Did LOAC Take the Lead? Reassessing Israel’s Targeted Killing of Salah Shehadeh and the Subsequent Calls for Criminal Accountability

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Abstract

The recent report of an Israeli Inquiry Committee that examined the 2002 targeted killing of Salah Shehadeh, the commander of Palestinian armed group Hamas, provides a valuable opportunity to reassess the legality of this highly controversial incident. The attack on Shehadeh by Israeli forces caused the death of 13 innocent civilians and the injury of dozens of others. While Israel refused to open a criminal investigation following the attack, several attempts in Israel and elsewhere were made in order to initiate criminal proceedings and to hold those involved accountable. It seems however that the allegations of ‘an Israeli war crime’ neglected the normative framework which governs the incident. This article analyses the lawfulness of the Israeli operation under the law of armed conflict (LOAC) by discussing the legitimacy of the selected target and the issues of proportionality and precautions in attack. It also considers the relationship between LOAC and human rights law. As the calls for criminal measures may be resumed in light of the Inquiry Committee’s findings, the article recalls the supremacy of LOAC when assessing behaviour in the context of high-intensity hostilities. In the absence of a LOAC violation which triggers individual criminal responsibility, human rights law may play a role in relation to a post-incident remedy, namely, a review of the attack and, in some cases, compensation for victims. Yet, allegations of war crimes cannot be based on human rights law when there is no case to answer under LOAC.

1. Introduction

A. The Attack and Accountability Measures

On 22 July 2002, at around midnight, an Israeli F-16 war-plane dropped a single one-ton bomb on a house in a residential neighbourhood in Gaza City. The attack targeted Salah Shehadeh who was, at the time, the commander of Izz al-Din al-Qassam Brigades, the military wing of Palestinian Hamas. The bomb

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hit the house where Shehadeh was staying and destroyed it completely. Shehadeh and his senior assistant, Zaher Nasser, were killed. The attack also caused severe civilian loss: Shehadeh’s wife and young daughter were killed and the shock wave of the explosion damaged five adjacent buildings, resulting in the death of 11 civilians and injuring more than 100 others.¹

The attack attracted international condemnation: UN Secretary-General Kofi Annan called the government of Israel ‘to conduct itself in a manner that is fully consistent with international humanitarian law’;² US President George Bush said the attack was ‘heavy handed’; the UK emphasized that while it recognizes Israel’s right to protect itself from terrorist attacks, its actions ‘should be neither disproportionate, nor excessive’; and the EU stated that ‘there can be no justification’ for the attack carried out in a residential area of Gaza.³ The UN Security Council was convened and, during its meeting, the Permanent Observer of the League of Arab States called the Israeli operation ‘a flagrant violation of international laws, a war crime and State terrorism’. The Permanent Observer for Palestine described it as a ‘blatant war crime’ and demanded to bring the perpetrators to justice.⁴ Anger and criticism were also expressed within Israel.⁵

The Israeli government publicly expressed ‘deep regret for the deaths of civilians, particularly children, and the injuries caused to many others’; however,

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⁴ UNSC Meeting Records (n 3) 3, 26.

it insisted that the attack was lawful and part of ‘ongoing efforts to protect civilians from the unrelenting threat of Palestinian terrorism’. An internal probe by Israeli security forces immediately took place and, 10 days later, the probe found shortcomings in the information that had been available to the forces concerning the presence of innocent civilians near Shehadeh. The probe concluded, however, that the attack which had resulted in ‘the elimination of a major terrorist leader’ was ‘correct and professional’. Thus, Israel did not find it necessary to open a criminal investigation into the incident.

Nonetheless, calls to prosecute and punish the persons who had planned, approved and executed the attack for their alleged war crime had continued. Israeli NGOs requested the Israeli Military Advocate General to open a criminal investigation but the request was refused and, in 2003, a petition was filed in the Israeli High Court of Justice demanding a criminal investigation of the attack. The judicial proceedings in this petition were suspended until the Court had ruled on another petition that challenged the legality of the Israeli government’s policy of targeted killings in general (‘the Targeted Killings case’). In 2006, the Court ruled on the latter petition and opined that during an armed conflict, targeted killing may be lawful in certain circumstances and subject to a number of specific requirements; therefore, its legality should be determined on a case-by-case basis. Following this judgment, the Court held, in 2008, that the targeted killing of Shehadeh was consistent with the conditions that were laid out in the Targeted Killings case. Accordingly, the Court did not instruct the initiation of a criminal investigation; however, it ordered an Inquiry Committee—external to the security forces—to examine the incident due to its ‘special and exceptional circumstances’.

In the meantime, and in response to these developments in Israel, several attempts on behalf of Palestinian victims were made outside Israel to initiate

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6 UNSC Meeting Records (n 3) 5; Aluf Ben, ‘The Assassination of Shehadeh: in a One-ton Bomb’ Haaretz (Tel Aviv, 23 July 2002) [in Hebrew].


10 Hess (n 8) para 8.
criminal proceedings against those who were involved in the attack. In accordance with the principle of universal jurisdiction, judicial proceedings were launched against a number of Israeli State agents in foreign domestic courts. Most notably, arrest warrants were issued against Israeli officers in the UK\textsuperscript{11} and New Zealand.\textsuperscript{12} In addition, in 2008, a private criminal action against senior officials and military officers was filed in Spain. Israel argued that the criminal action should not proceed due to an ongoing examination of the incident by an Israeli Inquiry Committee, and, in June 2009, the action was accordingly dismissed by the Spanish Court of Appeals.\textsuperscript{13}

In February 2011, nearly 10 years after the incident, the Israeli Inquiry Committee concluded its work. Its unclassified report holds more than 100 pages but does not add much to the information that was publicly available shortly after the incident, and its findings are generally in line with the findings of the internal probe that took place immediately after the attack. The Inquiry Committee found that while Shehadeh himself was a legitimate target, the resulting civilian damage of the attack was excessive. Nonetheless, those involved in the attack did not predict excessive collateral damage as they based their targeting decision on what turned out—with hindsight—to be faulty intelligence. Therefore, the Inquiry Committee did not recommend any disciplinary or criminal actions against individuals but, rather, made a number of general recommendations.\textsuperscript{14}


\textsuperscript{13} In April 2010, the Spanish Supreme Court affirmed the dismissal, see Dan Izenberg, ‘Universal Jurisdiction Victory in Spain but Battle Goes On’ \textit{Jerusalem Post} (Tel Aviv, 19 April 2010); For an unofficial English version of the criminal action submitted in the Madrid Magistrates’ Court see <http://www.adh-geneve.ch/RULAC/pdf_state/Court-Case-as-presented-1.pdf> accessed 20 August 2011. For an overview of the proceedings in Spain, see Sharon Weill, ‘The Targeted Killing of Salah Shehadeh: From Gaza to Madrid’ (2009) \textit{7 JICJ} 617. Weill assumes a \textit{prima facie} Israeli war crime; however, the basis for such an assumption is unclear since an analysis of the attack under LOAC is not provided.

\textsuperscript{14} Israeli Inquiry Committee (n 1) 97–99, 103.
B. The Analysis and Structure of this Article

In light of the Inquiry Committee’s findings, the calls for criminal accountability may now be resumed and criminal measures, probably outside Israel, could be initiated against Israeli nationals.\textsuperscript{15} Oddly enough, previous attempts to initiate criminal proceedings, asserting an Israeli war crime and individual criminal responsibility, lacked a meaningful discussion of the law of armed conflict (LOAC). This article submits, however, that since LOAC takes the lead in the analysis of the attack, these calls—as constructed thus far—were based on questionable legal grounds. A review of the information that was already in the public domain shortly after the attack indicates that there is no \textit{prima facie} case, and in its absence, Israel is not legally obliged to open a criminal investigation of the incident.

In order to advance this argument, the next sections discuss the law applicable to the Israeli attack on Shehadeh (Section 2) and question whether he was a legitimate target (Section 3). The article then deals with the principle of proportionality (Section 4), which is the core issue in the instant debate, and with the obligation to take precautions in attack (Section 5). An important caveat is that the factual material presented throughout these sections is primarily based on Israeli sources. Given that the information presented by Israel is currently the only factual description of the incident and that the calls for criminal accountability have not claimed that the published information is false or fabricated, the assumption here is that it is reliable and should be thoroughly addressed. The article further considers the relationship between LOAC and human rights law (Section 6). It emphasizes that LOAC is the \textit{lex specialis} during high-intensity hostilities while human rights law still plays an important role in relation to secondary rules which provide remedies for victims. A concluding observation on the legality of the attack and on the Israeli Inquiry Committee’s report is presented in the final section (Section 7).

2. The Normative Framework: LOAC

Israel targeted Shehadeh in Gaza in July 2002. At that time, high-intensity hostilities were taking place between Israel and Palestinian armed groups, including Hamas. The International Committee of the Red Cross (ICRC) described the situation in Israel and the Palestinian occupied territory in 2002 as follows:

[The year 2002] was one of the most violent and destructive in Israel and the occupied Palestinian territories since Israel occupied the West Bank

\textsuperscript{15} In response to the Report, the Palestinian National Authority urged the international community to ‘hold Israel to account by whatever legal and other means, and to show Israel it cannot act with impunity’. —, ‘PA: Israel Assassination Probe “Making Excuses for Murder”’ \textit{Ma'an} (28 February 2011) <http://www.maannews.net/eng/ViewDetails.aspx?ID=364216> accessed 20 August 2011.
and Gaza in 1967. By the end of 2002, spiralling hostilities were reported
to have claimed the lives of more than 1,700 Palestinians and some 700
Israelis since the current Palestinian insurgency against occupation
erupted in September 2000. In the first half of 2002, an unprecedented
wave of indiscriminate and devastating Palestinian suicide attacks caused
deep psychological trauma in Israeli society and prompted the most
massive action by the Israeli Defense Forces (IDF) in the Palestinian

Considering the situation on the ground, both the UN Security Council and
the Quartet on the Middle East (the UN, US, EU and Russia) had called, before
and after the Shehadeh incident, for an immediate ceasefire and for the parties
to comply with international humanitarian law.\footnote{UNSC Res 1397 (12 March
2002), 1402 (30 March 2002) and 1435 (24 September 2002); Quartet Statement
of 10 April 2002 <http://domino.un.org/unispal.nsf/0/e7d71a18d1d8ba4e85256b98004caf2a70?OpenDocument> accessed 20 August
2011.} The Israeli High Court also held in 2002 that, since September 2000, when the Palestinian Second Intifada
began, an armed conflict had been taking place between Israel and Palestinian
armed groups in the West Bank and Gaza.\footnote{HCJ 7015/02 Ajuri v Military
Commander (2002) para 1; Targeted Killings case (n 9) para 16; Commentators
reached a similar conclusion, for example, David Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial
Executions or Legitimate Means of Defence?’ (2005) 16 EJIL 171, 208; Orna Ben-Naftali and Keren
Michaeli, ‘We Must not Make a Scarecrow of the Law: A Legal Analysis of the
Israeli Policy of Targeted Killings’ (2003) 36 Cornell Int'l LJ 233, 257–58.} Hence, as a high-intensity armed
conflict exists, LOAC is the law governing the conduct of hostilities.\footnote{Marco Sassoli et al, How Does Law
Protect at War, vol 1 (ICRC 2011) 21–24. An 'enhanced' application of human rights law is, however, sensible
during 'calm' occupation and law-intensity non-international armed conflicts, see David Kretzmer,
‘Rethinking the Application of IHL in Non-international Armed Conflict’ (2009) 42 Isr L Rev 8, 39, 43; Charles Garraway, ‘To Kill or Not to Kill?: Dilemmas on the Use of
Humanitarian Law Provide all the Answers?’ (2006) 88 Int'l Rev Red Cross 881,
892–94, 903–04.} LOAC is the applicable law to assess the legality of the Israeli attack on Shehadeh.

In the Targeted Killings case, the Israeli High Court opined that the Israeli–
Palestinian armed conflict is of an international character as hostilities were
taking place between the occupying power and armed groups in the occupied
territory.\footnote{Targeted Killings case (n 9) paras 18, 21; See also Louise Arimatsu, ‘Territory,
Boundaries and the Law of Armed Conflict’ (2009) 12 YIHL 157, 176–77.} This classification was subject to debate, and some commentators
classified the conflict as a non-international armed conflict since the parties to
the conflict are the State of Israel and non-state actors, meaning Palestinian
organized armed groups (Hamas, Islamic Jihad and Fatah factions).\textsuperscript{21} Notwithstanding the classification of the armed conflict, as an international or a non-international one, there is no question that the applicable law at the time of the incident was LOAC.

Detailed rules on targeting, a deliberate or direct attack on individuals during an international armed conflict, are mainly embodied in the 1977 Additional Protocol I to the Geneva Conventions of 1949 (AP I).\textsuperscript{22} These rules stipulate that a combatant can be targeted at any time as long as hostilities are taking place and he/she is not hors de combat.\textsuperscript{23} Conversely, targeting civilians is absolutely prohibited; however, those civilians who take a direct part in the hostilities lose their protection from direct attack and their targeting is permissible for such time as they take such part in hostilities.\textsuperscript{24}

Given that targeting rules reflect the fundamental principle of distinction—between civilians (and civilian objects) that are protected and combatant (and other military objectives) which are legitimate targets—these rules form part of customary international law and, thus, bind Israel even though it is not a party to AP I.\textsuperscript{25} In addition, these targeting rules apply also during a non-international armed conflict; indeed, during such a conflict, there is no legal status of ‘combatant’; however, a strict distinction is preserved between those who fight—and thus can be targeted—and that part of the civilian population which does not take any direct part in the hostilities and remains protected from direct attack.\textsuperscript{26}

\textsuperscript{21} See for example Kretzmer (n 18) 210; Ben-Naftali (n 18) 257, 271; Marko Milanovic, ‘Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case’ (2007) 89 IHL Rev 373, 384.

\textsuperscript{22} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 (AP I).

\textsuperscript{23} AP I, arts 41(1), 48, 52(2); Gabriella Blum and Philip Heymann, ‘Law and Policy of Targeted Killing’ (2010) 1 Harv National Security J 145, 146 (‘Once in uniform of an enemy state, any soldier, by commitment and allegiance, is a potential threat and thus a legitimate target, regardless of the degree of threat the soldier is actually posing at any particular moment.’); Kretzmer (n 19) 24 (As opposed to civilians, combatants are ‘fair game and as long as they are not hors de combat they may be attacked even when they pose no immediate danger to the enemy’).

\textsuperscript{24} AP I, arts 51(2), 51(3).


\textsuperscript{26} Common art III of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, para 1; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II), art 13. Israel is not a party to AP II; however, these rules of distinction and targeting form part of customary international law, see ICRC Commentary (n 25) 1448 (‘Article 13 codifies the general principle that protection is due to the civilian population against the dangers
Based on these norms, the question whether Shehadeh was a permissible target shall now be examined.

3. The Legitimacy of the Selected Target

Whilst in the Targeted Killings case, the Israeli High Court classified the Israeli–Palestinian conflict as of an international character, it refused to classify members of the Palestinian armed groups—‘terrorists’ in the Court’s perception—as combatants who possess the right to fight and, consequently, the privilege to become prisoners of war upon capture.27 Instead, the Court classified Palestinian militants as civilians who participate in the fighting and it further held that they are targetable for such time as they take a direct part in hostilities.28

This particular classification required the Court to define the temporal scope during which attacks on such civilians are permissible. It had to address the ‘revolving door’ problem where civilians are alternately participating in the fighting, however, regaining civilian protection every time they take a break between discrete attacks, thus abusing the general protection afforded to civilians.29 The Court held that once civilians take a direct part in hostilities on a regular and continuous basis, they forfeit the civilian protection and their targeting is permissible even during periods when they rest, getting ready for the next attack, although their behaviour during this ‘resting period’ does not necessarily amount to direct participation in hostilities.30 In the Shehadeh case, the Israeli Inquiry Committee adopted a similar approach and classified Shehadeh as a civilian who took a direct part in the hostilities and, therefore, lost civilian protection.31

Drawing from the ICRC Interpretive Guidance on this matter, Palestinian militants can be classified as either civilians who take a direct part in hostilities of hostilities, already recognized by customary international law and by the laws of war as a whole’). See also ICRC Study (n 25) 25 (r 7).

27 The Court opined that they did not meet the required criteria for a ‘combatant’ status principally because they do not wear a fixed distinctive sign recognizable at a distance and do not conduct their operations in accordance with the laws and customs of war, Targeted Killings case (n 9) para 24; see also Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907) 205 CTS 277 (Hague Regulations) reg 1; Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, art 4A (2). States clearly seek to deny adversaries that are non-state actors the benefit of combatant legitimacy and the status of prisoner of war, see M Cherif Bassiouini, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-state Actors’ (2008) 98 J Crim L Criminology 711, 729.

28 Targeted Killings case (n 9) paras 27, 31.

29 ibid, para 39.

30 ibid.

31 Israeli Inquiry Committee (n 1) 65.
or as members of organized armed groups. The ICRC Interpretive Guidance suggests that the latter classification is more appropriate for individuals whose regular and routine activity is to prepare, execute or command acts amounting to direct participation in hostilities; in other words, for individuals who possess a 'continuous combat function'. This classification distinguishes members of the military wing of a non-state party to an armed conflict from civilians who directly participate in hostilities 'on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions'.

The ICRC's interpretation seems to deal properly with the 'revolving door' problem. While a 'legal revolving door' — in which civilian protection is regained following an engagement in a hostile act — is legitimate for individuals who might only exceptionally take up arms, members of organized armed groups that possess a continuous combat function, lose immunity and can be targeted at any time. There is no 'revolving door' in their case and the civilian protection is restored only if they cease to assume such function, for instance, by a lasting physical distancing from the organized armed group. An appropriate balance is, therefore, preserved between members of the State's armed forces that can be targeted at any time based on their status — and not just while performing specific hostile acts — and members of organized armed groups.

Along these lines, Shehadeh clearly possessed a continuous combat function as he was the commander of the military wing of Hamas. Official Israeli sources stated that he was behind dozens of attacks on Israeli soldiers and civilians during the two years that preceded his targeting and was responsible for the death of dozens of Israelis and for injuring hundreds more. According to Israeli media reports, he was directly behind the attack on a military post in January 2002 in which four Israeli soldiers were killed; an attack on an Israeli settlement in March 2002 that killed five and injured 23 Israeli civilians; and a suicide bomb attack on a restaurant in Haifa in March 2002, killing 16 civilians and injuring 40 others. He was involved in manufacturing rockets and financing arms purchases for Hamas. Other members of the military wing received funding and instructions from him in order to carry out attacks in the Palestinian

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32 See AP II art 1 (defining a non-international armed conflict as a conflict between a State armed forces and 'dissident armed forces or other organized armed groups...').
34 ibid 34.
35 ibid 70–71. Some aspects of the ICRC Interpretive Guidance, including this notion of a 'legal revolving door', are controversial; see, for example Michael Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 Harv National Security J 5, 38.
36 ICRC Interpretive Guidance (n 33) 71–72.
37 ibid 72; Garraway (n 19) 505.
38 IDF Spokesperson (n 7); UNSC Meeting Records (n 3) 6.
occupied territory and within Israel. In a May 2002 interview to Islam Online, 2 months before he was targeted, Shehadeh himself described his involvement in recruiting minors for suicide attacks against Israel, in planning and preparing attacks and in purchasing and manufacturing arms. In 2011, the Israeli Inquiry Committee concluded that, as a result of Shehadeh’s involvement in terror activity, 474 Israeli soldiers and civilians were killed and 2649 were injured between July 2001 to July 2002. Thus, given his continuous combat function, Shehadeh was lawfully targetable at all times. As he had not ceased to assume such a function, for instance by handing himself over to the Palestinian Authority, he did not regain civilian immunity from direct attack.

Most of the calls condemning the Israeli operation did not dispute that Shehadeh himself was a legitimate target. They were rather concerned with the high toll of civilian casualties incidental to the attack. In light of the severe collateral damage, an argument was raised that the attack was an indiscriminate one. An indiscriminate attack is an attack which, from the outset, is not directed at a specific military objective, or one that uses means or methods which do not distinguish between civilians and legitimate targets (military objectives). Moreover, it is clear that the whole purpose of Israel’s operation was to target Shehadeh, indeed a military objective. For this aim, Israel employed a single one-ton bomb (the means) that was able to hit the shelter house and destroy it when dropped from the air (the method). The target was hit accurately while nearby houses were damaged by the resulting shock wave. There is no basis to argue that Israel did not direct its attack at a specific military objective.


Israel Inquiry Committee (n 1) 59.

A similar analysis applies to Shehadeh’s assistant Zaher Nasser who was a member of Hamas military wing and assisted Shehadeh in the activities mentioned. The Israeli Inquiry Committee (n 1) 66 found that Nasser was involved in sending suicide bombers to Israel, arms smuggling and rockets manufacturing.

The criminal action submitted in Madrid Central Magistrates’ Court (n 13), however, described the targeted killing of Shehadeh as ‘murder’ and included Shehadeh in the calculation of civilian collateral damage.

AP I, arts 51(4)(a)-(b); Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (CUP 2010) 62. For a discussion whether the attack was indiscriminate because it had violated the principle of proportionality, see s 4.

See ICRC Commentary (n 25) 620 (‘Obviously military objectives also include, indeed principally so, the armed forces, their members’...’).
4. Proportionality

Although Shehadeh was a lawful target, a legal attack must pass the test of proportionality. Whilst, in the case in hand, this is the main issue to address, the calls for criminal measures against Israeli State agents did not pay due regard to this matter. For instance, the petition submitted in Israel in 2003, asking the Israeli High Court to order the opening of a criminal investigation, did not mention LOAC at all.\(^{46}\) Similarly, the criminal action filed in Spain in 2008 lacked a meaningful discussion of the proportionality aspect. It merely asserted that the resultant collateral damage was disproportionate and that the disproportion arose from the fact that the attack was directed at a single person, yet caused severe collateral damage.\(^{47}\) This is clearly not the proportionality test in LOAC.\(^{48}\)

The fact that an attack on a military objective caused serious collateral damage does not denote, by itself, criminal wrongdoing or render the attack illegal. LOAC tolerates, at least to some extent, civilian casualties which are incidental to such an attack, depending on the perceived importance of the military advantage.\(^{49}\) As long as the attack was not expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, it is lawful.\(^{50}\) If an attack is expected to cause excessive collateral damage, it is prohibited and must be refrained, otherwise those involved may bear criminal responsibility. Indeed, the planning, approving or executing of attacks that are expected to be disproportionate is a serious violations of LOAC: it is a ‘grave breach’ of the Fourth Geneva Convention and AP I, as well as a war crime under the Rome Statute of the International Criminal Court and under customary international law.\(^{51}\) A credible allegation regarding a disproportionate attack constitutes a *prima facie* war crime that must lead to

\(^{46}\) On file with the author [in Hebrew].

\(^{47}\) Criminal action submitted in Madrid Central Magistrates’ Court (n 13) 24.


\(^{50}\) AP I, arts 57(2)(a)(iii), 57(2)(b) and see also art 51.

the opening of a criminal investigation.\textsuperscript{52} However, before demanding criminal measures, close attention should be given to the elements of proportionality.

\textbf{A. Military Advantage}

A meaningful discussion of this element is absent completely from the calls for criminal accountability that followed the Israeli attack; however, when assessing whether a specific attack was proportionate, the anticipated military advantage is part of the equation. The expected collateral damage needs to be weighed vis-à-vis the concrete and direct military advantage that the attacker was expecting to gain.

From the information that was available immediately after the incident, the significance that Israel attached to Shehadeh is obvious. It can be easily inferred from his continuous combat function discussed earlier. Then Israeli Prime Minister Ariel Sharon, who approved the attack together with Minister of Defence Ben Eliezer, described Shehadeh to Cabinet members as ‘the most senior member of Hamas operational side’.\textsuperscript{53} Indeed, Israeli security sources said the targeted killing of Shehadeh caused substantial damage to Hamas’ capabilities. They also revealed that information obtained from Hamas detainees indicated that Shehadeh was involved in planning attacks against Israeli soldiers and settlers in the Gaza Strip, including plans to kidnap soldiers and to send suicide bombers to attack within Israel near the town of Beer-Sheva.\textsuperscript{54}

A week after the attack, Ben Eliezer reported to the Israeli parliamentarian Foreign Affairs and Security Committee that, prior to his targeting, Shehadeh was planning ‘a mega attack’: simultaneous attacks in six Israeli towns, including the use of a truck with 600 kilograms of explosives.\textsuperscript{55} Israeli military, thus considered Shehadeh as a ‘heavy ticking bomb’,\textsuperscript{56} a high-value target from whose elimination Israel would gain a crucial military advantage.

\textsuperscript{52} Fourth Geneva Convention, art 146, ICRC Study (n 25) 607 (r 158). For the requirement that an allegation will be credible, see Michael Schmitt, ‘Investigating Violations of International Law in Armed Conflict’ (2011) 2 Harv National Security J 31, 39, 83.


\textsuperscript{55} IDF Spokesperson (n 7); Bachur (n 39); Smadar Shmueli, ‘Ben Eliezer: Shehadeh Planned Six Attacks Simultaneously’ Ynet (29 July 2002) <http://www.ynet.co.il/articles/1,7340,L-2028295,00.html> accessed 20 August 2011 [in Hebrew]; Margot Dudkevitch, ‘Shehadeh Was “Ticking Bomb”’ Jerusalem Post (Tel Aviv, 24 July 2002); Nina Gilbert, ‘Ben-Eliezer: Shehadeh was Organizing “Mega-Attack”’ Jerusalem Post (Tel Aviv, 30 July 2002).

\textsuperscript{56} Amir Oren, ‘Operation “Daglan”’ Haaretz (Tel Aviv, 26 July 2002) [in Hebrew].
B. Collateral Damage

Various reports confirmed that 13 civilians were killed as a result of the attack on Shehadeh, more than 100 civilians were injured and damage was caused to five civilian houses.\textsuperscript{57} The day after the attack, the Israeli Association for Civil Rights claimed that the Israeli army should have refrained from the attack since it was possible to predict ‘with complete certainty’ that civilians would be hurt.\textsuperscript{58} This, however, ignored the fact that the knowledge in advance of collateral damage does not preclude an attack or make it unlawful. Only the knowledge in advance that collateral damage will be excessive in relation to the anticipated military advantage obliges the cancellation of a planned attack.

In this context, it is important to distinguish between the resultant collateral damage and the expected collateral damage. The actual collateral damage, even if considered excessive, is not part of the proportionality test and does not necessarily indicate a violation of LOAC. It is only the expected collateral damage that is an element of LOAC proportionality. This can be illustrated looking at practice.

During Operation Desert Storm in Iraq in February 1991, Coalition forces bombed the A1-Firdus Bunker near Baghdad after it was identified as a command and control centre, without knowing that the Bunker was used as a shelter for Iraqi civilians. The air strike caused 300 civilian deaths; however, since the actual collateral damage was not expected, there was no violation of LOAC.\textsuperscript{59} In April 1999, NATO forces bombed a railway bridge in eastern Serbia which was claimed to be part of a re-supply route for Serb forces in Kosovo. The bomb killed 10 civilians and injured 15 others after a passenger train unexpectedly approached the target. In another incident, in May 1999, NATO bombed a Serbian military camp near the village of Korisa, killing 87 civilians and wounding approximately 60 others who were present near the camp. NATO insisted that it bombed a legitimate military objective and had believed the area was completely cleared of civilians. In both incidents, the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) concluded that the resulted collateral damage was not foreseen and, thus, did not make the attacks disproportionate. A criminal investigation was not opened.\textsuperscript{60}

\textsuperscript{57} See n 1.
\textsuperscript{59} US Army, Operational Law Handbook (Judge Advocate General’s Legal Center and School 2007) 13 <http://www.fas.org/irp/doddir/army/law2007.pdf> accessed 20 August 2011; Rogers (n 49) 104 argues that if the bunker was indeed being used as a command and control centre, civilians deaths (even if expected) were not disproportionate due to the high-value anticipated military advantage of the attack.
The question of expectation—of the attacker’s knowledge or mens rea prior to the attack—is indeed crucial. According to the authoritative ICRC Commentary, in order to impose criminal responsibility, it is required to show that those involved positively knew that the attack would cause excessive collateral damage. This does not cover cases where they were negligent or even ‘reckless’. While this might be a requirement for conviction in a criminal trial, it seems that the threshold for opening a criminal investigation is lower and requires that, based on credible evidence, there is a reasonable basis to believe that Israeli State agents knew, or should have known, that the civilian damage caused by targeting Shehadeh would be excessive. In judging the Israeli commanders’ actions, one must look at the situation as they saw it in the light of the information that was available to them, and only then determine whether a specific commander, in those specific circumstances, acted reasonably. As a breach of proportionality is examined in the context of criminal responsibility, the persons involved should be given the benefit of the doubt as in any other criminal case in which the presumption of innocence is applied.

In the Shehadeh case, the Israeli Inquiry Committee determined that the actual collateral damage of the Shehadeh attack was excessive; however, not expected by those involved due to an intelligence mistake. Nonetheless, the Committee did not sufficiently clarify what was the expected collateral damage and whether this predicted civilian damage was excessive.

In this context, since the 2002 attack, it has been repeatedly argued in Israel that despite the use of a single one-ton bomb in a densely populated area, the actual severe collateral damage was not expected. It was emphasized that from the intelligence gathered before the attack, the buildings adjacent to Shehadeh’s house—these were huts and a garage—were expected to be empty, but eventually turned out to be inhabited. If the people involved had known this, the timing or the method of the operation would have been changed as had been

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61 See ICRC Commentary (n 25) 994, 996; art 8(2)(b)(iv) of the Rome Statue of the ICC determines that an attack becomes a war crime only when it is launched intentionally, in the knowledge that it will cause incidental civilian loss or damage which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. Constructive knowledge, such as in the case of ‘wilful blindness’, is nevertheless sufficient to impose criminal responsibility, see AP I art 86(2); Rome Statute of the ICC art 28(a)(i); ICRC Study (n 25) 561–62 (r 153).

62 Compare with the ICC Prosecutor’s powers to initiate an investigation, Rome Statute of the ICC art 53(1)(a). Ben-Naftali argues that ‘[t]he devastating impact of the operation, which could have reasonably been foreseen, clearly fails to meet the proportionality standard...It is a war crime’; Orna Ben-Naftali, ‘A Judgment in the Shadow of International Law’ (2007) 5 JICJ 322, 330. This decisive statement fails, however, to address the question of the information that was available to commanders at the time and to explain how the expected collateral damage should have been weighed vis-à-vis the expected military advantage of the attack.

63 See Rogers (n 49) 110–11.

64 Ibid 22.

65 Ben (n 6); Oren (n 56); Harel, ‘Low Probability for Civilian Damage’ (n 39); Somfalvi (n 54).
done on previous attempts to target Shehadeh. It was also reported that during the planning, some Israeli officials, in fact, suggested targeting Shehadeh even in the presence of civilians nearby. They asserted that a limited number of civilian casualties is justified as Shehadeh was an ‘arch-terrorist’. In LOAC terminology, they meant that the collateral damage would not be excessive compared to the military advantage (a high-value target); nonetheless, Minister of Defence Ben Eliezer rejected their position.

While the Israeli Inquiry Committee similarly insisted the commanders did not expect the actual collateral damage of the attack, it is important to note that they did predict—or should have predicted—some collateral damage, especially since the bomb was dropped in a densely populated area. Indeed, in June 2003, Dan Halutz, Israeli Air Forces commander at that time and one of the accused of committing a war crime for his involvement in the attack, admitted that, in the Shehadeh case, a decision to carry out the attack was made despite knowledge in advance that civilians would get hurt; however, the high toll of civilian casualties was not expected.

What was then the expected collateral damage? Based on the intelligence available at the time of the attack, the Inquiry Committee eventually made the following findings:

1. Shehadeh’s wife was expected to be at the shelter house and killed;
2. adjacent huts seemed to be inhabited by three people, all of whom were expected to be killed or injured in the attack (resulting in 3 civilian deaths);
3. the presence of Shehadeh’s daughter in the shelter house was not expected;
4. nor the presence of civilians in a garage adjacent to the house (resulting in 7 civilian deaths);
5. nor the presence of civilians in a nearby street during the night (resulting in 1 civilian death).

It is noteworthy that, in the calculation of the expected collateral damage, Shehadeh himself and his assistant are not included as they were not civilians but permissible targets.

Contrary to the Israeli Inquiry Committee’s findings, Israeli media reported, two days after the attack, that an internal probe within the Israeli army suggests

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66 IDF Spokesperson (n 7); see Ben (n 5) and also Ben (n 6); see also Hess (n 5) para 7.
69 Israeli Inquiry Committee (n 1) 71, 73, 75–76, 90.
that, according to aerial photos, it was possible to infer that at least some of the huts near the shelter house were inhabited. It was, however, added that while Israeli Air Force estimated that Shehadeh's house would be completely destroyed and all those inside killed, in the adjacent huts, tenants would only suffer injuries caused by the shock wave, slivers and shrapnel. This seems to be true also in relation to the adjacent garage and probably to some other buildings in close proximity to the shelter house; these buildings should have been expected to be inhabited, however, their tenants were expected to be less-seriously injured. This estimation seemed reasonable at the time since certain precautions were taken and similar attacks using F-16 planes had not caused similar incidental loss in the past.

From the foregoing, Israel expected, or should have expected, at least four civilian deaths as a result of its attack, as well as less-serious civilian injuries, caused by slivers and shrapnel, to inhabitants of adjacent buildings, along with the damage to these buildings from the shock wave of the explosion. This collateral damage should have been foreseen by looking at aerial photos and due to the fact that the shelter house—targeted by a one-ton bomb—was located in a densely populated area. The material question is whether this expected collateral damage was excessive.

C. Excessive Proportion?

In order for an attack to be disproportionate, the relationship between the expected collateral damage and the anticipated concrete and direct military advantage needs to be excessive. There is no straightforward answer to the question when collateral damage becomes excessive. It depends on the merits of the military advantage and, as the ICRC Commentary admits, the calculation may be a matter of controversy. While the issue is 'a question of common sense and good faith', it allows 'a fairly broad margin of judgment', and, as Dinstein puts it, this is not 'an exact science'.

Then Israeli Prime Minister Sharon, while expressing his regret of civilian casualties, described the attack as a 'success', implying that, even if the resultant collateral damage had been expected, it was still not excessive in light of the high-value military advantage. In an interview that took place one month after

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70 Harel (n 67); Amos Harel, 'IDF Officers' Estimation to Sharon: Shehadeh's Neighbours will Only Get Injured from Shrapnel' Haaretz (Tel Aviv, 25 July 2002) [in Hebrew].
71 Shmueli (n 55); Oren (n 56). For a discussion of the Israeli precautions, see s 5.
72 art 8(2)(b)(iv) of the Rome Statute of the ICC uses the words 'clearly excessive'.
73 ICRC Commentary (n 25) 683–84.
74 Dinstein (n 44) 132.
75 Bachur (39); Shmueli and Bachur (n 5).
the incident, Israeli Air Forces commander Halutz presented the difficulty of determining when civilian damage becomes excessive in those circumstances:

Q: If you have known in advance that 15 or 17 people are in the building, including children, would you still order to drop the bomb?

A: I refuse to answer this question, let alone to specify numbers. I am willing to discuss the principal question: is there a situation in which it is legitimate to target a terrorist when you know that it will cause damage to civilians and others who are not involved [in hostilities]. I do not have a doubt in relation to that. The answer is in the affirmative. In relation to a person who committed, or you know in certainty that he plans what we call today ‘a mega terror’, my answer is ‘yes’. How many civilians [allowed to be hurt in this attack]? I do not know. I will know to give an answer in the moment of truth.\textsuperscript{76}

Some guidance on this matter can be drawn from practice. During the NATO bombing campaign in March–June 1999 against the Federal Republic of Yugoslavia (FRY), NATO bombed a television studio in Belgrade seeking to disrupt the FRY command, control and communications network and claiming that military traffic was also routed through the civilian system.\textsuperscript{77} Between 10 and 17 civilians were killed as a result of this attack and at least some of these were expected as NATO knew the building had a civilian as well as a military use. The ICTY Prosecutor stated that the civilian casualties were unfortunately high but they did not appear to be disproportionate.\textsuperscript{78}

Similarly, in 2003, US planes bombed densely populated neighbourhoods in Iraq, attacking Iraqi leadership figures that appeared on the US Central Command’s ‘most wanted list’. The targeting of Iraqi leadership resulted in dozens of civilian casualties.\textsuperscript{79} A US military official confirmed that 20 high-value targets that ‘had a direct relationship to command and control of Iraqi military forces’ were approved and hit despite a prior high collateral damage estimation.\textsuperscript{80} While these attacks were subsequently reviewed by a battle damage assessment, no criminal investigation was mentioned since they were not considered to be disproportionate.\textsuperscript{81}

\textsuperscript{76} Vered Levi-Barzilai, ‘An Interview with Dan Halutz’ \textit{Haaretz} (Tel Aviv, 23 August 2002) [in Hebrew] [all translations are unofficial]. This interview had attracted heavy criticisms and later led to a petition submitted to the High Court challenging Halutz’s appointment to the IDF Chief of General Staff, see Hess (n 5).

\textsuperscript{77} Nato Bombing Report (n 60) paras 71–72.

\textsuperscript{78} ibid para 77.


\textsuperscript{80} ibid 19–21.

\textsuperscript{81} ibid 16, 40–41.
Another relevant factor is that Shehadeh was targeted while he was violating LOAC. Being a member of Hamas' military wing, Shehadeh knew that he was exposed to the risk of a direct attack. He has known to be on Israel's 'top wanted list' and previous attempts had been made to target him.\(^\text{82}\) Israel has also requested the Palestinian Authority to arrest him but the requests were denied.\(^\text{83}\) Still, Shehadeh chose to hide and blend with the civilian population, attempting to shield himself from an Israeli attack, and thus violated the prohibition on using civilians as human shields.\(^\text{84}\) In these circumstances, it may be argued that the proportionality test is adapted to the nature of fighting with an adversary that employs unlawful tactics. While targeting civilians is strictly prohibited and taking feasible precautions is mandatory,\(^\text{85}\) Shehadeh's behaviour may affect the calculation of what is considered an excessive collateral damage. In other words, in comparison to circumstances where the enemy does not use civilians as human shields, LOAC may tolerate a greater amount of civilian casualties before the attack becomes disproportionate.\(^\text{86}\)

In sum, given that Shehadeh was targeted in a densely populated neighbourhood and that the buildings adjacent to the shelter house should have been expected to be inhabited, Israeli forces predicted a substantial collateral damage (four civilian deaths as well as civilian injuries and damage). This is not contested. Nonetheless, taking into account that Shehadeh was a high-value target hiding among civilians, the question whether the attack was disproportionate is far from clear-cut. The burden of persuasion lays on those who call for criminal measures. They must demonstrate that Israeli State agents knew or had reason to know that the attack would result in an excessive civilian damage in relation to the expected military advantage which was evidently significant. The available information does not necessarily support such a conclusion.

5. Precautions in Attack

Even when an attack on a legitimate target is proportionate, there is always a duty of precautions. Israel must have taken all feasible precautions in the choice of means and methods of the attack in order to avoid or at least minimize civilian casualties and damage.\(^\text{87}\) This obligation is not to be confused with proportionality. A relatively small civilian damage may not be excessive, bearing

\(\text{\(^\text{82}\) Ben (n 6); — ‘Salah Shehadeh was Assassinated Together with 15 Civilians’ Ynet (23 July 2002) <http://www.ynet.co.il/articles/0,7340,L-2015833,00.html> accessed 20 August 2011 [in Hebrew].}\)

\(\text{\(^\text{83}\) See UNSC Meeting Records (n 3) 6.}\)

\(\text{\(^\text{84}\) AP I art 51(7); ICRC Study (n 25) 337 (r 97); Rome Statute of the ICC art 8(2)(b)(xxiii).}\)

\(\text{\(^\text{85}\) See AP I art 51(8). For a discussion of precautions in attack, see s 5.}\)

\(\text{\(^\text{86}\) See Fourth Geneva Convention art 28; Dinstein (n 44) 155; see also Rogers (n 49) 21.}\)

\(\text{\(^\text{87}\) AP I art 57(2)(a)(ii); ICRC Study (n 25) 52 (r 15).}\)
in mind the importance of the target; however, it could have been avoided if necessary precautions had been taken.

Special attention should be given to the word feasible reflecting the under-
lining balance in LOAC between military necessity and humanitarian consider-
ations. The ICRC Commentary refers to precautions which are ‘practically
possible taking into account all circumstances ruling at the time, including
humanitarian and military considerations’. In the implementation of this
obligation, one should, therefore, consider the alternatives available to the
commander, bearing in mind the need to achieve a specific compelling military
necessity.

Israel chose to target Shehadeh using a single one-ton bomb dropped from a
plane. Israeli officials described, shortly after the incident, why these specific
means and method were chosen, and specified the precautions that were taken.
In order to assure that Shehadeh would be hit, it was decided that the shelter
house should be destroyed completely and there was a doubt whether a smaller
bomb would be able ‘to do the job’. It was mentioned that experimental attacks
on buildings were made in order to collect data on the possible damage.
A one-ton bomb was preferable to two half-ton bombs or four quarter-ton
bombs that would be less likely to destroy the house, but more likely to miss
the target and hit the surrounding civilian population. It was reported that the
alternative of using helicopters for the attack was rejected, given the concern
that a missile from a helicopter would not cause the necessary damage to the
shelter house, and would be riskier for the helicopters which will be more
exposed to ground fire. The option of an arrest operation using ground forces
was rejected for similar reasons: the fear for the safety of soldiers and the risk of
a violent acceleration that would result in high number of civilian casualties,
considering Israel’s lack of effective control in the Gaza Strip. Clearly, the risk
to the attacking forces is a legitimate factor when addressing the need to
minimize civilian loss.

Further details were provided in relation to precautions: from studies of aerial
photos, Air Forces experts recommended the bomb to be delivered at an angle
that would minimize the impact on nearby buildings. It was also decided to

88 The ICRC Commentary (n 25) 683 refers to the definition of ‘feasible precautions’ in
Protocol II annexed to the 1980 Convention Prohibitions or Restrictions on the Use of
Certain Conventional Weapons (adopted 10 October 1980, entered into force 2
89 Somfalvi (n 54); Oren (n 56); Shmueli (n 55); Amos Harel, ‘IDF Officers’ Estimation
to Sharon’ (n 70).
90 Harel (n 67). Following the 1994 Israeli–Palestinian Gaza–Jericho Agreement, Israel
withdrew from most of the Gaza Strip which came under civilian and security control
of the Palestinian National Authority, see Kretzmer (n 18) 211; Ben-Naftali (n 18)
243.
91 Rogers (n 49) 20; Dinstein (n 44) 141 is of the view that there is no such obligation to
unnecessarily risk the attacking troops in order to minimize civilian loss.
92 Amos Harel, ‘The Criticism of the Gaza Attack will Decrease Future Targeted
Killings’ Haaretz (Tel Aviv, 26 July 2002) [in Hebrew].
attack at night when the nearby streets are likely to be empty. It was mentioned that previous attacks on Shehadeh had been cancelled as it became evident that civilians might be hurt. Minister of Defence Ben-Eliyzer said this had happened 'six or eight times'.

It seems that the main issue in the context of precautions relates to insufficient intelligence gathering. A single media report argued shortly after the attack that the army was able to infer from aerial photos that at least some of the huts adjacent to Shehadeh's house were inhabited. This implies that civilian casualties and damage could have been avoided or at least minimized if only this information had been collected and evaluated properly. Almost 10 years later, the Israeli Inquiry Committee was more explicit in this regard, finding that aerial photos and the familiarity of the people involved in the planning with the area made it possible to realize that the buildings adjacent to the targeted house were inhabited:

There was no positive information that the huts and garage are inhabited but from the information, it was more reasonable that they are inhabited than they are not...

According to the Committee's report, the Israeli Security Agency (ISA) was responsible for the gathering of this information. However:

The expected number of deaths as an incidental result of the attack was not discussed [in the ISA] in any context, nor there was a sufficient and thorough procedure to map the potential damage in the surroundings due to the fear of exposing the intents [to attack] to the target. In this kind of operation it was necessary to further deepen in identifying and mapping the number of individuals that might get hurt in the close surroundings.

Finally the Report concluded as follows:

It seems that concentrating on intelligence gathering for the incrimination of Shehadeh and the effort that was invested in locating and eliminating him were in a higher priority than the effort invested in avoiding - as much as possible - damage to innocent civilians or minimizing this damage. Thus an inadequate balance was created between two fundamental considerations within the decision and approval of a targeted

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93 Hess (n 8) para 3.
94 Ben (n 5); Somfalvi (n 54).
95 Harel, 'Low Probability for Civilian Damage' (n 39).
96 Israeli Inquiry Committee (n 1) 78–79. As noted, the expected collateral damage was that the tenants will suffer less serious shrapnel injuries. See discussion of proportionality in s 4.
97 ibid 89.
killing operation: the elimination of the target on one hand and avoiding the risk of damage to innocent civilians on the other hand.\textsuperscript{98}

The report of the Inquiry Committee is, however, lacking. Despite this troubling conclusion, the Committee did not continue to make an explicit determination that the obligation to take all feasible precautions was breached, nor did it discuss the implications of such a breach, including the required remedy. At the same time, the Committee did not explain how shortcomings of the ISA should be weighed against certain precautions that were indeed taken by others involved, especially by the Israeli Army and Air Forces. Moreover, the report did not present alternatives to the means or method which would not have compromised the military necessity. It did not answer the most important question: whether it was feasible, at the time, to collect more information about the target and its surroundings.

Dinstein cautions in this respect from the temptation in a post-event analysis to scrutinize the situation with the benefit of knowledge of the facts as they actually unfolded (rather than as foreseen).\textsuperscript{99} A decision that has been taken by those involved in the operation has to be judged according to the information available to them at that time. As Rogers further explains:

> The test must be one of reasonableness and will depend to some extent on the amount of information readily available, the staff at hand to deal with it, whether that information raises questions that require further research of other sources of information... Perhaps the most important factor of all is the time available for making the decision.\textsuperscript{100}

Thus, it is unclear whether taking additional precautions was feasible without risking the success of the whole operation. Special consideration should be given to the difficulty of gathering intelligence in an area over which Israel did not have effective control, to time constraints, and to the fact that Shehadeh was a high-value target who emerged as an 'opportunity' only for a very limited time and place.

Finally, in terms of criminal accountability, even if the possibility of a LOAC violation materializes, the failure to take precautions in the attack is not classified as a 'grave breach', nor as a 'war crime', meaning it probably does not trigger individual criminal responsibility.\textsuperscript{101} This is, of course, provided that the attack—carried out without taking all feasible precautions—was directed

\textsuperscript{98} ibid 81.

\textsuperscript{99} Dinstein (n 44) 139.

\textsuperscript{100} Rogers (n 49) 111. Several reservations were made by State Parties to AP I stressing this point, see Dinstein (n 44) 139.

\textsuperscript{101} It is not enumerated as a 'grave breach' in the Geneva Conventions (for example art 147 of the Fourth Geneva Convention) or in art 85 of AP I, nor as a 'war crime' in art 8 of the Rome Statute of the ICC.
at a legitimate target and was proportionate. At the same time, alleged negligence in taking precautions may lead to disciplinary, administrative or civil proceedings against the persons involved.\textsuperscript{102}

6. LOAC and Human Rights Law

The discrepancy between LOAC and human rights law is most noticeable in the context of a violation of the right to life. The issue of targeted killing is, therefore, at the centre of the clash between these two branches of international law. Under human rights law, the use of deadly force by State agents is exceptional and allowed only: (i) when strictly unavoidable in order to protect life, for instance, as self-defence from an imminent threat of death or serious injury; (ii) when less extreme means, such as capture and arrest, do not eliminate the risk; and (iii) to the extent required to protect life (injuring is 'the lesser evil' in comparison to killing if sufficient to remove the danger).\textsuperscript{103} These standards are directly challenged by the LOAC-based permission to kill those individuals who fight and the acceptance of collateral damage to innocent civilians as long as it is proportionate. As the right to life, a non-derogable human right, continues to apply in times of war,\textsuperscript{104} it is required to consider human rights law when analysing the legality of the Israeli attack on Shehadeh.

A. The Selected Target

In the Targeted Killings case, the Israeli High Court added a number of elements to the analysis of targeted killing operations. These elements are taken essentially from human rights law. Based on the last resort

\textsuperscript{102} The ICRC Commentary (n 25) 994 clarifies that while negligence is not an element of a 'grave breach', 'failing to take the necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by disciplinary sanctions'. Criminal sanctions may also be taken for gross negligence under domestic law. In an extreme scenario, a blatant failure to take feasible precautions and mitigate civilian losses (such as in the case of 'wilful blindness') could amount to an indiscriminate attack or even to a direct attack on civilians. In these cases, a criminal investigation must be opened.


condition for the use of lethal force, the Court opined that a civilian taking a direct part in hostilities should not be targeted in the case he/she can be arrested, interrogated, and tried.\textsuperscript{105} If such less harmful means are available, the use of deadly force is unlawful, including the incidental damage caused to civilians.

There are no such requirements in LOAC that limit the right to target those who fight, including those civilians who take a direct part in hostilities for such time as they fight. Further, the Israeli High Court admitted that the possibility of an arrest is not always practicable, especially when the attacker does not possess effective control in the area where enemy militants are present. A prior arrest may unreasonably risk the participating forces or increase the risk of harm to civilians.\textsuperscript{106} A similar approach was expressed by the ICRC.\textsuperscript{107}

In the Shehadeh case, the debate over these additional requirements largely remains theoretical. Given the high-intensity hostilities in Gaza at the time of the incident, Shehadeh’s targeting is properly governed by LOAC. Under LOAC, Shehadeh was a permissible target as he was engaged in fighting. If arguendo, his targeting was subject to additional requirements from human rights law, the attack still adhered to these standards. Bearing in mind the Israeli explanation that Shehadeh was a ‘heavy ticking bomb’, the lack of Israel’s effective control in Gaza, the failure of the Palestinian Authority to arrest him and the high risk expected to Israeli soldiers and to nearby civilians during a ground operation for his arrest—all these data would suggest that the use of deadly force against Shehadeh was a lawful preventive measure in accordance with human rights law.\textsuperscript{108}

\textbf{B. Collateral Damage}

Once again, the main concern is the serious collateral damage resulting from the attack. Allegations that a war crime had been committed and the calls for a criminal investigation were made primarily in response to the high civilian toll. Nonetheless, whilst evidence of civilian casualties is sufficient to establish a prima facie violation under human rights law, it is not the case under LOAC. Indeed under human rights law, the exceptional manner in which lethal force may be employed by State agents and the strict criteria for its use raise the suspicion of unlawful behaviour in every incident where civilians

\textsuperscript{105} Targeted Killings case (n 9) para 40.

\textsuperscript{106} ibid. The Court opined that arrest, investigation, and trial might be particularly practical during belligerent occupation where the army controls the area in which the operation takes place.

\textsuperscript{107} ICRC Interpretive Guidance (n 33) 80–82. The ICRC’s position that introduces additional non-LOAC restraints on the use of force against permissible targets is highly controversial, see for example Schmitt (n 35) 40–42.

\textsuperscript{108} See Nils Melzer, Targeted Killing in International Law (OUP 2008) 239.
were hurt and accordingly a criminal investigation is 'almost automatic'.\textsuperscript{109} Conversely, in LOAC civilian deaths, that are incidental to a proportionate attack on a lawful target or a result of an erroneous attack, do not suggest that State agents acted in a criminal manner. Therefore, there is no legal obligation to open a criminal investigation in each and every case.

It is widely accepted today to look at LOAC and human rights law as complementary and, thus, both should be taken into consideration.\textsuperscript{110} At the same time, it should be borne in mind that the rules of one regime can be more relevant to certain circumstances as they were specifically designed to regulate a particular situation.\textsuperscript{111} Clearly, LOAC was designed to regulate the conduct of hostilities during a high-intensity armed conflict. LOAC is dominant, or as commonly referred as the \textit{lex specialis}, during an inter-State armed conflict or a non-international armed conflict in which the level of violence reaches, for instance, the threshold of Article 1(1) of AP II, meaning that organized armed groups managed to gain control of territory as to enable them to carry out sustained and concerted military operations. On these occasions, it is difficult to expect the State to handle the high level of violence with regular policing.\textsuperscript{112} Thus, when life was deprived during this kind of conflict and for reasons related to the conflict, the lawfulness of the lethal act should be assessed according to LOAC.\textsuperscript{113} As noted, in the Shehadeh case, a LOAC analysis of the available information does not indicate that a war crime may have been committed during Israel's attack despite its resultant severe collateral damage.

\textsuperscript{109} Basic Principles on the Use of Force (n 103) 6, 22; This notion was stressed in the jurisprudence of the European Court of Human Rights, see for example \textit{McCann v UK} App no 18984/91 (27 September 1995) para 161; \textit{Ergi v Turkey} App no 23818/94 (ECHR, 28 July 1998) paras 82, 98; \textit{Isayeva v Russia} App no 57947/00 (ECHR, 24 February 2005) paras 208, 237; see also Kenneth Watkin, 'Controlling the Use of Force: a Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 \textit{AJIL} 1, 19, 32.

\textsuperscript{110} \textit{Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)} (Judgment) [2005] ICI Rep 168, paras 215–21.

\textsuperscript{111} See for example, Human Rights Committee, \textit{General Comment No 31} (n 104) para 11 ('[T]he Covenant [on Civil and Political Rights] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive'); Ben-Naftali (n 18) 288–89; Droege (n 19) 524.

\textsuperscript{112} Kretzmer (n 19) 37, 39.

\textsuperscript{113} \textit{Legality of the Threat or Use of Nuclear Weapons} (Advisory Opinion) [1996] ICI Rep 226, para 25; Melzer (n 108) 80–81, 382; Sassoli (n 19) vol 1, ch 14, 15 ('IHL defines what is lawful in war. When confronted with State-sponsored killings in time of armed conflict, human rights courts, commissions or NGOs must therefore check whether such actions are consistent with IHL before they can know whether they violate International Human Rights Law') [emphasis added].
C. Remedy

Human rights law can complement LOAC when it comes to secondary rules, meaning the remedy available to victims of a LOAC violation, since the question of remedy is not sufficiently regulated by LOAC. Human rights law can be of assistance especially when dealing with non-criminal violations of LOAC, such as a failure to take feasible precautions. In these cases, States are not obliged to open a criminal investigation as to assert otherwise would conflict with LOAC's primary-substantive rules that do not assume criminal liability. Nonetheless, human rights law informs the responsible state's duty to hold a post-attack review following a suspected failure to take required precautionary measures. This is an effective remedy which does not amount to a formal criminal investigation, and from a victim's perspective, fulfils the satisfaction element of reparation following a 'wrongful act' that violates international law:

Satisfaction should include, where applicable, any or all of the following...(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim...

As a minimum, and according to standards developed in human rights law, this procedure should be prompt, thorough, independent and impartial. Other standards, such as those of transparency and victim participation, have to be considered taking into account the special circumstances of an armed conflict and practical constraints, for example the degree of effective control that may hamper the collection of evidence or the need to secure the confidentiality of intelligence information. The review may lead to disciplinary measures and/or

114 See Dinstein (n 44) 25.
115 This notion does not preclude an 'examination' or 'review' of the incident as it may be required in order to hold disciplinary, administrative or civil proceedings against the persons involved in an alleged failure to take precautionary measures, see n 102. A criminal investigation may also be initiated due to a possible violation of domestic law.
116 See 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (adopted by UNGA Res 60/147 of 16 December 2005) art 22; International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' Yearbook of the International Law Commission 2001, vol II (2) (UN 2007) 106 ('The appropriate form of satisfaction will depend on the circumstances...Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury'); see also ICCPR art 2(3).
to compensation in case the allegations of a non-criminal violation of LOAC are substantiated. The responsible state is required to pay compensation for the loss or injury caused by violations of LOAC, including non-criminal violations,\textsuperscript{119} and, in the absence of guidance on this matter in LOAC, the exact standards of what is considered adequate compensation shall be determined according to human rights law.\textsuperscript{120} In case the review of a specific attack indicates criminal activity, this must lead to the opening of a criminal investigation.

In the Shehadeh case, Israel failed to provide an adequate remedy for the victims. Even if there was no apparent element of individual criminal responsibility, a proper examination of the incident was required from the outset due to the severe collateral damage, the acknowledgment of intelligence mistakes and possible failure to take necessary precautions. Israel, however, did not create a credible review mechanism. Although an internal probe took place immediately after the attack, it concluded its work within ten days in a laconic public statement. Whilst the probe admitted some shortcomings, it did nothing to convince the victims and the general public that a thorough and impartial post-incident review had been carried out and that all feasible precautions had been taken as required. An Inquiry Committee was appointed only in January 2008 and only following a petition to the Israeli High Court. The Inquiry Committee published its report almost 10 years after the incident and its report does not clarify whether Israel violated its LOAC obligation of feasible precautions, and whether compensation to innocent victims is legally required.\textsuperscript{121}

7. Conclusion

The legality of the conduct of hostilities during an international armed conflict or during a non-international armed conflict that reaches a high threshold of

\textquote{It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate - this would eviscerate the non-derogable character of the right to life - but they may affect the modalities or particulars of the investigation... On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints'}; Watkin (n 109) 33–34.

\textsuperscript{119} Hague Regulations art 3; AP I art 91; ICRC Study (n 25) 537 (r 150).

\textsuperscript{120} See Basic Principles on the Right to a Remedy (n 116).

violence, such as that of Article 1(1) of AP II, is properly assessed under LOAC as the *lex specialis*. Thus, an attack on a high-value military objective that caused severe collateral damage does not necessarily indicate a violation of LOAC, let alone a criminal wrongdoing. Further examination is required, namely of the questions whether the attack was proportionate and whether all feasible precautions were taken. The anticipated military advantage is part of the assessment and should be carefully evaluated vis-à-vis the expected collateral damage.

At the same time, where a specific attack caused incidental civilian loss or damage, even in the absence of credible allegations regarding criminal activity, the responsible state is not absolved from its obligation to hold a post-incident review that will focus on the issue of precautionary measures. This procedure—which is not a formal criminal investigation—should be carried out as much as possible according to the standards developed by human rights law, and, as a minimum, must be prompt, thorough, independent and impartial. Should the examination indicate ‘only’ a non-criminal violation of LOAC, disciplinary actions shall be considered and compensation must be paid to innocent victims. In case suspicions of criminal activity arise, a criminal investigation must be opened.\(^{122}\)

The analysis of the available information regarding the 2002 targeted killing of Salah Shehadeh does not seem to establish a *prima facie* violation of LOAC that would trigger individual criminal responsibility. The condemnation of the attack, labelling the operation as a war crime and demanding criminal measures against Israeli State agents, overlooked the fact that the attack took place during a high-intensity armed conflict. Whilst thus far no reliable information had emerged to justify a criminal investigation, the post-attack review in the Shehadeh case was substantially delayed. In addition, the long awaited report of the Israeli Inquiry Committee, unfortunately, did not sufficiently clarify whether the duty to take feasible precautions was breached, and whether Israel is obliged to compensate the innocent victims of the attack.

\(^{122}\) This also applies to the review of attacks that caused collateral damage during the armed conflict in Gaza in December 2008–January 2009, see Eyal Benvenisti, ‘An Obligation to Investigate’ *Haaretz* (Tel Aviv, 28 January 2009).