

Israel – Hamas 2024 Symposium – Civilian Protection as an Element of Military Advantage in Determining Proportionality

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April 2, 2024

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In a prior [post](#), I raised the issue of whether the protection of Israeli civilians may be treated as a military advantage in determining the proportionality of attacks in Gaza. This situation arises when an Israeli Defense Force (IDF) attack prevents harm from being inflicted by Hamas on Israeli civilians. This post concludes that civilian protection is an imperative military necessity which yields a compelling military advantage. Civilian protection may be an important military advantage in both international and non-international armed conflicts. However, its importance in non-international armed conflicts is magnified by the fact that non-State actors such as Hamas commonly employ terrorism against civilians as a means of achieving their strategic objectives.

Civilian Protection in the Determination of Military Advantage

The targeting rule of proportionality applies when civilian casualties and/or damage to civilian objects are expected to result from attacks on military objectives. Pursuant to [Additional Protocol I](#) (AP I), proportionality requirements are violated when the expected civilian

casualties and/or damage to civilian objects are excessive in relation to the “concrete and direct military advantage anticipated” (AP I, arts. 51(5)(b), 57(2)(a)(iii), 57(b)). This legal test reflects customary international law.

The issue of whether the proportionality determination may consider civilian harms that were prevented by an attack is rarely addressed by national military manuals or in academic literature. This issue is the subject of disagreement among experts in the few instances in which it has been addressed. The lack of attention to this issue is surprising given that military operations are often designed for the express purpose of protecting the civilian population of the attacking country or its allies. There is a brief reference to this issue in Section 5.12.3 of the U.S. Department of Defense (DoD) *Law of War Manual*, which states that “civilians at risk if the attack is not taken” may be considered in the proportionality evaluation. However, the *Law of War Manual* does not indicate whether this factor should be treated as an element of military advantage or should be factored into the proportionality evaluation in some other way.

Nonetheless, it is consistent with the principles underlying AP I to include in the proportionality determination civilian harms prevented by an attack. The proportionality requirements contained in Articles 51 and 57 AP I implement a general duty to exercise “constant care” in protecting the civilian population. Article 50 of AP I states that the civilian population “comprises all persons who are civilians” without regard to whether they are nationals of the attacked or attacking party. An International Committee of the Red Cross (ICRC) 1987 *Commentary* to Article 50 states that in “protecting civilians against the dangers of war, the important aspect is not so much their nationality as the inoffensive character of the persons to be spared” As further noted in the *Commentary* to AP I, the civilian population protected is similar in scope to that described in Article 13 of the Fourth Geneva Convention, which refers to “the whole of the populations of the countries in conflict.” It would thus appear that commanders should exercise constant care in protecting their own nationals from the dangers of war, as well as the civilians of any adverse party. Therefore, factoring into the proportionality analysis prevention of injuries to civilians of the attacking party is consistent with the principles underlying AP I.

Civilian harm prevented by an attack cannot be considered in that part of the proportionality analysis which involves determining the “incidental loss of civilian life” (AP I, art. 51(5)(b), 57(2)(a)(iii), 57(b)). The term “incidental loss of civilian life” measures the civilian losses which an “attack may be expected to cause” as opposed to civilians whose injury may be prevented by that attack. Moreover, protection of an attacking party’s civilians may be the primary reason for an attack, which is the opposite of an “incidental” effect. Accordingly, civilian harm prevented by an attack must be treated as a military advantage if it is to be factored into the proportionality analysis.

Treating civilian protection as a military advantage is also consistent with established principles of military necessity. Military necessity is not defined by treaty law. Nonetheless, a widely used definition contained in Article 14 of the *Lieber Code* of 1868 defines military necessity as “the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.” The ICRC *Commentary* to Article 35 of AP I notes that this definition is still applicable.

In the case of the Gaza conflict, the military objective of Hamas in launching their October 7 attack was not to gain territory or to destroy Israel’s military capabilities. Rather, their purpose was to terrorize Israel’s civilian population. Correspondingly, Israel’s primary military objective is to secure its civilian population from further attacks by Hamas. Therefore, all actions that are indispensable for achieving this purpose necessarily fall within the definition of military necessity, unless those acts are otherwise prohibited by law. Accordingly, attacks made by the IDF for the purpose of safeguarding the lives of Israeli civilians may properly be viewed as a military necessity.

Moreover, it would be morally repugnant to consider civilian harm caused by an attack in determining proportionality while at the same time excluding civilian harm prevented by that attack. This would be tantamount to declaring that only the lives of some civilians have value.

Excluding civilian protection from the determination of military advantage would also be inconsistent with State practice regarding the protection of attacking forces. Several States treat the “security of the attacking forces” as an appropriate element of military advantage. Treating protection of military personnel as a legitimate military advantage while excluding protection of civilians similarly at risk assigns a higher value to the lives of military personnel than to civilians. This is not consistent with the objective of AP I, which is to afford protection to the civilian population from the dangers of war.

Civilian Protection and “Concrete and Direct” Military Advantage

The military advantage from an attack must be “concrete and direct” to be considered in the proportionality analysis. There are many possible interpretations of the term “concrete and direct.” However, it is generally accepted that any military advantage must not be “merely hypothetical or speculative.” Likewise, the military advantage anticipated from an attack need not be immediate. Rather, the ICRC has stated that AP I permits consideration of a 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” (ICRC, *Customary IHL Study*, rule 156).

It is widely accepted that military advantage may be based on the benefits anticipated from the “attack considered as a whole and not only from isolated or particular parts of that attack” (ICRC, *Customary IHL Study*, rule 14). The DoD *Law of War Manual* states that “in assessing the military advantage of attacking an object, one may consider the entire war strategy rather than only the potential tactical gains from attacking that object” (§ 2.2.3.1).

One might argue that it is inherently speculative to estimate civilian losses prevented by an attack. However, the identical argument could be made with respect to estimating military losses. As noted above, civilian protection should be accepted as a military advantage given that force protection is widely accepted as a military advantage. Moreover, every element of the proportionality analysis is to some extent speculative as it is based entirely on estimates made prior to the attack. The fact that military advantage may be perceived over a longer period also suggests a relatively high tolerance for predictive uncertainty.

The military necessity of protecting civilians is almost always amplified by the extreme consequences of attacks targeting civilians. The extraordinarily provocative nature of such attacks tends to produce a significant retaliatory response, as occurred after September 11, 2001, and again after October 7, 2023. Protection of civilians from such attacks is therefore imperative if a conflict is to be brought to a successful conclusion.

Military Advantage in the Conflict in Gaza

Turning to the war in Gaza, the military advantage of protecting civilians inside Israel has enormous weight, given that Israel's entire war strategy is premised on this purpose. This is not to say that protection of Israeli civilians will constitute a concrete and direct military advantage in every attack. Military advantage is typically a fact intensive inquiry based on "the circumstances ruling at the time."

Nonetheless, the military advantage of protecting Israeli civilians is certainly augmented by the geographic proximity of Hamas operatives to Israeli civilian communities. I would invite readers to review an online map showing the locations at which the October 7 massacres occurred. Most of these massacres occurred in Israeli communities located only a few kilometers from the Gaza border fence. A major massacre also occurred at a makeshift music festival five kilometers from the border. It is therefore reasonable to assume that protection of Israeli civilians living adjacent to the Gaza border is an omnipresent objective for all echelons of the IDF in virtually every operation. The military advantage of neutralizing even a single Hamas operative situated a short distance from Israeli civilian communities is almost definitionally driven by the IDF's duty to protect its civilian population, especially given the announced intention of Hamas to attack again.

The same is true with respect to IDF operations on the Lebanese border. A significant number of Israeli civilians reside within a few kilometers of Lebanese border areas controlled by Hezbollah. More than 96,000 Israeli civilians have been internally displaced from their homes near the Lebanese border due to Hezbollah's presence astride the border. IDF operations on the northern border are geared to the singular purpose of creating safe living conditions for these civilians.

Moreover, the military advantage of civilian protection is not limited to Israeli communities adjacent to the Gaza or Lebanese borders. Hamas is still capable of striking cities removed from the immediate border area, as illustrated by its March 25, 2024, attack on Ashdod. The case for civilian protection is even more compelling on Israel's northern border. Hezbollah is estimated to possess 120,000 to 200,000 rockets, many of which are precision guided and capable of striking every major Israeli city. By virtue of sheer numbers, Hezbollah may be capable of overwhelming the Iron Dome system, thereby leaving Israeli civilians vulnerable to large scale aerial bombardments.

Conclusion

Israel is unique in that virtually its entire civilian population lies within firing range of highly organized and well-armed non-State actors. Prevention of attacks against civilians is especially important in conflicts involving non-State actors who employ terrorism for the purpose of achieving their political objectives. Therefore, civilian protection is an imperative military necessity for Israel, which yields a compelling military advantage.

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