinction: their forces wore distinctive uniforms and their equipment bore distinctive markings. It is equally self-evident that Hamas violated this aspect of distinction: their fighters not only did not distinguish themselves from the civilian population, they deliberately exploited the civilian population, civilian property, and the uncertainty created by cloaking themselves in the appearance of civilians to gain tactical advantage against an enemy committed to compliance with the first aspect of the distinction obligation.

The routine violation of this fundamental LOAC requirement produces highly negative consequences, most notably the dilution of the LOAC's protective effect for actual civilians and for civilian property that has not been transformed by the enemy into a lawful military objective. Ultimately, while the Report is correct to note that individuals who are not clearly identifiable as combatants are presumed to be civilians, and that property that is not clearly military in nature is presumed to be civilian, it completely fails to consider how the routine and deliberate violation of this aspect of distinction impacts – from a pragmatic tactical and operational perspective – the weight of this presumption. This failure completely undermines the credibility of the numerous conclusions that IDF attacks violated the principle of distinction because the objects of attack should have been “presumed” to be civilian in nature and therefore protected from attack.

War is a human endeavor, and therefore it is inevitable that mistakes are made. The salient question is whether those mistakes, under the circumstances prevailing at the time, were reasonable. In turn, that question must consider the deliberate violation of the obligation to distinguish belligerent forces from the civilian population, since it is this tactic that provides the context for assessing the reasonableness of attack judgments.

While focusing on actual effects of attacks is a much easier path, such an “effects based” methodology distorts the credibility of the law, a distortion exacerbated by the failure to consider the impact of this deliberate unlawful tactic on the actual effects of close combat operations. But even a cursory review of the Report reveals this tendency, which is manifested by initiating the critique of each considered “incident” with an italicized quote from a witness describing the effects of combat operations.

Insufficient Factual Foundations

The Report periodically attempts to justify this pervasive analytical focus by emphasizing Israeli non-responsiveness to requests for information related to the targeting decision-making process. But highlighting the absence of this input does not justify the ultimate methodology that provides the foundation for so many conclusions, for two reasons.

First, the failure to consider the opinions of military operational and legal experts who were given access to IDF information and rendered publically available reports or statements expressing their conclusions that IDF conduct complied with, and in many

cases exceeded, LOAC obligations, is inexplicable. For example, in March JINSA's Gaza Assessment Task Force of five retired U.S. generals published an in-depth report concluding that "the available evidence makes clear that Hamas habitually violated LOAC," and that "IDF operations in Gaza exercised considerable restraint and exceeded the requirements of LOAC." This report also provided an extensive discussion of how consideration of complex military operational considerations influences assessment of LOAC compliance, and strongly cautions against the tendency to resort to the type of effects-based analysis that undermines the credibility of the Report.¹ Second is the failure to acknowledge that, while obviously frustrating, the absence of such input made it impossible to reach any credible finding as to the legality of the conduct of hostilities.

There is a surprising failure to rely more substantially on other objective assessments conducted by groups whose collective military expertise is beyond question. Notably, there is only passing reference in footnotes to the Report to the JINSA Gaza Assessment, and to the remarkably insightful law review article published by Professor Michael Schmitt and Major J.J. Merriam of the U.S. Naval War College's International Law Department, and minimal consideration of statements and conclusions by Chairman of the Joint Chiefs of Staff Gen. Martin Dempsey following his information gathering visit to Israel by him and other experts from the Pentagon after the conflict. No reference is made to an assessment conducted by a group of high-level military and civilian experts from NATO members that concluded Israel "not only met a reasonable international standard of observance of the laws of armed conflict, but in many cases significantly exceeded that standard."²

These opinions are relevant, and highly probative, precisely because they are offered by individuals with unquestioned expertise in the relationship between military operations and legal compliance (and certainly reflect a more informed perspective of this question than an off-the-cuff statement by Secretary of State John Kerry, which in contrast is prominently referenced in the Report). At worst, this suggests a predisposition by Commission members, and at best reflect a failure to consider highly probative and available sources of information related to the focal point of the Report: the conduct of hostilities.

Indeed, one might expect that a Commission composed of civilian jurists, tasked with assessing compliance with the laws and customs of *war* with a principal focus on the conduct of *hostilities*, would have manifested a voracious appetite for this type of expert information. These omissions suggest this was not the case, and undermine the credibility of a Report that must consider the intersection of military operational art with international legal regulation.

This is also reflected in the inexplicable invocation of the expertise of Colonel (ret.) Richard Kemp. Colonel Kemp submitted a widely publicized letter to the Commission in which he expressed, in the most emphatic terms, his conclusion that IDF conduct was more compliant with LOAC obligations than any operation he had ever been involved with in his many years of service in the U.K. armed forces. However, the sole reference to Colonel Kemp's input was one sentence, ostensibly taken out of context (considering Kemp's public praise for the IDF), to support the conclusion that a residence used by enemy command and control personnel is not a lawful military objective.

Finally, while the Report indicates that "[A]ll available materials relating to each incident were reviewed by a military expert to determine the type of weapons most likely to have

been used,” it fails to identify the identity or qualifications of that expert. Ignoring the views of the many highly qualified military experts who rendered opinions on IDF LOAC compliance, and relying on an anonymous expert to provide the foundation for conclusions that are inconsistent with these publically available conclusions, substantially undermines the credibility of the Report.

Even assuming there was some rational justification for not considering these highly probative sources of information, this ultimately resulted in a lack of information needed to render credible conclusions on the conduct of hostilities. However, instead of acknowledging this fact, perhaps even with a criticism of Israel for the failure to provide greater access to operational information, the Report simply proceeds to render legality conclusions.

What is perplexing, however, is that the Commission seemed to be more tolerant of Hamas’s failure to provide access and information related to their conduct of hostilities. Indeed, the Report seems to reflect an underlying assumption that a nation like Israel must provide comprehensive access to operational decisional information, even beyond that which Israel in fact did publicly disclose, while the lack of access to analogous information held by hybrid belligerent groups like Hamas is both understandable and tolerable. These disparate expectations not only reflect a bias of dual expectations, but actually incentivizes systemic and institutional disregard of the LOAC by hybrid and non-state belligerent forces by reinforcing their perception of immunity from meaningful scrutiny.

By acknowledging it was incapable of obtaining, and therefore considering, information essential to assessing the legality of IDF military operations, the Commission should have then concluded that the factual and evidentiary foundation for legality conclusions was simply insufficient. Instead, the Report indicates that its conclusions will simply be rendered based on whatever information it could obtain. This, in turn, is used to subtly justify the substantial reliance on attack effects as the basis for legal judgments.

The Report condemns Israel for failing to provide substantial information to the Commission. Indeed, paragraph 217 indicates that:

“[T]his information must be released to independent and impartial mechanisms which have the effective power to ensure accountability (for a more detailed discussion of this see chapter VII below). The commission also notes that, while there may be limitations on publishing certain types of information, a minimum level of transparency is required from the point of view of assisting victims’ quest for the truth and their right to effective remedies.

However, the Report fails to cite any basis for this asserted legal obligation. In fact, there is no international legal rule obligating a State to disclose what it considers sensitive military information to a Commission such as this. But even applying this aspirational standard, the conclusion that Israel breached this “obligation” is perplexing.

First, as noted above, the Commission had ample access to publicly-disclosed reports by other experts who had substantial access to the IDF and the operational decision-making process utilized during Operation Protective Edge, including the JINSA Gaza Assessment Task Force’s March 2015 report. Why this fails to comply with the asserted obligation

to provide “a minimum level of transparency” is never addressed. Second, there are in fact references throughout the Report to IDF information, which arguably surpasses this “minimum level” standard.

Third, while it is unfortunate the Commission could not achieve cooperation and access to IDF material and personnel available to other study groups on the conflict, this is understandable given the history of U.N. commissions’ previous findings on Gaza conflicts. Regardless of the explanation for this lack of access, it cannot excuse the Commission’s failure to leverage other sources of publicly available information providing insight into IDF targeting practices and LOAC implementation, including information provided by the IDF itself. Notably, the Commission failed to consider the 275-page IDF report assessing LOAC implementation and compliance during the conflict, even though it was available prior to the publication of this Report.

None of this means that IDF conduct of hostilities during Protective Edge should be immune from external critique. Nor is there anything irrational about a focus on objectively observable attack effects as a source of information to both trigger inquiry and as evidence during such an inquiry. In this regard, the Commission was justified in focusing on a number of combat actions that resulted in civilian casualties and destruction of civilian property. What is essential, however, is that the probative value of both attack effects, and witness observations from individuals inherently associated with one party to the conflict, be carefully and credibly assessed, to include consideration of evidence of misinformation campaigns that might influence the veracity of eyewitness accounts.

Ultimately, it is essential that final judgments of LOAC compliance be based on all necessary information. Thus, while inquiry into incidents such as the attack that led to the death of the Palestinian children on the beach, or the destruction produced by the combat operation launched to prevent escape of the enemy operatives who abducted an IDF officer, is certainly appropriate, the factual foundations for most if not all conclusions about IDF LOAC violations are insufficient.

Questionable Legal Interpretations

The flawed foundation for many conclusions in the Report is also exacerbated by a failure to appreciate the complexity of “military advantage” analysis related to distinction and proportionality judgments, and to a lesser extent misleading interpretations of the underlying law. The following examples are offered to illustrate these flaws.

First, the Report relies extensively on eyewitness accounts from Gaza residents, but fails to consider the influence of bias, or the potential that these accounts were part of a documented Hamas misinformation campaign.

Second, the Report fails to accord any weight to the *overall* record of LOAC compliance or non-compliance efforts of the two parties to the conflict when assessing the credibility of allegations of misconduct. This is perplexing, as there can be virtually no dispute that the IDF commits substantial resources and emphasis to understanding and complying with the LOAC, while there is previously disclosed information indicating that Hamas leadership

encourages the deliberate violation of the law. This supports a justifiable inference that IDF personnel endeavor to comply with the law, while Hamas personnel do not. When assessing the credibility of allegations of blatant violations – such as allegations of assassination or use of human shields by the IDF – it would be appropriate to consider the relative probability of such misconduct within the context of a culture that emphasizes LOAC compliance.

Third, the Report includes what appears to be a confused statement of the law related to the legality of attacking members of organized belligerent groups. This asserted legal standard is central to many of the condemnations of IDF targeting decisions related to members of Hamas and other belligerent groups, as revealed in the following excerpt:

220. ... only individuals who directly participate in hostilities or are members of organized armed groups under international humanitarian law, a member of an armed group has to have a continuous combat function to constitute a legitimate military target.

Contrary to this assertion, members of organized armed groups are targetable to the same extent as members of the armed forces of a state. From the perspective of defining those individuals who may be targeted based on their membership in an organized armed group, the LOAC imposes no requirement that the individual member be performing a particular function at any given time. This excerpt misidentifies the International Committee of the Red Cross's proposed "test" as established law, which it is not, and confuses the legality of targeting members of organized armed groups based on their membership with the legality of targeting civilians who temporarily lose their protection against attack based on their engaging in certain belligerent acts that constitute direct participation in hostilities. This in turn provides the basis for conclusions such as that reflected in the same paragraph in which this conflated definition appears:

220. Indications of possible military objectives emerged in 9 of the 15 cases examined by the commission. In the Kaware case, the MAG indicated that "the aerial strike was carried out against the building due to its use for military purposes by Hamas." The attack on the Al Salam Tower was directed against an Islamic Jihad operative, according to the MAG. In addition, in four cases, there were possible links of family members or premises to Al Qassam (Abu Jama, Al Haj, Al Batsh, one Sayam family member); to Saraya Al Quds (Al Dali, Dheir); or to the Democratic Front for the Liberation of Palestine (one Sayam family member). In one incident, it appears that a person may have been targeted because he worked with Hamas (Al Farra). In these nine cases, while the commission is not in a position to ascertain why a residential building was attacked, the potential targets of the attack seem to have been mostly individuals who were or who could have been present in the building that was struck, indicating that one or several individuals were the likely target and not the building itself. In that context the commission underlines that the mere fact of being a member of the political wing of Hamas or any other organization in Gaza, or working for the authorities (Al Farra case), is not sufficient in and of itself to render a person a legitimate military target. While the IDF indicated that it did not target Hamas lawmakers, politicians or law-enforcement officials because of their affiliation with Hamas, but only individuals who directly participate in hostilities or are members of organized armed groups *under international humanitarian law, a member of an armed group has to have a continuous combat function to constitute a legitimate military target.*

Fourth, the Report makes several conclusions about “military advantage” that do not seem to have any basis in military logic or practice. For example, in addressing the military action launched to recover captured IDF personnel, the Report provides:

369. The latter point must be examined in depth. Preventing the capture or freeing a soldier from captivity may be conceived as a concrete and direct military advantage, albeit of a limited nature, since the loss of one soldier in a large army such as the IDF does not reduce its military capability. When doing so in a manner that is highly likely to result in the soldier’s death, it further reduces the concrete and direct military advantage. On the other hand, some have argued that in such a case the proportionality test must take into account the strategic consideration of denying the armed groups the leverage they could obtain over Israel in negotiations for the release of the captured soldier.³

370. The commission considers this an erroneous interpretation of international humanitarian law. The leverage that armed groups may obtain in negotiations does not depend solely on the capture of a soldier, but on how the Government of Israel decides to react to the capture in the aftermath. The strategic military or political advantage sought is therefore not a concrete and direct military advantage as required by international humanitarian law. An assessment of the strategic and political advantage depends on a large number of post facto elements which are merely speculative for the commander on the ground at the moment he decides to launch the attack. Indeed, the proposed interpretation of the anticipated military advantage, which would allow for abstract political and long-term strategic considerations in carrying out the proportionality analysis, would have the consequence of emptying the proportionality principle of any protective element. The commission finds therefore that the IDF attack of 1 August 2014 in Rafah could have been expected to cause incidental loss of civilian life and damage to civilian objects which would be grossly excessive in relation to the anticipated concrete and direct military advantage, and may therefore amount to a war crime.

There is no effort to assess military practice in relation to this conclusion – practice that would be highly probative in attempting to allocate potential “military advantage.” Furthermore, the Report dismisses the view of one source of authority indicating that the value would be potentially significant. One need only consider the decision by the United States to exchange six of the highest level enemy operatives for one captured U.S. soldier to recognize that recovery of friendly personnel from an enemy that seeks to utilize the captive as strategic leverage is an extremely important military objective.

There are other examples of the Report’s unsupported military consideration conclusions:

222. The IDF later stated that many commanders of armed groups were using their homes as command centres and that it was the command centres, rather than the homes themselves, that were targeted.⁴ Although issuing operational orders may be construed as using a home for military purposes, in order for it to become a military objective, its destruction must offer a definite military advantage at the time of the attack. The mere presence of a laptop or a mobile phone used for military purposes in the apartment, or the fact that meetings of a military nature had been held there in the past, are not sufficient to turn a civilian object into a military objective owing to the extremely limited military advantage the destruction of the home would offer.

Without information related to why such attacks were launched, this conclusion is inherently speculative.

293. The sheer number of shells fired, as well as the reported dropping of over 100 one-ton bombs in a short period of time in a densely populated area, together with the reported use of an artillery barrage, raise questions as to the respect by the IDF of the rules of distinction, precautions and proportionality.

As noted above, this is certainly a credible assertion. However, what follows is not:

293. These methods and means employed by the IDF could not, in such a small and densely populated area, be directed at a specific military target and could not adequately distinguish between civilians and civilian objects and military objectives as required by IHL. The information available also indicates that during the Shuja'iya operation on 19 and 20 July the IDF violated the prohibition of treating several distinct individual military objectives in a densely populated area as one single military objective. Therefore, there are strong indications that the IDF's Shuja'iya operation on 19 and 20 July was conducted in violation of the prohibition of indiscriminate attacks and may amount to a war crime.⁵

Without relevant information related to the enemy situation, this is speculative. Here, as elsewhere in the Report, the Commission reached conclusions about the application of legal rules to military operations without either sufficient knowledge of the circumstances related to the tactical execution of the operations, technical military expertise, or an adequate foundation of military experience and judgment to credibly reach such conclusions.

Furthermore, as noted above, the fact that the enemy completely violated its component of the distinction obligation must be considered when assessing the reasonableness of these judgments about military objectives.

294. The Shuja'iya operation also raises serious concerns that the IDF did not conform with its obligation to take precautionary measures in attack.

Again, noting that such attacks raise concerns is certainly credible, however:

294. The choice of the methods and means used by the IDF cannot be reconciled with the obligation to take constant care to spare civilians and civilian objects or at the very least to minimize incidental loss of civilian life and damage to civilian objects in a densely populated area. It is questionable whether the use of such immense firepower in such a short period would have allowed the IDF: (1) to respect its obligation to do everything feasible to verify that the targets were military objectives; and (2) to assess whether the attack respected the principle of proportionality. In addition, the length of the intensive shelling (more than 6 hours), together with the observation and intelligence means that the IDF had at its disposal in Gaza, would have allowed those responsible for the attack to receive opportune information as to the dire impact of the shelling on civilians and civilian objects. The fact that the attack was allowed to continue under these conditions evidences the commander's failure to comply with his obligation to do everything feasible to suspend an attack if it becomes apparent that it does not conform to the principle of proportionality.

This is equally speculative, and fails to account for the contextual assessment of “feasible” in relation to the precautions obligation. Time, enemy, terrain, available resources, and mission imperatives must all be assessed before concluding a violation of this obligation, which is not reflected in this conclusion.

The following paragraph reflects the combined effect of insufficient understanding of military operations and an improper interpretation of a legal obligation:

296. The intense shelling, combined with the use of a large number of one-ton bombs, raise serious concerns about the respect for the principle of proportionality. While shelling had started in the late evening of 19 July, it changed in nature and significantly intensified around 1.30 a.m., just after seven IDF soldiers had been killed when the APC they were riding in was destroyed. The objective of the shelling and heavy bombardment appears mainly to have been force protection. The commission observes that the issue of force protection of the attacking force as an element in assessing proportionality is still unresolved⁶. While it is certainly true that the protection of soldiers who are coming under attack represents a concrete and direct military advantage, it is an “undisputed fact that force protection is not an overriding concern that could set aside all other considerations when assessing the proportionality of an attack”.⁷ Although the proportionality analysis may properly take into consideration force protection and the neutralization of units of Palestinian armed groups, given the means and methods used by the IDF in Shuja’iya, it is possible to conclude that a reasonable commander would be aware of the potential for such an intense attack to result in the death of a high number of civilians. As such, it is highly likely that a reasonable commander would therefore conclude that the expected incidental loss to civilian life and damage and destruction of civilian objects would be excessive in relation to the anticipated military advantage of this attack. In addition, even if, at the moment of launching the attack, the initial assessment by the commander was that the attack was proportionate, he had an obligation to suspend the attack as soon as its disproportionate nature became apparent.

Movement to contact against an enemy in an urban environment is one of the most dangerous and complex military maneuvers. Using combat power to shield friendly forces from attack in such operations is not “force protection,” but is instead central to the maneuver itself. Use of such assets is not limited to “killing” a clearly identifiable enemy, but also involves disrupting the enemy’s ability to compromise maneuver, and retaining the initiative for friendly forces. Failure to consider this full range of military considerations undermines the conclusion that a commander would consider such use of combat power as “excessive” within the meaning of the proportionality rule.

Furthermore, the Report makes no effort to consider other examples of similar military operations, such as U.S. operations in Fallujah, Ramadi, or Panama City. Doing so would provide a touchstone to credibly assess whether this use of combat power fell far beyond the norm of military operations. Finally, the assertion that it is an “undisputed fact that force protection is not an overriding concern that could set aside all other considerations when assessing the proportionality of an attack” confuses “force protection” and the relationship of mobility and counter-mobility to effective tactical maneuver. These are not synonymous, and by conflating the two the Report distorts the proper assessment of military advantage in relation to the proportionality assessment in such operations.

This distortion of legal principles and rules infects other conclusions in the Report. For example, the section analyzing ground operations in Gaza begins by noting that the operations had a, “devastating” effect on civilians:

250. The combined impact of these ground operations has had a devastating impact on the population of Gaza, both in terms of human suffering as well as in terms of damage to the infrastructure. The four operations described below have resulted in the killing of at least 150 civilians, the total destruction of over 2000 homes, and the partial destruction of at least 2200 homes.

It is self-evident that any harm to innocent civilians and their property is, in the subjective sense, “devastating.” However, this term is not legally controlling in any LOAC analysis. Instead, the focal point of assessing the legality of operations that produce a “devastating” effect on civilians and their property is the balance between anticipated military advantage and anticipated civilian risk. By initiating the critique by emphasizing “devastation,” the Report subtly marginalizes consideration of military advantage. This is also reflected in paragraphs concluding IDF ground combat operations violated the principles of proportionality and precautions.

These paragraphs do not credibly recognize the complexity of implementing these principles in the context of close-combat operations in urban terrain; fail to provide any comparative analysis to other military operations; and seem to demand implementation based on a “pre-planned” targeting context rather than the existing “dynamic” targeting context in which these operations occurred (as evident in sections from paragraphs 293-6 in the Report, quoted above).

Another example of failing to fully consider military aspects of the decision-making process is reflected in sections on purported IDF tactics during ground operations:

338. The commission recognizes that the obligation is to take “feasible precautions”, which means that not only humanitarian, but also military considerations can be taken into account when deciding on the precautions to be observed. However, in the absence of any information from Israel on the issue, *the commission does not see any military consideration that could have justified preventing civilians from fleeing*. The IDF had already sacrificed any element of surprise by issuing a warning several days earlier, meaning that Palestinian armed groups were aware of the impending attack.

339. While preventing members of armed groups from fleeing by mingling with civilians is hypothetically a valid military consideration [although such an argument has not been put forward], it does not, in the circumstances at hand, outweigh the humanitarian consideration of allowing a substantial group of civilians to evacuate an area that has or will shortly be subjected to heavy bombardment. When refusing to allow civilians to flee Khuza’a on 21 and 23 July, the IDF had full knowledge of their presence and therefore should have foreseen that an attack against the town using intense shelling and aerial bombardment would very likely be indiscriminate or disproportional. This also raises concern that not all feasible precautions to minimize danger to civilians were taken by the IDF in its attack against the town of Khuza’a.

Even assuming the accuracy of the factual findings reflected in these paragraphs, without information related to the enemy situation, the potential value of enemy operatives co-mingled with civilians, and the alternate options available for IDF commanders, these conclusions are speculative.

Finally, the Report's criticism of IDF Military Advocate General's (MAG) investigations raises serious concerns about respect for the primacy of national accountability mechanisms in the investigation and sanction of LOAC violations. Numerous experts have publically noted the quality and integrity of the IDF's accountability mechanisms. As the IDF's report on Operation Protective Edge extensively explains, these mechanisms are defined by an independent MAG, ultimately accountable to the rule of law and not to the IDF Chief of Staff. The Report acknowledges that the IDF MAG conducted prompt investigations in response to wide array of incidents that triggered justifiable concerns over LOAC compliance. However, ostensibly because these investigations did not reach conclusions that align with those of the Commission, the Report questions their validity. A notable example is the IDF MAG's decision not to pursue criminal process in response to the tragic killing of the three young men on a beach in Gaza:

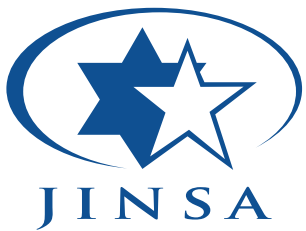
633. Concerning the investigation itself, the MAG explained that testimony was gathered from a large number of soldiers, and supplemented by video footage, media images and affidavits of 3 Palestinian witnesses. International journalists and other eyewitnesses, including Palestinians, do not appear to have been questioned, despite many persons having witnessed the incident. This raises questions about the thoroughness of the investigation.

This criticism is not based on an objective foundation, and without knowing all of the evidence available to investigating officers, and all the considerations associated with their findings – to include consideration of the heavy burden of proof necessary to support criminal prosecution, a burden the Commission itself acknowledges requires distinguishing its findings from findings of actual criminal responsibility – and considering the exceptional quality, professionalism, and structure of the IDF's MAG Corps, this criticism is unjustified. Suggesting that an accountability process has failed because prosecutions are not pursued for every incident that raises concerns over LOAC violations is unrealistic, and completely fails to appreciate the complex process of transforming battlefield regulatory standards into standards of criminal responsibility.

There are numerous other aspects of the Report that unfortunately undermine its credibility. Nonetheless, the Commission deserves praise for its willingness to condemn Hamas (though considering the blatant nature of Hamas LOAC violations, failing to do so would have been catastrophic to the Report's credibility), and more importantly for the very clear distinction between its findings and the determination that any conduct qualifies as a war crime. The Commission clearly recognized that the standard of proof it applied was not analogous to that required to establish criminal responsibility, and that its conclusions should not be understood as an indication war crimes were in fact committed. However, this cannot offset the distorting effect produced by offering conclusions related to LOAC violations based on a flawed factual and legal foundation.

Endnotes

1. JINSA Gaza Assessment Task Force, *2014 Gaza War Assessment: The New Face of Conflict*, March 2015, pp. 11-12, 36-37.
2. High Level International Military Group, "The Gaza Conflict in 2014," May 31, 2015, p. 6.
3. John Merriam, Michael Schmitt, Israeli Targeting: A Legal Appraisal, *Naval War College Review*, Fall 2015, p. 13 (Forthcoming publication available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2596836).
4. Lecture by MAG Major General Dani Efroni at the Institute for National Security Studies (INSS) conference: Challenges of Warfare in Densely Populated Areas, 2 December 2014, see IDF report on lecture: <http://www.law.idf.il/163-6967-he/Patzar.aspx>. Op. cit. note 235. <http://www.idf.il/1153-20893-he/Dover.aspx>
5. The International Criminal Tribunal for the former Yugoslavia stated in the *Galic Case* that "indiscriminate attacks, that is to say attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians," ICTY, *Prosecutor v. Galic*, case No. IT-98-29-T, Judgement, 5 December 2003, para. 57. The International Court of Justice in the Nuclear Weapons Case linked the prohibition of indiscriminate attacks to attacks against the civilian population, by stating that: "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets." Para. 78. Article 8 of the Rome Statute of the International Criminal Court lists intentionally directing attacks against the civilian population or civilian objects as a war crime.
6. ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 2000, available at <http://www.icty.org/sid/10052#IIIwork>: "The questions which remain unresolved once one decides to apply the principle of proportionality include the following: [...] d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?"
7. Robin Geiss. The Principle of Proportionality: 'Force Protection' as a Military Advantage, *Israel Law Review* 45, p.74



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