



NATIONAL SECURITY LAW REPORT

Table of Contents

In this issue we feature three contributions which depart from our normal word limits and address the important topic of direct action against alleged terrorists and the legal framework which should apply to governmental conduct in those circumstances.

David Luban (Georgetown University Law Center) and Amos N. Guiora (University of Utah, S.J. Quinney College of Law) debate the legal framework applicable during the recent conflict in Gaza. Professor Luban asks “Was the Gaza Campaign Legal?” while Professor Guiora suggests a new legal framework which he terms “Proportionality‘Re-Configured.”

Pages 2-16

Sarah Miller (Harvard Law School), winner of The ABA Standing Committee on Law and National Security’s 2008 Student Writing Competition, pens an essay entitled “Covert Action and the War on Terror: Reconciling Secrecy and Public Legitimacy” in which she examines the current legal framework governing covert action and makes the case for transparent guidelines.

Pages 16-24

Gregory S. McNeal
Editor

Was the Gaza Campaign Legal?

By David Luban

(University Professor, Georgetown University Law Center)

The destruction caused in Gaza by Operation Cast Lead can only be estimated; and, like virtually everything having to do with Israel and Palestine, the facts are contested. The New York Times, quoting aid agencies, puts the property damage alone at 4,000 homes destroyed, and 21,000 badly damaged, with 100,000 people homeless. (Ethan Bronner, "Amid the Destruction, a Play About Shells for Gaza Children Back in School," N. Y. Times, Jan. 25, 2009, A6.) This is in addition to 5,500 Gazans wounded and over 1,300 dead, more than half of them civilians (according to Gazan officials) or about 50 of them civilians (according to some Israeli sources). On the Israeli side, casualties amounted to thirteen dead, including three civilians. Muddying the waters, some Hamas announcements claimed that fewer than sixty Hamas fighters were killed, and claimed to have killed hundreds of Israeli soldiers. I will assume that the most commonly-quoted numbers—hundreds of Gazan dead and wounded, with a substantial portion of them civilians, and very low Israeli casualties—are at least roughly correct.

The devastation caused by Operation Cast Lead has provoked great outrage, and Israel's defenders respond with outrage of their own. The operation raises terrible questions of proportionality, morality, and legality, which Israel's critics and defenders often discuss in fiery language. I appreciate Professor Guiora's spirit of rational dialogue, and I will try to address the legal questions in an even-handed way. Writing in Washington, six thousand miles from Gaza, I am obviously in no position to vouch for contested facts.

One contested fact is, simply, who started the latest round of violence. In June 2008, Israel and Hamas reached an informal ceasefire, which required Hamas to stop rocket and mortar attacks against Israel, and bring under control other groups in Gaza who were launching some of the attacks. Rocket attacks fell off from hundreds per month to single digits beginning in July. (Israeli Intelligence and Information Center, "Intensive rocket fire attacks against the western Negev population," Dec. 21, 2008, p. 6, http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e018.pdf). Evidently, Hamas was living up to its end of the bargain: the few remaining attacks show merely that Hamas does not have complete control over other militants. On November 4, Israel nevertheless launched a raid inside Gaza that killed six Hamas militants. According to Israel, Hamas was digging a tunnel for purposes of kidnapping an Israeli soldier. In reprisal for the November 4 raid, Hamas resumed the rocket attacks: 126 in November and 98 in December. Hamas declared an end to the ceasefire on December 19, and Operation Cast Lead began eight days later. Each side has some claim to point the finger at the other—Israel because of the tunnel, Hamas because of the November 4 raid, Israel because of the resumed rocket attacks.

Some commentators think that confining the question to the resumption of violence in November and December is a mistake: without bringing in the Israeli boycott of Gaza, or the years of rocket attacks against Israel, or the years of targeted killings by Israeli forces, or the terrorist attacks of the second intifada, it is impossible to understand or analyze the events since November 4. There is some sense to the argument, but I think it is a path of futility, because the question of original guilt and responsibility has no stopping point, and ultimately the entire conflict between Israel and the Palestinians would be on the table. Ultimately, I suppose, it always is; but if so, legal discussion of Operation Cast Lead would be impossible.

The first issue that arises is a threshold question: what is the legal status of Gaza? Specifically, is it or is it not occupied territory? Israel says no: the occupation ended with the December 2005 disengagement, when Israeli troops evacuated Jewish settlements and removed themselves from Gaza. The United Nations, and some legal commentators, say yes. The legal test, originating in Article 42 of the 1907 Hague Convention Annex, is whether Israel still has effective control over Gaza. Those who say

yes point to Israeli control over the population registry, the airspace, sea access, and borders of Gaza. (See Iain Scobbie, “Is Gaza still occupied territory?”, *Forced Migration Review*, <http://www.fmreview.org/FMR-pdfs/FMR26/FMR2608.pdf>.) Perhaps surprisingly, given the strong U.S. backing of Israel, both the CIA’s World Factbook and the U.S. State Department’s website describe Gaza as Israeli-occupied territory even after the disengagement.

The status question—occupied or not?—matters because if Gaza remains under Israeli occupation, Israel must abide by the Fourth Geneva Convention. Under Article 64 of GC IV, Israel would have obligations to “maintain the orderly government of the territory,” and other articles make it clear that GC IV assumes that an occupying power is running the occupied territory, not attacking it. However, if Israel no longer occupies Gaza, the campaign is governed by combat rules rather than occupation rules.

This is an issue on which legalisms seem particularly unhelpful. In real terms, it is reasonably clear that Israel does not have Gaza under occupation. Operation Cast Lead is itself proof of that: genuine occupying forces—which, in the words of the International Court of Justice, have “substituted their own authority” for that of the government (*Uganda v. Congo*, decision of Dec.19, 2005, para. 173)—do not have to fight their way in. Furthermore, if the point of declaring Gaza “occupied” is to assert that Israel should be exercising governmental authority in Gaza, then Israel would have to re-engage rather than disengaging from Gaza. Nobody, especially Hamas and the Gazan people, wants that.

Thus, the Israeli operation should be regarded as an armed conflict, not an act of occupation; and the law governing it is the law of armed conflict. Was Operation Cast Lead legal? There are two aspects to this question, following the traditional distinction between the justice of fighting a war in the first place (*jus ad bellum*, JAB for short) and the justice of the way the war is fought (*jus in bello*, JIB for short).

JUS AD BELLUM

Classical just war theorists, beginning with St. Augustine and St. Thomas Aquinas, developed elaborate criteria of just war: it must have a just cause, it must be the last resort, it must be launched by legitimate authority, it must be launched with rightful intention (the just cause can’t be merely a pretext), it must have a reasonable chance of success, and the war aim must be proportional to the expected civilian devastation of the war. On these criteria, the Gaza campaign is a mixed bag. Stopping rocket attacks on Israeli towns is a just cause, and Israel’s government is a legitimate authority. (If, on the other hand, Israel’s real war aim was, as some commentators in Israel asserted, demonstrating the power of the Israeli deterrent to Israel’s other enemies, or destroying the elected Hamas government, it would be hard to see that as a just cause.) Whether the attack passes the “last resort” test is a harder question. Had Israel not launched the November 4 raid, might the ceasefire have been maintained? Was there any other means to destroy the kidnapping tunnel? If the answers are yes, Operation Cast Lead failed the last resort criterion.

Under the other JAB criteria the operation is even more problematic. If stopping the rocket attacks is only a pretext for destroying Hamas, it flunks the rightful intention test. Viewed from afar, the prospect of success in the stated aim always looked small: few observers realistically thought that the campaign would stop the rocket attacks, which in fact have resumed. But I admit that I don’t know and am not competent to judge whether the Israeli war aims had a realistic *ex ante* hope of success.

As for proportionality under JAB, it seems clearer that the war fails the test. Hamas’s rocket attacks over the years since it took control of Gaza have been numerous, ranging somewhere between 6,000 and 8,000 launches. But the overall casualties and damage caused by inaccurate, mostly-homemade, rockets have been nowhere near the damage to civilians and civilian property in Gaza in Operation Cast Lead. Michael Walzer, perhaps the world’s leading just war theorist, makes the important point that proportionality judgments are forward-looking: it’s not only a question of how many lives have been lost in the past, but how many might be lost in the future, if Hamas acquires more sophisticated weapons. (Michael Walzer, “On Proportionality,” *TNR.com*, Jan 8, 2009, <http://www.tnr.com/politics/story.html?id=d6473c26-2ae3-4bf6-9673-ef043cae914f>.) That may be true, but it isn’t a good enough response without specifying how

far in the future we are talking about. It can't be "Some day—we can't say when— Hamas might get really accurate weapons and kill hundreds or thousands of Israelis; therefore, no matter how many Palestinians we kill now, we haven't violated JAB proportionality." Walzer's argument would hold only if Israel can demonstrate a real likelihood of a far greater threat in the near future than anything in the past. The fact is that Israel inflicted vastly more civilian damage in three weeks than Hamas did in three years.

I mention the classical JAB criteria not because they're the law, but only because they provide a structured way to think about the morality of war. Under these criteria, Operation Cast Lead was an unjust campaign, because it fails at least one, and perhaps several, of the six JAB conditions. This is a test in which the only passing score is a perfect score.

How have these criteria entered into contemporary law? In an earlier version of this comment that I posted on the blog Balkinization, I stated mistakenly that the classical JAB criteria bear little relation to the law of war. (The question of JIB legality is different, and I'll come to it shortly). In fact, the most important of the JAB criteria have been incorporated into the law of war. Under Article 51 of the UN Charter, every state has an inherent right of self-defense against armed attacks, and self-defense corresponds to the classical "just cause" criterion. On its face Article 51 contains no requirement of JAB proportionality, as the International Court of Justice acknowledged in *Nicaragua v. United States* (Decision of 27 June 1986, para. 176). Likewise, on its face it contains no requirement of rightful intention, nor of reasonable chance of success, nor of last resort. However, the ICJ found that JAB proportionality and necessity are rules of customary international law (*ibid.*); and in the *Nuclear Weapons Advisory Opinion*, the ICJ departed from its Nicaragua analysis and found that the JAB rule of proportionality and necessity "applies equally to Article 51 of the Charter..." (Advisory Opinion of 8 July 1996, para. 41); it reiterates this holding in the Oil Platforms case (*Iran v. U.S.*, Judgment of 6 Nov. 2003, paras. 74, 76-77). Necessity is the closest concept in the law of war to the classical JAB concept of last resort. Alan Dershowitz, who vehemently defends the legality of Operation Cast Lead, takes it for granted that self-defense is limited by proportionality and necessity. (Alan Dershowitz, "Israel's Policy Is Perfectly 'Proportionate'," *Wall St. J.*, Jan. 2, 2009). In short, the JAB criteria of just cause, legitimate authority, proportionality, and last resort belong to today's law on the use of force.

One Israeli, responding to my earlier blog post, pointed out that if the casualties in Hamas's thousands of rocket attacks are small, it is because every time the siren goes off, Israelis drop whatever they are doing and move to bomb shelters—an intolerable mode of life. No doubt the prospect of continued rocket attacks justifies a self-defensive military response; but that observation does not speak to the proportionality question. The ultimate fact is simply that the devastation Operation Cast Lead caused to Gazan civilians is orders of magnitude greater than that caused by all the rocket attacks, and all the rocket attacks Israel can expect in at least the near-term future. There is no mathematical formula for proportionality. But to those who reject the claim of disproportion here, I ask a simple question: how many dead Palestinian civilians and blasted Palestinian homes would you consider disproportionate? Does it really have to be dead civilians in the thousands or tens of thousands? Israel may surely defend itself against rockets and mortars raining into Sederot and Ashkelon; what JAB proportionality rules out is an operation that foreseeably causes incidental civilian casualties and damage far greater than the security threat. Palestinian lives are no less valuable than Israeli lives.

One final point about JAB. I pointed out earlier that Israel and Hamas dispute who "started it" in November. Can Israel claim self-defense if it broke the truce? A group of eminent international lawyers have argued that the answer is no, and described Operation Cast Lead as mere aggression, not self-defense. ("Israel's bombardment of Gaza is not self-defence—it's a war crime," letter to the editor with 27 signatories, Sunday (London) Times, Jan. 11, 2009, <http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece>.) I disagree. Even if Israel's November 4 raid "started it," Israel does not forfeit its right to defend its cities and towns against a renewed rain of rocket attacks—so long as it

does so proportionately and as a last resort.

JUS IN BELLO

What about the *jus in bello*? JIB contains two crucial principles: the principles of discrimination, which holds that you can never intentionally target civilians (violence must discriminate between military and civilian targets), and proportionality, which holds that unintended civilian damage must not be excessive compared to the military value of the objective. (Confusingly, although the name is the same, JIB proportionality and JAB proportionality are different rules with different requirements.) Discrimination and proportionality are embodied in treaty law, most notably the 1977 First Additional Protocol to the Geneva Conventions—AP I, for short—in Article 51.

Defenders of Israel's Gaza campaign argue that Hamas routinely, and as a matter of policy, targets civilians. Indeed, the Palestinian human rights organization Al-Haq "acknowledges that rocket attacks by Palestinian armed groups, including Hamas, against civilian population centres within Israel are in violation of international humanitarian law." ("Legal Aspects of Israel's Attack on the Gaza Strip during 'Operation Cast Lead,'" Jan. 7, 2009, p. 6, http://www.alhaq.org/pdfs/Legal_Brief_Gaza_Cast_Lead_Jan.pdf.) And Israel insists that it does not target civilians: Israel phones civilian residents of targeted buildings to tell them to leave; and, in a tactic called "a knock on the roof," its forces respond to Palestinians who crowd onto rooftops as human shields by firing a non-exploding rocket onto an empty corner of the roof to warn them away. (Steven Erlanger, "A Gaza War Full of Traps and Trickery," N. Y. Times, Jan. 10, 2009.) Put this way, it seems that it is not Israel but Hamas that violates the principle of discrimination.

But that is true only if you count all the Hamas infrastructure that Israel targeted as military. For example, the very first day of the Israeli campaign, the air force bombed a police academy at a mid-day graduation ceremony, killing dozens. What makes policemen a legitimate target? Here, I want to focus not on the international law of armed conflict, but on Israel's own interpretation of it, in the Israeli Supreme Court's 2006 decision on targeted killings (*Public Committee Against Torture v. Government*, Dec. 11, 2006, http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf). The Israeli Supreme Court approved some targeted killings, but outlawed others, on precisely the ground that civilians can't be targeted unless they directly participate in hostilities. Its decision offers perhaps the most detailed analysis to date of who is and is not a protected civilian.

The Court focused on Article 51(3) of Additional Protocol I (AP I): "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities." As a preliminary matter, it held that even though Israel isn't a party to AP I, it accepts Article 51—the JIB rules—as binding law. As a second preliminary, the Court found that AP I applies to Israel's conflict with Palestinian militants. Then it turned to the main question: when do civilians lose their protection? The Court answered the question by interpreting Article 51(3) a phrase at a time.

It first asks when a civilian participates in hostilities, and answers: "when using weapons in an armed conflict, while gathering intelligence, or while preparing himself for hostilities" (*Public Committee*, para. 33). Plainly, the Hamas policemen were not using weapons or gathering intelligence. They were getting their diplomas. Were they preparing for hostilities? Not unless they were preparing to launch rockets at Israel—and there is no reason to think they were. For better or for worse, like it or not, Hamas is administering Gaza, and the police are the police. Matters would be different if Israel could show that Hamas police are really militants who fire off rockets at Israel—but as far as I can determine, Israel hasn't suggested that they are. These policemen were civilians who under Israeli law of war were not taking direct part in hostilities. And what is "a direct part"? Here's what the Court says:

the following cases should also be included in the definition of taking a "direct part" in hostilities: a person who collects intelligence on the army...; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlaw-

ful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. All those persons are performing the functions of combatants....However, a person who sells food or medicine to an unlawful combatant is not taking a direct part, rather an indirect part in the hostilities. The same is the case regarding a person who aids the unlawful combatants by general strategic analysis, and grants them logistical general support, including monetary aid... (ibid., para. 35).

Here, once again, it seems pretty clear that Gazan policemen, even if they are enthusiastic Hamas members who cheer on the militants, fall on the “indirect” support side of the line, not the “direct” side. And that makes them—under Israeli law—protected civilians who cannot be targeted. And what about “for such time”? Again, here’s what the Court says:

On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities he committed in the past. On the other hand a civilian who has joined a terrorist organization which has become his “home,” and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack.... Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility. (Ibid., para. 39)

The Court goes on to say that there are gray areas in between—but the policemen are not in the gray area. Even if they had launched rockets against Israel at some point in their lives—which no one has suggested is true—they are protected civilians unless launching rockets or helping those who do is pretty much their “day job.”

Finally, the Court adds, “if the harm is not only to a civilian directly participating in hostilities, rather also to innocent civilians nearby, the harm to the civilians is collateral damage. That damage must withstand the proportionality test.” This brings us to the next crucial question: did Operation Cast Lead pass this test? The JIB proportionality test is found in AP I, Article 51(5), which prohibits: “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

Notice how greatly this principle differs from JAB proportionality: where the latter judges the total anticipated civilian devastation of the conflict against the threat it defends against, JIB proportionality judges individual attacks. For purposes of JIB proportionality, the Hamas rocket campaign is irrelevant, as is Hamas’s ideology. The question is only whether blowing up this particular building will cause excessive civilian damage compared with the “concrete and direct military advantage anticipated” from blowing up the building.

Consider, for example, Israel’s killing of Nizar Rhayyan. Rhayyan was a senior Hamas leader, and seems like a lawful target under AP I. But the dead included his wives, eleven children, and whoever else was around at the time. Is that level of death excessive compared to the value of the military objective, as AP I requires? If the answer to this question is not obvious—and it isn’t—that indicates one of the flaws in the law of armed conflict, the utter lack of a metric for weighing concrete military advantages against dead and maimed civilians.

But the lack of a metric does not mean that anything goes. A disturbing possibility is that IDF troops fought under rules of engagement that put a premium on force protection even at the risk of heightened civilian casualties; some news reports strongly suggest that this was the case. (Critics have asserted that minimizing Israeli casualties is a political necessity within Israel.) Consider the following three items:

A. If Israeli troops were fired on, including from civilian buildings, they “went in ‘heavy,’” by

responding with air strikes or tank fire. One Israeli commander boasted, “We are very violent. We do not balk at any means to protect the lives of our soldiers.” (Steven Erlanger, “A Gaza War Full of Traps and Trickery,” N.Y. Times, Jan. 11, 2009.)

B. An Israeli commander identified only as “Captain Y” blew up a house in a residential neighborhood without investigating whether it held weapons or other military material. “A search of it two weeks later ... showed no evidence of explosive material or of a secondary blast.” Captain Y explained that the house looked suspicious, and he did not want to risk the lives of his men by searching it. “That seemed to be the guiding principle for a number of the operations in El Atatra: avoid Israeli casualties at all cost.” (Ethan Bronner & Sabrina Tavernese, “In Shattered Gaza Town, Roots of Seething Split,” N. Y. Times, Feb. 4, 2009.)

C. Amnesty International reports that the IDF used white phosphorous indiscriminately, as well as drone launched shrapnel weapons “clearly designed to maximize injury.” (Amnesty International, “Foreign Supplied Weapons Used Against Civilians By Israel and Hamas, Feb. 20, 2009).

The natural inference from the small number of IDF casualties in intense urban warfare is that force protection, even at the cost of “going in ‘heavy’” against enemy fighters near civilians, must have been a conscious military decision. Of course, military commanders always, and rightfully, want to protect the troops they command. But soldiers are also expected to take some risks to avoid unnecessary harm to civilians. Can casualty minimization justify tactics that inflict severe civilian damage? Can force protection count, in the words of Article 51, as a “concrete and definite military advantage” that justifies heightened civilian risks? Surely the answer is no. As law of war expert Gary Solis explains, “Force protection is not itself a concrete and direct military advantage that allows proportionality to be disregarded or slighted. Were it otherwise, an attacker with superior arms would be free to flatten all opposition with overwhelming firepower and call any civilian casualties collateral.” (Private communication.) This appears to be exactly what Captain Y did.

We must also remember that proportionality comes in only when the targets are themselves legitimate. Proportionality under JIB concerns civilian deaths when attacking a military target. If Israel was targeting all the institutions of Hamas’s civil government of Gaza, as the bombing of the police as well as Hamas government buildings suggests, it seems to be going after civilian targets—not only according to foreign interpretations of international law, but also according to the law of war as Israel’s own Supreme Court understands it.

AMOS GUIORA RESPONDS

I begin by thanking Professor Luban for his gracious and generous comment regarding my ‘spirit of rational dialogue.’ That is, I suggest, the most effective manner in which to address this most complicated and complex of issues. Professor Luban and I agree that Israel does not occupy the Gaza

Standing Committee on Law and National Security

Chair: Al Harvey

Members: Mary DeRosa, James M. Durant III, James E. McPherson, Judith A. Miller, Vincent Polley, Jill Rhodes, Jonathan R. Scharfen, Scott Silliman, Michael Smith, Charles White

Advisory Committee Chair: Suzanne E. Spaulding

Staff Director: Holly Stewart McMahon

740 15th St., NW

Washington, D.C. 20005-1009

(202) 662-1035 -- FAX: (202) 662-1032

E-mail: hcmcmahon@staff.abanet.org

Web page: <http://www.abanet.org/natsecurity>

Strip; in agreeing on this point we—I believe—concur that Hamas is fully responsible and accountable for the Gaza Strip.

Professor Luban’s thoughtful and carefully reasoned essay focuses on the legality of Operation Cast Lead. In doing so, he addresses and analyzes “the traditional distinction between the justice of fighting a war in the first place (*jus ad bellum*), and the justice of the way the war is fought (*jus in bello*).” The question from Professor Luban’s perspective is whether Israel had cause to engage in Cast Lead and whether it was conducted legally and morally.

In doing so, Professor Luban relies heavily on the Israeli Supreme Court’s holding (sitting as the High Court of Justice) in *Public Committee Against Torture v Government of Israel*, H CJ 769/02. In that decision the Court, as Professor Luban correctly summarizes, “approved some targeted killings, but outlawed others, on precisely the ground that civilians can’t be targeted unless they directly participate in hostilities.”

Operation Cast Lead is fundamentally—legally, morally and militarily—distinct from the paradigm the Court was asked to address in that holding. Frankly, the targeted killing paradigm is as distinct from the ‘war on Hamas’ paradigm as responsibility and accountability are distinct from how Hamas has ruled the Gaza Strip. *Public Committee Against Torture* is relevant to person specific operational counterterrorism which Israel conducted for decades. It is not relevant to the new paradigm.

Professor Luban and I do not disagree on the justness of the cause. I suggest that 6,000 rockets over three years is 6,000 rockets over three years, meaning Israel was under constant and consistent armed attack for that period of time. The following vivid description of life for Israelis in southern Israel after Israel disengaged from the Gaza Strip articulates life under armed attack:

“The kids in first grade in Sderot were born when rockets were being fired at Sderot. They have lived their entire lives having to think that when they leave the house, when they’re walking down the street, when they’re playing ball, that they have fifteen seconds to hide from an incoming rocket. And it’s not only the kids, it’s the parents. I have a friend who won’t drive with two kids in the car. If the alert goes off he doesn’t want to have to ask himself which of his kids he is going to save.” (Michael Totten, “A dispatch from the border with Gaza,” Instapundit.com, Feb. 9, 2009, <http://pajamasmedia.com/instapundit/69190/>.)

Were Israel not to respond to 6,000 missiles that endangered 1,000,000 civilians—Jewish and Arab alike—the government would correctly be accused of abdicating its primary responsibility. Article 51 of the United Nations charter resoundingly justifies Israel’s decision to engage in self-defense.

As to the “how”, Professor Luban suggests that the enormously significant damage wrought on the Gaza Strip by the IDF is fundamentally disproportionate to the damage caused by 6,000 missiles. Professor Luban is correct; the damage to Gaza is incomparably greater than to southern Israel. It is, also, not a relevant measuring stick given the inherently disproportionate nature of a conflict between a state and non-state. Clearly the state has far greater resources; that, however, is not the issue. In the context of analyzing “how” it is critical to ask against whom and to what end.

Seeking to destroy the sophisticated infrastructure of an organization that built between 600-800 tunnels, built and stored thousands of missiles and fired 6,000 missiles requires attacking an organization in its entirety. The dilemma is how to engage an organization in extraordinarily densely populated area while seeking to minimize loss of life to innocent individuals.

It is on this point that Professor Luban and I fundamentally disagree. Declaring war on an organization—in direct contrast to person specific operational counterterrorism—explicitly enlarges the pool of legitimate targets. Unlike the High Court opinion Professor Luban references, Operation Cast Lead actively sought to destroy an organizational infrastructure that had actively facilitated continuous armed conflict.

The qualitative difference between the two paradigms is of extraordinary importance. It not only requires a re-articulation of international law re-defining proportionality and legitimate targets but also

with respect to *jus in bello*. Aggressive self-defense in response to armed attack is the essence of Article 51; protecting innocent civilians against that armed attack is the essence of the social contract between the individual and the state.

The pictures from Gaza, in contrast to the pictures from southern Israel, suggest a lack of proportionality. What they reflect is the fundamental re-articulation of conflict between the state and the non-state. With respect to “how”: the continuity of the armed conflict against Israel suggests that to significantly minimize the danger to Israelis requires a military operation on the scale of Cast Lead. That continuity was possible only because of the wide-spread infrastructure Hamas developed and implemented. That infrastructure depended on wide-spread support (active and passive) for Hamas.

The “how” results in wide-spread damage to Gaza. It also responds to continuous armed conflict against a civilian population conducted by Hamas—leadership, fighters and passive supporters. That is the essence of lawful self-defense against a non-state actor who rather than building an economic infrastructure built a military infrastructure consistent with its charter.

That charter calls for ‘jihad’; the missile policy sought to facilitate that goal. Self defense, *jus ad bellum* and *jus in bello* are principles critical to the protection of innocent civilians. The balancing of those principles justified Operation Cast Lead. The burden for unnecessarily endangering the innocent Gazan population clearly rests with Hamas and its supporters. It is to Hamas that the population must ask “what have you wrought on us?”

Proportionality “Re-Configured”

By Amos N. Guiora

(Professor of Law, S.J. Quinney College of Law, University of Utah)

I begin by thanking my friend and former colleague Professor Greg McNeal and the American Bar Association for facilitating this discussion with Professor David Luban for whom I have the greatest respect. Professor Luban to whom I was introduced by a wonderful mentor—Professor Martha Minow—has been extraordinarily gracious over the years in commenting on my scholarship. I eagerly await Professor Luban’s comments in response to my submission. As “instinct” tells me we shall disagree but I hope that the reader will find the discussion both engaging and informative; that, after all, is the “point of the exercise.” While Professor Luban and I have been invited to comment on the question of proportionality regarding the Israel Defense Forces incursion (Operation Cast Lead, December 2008-January 2009) into the Gaza Strip I suggest starting the discussion with a short historical over-view.

HISTORICAL OVERVIEW

While engaging in a historical discussion regarding the Israel-Palestinian conflict is fraught with danger it is important to recall the Arab world’s overwhelming rejection of UN Resolution 181 in 1947 (<http://www.yale.edu/lawweb/avalon/un/res181.htm>) which called for the partition of the British Mandate in Palestine into a Jewish state and an Arab state. The two-state solution has eluded both sides ever since. It would be safe to state that the small strip of land with enormous significance to the three monotheistic religions has not known a moment’s peace in generations.

In the months prior to June 1967 Egyptian President Gamal Abdel Nasser threatened to “drive the Jews into the sea” and promised his United Arab Republic partner, King Hussein of Jordan that they will “meet in Jerusalem” after vanquishing the Jewish State. Furthermore, and of far greater significance, Nasser closed the Straits of Tiran thereby directly endangering the Israeli economy. On June 5, 1967 Israel preemptively attacked Egypt.

As a result of the Six-Day War Israel came to occupy the West Bank and East Jerusalem (including the Old City of Jerusalem) from Jordan, the Golan Heights from Syria and the Sinai Peninsula (returned to Egypt in the 1979 Camp David Accords) and the Gaza Strip from Egypt. As Israel never annexed the Gaza Strip (neither the West Bank) a Military Government—under an IDF Military Commander—was established for each area. The war, considered by military strategists a stunning victory, has been called a “cancer” on

Israeli society because of the resulting occupation of the West Bank and the Gaza Strip. I too, have publicly argued that the occupation is a “cancer” on Israeli society. In doing so, I have echoed the words and warnings of the late Professor Lebovitch who in the immediate aftermath of the 1967 War predicted that the war and the subsequent occupation would be Israel’s greatest tragedy.

In 1994, in the aftermath of the Oslo Peace Accords the Palestinian Authority was established in the Gaza Strip and West Bank. In accordance with the Agreements, the Palestinian Authority assumed police and civil affairs responsibilities in parts of the Gaza Strip and West Bank. Security responsibilities for both remained with the IDF. The Oslo Accords were intended to create a framework by which a Palestinian state would be established by 1999. For reasons too complicated to address in this discussion, the Oslo Accords have largely failed.

It is an open question whether then Foreign Minister Peres pushed then Prime Minister Rabin to reach an agreement with the Palestinians. Nevertheless, the reality is that Rabin understood that occupation of the West Bank and Gaza Strip must come to an end. While Rabin did not live to see disengagement (he was assassinated in November, 1995) Prime Minister Ariel Sharon decided to go forward with disengagement.

Sharon, the architect of Israel’s settlement policy in the West Bank and Gaza Strip, implemented unilateral disengagement (August, 2005) from the Gaza Strip, in spite of enormous political opposition from the political right in Israel, in particular amongst 10,000 Jewish settlers living in the Gaza Strip and their supporters both in the West Bank and Israel who engaged in active civil disobedience in response to the decision. In so doing, Sharon literally turned the reins of power to Hamas which had defeated the Palestinian Authority first at the polls and then in a brutal civil war literally resulting in a coup in the Gaza Strip. The former because of extraordinary corruption during the Arafat years; the latter owing to superior military capability and, perhaps, greater ruthlessness.

The immediate results were two-fold: Hamas gained control over the Gaza Strip and 1,000,000 Israelis living in a 25 mile (40 kilometer) radius of the Gaza Strip were endangered on a daily basis. While Kassam missiles were fired into Israel before disengagement I suggest—without minimizing the significant damage done to Israelis living in southern Israel—that the forthcoming proportionality discussion is best understood in the post disengagement paradigm. After all, as discussed below, Hamas fired 6,000 Kassam and Grad missiles into Israel from the Gaza Strip after Israel disengaged.

POST DISENGAGEMENT

It has been suggested that regardless of disengagement Hamas does not control the Gaza Strip. It is another way of asking whether Israeli occupation of the Gaza Strip truly ended. While criticism of the Israeli occupation—both its essence and manner—is legitimate it is, frankly, irrelevant to the Gaza Strip post disengagement. Hamas controls the Gaza Strip, albeit subject to Israeli control over the crossing points between Israel and the Gaza Strip and the sea; Egypt controls the crossing point between Gaza and Egypt.

While problematic in the context of sovereignty as articulated by international law and understood in the aftermath of the 1648 Peace of Westphalia it is appropriate to recall that Hamas is not a state. To that extent it does not have control over its borders. That said, Hamas as the democratically elected government of the Gaza Strip bears full responsibility and accountability for events occurring within the Gaza Strip. Simply put, Hamas is responsible (for a fuller discussion of non-state governance, See *Non-State Governance*, 2010 Utah L. Rev. forthcoming Mar. 2010) both for what I call internal-internal affairs and internal-external affairs. The thousands of missiles fired into Israel over the years are not a happenstance development. It reflects clear implementation of Hamas policy directed at the State of Israel. The policy is facilitated by an exceptionally well organized and developed infrastructure directly benefitting from wide-spread support within the Gaza Strip.

While admittedly an open—and rhetorical—question it is appropriate to ask how Hamas and the Gazan population benefited from the constant barrage of missiles to which they subjected Israelis living in

southern Israel. In that sense, while Israel disengaged Hamas's response was constant armed attack. George Will has correctly asked whether the U.S. would tolerate such an attack; the answer is obviously 'no'. The border closings have clearly contributed to much criticism of Israel in the 'court of international opinion' and resulted in hardship for the residents of the Gaza Strip. That said, Israel's closing of the crossings was in direct reaction to the missile firing policy.

HAMAS

I would like to turn my attention at this stage to Hamas. Hamas (the word is an acronym meaning "Islamic Resistance Movement") is the Gaza Strip "off-shoot" of the Egyptian Islamic Brotherhood established in 1987/1988 in the initial stages of the Palestinian intifada (1987-1993). There is some controversy regarding the circumstances of its establishment; some have suggested it was largely an Israeli creation as a counter-weight to the Palestine Liberation Organization (PLO), at the time the dominant Palestinian entity. Be that as it may, Hamas quickly made its mark. In February 1989 Hamas terrorists killed IDF Staff Sgt. Avi Sasportas and in May, 1989 Cpl. Ilan Sa'adon was killed by Hamas.

Hamas has consistently argued that it is a movement with two distinct purposes: providing social services to the population and attacking Israeli targets in Israel, the West Bank and the Gaza Strip. Israel has consistently defined Hamas as a terrorist organization without distinguishing between different organizational goals and infrastructure. Hamas virulently opposed the Oslo Agreements accusing Arafat of 'selling out' rather than continuing the 'struggle' against Israel. Moreover, Hamas has historically rejected the two-state solution; according to the Hamas charter: "There is no solution to the Palestinian problem except by Jihad. The initiatives, proposals and International Conferences are but a waste of time, an exercise in futility." (<http://www.acpr.org.il/resources/hamascharter.html>).

While some have suggested a direct link between Hamas and Iran (akin to the link between Iran and Hezbollah) I would suggest caution in drawing direct parallels. This is primarily because Hamas perceives itself as a local (Palestinian) nationalist-religious party that has consistently rejected efforts by "outsiders" (al-Qaeda, Hezbollah) to participate in the Palestinian-Israeli conflict, just as Hamas has not participated in their conflicts (there are no reports of Hamas fighting in Lebanon, Iraq or Afghanistan). That said, careful attention must be paid to the possible continued supplying by Iran of missiles to Hamas.

I would be remiss were I not to add a word about Hamas's conduct with respect to its own population. Three points are appropriate to note: while Hamas leadership was in underground bunkers, the civilian population was indeed exposed to IDF attacks (<http://www.freerepublic.com/focus/f-news/2157211/posts>), it has been reported by the UN that Hamas leadership stole humanitarian aid intended for the civilian population (http://www.indymedia-letzebuerg.net/index.php?option=com_content&task=view&id=18181&Itemid=28) and has actively engaged in human shielding (<http://www.youtube.com/watch?v=J08GqXMr3YE>, showing armed terrorists grabbing innocent civilians, including children, and holding them close to the body in an effort to 'convince' the IDF not to operationally engage), which is without doubt a grave violation of international law.

WHO IS A LEGITIMATE TARGET? PROPORTIONALITY EXAMINED

Over the years Israel conducted person specific operational counterterrorism directed at the individuals responsible for terrorism. The most effective manner to explain this is by describing the suicide bomber infrastructure. According to counterterrorism experts a successful suicide bombing requires four roles: the bomber, the planner/bomb maker, the financier and support personnel (primarily, the driver). Traditional operational counterterrorism is predicated on reliable and credible intelligence that provides decision makers and commanders with information relevant to specific individuals. In the traditional paradigm the legitimate target is defined as a direct participant. The critical question is when is an individual directly participating.

I have argued elsewhere that the bomber is a legitimate target only when actively engaged either in actual preparation or in motion towards the intended target; the planner is a legitimate target 24/7; the sup-

port personnel and financier only when engaged in activities or financial transactions relevant to terrorism. In the classical international law model the nation state was obligated to honor the principles of alternatives, collateral damage, proportionality and military necessity. These principles were to be strictly respected; commanders were obligated to instruct their forces accordingly and all command levels were to be taught these principles (In my capacity as Commander, IDF School of Military Law I had command responsibility for developing an interactive video instructing IDF soldiers how to conduct themselves vis-à-vis a civilian population).

In the traditional paradigm the principles were applied with the over-arching goal of operationally engaging the legitimate target who was believed to be—based on intelligence information—a direct participant. Israel’s traditional operational counterterrorism model was predicated on the triangle of intelligence information, identifying the legitimate target based on direct participation and international law obligations according to the four principles articulated above. While the four principles are of equal importance, it seems accurate to suggest that proportionality receives the greatest attention and is the most scrutinized. It is also, I suggest, the most problematic, most misconstrued, and the least attainable. Clearly, it is ill-defined. Simply put, how can there be proportionality in the context of state-non-state conflict? It is a conflict that is inherently disproportionate. After all, history is replete with examples of disproportionate warfare between nation states, much less between states and non-states.

What is the blitz of London? What is the fire-bombing of Dresden? While the principle of proportionality was intended to protect the civilian population, the reality of war, unless conducted by foes of and with equal power, is characterized by disproportionate force. After all, war is won in large part by use of significant force in order to defeat the other military.

In the person specific operational counterterrorism model, proportionality means state action (proactive and reactive alike) must be proportional to the threat posed (whether actual or perceived depends on intelligence information and circumstances). Operationalized the term means the commander must be very selective both with respect to force used and individuals targeted. It also means the military commander in a state-non-state paradigm has significantly greater firepower available. After all, the commander has the capability to request additional forces (air, ground and sea) well beyond the capacity of a non-state organization (with the possible exception of non-conventional weapons).

The reality is that disproportionate force is the manifestation of what Major General Charles Dunlap calls “asymmetrical warfare.” A conflict between Israel and Hamas is inherently asymmetrical—the organization while armed with missiles, does not have planes, tanks and patrol boats. The force available to Israel is obviously disproportionate. The question is whether Israel used the disproportionate force disproportionately. The answer depends on what predicated Operation Cast Lead and with whom Israel was engaged.

THE ABA NATIONAL SECURITY LAW REPORT
<http://www.abanet.org/natsecurity/>

EDITORIAL BOARD

Suzanne E. Spaulding
Stewart Baker
Richard E. Friedman
Elizabeth Rindskopf Parker
Holly Stewart McMahon
Gregory S. McNeal, Editor (gregory.mcneal@gmail.com)

The *National Security Law Report* (N.S.L.R.) contains articles concerning the law relating to the security of our Nation and associated topics. The N.S.L.R. is sponsored by the ABA Standing Committee on Law and National Security. The views expressed in this publication are not necessarily those of the Standing Committee, the ABA, or any governmental agency or private enterprise.

To receive the N.S.L.R., contact Holly Stewart McMahon at 740 15th St., NW, Washington, DC 20005-1009; (202) 662-1035; FAX (202) 662-1032; or hcmahon@staff.abanet.org.

Copyright © 2009 American Bar Association, ISSN 0736-2773.

OPERATION CAST LEAD—SELF-DEFENSE?

Back to facts...for over 3 years (after disengagement from the Gaza Strip) 6,000 missiles were fired into Israel from within the Gaza Strip. One million Israelis living in a 25 mile (40 kilometer) radius of the Gaza Strip were endangered by daily barrages. While property damage was not insignificant, fortunately loss of human life and injury were kept to a minimum. Despite this fact, this is frankly, a largely meaningless statistic. The fortunate preservation of life is largely the result of a well prepared Home Front Command and a well-trained public who sat in bomb shelters while schools and kindergartens were closed for fear Hamas would fire missiles in the morning hours. Of far greater importance and relevance to the proportionality discussion is the fact that Hamas deliberately put at risk—on a daily basis—one million Israelis. It is to that fact that Israel responded.

According to Article 51 of the United Nations a nation state may respond if an armed attack has occurred (<http://www.un.org/aboutun/charter/chapter7.shtml>). While I have advocated elsewhere for the adoption of an anticipatory self-defense paradigm in a re-articulated international law model, responding to 6,000 missiles is not anticipatory self-defense. It is classic self-defense as understood by international law. Is the response proportionate? To answer this question we must ask proportionate to what and to what threat posed by whom.

In announcing Operation Cast Lead Defense Minister Barak declared war on Hamas. While Hamas is not a State it is the democratically elected ruling party of an area, the Gaza Strip. Therefore, Israel did not declare “war” as traditionally understand in international law. In addition, it eschewed the person specific counterterrorism it has conducted for decades. In operational terms the significance is enormous: by declaring war on an organization the IDF significantly expanded the pool of legitimate targets. Rather than limiting operational engagement only to those operationally engaged Israel declared “war” on an entire organization.

Recognizing the distinction between declaring war on an organization and traditional operational counterterrorism is essential to the discussion. In declaring war on Hamas, Barak expanded the category of legitimate targets to include not only the four ‘actors’ intrinsic to the suicide bomber infrastructure previously described, but also to include additional categories. Those additional categories when applied broadly (as Israel did) include passive supporters of Hamas.

What does that mean operationally? As I have argued elsewhere (<http://jurist.law.pitt.edu/forumy/2009/01/legal-aspects-of-operation-cast-lead-in.php>), the IDF broadened legitimate targets to include passive supporters. While some have suggested this is akin to “aiding and abetting” in the criminal law paradigm I would suggest it is broader than that. Passive support extends to individuals who knew of Hamas’ activity (missile firing) and one can assume passively supported the policy knowing that at some point Israel would respond. This broad scale approach—as distinct from person-specific counterterrorism—comes dangerously close to “guilt by association.” However, as required by international law the IDF warned the civilian population prior to specific military operations.

According to the IDF, over 250,000 phone calls were made to residents of the Gaza Strip warning them of impending aerial bombings intended to strike at Hamas’s infrastructure in the Gaza Strip. Furthermore, flyers were consistently dropped warning residents of the Gaza Strip of imminent attacks. Both measures are in accordance with international law obligations requiring protection of the innocent civilian population. The purpose was clear: to minimize the damage to innocent residents of the Gaza Strip while fully engaging Hamas commensurate with an expanded definition of “legitimate target.”

This is the manifestation of a re-articulated international law. Direct participation as the sole criterion determining whether an individual is a legitimate target has been replaced by a new paradigm that categorizes both direct participants and passive supporters as legitimate targets. What enormously complicates this re-articulation of legitimate targets are two realities: Gaza Strip is the world’s most densely populated region and Barak’s declaration was against Hamas, not the Gazan population.

PROPORTIONALITY RE-ARTICULATED

Commentators have pointed to specific examples where it is claimed that Israel unequivocally acted disproportionately. In particular, the criticism has focused on two events: the bombing of a Hamas police parade (<http://www.ynetnews.com/articles/0,7340,L-3644911,00.html>) and the bombing of a UNRWA facility (<http://www.hrw.org/en/news/2009/01/07/gaza-israeli-attack-school-needs-full-un-investigation>). I would like to address the first as the facts and circumstances of the second are ambiguous.

Israel readily acknowledged bombing the parade which was the opening salvo in Operation Cast Lead. Perhaps more than any other attack during the operation it represents the fundamental break from traditional, person-specific operational counterterrorism. It is, by all measures, an unambiguous implementation of the re-articulated concept of legitimate target and directly reflects how proportionality has been accordingly re-defined. It is a very concrete example of international law not as applied neither to traditional operational counterterrorism nor to war as historically understood but to a new concept—war against a non-state actor.

By declaring “war on Hamas,” the policemen participating in the parade were considered to be affiliated with the organization. In accordance with the re-articulated definition of legitimate targets the policemen were deemed legitimate targets even if not operationally engaged. According to this new criterion, the target—if identified as a supporter of the organization—need neither be operationally engaged immediately preceding the bombing nor suspected of involvement in terrorism. This represents the fundamental distinction between traditional international law and re-articulated international law. It goes to the heart of how proportionality is re-configured.

To better understand the fundamental philosophical difference it is helpful to visualize a spectrum: on one end is war as traditionally understood and on the other end is operational counterterrorism. Between those two, but far closer to war (state-state) is “war on an organization.” In the “war on organization” paradigm the proportionality discussion must be fundamentally re-configured. This requires circling back to the beginning two preliminary assumptions: Hamas and Israel have disproportionate weapons at their disposal and Operation Cast Lead was classic self-defense.

This was not anticipatory self-defense rather it was self-defense as defined by Article 51. Over the course of three years 6,000 rockets were fired by Hamas into Israel meaning that Israel had been under constant and consistent armed attack. During that period of time Israel engaged in what can only be described as “disproportionate restraint.”

Not one individual and not two were responsible for the smuggling, manufacturing, hiding/storing, firing and no less importantly providing the necessary infrastructure that enabled the consistency and constancy of the attacks over the course of years. To fire that many missiles over a number of years as Hamas has done requires an organization that far more resembles a state than a terrorist organization.

How the nation state defends itself against an attacking non-state actor is a critical question that must be addressed by academics, policy makers and the human rights community. The citizens of the nation state when under attack, have the right to demand that the state protect them. The state has the obligation to protect its civilians. That is the essence of the social contract between the individual and the state: the state will protect and defend its citizenry. If, for three years (post disengagement from the Gaza Strip) the civilian Israeli population (Jewish and Arab alike) has been under armed attack then it has the right to demand—and expect—from the state active protection. Why the Olmert government waited before responding to the missiles is a legitimate question that the citizens of Israel have a right to ask. It is, however, an issue beyond the purview of our discussion.

Operation Cast Lead re-articulated the traditional international law model so that a state can declare a war on an organization in its entirety. The logical conclusion then, is that proportionality is similarly re-configured. The reasoning behind the re-articulation of proportionality is basic: only an

organization with a developed infrastructure, loyal activists and wide-spread passive support could have smuggled, developed, stored and fired 6,000 missiles. International law, in adapting to new geopolitical realities must enable the nation state to effectively defend itself not only in the context of traditional operational counterterrorism but in a broader “almost war” between the state and a large and committed organization.

While the loss of innocent human life is always tragic it is also essential to understand who ultimately bears responsibility. It should and must never be forgotten that Israel disengaged from the Gaza Strip three years ago and turned control over to Hamas. For three years after gaining control over an entire region Hamas took to the offensive and attacked Israel. Perhaps the title of our debate should be “disproportionate restraint”.

DAVID LUBAN RESPONDS

Readers of Professor Guiora’s analysis of Israel’s Gaza campaign and my own may conclude that we are engaged in entirely different projects, based on dramatically different premises. My own analysis is straightforwardly positivist and conservative: it accepts the traditional just-war framework as interpreted in the law of war, and asks whether, within this framework, Israel broke the law. My answer was yes. Professor Guiora’s project is more radical. He rejects the traditional framework in the fight against terrorist groups and proposes “a new paradigm that categorizes both direct participants and passive supporters [of Hamas] as legitimate targets.” The new paradigm is not simply Professor Guiora’s proposal, though. He believes that Israel has “re-articulated international law,” and that Israel accepts the new paradigm. Within the new paradigm, Israel has acted lawfully and properly—and if Israel has violated proportionality, it is through “disproportionate restraint.”

Under the new paradigm, “a state can declare a war on an organization in its entirety”; the class of legitimate targets expands to include both “direct participants” and “passive supporters” of the organization; and “proportionality is similarly reconfigured.” Although Professor Guiora does not explain in detail what the “reconfigured” proportionality principle is, it seems to entail a drastic conclusion: the destruction of “passive supporters” of Hamas, who are “neither ... operationally engaged ... nor suspected of involvement in terrorism” will henceforth count as a legitimate war aim, and collateral civilian devastation will be illegal only if it is clearly excessive compared with that aim.

In effect, the “reconfigured” international law alters not only the principle of proportionality, but the morally fundamental principle of discrimination, which requires that military violence discriminate between civilians and combatants and target only the latter. The “new paradigm” subtracts passive supporters of Hamas from the set of civilians whom the law protects, and transfers them to the set of legitimate targets. That reclassification of civilians “reconfigures” proportionality because now the set of innocent civilians is smaller and the set of legitimate targets is correspondingly larger. In the ratio of civilian “collateral damage” to legitimate destruction of enemy combatants, the numerator shrinks and the denominator expands: instead of N civilians:M combatants, we now have N-X civilians:M+X combatants, where X represents the “passive supporters” of Hamas. The smaller ratio is more likely to survive a JAB proportionality test than the former.

I do not know whether the Israeli government accepts Professor Guiora’s “new paradigm” as its own. It may well. The “new paradigm” would explain why Israel’s first target was a police graduation ceremony—a choice of target and time that was evidently chosen to maximize death and devastation among Hamas members—and why Israel targeted buildings that house Hamas’s apparatus of civil administration. It would explain why Defense Minister Barak named “dealing Hamas a forceful blow” as one of Israel’s three war aims (press conference, Dec. 27, http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Israel_strikes_back_against_Hamas_terror_infrastructure_Gaza_27-Dec-2008.htm). And it would explain the widely quoted and controversial comment of Prime Minister Olmert, that “The government’s position was from the outset that if there is

shooting at residents of the south there will be an Israeli response that will be harsh and disproportionate by its nature.” If that was really the Israeli government’s position from the outset, it means that Israel had concluded that “by its nature” the kind of war it was fighting would violate traditional proportionality.

It appears that Professor Guiora and I both agree that blowing up Hamas’s civil administration violates the law of war under the “traditional paradigm,” but I see that as grounds for criticism, and he does not.

In response, I want to emphasize two main points. First, the international law of war does not go away merely because Israel rejects it in favor of the new paradigm (assuming Professor Guiora’s diagnosis of Israel’s legal position is correct). As a jurisprudential matter, it is not up to Israel, or any one state, to “re-articulate” and “reconfigure” international law, any more than a single citizen can “reconfigure” domestic law so that smiting his enemies is no longer a crime. International law does not belong to any state. The law of war is a matter of multilateral treaties, of international custom, of soldiers’ shared sense of martial tradition and warrior’s honor, perhaps even of natural law—Grotius’s *jure belli ac pacis*. As I pointed out in my contribution to this debate, the “new paradigm” would violate Israel’s own domestic interpretation of the law of war, which remains largely traditionalist.

Second, the “new paradigm” crosses a moral line that should never be crossed: the line between combatants and their civilian supporters. Expanding the range of targets to include all Hamas members and passive supporters comes, in Professor Guiora’s words, “dangerously close to guilt by association.” He is undoubtedly right that Hamas’s rocket attacks require a large infrastructure of sympathizers and enthusiasts. And it may be that Gazans both in and out of Hamas hate Israel, pray for its destruction, and cheer the rockets. That does not entitle the Israeli Defense Forces to become their executioners. Hatred, enmity, and political passion are hardly unique to the Gazans, and if every civilian hater were a legitimate target in every conflict, the law of war would become a death warrant for thinking evil thoughts.

Professor Guiora believes that the growth of terrorist organizations makes the new paradigm necessary. We heard similar ideas from the Bush administration about the U.S. war with Al Qaeda; and the result was a legal definition of “enemy combatant” in the Military Commissions Act that may encompass tens of millions of people. Thankfully, that definition has not seeped into the U.S. law of armed conflict, which retains the traditional principle of distinction. Professor Guiora himself seems ambivalent about the new paradigm: in places he backs away from it and asserts that Israel has fulfilled its obligations under the traditional law of war. Perhaps he recognizes that the new paradigm is not the law that the world recognizes. Nor should it be.

Covert Action and the War on Terror: Reconciling Secrecy and Public Legitimacy

By Sarah Miller

(Sarah Miller is a third year law student at Harvard Law School, where she is also Co-President of the Harvard National Security and Law Association. She is also finishing a Ph.D. in International Relations at Cambridge. This essay was the winner of the *ABA Standing Committee on Law and National Security’s* 2008 Student Writing Competition.)

INTRODUCTION

It is now a commonplace to aver that 9/11 has changed everything; that the terrorist threat requires the deployment of any and all means against a largely undeterrable adversary. Moreover, according to various newspaper reports, a significant dimension of the “war on terror” appears to be prosecuted in secret through an array of CIA operations. Only a handful of these operations have been revealed, but they include the GST program, authorized less than a week after 9/11, which reportedly encompassed extraordinary rendition, black sites, and targeted killings of al-Qaeda leaders. Beyond operations concerning al-Qaeda, major news sources have reported that the President authorized a major

clandestine program to destabilize Iranian president Ahmadinejad through black propaganda and covert support for his opponents. On the eve of the 2005 Iraqi elections, President Bush reputedly urged the CIA to neutralize Iranian interference by subsidizing moderate secular Iraqi groups; the operation was allegedly scuttled at the last minute.

All of these operations exemplify covert actions, defined as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.” Covert action excludes activities undertaken for primarily intelligence-gathering purposes; diplomatic or military activities; law enforcement activities; “routine support” for overt activities conducted by other American agencies operating abroad, and cannot include activities intended to have a domestic effect. (See 50 U.S.C. § 413b(e)).

Covert action is not a method unique to the war on terror, but the terrorist threat has endowed it with a newfound sense of indispensability. Never in American history has covert action received such solid statutory recognition as a principal means of waging a war. From its inception in 1947, the CIA relied upon the National Security Act’s reference to “other means” to infer Congressional authorization. (See Arthur Darling, *The Central Intelligence Agency: An Instrument of Government to 1950* 260-5 (1990).) Now, the Anti-Terrorism and Effective Death Penalty Act of 1996 includes an express Congressional finding that “the President should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens.” (Pub.L. 104-132, 22 U.S.C.A. § 2377 (1996).) More recently, the Intelligence Reform and Terrorism Prevention Act of 2004 included a Congressional finding that “Long-term success in the war on terrorism demands the use of all elements of national power, including diplomacy, military action, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense.” Pub.L. 108-458, Title VII, § 7101, 118 Stat. 3775 (2004). Whatever the reservations about relying so heavily upon a foreign policy tool outside the ordinary boundaries of the political process, covert action seems an essential strategic tool given the swift timeframe needed to mount operations for intercepting identified terrorists, the political sensitivity of operations in places like Northern Waziristan and the inefficacy of conventional warfare against a transnational, non-state opponent.

I. LEGAL CONSTRAINTS ON COVERT ACTION

These developments raise anew questions about the nature of legal constraints upon CIA covert actions. The first category of constraints concerns limitations on CIA activities and targets. The CIA cannot violate the Constitution or U.S. law, nor can it conduct any activities in the United States. (See 50 U.S.C. §413b(f) and §413b(a)(5).) But until recently, the notion that as a general matter the Constitution does not protect non-U.S. citizens abroad arguably made this a limited constraint. The recent Supreme Court decision in *Boumediene v. Bush* has extended constitutional protections in the habeas context to non-citizen detainees abroad, but it leaves open critical questions concerning the degree of U.S. involvement necessary to constitute “U.S. action” and the extent to which its analysis extends beyond the habeas context. (See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).) Moreover, to the extent that *Boumediene* constrains Agency operations, it will be through its interpretation by executive branch lawyers; standing and the state secrets and political question doctrines limit the possibility of judicially imposed rules on the Agency. (See, e.g., *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005).) The CIA has been banned from conducting assassinations since 1976, (See Executive Order 11905 (1976)); the most current version of this prohibition states that “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.” (Executive Order 12333 (2008).) But this limitation is almost certainly inapplicable in war, where an otherwise impermissible would-be assassination in peacetime can be justified as a valid exercise of self-defense.

Executive Order 12333 and a handful of statutes impose other limitations—for instance, on the use of surveillance abroad—but a number of these limitations turn on whether the target is a U.S. citizen. (See, e.g. Section 2.5, Executive Order 12333 (2008) (on surveillance); see also 50 U.S.C. § 413b(a)(5).) The Agency, pressured to use its assets to the utmost and ferret out would-be terrorists before they can again launch an attack on American soil, has, according to public accounts, opted for the most aggressive legal interpretations possible to facilitate its mission. (See Jack Goldsmith, *The Terror Presidency*, 43–70, 99–140 (2007).) More rules may limit the Agency, but they are in the form of classified annexes to executive orders, and are thus beyond public scrutiny. (See John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 *Mich. J. Int'l L.* 595, 617 (2007).) These examples rebut the notion that CIA faces no legal constraints when it undertakes covert actions, but because these limitations are legally complex, tend to be defined by Agency lawyers and others within the executive branch, and are almost never litigated, they receive little public attention. The critical outcome is the perception that the Agency operates with few limits on its covert action programs.

The second category of constraints concerns limitations on the conduct and regulation of covert action imposed by constitutional separation of powers principles. As a matter of constitutional law and as a matter of practical politics, the executive and legislative branches have sparred over these issues for decades. Until recently, congressional statutes have had relatively little impact upon presidential discretion in the intelligence arena. By statute, the president can only approve a covert action if it is “necessary to support identifiable foreign policy objectives of the United States” and “important to the national security,” but these criteria are left for the President to define. (50 USC §413b(a).) Nor is the War Powers Act a constraint, for it deliberately excluded CIA use of paramilitary groups from its terms. Nor does Congress possess any statutory authority to accept or reject a proposed covert action. (See 50 U.S.C. § 413(a).) The terms of the National Security Act make it clear that “Nothing in this subchapter shall be construed as requiring the approval of the congressional intelligence committees as a condition precedent to the initiation of any significant anticipated intelligence activity.”

The President is to report his authorization of a covert action program to the Senate and House Select Committees on Intelligence before the operation begins, whereupon the committees can ask questions about the proposal. However, this provision can be waived in “extraordinary circumstances,” and if the president fails to offer prior notice, he is to simply “fully inform the congressional committees in a timely fashion.” Presidents have also historically objected to more stringent reporting requirements as unconstitutional congressional encroachments on executive power. (50 U.S.C. § 413(b).) The distribution of powers between the President and Congress in the foreign intelligence realm is one of the murkiest areas of separation of powers doctrine; whether Congress can substantively regulate it, and whether the President has the constitutional authority to disregard such regulations on the basis of his Article II powers, remains a deeply contentious and unsettled issue.

The expanded use of covert action in the war on terror raises a related question: as other, overt government agencies increasingly engage in practices in the war on terror that are also undertaken by the Agency—detention and interrogation of terrorist suspects being the two most contentious and publicly discussed examples—and as Congress increasingly seeks to regulate these activities, is the CIA equally subject to these regulations? There is a growing tension between the rules that are being developed to govern these practices and the traditional arguments to the effect that the Agency is exempt from such rules. Arguably, given the perception that the Agency is subject to too few constraints, the temptation is for Congress to simply legislate in a categorical fashion and to treat the Agency like any other government organ when Congress prescribes permissible methods to be used in the war on terror.

Three specific risks arise from a failure to clarify what legal constraints apply to covert action and how they are imposed. First, if the CIA becomes exempt from more stringent rules simply by omission, covert action may become the means of choice, not because no other means are feasible but as a

way to evade otherwise categorical prohibitions on certain kinds of conduct. On the other hand, if the default assumption is that all categorical prohibitions apply across the board to the CIA, the Agency may be over-constrained in its actions. The point of covert action, after all, is to use secrecy to achieve objectives not attainable through open means. If the end result is a rule that nothing can be done abroad if it is prohibited at home, covert action loses its strategic significance as an essential means of defending American interests.

Finally, arguably the greatest risk is the risk that the Agency's past will repeat itself, and that a change in the political winds may transform the Agency's reliance upon legal gray areas and congressional acquiescence into indefensible arguments, ushering in another era of congressional condemnation and restructuring. In the fifties, the Agency authorized its most notorious covert action programs with tacit congressional support and a sympathetic public firmly convinced of the Agency's near-infallibility. But Vietnam and Watergate fundamentally altered the political landscape, and unfettered executive discretion over national security, so uncontroversial in the Eisenhower years, hardened into a plainly recognizable "imperial presidency" by the Nixon administration. (See Arthur Schlesinger Jr., *The Imperial Presidency* (1973).) When the Agency's actions finally came to light, the American public turned against the Agency as a symbol of the worst practices of the Vietnam War; its greatest misdeed was not to violate applicable laws—in most cases, there were none—but to violate perceived fundamental norms of governmental behavior in a democracy. The reaction, in the form of the Church Committee, came within a hair of banning covert action outright, and in the aftermath, the Agency's senior ranks thinned, morale collapsed, and its operations suffered. Perhaps some of this was necessary housecleaning; the more important point was its avoidability.

The paucity of present discussion, the ambiguity of current rules, and the dramatic rise in covert action programs still raise the specter of an eventual backlash against the Agency, not only on the basis of the methods it uses to wage the war on terror but on the grounds that the decision-making process for covert action is too distant from democratic accountability to be considered legitimate. Disclosures concerning the Agency's destruction of videos showing its use of coercive interrogation tactics, and ongoing Congressional investigations into the subject, may have already sparked the flame. (Scott Shane, *CIA Agents Sense Shifting Support for Methods*, *New York Times*, Dec. 13, 2007.) Neither the Agency nor congressional interests are well served by cycles of acquiescence punctuated by revelations, overcorrections, and restructuring. The problem of reconciling the strategic need for covert action with all the demands of a democracy may have no fixed solution, but clearer rules about decision-making processes may avert the worst swings of the cycle.

PART II: THE CASE FOR TRANSPARENT GUIDELINES GOVERNING COVERT ACTION

This section considers two possible ways of resolving the tensions described in Part I: (1) establishing a clear exemption for covert action such that CIA operations are considered automatically exempt from rules that might otherwise apply, and (2) establishing transparent rules to assess the desirability or permissibility of particular covert actions. While a clear exemption would further the paramount objective of keeping covert operations secret, this section concludes that transparent rules are nonetheless superior and could be promulgated in a way that addresses security concerns.

A. Establishing a clear exemption for covert action

What might a rule completely excluding covert action from substantive legal regulation look like? Existing statutory limitations, including prohibitions on domestic activity and any other explicit limitations on covert action, would remain. As for everything else, a clear default position could be established: unless expressly stated otherwise, the CIA would be exempt from the regulation of activities like interrogation and detention that would apply to all other government entities, including the military. This is the rule Congress adopted in the context of the War Powers Act, which excluded covert

paramilitary action. (See Damrosch at 798-9.)

The case for a presumptive CIA exemption is in many respects compelling. In order to defeat a transnational, non-state enemy of ruthless tactics and limitless determination, one might argue, American security depends on deploying all available means. If the war on terror is a prolonged national security emergency, Congress should not be able to intervene in particularly sensitive matters due to the risks of delay and the disclosure of national security secrets. The more knowledge of covert action programs can be restricted to a small number of individuals, the greater likelihood that American officials could plausibly deny any knowledge of such activities. Beyond this, intelligence is an area that does not lend itself well to comprehensive, set rules, since so much is situational, unforeseen, and unseen. Finally, internal executive branch regulation, in the form of executive orders, National Security Council scrutiny of proposed covert actions, and legal assessments by executive branch lawyers, creates some level of effective oversight and legal constraints, mitigating the need for substantive regulation by Congress. Thus, a presumptive exemption for CIA would ensure that the benefits of covert action are fully realized and would also generate a more predictable rule than the present. Moreover, such a rule would minimize the risk that Agency officials might be retroactively prosecuted for relying on non-public legal advice in the event Congress later succeeded in prohibiting certain Agency actions.

However, such a course of action appears highly unrealistic. As a practical matter, in order to secure enduring CIA exemptions from congressional regulation of matters in which CIA and other government agencies are involved, the President must either be able to successfully veto all such legislative proposals or be willing to claim a preclusive power to flout legislation passed over his veto, a course that carries significant risks of public disapproval and a brutal battle over relative constitutional powers. Moreover, such a course relies on unrealistic notions of secrecy and an unrealistic degree of public confidence in the integrity of intelligence agencies. Plausible deniability is ever more difficult to achieve given the constant news cycle and the global reach of communications. The fundamental assumption must be that covert actions inevitably will be revealed. The American public has been historically hostile to the notion that covert action is an area exempt from scrutiny; even if the current public agreed to place covert action off bounds, there is no guarantee that future generations would be as forgiving when operations were inevitably revealed, and the resulting backlash could easily prompt over-reaction and over-regulation. Justifications solely based on assertions of necessity ring hollow. If covert action is to remain a significant tool in the American arsenal, it must possess at least some level of public legitimacy, an impossible goal if it is entirely shielded by a cloak of secrecy.

B. Transparent options

1. Categorical prohibitions: Categorical prohibitions on certain activities seem the most likely means by which Congress may set limits applicable to covert action. The key question is whether categorical prohibitions on certain types of activities should necessarily extend to the Agency as well as to the military and to overt agencies involved in foreign affairs. The argument for applying categorical prohibitions to certain activities to covert action is simple: certain acts are so fundamentally repugnant to the essence of a democracy that they should be prohibited no matter how efficacious they seem; leaving covert action as a possible loophole would undermine the force of any otherwise sweeping prohibition. Categorical prohibitions on certain actions have the added advantage of clearly identifying prohibited behavior in a way that reinforces both moral and legal sanctions against it. The problem is in drawing a line between applying some versus all categorical prohibitions to the Agency. If there is no scope for the Agency to have some exemption from the normal rules applying to overt diplomacy, covert action simply becomes overt action.

A few tentative distinctions can be made. First, categorical rules pertaining to human rights can and should be distinguished from categorical rules pertaining to the use of force. Torture is the same act irrespective of whether it is carried out by secret agents or by military interrogators; carrying out torture

in secret does not affect the essential nature of the act. Moreover, human rights violations are generally proscribed both in war and in peace. The use of force can be seen differently, not least because as a practical matter, the secret use of paramilitary forces, though technically an act of war, is treated differently from the overt use of the military. Moreover, the rules governing the use of force obviously shift, both legally and perceptually, depending on whether the country is at war. All of this suggests that if categorical prohibitions become the main means by which CIA covert actions are restricted, they should not be automatically applied across the board.

But even if such a sliding scale were developed, the task of applying categorical prohibitions to the Agency as a means of regulating covert action is still problematic. Such rules would still remain piecemeal. Moreover, while such rules would clarify the constraints applicable to covert actions, they would do little to correct the perceived legitimacy and transparency of the decision-making process, and as a practical matter, the ways in which such prohibitions were interpreted within the executive branch would remain out of sight.

2. Substantive criteria: This paper instead argues that the perceived legitimacy concerns surrounding covert action could best be addressed through the development of substantive guidelines. At present, the substantive criteria used by the political branches to assess the desirability of a proposed covert action are vague. The amended National Security Act requires the President to make a finding that the covert action is “necessary to support identifiable foreign policy objectives of the United States” and “important to the national security of the United States,” but these broad phrases are left undefined. (50 U.S.C. §413b(a).) As of July 2008, the National Security Council is to provide the President with an assessment of covert actions in light of general policy considerations, relevant legal issues, and effectiveness and consistency with current policy. (See Section 1.2, Executive Order 12333 (2008).) The Senate Select Committee on Intelligence, one of the two committees charged with oversight, has recently noted that it reviews proposed and ongoing covert actions only “to ensure that their means and objectives are consistent with U.S. foreign policy goals, were conducted in accordance with U.S. law, produce or can be expected to produce reasonable benefits for the resources expended, and are consistent with U.S. ideals and principles.” (See Report of the Select Committee on Intelligence, United States Senate, Covering the Period January 4, 2005 to December 8, 2006 (2007).)

A move to more transparent and comprehensive guidelines offers the potential for greater transparency without compromising secrecy. Such guidelines should set no fixed rules to mechanically determine when a proposed covert action should go forward. Instead, the guidelines should articulate the essential questions to ask about the desirability, efficacy, and potential consequences of a proposed covert action in order to identify the full range of potential costs and benefits and to highlight an acceptable range of risk. Ideally, these guidelines might inform both the internal debates within the executive branch over the desirability of a proposed covert action and the debates within the congressional committees charged with oversight. If the same standards were used to assess covert action programs at both stages of the process, oversight of covert action might become a more collaborative process between the executive and Congress, even if the standards did not result in any greater degree of executive disclosure to Congress. Finally, the public could at least understand the process being followed, if not the operational details.

The advantages of a set of flexible criteria are many. While these guidelines would not necessarily set stricter limitations on the use of covert action, they would at least provide a clearer articulation of how covert action programs are assessed and what legal constraints were considered. Judgment calls as to the line between wise and unwise covert actions must remain secret, but disclosing the questions asked would at least furnish foundations for public discussion in the event of disclosure. Such guidelines would also ensure structured, robust discussion of covert action programs between the executive branch and in Congress. Even if, in practice, these discussions already occur, these debates are necessarily conducted in secret; transparent guidelines would at least provide assurance that rationales for a

course of action were developed *ex ante* rather than *ex post*.

How effective might these guidelines be in discouraging overly risky covert action programs? One answer comes from Secretary of Defense and former DCI Robert Gates, who reflected, “I sat in the Situation Room in secret meetings for nearly twenty years under five Presidents...and all I can say is that some awfully crazy schemes might well have been approved had everyone present not known and expected hard questions, debate and criticism from the Hill.” (See Robert M. Gates, *From the Shadows* 559 (2007).) Even if the guidelines offered no substantive improvement over the current process, they would still offer the benefits of greater transparency and would thus enhance the public legitimacy of covert action.

The idea of guidelines to evaluate the use of covert action is not new. In the immediate aftermath of the Iran-Contra affair in the late eighties, a number of academics, former practitioners, and congressional committees considered the idea. (See Report of Activities (Senate, Nov. 21, 1989) hereafter referred to as the “Senate 1985-6 criteria”; Loch Johnson, *On Drawing a Bright Line for Covert Operations*, 86 A.J.I.L. 284, 305-6 (1992); Michael Reisman and James E. Baker, *Regulating Covert Action* 139-43 (1992).) More recently, a number of academics and former practitioners have developed guidelines to enhance transparency in other elements of the war on terror. (See, e.g., Philip Heymann and Juliet Kayyem, *Protecting Liberty in an Age of Terror*, 29-30, 109-117 (2005); David Omand, *Ethical Guidelines in Using Secret Intelligence for Public Security*, 19 *Cambr. Rev. Of Int’l Affairs* 4, 613 - 18 (2006).)

3. *Guidelines*: While this essay seeks to build upon past proposals, it advocates the following as the basis for guidelines for covert action in the present:

Necessity, meaning that a severe threat exists justifying the use of covert action. Subordinate criteria to establish necessity might include:

- Is the threat severe and/or imminent? This criterion might involve a showing that a significant threat exists, along with an estimate of the reliability of the underlying intelligence. Even if the intelligence itself cannot be disclosed, promoting a discussion about the credibility of the intelligence used to arrive at this estimate seems essential.
- What kind of a threat to national security is it? Clearly, an imminent terrorist attack on an American base abroad would be universally recognized as an obvious threat to national security, but as the concept of “national security” becomes broader, a hierarchy of threats might be developed.
- Have all other feasible means been exhausted? This criterion might look to the kind of covert action under consideration—whether it is a black propaganda operation, support for guerillas, assistance to a dissident group, or other operations—and to the precise nature of American covert assistance in the course of the operation—whether it be financing, training, ground support, or other acts. It would also address questions of whether the proposed action was being undertaken to evade restrictions on other departments.

Proportionality, meaning that the covert action chosen is proportional to the identified threat and minimizes unnecessary death or damage. Proportionality is a notoriously difficult criterion to define in concrete terms; its meaning changes over time, in reaction to new and different threats.

- One element might include the question of whether the proposed covert action is likely to kill or harm civilians, and whether this risk can be feasibly reduced. Former DCI William Colby, for instance, wrote in 1989 that “It is clear that torture, violation of American law, the use of repulsive weapons, indiscriminate violence against innocent bystanders, etc., all must be considered beyond inclusion as ‘proportionate.’” (See Colby at 65.) Regardless of where the line falls on proportionality, it is an essential criterion both from the standpoint of governmental justifications of the action if it is exposed and from the standpoint of good

operational practice, since the more unnecessary force is used, the greater the likelihood of exposure.

Effectiveness, meaning that the proposed covert action is likely to succeed in its stated aims with an acceptable level of potential consequences. Factors of use to evaluate prospective effectiveness might include:

- The basic capabilities involved, in relation to the strategic objectives.
- The message sent by the proposed covert action, and the likelihood that the target would respond as anticipated.
- Whether foreign collaborators on the ground are needed, and if so, whether their interests are compatible with the U.S. in the short and long term; their past track record; and any risk factors, like serious human rights violations or participation in narcotics or arms trafficking, which might uniquely undermine or discredit the operation if exposed.
- The possible consequences in the country where the covert action is to take place, and possible consequences in the region as a whole.
- The likelihood that Americans, including the American operatives involved, are likely to lose their lives in the operation.
- Whether the proposed covert action will necessarily commit the U.S. to successive interventions even if it succeeds.

Public acceptability, meaning, if the proposed covert action was suddenly revealed, would the resulting anticipated consequences overly embarrass or harm American interests? This is perhaps the most widely accepted standard, both as an internal criterion historically used by the Agency and as a way for the executive branch and Congress to grapple with the likely possibility that plausible deniability might fail. (See Colby at 69.)

Consistency, meaning, the degree to which the proposed covert action comports with stated open aims of American foreign policy, and with ongoing open initiatives. This criterion would explore the degree of risk an administration might be willing to take in terms of a domestic political backlash in the event of inconsistencies. It could also open up discussions of the extent to which an exposed covert action might undermine overt diplomatic initiatives with the target group, country, or region.

Legality, meaning, whether the proposed covert action might violate American laws or international law or norms. The National Security Act expressly prohibits the Agency from violating any U.S. law or Constitutional provision, a position reaffirmed in Executive Order 12333. Because, as described above, the interpretation of these limitations is often undertaken in secret, by lawyers within the executive branch, including discussions of legality within the guidelines would at least afford an opportunity for the executive and legislative branches to identify and debate competing legal theories, even if no consensus was reached.

Incorporating considerations of international law into this criterion would undoubtedly be controversial. In 1985-6, the Senate Select Committee on Intelligence straightforwardly listed justifiability under international law as one of its criteria. (See Senate 1985-6 Criteria.) However, subsequent developments in international law raise a host of more complicated questions. One obvious initial question is whether the proposed operation would violate international law as defined by our allies, or international law as incorporated within domestic law. Moreover, virtually all covert actions violate international law on some level, whether it be a violation of consular relations, non-intervention, or territorial sovereignty, making a line between permissible and impermissible violations difficult to draw. Past experience in the form of the *Nicaragua v U.S.* case before the International Court of Justice suggests, at the very least, that covert action involving paramilitary training and assistance and targeted bombings to assist a foreign group in its campaign may violate international norms of non-intervention and prohibitions on the use of force. (See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*, ICJ Judgment of 27 June 1986.) But because the U.S. has withdrawn from

most optional protocols conferring jurisdiction to international tribunals, it would not necessarily face formal international legal consequences for violations.

Nonetheless, there are a number of policy reasons why conformity with generally recognized principles of international law should be a criterion. First, anticipating potential charges that a given covert action might be seen to violate international law would facilitate a more informed decision on the relative risks and benefits at the outset. Secondly, many covert actions require at least tacit acquiescence from the country where the covert action is being undertaken; larger operations often involve cooperation with allies may depend on intelligence provided through intelligence-sharing agreements. Key American allies, especially European allies, have embraced much more stringent international legal obligations and may be limited in their ability to cooperate in American operations if they would violate these obligations. Significantly, a recent report from Britain's Intelligence and Security Committee revealed that SIS backed out of a number of recent joint operations with the Agency because it did not receive sufficient assurances from the United States that the detainees involved in the operations would be treated in conformity with international human rights obligations. See UK Intelligence and Security Committee Report on Rendition, Jun. 28, 2007, available at <http://www.cabinetoffice.gov.uk/intelligence>.

PART III: IMPLEMENTATION

From the vantage of transparency and public accountability, legislative adoption of the guidelines, supplemented by categorical prohibitions of extreme activities, would be optimal. Guidelines enacted with the full benefit of vigorous congressional debate would carry the greatest presumption of public legitimacy. Moreover, if Congress adopted some form of the guidelines as law, it would send the clearest signal that the guidelines would be incorporated at all levels of the planning and decision-making processes. In practical terms, this would likely mean amendment of the National Security Act of 1947; the guidelines might clarify the meanings of "necessary to support identifiable foreign policy objectives of the United States" and "important to the national security."

Lesser forms of adoption are also available: the president could adopt the guidelines, as both Carter and Reagan did to a more general degree, through executive orders. (See Koh at 59.) However, adoption through executive order does not ensure subsequent administrations will maintain the practice; President Reagan, for instance, pointedly eliminated President Carter's promises of full intelligence sharing with Congress when he replaced and revised Carter's Executive Order 12036 with Executive Order 12333. (See Executive Order 12333 (1980) and Executive Order 12036 (1978).) Nor would this ensure that Congress agreed to the terms of discussion for assessing covert actions.

Finally, the proposed guidelines would surmount the usual separation of powers objections to congressional regulation of covert action because they represent a commitment to discussing a set range of concerns; they do not commit the executive to disclosing any greater degree of information, nor do they give Congress any greater powers of substantive regulation than it already possesses. Their main virtue is to structure discussion and to provide the public with some sense of the criteria on which secret decisions are made, even if the substance of these decisions necessarily remains secret.

Note: *In Case You Missed It*, featuring excerpts from Professor Chesney's National Security Law listserv will return in our March/April issue.

Watch this Newsletter and the Committee's website for the announcement of the **2009 Student Writing Competition** – announcement expected in late Spring.