One of the major challenges presently facing the international community is the extent to which the laws of armed conflict, as understood today, may be applied to conflict scenarios of today’s world realities, and specifically in a situation in which the international community finds itself in a concerted global campaign against terror. In other words, is the law of armed conflict, as articulated, understood and applied in what we have grown up to understand to be today’s world, capable of guiding States in the fight against today’s terror?

When faced with legal issues arising in a “standard situation” of armed conflict—whether in regard to ground operations, air or naval targeting operations—the legal parameters are usually relatively clear. This is because the laws and customs of war and international humanitarian law—which constitute integral components of international law—set out the norms and standards by which

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The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
States are obliged to act and armed forces required to operate. The term “standard situation” assumes that the clearly-defined armed forces of the two sides—usually belonging to States—confront one another on a defined or clear battlefield, and engage in such actions as are necessary to conduct the armed conflict.

The term “armed conflict,” as understood up to now, thus serves as a code-word or form of algebra, indicative of a series of norms, rules, articles, principles, rights, prohibitions and requirements, obligating the forces, and the governments sending them, in guiding the military conduct of the war. The assumption is, in most cases, that armed forces—on both sides—will indeed conduct themselves in accordance with such rules and norms. More important, the assumption is also that each relies on the fact that the other will indeed observe the requisite norms and rules. That is, perhaps, the underlying assumption of any logical and viable armed conflict situation in today’s international legal system.

This is a somewhat idealistic and even simplistic description of any normal legal system—both civil and international—in which the individual components within the system are able to live and conduct themselves within the orderly parameters of the system, on the assumption that the other components of the system will comport themselves in the same way. Departure from such parameters and behavior in violation of such a normative system undermines and threatens the very existence of the system and raises the question as to the need to review the system, adjust the norms or adapt them to meet the new realities or developments.

Thus, as long as the conduct of armed conflict includes the accepted components and follows the accepted normative guidelines—whether from the point of view of the parties to the conflict or as to the modes of behavior and the theater of war—then the “standard situation” prevails. To conduct a war in Iraq against the Iraqi army, or in Afghanistan against organized armed forces fighting for the regime in Afghanistan, or even a collective NATO action against organized Serbian military forces in Yugoslavia, would generally fall within the parameters of the “standard situation,” even if, during the course of such conflict, the necessity might arise to deal with exceptional occurrences, including terror, violations of the law of armed conflict, war crimes, crimes against humanity and other irregular events.

Today’s international community is faced with a dichotomy, because what is currently known and acknowledged to be “the law of armed conflict,” by which States and their armed forces are supposed to function, developed over the years, and was set out in clear terms in the late 1800’s and early 1900’s, amended in the post-Second World War years (1949), and again in the 1974–7 timeframe in the background of the Vietnam War, and has since not really been touched (apart from specific instruments to reflect the need for protection of cultural property in time of war, as well as instruments reflecting technological developments in conventional
and non-conventional warfare.\textsuperscript{8}) However, it is questionable whether the law of armed conflict as it exits today, incorporating as it does, international humanitarian law, is really capable of providing legal as well as operative answers to the practical issues arising out of today’s struggle, directed not necessarily against a defined and identifiable armed force of a State, but rather against terror as a concept and a phenomenon. This may not necessarily be confined to the territory of a particular State, and certainly, by its very definition, is not necessarily directed against military forces of a State in the reality of today.

“Global War on Terror”

While the concept of “war” or even “global war” may be clear, while the phenomenon of “terror” is rapidly and ever-increasingly becoming understood to more and more countries, and while the challenge placed before the international community may be patently evident, the concept of a “global war on terror” in international legal terms nevertheless raises innumerable questions. Can such a war legally take place? Is the existing law of armed conflict, based as it is on well-defined criteria, capable of identifying, categorizing and recognizing the needs and components of such a war, especially when considering that the parties to the conflict are not necessarily States, and the geographical boundaries of the war are not necessarily within the confines of one State? Similarly, as the tactics and the weapons needed to deal with terror are not necessarily the same as those used \textit{vis-a-vis} a conventional enemy in a standard war, are the law of armed conflict and international humanitarian law equipped to deal with this?

To fight against Iraqi or Afghani armed forces, or in Israel’s case, a Syrian or Lebanese army, is theoretically and legally relatively simple, and can indeed be addressed in terms of the existing rules and sanctions of warfare. But as has become evident, to fight against al Qaeda, Hamas, Hezbollah, Islamic Jihad and Fedayeen Saddam, and other such nebulous and vague terrorist opponents, may be quite a different kettle of fish for a number of very significant reasons:

• They openly and demonstratively shun and violate the accepted norms and rules of armed conflict. Their very \textit{modus operandi} and inherent functioning philosophy are built, and rely as a tactical assumption, on the fact that the organized, western armies—as well as the society that they defend—will indeed abide by the norms and rules. Thus, they utilize civilian locations, homes, churches, mosques, medical facilities and ambulances, and schools as shields for placement and concealing of weapons, bases, headquarters, laboratories and training camps, assuming that an organized army of a State obligated by the law of armed conflict and international humanitarian law, will not risk causing collateral civilian damage
to civilians and civilian facilities by responding and targeting such blatantly civilian objects, and will not wish to be accused of using disproportionate military force against groups of apparently unorganized civilians.

- They target civilians as a distinct, deliberate and concerted means to demoralize and terrorize the civil population and to pressure organized governments and society. This is their tactical *modus operandi*.

- In so doing, they knowingly violate, and operate outside the law of armed conflict and thereby place themselves outside the bounds of any accepted norms entitling them to protection or combatant status and privileges. This in itself undermines and abuses the basic assumption of an organized society, functioning pursuant to legal norms and obligations—both in its civil legal system as well part of its international conventional and customary obligations.

- Such *modus operandi* undermines and abuses the humanitarian sense of responsibility and obligation instilled into the psyche of soldiers, whether in military training and academies, or whether stemming from the basic sense of decency and morality emanating from home, childhood, family values, education, Sunday school, church, synagogue and upbringing.

- This phenomenon produces the impossible and paradoxical predicament in which, on the one hand, organized armed forces or police forces of the State are obliged to function within the limitations of the law and the accepted norms, while on the other hand, the terrorists openly, deliberately and proudly violate such law and norms. This is perhaps the essence of terror.

*Israel Defense Force (IDF) Case Studies—Jenin and Bethlehem*

Following are two pertinent case studies and other examples from Israel’s own experiences of the blatant abuse by Palestinian terrorists of the laws and accepted norms of armed conflict, and the sometimes tragic moral and humanitarian dilemma that this creates in the psyche of the field commanders, soldiers, as well as the political leadership that holds responsibility. This is no less of a dilemma for the judiciary that is often called upon to judge the actions of the government or the armed forces during real time conflict.

These studies are also indicative of a certain element of hypocrisy and dual standards within parts of the international community, which to a certain extent would, for reasons of political interest, appear to prefer to sit on the side and rush to judgment rather than seek to unify efforts and engage in the fight against terror.

The situations covered are:
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- The IDF operation, between April 3–10, 2002 to overcome an armed and fortified terrorist infrastructure in the Jenin refugee camp and to prevent its conversion into a training and exit base for suicide terrorism.
- The 37-day occupation and violation by Palestinian terrorists of one of the holiest sites to Christianity—the Church of the Nativity in Bethlehem, between April 2 and May 8, 2002.
- Other pertinent examples.

Scenario
The refugee camp in Jenin occupied a corner of the south-eastern outskirts of the town. The refugee institutions (schools, clinics and related facilities) were under the administration and responsibility of the United Nations Refugee and Works Agency (UNRWA), within the general context of the United Nations’ responsibility for handling refugees.⁹

In fact, this camp (together with others in the West Bank and the Gaza Strip) had, for a considerable period of time prior to the hostilities in the area, been overrun and controlled by the Hamas and Islamic Jihad terror organizations, which had established a series of terror training centers, explosive-producing laboratories, suicide-belt sewing workshops, metal-working facilities and foundries to produce, cut and sharpen metal shavings, ball bearings, screws, bolts and related objects comprising part of the “suicide kits,” and related equipment. This despite clear United Nations requirements prohibiting use of refugee camps under its administration for military purposes, including a call by the United Nations Secretary-General establishing that “[r]efugee camps should be free of any military presence or military equipment, including weapons and munitions . . . the neutrality and the humanitarian nature of the camps must be meticulously kept,”¹⁰ and despite a series of very clear obligations undertaken by the Palestinian Authority, and witnessed by the international community, to dismantle terrorist infrastructure and arrest and prosecute those involved in all forms of terror.¹¹

The schools and kindergarten facilities—ostensibly under the administration of the United Nations—were used to train terrorists, replete with posters covering the classrooms and nurseries depicting the shaheeds (“martyrs”) suicide bombers, as folk heroes, and as role-models for the children. Children’s playing cards depicted the faces of these “folk-heroes.”¹²

The presence and control by the various terror organizations was no secret and was not done in a covert manner.¹³ Jenin was proudly dubbed in the Palestinian propaganda apparatus as “capital of the shaheeds,” having produced over 20 successful suicide bombings within Israel.
During the course of the armed activities prior to the entry of IDF into the camp, the terror organizations had evacuated the majority of the refugees, sending them into the town of Jenin, and proceeded to booby-trap buildings within the camp, disperse small mines connected to piping along the narrow streets, and booby-trap doorknobs, toys, household utensils and other objects.

**The Legal Situation**

In strict legal terms, in the context of the law of armed conflict, the Jenin refugee camp had been turned into a military objective/location, which openly and clearly served and rendered an effective contribution to the Palestinian unique form of military action. The camp served as a purveyor and chief supply depot and training base for acts of terror—predominantly suicide bombings both during the days immediately preceding the military action, as well as having supplied an unknown number of potential future suicide bombers, the neutralization of which was clearly required in order to gain military, psychological and tactical advantage.14

Despite the obvious factors pointing to this case as being a classical “military objective” by all criteria of international humanitarian law, and despite the lack of any doubt that might place it within the “grey area” set out in paragraph 3 of Article 52 of Additional Protocol I,15 the legal and moral dilemma facing the IDF was whether indeed to treat it as such, or whether, in light of its overall denomination as a refugee camp and the protected status to which such camps are entitled, nevertheless to grant it immunity as a civilian object.

**The Action**

In reaching the decision to enter the camp, consideration was given to the fact that most of the civilian population had been sent out of the camp and virtually all remaining persons were presumed to be terrorists (about 200). The extent of the fortification of the camp as ascertained through intelligence and aerial photographs, subsequently became evident from a series of statements made by the Palestinian terrorists who fought in the camp:

- “The fighting forces, from all the factions in the camp, have been equipped with explosive belts and grenades.”16
- “Our fighters are blowing themselves up in front of the soldiers and planting explosive devices on the roads.”17
- “We had more than 50 houses booby-trapped around the camp. We chose old and empty buildings and the houses of men who were wanted by Israel because we knew the soldiers would search for them. . . .” “We cut off lengths of main water pipes and packed them with explosives and nails. Then we placed
them about four meters apart throughout the houses—in cupboards, under sinks, and in sofas. . . .” “They were lured there. We all stopped shooting and the women went out to tell the soldiers that we had run out of bullets and were leaving. The women alerted the fighters as the soldiers reached the booby-trapped area.”\(^\text{18}\)

However, due to the cramped nature of the building, the narrow and winding streets and the possibility that some refugees remained, or were nevertheless being held as hostages or human shields within the camp, a tactical decision was made not to use artillery, tank or aerial targeting, with their concomitant potential of indiscriminate or collateral damage to civilian life and property, but rather to send ground forces into the camp and to move from house to house with a view to limiting offensive action strictly to armed terrorists and to military objectives.

During the action, IDF forces suffered heavy casualties as a result of the booby-trapped buildings and suicide bombers who exploded themselves within and close to buildings that collapsed on to the soldiers. 23 soldiers were killed (10 in one house). This required introduction of heavier equipment to enable acquisition of control by widening the narrow routes for heavier military equipment. By the end of the action, a total of 59 terrorists had been killed in the entire action—most of whom were discovered together with their weapons.

**International Reaction**

In the immediate aftermath of the action, Israel and its forces were widely accused of carrying out a “massacre” and of killing hundreds of innocent civilians. Senior United Nations officials came out with televised statements describing the situation in such terms as “horrific” and “morally repugnant.”\(^\text{19}\) The United Nations Human Rights Commission, Amnesty International, Human Rights Watch and others determined that Israel had committed war crimes.\(^\text{20}\)

Pursuant to consultations between the Israeli leadership and the US Administration, Israel agreed to the sending of a team composed of US military experts, under United Nations auspices, to ascertain the situation on the ground and to view the terrorist infrastructure prevalent in the camp and the terrorist activity that rendered the camp a military target. The Secretary-General of United Nations, through the United Nations Security Council, converted this into a fully-fledged international fact-finding commission\(^\text{21}\) with the substantive components of an international tribunal (headed by the ex-President of Finland who had previously served as an Under–Secretary-General of the United Nations, ex-President of the International Committee of the Red Cross, ex-United Nations High Commissioner for Refugees and a US retired general, with legal, political and technical staff and advisers) with an extended mandate to interview witnesses and officers, to attribute blame, place
responsibility, and to extend the commission to cover other areas of the West Bank territory, rather than the initial intention to analyze the Jenin situation.

The Government of Israel objected to the extended format of the Fact Finding Commission. The team was subsequently disbanded by the Secretary-General, especially after it became publicly and internationally evident that no massacre had been perpetrated; that those killed were terrorists; and that the camp had become a military object to all intents and purposes. The Secretary-General subsequently issued a report acknowledging the misuse by the Palestinian terrorists of the civilian infrastructure in the camp and affirming the fact that only 59 Palestinians had been killed, specifically rejecting the claim by Palestinian leaders and echoed by several senior United Nations and other international personalities that 300–500 had been massacred.22

**IDF Operation in Bethlehem—the Church of the Nativity (2 April–8 May 2002)**

**Scenario**
The Church of the Nativity is one of the major holy sites for all of Christianity (Catholics, Greek Orthodox, Armenians and others). It is the site at which the nativity scene, as described in the New Testament, took place. It is the site of the annual pilgrimage by all the various Christian sects and general public to Bethlehem to conduct the Christmas Eve midnight mass. It contains a complex of chapels and altars serving the various Christian sects.23

**The Abuse**
On April 2, 2002, some 220 armed Palestinian terrorists belonging to the Hamas, Palestinian Islamic Jihad, Popular Front for the Liberation of Palestine and the Al Aksa Martyrs group, entered the main church areas with weapons and ammunition, barricaded themselves inside the Church, used the roofs and balconies as shooting positions, held priests, monks, religious officials serving in the church, as well as ordinary citizens who happened to be there, as hostages and human shields, and abused holy artifacts (chalices, baptismal fonts, altars, carpets, tapestries).24

**The Moral, Military and Legal Dilemma**
Clearly this was not merely a simple combat situation of the use of a municipal or local holy site for shielding hostile action, or the occupation by enemy forces of a neighborhood church or mosque (which in itself is no less a violation of the laws of armed conflict). This situation centered within one of the world’s major holy sites revered by over one billion Christians throughout the world, from as far afield as Italy, Spain, Greece, Russia, Germany, Scandinavia, Central and South America, the Philippines, South Korea, Ireland, and Africa. The Holy See immediately issued
s tern warnings to Israel to ensure the integrity and holiness of the site. Whether any admonishment was passed on to the Palestinian authorities for encouraging and supporting the terrorist overrunning of the site, is unknown.

The moral and tactical dilemma faced by the IDF and the Israeli government was clear. Both Article 4 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict, as well as Article 53 of Additional Protocol I to the Geneva Conventions, regarding the protection of cultural objects and places of worship, prohibit acts of hostility against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and prohibit the use of such objects in support of the military effort and as objects of reprisals. While indeed the immunity of the site, as a place of worship, had been clearly prejudiced and abused, and technically and legally the circumstances (including the intense publicity worldwide and concomitant psychological warfare) were such that there existed an imperative element of military necessity as a criterion for active intervention against those who had occupied the Church, in order to bring the stand-off to an end, could Israel, the Jewish State, of all countries, nevertheless afford to bring upon itself the ire of all of Christendom by responding to this provocation and undertaking any military action that might prejudice the status of or damage the Church?

**Action by the Israeli Army**

Apart from responding to sniper fire emanating from the terrorists using the Church as cover (sometimes leading to casualties), and pressuring the terrorists through the withholding of supplies, the matter was handled by negotiation between officers comprising a special negotiating unit, and a group of priests held hostage within the Church who negotiated—principally by cell phone—on behalf of the terrorists.

Ultimately, after twenty five days, an agreement was negotiated, with assistance from such foreign actors as the Italian government and the Vatican, whereby the majority of those occupying the Church were able to leave for their homes in the vicinity of Bethlehem, while twenty six were transferred to Gaza and thirteen wanted men were deported to a number of European countries that undertook to host them in restrictive conditions.

**Additional Examples of Abuse**

While the case studies analyzed above clearly exemplify on a large scale the *modus operandi* of terror organizations in utilizing and abusing accepted civil and humanitarian norms and institutions, other less grandiose, but no less serious examples of such abuses abound on a daily basis, all of which involve some manner of element
shielding and perfidy in violation of, and abuse by, the terrorists of central components of international humanitarian law norms and instruments. The use of civilian ambulances for carrying arms and terrorists under recognized humanitarian emblems; the use of mosques, churches and schools as storage space for weapons and explosives; travel by wanted terrorists in vehicles accompanied by children and family; location of offices and headquarters in dense residential areas; and the use of innocent vehicles to approach and attack roadblocks are illustrative examples.

The techniques developed for rendering the weapons of terrorism more lethal cynically and blatantly utilize normal civilian objects in order to enhance the extent of the damage caused by a suicide bomber. For instance, sharpened metal shavings, rusty screws and ball bearings are added to the “concoction” of explosive materials and placed into the suicide belts in order to increase the damage to internal organs and to increase infection, germ impregnation and other such inventive and horrific means—all clearly in violation of basic humanitarian principles.

Legal Dilemma

The irony of the situation is that despite the fact that the accepted rationale of such terms as “combatant,” “legitimate target,” “defended locality” and “human shield,” as well as the situation of “military necessity,” have become blurred in the context of a war on terror, the international community is still geared to somewhat anachronistic conceptions of armed conflict between States, and presumes to judge those fighting terror by such criteria and standards. Hence, in some cases, reaction in international fora to actions by Israel and the United States (as well as others) takes a more critical view of the actions taken against the terrorists, while overlooking the terrorist acts that have themselves given rise to the need for response. This dilemma is compounded by a situation in the various international political fora in which automatic majority resolutions are adopted condemning those that fight terror while unwittingly (or deliberately) giving encouragement to those supporting and perpetrating the terror, instilling them with the confidence that their actions are indeed achieving their intended political ends.

Conclusion

Clearly, the international community must come to terms with the existence of modern-day terror and the need to deal with it both militarily and legally. To do so requires addressing the motivation driving terror—especially the religious, educational and social element inherent in the vast rate of incitement feeding terror from the youngest of ages. This might require some reevaluation of human rights concepts
in the context of dealing with terrorist infrastructures. It also requires addressing the
capability of terrorists to act, including dealing with those States and organizations that
finance, support, encourage, and glorify terror, and thereby grant the terrorists the
green light to continue with their activities.

Here the international community in its most developed and organized form—the
United Nations and its related organs, as well as the major human rights and interna-
tional humanitarian law bodies—political, social, as well as legal—must re-evaluate
the way in which they address the problem. Rather than systematically criticize those
that fight terror through allowing a parliamentary majority to dictate resolutions that
are viewed as encouraging terrorism, this community must tackle that aspect of the
problem and not allow itself to be abused and utilized for furthering terror.

Both from the case studies and situations examined in this article, it is clear that
the international community is presently experiencing a period of acute change
and evolution in what has up to now been accepted morality and behavior in
armed conflict and warfare. The enemy is different—in nature, definition, geogra-
phy, modus operandi, and in terms of morality and responsibility.

In order to be capable of dealing with international terror, and overcoming it,
the civilized world is going to have to adapt legal concepts and modes of behavior
to the exigencies and challenges that modern-day terrorism poses.

Tragically,—so far—this is being achieved by a system of default and trial and
error. Sometimes it works and lives are spared. Sometimes it does not. Practically,
the trial and error is taking on the character of a new mode of international practice
that is obliging the international community to adjust itself accordingly and to
consider reviewing the old rules with a view to their possible rejuvenation in light
of today’s terrorism. The question remains if the international community is capa-
ble and prepared to take up the challenge.

Time—and terror—will tell.

Notes

1. Ambassador Alan Baker is Legal Adviser to the Israel Ministry of Foreign Affairs. The views
expressed in this article are solely those of the author.
2. See the statement by President George W. Bush to the United Nations General Assembly, Nov.
3. Convention (IV) Respecting the Laws and Customs of War on Land and Annexed
Regulations, The Hague, Oct. 18, 1907, reprinted in DOCUMENTS ON THE LAWS OF WAR 69
4. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces
in the Field, Geneva, Aug. 12 1949, 75 U.N.T.S. 31, reprinted in id. at 197; Convention for the
Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at
Sea, Geneva, Aug. 12, 1949, 75 U.N.T.S. 85, reprinted in id. at 222; Convention Relative to the
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9. See United Nations General Assembly Resolution 302(IV), Dec. 8, 1949, on Assistance to the Palestinian Refugees, and subsequent annual resolutions adopted by the United Nations General Assembly renewing and extending the functions and mandate of UNRWA.

10. United Nations Doc. A/52/871, Apr. 1998. See also United Nations Security Council Resolutions 1208 (1988) and 1296 (2000) emphasizing the importance of safeguarding the civil and humanitarian nature of refugee camps, prohibiting the arming of refugee centers in “situations where refugees and internally displaced persons are . . . vulnerable to infiltration by armed elements and where such situations may constitute a threat to international peace and security.”

11. 1995 Israeli-Palestinian Interim Agreement and related documentation.

12. See for instance BBC report by correspondent Barbara Plett, August 7, 2002: “In vivid reds, blues and yellows, in murals and sweeping Arabic script, the graffiti celebrates suicide bombers as heroes, along with other Palestinian fighters. Their attacks are called martyrdom operations.” Available at http://news.bbc.co.uk/2/hi/middle-east/2179609.stm.


14. Article 52(2) of Additional Protocol I, *supra* note 5, to the 1949 Geneva Conventions, requiring the distinction between civil and military objectives, and limiting attacks to military objectives, described as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Neither Israel nor the United States are party to this Protocol, but several of its central articles are widely viewed as representing customary international law.

15. *Id.*


17. See AL-HAYAT (London), Apr. 9, 2002.

18. See AL-AHRAM (Cairo), Apr. 19–24, 2002, statements by the main bomb-maker in the town of Jenin. See also additional statements by Palestinian terrorists, quoted in *Anatomy of Anti-
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22. See A/RES-10/186 dated July 30, 2002 at paragraph 56. This report includes a detailed description of the extent of Palestinian fortifications in the refugee camp (paragraphs 45–47) and a description of the battle within the built-up area of the camp (paragraphs 50–52).

23. For a detailed description of the history and structure of the Church of the Nativity, see Qustandi Shomali, Church of the Nativity, available at www.unesco.org/archi2000/pdf/shomali.pdf.


25. On April 8, 2002, Vatican spokesman Joaquin Navarro-Valls issued a stern warning to Israel to respect religious sites and stated that the Holy See was following the events with "extreme apprehension."

26. Supra note 6.

27. Supra note 5.

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