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Lessons from Gaza: The Rhetoric and Reality of Independence in War Crimes Investigations

By Peter Margulies Thursday, July 28, 2016, 3:40 PM

Omphalos: Middle East Conflict in Perspective

Critics of state investigations of alleged violations of the law of armed conflict (LOAC) often accuse those inquiries of being insufficiently independent from the chain of command. Medics Sans (MSF, also known as Doctors Without Borders) raised this argument about the recently completed—and exhaustive—U.S. investigation into the October 2015 bombing of a MSF facility in Kunduz, Afghanistan. (See my account here and Geoff Corn and Rachel Vanlandingham’s analysis here). And earlier in July, Amnesty International leveled a similar charge against Israel’s efforts to investigate LOAC violations during 2014’s Operation Protective Edge in Gaza. But a careful review of LOAC suggests that the situation is more complex than Amnesty’s rhetoric reveals.

Israel has taken substantial structural steps toward independence in LOAC investigations. Independence in investigations is not an end itself—its primary purpose under LOAC is the promotion of effective, timely, and accurate investigation of war crimes allegations. Earlier this month, I visited Israel with a diverse group of U.S. international law scholars and was struck by the robust exchange of views on the topic. (Disclosure: that trip was sponsored by the American Association of Jewish Lawyers and Jurists, Scholars for Peace in the Middle East, and the Israeli Ministry of Foreign Affairs).

To assess the independence of an investigation, it is necessary to define independence. Mike Schmitt has suggested that, under LOAC, independence is narrowly defined as standing outside a particular operation’s chain of command. The principle of independence under LOAC does not disqualify a state from reviewing allegations about the misconduct of that state’s forces. In the Kunduz case, MSF argued that the U.S. should have relinquished control to a little-known, never used transnational mechanism, the International Humanitarian Fact-Finding Commission. However, international law assumes that states are competent to investigate alleged abuses involving their own forces. The principle of complementarity holds that states, which after all make international law, should have the authority to address their own LOAC violations unless such states default in their duties. That authority is an incident of state sovereignty. Moreover, a contrary view would let states off the hook, inhibiting the development of robust state investigatory capabilities. The world has turned to ad hoc tribunals like the Nuremberg Tribunals and the International Criminal Tribunal for the Former Yugoslavia (ICTY) when the volume and scale of widely acknowledged atrocities and the absence of a state response called out for such a forum. And the International Criminal Court (ICC) can step in today to prosecute matters when a state brought within the ambit of the ICC’s governing Rome Statute has failed to fulfill its own responsibilities. However, state investigations are the default setting for LOAC violations.

As Schmitt observes, the LOAC principle of independence also does not require civilian investigations of alleged military abuses. Civilian conduct of investigations may hinder their efficiency and accuracy, since civilians lack a firm background in tactics, munitions, personnel, and the exigencies of combat. Rather, LOAC merely requires that an investigative team is free from the operational chain of command for the action at issue. This is common sense; LOAC does not permit commanders to handcuff investigations to insulate his or her own decisions from accountability. However, beyond that basic principle, states have a measure of discretion in structuring their investigative apparatus. When courts such as the European Court of Human Rights (ECHR) have gone further, that broadened reading of independence has relied on binding domestic law, such as the European Convention, not on LOAC itself.

Contrary to the recent Amnesty International report, Israel reinforces independence far more concretely than most other states. Israel has repeatedly welcomed outside scrutiny, including the Turkel Commission, a group of prominent Israeli jurists and scholars including a former Supreme Court justice, aided by international experts such as Australia’s Tim McCormack and Canada’s Ken Watkin. Israel invited this group to study its investigative process after the ill-fated Gaza flotilla raid of 2010. The Turkel Commission found that in most material respects, Israel’s process met the independence criterion. For example, as Israel’s 2014 report indicated, the investigative decisions made by the IDF’s Military Advocate General (MAG) are reviewable by the Attorney General (AG), a cabinet official outside the chain of command. Moreover, the AG’s decisions are in turn reviewable by the Israeli Supreme Court, a vigorous body that has forthrightly stated that “the combat operations of the IDF do not take place in a normative vacuum.” (Physicians for Human Rights v. Prime Minister, Para. 11 (2009)). Israel’s Supreme Court has followed up on this observation with concrete interventions that would be unthinkable under the U.S. Supreme Court’s far more deferential regime. For example, Israel’s Supreme Court has imposed constraints on the IDF’s criteria for targeting suspected terrorists (see Schmitt and John Merriam on IDF extensive targeting protocols). The prospect of the Israeli Supreme Court’s robust review, facilitated by the Court’s broad grants of standing to residents of the West Bank or Gaza as well as Israel proper, acts as an additional ex ante check on military discretion.

Following publication of the Turkel Report, an Israeli interagency team, headed by Dr. Joseph Ciechanover (who had served as General Counsel to the Ministry of Defense and Director General of the Ministry of Foreign Affairs) and comprised of representatives from the IDF and Ministry of Justice, recommended further safeguards. All of the Ciechanover team's recommendations were approved by Israel's cabinet earlier in July. A central change was provision for a Fact-Finding Assessment (FFA) of "exceptional incidents" involving alleged loss of civilian life. (See the interagency report here.) The IDF started using the FFA Mechanism during the 2014 Gaza campaign, before issuance of the Ciechanover report. Teams of active duty and reserve military personnel from a variety of disciplines, including law, conduct the FFA. Each FFA works outside the chain of command for the operation under review.

Turkel also urged steps toward further independence in the selection of the MAG. (p. 389) As the Turkel process unfolded, the Israel interagency report added a civilian element here, requiring that the AG consent to each MAG's appointment. This feature is not required by LOAC, as state practice shows; the U.S., for example, has no comparable provision. Turkel made another suggestion: a "Public-Professional Committee" to select the MAG. After much deliberation, the Israeli government wisely decided against implementing this idea.

The public-professional committee would have frayed the fabric of accountability that independence is designed to protect. The committee would have been composed largely if not exclusively of civilians, whose only military experience might have been the mandatory service required of all Israelis. Such a group would have lacked the nuanced understanding of combat necessary to gauge whether a particular candidate for the MAG can do the job. Moreover, the military investigation process depends as much on the trust accorded it by military personnel as it does on respect for the MAG's authority. That trust aids the MAG in addressing the challenges of LOAC investigations, including gathering evidentiary leads and testimony, much of which must come from IDF personnel. Further civilian involvement could have undermined this trust, diminishing the MAG's investigative efficacy.

While a civilian-driven appointment procedure has precedent in other common law states, it would be a marked departure from the U.S. experience. The U.S. does not replicate many of the IDF's safeguards on independence, such as appealability to the AG and the Supreme Court. However, in spite of these limits, the U.S. has long had a robust system of military justice, capable of generating unsparing reports like the recent comprehensive analysis of the Kunduz attack. (See Jens David Ohlin here and Kevin Jon Heller here on the U.S. Kunduz report.) To be sure, the U.S. has had gaps in LOAC compliance, most infamously the "torture memos" issued by the Justice Department after 9/11. However, those discredited opinions were the product of *civilian* agendas. In contrast, in Israel, the Supreme Court checks both civilian leaders and the IDF.

Critics of military LOAC investigations seriously underestimate the difficulties inherent in investigating alleged war crimes. Preserving evidence under battlefield conditions is an arduous task, while witnesses in locations such as Gaza may be subject to intimidation by Hamas and other terrorist groups. Outside observers have a troubled track record when it comes to Israel's Gaza campaigns. For example, the notoriously flawed Goldstone Commission investigation has drawn much critical commentary. All too often, these outside reports, such as the McGowan Davis report for the U.N. Human Rights Council, have failed to adequately acknowledge the challenges that Israel faces in fighting terrorist entities such as Hamas.

The history of international tribunals reviewing tactical decisions in armed conflicts is also troubled. In the *Gotovina* case, the ICTY Appeals Chamber vacated a conviction of a Croatian general who had captured a town held by Serbian forces. The prosecution had sought to retrospectively micro-manage the general's tactics, asserting that any artillery shells that landed more than 220 yards from a specific military target were evidence of a plot to harm civilians. The Appeals Chamber criticized the reduction of military tactics in an armed conflict to a mechanical distribution chart. That reductive approach would subject all commanders to the smug tyranny of hindsight, undermining LOAC's careful balance between humanity and military necessity. (See this article by Geoff and Gary Corn.)

The perils of second-guessing tactical decisions should not obscure legitimate questions about particular episodes. (See my analysis here of one such incident that the MAG is continuing to investigate: the shelling of a U.N. school in Beit Hanoun that resulted in the deaths of civilians who had taken refuge there.) Accurate and timely investigations of these incidents are vital for preserving the accountability at LOAC's heart. When the MAG has declined to prosecute such incidents, it has furnished lucid explanations for its decisions. That lucidity equips Israel well in its interactions with international institutions such as the ICC.

Israel's critics are right on one point. Given the sheer number of military decisions in the 2014 Gaza campaign, common sense strongly suggests that the IDF's performance was not perfect. As human beings, IDF personnel are not immune from the pull of anger, fear, and haste.

However, neither imperfections nor grievous mistakes such as the U.S. Kunduz attack necessarily translate into war crimes. For commission of a war crime, a culpable state of mind is an essential element. Article 8 of the ICC's Rome Statute requires a showing of either intent to harm civilians or recklessness: ordering an attack with the knowledge that the resulting harm to civilians would be "clearly excessive in relation to the ... military advantage anticipated." The high threshold for proof of a culpable state of mind is no accident. Rather, it is a recognition that a less demanding test would not adequately acknowledge the risk of harm that inevitably flows from the fog of war.

Because of the exigencies of armed conflict, assessing the adequacy of a state's efforts to investigate alleged LOAC violations cannot be reduced to a mere statistical compilation of indictments. A responsible, professional military organization such as the IDF has a range of remedies available for its soldiers' mistakes, including the promulgation of "lessons learned" from wartime tragedies. A case in point: the MAG's acknowledgment of the need to improve technological and intelligence capabilities to avoid a repetition of the deaths of four boys on the beach during the 2014 Gaza campaign. One hopes that the U.S. will similarly refine its own systems to avoid a recurrence of the catastrophic Kunduz attack. Any balanced assessment of Israel's compliance with its international obligations should also take into account its readiness to prosecute IDF personnel serving in the West Bank (for example in this manslaughter prosecution based on killing of a wounded Palestinian). That willingness and reforms such as the FFA process that safeguard the MAG's independence furnish strong evidence of Israel's adherence to LOAC norms.

Topics: Omphalos

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