**Aerial Strikes against Terrorists: Some Legal Aspects**

IDF Military Advocate General

http://www.mag.idf.il/592-6584-en/Patzar.aspx

|  |
| --- |
| **The State of Israel is committed to the rule of law and places great emphasis on conducting its military operations in accordance with international law, including in the context of its armed conflicts with terrorist organizations.**  **Against the backdrop of recent discourse regarding the legal regulation of aerial strikes against terrorists, below is a brief review of the legal rules generally applicable to such attacks and their implementation in the context of Israel's armed conflict with terrorist organizations operating against it.**    **Modern Challenges Encountered in Counter-Terrorism Warfare**    In recent  A salient example is Operation Pillar of Defense conducted in November 2012 against terrorist organizations in the Gaza Strip. Not only were multiple military facilities and infrastructure located by these groups in heavily populated civilian areas, during the operation Palestinian terrorist organizations fired some 1,500 missiles against Israeli civilian population centres with the intention of inflicting as much harm as possible on civilian life, in grave violation of the Laws of Armed Conflict ('LOAC').    In such circumstances, a wide variety of complex challenges are encountered in conducting aerial strikes against terrorists, including with respect to both the identification and pin-pointing of attacks against terrorists. Such challenges are not mere happenstance; they are deliberately created by those terrorist organizations in order to exploit and abuse the commitment of law-abiding states, such as Israel, to comply with international law.  [back to the top](javascript:backToTop();)  **Legal Framework Applicable to Aerial Strikes against Terrorists**    In accordance with LOAC, it is permissible to attack combatants as well as civilians taking a direct part in hostilities. The State of Israel directs its attacks only against lawful targets. More particularly, Israel views Article 51(3) of the First Additional Protocol to the Geneva Conventions as reflecting customary international law. Accordingly, Israel's position is that it is permissible to attack civilians during such time as they take a direct part in hostilities. Furthermore, Israel adheres to the principle of proportionality, which forbids attacks expected to cause damage to civilians or civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, and takes the precautionary measures necessary to minimize any expected collateral damage to the extent possible.    Oftentimes, when conducting aerial attacks, Israel applies rules that are more stringent than those required by international law. Thus, in parallel with Israel's commitment to the rules of international law, certain aspects of its operational activities are bound by additional restrictions, derived from the jurisprudence of its Supreme Court or internal policy considerations.    An example of restrictions deriving from decisions of the Israeli Supreme Court sitting in its capacity as the High Court of Justice ('HCJ') - which rely *inter alia* on Israeli constitutional and administrative law – may be found in the HCJ's judgment from 2006 in the 'targeted killings' case (HCJ 769/02). In the course of examining the legality of 'targeted killings' - *i.e.* the practice of conducting attacks    An    fronts.  [back to the top](javascript:backToTop();)  **The Decision-Making Process Regarding Aerial Strikes**  Given the complexity, sensitivity and potential consequences of aerial strikes against terrorists, decisions in this regard are made through highly regulated operational processes. These operational processes are set out in clear orders and procedures, which are classified by nature. Among other things, these orders and procedures define the various stages of the process of planning an aerial strike, thus identifying the entities whose input the military commander must receive before conducting the attack    The process whereby decisions on aerial strikes are made reflects the full implementation of relevant aspects of international law. First and foremost, the decision to strike is subject to criteria and conditions specified in the orders and procedures, which are designed to ensure that the attack will be consistent with international law. These criteria and conditions have been formulated on the basis of preliminary legal advice and they are implemented by the commanders in each and every aerial strike. Furthermore, although not legally required, in certain cases advice is provided in respect of the legality of a specific target. Obviously this type of advice is generally unfeasible during "real time" aerial strikes conducted in response to immediate threats, when the decision to attack a target is required to be reached in fractions of a second.    The implementation of principles of international law in procedures surrounding aerial strikes is also reflected in the intensive training that those involved in the decision-making process undergo. As an inseparable part of these training programmes, the relevant operational entities - from intelligence officers to operational commanders - learn and internalize the laws of armed conflict that apply to attacks, under the guidance of skilled legal advisers with expertise in the subject.    Within the decision-making process, significant emphasis is placed on the input from intelligence officers, which factor in all the relevant information available about the target, the anticipated military advantage and the collateral damage expected. For example, the intelligence input considers factors that may establish the legality of the target and the anticipated military advantage, such as the nature of the terrorist activity in which the terrorist target is involved (for example, participating in rocket attacks directed at Israeli civilians) and their role within the enemy's military operations. The intelligence insight will also consider, to the extent possible in the given circumstances, information that can be used to assess the extent of the anticipated collateral damage to civilians or civilian objects.    Based on this information, along with the insight of additional professionals such as damage assessment experts, the military commander may properly apply the principles of distinction, proportionality and the obligation to undertake precautionary measures – both in deciding on the attack itself and the manner in which it will be conducted (for example, the timing of the attack, the type of munitions to be used, etc.).  [back to the top](javascript:backToTop();)  **Retrospective Inquiry of Aerial Strikes**  *Examination and investigation mechanisms applicable to aerial strikes against terrorists*    As part of its commitment to the rule of law, the State of Israel applies in full those LOAC rules which regulate the examination and investigation of claims of LOAC violations. The examination and investigation mechanisms that Israel applies were recently examined by a public committee lead by a former Israeli Supreme Court Judge and included academic experts and former officials of the Israeli public service, as well as two international observers (the 'Turkel Commission'). The Turkel Commission found that "the examination and investigation mechanisms in Israel for complaints and claims of violations of international humanitarian law and the methods they practice, generally comply with the obligations of the State of Israel under the rules of international law." Furthermore, the Commission recommended amendments in the existing mechanisms and changes in the accepted practices. These recommendations are currently being studied by an inter-agency committee specially designated for the task by the Israeli government    In accordance with existing policy, whenever the IDF Military Advocate General's Corps becomes aware of any information, complaint or allegation – irrespective of its source – giving rise to reasonable grounds for suspicion that a certain attack carried out by the IDF constitutes a war crime, that suspicion will be investigated by means of a criminal investigation. In the event that the existing information does not give rise to such a suspicion (for example, where the information received is partial or circumstantial) a preliminary inquiry will be conducted to decide whether additional legal measures should be taken. Where such examination establishes reasonable grounds for suspicion that a war crime was committed, a criminal investigation will be conducted    In this context, it is important to note that during combat, the fact that harm was caused to a civilian in the course of an aerial strike does not in itself raise a suspicion of a LOAC violation. Harm caused to a civilian in the course of an aerial strike against a terrorist is not unlawful as long as it complies with the principle of proportionality. Such harm, unfortunately, is an inherent part of warfare, especially when it takes place against terrorist organizations that operate from civilian population centres. Furthermore, it is not rare that allegations are made regarding the death of civilians in the course of aerial attacks, whereas the preliminary inquiry – which relies, among other things, on intelligence information – indicates that those harmed were not in fact civilians, but rather lawful targets in accordance with LOAC. These cases, therefore, do not raise reasonable grounds to suspect a LOAC violation (certainly not a war crime) and there is no reason to conduct a criminal investigation regarding the matter. In most cases, it is not possible to publish detailed findings, due to the classified nature of intelligence information and operational capabilities.    *Examination mechanism applicable to 'targeted killings'*    Apart from the general examination and investigation mechanisms described above, a separate designated mechanism was established in accordance with the HCJ's decision in the 'targeted killings' case. This mechanism to examine the legality of targeted killings consists of an examination committee external to the military – the establishment and mandate of which exceed the requirements of international law.    The committee's staffing reflects the need for its members to be both independent and to possess legal and operational expertise.    The committee's mandate is limited to the sort of military strikes that were the subject of the petition to the HCJ. Thus, for example, the committee does not examine the legality of other military attacks, such as 'real time' strikes that were not planned and approved in advance, but were carried out in order to prevent an immediate threat (such as rocket firing into Israeli territory). Similarly, the committee's mandate is limited to those strikes which gave rise to doubts as to whether a target was correctly identified, or which resulted in the death of civilians who did not take part in hostilities (in line with the Supreme Court's ruling in HCJ 8794/03).    To the extent that the examination conducted by the committee raises reasonable grounds to suspect that a war crime was committed, a criminal investigation is commenced (as declared by the State to the Supreme Court in the aforementioned HCJ 8794/03).  [back to the top](javascript:backToTop();)  **Current Discourse on Aerial Strikes against Terrorists**  There has been spirited debate in recent years regarding the legal rules which regulate aerial strikes against terrorists. In the framework of that discussion calls have been made to establish even more rules and additional obligations on states fighting terrorism. It is important that this discussion not be held in the abstract, and that it takes into account the complex reality in which aerial strikes take place (that is, the unfortunate reality in which terrorist organizations operate from populated civilian areas); while balancing between the appropriate humanitarian considerations and military necessities of states fighting terrorism.    While carrying out that balancing exercise, it is also important to take into account the asymmetry which exists between states and terrorist organizations, from the perspective of the evident lack of any commitment to the rules of international law by the latter. Thus, many states like Israel are committed to the rule of law and operate in accordance with international law rules, even at the cost of impeding the effectiveness of military operations and prolonging military campaigns. By contrast, terrorist organizations violate international law rules, due in part to their lack of accountability, the absence of effective compliance mechanisms with respect to non-state actors (NSAs) and the fact that there are nearly no reputation costs for such groups when committing LOAC violations.    Given this prevailing state of affairs, it is necessary to take into account the already complex reality and asymmetry which law-abiding states are compelled to deal with and to beware in particular of imposing additional legal and operational burdens which serve only to exacerbate the asymmetry and make it more difficult to deal with terrorist organizations. |

|  |
| --- |
|  |