Update to Chapter 8, Problem II

The 2014 Gaza War discussed in the casebook triggered both international and Israeli investigations of violations of international humanitarian law. In June 2015, a fact-finding commission created by the UN Human Rights Council released its report on the conflict. It found significant violations of IHL by Hamas as well as by Israel. One typical conclusion regarding Hamas stated:

The use of rockets in the possession of Palestinian armed groups, indiscriminate in nature, and any targeted mortar attack against civilians constitute violations of international humanitarian law, in particular of the fundamental principle of distinction, which may amount to a war crime. The intent of some Palestinian armed groups to direct attacks against civilians is demonstrated by statements indicating that their intended targets were civilians or large population centres in Israel. While certain Palestinian armed actors cited the limits of their military arsenals as a reason for failing to attack military targets precisely, the military capacity of a party to the conflict is irrelevant to its obligation to respect the prohibition against indiscriminate attacks.

The absence of any possible military advantage resulting from rockets that cannot be directed at a military objective, coupled with statements by Palestinian armed groups, strongly suggest that the primary purpose of the rocket attacks was to spread terror among the civilian population, in violation of international humanitarian law.

With respect to Israeli attacks on residential buildings in Gaza, the Commission wrote:

The commission found that the fact that precision-guided weapons were used in all cases indicates that they were directed against specific targets and resulted in the total or partial destruction of entire buildings. . . . Many of the incidents took place in the evening or at dawn, when families gathered for . . . the Ramadan meals, or at night, when people were asleep. The timing of the attacks increased the likelihood that many people, often entire families, would be at home. . . .

In six of the cases examined . . . there is little or no information available to explain why residential buildings, which are prima facie civilian objects immune from attack, were considered to be legitimate military objectives. In relation to each attack on residential buildings that resulted in significant destruction and civilian deaths or injuries, the onus is on Israel to explain the factual elements that rendered the houses or the person(s) present inside a military target. Israel should provide specific information on the effective contribution of a given house or inhabitant to military action and the clear advantage to be gained by the attack. Should a strike directly and intentionally target a house in the absence of a specific military objective, this would amount to a violation of the principle of distinction. It may also constitute a direct attack against civilian objects or civilians, a war crime under international criminal law.
Although the commission found indications of possible military objectives in the remaining nine cases examined, it is not in a position to determine whether they actually motivated the attacks in question. It appears that the potential targets were mostly individuals who were or who could have been present in the building at the time it was hit, presumably on account of their alleged links to the police, Hamas or an armed group. In that regard, international law provides that persons may be targeted only if they participate directly in hostilities or are members of organized armed groups with a continuous combat function.

With regard to proportionality, given the circumstances, a reasonable commander would have been aware that these attacks would be likely to result in a large number of civilian casualties and the complete or partial destruction of the building. Such circumstances differ from case to case, and include the residential nature of the targeted buildings; their location in densely populated areas; the timing of the attacks; and the frequent use of large bombs that were apparently meant to cause extensive damage. Given the absence of information suggesting that the anticipated military advantage at the time of the attack was such that the expected civilian casualties and damage to the targeted and surrounding buildings were not excessive, there are strong indications that these attacks could be disproportionate, and therefore amount to a war crime.

How does the Commission handle the factual predicates needed to determine if Hamas and Israel violated the principle of distinction or the rule of proportionality? Can an international fact-finding body working after the fact make definitive determinations of these IHL violations?

Israel simultaneously released its own lengthy report on the 2014 Gaza War. The Executive Summary included the following:

43. Despite the serious challenges posed by the conduct of Hamas and other terrorist organisations in the Gaza Strip, and despite the complex nature of urban warfare, the IDF remains committed to the Law of Armed Conflict. Accordingly, in the complex circumstances of the 2014 Gaza Conflict, Israel undertook to attack objects only when there was reasonable certainty — based on reliable intelligence — that they constituted military objectives in accordance with the Law of Armed Conflict. Likewise, the IDF directed attacks on individuals only when there was reasonable certainty that such persons were members of organised armed groups or civilians directly participating in hostilities.

44. Unfortunately, some of these attacks resulted in damage to residential buildings, schools, mosques, and even medical and U.N. facilities. Damage occurred mostly when these sites became lawful military targets due to Hamas’s and other terrorist organisation’s use of such sites for military purposes; when Hamas and other militants located themselves during the hostilities within such structures; or as unintended incidental harm resulting from IDF attacks against these organisations’ military operations in the immediate vicinity of such sites. Israel did not intentionally target civilians or civilian objects. . . .
46. The IDF’s attacks were mandated to accord with the principle of proportionality, which prohibits attacks that 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. . . .

49. Despite the IDF’s efforts to mitigate the risk of incidental harm, civilian casualties and damage to civilian objects regretfully resulted from Israeli attacks against military objectives.

Without ignoring the unfortunate nature of such consequences, they must be assessed in light of the Law of Armed Conflict and the reality of hostilities in a complex and rapidly changing urban terrain against an adversary that deliberately seeks to cause harm to its own civilian population. For example, the principle of proportionality requires consideration of a commander’s assessment of the expected collateral damage from an attack. The test is based on the expected collateral damage a “reasonable commander” would have assessed at the time of attack — and not the damage that in actuality occurred as a result of the attack — and whether there is a significant imbalance between that expected damage and the anticipated military advantage.

Is the Israeli standard of “reasonable certainty” set out in paragraph 43 consistent with the principle of distinction in Additional Protocol I? Where do the UN and the Israeli government agree and disagree regarding the rule of proportionality? If the rule of proportionality is based on the commander’s assessment before beginning an attack, then what probative value does evidence of actual civilian casualties after an attack have regarding the state’s compliance with proportionality?

In December 2016, following many years of internal deliberation and sharing of drafts with the public, the U.S. Department of Defense issues its new Law of War Manual. The 1200-page Manual, meant to provide authoritative guidance to U.S. military lawyers, was the subject of significant academic commentary, some of which can be found here.

One significant change to the prior manual concerned the commander’s duties needed to fulfill the principle of proportionality. Section 5.11.7 states:

*Selecting Military Objectives.* In planning or conducting an attack, the selection of a military objective may reduce the risk of incidental harm. In particular, when attempting to achieve a particular military advantage through an attack, a commander may confront a choice among several military objectives for achieving that advantage. When facing such a choice, provided that all other factors are equal, the object to be selected for attack shall be the object the attack on which may be expected to cause the least danger to civilian lives and to civilian objects. For example, in seeking to deny an adversary the ability to use a railroad network, it may be possible to disable the railroad network just as effectively by striking the railroad lines away from inhabited areas as by striking the railroad station located near civilians.
This rule does not dictate what choices a commander should consider, but presupposes that the commander is confronted with a choice of potential military objectives to attack to achieve the desired military advantage. In other words, this rule does not prevent the commander from attacking multiple military objectives or pursuing every military advantage he or she believes warrants pursuit.

When the choice of military objectives involves different risks and benefits potentially yielding different military advantages, this rule does not require that the object that may be expected to cause the least danger to civilian lives and to civilian objects be chosen for attack. For example, a commander could decide to attack a military objective involving higher risks of civilian casualties because the attack on that objective affords a greater likelihood of achieving the military advantage.

Two passages that earned some academic criticism concerned the relative responsibility of the attacking party and the defending party for civilian safety, and whether any responsibility of the defending party for civilian safety should affect the attacking party’s proportionality calculation. Thus, two sections read:

5.2.1 Responsibility of the Party Controlling Civilian Persons and Objects. The party controlling civilians and civilian objects has the primary responsibility for the protection of civilians and civilian objects. The party controlling the civilian population generally has the greater opportunity to minimize risk to civilians. Civilians also may share in the responsibility to take precautions for their own protection. . . .

5.12.1.4 Harms Caused by the Attacking Force Versus Harms Caused by Enemy Action or Beyond the Control of Either Party. The harm caused by the attacking forces’ actions in conducting the attack must be considered. Harm caused by enemy action, or beyond the control of either party, need not be considered.

For example, a commander directing an air operation would not need to consider civilians injured or killed by counter-attacks from enemy air defense measures, such as spent surface-to-air measures or anti-aircraft projectiles. Similarly, the risk to the civilian population from the legitimate deception activities of the defending force, such as jamming, smoke, or chaff, would not need to be considered by the attacking force, although the defending force should consider such risks as part of its obligations to take feasible precautions in defense.

When the attacking force causes harms that are the responsibility of the defending force due to its use of voluntary human shields or due to the employment of civilian personnel in or on military objectives, the responsibility of the defending force is a factor that may be considered in determining whether such harm is excessive.

Does Section 5.2.1’s placement of the “primary” responsibility for protection of civilians on the defending party accurately describe the rules in Additional Protocol I? Does the last sentence in Section 5.12.1.4 mean that civilian lives count less in the proportionality calculus if the defending force is somehow using them to deter attacks from the attacking force?
In the spring of 2018, Palestinians in Gaza began large-scale demonstrations against Israel on the edge of the multi-layered fence between southern Israel and Gaza. Some protesters hurled rocks at Israeli soldiers on the other side of the fences, and in response Israeli troops used lethal force. Between March and June 2018, over 140 Palestinians were killed. On May 22, the Human Rights Council condemned “the disproportionate and indiscriminate use of force by the Israeli occupying forces against Palestinian civilians, including in the context of peaceful protests, particularly in the Gaza Strip, in violation of international humanitarian law, international human rights law and relevant United Nations resolutions . . . .” and set up an investigative body to study the episodes in more detail and report to the Council. The same week, the Israeli Supreme Court upheld the Army’s rules of engagement for the use of force against claims that they violated international humanitarian law. The Court generally accepted the Israeli government’s factual assessment of the situation and found that IHL permitted the use of lethal force. For an analysis of the opinion, click here.