

Chapter 2

Proportionality and precautions in attacks

Section 1 – Proportionality in Attack

1. Customary International Humanitarian Law

Rule 14. Launching 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, is prohibited¹.

2. Treaty

2.1. Additional Protocol I

Article 55, adopted by 77 votes in favour, one against and 16 abstentions

5. Among others, the following types of attacks are to be considered as indiscriminate:

(b) 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 71, adopted by consensus

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) 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 85, adopted by consensus – Repression of breaches of this Protocol

3. In addition to the grave breaches defined in Article 11^(a), the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

¹ Article 51(5)(b) and 57.1 of Additional Protocol I

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

In relation with the issue of environment

Art. 35, § 3 – Basic rules

It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Article 55 - Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

2.2. ICC Statute

ICC Statute, Article 8(2)(b)(iv) – War crime of excessive incidental death, injury, or damage.

Constitutes a war crime in international armed conflicts

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated².

Elements of crime

1. The perpetrator launched an attack.
2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an

² See also UNTAET Regulation 2000/15, Section 6(1)(b)(iv)

extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

For § 2 : The expression “concrete and direct overall military advantage” refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.

For § 3: As opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time.

3. International case law

3.1. ICJ

ICJ, Nuclear Weapons, 1996:

States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality³.

The Court did not elaborate further on the general principle of proportionality in the conduct of hostilities but rather focused on the application of this principle in the context of the use of force in the framework of the right of self-defense as defined in Article 51 of the UN Charter⁴.

ICJ, Nuclear Weapons case, 1996, dissenting opinion of Judge Higgins

Even a legitimate military target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack⁵.

3.2. ICTY

ICTY, Martić, 1996

³ ICJ, Nuclear Weapons case, Advisory Opinion, 8 July 1996, para 30.

⁴ ICJ, Nuclear Weapons case, Advisory Opinion, 8 July 1996, para 41.

⁵ ICJ, Nuclear Weapons case, Dissenting Opinion of Judge Higgins, 8 July 1996, para 20.

The ICTY Trial Chamber referred, among the relevant norms of customary law, to Article 51(5)(b) AP I and held that, even when directed against a legitimate military target, “attacks must not cause damage and harm to the civilian population disproportionate in relation to the concrete and direct military advantage anticipated”.⁶

ICTY, Kupreskic, 2000

The principle of proportionality required that any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack.⁷

4. International regional case law

In a report on Colombia in 1999, the IACiHR noted that the legitimacy of a military target did not provide unlimited license to attack it. According to the report, the rule of proportionality prohibited “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”. The Commission added that the principle of proportionality required that foreseeable injury to civilians and damage to civilian objects should not be disproportionate or excessive to the anticipated concrete and direct military advantage.⁸

5. National case law

*Hight Court of Justice, Committee against Torture.*⁹

The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage (in protecting combatants and civilians). In other words, attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it. That is a values based test. It is based upon a balancing between conflicting values and interests...

The requirements of proportionality *strict sensu* must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage caused to nearby innocent civilians. The proportionality rule applies in regards to harm to those innocent civilians... The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists. ... Performing that balance is difficult. Here as well, one must proceed case by case, while narrowing the

⁶ ICTY, Martić, 8 March 1996, p. 7, para 18.

⁷ ICTY, Kupreskic, 14 January 2000, para 524.

⁸ IACiHR, Third report on the human rights situation in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev.1, 26 February 1999, paras 77 and 79.

⁹ H.C.J. 769/02 The Public Committee against Torture in Israel v. Government of Israel et al. (in English at: http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf). paras 45-46. 109.

area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch.

Shooting at him is proportionate even if as a result, and innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed... The hard cases are those which are in the space between the extreme examples. There, a meticulous examination of every case is required; it is required that the military advantage be direct and anticipated... Indeed, in international law, as in internal law, the ends do not justify the means. The state's power is not unlimited. Not all of the means are permitted...

However, when hostilities occur, losses are caused. The state's duty to protect the lives of its soldiers and civilians must be balanced against its duty to protect the lives of innocent civilians harmed during attacks on terrorists. That balancing is difficult when it regards human life. It raises moral and ethical problems. Despite the difficulty of that balancing, there's no choice but to perform it.

This analyze is qualified as "probably the most comprehensive judicial statement on the principle of proportionality" by the report *Non Safe Place* : As President Barak says, military advantage and the protection of the lives of soldiers must be balanced against the duty to protect the lives of innocent civilians on a case by case basis, with regard to the circumstances of each case.

6. International practice

In a resolution adopted in 2000 on events in Jerusalem and other areas throughout the territories occupied by Israel, the UN Security Council condemned "acts of violence, especially the excessive use of force against Palestinians, resulting in injury and loss of human life".¹⁰

7. National references

With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "the IDF would not attack a target in cases in which it is expected that the attack would cause civilian loss, injury or damage excessive in relation to the military advantage anticipated"¹¹.

Israel's Manual on the Laws of War states that:

Even when it is not possible to isolate the civilians from an assault and there is no other recourse but to attack, this does not constitute a green light to inflict unbridled harm on civilians. The commander is required to refrain from an attack that is expected to inflict harm on the civilian population that is disproportionate to the expected military gain¹².

¹⁰ UN Security Council, Res. 1322, 7 October 2000, para 2.

¹¹ ICRC, Report on the Practice of Israel, 1997, Chapter 1.5, referring to Law of War Booklet (1986), pp. 4–5.

¹² Israel, Manual on the Laws of War (1998), p. 40.

In the time of the attack against the Hizbollah in Lebanon, in 2006, the Israeli Ministry of Foreign Affairs stated about proportionality¹³

Major General A.P.V. Rogers, a former Director of British Army Legal Services, explains the rationale behind this principle:

Although they are not military objectives, civilians and civilian objects are subject to the general dangers of war in the sense that attacks on military personnel and military objectives may cause incidental damage. It may not be possible to limit the radius of effect entirely to the objective to be attacked... Members of the armed forces are not liable for such incidental damage, provided it is proportionate to the military gain expected of the attack.

While the principle is clear, in practice weighing expected military advantage against possible collateral damage can be an extremely complex calculation to make, especially in the heat of an armed conflict. [...]

One important principle established by international law for the "reasonable military commander" seeking to make this difficult balance, is that the proportionality of a response to an attack is to be measured not in regard to the specific attack suffered by a state but in regard to what is necessary to remove the overall threat. As Rosalyn Higgins, currently President of the International Court of Justice, has written, proportionality: cannot be in relation to any specific prior injury - it has to be in relation to the overall legitimate objective of ending the aggression.

Accordingly, the right of self-defense includes not only acts taken to prevent the immediate threat, but also to prevent subsequent attacks.

8. Doctrine

8.1. ICRC

To fulfill its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The rule of proportionality shall be respected. An action is proportionate when it does not cause incidental civilian casualties and damage which is excessive in relation to the value of the expected result of the whole military operation. The rule of proportionality cannot be used to justify unlimited destruction or attacks on civilian persons and objects as such.

ICRC delegates teach, furthermore, that an "indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive civilian casualties and damage" constitutes a grave breach of the law of war.¹⁴

¹³ 25 July 2006.

<http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hizbullah+attacks+from+Lebanon+-+Issues+of+proportionality+July+2006.htm>

¹⁴ F. de Mulinen, Handbook on the Law of War for Armed Forces, ICRC, Geneva, 1987, para 389 and 778.

At the Rome Conference on the Establishment of an International Criminal Court in 1998, the ICRC stated about the War crime of excessive incidental death, injury, or damage (Article 8(2)(b)(iv):

The addition of the words “clearly” and “overall” in [the] provision relating to proportionality in attacks must be understood as not changing existing law. The word “overall” could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974–1977 Diplomatic Conference that led to [AP I] and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of AP I, the inclusion of the word “overall” is redundant.¹⁵

8.2. Report “No Safe Place”, 30 April 2009¹⁶

423. The principle of proportionality is central to the question of criminal responsibility. It is a principle reaffirmed in Additional Protocol I (Article 51 (5) (b)), the Rome Statute of the ICC (Article 8 (2) (b) (iv)) and national military manuals. It is also a recognized principle of customary international law and has been formulated as follows by the International Committee of the Red Cross in its study on *Customary International Humanitarian Law*: Launching 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, is prohibited.

424. In her dissenting opinion in the *Legality of the Threat or Use of Nuclear Weapons*, Judge Higgins declared that “even a legitimate military target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack”.

Section 2 - Principle of precautions in Attack

1. Customary international humanitarian law

Rule 15. In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects¹⁷.

Rule 16. Each party to the conflict must do everything feasible to verify that targets are military objectives¹⁸.

¹⁵ ICRC, Statement at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 8 July 1998, UN Doc. A/CONF.183/INF/10, 13 July 1998, p. 1, § 2.

¹⁶ http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf

¹⁷ Article 2(3) of the 1907 Hague Convention (IX); Article 57(1) of Additional Protocol I; Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 7.

¹⁸ Article 57(2)(a) of Additional Protocol I.

Rule 17. Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects¹⁹.

Rule 18. Each party to the conflict must do everything feasible to assess whether the attack 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 anticipated²⁰.

Rule 19. Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack 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 anticipated²¹.

Rule 20. Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit²².

Rule 21. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects²³.

2. Treaty

2.1. Hague Regulations 1907

Article 26. 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.

2.2. Additional Protocol I

Article 57²⁴ – Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

¹⁹ Article 57(2)(a)(ii) of Additional Protocol I.

²⁰ Article 57(2)(a)(iii) of Additional Protocol I.

²¹ Article 57(2)(b) of Additional Protocol I.

²² Hague Regulations, Article 26; Additional Protocol I, Article 57(2)(c). Respect for the principle of distinction (see Rules 1 and 7) and the principle of proportionality (see Rule 14), both of which are customary in international armed conflicts, requires respect for this rule by inference.

²³ Article 57(3) of Additional Protocol I. This rule should also be seen as a further specification of Rule 17 on the precautions to be taken in the choice of means and methods of warfare. Some States indicate that target selection is a means of complying with that requirement, and this rule describes a way in which target selection can operate as a precautionary measure. J-M. Henckaerts and L. Doswald-Beck.

²⁴ Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.

a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any 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;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

2.3. Lieber code

Article 19

Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences”

3. International case law

ICTY, Kupreskic, 2000

In its judgment in the *Kupreskic case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.

The Trial Chamber also noted that in the case of attacks on military objectives causing damage to civilians, “international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness”²⁵.

With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of Article 57 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians”²⁶.

4. International regional case law

ECtHR, Ergi v. Turkey, 1998

In its judgment in *Ergi v. Turkey* in 1998, the ECtHR held that:

The responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimizing, incidental loss of civilian life²⁷.

5. International practice

UN General Assembly Resolution 2675 (XXV), 1970

In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations”²⁸.

In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

In determining whether or not the *mens rea* requirement²⁹ has been met, it should be borne in mind that commanders deciding on an attack have duties: . . .

²⁵ ICTY, *Kupreskic*, 14 January 2000, para 524.

²⁶ ICTY, *Kupreskic*, 14 January 2000, para 525.

²⁷ ECtHR, *Ergi v. Turkey*, 28 July 1998, paras 79 and 80.

²⁸ UN General Assembly, Res. 2675 (XXV), 9 December 1970, para 3.

²⁹ Intention or recklessness, for the offence of unlawful attack under Article 3 of the ICTY Statute

c) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage³⁰.

6. National references

6.1. Israel's Manual on the Laws of War

Israel's Manual on the Laws of War states that

In any attack it is imperative to verify that the attack will be directed against a specific military target³¹.

One should plan the means of attack in a way that will prevent, or at least reduce, the injury to the civilian population³².

The commander is required to refrain from an attack that is expected to inflict harm on the civilian population that is disproportionate to the expected military gain.³³

There is an obligation to refrain from harming civilians insofar as possible.³⁴

6.2. Practice

In a briefing in 1982, the Israeli Ministry of Foreign Affairs declared that all precautions had been taken by Israeli forces by giving an effective advance warning through the distribution of leaflets and appeals to the civilian population via radio and loudspeakers so that they could leave the operational zone temporarily³⁵.

In 1996, in a report on UNIFIL in Lebanon, the UN Secretary-General stated that:

In the early morning of 11 April 1996, Israeli aircraft and artillery began an intensive bombardment of southern Lebanon as well as targets in the Beirut area and in the Bekaa valley . . . In the first few days of the operation, Israeli air force and artillery attacked selected targets, including the homes of persons suspected to be affiliated with Hezbollah. At the same time, an IDF-controlled radio station in southern Lebanon broadcast threats of further bombardments, set deadlines for the inhabitants to leave and stated that once the deadline had passed IDF would regard all who remained as legitimate targets.

By 13 April, some 90 towns and villages, including Tyre and villages north of the Litani river, had thus been placed under threat. As a result of these threats and the Israeli bombardment, about a quarter of the inhabitants, more than 100,000, left UNIFIL's area of operation and Tyre. Around 5,000 persons sought refuge inside

³⁰ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, paras 21 and 28.

³¹ Israel, Manual on the Laws of War (1998), p. 37.

³² Israel, Manual on the Laws of War (1998), p. 39.

³³ Israel, Manual on the Laws of War (1998), p. 40.

³⁴ Israel, Manual on the Laws of War (1998), p. 42.

³⁵ Israel, Ministry of Foreign Affairs, Department of Information, Briefing 342/18.7.82/3.10.108, 18 July 1982.

UNIFIL positions and at its logistic base in Tyre. Given the large number of inhabitants who remained behind, IDF did not in fact treat the whole area as a free-fire zone³⁶.

On 13 October 2000, Israeli helicopters carried out an air-strike on a Palestinian police station in Ramallah in retaliation for the killing of two Israeli soldiers the previous day. After the attack, a senior IDF officer said that the military had made every effort to avoid casualties, warning the Palestinian police to evacuate their posts three hours before the strike. Warning shots were also fired minutes before the actual attack to warn off those who had not understood the earlier message³⁷.

The Report on the Practice of Israel states that:

The issue of “effective advance warning” is somewhat complicated. Unfortunately, due to current practices in the region, in which attacking forces are shielded within civilian populated localities (especially as regards the activities of the terrorist organizations in Lebanon), Israel is forced, quite often, to return fire at targets situated in close vicinity to civilians. Obviously, issuing advance warning of such counter fire is unfeasible from both military and logical perspectives (not only is time of an essence in such cases, but the civilian population is already all too aware of the fact that hostilities are taking place in their immediate area) . . .

Nevertheless, Israel and the IDF have, on several occasions in the past, made public advance warnings to the civilian population in Lebanon of impending hostilities. Such instances include the 1982 operation “Peace for Galilee”, during which the IDF dropped leaflets over cities in the vicinity of which hostilities were expected, thereby enabling those elements of the population uninvolved in the conflict to vacate the area beforehand.

Similar practices were adopted by Israel in other Lebanese-related operations over the years . . . Israel has found that the use of advance warnings to the civilian population is feasible only prior to the commencement of hostilities in a general area, or in cases in which the elements of surprise or speed of response play no significant part³⁸.

According to the Report on the Practice of Israel, “in principle, when a choice is possible between several military objectives for obtaining a similar military advantage, the IDF will select the military target representing the least potential risk for the civilian population”³⁹.

7. Goldstone report⁴⁰

Report of the fact finding mission on the Gaza Conflict, 15 September 2009

³⁶ UN Secretary-General, Report on UNIFIL, UN Doc. S/1996/575, 20 July 1996, §§ 10–13.

³⁷ Israel, Press briefing by the Director-General of Science, Culture and Sports, Coordinator of Information Policy and the Head of the IDF Operation Branch, Jerusalem, 13 October 2000; Suzanne Goldenberg, “Israel launches rocket attacks after frantic mob murders soldiers”, The Guardian, 13 October 2000.

³⁸ Report on the Practice of Israel, 1997, Chapter 1.6.

³⁹ Report on the Practice of Israel, 1997, Answers to additional questions on Chapter 1.6.

⁴⁰ Report A/HCR/12/48 – Conclusions

http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf

Precautions in launching attacks

1716. The Mission finds that in a number of cases Israel failed to take feasible precautions required by customary law reflected in Article 57(2)(a)(ii) of the First Additional Protocol to avoid or minimizing incidental loss of civilian life, injury to civilians and damage to civilian objects. The firing of white phosphorus shells over the UNRWA compound in Gaza City is one of such cases in which precautions were not taken in the choice of weapons and methods in the attack and these facts were compounded by reckless disregard for the consequences. The intentional strike at the Al Quds hospital using high explosive artillery shells and using white phosphorous in and around the hospital also violated Articles 18 and 19 of the Fourth Geneva Convention. With regard to the attack against Al Wafa hospital, the Mission found a violation of the same provisions, as well as a violation of the customary law prohibition against attacks which may be expected to cause excessive damage to civilians and civilian objects.

1717. The Mission finds that the different kinds of warnings issued by Israel in Gaza cannot be considered as sufficiently effective in the circumstances to comply with customary law as reflected in the First Additional Protocol Article 57 (2) (c). While some of the leaflet warnings were specific in nature the Mission does not consider that general messages telling people to leave wherever they were and go to city centers, in the particular circumstances of the military campaign meet the threshold of effectiveness. Firing missiles into or on top of buildings as a “warning” is essentially a dangerous practice and a form of attack rather than a warning.

8. Doctrine

The ICRC Commentary on the Additional Protocols considers that the obligation to take constant care to spare the civilian population, civilians and civilian objects appropriately supplements the basic rule of distinction. It is quite clear that by respecting this obligation the Parties to the conflict will spare the civilian population, civilians and civilian objects. This is only an enunciation of a general principle which is already recognized in customary law.⁴¹

To fulfill its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

To fulfill his mission, the commander needs appropriate information about the enemy and the environment. To comply with the law of war, information must include:

- a) concentrations of civilian persons;
- b) civilian surroundings of military objectives;
- c) nature of built up areas (towns, villages, shelters, etc.);
- d) existence and nature of important civilian objects, particularly of specifically protected objects;
- e) natural environment.⁴²

The attack may only be directed at a specific military objective. The military objective must be identified as such and clearly designated and assigned. The attack shall be

⁴¹ Y. Sandoz et al. (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para 2191.

⁴² F. de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, paras 436 and 459.

limited to the assigned military objective. The precautions to be taken in targeting are equivalent to those to be respected in the choice of a military objective. In combat action the military character of the objectives and targets must be verified.⁴³

Section 3 - Precautions against the Effects of Attacks

1. Customary international humanitarian law

Rule 22. The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks⁴⁴.

Rule 23. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas⁴⁵.

Rule 24. Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives⁴⁶.

2. Treaty

2.1. Additional protocol 1

Article 58 adopted by 80 votes in favour, none against and 8 abstentions. Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;

(b) avoid locating military objectives within or near densely populated areas;

(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

⁴³ F. de Mulinen, Handbook on the Law of War for Armed Forces, ICRC, Geneva, 1987, paras 428, 434 and 454.

⁴⁴ Article 58(c) of Additional Protocol I. This practice should be read together with the extensive practice on the prohibition of the use of human shields (see Rule 97). The deliberate violation of the obligation to take all feasible precautions against the effects of attacks is often related to the use of human shields. In addition, international caselaw has confirmed the obligation under international human rights law to take positive steps to protect life (see commentary to Rule 97). J-M. Henckaerts and L. Doswald-Beck.

⁴⁵ Article 58(b) of Additional Protocol I. The rules which require that persons deprived of their liberty be held in premises which are removed from the combat zone (see Rule 121) and that in case of displacement all possible measures be taken in order that the civilian population may be received under satisfactory conditions of safety (see Rule 131), which are both applicable in international and non-international armed conflicts, are also relevant in establishing the customary nature of this rule. J-M. Henckaerts and L. Doswald-Beck.

⁴⁶ Article 58(a) of Additional Protocol I.

An attacker is not prevented from attacking military objectives if the defender fails to take appropriate precautions or deliberately uses civilians to shield military operations. The attacker remains bound in all circumstances, however, to take appropriate precautions in attack (see Rule 15) and must respect the principle of proportionality (see Rule 14) even though the defender violates international humanitarian law.

2.2. San Remo Manual, 1994

Paragraph 46(b)

In the light of the information available to them, those who plan, decide upon, or execute an attack shall do everything feasible to ensure that attacks are limited to military objectives.

3. International case law

ICTY

ICTY, Kupreskic, 2000

In its judgement in the *Kupreskic case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol. The Trial Chamber held that:

The prescriptions of Article 57 and of the corresponding customary rules must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.⁴⁷

4. International regional case law

IACiHR

IACiHR, La Tablada in Argentina, 1997

In 1997, in its report concerning the events at La Tablada in Argentina, the IACiHR referred to the obligation to take precautions to avoid or minimize incidental damage. The case dealt with an attack by some 40 persons on military barracks of the armed forces of Argentina and the subsequent counterattack. The Commission found that common Article 3 of the 1949 Geneva Conventions and other rules relevant to the conduct of internal hostilities were applicable. The Commission stated that customary law imposes an obligation to take precautions to avoid or minimize loss of civilian life and damage to civilian property that may occur as a consequence of attacks on military targets.⁴⁸

5. International practice

⁴⁷ ICTY, Kupreskic, 14 January 2000, paras 524 and 525.

⁴⁸ IACiHR, Case 11.137 (Argentina), Report, 18 November 1997

In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

In determining whether or not the mens rea requirement [intention or recklessness, for the offence of unlawful attack under Article 3 of the ICTY Statute] has been met, it should be borne in mind that commanders deciding on an attack have duties: (a) to do everything practicable to verify that the objectives to be attacked are military objectives.⁴⁹

Regarding the 15,000 feet minimum flying altitude adopted by NATO for part of the campaign, the Committee stated that “NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilians and civilian objectives”.⁵⁰

6. National references

Israel’s Manual on the Laws of War prohibits “mingling military targets among civilian objects, as for instance, a military force located within a village or a squad of soldiers fleeing into a civilian structure”⁵¹.

Israel’s Manual on the Laws of War states that “one should try and remove the civilian population from military targets”⁵².

In 1992, in a letter to the UN Secretary-General, Israel stated that: “Operating with cruel indifference to the fate of innocent Lebanese civilians, Hezbollah and other terrorist organizations continue to use civilian centers as bases of operation. Therein lies the true cause of the suffering of the civilian population of southern Lebanon”⁵³.

In 1996, the Monitoring Group on the Implementation of the 1996 Israel-Lebanon Ceasefire Understanding, consisting of France, Israel, Lebanon, Syria and the US, pleaded with combatants to respect the precautionary measure of separating military objectives from densely populated areas, re-emphasising that artillery fired from populated areas endangered civilians. The Monitoring Group also asked combatants to take all necessary precautions during military operations launched from the vicinity of populated areas⁵⁴.

Article 3 of the 1996 Israel-Lebanon Ceasefire Understanding states that the two parties commit to ensuring that “civilian populated areas and industrial and electrical installations will not be used as launching grounds for attacks”.

⁴⁹ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, para 28.

⁵⁰ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, para 56.

⁵¹ Israel, Manual on the Laws of War (1998), p. 38.

⁵² Israel, Manual on the Laws of War (1998), p. 39.

⁵³ Israel, Letter dated 27 January 1992 to the UN Secretary-General, UN Doc. S/23479, 27 January 1992, p. 2.

⁵⁴ Monitoring Group on the Implementation of the 1996 Israel-Lebanon Ceasefire Understanding, Fourth and fifth meetings, 22–25 September and 14–18 October 1996.

According to the Report on the Practice of Israel, “the IDF endeavors, to the maximum extent possible, not to place military objectives within or in the vicinity of densely populated civilian areas”. The report remarks, however, that demographic changes have sometimes caused certain long-standing military bases to end up in mainly civilian areas. The IDF General Headquarter in Tel Aviv is cited as an example⁵⁵.

⁵⁵ Report on the Practice of Israel, 1997, Chapter 1.7.