

General

[N. B.: The “Winograd Commission” is an Israeli-government-appointed commission of inquiry chaired by Judge Eliyahu Winograd, charged to review the preparation and conduct of the Israeli military operations during the war against Hezbollah in 2006.]

N.B. As per the disclaimer ^[1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Report of the Winograd Commission, 30 January 2008, Chapter 14 “The Conduct of Israel in Light of International Law”, available in Hebrew at <http://www.vaadatwino.org.il/> ^[2], unofficial translation]

Chapter Fourteen:

The Conduct of Israel in Light of International Law

General

1. Humanitarian law is a set of norms that is part of international law, which applies to Israel as it does to every state. For our purposes regarding the present war, it includes the **laws of war**.
2. The laws of war are divided into two categories:
 - The first examines the decision to go to war (*jus ad bellum*). The general principle of international law is that war is justified only if it is waged in reaction to an act of aggression.
 - The second category of laws of armed conflict, or laws of war (*jus in bello*), deals with **the manner in which hostilities are conducted**. The supreme requirement, which is the most central principle of the laws of armed conflict, is the distinction between military combatants and targets and non-combatants and non-military targets. The general principle is that intentional targeting of only the former is permissible. The laws of war also determine the types of weapons and munitions that are forbidden for use in all circumstances, those that are permitted and those that are restricted in use. In addition, the laws of armed conflict require the parties to the hostilities to reduce the risk of harming civilians by moving the military targets and acts of combat away from civilian population centers. The use of civilians as a “human shield” is absolutely forbidden. In addition, according to the laws of war, military action should be “proportionate,” and a reasonable relationship must be maintained between the anticipated harm to civilians as a result of the action and the military advantage it is expected to yield. In addition, the parties to the conflict must enable humanitarian aid to reach the civilian population located in the areas of combat.
3. The manner in which the combat is waged is examined separately to the question of the decision to engage war, and the laws of armed conflict apply to all those who engage in acts of combat, aggressive and defensive alike. This is in order to protect the civilians of both sides and also because in many cases the question of who is the aggressor and who the defender is controversial and cannot be clearly determined. In

addition, this principle alone ensures that the aggressor will also have an incentive to abide by the laws of armed conflict.

[...]

5. [...] [T]he only subject that we will address here is an assessment of the conduct of Israel in light of the laws of armed conflict.

A. The Way the Committee Addresses the Subject

[...]

8. We examined a large volume material and in light of this we made the decision to limit ourselves to **general** comments regarding the conduct of the political echelons and the IDF forces in the context of the rules of international law. We recommend that an authorized examination also be held where the facts seem to indicate deviation from the rules of international law, in general and regarding the Second Lebanon War, in particular. Only on one issue – the use of cluster bombs – do we recommend an additional examination. [...]
9. Here we mention only some of the principle general findings:
 - The Second Lebanon War caused severe damage in loss of life, dislocation of people from their homes and vast destruction, in both states. The Government of Israel expressed sorrow for the harm inflicted on the citizens of Lebanon and we share this sorrow. However, such damage occurs in war. The fact that civilians were hurt or that civilian infrastructures were damaged does not in itself constitute evidence that Israel failed to adhere to the rules of international law.

[...]

- We did not encounter any case in which an act was taken despite the decision maker or commander being told that it was illegal prior to its implementation. Nor did we encounter any case in which commanders or soldiers knowingly performed acts that violate international law.
- [...] We found that both in the political echelons and within the IDF, there was

generally a high and constant level of awareness of the rules of international law and its restrictions, and of the need to ensure that the forces act in accordance with them.

- In cases in which there arose – during or after the war – a significant question regarding the conduct of hostilities in terms of the laws of war – special teams were set up to study the events. Such was the case regarding the killing of UN members at their post, regarding the attack that caused the killing of civilians in Kfar Kana and regarding the way in which cluster bombs were employed.

[...]

15. [...] [W]e will concentrate on examining the general norms, the operational plans for the Lebanese arena and the issue of legal counsel during the war. We will add some general guidelines on the subject of the appropriate investigation of military activity, in general, and of the events of the Second Lebanon War, in particular.

[...]

B. Instilment of International Law in the IDF and Legal Counsel during Hostilities

[...]

20. [...] [I]t is in Israel's interest that its leaders, commanders and fighters act in both a legal and moral manner. For this purpose there must be effective dissemination of the norms of international law – independently or as part of strict adherence to Israeli law, military law or purity of arms – among state leaders, IDF commanders and to the very last combat soldier. This education is essential both in order to guide the behavior and to provide a normative foundation for examining specific events. It is also essential to place responsibility when necessary, on the one hand, and to provide genuine support to people who acted on behalf of the state in the framework of the rules, on the other hand.
21. It is precisely because international law on these subjects is unclear and indeterminate, and because the mechanisms for its enforcement are lacking and in some cases politically biased, that it is also very important to deal in this context with

problems regarding any legal order: In some cases there is great tension between what the legal rule commands – such as the duty to obey orders or the duty not to harm civilians – and what is dictated by common sense, existential need or morality itself.

22. The law itself sometimes refers to these tensions. For example, the legal and moral duty not to obey a manifestly illegal order is a case in which the law directs the soldier not to obey an order.
23. Sometimes there is concern that the fear of international law (or the danger of being put on criminal or military trial) will paralyze soldiers from discharging their missions and from carrying out action that would enable fulfillment of the mission. Such concern also exists in Israel, and it is important to examine ways to ensure that combatants and commanders are not paralyzed in operational action. This is not a matter of permitting acts that are contrary to local or international law, but clarification that the principles of international law (and domestic criminal law) are not intended to stultify the ability to take military action in defense of the state and its citizens.
24. At any rate, these problems are not special to international law, and the need to deal with them should not be construed as a deviation from the principle that the rules of humanitarian law are binding upon Israel.
25. As noted above, it seems to us that the authorities are aware of these duties, and that they generally act, and acted during the war, in conscious awareness of these duties and out of a desire to honor them.
26. Thus, for instance, at critical crossroads of decision in the political echelons, the presence – and sometimes the approval in legal terms – of the Attorney General was requested. The examination dealt with both legal and factual aspects. Even when the target seemed to be a legitimate target – the political echelons took care to make their approval of action contingent upon explicit prior warning and reliable intelligence estimates that there was no civilian population in the location. The operative plans included a detailed appendix that dealt with international law, and also included special guidelines for special types of arms (such as cluster bombs). [...]
27. The practice noted – providing legal consultation in real time to the military and political echelons – expressed an interesting and not at all simple decision that was taken by the legal advisors – both in the military and the political echelons. [...] [Its]

essence: the members of the legal advisory staff are involved in decisions **prior to the act or in real time while hostilities are underway**. There are acts that are not carried out because they do not give legal approval for them, and there are acts that they do approve, and statesmen and combatants act according to the approval, although others may claim that these acts are illegal and even that they constitute war crimes.

28. Despite all the above in favor of “close” legal consultation, we would like to address the question of whether such a heightened level of legal consultation in real time was indeed desirable.
29. The natural tendency – for reasons of personal responsibility – to seek the assistance of legal counsel even, and perhaps mainly, in real time is clear to us; nevertheless, we fear that increased reliance on legal counsel during a military action is liable to cause a diversion of responsibility from elected officials and commanders onto the advisors, and is liable to impair both the essential quality of the decision and the operational activity.
30. In principle, we consider preferable a position according to which the general norms regarding the application of discretion and force, alongside guidelines for action, education and training to uphold the rules of combat according to international law, including all the ethical, political and legal restrictions, should be instilled **prior to action** as a matter of routine. **During the action** (that is, during combat, in real time) the decision makers and combatants should be allowed to act in accordance with these norms, which were instilled as said. **After the fact**, incidents should be examined, including placing responsibility in cases where it emerges that there was a significant deviation from the binding norms that were instilled.
31. Our discussion refers mainly to legal counsel in real time to those who are in the actual combat situation. It seems to us that it is appropriate that the combat forces, and certainly the field ranks, should concentrate on combat and not on consultation with legal advisors. This certainly holds when the constraints of legality and purity of arms have already been instilled in them during their professional training.
32. Another advantage that arises from giving greater weight to operational judgment (where the legal and ethical norms have already been instilled) lies in the fact that this will also enable the echelons of the legal counsel not to put themselves in situations in which they will be prevented – due to personal involvement – from rendering a

professional opinion after the fact, or even from effective representation of the members of the combat forces in Israel and abroad, simply because their members already legitimized the action or determined that it was illegal in real time.

33. In order to eliminate any doubt, we clarify further that the difficulty we describe does not arise in relation to the approval of plans or standing orders, which are part of the system of **preparation and education** of the IDF. This system must bring the difficulties to the surface, in time, and it must include clear guidelines regarding the degree of legality of the general plans and orders. As noted, in the complete orders that we examined we did indeed find organized chapters that dealt with international law in general, and with restrictions corresponding to the specific plan, such, in particular, was the case regarding types of armament. These materials are one of the essential tools for effective inculcation of the instructions in IDF units.
34. We also remind the readers that the soldier, every soldier, bears the legal duty not to obey a manifestly illegal order, orders over which there waves a “black flag” [clearly immoral]. The military system – and the political echelons that supervise over it – are obligated to ensure that standing orders and plans do not include such orders, and that this duty is instilled in an orderly manner during the training of the combatants and the commanders. This is important not only because of international law, but also in order to create the correct consistency between the education and the system of commands in general, and in times of emergency and war in particular.
35. The situation differs with regard to the senior political echelons. Here the issue of dealing with legal questions in the course of combat does not usually arise. Among other things, the information that the leaders consider regarding a concrete decision must also include the international law aspects of the issue at hand. [...]
36. As noted, operational considerations are not the main focus of leaders’ decisions. Here we note only that the Attorney General’s determination that a given action being considered by the political echelon is liable to be interpreted as contradicting international law is an authoritative determination of the legal situation as far as the government is concerned.
37. Some believe that this determination, in itself, does not require the government to act or refrain from acting. In their opinion – the government bears the responsibility for managing state affairs in a manner that protects the state’s security and essential

interests, and if it seems to it essential to act in a certain manner in order to protect a critical interest of the state – it has the right and perhaps also the duty to do so, even if the Attorney General has determined that it is liable to be interpreted as contradicting international law. In contrast to those who believe this, there are others who hold that the opinion of the Attorney General is binding and that the political echelons must refrain from such an action. Our view is that the senior political echelon bears the ultimate responsibility for decisions on central political-security issues. Such decisions must be made by the state leaders, and not the professional advisory echelons, however senior they may be. It goes without saying that such decisions will be made only extremely rarely and in cases of clear and essential necessity, and that those who make such a decision – in the knowledge that it contradicts the accepted interpretation of the applicable law – must also be prepared to take responsibility for its consequences, if and insofar as this is required. This is an inherent aspect of leadership.

C. International Law and the Effectiveness of Combat

38. A difficult question is whether the types of war conducted today, and those that are increasingly developing – in which there are in many cases many elements of asymmetry between the parties, where injury is inflicted on civilians of one state by forces whose political or military base is very distant from the state, and in which there is prolonged confrontation (which may be of low, high or varying intensity) – justify or require rethinking of the laws of war and the political positions regarding war or the use of military force that were developed mainly on the basis of lessons of “ordinary” wars between states and armies. We clarify:
39. The laws of armed conflict indeed apply in the most appropriate way to the “old” pattern of war – a war between organized armies of sovereign states, which have a beginning and an end, where the outcome of the war is determined by the outcome of the fighting forces and the consequences of the outcome of the war influence the political order obtained as a result of it.
40. The facts in the arena of Lebanon – and in other places in the region and in the world – have created a situation that poses a serious challenge to the dominion of the laws of armed conflict contained in international law. In the Lebanese arena there is a situation of an “ineffective state” in whose realm Hezbollah – a sub-state force that

has characteristics of a military organization, a militia and a fanatic ideological religious movement – operates. Hezbollah is connected spiritually, economically and militarily to bodies and states outside of Lebanon, but it also represents an authentic Lebanese community, and is an active participant in the governing institutions of Lebanon. As described, Hezbollah in fact controlled southern Lebanon and it maintains an independent military presence throughout the country. We described the complex array that it built against the State of Israel. During the war, Hezbollah – intentionally – attacked the citizens of Israel indiscriminately, and tried to attack infrastructural targets, including electricity and petrochemical installations. It made massive use of imprecise munitions and in many cases also aimed these munitions at clear population centers. Throughout the war the Lebanese Army made no attempt to impair or limit the military action of Hezbollah towards Israel from Lebanese territory. In contrast, Israel itself restricted its attacks on centers of power and infrastructures that were not directly identified with Hezbollah and its ability to fight.

41. On the other hand, Israel's ability to damage Hezbollah and its combatants in a focused and direct manner was very limited, as Hezbollah had almost no fixed centers of attack, such as visible bases and commands, it was not clear whether its activists were combatants or civilians, and whichever the case, they acted in many cases from within the civilian population and in built-up areas. Moreover, their early preparations for a military confrontation afforded them, on the one hand, high durability of their means of attack, as the majority was buried underground in a way that protected them from the Israeli bombs – and on the other hand, defensive and fortified preparations that were liable to take a heavy toll of life on the Israeli ground troops that would try to attack its centers. Furthermore, some of the instruments of attack of Hezbollah were deliberately hidden in residential homes and even in places of worship.

[...]

43. Therefore, in addition to military preparations that respond effectively to the special type of threat posed to Israel from the Lebanese arena – it would be good if Israel – as it does to a great extent, and as other nations are also doing already – continues to examine the laws of armed conflict according to the conditions and apply them, in keeping with their spirit, in a way that enables Israel to take effective action against

those who attack it and endanger its citizens, while honoring the accepted principles of international law with the flexibility incorporated in them.

44. We emphasize that the challenge that we raised here is urgent and it has far-reaching implications. The power of individuals or small groups to harm countries and their citizens is expanding constantly and rapidly. It is necessary to adapt the laws of armed conflict (and enforcement of the law) to the changing conditions, while ensuring the right balance between protection of a state's citizens from aggressors – and preserving human rights and rules of international law.
45. Israel's prolonged endurance of different types of combat, including these new characteristics, makes it an important focal point for the adaptation of the laws of armed conflict to changing conditions. It is important that this adaptation be based on continual discourse with leaders, senior commanders and legal advisors of the states that are facing similar threats. This is not a unique issue to Israel and it would be an error to relate to it as such. [...]

Investigations and Examinations

46. We recall that the fact that Israel undertook to abide by the principles of the laws of war imposed a duty upon the authorized authorities in Israel, which have the appropriate tools for doing so, to examine the individual events regarding which claims were raised that necessitate examination. In addition, it is also the duty of the authorities to examine further the general and principal implications of the claims that were voiced against Israel on this issue and to draw conclusions for the future accordingly. [...]
47. Following hostilities, particularly those that end in death or significant damage, there are liable to be claims against the IDF forces. Such claims may refer to deviation from the rules of international war – with which we deal in this chapter – or issues of negligence or other flaws in the circumstances that led to the terrible result.
48. The need to balance between the effectiveness and the speed of the investigation, and between the desire not to expose operational details and the credibility of the investigation creates a difficult set of circumstances. We stress that a credible investigation in cases of allegedly well-established claims of deviation from

international law by IDF forces is not only a moral necessity, but it is also vital to the ability of the state to respond to political claims and legal suits. This is true in general as well as regarding the specific events of the Lebanon War.

[...]

Recommendations

Based on our examination and analysis, we recommend:

52. Recommendation No. 1: Systematic and orderly dissemination of the laws of armed conflict in the state, professional and security force echelons.

- The issues of international law and laws of armed conflict will be included in the IDF plans and training of combat soldiers and commanders. These norms will be instilled in all ranks of the IDF. The relationships between the instructions of international law and the values of the IDF, in general, and the element of purity of arms will be stressed in particular. Special attention will be given to these issues in relevant units (such as units that employ restricted munitions, or units whose actions are liable to have severe consequences in terms of injury to a civilian population).
- The issues of purity of arms, international law and laws of armed conflict will be instilled in the professional and state echelons and will be presented as part of the staff work regarding relevant decisions.
- The examination of operational plans and instructions in terms of their compatibility with international law will be an obligatory stage prior to their approval.

53. Recommendation No. 2: The State of Israel and the IDF will be sure to conduct as immediate and reliable an investigation as possible of events in which concern arises regarding deviation from military law, the laws of Israel or the laws of armed conflict contained in international law.

- Such investigations will differentiate between the element of drawing conclusions and the element of personal responsibility.

- A correct balance will be maintained between supporting combatants under the conditions of operational action and enforcement of norms of purity of arms and international law.
 - The results of the investigations will be published subject to considerations of information security and privacy.
 - **Investigations related to the Lebanon War will be conducted or completed under the supervision of and together with a body external to the systems regarding whose action the complaint is made.**
54. **Recommendation No. 3: As part of the preparation for military action, care must be taken to ensure effective established and embedded preparation for humanitarian responses in emergency and war.**
55. **Recommendation No. 4: It is necessary to continue promoting the preparation of the IDF and the legal counsel to improve the effectiveness of combat within the framework of the principles of international law.**
56. **Recommendation No. 5: According to the lessons learned from the war, the issue of using cluster munitions shall be reexamined, in order to clarify the rules for use of these munitions in the future and ensure their instilment and enforcement.**

[...]

Discussion

1. What does this report show about Israel's attitude towards IHL? Towards accusations that it violated IHL in that conflict?
2.
 - a. (*Para. 20*) What are the rules in IHL regarding its dissemination among armed forces? Is there an obligation for States to include the teaching of IHL in military training? (GC I-IV, Arts 47 ^[3]/48 ^[4]/127 ^[5]/144 ^[6]; P I ^[7], Art. 83 ^[8]; P II ^[9], Art. 19 ^[10]; CIHL ^[11], Rule 142 ^[12])
 - b. (*Para. 21*) Do you agree with the Commission that the rules of IHL are “unclear and indeterminate” and that “the mechanisms for [their] enforcement are lacking and in some cases politically biased”? Is this also true of the rules on

dissemination? What dissemination mechanisms does IHL provide for or recommend? (GC I-IV, Arts 47 ^[3]/48 ^[4]/127 ^[5]/144 ^[6]; P I ^[7], Art. 83 ^[8]; P II ^[9], Art. 19 ^[10]; CIHL ^[11], Rules 142 ^[12] and 143 ^[13])

3. (*Para. 21*) Do you agree with the Commission that there may sometimes be tension between the international legal rule and morality? According to you, what kind of situation does the Commission refer to? Could you think of examples where such a tension would exist? When could the duty not to harm civilians be contrary to morality or common sense?
4. (*Para. 26*) What do you think of the Commission's statement that "[e]ven when the target seemed to be a legitimate target – the political echelons took care to make their approval of action contingent upon explicit prior warning and reliable intelligence estimates that there was no civilian population in the location"? Could it be otherwise? What must be done before launching an attack? Does the fact that the target is a military objective suffice? What does IHL say about precautions to be taken before an attack? (P I, Arts 51 ^[14], 52 ^[15], 57 ^[16]; CIHL, Rules 15 ^[17]-21 ^[18])
5.
 - a. (*Paras 26-33*) Is there an obligation under IHL to consult legal advisers before launching an attack? What does the Commission recommend with regard to the involvement of legal counsel during operational decision-making? Should it be assumed that political and military leaders, when weighing military necessity against humanitarian considerations, will always follow IHL? What are the dangers of removing legal counsel from the decision-making process? What are the dangers, from a military and from a humanitarian perspective, of legal advisors being involved in operational decisions? Of them having the final word? (P I, Art. 82 ^[19]; CIHL, Rule 141 ^[20])
 - b. (*Para. 37*) Under IHL, is the legal advisers' determination of a situation binding upon the political echelon? Should it be? Would this requirement be realistic?
 - c. (*Para. 37*) May necessity legitimize violations of IHL? Can necessity be a defence?
6.
 - a. (*Paras 38-45*) Do you agree that IHL is no longer adapted to contemporary conflicts? Should IHL rules be reconsidered and reformulated to meet the

specific needs of asymmetric conflicts? What are the dangers of such an argument? Should the existing rules of IHL cease to apply until new rules are agreed upon?

- b. (*Paras 38-45*) What are the difficulties of applying IHL in an asymmetric conflict? Could they be overcome without reformulating existing rules?
 7. (*Para. 46*) Is there an obligation to investigate violations of IHL? Is there an obligation to investigate when a claim is brought to the State's attention by an individual? Why are credible investigations into alleged violations important? For the victims of violations? For the State accused of violations? To enhance respect for IHL in future conflicts? (GC I, Arts 49 ^[21] and 52 ^[22]; GC II, Arts 50 ^[23] and 53 ^[24]; GC III, Arts 129 ^[25] and 132 ^[26]; GC IV, Arts 146 ^[27] and 149 ^[28]; CIHL, Rule 158 ^[29])
 8. (*Paras 52-56*) What do you think of the Commission's recommendations? Could you think of other recommendations it could have formulated? What other enforcement mechanisms does IHL provide for?
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