

Chapter Fourteen: The Conduct of Israel in Light of International Law¹

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
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.³
 - The second category of laws of armed conflict, or laws of war (*jus in bello*), deals with **the manner in which hostilities are conducted**.⁴ 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.⁵ 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.⁶ 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

¹ In this chapter we were greatly assisted by reviews and material provided us by the Attorney General and by the Military Advocate General. This chapter has been examined by the Military Censor.

² We shall not address questions involving the way in which international law binds the State of Israel (such as whether the requirement is direct or derived from the instructions of the domestic law, and whether it is or should be enforceable). Our working assumption is that, as noted, it is appropriate to examine the conduct of the IDF in light of these norms, and this is what we have done.

³ Under certain circumstances preventative acts are also justified. We shall not delve into this subject because it is not relevant to the matter at hand.

⁴ We note that today some refer to the laws of armed conflict as “humanitarian law.” We shall continue to refer to them in this report as laws of armed conflict.

⁵ We will not delve into the complex questions related to the identification of targets as “military” or as aiding combat in a way that justifies attacking them.

⁶ Cluster bombs, for example, are not forbidden according to international law, but restrictions apply to their use in regions in which there is a civilian population, and those who use them are required to chart the areas to which these munitions are fired, in order to prevent, at the end of the conflict, harm to innocent people who are not related to the combat that was carried out in the region and has ended.

“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.⁷ 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.
4. It was said in the introduction that we believe – together with the international community – that **Hezbollah’s attack on Israel on 12 July 2006, in which IDF soldiers were kidnapped from Israeli territory to Lebanon, and which was accompanied by artillery fire along the border, with no Israeli provocation, was an “armed attack” according to the meaning of this term in Article 51 of the UN Charter. This gave rise to the right of Israel to react with force in self-defense.**
5. Consequently, the 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

6. During the war, the Government of Israel consistently and clearly declared that it adopted and complied in practice with the principles of the laws of war in international law.⁸ We have heard testimony from people of the political echelons,

⁷ The subject of proportionality is most complex and ambiguous. A legitimate military advantage is any damage to the ability or desire of the other side to engage in combat. Alongside clear cases of what is prohibited – harm to civilian population centers – or permitted – harm to army camps – there are many cases that are ambiguous, and in those cases the military advantage must be weighed against the risk of harming those who are “uninvolved.” Harm to civilians includes not only death or injury, but also harm to means of sustenance. On the other hand, damage to roads and bridges undoubtedly harms civilians, as well – but if these aid the enemy forces, it is likely to be justified.

⁸ We stress that adoption of the principles of international law and the laws of war does not require a political leader or senior military commander to act according to **an interpretation** of international law that appears to him to be clearly inconsistent with the essential security needs of his country. The rules of international law are not meant to paralyze the ability of a state to defend its citizens and to defeat its enemies. Their purpose is to reduce the harm from combat to civilians and those who are uninvolved. The discussion of how to implement this principle in different types of wars is beyond the scope of this report. Indeed, in many cases there are reasonable differences of opinion among experts regarding the question of implementation of the laws of armed conflict in specific situations. In addition, there is an important distinction between legal counsel

IDF commanders, and members of the Attorney General's office and the Military Advocate General's office about the way in which the norms of the laws of armed conflict are instilled in general, and the way in which they were preserved during the Lebanon War in particular.

7. The committee received applications from different individuals and organizations on subjects of international law and the laws of war. Some of the applications dealt with specific events and some made general claims, such as intentional and systematic damage by the IDF of illegitimate targets, aberrant and illegal use of cluster bombs, disproportionate injury to civilians and infrastructures in Lebanon, and use of Israeli civilians, particularly the Arab population, as "human shields." Some also made claims against the statements of leaders or officers in the IDF that allegedly expressed support for measures that were inconsistent with the laws of armed conflict. The committee also received detailed reports of organizations, prepared after the war, which dealt with some of these questions, presented findings and drew conclusions.
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. We explain this recommendation in paragraphs 51-52 below.
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.

from the outset and evaluation of conduct in retrospect. Sometimes behavior will be justified in retrospect even if it was, at least according to ordinary interpretations, contrary to law. The critical distinction here is between conduct that is consistent with upholding the principles and the spirit of international law and conduct that disregards these principles and does not adhere to them. We also note that in international law today, there is no small degree of politicization and application of different standards to different conflicts, which are unrelated to the principles of international law themselves. A country does not have to accept the interpretation of international law suggested by its enemies, and it certainly does not have to accept the narrative of the facts presented by them.

- Israel acted in many diverse ways, prior to and during the war, in order to reduce violation of the rules of international law by its forces.
 - 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.
 - From the testimony we heard, mainly from the Attorney General and the Military Advocate General (MAG), but also from members of the political echelons and IDF commanders, and from the vast material received by the committee, we were favorably impressed by the picture that emerged regarding the awareness and motivation to uphold the laws of war. 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.
10. Against this general background, we decided not to enter into questions of whether Israel upheld the rules of the laws of war beyond these findings, and we did not examine specific events or claims, for the following cumulative reasons:
- Detailed examination would have required cautious application of the rules of international law, some of which are controversial, including determination of detailed facts. We did not see the need to delve into disagreements regarding the rules of international law relevant to a front such as Lebanon in light of our decision not to enter into determining detailed facts on these subjects.
 - The factual examination required, both in terms of scope and in terms of breadth and location, was beyond our capabilities. We remind the readers that a substantial portion of the facts that were necessary for making authoritative determinations on these subjects were related to events in Lebanon and decisions made in the course of combat. In many cases, it was impossible to evaluate the compliance of the decision or conduct with international law without reliable and detailed information about the facts on the ground, and how the fighting forces and their commanders perceived these facts.⁹ In many cases it was also necessary

⁹ This is true, for instance, regarding the question of how many people were killed in Lebanon, how many of them were civilians, and the circumstances of their deaths. There is a considerable disagreement over the facts concerning the question of the number of Hezbollah combatants that were killed during the war, and this is a question that was not easy to answer, as the investigators had no access to the relevant places in real time. This

to examine facts and processes that preceded the war (such as the training of units that employed certain types of weapons).

- This consideration prevailed in light of the fact that Israel accepted the duty to investigate cases in which claims were raised regarding violation of laws of war and because, as said, it did so in practice. We did not find it appropriate, as a public committee appointed to investigate the main aspects of the war, to separately examine questions that bodies authorized to do so examined or are meant to examine as part of their authority. **We emphasize that it is appropriate and correct for the State of Israel to duly examine any case about which apparently substantial claims are made regarding deviation from the rules of international law (or the rules of Israeli domestic law), and we recommend that this be done.**
- Claims of violation of international law have been a central part of the political, public awareness and propaganda battle that accompanies wars in general, and the Second Lebanon War in particular.¹⁰ This was true during the actual combat, but also in the period following it. The government established the committee in order to examine the events of the war for the purpose of drawing conclusions in Israel. We did not see fit to use the vast material made available to us for this purpose in order to enter into issues that are part of the political struggle and propaganda campaign against the state.
- In addition, separate examination of these issues was liable to raise questions regarding fair process and fulfillment of the rules of natural justice towards those whom the examination and findings might harm – in Israel and abroad. This would have required us to conduct an investigation and discussion of the type that we decided generally to avoid.

11. Nor did we see fit to draw conclusions regarding another subject about which some of the applicants complained: the public statements of some of the members of the political or military echelons regarding the methods of action in the war, where it

is also the case regarding the circumstances of their deaths. International law distinguishes between civilians injured while in proximity of a legitimate military target, and civilians injured as a result of deliberate attack on a civilian population or civilian target for its own sake (these are examples presented only to demonstrate the factual difficulty; we are not referring to any specific event during the Second Lebanon War). There is also an essential difference – which reaches the root of the matter – between damage to civilian regions after its residents have been warned and asked to leave, which were attacked after checking that the area had been evacuated, and attack on a civilian target without any prior action of this sort.

¹⁰ It seems that this was the most widely filmed and media-covered war the state (and perhaps the entire world) has known; this refers not only to the coverage of the war, but also to the intensive and focused use of the media during the war. On this subject, see the discussion in the chapter on information security. However, widespread media coverage does not necessarily facilitate identification of true facts.

was claimed that their very statements were a war crime or at least enticement to such.

12. We distinguish between official statements by the Government of Israel or its representatives, and statements by others, even if they are ministers or elected public officials. Expressions of the first type would have been inconsistent with the state's declaration that it adopts international law (unless the claim was that the proposed measures were in keeping with it). We did not hear public expressions of this type.
13. The expressions of elected officials or other public figures are, in our view, part of the public discourse, and they should be treated as other statements are treated. There is no need for an investigative committee in a democratic country to engage in the question of responsibility, legal or public, of those who publicly voice their opinions. If exceptional statements include violations of the law, it is the Attorney General's authority to decide how to deal with them.
14. We note also, perhaps even beyond what is necessary, that with regard to elected public officials (who do not represent the state), these statements are usually subject to essential immunity, intended to ensure, insofar as possible, full freedom of expression on subjects that are central to their activity as elected officials. These principles apply both to those who supported the actions that are claimed to contradict the laws of war and those who strongly opposed them.
15. According to these decisions, we 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.
16. We note further that there is an important difference between examination of the functioning of the system during the actual fighting, as in the case that we are investigating, and between examinations of isolated events conducted as part of routine activity. This is true regarding the ability to investigate events close to the time of their occurrence, regarding the standards that apply to the activity, and regarding the appropriate measures in cases of deviation.

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

17. As noted, Israel has adopted the rules of international law. We believe that this is correct both in essence and in principle. The rules of international law reflect value-based judgments regarding the question of how war ought to be conducted. Israel is a member of the family of nations. It respects the rules of international law, has educated its soldiers in the purity of arms since its founding, and takes pride in the fact that they honor it.
18. We note that adherence to the laws of war contained in international law and provision of an effective response to the humanitarian needs of the civilian population are not only a legal, ethical or value-related matter. They also have a

political aspect and they are likely to increase the chances that Israel's military action will enjoy international support and legitimization.

19. In recent years there has been a great expansion of the rules of international law, and particularly of their enforcement mechanisms. This has taken the form of international tribunals and of states assuming "universal jurisdiction" regarding claims related to war crimes, even if these were not related in any way to that country. The ability of Israel to deal with attempts to make legal claims against it or against its commanders and leaders depends upon its ability to show that it abided by the rules of international law, and that it had, and has, effective mechanisms to examine claims of deviations and draw the appropriate conclusions from them.
20. It emerges from the above that it 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.¹¹ 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). The Military Advocate General (and, correspondingly, the Attorney General) did not make due with issuing general written guidelines, but participated in the meetings of the General Staff, and his representatives presented themselves at the command headquarters, and in certain cases, also consulted in real time with the commanders of smaller units. As noted, sometimes the initiative for legal approval was made prior to or during the action, by the decision makers or the units themselves.
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. Other Western armies have also made similar decisions. This decision had many advantages and was based on the lessons drawn from Israel’s experience in addressing issues of international law in war and with the legality of government actions. These were not new modes of behavior. Their 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.¹²

¹¹ See, for example, the approval of the actions on the day of setting out to war, 12 July 2006. See also the discussion of the Forum of Seven of 14 July 2006.

¹² It is clarified that we did not find any such example or case in the investigations and testimonies we heard on the Lebanon War. However, the lack of direct evidence of an

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.

event that demonstrates this is insufficient to eliminate the concern about such an occurrence, against which we warn.

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. This is so for both ethical and utilitarian political considerations. Where the professional-legal echelons are asked their opinion on the implications of international law regarding a given situation, they must present the legal picture as they see it.
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 world¹³ – 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.
42. We emphasize that the challenge presented by an organization such as Hezbollah does not exist with regard to Israel alone. In many countries in the world violent and prolonged confrontations are being waged between countries and groups within or outside of them, without the state regime succeeding in enforcing law and order. However, as the legitimate action of Israel is limited to action from its own borders, while the enemy could effectively prepare unfettered and build its force to minimize its injury, and Israel's ability to respond towards Hezbollah and particularly toward the places from which it acts is limited by different considerations, including

¹³ The United States' conflict with the Al-Qaeda organization, which is responsible for the attack on the World Trade Center in September 2001, is a significant example of the upset of the old “classic” order in the present era.

political, legal and humanitarian restrictions that it adopts, an extremely problematic situation has arisen here.

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. We were impressed by the manner in which the legal echelons in Israel are acting on this issue and we recommend that this activity expand by means of constant discourse among the echelons involved.

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. Such investigations and their findings are, of course, subject to the rules of confidentiality, due to considerations such as information security and protection of the rights of individuals. Subject to these principles, the authorities are obligated to publicize the existence and the findings of the investigations. We also recall that the existence of these examinations and publication of the unclassified portion of their findings and conclusions is not only a matter of duty, but also in Israel's best interest. The ability to respond to claims raised against its actions in a worthy, credible and well-founded manner is an important element in the necessary struggle for legitimacy. This is especially true when propaganda against Israel and its actions is a central aspect of the action of the enemies it faces.

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.
49. In a case such as the Second Lebanon War, in which some of the claims are directed at state leaders and the highest-ranking IDF commanders, and where the legal counsel of the army and the government was involved in ongoing consultation during the war, it is especially difficult to ensure such credibility. This is another reason for reducing the involvement of the legal counsel in the actual time of war, and it necessitates special independence in investigating claims regarding the conduct of the army during the Lebanon War.
50. On the subject of the use of cluster bombs, a comprehensive IDF investigation was conducted. We elaborate on this subject in the Appendix (attached to this chapter). On this issue, as well, the general findings that we established in section 9 above are also valid. We did not find any deliberate deviation from the rules of international law. However, disparities were found between the conduct of some of the IDF forces during the combat and the general guidelines set forth in the IDF plans regarding use of munitions. These deviations arose in part from lack of clarity regarding the essential meaning and the scope of applicability of these restrictions. In light of these findings, we recommend that the issue of use of cluster munitions be reexamined on the basis of the investigations conducted, with the aim of clarifying and ensuring the instilment of the rules for future use of this weapon.¹⁴
51. We wish to make it clear that this recommendation is not presented in place of the general recommendation to investigate events in which there are claims of alleged deviation from legal norms, including such events in the framework of the Lebanon War.

Recommendations

Based on our examination and analysis, we recommend:

¹⁴ On 24 December 2007, just as the work on this report was being concluded, an announcement was issued to the media on the opinion of the Military Advocate General, Brigadier General Avihai Mendelblit. We studied the opinion of 6 September 2007, and we refer to it briefly in the appendix.

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.**

- The reexamination will be conducted in cooperation with a body external to the army;
- The reexamination will clarify the rules for use of cluster-type munitions;
- The reexamination will recommend a range of ways to ensure that the use of cluster bombs complies with the requirements of international law, military discipline and purity of arms;
- The fact of the reexamination and the main aspects of the general recommendations will be published (subject to relevant restrictions).

Appendix: The Use of Cluster Bombs in the Second Lebanon War¹

General Comments

1. The central problem with using cluster bombs derives from three characteristics of this weapon:
 - a. In most launching methods, cluster munitions are imprecise;²
 - b. The arms include “bomblets” that scatter over a large area around the focal point of the hit;³
 - c. Some of the bomblets do not explode upon contact (“duds”), and unexploded bomblets are liable to explode and cause injury during a relatively long period after the weapon is fired.⁴
2. This combination may be very effective in different types of combat against military forces, and it is likely to effectively limit the capability of enemy troops to act. However, the use of this weapon gives rise to difficult problems when it is fired into areas in which there is much and frequent traffic of civilians. Hence the types of restrictions imposed on the use of these munitions:
 - a. As any imprecise weapon – there are restrictions on its use in areas in which precision is critical to the prevention of civilian injury;
 - b. Because of the range of the scattering – the danger of injury far from the center of the target is greater than with ordinary arms. Therefore, the restrictions on the safety range of the shooting are stricter.
 - c. And most significantly for our purposes: the use of cluster bombs must also take into account injury from unexploded bomblets **long after they are fired** and at times even **after cessation of the hostilities**.

¹ Due to considerations of information security and the instructions that apply to IDF investigations, parts of the document were omitted from the unclassified report.

² However, there are differences in the levels of precision of different types of cluster munitions.

³ The number of bomblets and the range of their scattering vary among the different types of cluster munitions.

⁴ The percentage of unexploded bomblets varies considerably among the different types of cluster munitions. In the barrel system, it ranges from 12-18% in one type to 0.5 to 3% in another type. In the rocket system, the percentage of unexploded bomblets is 5%.

- Because of this characteristic, some seek to prohibit the use of cluster munitions completely. International law at this stage does not include such special instructions.
 - Nevertheless, the application of the general principles of the laws of armed conflict to the characteristics of cluster munitions is usually interpreted as though it includes several types of restrictions:
 - 1) Prohibition or limitation of cluster fire at locations in which there are concentrations of civilian population;
 - 2) The obligation to precisely chart the launching areas and delivery of the firing charts to the party that controls the area and is meant to carry out effective treatment of unexploded bomblets after cessation of the combat.
 - 3) In order to ensure special caution in using cluster munitions, it is also possible to require special approval of high – command or legal – echelons for such use.⁵
3. We reemphasize that the use of cluster-type munitions is not, in itself, illegal according to the principles of international law.⁶ Moreover, the possibility of using such munitions in the arena of Lebanon was included expressly in the operational plans for the Lebanese region, with detailed reference to the restrictions on its use.
 4. After the war, when the facts and claims regarding the subject of unexploded bomblets left in Lebanese territory and their injury to civilians were publicized, an investigating officer – Major-General Gershon Hacoheh – was assigned to examine the subject. We also found multiple references to the issue of using cluster bombs in the materials we read. We asked the MAG, the head of the Logistics, Medical and Centers Branch and Major-General Gershon Hacoheh about this subject. We

⁵ In international law itself at this stage there is no authoritative and unequivocal determination in a convention regarding restrictions of the use of cluster munitions, but such restrictions can be derived from the general laws of armed conflict, and especially from the principle of distinction between military and civilian targets, from the requirement to preserve proportionality between the military need and the concern of harming civilians, and from the general requirement to take precautions to reduce civilian injury. Restrictions may also arise from commands or guidelines of the army itself, and from agreements between the state and the states that supply it with arms. In this chapter we deal only with the rules of international law, and their influence on the IDF commands. The restrictions that arise from agreements are another subject.

⁶ Such munitions exist in most Western armies, and they have also been used in practice in wars in recent years. Some states have recently organized in the framework of the accord to prohibit and restrict types of conventional weapons, to add a special protocol to the accord that forbids the use of cluster-type munitions, but this is not the legal situation today and it is not clear whether this organized action will be fruitful.

carefully read the investigation that he conducted. We also read additional material submitted to us by different sources on the subject of cluster bombs and their use by the IDF during this war. After we had completed the main part of our work, an announcement was issued to the press on 24 December 2007 regarding the opinion of the MAG based on the Hacoheh Report (referred to hereafter as “the press announcement”). Therefore we also studied his opinion of 9 September 2007. We based our writing on the composite of materials available to us on this issue.

Findings

5. It is undisputed that some of the unexploded bomblets were found in villages and regions in which there is ordinary civilian movement and that these unexploded bomblets caused the death and injury of civilians after the combat. The rules of international law, the instructions of the operative plan for the Lebanese region and the commands given during the war were all intended to reduce such injury to civilians. We note that we did not hear any claim of injury to civilians by cluster bombs **in the course of** the war.
6. One of the restrictions placed on the use of cluster munitions by the "Magen Haaretz" [Shield of the Land] plan for the Lebanese arena (in addition to emphasis on security zones and the requirement of charting) was a requirement of approval from the Chief of Staff before any use of cluster munitions. In the announcement to the press, it was said that “the findings of the investigating officer reveal that throughout the entire war the commands of the Chief of Staff that prohibited execution of cluster fire into built-up areas remained valid.”
7. The report on cluster munitions examined incidents of cluster fire without the required permission or at targets prohibited for their use. In one case, firing without permission, but at permitted locations, was found. The cluster munitions report also determined that problems regarding the targets of the firing existed only regarding the use of cluster munitions by the artillery corps, as the cluster firing by the air force complied with all requirements.⁷
8. In the general chapter, we noted the reasons for not engaging in detailed examination of claims that were made. In this case, too, we do not have the means to determine how many unexploded bomblets remained in Lebanese territory and where they are concentrated, nor when the cluster bombs were fired, at which targets and under what circumstances.
9. Nevertheless, even if we accept that during the entire war constant and genuine care was taken to minimize the injury of Lebanese civilians, and even if we accept that there were no **deliberate** deviations from the rules of international law during the Lebanon War – there is no doubt that the firing of cluster munitions in the Second Lebanon War was a grave demonstration of the possible results of ambiguous orders, flaws in discipline and the absence of effective monitoring.

⁷ The testimony of Maj.-Gen. Gershon Hacoheh to the committee of 17 January 2007.

Analysis

10. The MAG determined that “the use of cluster munitions during the Second Lebanon War was made in compliance with the principles of the laws of armed conflict of international law.”⁸ The reasons for this were: “the firing was executed with a legal weapon, which does not cause unnecessary damage to the enemy (that is – upholds the principle of humanity), at military targets only (in accordance with the principle of distinction), after a concrete military need was created for its execution in order to stop the rocket fire into the territory of the State of Israel (as required by the principle of military need), and under circumstances in which the military commander believed that the anticipated injury to civilians and civilian property as a result of use of the cluster munitions was not disproportionate to the military advantage that lay in firing cluster bombs at these targets (in other words, in a manner that complies with the principle of proportionality).⁹
11. As said, we will not enter into the conclusions of the MAG, because we did not examine **the facts** on which they are based. We did not find evidence that these conclusions are not well founded, and the investigations and analysis of their findings in the report on munitions and the opinion are quite detailed. We will concentrate only on the legal-factual question, which was also at the heart of the cluster munitions report and opinion: **What is the status of cluster firing at a military target located in a civilian population center, such as a village, when the inhabitants of the village are temporarily absent due to the hostilities, but it is known that they will return to their villages after the combat ends?**
12. The conclusion of the MAG suggests that, at least in retrospect regarding the firing in Lebanon, such firing is likely to be legitimate in terms of international law, if the conditions it lists existed. This conclusion is based on the determination that regarding cluster firing at military targets in villages – in which the civilian inhabitants are temporarily absent – the regular principles of balanced consideration of the principles of international law also apply; and that balanced consideration in these cases of firing indicated that using such munitions under these conditions was also justified (or, at least, it was based on the sincere and reasonable belief in such justification). The claims towards Israel are based on the interpretation that even if this is the situation regarding balanced consideration of the damage of the firing at the time of the firing, the anticipated damage from unexploded cluster bombs **after the hostilities** should have led to a total prohibition, in terms of international law, of cluster fire into areas usually inhabited by civilians, even with regard to clear-cut military targets (such as rocket launchers identified in “hot spots.”).

⁸ The Opinion, paragraph 64, p. 26. The conclusion is also included in the announcement to the press.

⁹ The Opinion, paragraph 63. These determinations also appear in the announcement to the press.

13. As noted, restrictions on the use of munitions may also arise from other sources, besides international law, such as military orders or agreements with other states. We do not deal here with the question of whether the action of the IDF forces contradicted the guidelines that were included in orders or instructions (beyond the question of the importance of inculcating norms in the IDF, which applies to norms of every type and from every source). **Our main interest is in the ambiguity that existed in the IDF throughout the war, and that continues to this day, regarding the very legality of the use of cluster munitions and the conditions required for such use if the prohibition is not total, regarding military targets in built-up areas, even if their inhabitants are not present at the time of the firing.**
14. We believe that the position of the IDF on this subject should be clarified, based upon an interpretation of international law or a value- or command-based position of the IDF itself.
15. Moreover, we believe that a broad interpretation that also permits firing cluster-type munitions at military targets in places where the unexploded bomblets are liable to injure civilians – even if only after their return – according to the sole discretion of the military commander in the area – is inconsistent with the rationale upon which the restrictions for cluster use are based. We again note that no guidelines of the IDF itself prior to or during the war were based on such a principle alone. The style of combat that focuses on action within built-up areas does considerably limit the ability of military action by those defending themselves against it. International law expressly prohibits this style of combat. **Nevertheless, we do not believe that general expansion of the use of cluster-type munitions, which have many unexploded bomblets, in such areas without strict and specific controls - even after the inhabitants have temporarily evacuated - is an acceptable expansion.**
16. Even if we accept that the commanders who were responsible for the cluster firing genuinely believed that the firing of cluster munitions towards military targets within villages that had been evacuated of their civilians was legal and necessary – and that therefore it was possible to determine, as the MAG did, that “the use of cluster munitions during the Second Lebanon War was done in a manner that complies with the principles of the laws of armed conflict of international law,” it is not right, in our view, that the critical question of cluster firing at military targets within villages that have been temporarily abandoned by their inhabitants remain ambiguous, without any requirements or permits.
17. We believe that it is essential that this matter be decided in the IDF rapidly and clearly and that the necessary norms be instilled in an effective manner among all military ranks.
18. In conclusion, we can state as follows:

- a. In our investigation, we did not find evidence that indicated **the deliberate** use of munitions in breach of the rules of international law. The guidelines on these subjects, which stressed the duty to avoid civilian injury, were issued prior to and during the war.
 - b. The findings on the issues of the use of cluster bombs demonstrate flaws in operational discipline, monitoring and control, and ambiguity of orders and guidelines, as we also found in other contexts.
 - c. Moreover, we found that those who offered clarifications regarding the rules of using cluster munitions in the future based on the lessons of the war did not qualify their position by means of supervision that would ensure maximum reduction of civilian injury and responsible and correct consideration of the principles of international law.
 - d. As said, it is essential in our opinion that this controversy be clarified unequivocally regarding the future.
 - e. It is also essential that the lessons be drawn from the fact that in the use of cluster bombs during the war there was a continuous situation of unclear guidelines, lack of operational discipline and of orders that gave rise to cases of deviation from the explicit command guidelines on the subject of the use of this type of munitions, which was not identified and was not stopped during the long combat.
19. This is the reason that we deviate from our general approach and recommend a reexamination of the rules and principles that should apply in the IDF to the use of cluster firing, in light of the findings of the cluster munitions report and the opinion. In our view, this reexamination should:
- clarify the areas and the conditions in which it is permitted to use cluster-type munitions. Special attention should be devoted to the need to minimize civilian injury after cessation of hostilities and to limit the use of clusters to situations in which there is a clear military necessity for such use;
 - again clarify the types of permits required for use of this type of munitions, including different sub-variations and different targets, and include these instructions not only in the operational orders but also in training and exercises of the combat units;
 - examine the development, equipping and use of cluster munitions with which the fear of civilian injury is reduced (both in terms of the precision of launching and injury during firing and in terms of the quantity of unexploded bomblets).
 - organize the conditions for delivery of documentation on cluster firing after the cessation of hostilities, with the aim of minimizing civilian injury from unexploded bomblets.

20. We recommend that the reexamination be conducted together with bodies outside of the IDF itself. The conclusions of the reexamination regarding the rules of use of these munitions and the control of their implementation must also be examined by the Attorney General.
21. It is desirable that the reexamination and its main recommendations, subject to issues of information security, be published.