Expert Opinion

International legal rules concerning targeting within the framework of “Operation Protective Edge”

1. The problem

This expert opinion is tasked with clarifying the international legal rules which applied or should have been applied to the Operation Protective Edge in 2014 concerning the destructions in the Gaza Strip. In particular, Israeli ground and air attacks have caused numerous civilian casualties and have led to a widespread destruction of private living quarters which observers describe as devastating. They have led to an uproar of public opinion around the world, which, however, also condemned the rocket attacks on Israel as being indiscriminate warfare. The UN Human Rights Council has decided to establish a commission of inquiry to investigate violations of international humanitarian law and of international human rights law committed in the Occupied Palestinian Territory.

Yet the fact alone that there are widespread destructions also causing numerous casualties and immense suffering for the survivors is in and of itself not a sufficient indication that the attacks causing such destructions are unlawful. The Government of Israel maintains that the attacks, at least as a rule, were lawful because directed against military objectives and because civilian casualties and damage to civilian objects were limited as required by the proportionality principle, i.e. not excessive in relation to the military advantage sought by these attacks.

It is therefore the purpose of the expert opinion to clarify these purported justifications from a legal point of view. It argues on the premise that customary international humanitarian law as it relates to international armed conflicts applies to the conflict. This includes the assumption that there is on the Palestinian side an entity which is a party to that conflict and which possesses a military organization as distinguished from the civilian side. All sides and the international reaction agree that, as a consequence, the principle of distinction, fundamental under international humanitarian law, applies. Persons belonging to that military organization are fighters/combatants. Objects contributing to their military effort are military objectives and may be targeted.

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1 The death toll in Gaza is estimated at close to 2,200 persons, the percentage of civilian which is indicated by different sources varies between 48% (Israeli sources) and 76.9%. About 30% of the civilian deaths are children. Source: ‘2014 Israel-Gaza conflict’, [http://en.wikipedia.org/wiki/2014_Israel%E2%80%93Gaza_conflict](http://en.wikipedia.org/wiki/2014_Israel%E2%80%93Gaza_conflict)
2 According to figures provided by OCHA, 17,200 Gazan homes were destroyed or severely damaged, 37,650 were damaged but still inhabitable. As a consequence, about 30% of the population of Gaza might have been displaced. Source quoted note 1.
6 There are a number of publications by the IDF, see *inter alia* ‘How is the IDF Minimizing Harm to Civilians in Gaza?’, [http://www.idfblog.com/blog/2014/07/16/idf-done-minimize-harm-civilians-gaza/](http://www.idfblog.com/blog/2014/07/16/idf-done-minimize-harm-civilians-gaza/)
The opinion will therefore concentrate on two questions:

- Were the attacks conducted during the Operation Protective Edge only directed against military objectives as required by the law of armed conflict? This requires, in particular, an assessment of what constituted a military objective in the particular situation of the Gaza conflict. A major issue in this connection is the legal qualification of the tunnel system used by Hamas fighters as cover and as a way to clandestinely penetrate into Israeli territory.
- Insofar as civilians were killed or wounded, or civilian objects were damaged, was that "collateral" damage not excessive in relation to the military advantage sought by the attack (principle of proportionality)?

It is not the task of the present opinion to give a definite legal and factual assessment of the way in which Operation Protective Edge was conducted nor of any particular attack. The opinion only tries to clarify the legal framework which could and should guide such assessment.

2. Military objectives within the framework of "Operation Protective Edge"

The starting point for an answer to the first question is the definition of military objectives formulated in Art. 52 para. 2 AP I. This rule constitutes customary international law. It therefore binds Israel, which is not a party to AP I, as well as the Palestinian side. That definition provides a two pronged criterion: In order to be qualified as a military objective, an object

- must make an effective contribution to military action, and
- its total or partial destruction, capture of neutralization must offer a definite military advantage.

The most important object or rather combination of objects which have to be discussed in this connection is the extensive network of tunnels existing underneath the Gaza Strip and leading from there to neighbouring territories. The elimination of this tunnel system was a primary objective in Israel's "Operation Protective Edge" in 2014 as it had already been in "Operation Cast Lead" in 2009. The tunnel system was started in 2007 with underground connections between Gaza and Egypt built in order to circumvent the closure of the border by Egypt in support of the Israeli blockade of the Gaza Strip. At the outbreak of the most recent conflict in 2014, there were three different types of tunnels in the network: tunnels connecting the Gaza Strip with Egypt, tunnels serving as hiding places within the Gaza Strip, tunnels leading from the Gaza Strip into Israeli territory. The latter ones have indeed been used for clandestine incursions by Hamas fighters into Israeli territory. Clearly, the

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8 The question whether the State of Palestine has become a Party to the Geneva Conventions and the Protocols additional thereto must therefore not be discussed in the context of this expert opinion.
10 For information concerning their sites, see the information published by the IDF see the 'Map of Tunnels under Gaza, available at www.jewishvirtuallibrary.org/jsource/Peace/protectivetunnelmap.html', last accessed Jan. 8, 2015.
individual tunnels and the entire network constitute military objectives. The tunnels linking the Gaza Strip with Egypt may be so-called dual use objects, the other types are military only. All three types of tunnels make an effective contribution to the Hamas/Palestinian military effort and their destruction or neutralization would indeed offer a definite military advantage for Israel.

This does not mean that houses situated over and above the tunnel network are military objectives as well. Private dwellings are presumed to be civilian objects (Art. 52 para. 3 AP I). But this does not prevent them becoming military objects if they are used in a way which makes an effective contribution to military action, or if they are situated in such manner. Some houses may be used as entrance to the tunnel system so that they become an integral part of the network and, for that reason, military objectives. But the mere fact that houses are situated above a tunnel does not automatically make them part of the network. They remain civilian objects.

A circumstance which arguably could render them military objectives is the fact that the destruction of the houses above a tunnel greatly facilitates the destruction of the tunnel itself. But it would really overstretch the notion of “contribution to the military effort” if one considered the fact that the house so to say shields the tunnel as being a contribution to the military effort. The location of a dwelling above a tunnel means no more than a dangerous vicinity. If the house is not otherwise connected to the tunnel network it remains a civilian object and its destruction would count as collateral civilian damage.  

There are also other ways in which private dwellings, schools or places of worship could become military objectives. Examples are their use as weapons’ storage facilities or as firing positions for fighters. Israeli reports claim that this has happened. This expert opinion is not in a position to evaluate relevant facts in this respect.

In this connection, missile launching sites are a special problem. They are of course military objectives, but they are moving. It can be detected by aerial or satellite reconnaissance where missiles are fired from. But it appears that the firing equipment is mobile and is removed after a missile is launched. If this is done, the site from which a missile had been launched before is no longer a military objective. It no longer contributes to the military effort as long as it is not again used for the same purpose.

3. Prohibition of indiscriminate attacks – attacks “directed” against military objectives

Attacks may not be directed against civilian objects, they may only be directed against military objectives. Action to destroy the tunnels or to render them unusable constitutes an attack against this military objective and is therefore lawful. As a matter of principle, this may be done through the use of high explosives, both launched be artillery from of the air. If civilian objects such as private dwellings are damaged as a consequence, this constitutes a collateral damage which has to be

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11 See below sec. 4.
12 See the publication referred to in note 10.
13 See Rule 10 of the ICRC Customary Law Study, op.cit. note 7, p. 34 on this ratione temporis limitation of of the character of an object as military objective.
limited according to the principle of proportionality.\textsuperscript{15} The targeted destruction of houses which, according to the rules explained above, are not military objectives, for instance in order to gain a better access to the tunnels, is not lawful.

It must be noted in this connection that the missiles launched from Gaza into Israeli territory were, according to the reports which are available, not directed against specific military objectives in Israel. If these reports are correct, these attacks constitute a forbidden indiscriminate warfare.\textsuperscript{16}

4. The principle of proportionality in the framework of “Operation Protective Edge”

Due to the widespread location of military objectives in the Gaza Strip, in particular due to the existence of the tunnel network all over the area, civilian damages caused by the attacks against these targets appear to be unavoidable. It is next to impossible to attack these lawful objectives existing everywhere in one of the most densely populated areas of the world from the air or by artillery without causing damages to, or destruction of, private homes. It could be asked whether the use of high precision weaponry could change this dilemma, but the information available to this writer does not show that this is sufficiently probable. This very fact makes the principle of proportionality the cornerstone of legal restraints on attacks conducted under these circumstances.\textsuperscript{17}

The principle of proportionality which provides a limitation on the permissibility of attacks, enshrined in Art. 51 and 57 para. 2(c) AP I, is a rule of customary law. The ICRC Customary Law Study\textsuperscript{18} formulates it as follows:

"Launching an attack which may be expected to cause \textit{incidental loss} of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be \textit{excessive in relation to the concrete and direct military advantage} anticipated, is prohibited."\textsuperscript{19}

The principle requires a comparison between two elements, namely civilian losses on the one hand and military advantage on the other, for which there is no hard and fast yardstick of comparison.\textsuperscript{20} They cannot be formulated in numerical terms. But even if they could, the question of what is “excessive” remains. Thus, the practical application of the principle leads to a balancing process (sometimes called a “proportionality equation”) for which some type of orientation is needed.

Despite this difficulty of application, the principle no doubt is a rule of customary law.\textsuperscript{21} This is so because the rule is firmly embedded in the rule of reason.\textsuperscript{22} It is a rule providing for a reasonable restraint. As such, the principle is well known and commonly applied in various fields of both national

\textsuperscript{15} See below sec. 4.
\textsuperscript{16} Customary Law Study, Rules 11 and 12, \textit{op.cit.} note 7, pp. 37 et seq.
\textsuperscript{17} Yoram Dinstein, \textit{The Conduct of Hostilities under the Law of International Armed Conflict}, 2nd ed., CUP, Cambridge 2010, p. 128 et seq.
\textsuperscript{18} Rule 14, \textit{op.cit.} note 7, p. 46.
\textsuperscript{19} Emphasis added.
\textsuperscript{20} Dinstein, \textit{op.cit.} note 17, p. 132 et seq.
\textsuperscript{21} See the numerous references in \textit{op.cit.} note 7, pp. 46 et seq.
and international law. In these other contexts, however, the final balancing decision is controlled by courts or, as the case may be, other independent and impartial bodies. That possibility has so far been lacking in the field of the law of armed conflict. The development of international criminal law and the increasing recourse to arbitration or adjudication also in the field of international humanitarian law may remedy that flaw. Some guidance has already been provided by the ICTY.

Even without the help of such decisions, some more precise orientation has to be sought for a decision-maker under the law of armed conflict. The decision contains three elements: the military advantage must be prognosticated and assessed, the civilian damage must be prognosticated and assessed, and both must be balanced against each other.

As to the advantage, it must relate to the “attack”. There is general agreement that this cannot reasonably mean an individual act of violence by a soldier, a single shot or a single rocket. It must relate to a larger operation, which may be a ‘composite mosaic’. This is well reflected in the Swiss reservation made on ratification of AP I regarding Art. 57:

“The provisions of Art 57(2) are binding only on battalion or group commander and higher echelons.”

The same idea is conveyed in the relevant provision of the ICC Statute, which adds the word “overall” to the adjectives “concrete and direct”. Thus, as the advantage to be assessed relates to a larger operation, the decision-maker addressed by this rule, i.e. the person tasked to balance advantage and damage, is a higher commander.

But what is his or her yardstick in comparing the incomparable? An important suggestion has been made by the Report of the Committee established by the Prosecutor of the ICTY to review in 1999 NATO bombing campaign against Yugoslavia:

“It is suggested that the determination of relative values must be that of the ‘reasonable military commander’. Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.”

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26 Dinstein, op.cit. note 17, p. 94.
29 Loc.cit. at p. 1271.
This may be an appropriate solution where the relevant decision merely is a tactical one. But it is not enough where the question is the general targeting policy. On that level, broader consideration of policy and of international legitimacy come into play. The report just quoted itself adds a question mark to its conclusion:

"It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants."

This prompts the question why, as a matter of international law, the judgment of the commander counts more then the evaluation made by a human rights lawyer. At least at the level of targeting policy, the tactical perspective of the reasonable commander is not enough. A socio-political and ethical balancing is necessary. This is the only way in which this balancing decision can gain international legitimacy.

A telling example of this approach is the targeting policy of the United States relating to the NATO bombing campaign during the Kosovo conflict 1999. Depending on the number and type of civilian casualties to be expected, the decision on the selection of a specific target was taken by a higher echelon, going up to the Joint Chiefs of Staff and the Commander-in-Chief, the President of the United States in certain cases. This was not ordered because the President knew military tactics better than his generals, but because the balancing judgment in question had an important political element where the legitimacy of the entire operation was at stake.

These considerations are strengthened by reference to another principle of customary humanitarian law, namely the Martens Clause, it is inter alia formulated in Art. 1 para. 2 AP I and must thus guide the interpretation of other basic provisions of AP I as well as of relevant customary law. According to this provision, civilians and combatants

"remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

In the Kupreskić case, the ICTY holds indeed that the proportionality principle must be interpreted in the light of the Martens Clause. The dictates of public conscience refer to the need for international legitimacy.

It is against the backdrop of these considerations that the violent international reaction in the light of the devastations becomes relevant as a matter of law. These reactions were not limited to utterances by voices coming from a usual pro-Palestinian or even pro-Hamas camp. They came from the world at large. These reactions reflect what are the dictates of public conscience. The "public"

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30 Tony Montgomery, 'Legal Perspective from the EUCOM Targeting Cell', in Andru E. Wall (ed.), Legal and ethical lessons of NATO's Kosovo campaign, Naval War College International Law Studies vol. 78, Newport, R.I. 2002, 189-197, at 191 et seq.
31 Emphasis added.
32 loc.cit. note 25, para. 525.
conscience, the conscience of the world at large, does not accept the type of massive devastation of urban areas which characterize Operation Protective Edge.

This condemnation of vast destruction in densely populated areas effected by the use of high explosive weapons was not for the first time prompted by the devastating effects of Operation Protective Edge. A study based on an analysis of the earlier bombing campaigns against population centers during the conflict in former Yugoslavia comes to the conclusion that “a clear boundary must be drawn against the wide area effect of explosive weapons.” 33

To conclude on the question of proportionality of the widespread destruction of dwellings and other houses during Operation Protective Edge: It seems appropriate to balance military advantage and civilian damage in relation to the entire operation, i.e. relating to the decisions on targeting policy. It is the cumulative effect 34 of the attacks which makes the living conditions of the civilian population of Gaza so unbearable and thus the damage, subject to a further scrutiny of the facts, excessive in relation to the military advantage, also considerable, which is derived from putting the tunnel network out of function.

5. Precautions in attacks and precautions against the effects of attacks

The practical implementation of the proportionality principle depends on certain precautions to be taken both by the attacker and by the target State (active and passive precautions 35). As the principle of proportionality is the principal, if not the only legal restraint on attacks in the Gaza context, these precautions are also vital. The relevant obligations are formulated in Art. 57 and 58 AP I and also constitute customary law. 36

Active precautions: the first of the obligations of the attacker is a duty to verify the military character of the target as well as the possible scope of the civilian collateral damage (Art. 57 para. 2(a)(i) AP I). It can be assumed that the Israeli command was well aware of the character and use of buildings in Gaza. Israeli publications also suggest that it had knowledge of the location of each of the parts of the tunnel network, at least to a large extent. 37

The second of these obligations is a duty to “take all feasible precautions” with a view to avoiding or at least minimizing incidental civilian damage (Art. 57 para. 2(a)(ii)), which implies a duty to use the means likely to cause the least possible collateral damage (Art. 57 para. 3). This raises in particular the question whether and how it might have been possible to put the tunnel network out of function without causing extended surface damage. It is not the task of the present expert opinion to provide an answer to this question.

33 PAX (ed.), Unacceptable risk. Use of explosive weapons in populated areas through the lens of three cases before the ICTY, 2014, pp. 78 et seq.
34 Regarding the relevance of such cumulative effects see also the Kupreskić case, supra note 25.
35 Dinstein, op.cit. note 17, p. 137 et seq.
36 Customary Law Study, op.cit. note 7, Rules 15 et seq. (pp. 51 et seq.) and Rules 22 et seq. (pp. 68 et seq.).
37 See the publication quoted note 10.
Finally, there is a duty of effective advance warning (Art. 57 para. 2(c)). According to the reports which are available, warnings were indeed quite often given. These warnings, however, were quite useless, as there existed no realistic option to move away. There were practically no places of refuge, the danger of being attacked was so to say omnipresent. It is suggested that this impossibility to escape the consequences of an attack has to be part of the proportionality equation. The weight of civilian damage in relation to military advantage is higher if that damage cannot be reduced by the victim moving away.

Passive precautions: on the side of the targeted party, there is a duty to endeavour to remove civilians from the vicinity of military objectives and not to place military objectives within or near densely populated areas (Art. 58 (a) and (b)). That obligation only exists “to the maximum extent feasible”. This implies, it is submitted, at least a duty to make an effort not to put the civilian population unnecessarily at risk through the construction of military infrastructure. Reports which are available suggest that no such effort was made, quite to the contrary.

If military objectives are deliberately and systematically placed in the vicinity of, or under, civilian dwelling, this amounts to using the affected civilians a human shields. Evidence of such a policy is highly suggestive, but perhaps not conclusive. If such systematic policy can be proven, it amounts to a war crime (Art. 8 para. 2(b)(xxii) ICC Statute). On the other hand, it must be emphasized that even where parts of the civilian population are in this way used as human shields, injury to these civilians or damage to these objects has still to be taken into account in the proportionality equation.

6. Countermeasures and the principle of *tu quoque*

To the extent that Israeli attacks on Gaza are unlawful under the rules just explained, it has to be asked whether they can be justified as countermeasures. Art. 50 (1)(c) ARS refers to the rules of international humanitarian law prohibiting “reprisals”. Applying these rules, the answer to this question is negative, for two reasons: First, reprisals against the civilian population are prohibited; second, Israel does not claim a right of reprisal.

Attacks by way of reprisals against the civilian population are prohibited according to Art. 51 para. 6 AP I. This is also a rule of customary law. Furthermore, “countermeasures” are measures, otherwise unlawful, taken to induce the State to which they are addressed to comply with its allegedly violated obligations. This presupposes that some claim to this effect must be made. But Israel apparently does not claim a right of reprisal. It considers its attacks to be lawful without a need to justify them as reprisals.

A related principle which might be discussed in this context is the “*tu quoque*” principle. It was implicitly recognized by the International Military Tribunal in Nuremberg when it did not condemn

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38 See the references quoted supra note 6.
39 ICTY, Report to the Prosecutor, loc. cit. note 28; Bothe, loc. cit. note 27, p. 402.
40 Art. 22, 49 et seq. ILC Articles on the Responsibility of States for internationally wrongful acts (ARS).
41 Customary Law Study, op. cit. note 7, vol. 1, p. 520 et seq. For an elaborate analysis, see ICTY, Prosecutor v. Kupreskić, loc. cit. note 25, paras. 532 et seq.
42 Art. 49 ARS.
the German Admiral Dönitz for Germany’s unrestricted submarine warfare because the United States used it as well in the Pacific. Yet under current international humanitarian law, this principle is not accepted.

7. Special duties of an Occupying Power?

Contrary to the stance taken by the government of Israel, the Gaza Strip is still generally regarded as part to the Palestinian Occupied Territory. It has therefore to be asked whether the conclusions elaborated so far have to be modified taking into account the law of occupation. As a matter of principle, an Occupying Power must satisfy its legitimate security interests in the same way as a government maintains order in the internal sphere of a State, i.e. in “law enforcement mode”. This is implied in the customary law duty of the Occupying Power, formulated in Art. 43 of the Hague Regulations, “to restore, and ensure … public order and safety while respecting, unless absolutely prevented, the laws in force in the country.” But as an internal armed conflict may break out in a country, a fighting resistance may emerge in an occupied territory which makes it impossible to maintain order in a law enforcement mode. In such a situation, the applicable rules of behaviour are those relating to the conduct of hostilities in an international armed conflict. But do these rules on the conduct of hostilities as lex specialis completely displace the rules of the law of occupation protecting fundamental rights of the civilian population of the territory? The problem is parallel to the often debated issue of the relationship between human rights law, which is an important part of the law applicable in case of an occupation, and international humanitarian law. In the Wall case the ICJ, despite referring the the lex specialis principle, has upheld a parallel application of both areas of international law. Following this approach, the Occupying Power’s duty to ensure public order and safety, “la vie publique” in the authoritative French text, must at least be taken into account when interpreting the proportionality principle. This means that a yardstick of proportionality must apply to collateral damage caused by an attack of the Occupying Power which is stricter than the one to be applied in other circumstances.

8. The question of war crimes

A number of the violations of international humanitarian law discussed above would constitute war crimes. Israel is not a party to the ICC Statute, nor was Palestine at the relevant time in August 2014. But the concept of war crimes is also part of customary international law, and Art. 8 of the ICC Statute must be understood to reflect the customary law defining such crimes. States are obliged to

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43 Dönitz case, Trials of the Major War Criminals Before the International Military Tribunal, vol. 22, 558 et seq.
47 Watkin, loc.cit. note 46, at pp. 301 et seq.
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49 Michael Bothe, loc.cit. note 27, at p. 387.
prosecute war crimes committed by their nationals or by their forces,\textsuperscript{50} and other States may also prosecute them under the principle of universal jurisdiction.\textsuperscript{51}

The following points of the list of war crimes contained in Art. 8 para. 2(b) of the ICC Statute are of particular relevance in the present context:

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
(iv) 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 anticipated;
(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or sites where the sick and wounded are collected, provided they are not military objectives;
(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.

As stated at the outset, it cannot be the purpose of the present opinion to state whether or by whom such crimes have indeed been committed in any particular instance. But attention must be drawn to the fact, first, that the definitions of the crimes are sometimes narrower or more precise than the substantive prohibitions they are meant to enforce, which have been discussed above. Secondly, the elements of intent and of command responsibility (Art. 28 ICC Statute) may pose problems, in particular regarding the balancing processes required in the application of the proportionality principle.

9. Conclusions

1. This opinion will not be able to express a final judgment on the legality of any specific action undertaken in the context of Operation Protective Edge. It only tries to clarify the rules of international law which have to be applied to arrive at such a judgment.

2. Customary international humanitarian law relating to the conduct of hostilities in international armed conflict applies to this operation.

3. The most important target which Operation Protective Edge was designed to eliminate is the tunnel system spread over the entire area of the Gaza Strip and also leading into Israeli territory. The whole system and all its parts are military objectives which could lawfully be attacked.

4. As the tunnel system was spread everywhere in the Gaza Strip, one of the world’s most densely populated areas, it was practically impossible to effectively attack the tunnel system without causing injury to civilians or damage to civilian objects. This injury or damage has to be limited according to the proportionality principle. Therefore, this principle of proportionality was the cornerstone of legal restraints on attacks conducted in the framework of Operation Protective Edge.

\textsuperscript{50} Customary Law Study, \textit{op.cit.} note 7, Rule 158, vol. 1, pp. 607 \textit{et seq.}
\textsuperscript{51} Customary Law Study, \textit{op.cit.} note 7, Rule 157, vol. 1, pp. 604 \textit{et seq.}
5. The proportionality principle requires a balancing of military advantages and civilian losses (proportionality equation) for which no hard and fast yardstick exists. The balancing cannot be performed on the level of single hostile actions. It has to be done on a higher, more comprehensive level. The most appropriate level for this balancing is Operation Protective Edge as a whole.

6. In interpreting the proportionality principle, the Martens Clause is relevant. The balancing must be done in accordance with the principles of humanity and the dictates of public conscience. The widespread condemnation of the high civilian losses as of the devastation of dwellings in the Gaza Strip, which displaced about 30% of its population, are a valid indicator of these dictates of public conscience. This suggests the conclusion that the operation as a whole violated the principle of proportionality.

7. A stricter interpretation of the proportionality principle, i.e. a balancing of values giving more weight to the civilian losses, must be applied under the law of belligerent occupation.

8. The functioning of the proportionality principle depends on certain active or passive precautions taken by the attacking and the targeted party. As an active precaution, warnings to the civilian populations are important. They were to a large extent ineffective as there was no place to seek refuge following the warning. On the other hand, the tunnel system and the private homes were so intermingled that the desirable distance between military objectives and civilian objects was not achieved and civilians and civilian objects could be regarded as a kind of shield for military objectives. This raises the question whether this amounted to a war crime.

9. The alleged violations of international humanitarian law cannot be justified as countermeasures.

10. A number of the alleged violations of international humanitarian law constitute war crimes. Both Israel and the Palestinian side are obliged to investigate and punish such crimes committed by persons belonging to their respective side. Third States are entitled to punish such crimes under the principle of universal jurisdiction.

Frankfurt, 24 January 2015

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