The whole world awaits the realization of the vision of the prophets of Israel (Isaiah 2, 2-4):

"And it shall come to pass at the end of days that the Mount of the Lord's House shall stand firm above the mountains and tower above the hills, and all the nations shall flow unto it in joy. And many nations shall go and say: 'Come, let us go up to the Mount of the Lord, to the House of the G-d of Jacob, that he may instruct us in His ways, and that we may walk in His paths.' For Torah shall come forth from Zion and the word of the Lord from Jerusalem; thus He will judge among the nations and arbitrate for the many peoples, and they shall beat their swords into plowshares and their spears into pruning forks. Nation shall not take up sword against nation; they shall never again know war."

Until that happy time, the People of Israel will have no choice but to learn war and teach the laws of war to the nations. As King David praised the Lord and said (Psalms 144,1):

"Blessed is the Lord, my rock, who trains my hands for battle, my fingers for warfare".

When the Children of Israel fought under the leadership of King Jehoshaphat and vanquished their enemies, it is written (Chronicles II, 20, 21):

"As they went forth ahead of the vanguard, saying 'Praise the Lord, for his steadfast love is eternal'".

Rabbi Yonatan said: Why does their thanksgiving not include "for He is good"? Because G-d does not rejoice in the downfall of evildoers.

In this day and age, it can be learned from Israel what moral war is, and when the vision of the end of days is realized, the whole world will learn what the words of peace were that came forth from Jerusalem. Amen.
RABBI AVRAHAM GIESSER

THE JUST ISRAEL

ON WAR AGAINST TERRORISM:
MORALITY AND THE LAW

HARM CAUSED BY ISRAEL TO CIVILIANS
DURING "OPERATION CAST LEAD"
IN GAZA, JANUARY 2009

RABBI AVRAHAM GIESSER
In recent decades, no "large-scale" wars have been waged in Israel or the world, meaning those characterized by full-scale confrontation between countries. On the contrary, it is usually a matter of "small-scale" war, which is also known either as "asymmetric warfare" or "sub-conventional warfare". In this kind of warfare, one side is not a country, but an organization or a violent or semi-legal government, and this side is significantly weaker than the other in military power. Often, the weaker side compensates for its military handicap by operating from within a civilian population and against a civilian population. Ironically, this creates a strategic advantage, known as “the power of the weak”. The weaker party benefits from protection, cover and sympathy from the civilian population amongst which it takes cover, while using civilians, women and children as a protective barrier.

The 9/11 attack is a typical example of asymmetric warfare, in which civilians were intentionally attacked by terrorists who do not belong to any regular army. Similarly, the warfare waged against American forces in Iraq and Afghanistan is characterized by terrorists’ direct attacks on civilians, while the terrorists themselves hide among the civilian population, creating a virtually impenetrable moral shield. In addition, the definition of "victory" for terrorists is in actual fact their survival. Here the standard criteria of overpowering the other side or of dealing military blows are irrelevant. Terrorists are capable of absorbing severe blows, both to themselves and to their protective civilian population, and yet they still feel they are the victors by virtue of their ability to survive and to appear yet again on world media.

The State of Israel has been contending with terrorism since its inception, and is forced to fight under complex conditions dictated by asymmetric warfare. The moral complexity is doubled when, on the one hand, terrorists intentionally attack civilian targets, including women and children, and, on the other hand, the enemy operates from within a civilian population, where an attack is liable to lead to unintentional harm to women and children.

Such asymmetry was blatant during the recent "Operation Cast Lead". The operation began as a reaction to incessant rocket fire on Israeli cities. The shooting had been carried out from within Palestinian cities in the Gaza Strip. At the conclusion of the operation, over a thousand Palestinians, including hundreds of children, were counted as killed, while amongst the Israelis there were relatively few losses.

The Israeli military operation re-opened moral and practical debate on the implications of conducting asymmetrical warfare in warfare. In this context, we present a brief summary of a policy paper, based on classic texts...
Intentional harming of enemy civilians

Halacha essentially imposes moral and religious restrictions on human behavior, in a vigorous and consistent to refine human inclinations and guide them in a way that is both moral and balanced. As part of this policy, the Torah also encompasses the laws (dinim) of war. In Judaism, the muse of Halacha is not silent, even while the guns roar. War does not silence morality nor does it exempt anyone from moral obligation. In this vein the Rambam writes:

אין עושין מלחמה עם אדם בעולם עד שקראין לו שלום אחד מלחמת הרשות ואחד מלחמת מצוה.

One does not declare war of any type and on any person in the world, without calling first for peace.

Yet, despite all this, the Jewish eschatological vision is of a world without war:

וְכִתְּתוּ חַרְבוֹתָם לְאִתִּים וַחֲנִיתוֹתֵיהֶם לְמַזְמֵרוֹת לֹא יִשָּׂא גוֹי אֶל גוֹי חֶרֶב וְלֹא יִלְמְדוּ עוֹד מִלְחָמָה.

And they shall beat their swords into plowshares and their spears into pruning hooks. Nation shall not take up sword against nation; they shall never again know war.
anywhere. Indeed, terrorism is by definition an act aimed at harming the civilians per se, targeting them as the "enemy" while not endangering the terrorists' lives in any way.

**WAR IS A CLASH BETWEEN COLLECTIVES**

The wish to totally avoid harming civilians is impossible to implement in any war, and it is certainly quite impossible in asymmetric warfare, in which the enemy intentionally operates from within the civilian population.

Legally and morally, war is not is not a police operation to catch a criminal, but rather war is a confrontation between collectives, between nations. In a police operation the police are duty-bound to target the wanted criminal alone and not harm innocent bystanders. The target is the individual and not the collective. The police embody the collective’s monopoly on force vis-à-vis the individuals (even large groups of individuals) comprising society.

In that sense, the police must pinpoint their target, since other individuals are members of the society that the police sets out to protect. The rules that apply to police action are conceptually the same that would apply to an individual acting in self-defense. On the other hand the normative framework of armed confrontation between nations is markedly different. Each and every enemy soldier or member of the collective enemy is a legitimate target. In the context of confrontation, one collective endangers some of its members in order to protect the others. By the same token, attacking the enemy is not done on the basis of its soldiers being criminals who have broken the law, but because they are part of a collective entity which constitutes a threat to the nation seeking to defend itself.

The test for this conceptual difference is the treatment of civilian populations. Namely, when the issue is conflict between two nations, it is only permitted to harm civilians of the other nation when this is a vital part of the war effort. In the same way, Rabbi Shaul Yisraeli (an important posek on Halachic laws dealing with the public in Israel) wrote that, despite the wish to restrict the extent of the destruction:

> When carrying out an operation, there is no obligation to be careful about harming only those taking part, because it is the way of war that the tzaddik gets killed along with the rasha.7

This definition applies not only to countries but also to other national entities, such as the Palestinians in Judea and Samaria or the Shi'ites in southern Lebanon. This statement acquires further moral validity when it involves a government elected and supported by the people, as did both the Nazi regime in Germany and the Hamas government in Gaza. In such cases, the responsibility for the government's actions undoubtedly falls on the people who elected it and continue to support it.

**UNINTENTIONAL HARM TO CIVILIANS**

One of the methods used by the IDF to prevent harm to civilians is by explicitly calling on residents to evacuate war zones. This was done both in the Second Lebanese War, warning the residents of southern Lebanon, and in Operation Cast Lead, in an effort to prevent civilian casualties in Gaza. This is considered proper practice according to Halacha:

> It goes without saying that if it is possible to warn those who are innocent that they should remove themselves from the area, this should be done.8

After such a warning call, whoever decides to remain in the area takes the risk that he may be harmed unintentionally. In the Tanach there are two explicit expressions of this: once in the words of the prophet Ezekiel and in the story of Saul's war against Amalek.

**EZEKIEL 33: 1-5**

וַיְהִי דְבַר ה' אֵלַי לֵאמֹר: בֶּן אָדָם דַּבֵּר אֶל בְּנֵי עַמְּךָ וְאָמַרְתָּ אֲלֵיהֶם אֶרֶץ כִּי אָבִיא עָלֶיהָ חָרֶב וְלָקְחוּ עַמְּם אִישׁ אֶחָד מִקְצֵיהֶם וְנָתְנוּ אֹתוֹ לְצֹפֶה: וְרָאָה אֶת הַחֶרֶב בָּאָה עַל הָאָרֶץ וְתָקַע בַּשּׁוֹפָר וְהִזְהִיר אֶת הָעָם: וְשָׁמַע הַשֹּׁמֵעַ אֶת קוֹל הַשּׁוֹפָר וְלֹא נִזְהָר וַתָּבוֹא חֶרֶב וַתִּקָּחֵהוּ דָּמוֹ בְרֹאשׁוֹ יִהְיֶה: אֵת קוֹל הַשּׁוֹפָר שָׁמַע וְלֹא נִזְהָר דָּמוֹ בּוֹ יִהְיֶה וְהוּא נִזְהָר נַפְשׁוֹ מִלֵּט:

The word of the Lord came to me: O mortal, speak to your fellow countrymen and say to them: When I bring the sword against a country, the citizens of that country take one of their number and appoint him their watchman. Suppose he sees the sword advancing against the country, and he blows the shofar and warns the people. If anybody hears the sound of the shofar but ignores the warning, and the sword comes and dispatches him, his blood shall be on his own head. Since he heard the sound of the horn but ignored the warning, his bloodguilt shall be upon himself; had he taken heed he would have saved his life.
The Halachic Status of International Law

War requires a soldier to use violence and even to kill. However, as mentioned earlier, the Torah teaches us to reduce the extent of the violence wherever possible. Consequently, the attitude to the kind of cruel warfare described in the Tanach is one of necessary evil in a given situation, as discussed by Rabbi Avraham Yitzchak HaCohen Kook:

On issues of war, it was utterly impossible, while the neighbors were all preying wolves, that Israel should not fight, for then they would get together and, G-d forbid, annihilate the remnant; on the contrary, it was essential to inflict fear on the savages, even if that meant cruel behavior, in the hope that this would bring humanity to what it should be, but not to forestall its moral development...13
Simply put, the Jewish people were historically forced to behave cruelly at war, because had they not done so, they would have been annihilated. However, the awareness of this did not cloud over the wish and hope to attain times with no more war or, at the very least, to minimize its cruelty. The wish for the diminishment of cruelty in war began to be put into practice over the course of the last century by means of international conventions for basic rules of war. These conventions restrict the form of warfare and intensity of attack, and thereby reduce killing and cruelty. A good example of this is the ban on killing prisoners, and many lives have indeed been saved during wartime on all sides.

The broader question arises, therefore, as to the Halachic validity of international law.

A basic principle in the Halachic analysis of laws of war (dinei milchama) is derived from the ruling: “The Law of the king is binding” (literally: “is law”; Dina d’malchuta – dina).14 The very existence of a heter (permission) to wage war and kill in wartime stems from an international consensus to view war as a legal phenomenon, and, in the same way, if countries concur in restricting killing, this is obligatory. As Rabbi Prof. Neria Gutel expressed the matter:

If indeed the basis for the legality of war is embedded in this universal "agreement", one has to say that if it is "agreed" otherwise and most humans, or their representatives, will decide to beat their swords into plowshares and their spears into pruning hooks….in that case, the heter will be annulled, and war and conquest will become illegal.15

It should be stressed that the Halachic validity of conventions such as the Geneva conventions, is conditional on its being implemented by other countries, and not if they remain empty phrases.16

On the question of cruelty towards prisoners, there is an explicit source in the Torah which teaches us to treat prisoners humanely. The source is the words of the Cohen Meshuach Milchama – the priest appointed in biblical times, who acted as a kind of modern-day military chaplain). Before going out to battle, the Cohen would tell to the fighters:

Today you are approaching war on your enemies, not on your brothers…Were you were to fall into the hands of your brothers, they would have mercy on you….but you are going out against your enemies, and if you fall into their hands, they will not have mercy on you.17

The Cohen warns the fighters and explains to them that they must not have mercy on their enemies in battle, since if they were to fall into enemy hands, the enemy would not have mercy on them. As prisoners they would face nothing but cruelty. Yet the standard for Israelites was that of humane treatment, as evident even in instances of civil strife (see II Chronicles 28: 8-15). To the credit of the modern conventions and their implementation, considerations such as these have gained a different import and wars have become more restrained. In contradistinction, the knowledge that Hamas does not treat its prisoners or abducted soldiers according to international practice and law mandates taking more severe measures in war against them.

There were many who voiced their objections to Israel during Operation Cast Lead, claiming that Israel had violated international law. This claim is baseless. Not only was Israel very strict in its manner of conducting warfare, as the examples above show, at the same time the enemy flagrantly violated the law in its method of warfare by shooting at civilian targets, posing a threat to civilians on "its own" side and by murdering and torturing suspected collaborators both during and at the end of the battles. See Amnesty International report dated February 10, 2009.

International law relating to armed confrontation between countries attempts to strike a balance between two considerations: military necessities (including the ensuring of the safety of the military forces), and the humanitarian-civilian consideration (ensuring the human rights of enemy civilians).18 Towards this aim, international law differentiates between fighters and military targets on the one hand and civilians and civilian targets on the other. Fighters are legitimate targets for military attack and civilians are legally protected from attack.20

However, according to the first additional protocol to the fourth Geneva Convention,21 neither unintentional harm inflicted upon civilians nor civilian casualties due to their proximity to fighters are infringements per se of the convention. The protocol mandates efforts to limit such "collateral damage". Implicitly, international law understands that there are situations in which the killing of civilians as "collateral damage" incidental to military targeting is a legitimate necessity.

Furthermore, international law necessitates that the harming of enemy civilians be proportional to military achievement.22 The Israeli Supreme Court has implemented this rule in a series of decisions that give operative guidelines to the IDF. Proportionality is not defined in numbers. A negative example of this definition is: "Hitting a whole village in order to kill a soldier on leave who is in the village".23 The Court has held that it is...
acceptable to define proportionality from the perspective of an officer's reasonable judgment, given the facts at hand in relation to the importance of the target and the number of civilians actually killed or injured.

International law relates to countries, while the relationship to terrorists operating from within a civilian population is more complex. Israel has voluntarily chosen to adopt moral criteria also in its war against terror, but this is not dictated by international law. Undoubtedly, the attitude towards collateral damage towards civilians of an enemy who uses terrorist tactics is more lenient by virtue of the terrorists' operations.

According to the above sources, "proportionality" can be defined as follows:

- a. It is utterly forbidden to harm civilians intentionally.
- b. When hitting a military target, close to which civilians are liable to get hurt, every measure possible must be taken to reduce both harm to civilians and the intensity of the attack. Likewise, the importance of the attack has to be weighed up against the military gain from it.
- c. If the issue in question is one of direct protection of the lives of soldiers and civilians, they are not obligated to risk their lives in order to save the lives of enemy civilians.

Professor Assa Kasher (author of the IDF’s ethical code) wrote in a similar vein:

We have no moral obligation to risk the lives of our soldiers in the context of military operations of self-defense against the enemy...

Great consternation can be expressed regarding the legality of other military actions in the world that were carried out in recent years: cases such as Russia’s handling of Chechenian rebels, or destructive aerial bombing by NATO forces (with the U.S at their core) of Belgrade and Serbia in the spring of 1999, bombing which continued uninterruptedly for 45 days, during which thousands of Serbian civilians were killed.

The State of Israel does its utmost to avoid atrocities against its own civilians and against those of its enemies. In stark contrast to Israel, Hamas continues to aim its missiles at clearly defined, heavily populated areas in defiance of all international law, and “disappears” under cover of its civilians, whom it uses as hostages and who serve (often willingly) as a protective barrier. In violation of international law, Hamas fighters are often not identifiable by uniform or by any other means. Palestinian civilians who were hit while being forced to provide cover for the enemy were hit solely as a result of the fact that Hamas flagrantly violated every moral law of international convention.

The question of prisoners also resurfaces here, in that Hamas does not respect international law and treats the prisoners it holds with cruelty. In violation of international law, Hamas has given no information about Gilad Shalit's state of health, does not allow Red Cross representatives to meet him and violates every law and every convention in its treatment of prisoners of war. As a result, Israel is forced to wage war in a way that minimizes the danger of one of its soldiers being abducted by the enemy who cruelly abrogates the principles of international law in dealing with prisoners of war. Israel strives to achieve these aims through modification of the way it wages war. It seems clear that Israel has succeeded in minimizing harm to its citizens and soldiers in preventing attempts at abduction by Hamas, in defending its civilians from rocket attacks and in minimizing collateral damage to non-combatant Palestinian civilians.

**CONCLUSION**

1. In recent years, the majority of warfare has been asymmetric, in that the militarily weaker side operates from within a civilian population and against a civilian population. This situation poses a heavy moral challenge to civilized countries.
2. According to *Halacha*, there is a clearly-defined differentiation between peacetime, when the prohibition of "Thou shalt not murder" applies to every individual, and wartime, when killing is permissible, though undesirable. Furthermore, a war of defense falls within the realm of mandated war - *milhenum mitzvah*.
3. War is a confrontation between collective entities, and is not a police operation against crime.
4. Neither enemy civilians nor their property may be harmed unless necessary within the framework of harming enemy fighters.
5. As far as possible, enemy civilians should be forewarned to evacuate the war zone, and if they choose to stay, it is not forbidden to harm them incidentally in the fighting.
6. International law has *Halachic* validity if it is applicable and does not specifically contradict *Halacha*.
7. The State of Israel acts according to international law when it operates to minimize injury to enemy civilians, in direct contrast to the enemy, which operates from within a civilian population and against a civilian population.
ENDNOTES

1. בראשית ט, ז.
2. העמק דבר, בראשית ט, כא.
3. ועמי ס, מלכים אי, א.
4. ישעיהו, ז.
5. ועמי ר, מלכים ה, א.
7. חבקוק יא, עם המילים ז, כ, ב, מ, ו).
8. שם פרק ד, א.
9. שומואל א, ט.
10. חבקוק יא(תשמ'ג-תשנ'ג).
11. חבקוק יא(תשמ'ג-תשנ'ג).
12. חבקוק יא, תשמ'ג-תשנ'ג.
13. חבקוק יא, עם המילים ז, כ, מ, ו).
14. חבקוק יא, עם המילים ז, כ, מ, ו).
15. חבקוק יא, עם המילים ז, כ, מ, ו).
16. שם, עמ' 42.
17. שומואל א, טו.
18. רבי שבא בר ת уме ערים, פסוק יא ו-ז, א, ז, אי, א.
19.رش"א, כ, י, א.
20. עם מילים קסמים, ב, כ, מ, ו).
21. חבקוק יא, עם המילים ז, כ, מ, ו).
22. חבקוק יא, עם המילים ז, כ, מ, ו).
23. חבקוק יא, עם המילים ז, כ, מ, ו).
24. חבקוק יא, עם המילים ז, כ, מ, ו).
25. חבקוק יא, עם המילים ז, כ, מ, ו).


J. Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law p. 3.

19. רבי שבא בר ת уме ערים, פסוק יא ו-ז, א.

18. שם עשתו, עמ' 23.

17. שם, עמ' 30.

16. שם, עמ' 40.

15. שם, עמ' 38.

14. שם, עמ' 40.

13. שם, עמ' 38.

12. שם, עמ' 40.

11. שם, עמ' 38.

10. שם, עמ' 40.

9. שם, עמ' 38.

8. שם, עמ' 40.

7. שם, עמ' 38.

6. שם, עמ' 40.

5. שם, עמ' 38.

4. שם, עמ' 40.

3. שם, עמ' 38.

2. שם, עמ' 40.

1. שם, עמ' 40.