

# Comment

## The Lessons of Qana

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On April 18, 1996, Israeli artillery fired on a United Nations compound in Qana, southern Lebanon. In less than ten minutes, more than 100 Lebanese civilians sheltered in the compound died. Then U.N. Secretary-General Boutros-Ghali ordered his military adviser, General van Kappen, to conduct an inquiry. Van Kappen's report itself became a subject of controversy and a source of acute tension between the Secretary-General and the United States.

Alas, like so many sensational incidents in armed conflict that momentarily engage world attention and then recede as newer and more vivid horrors seize the screen, Qana has already been virtually forgotten. It should not be. It has implications for U.N. actions in the future and, more generally, for the way that humanitarian law will deal with advanced industrial states' increasing propensity to apply the legal requirements of proportionality and weapon-discrimination in ways that minimize their own exposure to casualty.

### I. THE CONFLICT IN SOUTHERN LEBANON

Qana is a village in southern Lebanon that lies approximately ten kilometers east of the Mediterranean coast and approximately twelve kilometers north of the international border between Lebanon and Israel. It is north of the "red line," the area of Lebanon approximately nine miles wide that Israel has tried to control directly or through proxies since 1978. The zone of Israeli control continues to be an arena of conflict between Israel and Lebanese groups, most significantly, Hesbollah—the Party of God—a Militant Shi'ite faction in Lebanon with ties to Iran and Syria.

Over time, Israeli security specialists have concluded that control of this

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area provides an important buffer against attacks on civilians in northern metropolitan Israel. As Syria and successive Lebanese governments have been either unable or unwilling to stop such attacks, the benefits gained by Israeli control outweigh whatever diplomatic costs Israel incurs for this form of permanent but confined intervention in the territory of another state. Israeli security specialists believe that control of the zone moves the inevitable conflict with Hesbollah and its supporters away from the Israeli civilian population. Critics of the zone contend that Israeli control over a part of Lebanon incites the conflict. They argue that if Israel's occupation and its support for the Southern Lebanese Army (SLA), an Israeli-backed militia composed of Lebanese, were to end, the conflict would abate if not terminate.

The buffer zone is supposed to protect civilians in northern Israel. Periodic ceasefires between Israel and its adversaries in southern Lebanon establish that civilian targets are off-bounds. Thereupon whatever irregular forces are then operating in southern Lebanon turn their attention to Israeli military contingents in the zone, which are, under the belligerent circumstances as well as the terms of the agreements, permissible targets. As Israel's military casualties in the zone mount, it escalates its own response, but given the irregular nature of its adversary, it perforce finds itself firing on civilian targets that are used by the irregulars for cover. The sur-response of the irregulars is to target northern Israeli towns and settlements. The violence becomes more intense and destructive until there is a new ceasefire, which again establishes as a common rule of engagement that urban targets in metropolitan Israel are off-bounds, while Israeli soldiers in southern Lebanon are not. *Da capo al fine*.<sup>1</sup>

A U.N. mission, the U.N. Interim Force in Lebanon (UNIFIL), has operated in Lebanon since 1978, when the Security Council created what was expected to be a short-term exercise. Its original mandate included "confirming the withdrawal of Israeli forces, restoring international peace and security and assisting the Government of Lebanon in ensuring the return of its effective authority in the area."<sup>2</sup> UNIFIL has been an extraordinarily difficult assignment and, from its inception, has not been spectacularly successful in achieving its

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1. Indeed, the 1996 war concluded according to pattern. On April 26, 1996, a ceasefire understanding was issued by the United States, to go into effect on April 27. The understanding included four substantive points:

- 1) Armed groups in Lebanon will not carry out attacks by Katyusha rockets or by any kind of weapon into Israel.
- 2) Israel and those cooperating with it will not fire any kind of weapon at civilians or civilian targets in Lebanon.
- 3) Beyond this, the two parties commit to ensuring that under no circumstances will civilians be the target of attack, and that civilian populated areas and industrial and electrical installations will not be used as launching grounds for attacks.
- 4) Without violating this understanding, nothing herein shall preclude any party from exercising the right of self-defense.

*Text of Ceasefire Understanding*, JERUSALEM REP., Apr. 26, 1996. But, of course, the conflict in the area continues.

2. S.C. Res. 33/425, U.N. SCOR, 33d Sess., 2074th mtg., para. 3, at 5, U.N. Doc. S/INF/34 (1978).

initial objective.<sup>3</sup> In 1981, the Secretary-General reported that "one of the most important principles on which UNIFIL was established was the full co-operation of all parties . . . it has been all too clear throughout the history of UNIFIL that that cooperation was not forthcoming."<sup>4</sup> That same year, the Security Council learned that UNIFIL positions and personnel had come under close fire by armed elements in forty-two incidents.<sup>5</sup> UNIFIL soldiers have been killed in the course of virtually every year of its operation. As of 1992, 184 soldiers had been killed and 272 wounded. Yet continuation of UNIFIL has been requested by the Lebanese government and regularly confirmed by the Security Council.

In 1982, Israel invaded Lebanon and thrust toward Beirut. UNIFIL's mandate was renewed. After Israeli withdrawal, UNIFIL was authorized, again as an "interim" task, to provide protection and humanitarian assistance to the civilian population in its area. By 1983, when UNIFIL was cooperating with the Lebanese gendarmerie, the Secretary-General requested UNIFIL's renewal and characterized its presence as "an important element of stability."<sup>6</sup> In 1985, UNIFIL reported a number of instances in which Lebanese irregulars supported by Israel had fired on UNIFIL forces and a few cases in which the latter returned fire. In that year, UNIFIL also reported a few instances in which Israeli troops fired close to UNIFIL personnel.<sup>7</sup> In 1986, the Secretary-General reported that the continuing Israeli presence in southern Lebanon "escalated the level of violence."<sup>8</sup> Lebanon and Syria claimed that Israeli withdrawal would stop the violence.<sup>9</sup> Israel, for its part, disavowed territorial designs but insisted that until Lebanon could effectively control its territory, "Israel had no alternative but to make its own security arrangements by means of the security zone and its alliance with SLA."<sup>10</sup> In 1988, UNIFIL protested 300 incidents in which SLA forces fired on UNIFIL. An Israeli tank even once shelled a Norwegian patrol.<sup>11</sup>

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3. In the aftermath of the Qana incident, a senior U.N. staff member described UNIFIL's profile in this unenviable way: "One party sees UNIFIL as an obstacle. The other party sees UNIFIL as a shield." James Walsh, *Anatomy of a Tragedy*, TIME, May 20, 1996, at 26, 29. Nor was this a recent problem. Within one year of UNIFIL's creation, the Secretary General reported that "[t]he mandate was largely unimplemented in 1979. . . . Heavy exchanges of fire over and across UNIFIL's area of operation were frequent." 1979 U.N.Y.B. 316, U.N. Sales No. E.82.I.1.

4. 1981 U.N.Y.B. 284, U.N. Sales No. E.84.I.1.

5. *See id.* at 285.

6. 1983 U.N.Y.B. 297, U.N. Sales No. E.86.I.1.

7. *See* 1985 U.N.Y.B. 306, U.N. Sales No. E.88.I.1. That is hardly surprising. The theater of operations is relatively small, and there are some 152 UNIFIL compounds within it. *See* Telephone Interview with Mike Lindvall, Press and Information Officer, UNIFIL (Oct. 8, 1996); Telephone Interview with Lt. Colonel Yam Phapa, Desk Officer, UNIFIL (Oct. 7, 1996). UNIFIL is now comprised of approximately 4600 soldiers in some 152 compounds and checkpoints in southern Lebanon. Moreover, Hesbollah operates as an irregular force that will virtually always be firing from a position in some proximity to a compound.

8. 1986 U.N.Y.B. 296, U.N. Sales No. E.90.I.1.

9. *See id.*

10. *Id.*

11. *See* 1988 U.N.Y.B. 221, U.N. Sales No. E.93.I.100.

## II. THE INCIDENT AT QANA

Southern Lebanon is thus a zone of continuing conflict, punctuated intermittently by ceasefires. In 1981, the PLO, which had become a virtual state within a state in Lebanon, concluded a ceasefire with Israel, the terms of which have not been published. In 1982, Menachem Begin declared the ceasefire null due to PLO violations. War commenced and quickly carried Israeli ground troops to Beirut. In the early 1990s, after a particularly intense exchange between Israel and Hesbollah, an agreement established ground rules for further conflict: Neither party would henceforth target civilians.<sup>12</sup>

That agreement broke down in the spring of 1996. Hesbollah attacks by Katyusha rockets against population centers in northern Israel increased markedly.<sup>13</sup> Israel's problems were not limited to attacks on civilians. On March 5, Hesbollah and Palestinian guerrillas killed four Israeli soldiers. On March 13, Hesbollah launched a concerted rocket and machine gun assault along the border of the security zone. An Israeli officer was killed in a bomb attack later in April. Such attacks against military personnel were within the "rules of the game" that had been established, but they undoubtedly increased domestic political pressure on the Israeli government to take action.

Hesbollah claimed it only responded to Israeli targeting of civilians in and near the zone. It is likely, however, that Hesbollah's actions in southern Lebanon were related to the opposition of Iran and Syria to the then-promising peace process being conducted by Israel and the Palestinian Authority. The fact that the impending election in Israel could well have determined the future direction and pace of the peace process was widely believed to have influenced the timing and increased intensity of Hesbollah actions. By the same token, the timing of Israel's military response was part of the struggle to influence the electorate in the face of the government's inability to stop the rash of suicide bombings in metropolitan Israel by Palestinian militants who opposed the peace process.

The Israeli action sought to force the Lebanese government to curb Hesbollah and thus stop the Katyusha attacks on the population in northern Israel. *The New York Times* reported that "Israel had warned civilians here and across much of southern Lebanon to flee or risk being caught up in its attacks."<sup>14</sup> About 400,000 civilians did flee northward, but in the course of the April campaign, significant numbers of Lebanese villagers sought refuge in

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12. See *U.S. Brokered Cease-fire Ends Israeli Strikes on Lebanon*, 53 FACTS ON FILE 570 (1993) (discussing ceasefire of July 31, 1993); see also Steven A. Holmes, *Christopher Says Middle East Talks Are Revived*, N.Y. TIMES, Aug. 5, 1993, at A6 (discussing Christopher's trip to Syria and Lebanon).

13. The Katyusha, a World War II vintage rocket, varies in caliber from 80 mm to 240 mm and has a top range of about 22 kilometers. Katyushas have poor accuracy and are often fired in barrages in the general direction of a target. Hesbollah appeared to be firing 122 mm size Katyushas, which carry about 10 kilograms of explosives. Rockets of this type can be easily transported and may be assembled, fired, and disassembled in less than a minute. See Arieh O'Sullivan, *The IDF Can't Stop Katyushas*, JERUSALEM REP., Apr. 26, 1996.

14. Douglas Jehl, *All Are Civilians*, N.Y. TIMES, Apr. 19, 1996, at A1.

various UNIFIL compounds.<sup>15</sup> One of the gathering points, Qana, was not a "safe area" and was certainly not outside the arena of active conflict. On April 15, for example, General van Kappen stated that a Hesbollah fighter shot a UNIFIL soldier in the chest when the latter tried to prevent the Hesbollah from firing rockets from the vicinity of the compound.<sup>16</sup>

The facts at this point are critical and were the major focus of the van Kappen commission of inquiry. As complex as they were, it is important to go into them in some detail. Israeli forces could locate the origin of the Katyushas on April 15 by means of an American surveillance and target acquisition system that they have used since the 1980s. The Hughes TQP-37 Firefinder computerized radar system tracks the trajectory of incoming rockets and aims artillery at their calculated source.<sup>17</sup> However, the radar is less accurate when tracking only a few missiles and the artillery itself is likely to be less accurate than the radar.<sup>18</sup> Israel had the means of responding by artillery, as it did on April 18, or by air. On the 15th, it did neither. From a brief comment by van Kappen, press reports, and Israeli responses to the van Kappen Report, the reason appears to have been that Israeli rules of engagement ordinarily precluded the shelling of an area within 300 meters of a U.N. compound.<sup>19</sup>

According to the van Kappen Report, between noon and 2 p.m. on April 18, Hesbollah fighters fired two or three rockets from a location 350 meters southeast of the compound.<sup>20</sup> Between 12:30 and 1 p.m., they fired four or five Katyushas from a location 600 meters south of the compound. Van Kappen also reported that a 120 mm mortar was installed between 150 and 200 meters from the compound between 11 a.m. and noon.<sup>21</sup> The 120 mm mortar is considered a heavy weapon in that category of artillery, with a high range (5000 to 9000 meters) and heavy firepower.

Several reports refer to an Israeli ground unit that had crossed the red line

15. While General van Kappen, in the report subsequently prepared for the U.N. Secretary-General, restricts his count to Qana, the *Time* investigation quotes U.N. officials to the effect that "up to 9,000 civilians were taking refuge in their compounds." Walsh, *supra* note 3, at 29. *The New York Times* set the number at 5000. See Jehl, *supra* note 14. According to General van Kappen, 745 civilians were in the UNIFIL compound in Qana by Sunday, April 14, and by April 18, the day of the Israeli shelling of the compound, there were over 800 civilians there. *Report Dated 1 May 1996 of the Secretary-General's Military Adviser Concerning the Shelling of the United Nations Compound at Qana on 18 April 1996*, Annex, para. 9(d), at 5, U.N. Doc. S/1996/337 (1996) [hereinafter *van Kappen Report*].

16. See *van Kappen Report*, *supra* note 15, para. 9(c), at 5.

17. See John Mintz, *High Tech Weaponry Not Infallible*, WASH. POST, Apr. 19, 1996, at A33.

18. See *id.*

19. See *van Kappen Report*, *supra* note 15, para. 6(b), at 4; Walsh, *supra* note 3, at 29; see also IDF Response to UN Report on the Qana Incident (May 1996), at 3-4 (on file with author) (precluding IDF forces from attacking civilians and U.N. personnel and bases). It is possible that the Israeli drone and helicopters that appeared over the compound after it had been hit were acting as target observers for the ground artillery, although such vehicles are not ideal observers. See U.S. ARMY, FM 6-20: FIRE SUPPORT IN THE AIRLAND BATTLE § 3 (1988); Telephone Interview with Anonymous U.S. Marine Corps Captain in Artillery Battery (Sept. 29, 1996). In any case, they appear to have arrived too late to have participated in directing the ground fire.

20. *van Kappen Report*, *supra* note 15, para. 9(a), at 5.

21. Although the van Kappen Report recites distances from the perimeter of the compound, this particular datum is described as "220 meters south west of the centre of the compound." *Id.* para. 9(c), at 5 (emphasis added). This appears to put it within 200 meters of the perimeter.

on April 18 into the range of the 120 mm mortar near the UNIFIL compound.<sup>22</sup> One source quotes a UNIFIL officer opining that the Israeli ground unit was laying sophisticated mines,<sup>23</sup> but that speculation was unsupported in other reports. It seems more probable, given the coincidence in time and the absence of any other Israeli counteraction, that the ground unit was advancing on Qana either for the purpose of engaging the authors of the Katyusha attacks intervisibly and hence with more precision than artillery could bring to bear, or to provide more accurate target information ("forward observation"), given the proximity of the rocket and mortar sites to the U.N. compound.

Whatever their mission, the Israeli unit came under mortar fire from Qana.<sup>24</sup> Van Kappen cites Lebanese witnesses who reported that shortly before 2 p.m.—about fifteen minutes before the Israeli shelling—between five and eight rounds were fired from the heavy mortar that had been installed less than 200 meters from the UNIFIL compound.<sup>25</sup> Van Kappen quotes Israeli military sources who indicated that the 120 mm mortar fire fell within forty meters of the Israeli unit that had advanced north of the red line.<sup>26</sup> Israeli press reports indicate that the commander of the ground unit under mortar attack radioed that his unit had taken casualties.<sup>27</sup> That report proved to be incorrect, but its misinformation may help to explain part of what transpired thereafter.

Van Kappen reports that the Israeli target acquisition system then identified, at 1:52 and 1:58 p.m., two separate targets in the vicinity of Qana. The target locations that the Israelis gave to General van Kappen corresponded to the sites of the 120 mm mortar and of the Katyusha attacks. The information was relayed automatically to the Northern Command and to an artillery battalion on the Israeli-Lebanese border, about twelve kilometers from the sea.<sup>28</sup>

The commander of the Israeli artillery battalion confirmed that one of the targets was within 300 meters of the compound. Consequently, he did not fire before securing explicit authorization. Northern Command, which presumably also had the "information" that the ground unit had come under mortar fire and taken casualties, checked the data and granted permission to fire.<sup>29</sup> Apparently, the reason for overriding the rules of engagement that preclude using such weapons within 300 meters of a U.N. area was that the ground unit had suffered casualties.<sup>30</sup>

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22. See, e.g., Walsh, *supra* note 3, at 28.

23. See *id.*

24. See *van Kappen Report*, *supra* note 15, para. 6(a), at 3.

25. *Id.* para. 9(c), at 5.

26. *Id.* para. 6(a), at 4.

27. See *IDF: Decisions Were Right in Kana*, JERUSALEM REP., Apr. 26, 1996.

28. See *van Kappen Report*, *supra* note 15, para. 6(b), at 4.

29. See *id.*

30. An infantry unit that comes under close and heavy fire from a weapon like a 120 mm mortar has a number of optional procedures, from proactive ground operations, to invoking air support, if jets or helicopters with appropriate weapons and ordnance are in the area or can scramble in time, on through to orderly withdrawal. Not all of the options are mutually exclusive. But a unit's options are severely limited when it is pinned down and especially when it has taken casualties. Under those circumstances, commanding officers think in terms of urgent defense of the unit and may resort to weapons they would, under other circumstances, eschew. Indeed, *Time* quoted a senior Israeli officer in Lebanon as saying that "[i]f there's

The precipitating event of the Israeli action then was the mortar attack on the ground unit north of the red line. Israeli command undertook a number of responses. First, as mentioned, it authorized artillery fire. The Israeli battalion comprised three batteries, each with four M-109A2 guns. According to information that Israel supplied to General van Kappen, the first target, the 120 mm mortar, was engaged by one battery, using all four guns and firing thirty-eight shells, two-thirds of which had impact fuses and one-third proximity fuses. The firing took less than five minutes, from 2:07 p.m. to 2:12 p.m. Israel reported to van Kappen that the two types of fuses had been distributed randomly.<sup>31</sup>

According to Israel, another battery engaged the second target by firing forty rounds from 2:11 p.m. to 2:17 p.m.<sup>32</sup> Thus, according to Israel, seventy-eight shells would have been fired from its batteries between 2:07 p.m. and 2:17 p.m. at the two targets in Qana. As a consequence of the bombardment, more than 100 Lebanese noncombatants were killed and many more were wounded. No UNIFIL personnel were killed.

General van Kappen found thirty-six impacts in the Qana area, in two distinct concentrations, with two “stray” impacts. Seventeen shells, sixteen with impact fuses and one with a proximity fuse, landed about 100 meters south of the U.N. compound, some seventy-five meters northwest of the point from which the mortar had been firing. Thirteen detonations struck inside or directly above the compound and four very close to it.<sup>33</sup> General van Kappen also found that “[d]uring the shelling, there was a perceptible shift in the weight of fire from the mortar site to the United Nations compound.”<sup>34</sup> Based on the evidence remaining after the clean-up, General van Kappen estimated that eight shells with proximity fuses detonated over the compound and one such shell exploded just outside it. Five high explosive shells with impact fuses struck the compound and three exploded close to it. It is not certain which shell type was responsible for the deaths of the civilians or whether a different mix of shells might have averted or minimized the tragedy.

The initial Israeli response to General van Kappen’s inquiries had been that two-thirds of the shells fired were armed with impact fuses and one-third with proximity fuses. The Israeli command later confessed error; the mix was the reverse. The battalion commander had indicated that the shells were fired in random order. The precise type of shells used is usually determined according to a formula that is designed for maximum impact on the particular target. Proximity fuses, which explode while the shell in which they are incorporated

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a unit under extreme pressure, you don’t think of anything but taking them out of extreme danger.” Walsh, *supra* note 3, at 29. In the circumstances, the law of armed conflict’s concept of self-defense would have allowed resort to actions in defense of a beleaguered unit—in terms of weapons used, ordnance selected, and intensity of fire—that might otherwise have been prohibited. But this does not mean that commanders could conclude that self-defense gives them a general waiver from limitations of the law of war.

31. See *van Kappen Report*, *supra* note 15, para. 6(c)–(d), at 4.

32. See *id.* para. 6(f), at 4.

33. See *id.* para. 6(a)–(c), at 3–4.

34. *Id.* para. 13(c), at 7.

is still in the air, are designed to rain shrapnel downward onto soldiers crawling on their bellies. They are an antipersonnel weapon. Impact fuses explode laterally and upward, thus doing maximum damage to standing or running soldiers.<sup>35</sup> The mix-formula can be calculated by the artillery computer or by hand. Proximity and impact fuses likely will be mixed for infantry targets. That Israel used more proximity than impact fuses suggests it may have thought the guerillas were dug-in or crawling, not running or standing.

Thus, if Israel fired into the compound accidentally, the use of more proximity fuses makes sense; it could have believed that the Hesbollah irregulars were dug-in, pinning down Israeli infantry with rifle and mortar fire. Israel probably would have used more impact fuses if it believed that the irregulars were running toward the U.N. compound. If the Israeli decisionmakers were unaware of the refugees, but assumed that Hesbollah irregulars had entered the camp and that UNIFIL soldiers had entered their bunkers, proximity-fused shells would have discriminated between Hesbollah and UNIFIL. Reports that Israeli helicopters or satellites actually observed Hesbollah irregulars running into the U.N. compound and mingling with refugees, if true, would support this interpretation, but only if Israel fired the artillery *after* the irregulars were observed running into the compound, as opposed to *while* they were running.<sup>36</sup>

Assuming that Israel's action was not intentional, the cause sine qua non of the death of the civilians and the destruction within the compound was not the initial targeting or the selection of the mix of ammunition, but a *change* in the direction of fire in the course of the attack. General van Kappen states: "Several witnesses reported that during the shelling there had been a perceptible shift in the weight of fire from an area south-west of the compound (the mortar site) to the compound itself."<sup>37</sup> Van Kappen asked the commanding officer of the artillery battalion about this.

Asked if he had shifted fire during the shelling, [the commanding officer] said he had not; he added that the mission had taken only three to four minutes (the time given by the Israeli forces was from 1407 to 1412 hours) and there would have been no time to change target data.<sup>38</sup>

General Harel, who responded to the van Kappen Report on behalf of Israel, could not explain the shift in fire. Reports in the Israeli and international press speculated on possible explanations.

35. See Telephone Interview with Anonymous U.S. Marine Corps Captain, *supra* note 19.

36. The question of how discriminating weapons and ammunition must be in circumstances of exigent self-defense is controversial among commentators and will be considered below. But one should note here that after the U.S.-brokered ceasefire, when Israel shelled civilian areas, *The New York Times* correspondent in Beirut reported that Israel's decision to use "specially designed solid shells—which contain neither fuses nor explosives—represented an effort to reduce the danger of civilian casualties." Douglas Jehl, *Israelis Shell Southern Lebanon*, INT'L HERALD TRIB., May 20, 1996, at 1. There is no evidence that this practice was continued.

37. *van Kappen Report*, *supra* note 15, para. 11, at 6.

38. *Id.* para. 6(d), at 4. General van Kappen found that the commanding officer's replies to questions about procedures "indicated a high professional standard." *Id.*



Israel initially stated that there had been no aircraft, helicopters, or remotely piloted vehicles (RPVs) over Qana before, during, or after the shelling. Witnesses in Lebanon, however, reported seeing an RPV over Qana. A videotape by a UNIFIL soldier shows an RPV and two helicopters. Van Kappen and the *Time* analysis indicate that Israeli helicopters were within two kilometers of Qana at the time. The Israeli military acknowledged that two helicopters had been sent north "to locate and attack the sources of fire."<sup>39</sup> But Israel averred that the helicopters had been unable to find the target and had left the area.<sup>40</sup> Subsequent to the report, Israel claimed that *after* receiving reports that the U.N. camp had been hit, they diverted an RPV "in order to ascertain the validity of the reports," and the RPV confirmed the report despite poor weather conditions.<sup>41</sup>

According to some accounts, U.N. investigators believe that Israeli helicopters had observed Hesbollah irregulars fleeing into the U.N. compound and mingling with the refugees, and even had a satellite spy camera trained on the source of rocket fire.<sup>42</sup> *The Times* of London reported that an amateur video of the massacre taken by a Norwegian soldier showed two Israeli helicopters observing the attack. The investigation also discovered an Israeli satellite stationed over Qana at the time, which showed hundreds of civilians milling around inside the UN base.<sup>43</sup>

In response to the van Kappen Report, Israel attributed the mistargeting to two errors: the placement of a pin on a map with a scale of one to 20,000 about 100 meters north of its actual location, and targeting calculations that did not take account of the space covered by the compound, making the target seem as if it were 350 meters from the compound rather than the 180 meters it actually was.<sup>44</sup> The *Time* investigation quotes a U.N. spokesman doubting the Israeli

39. *Addendum Dated 7 May 1996 to the Report of the Secretary-General's Military Adviser Concerning the Qana Shelling*, Annex, para. 2(f), at 10, U.N. Doc. S/1996/337 (1996) [hereinafter *Addendum to van Kappen Report*].

40. *See id.*

41. IDF Response to UN Report on the Qana Incident, *supra* note 19, at 4.

42. *See* Christopher Walker & James Bone, *Israel Rejects UN Blame over Massacre at Qana*, *TIMES* (London), May 9, 1996, at 14 ("Privately, UN investigators are convinced that Israel knew at the time of the attack that the Hezbollah guerrillas had fled into the compound.")

43. *See* James Bone, *Hezbollah Used UN Base To Avoid Wrath of Israel*, *TIMES* (London), May 4, 1996, available in LEXIS, News Library, Ttimes File. This information both defends and indicts parts of the Israeli military behavior in this incident. Given the proximity of the targets to civilian and U.N. concentrations, the dispatch of helicopters to engage the adversary involved the use of a more discriminating weapon, one that would have been intervisible with the target and thus more capable of avoiding injury to noncombatants. But the helicopters would or should have had the same information from the target acquisition system that the artillery battalion had. If they could not find the target, the justification for the continuing use of a less discriminating weapon such as artillery becomes shaky.

44. That is especially the case when the targets are Katyushas, which can be set up and fired within 30 seconds, after which the soldier or soldiers who have released them can take the tube and flee. As for the RPV, Israel, in its comments on the van Kappen Report, stated that the RPV had arrived at 2:18 p.m.—one minute after the firing ceased—and left at 2:31 p.m. Apparently, General van Kappen did not consider those explanations responsive or truthful. The utility of pictures from RPVs for targeting artillery is in any case questionable, for the images are often rather shaky. *See* Walsh, *supra* note 3, at 29; IDF Response to UN Report on the Qana Incident, *supra* note 19, at 4; *see also* Patricia Golan, *U.N. Version of Attack Infuriates Israel*, *ISRAEL FAXX*, May 9, 1996, available in 1996 WL 8153188 (quoting Israeli

explanation and insisting that when the Israelis withdrew from the area of Qana in 1985, they videotaped every building and street and used aerial photography to mark every house on their maps.<sup>45</sup> Whether such information was used in the maps available to the Israeli soldiers engaged in targeting and firing is not clear.

General van Kappen does not focus on whether the firing could or should have been suspended when it became clear that the shells were falling on civilians and on the UNIFIL camp, perhaps because his team did not think that this was a realistic option. *Time* quotes the commander of the UNIFIL compound at Qana as saying: "We made the effort to make them stop. But they kept firing."<sup>46</sup> The efforts apparently involved three neighboring U.N. posts firing red warning flares. These would not have been visible to the artillery battalion but might have been visible to aircraft. The RPV that was videotaped in the vicinity was reportedly of the type that has a real-time communications link. But even if the information had been conveyed, one wonders if it could have been absorbed, interpreted, and acted on in the remaining two or three minutes of the shelling.

Israeli television had shown civilians in U.N. compounds the day before the incident at Qana. General van Kappen did not explore the question of whether Israeli officers knew that a large number of civilians had sought shelter there because he felt it was irrelevant: "[T]he United Nations compound was not a legitimate target."<sup>47</sup> There were, however, 152 compounds, and none of the reports indicate whether the media information specified which were refugee centers or whether the Israeli command had issued a general advisory about the presence of refugees in *all* UNIFIL compounds. Van Kappen quotes Israeli officers to the effect that "it was not Israeli policy to target civilians or the United Nations."<sup>48</sup> Immediately after the incident, Shimon Peres averred that Israel had not known of the presence of the civilians; had it known, according to Peres, it would have acted differently.

General van Kappen did not find any of the Israeli explanations persuasive. In his report of May 1, he concluded, "While the possibility cannot be ruled out completely, it is unlikely that the shelling of the United Nations compound was the result of gross technical and/or procedural errors."<sup>49</sup> Reviewing the official Israeli responses on May 7, General van Kappen reaffirmed his earlier conclusion: "As I stated in my report, it is unlikely that gross technical and/or procedural errors led to the shelling of the United Nations compound. However, it cannot be ruled out completely."<sup>50</sup> The report of May 1 stated that Israel had informed the commander of UNIFIL "of new precautions adopted by the Israeli forces with regard to firing at targets near United Nations

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Army Lt. Col. Moshe Fogel as stating that artillery "mislocated by 150 meters").

45. Walsh, *supra* note 3, at 29 (quoting Timur Goksel, Senior Political Adviser to UNIFIL).

46. *Id.* at 27.

47. *van Kappen Report*, *supra* note 15, para. 7, at 5.

48. *Id.* para. 8, at 5.

49. *Id.* para. 13, at 7.

50. *Addendum to van Kappen Report*, *supra* note 39, para. 3, at 10.

positions,<sup>51</sup> but does not indicate what they were.<sup>52</sup>

International legal and political statements condemned the shelling of civilians, but were less vocal about the law concerning such operations against U.N. posts. On April 19, 1996, the International Committee of the Red Cross (ICRC) condemned the action, reiterating its earlier appeal to the belligerents "to comply with the rules of international humanitarian law, including the absolute ban on indiscriminate attacks of a nature to strike civilians or civilian property."<sup>53</sup> On May 10, 1996, the U.N. General Assembly passed a resolution that, among other things, expressed grave concern

at actions that seriously threaten the safety of the United Nations Interim Force in Lebanon and impede the implementation of its mandate, in particular the incident that occurred on 18 April 1996 in which shelling resulted in heavy loss of life among civilians at a site of the Interim Force.<sup>54</sup>

In its operative paragraphs, the Assembly condemned "the Israeli military attacks against the civilian population in Lebanon, especially against the United Nations base at Qana, which violate the rules of international humanitarian law pertaining to the protection of civilians."<sup>55</sup> The Assembly also resolved that "Lebanon is entitled to appropriate redress for the destruction it has suffered and that Israel is responsible for such compensation."<sup>56</sup> The resolution, however, made no further mention of the issue of UNIFIL's status. An initiative in the Security Council, which included condemnation of Israel, a call for compensation, steps by Israel to prevent recurrence, and steps by the Secretary-General to prevent such attacks in the future, was aborted.

### III. ATTACKS ON U.N. FORCES

Qana confirms that the *intentional* targeting of civilians is condemned at international law and that any sanctions international law can bring to bear will be applied to such actions. Indeed, the Israeli military and political leadership stated this clearly as a rule of law. The April 27 ceasefire understanding to

51. *van Kappen Report*, *supra* note 15, para. 14, at 7.

52. An Israeli military investigation, which was summarized in an Israeli publication, presented different factual versions of the incident. It gave a considerably smaller number of shells fired and denied the presence of any military aircraft in the area at the time, but acknowledged that the commander of the ground unit had exaggerated the danger, since the Israeli infantry unit that had come under mortar fire had suffered no casualties. The newspaper account concluded:

Senior IDF sources emphasized . . . that the team did not have the ability to judge everything.

What should be judged, they said, is whether the shelling was justified, was carried out in response to a real need, and through a correct decision-making process. Such a process was indeed carried out at every phase, the team said.

*IDF: Decisions Were Right in Kana*, *supra* note 27. Subsequently, other Israeli spokesmen gave different accounts. Many of the statements attributed to the internal military report are unquestionably incorrect.

53. International Comm. of the Red Cross, ICRC Condemns Shelling of Civilians in Southern Lebanon, Press Release 96/14 (Apr. 19, 1996) (on file with author).

54. G.A. Res. 50/22, U.N. GAOR, 50th Sess., at 2, U.N. Doc. A/RES/50/22 C (1996).

55. *Id.*

56. *Id.* at 3.

which both belligerents subscribed confirmed their acceptance of this norm.<sup>57</sup>

Qana is less clear on the law with respect to the status of U.N. personnel who are serving as peacekeepers. The international media focused on the civilian victims, but Secretary-General Boutros-Ghali had commissioned the van Kappen inquiry because of the shelling of the peacekeepers' position. In transmitting the report to the Security Council, the Secretary-General said, "I view with utmost gravity the shelling of the Fijian position, as I would hostilities directed against any United Nations peace-keeping position."<sup>58</sup> The fact that civilians had sought refuge in the facility made it "all the more serious."<sup>59</sup> Yet the status of the peacekeepers is not even mentioned in the ceasefire understanding and does not figure in the operative parts of the General Assembly's resolution.

The U.N. Secretariat has sought to give a special protected status to U.N. military personnel. In the Secretary-General's Somalia Report of August 24, 1993, the Rapporteur stated:

No act could by its very character more perfectly exemplify an international crime than the use of force against United Nations soldiers to prevent them from carrying out their responsibilities. Such use of force is a plain challenge to the ability of the United Nations to maintain international peace and security and hence to that minimum order on which all other collective human interests depend.<sup>60</sup>

General van Kappen, as will be recalled, stated that "the United Nations compound was not a legitimate target, whether or not civilians were in it."<sup>61</sup>

The political bodies of the United Nations, which express the interests of the member states, have not been as zealous or consistent in prescribing and applying norms to ensure the protection of U.N. personnel in the field. The General Assembly, on May 10, 1996, condemned in specific terms the Israeli "attacks . . . against the United Nations base at Qana,"<sup>62</sup> which may or may not have been intentional. It passed in silence, however, over the intentional shooting of a UNIFIL soldier by a Hesbollah on April 15. Israel affirmed the prohibition against targeting U.N. personnel. Hesbollah did not and suffered no condemnation for it.

Qana is also unclear on the issue of *unintentional* injury to a U.N. compound. General van Kappen's statement that "the United Nations compound was not a legitimate target, whether or not civilians were in it" is reminiscent of article 25 of the 1907 Hague Regulations: "The attack or bombardment, by *whatever means*, of towns, villages, dwellings, or buildings which are

57. See *Text of Ceasefire Understanding*, *supra* note 1.

58. *Letter Dated 7 May 1996 from the Secretary-General Addressed to the President of the Security Council*, at 1, U.N. Doc. S/1996/337 (1996).

59. *Id.*

60. *Report of an Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia by Professor Tom Farer*, Annex, para. 7, at 3, S.C. Doc. S/26351 (1993).

61. *van Kappen Report*, *supra* note 15, para. 7, at 5.

62. G.A. Res. 50/22, *supra* note 54, at 2.

undefended is prohibited.”<sup>63</sup> Practice in the world wars departed from this absolute provision because factual situations proved to be much more complicated: Important military objectives may well be located in urban areas. The Hague Rules of Aerial Warfare of 1923, which were never ratified, prohibited the bombardment of conurbations not in the neighborhood of the operation of land forces, unless they were the sites of specified military objectives. Even then, if “they cannot be bombarded without the indiscriminate bombardment of the civilian population,” they may not be bombarded.<sup>64</sup> But many contemporary commentators allow the comparative importance of the military objective in question to be factored into the determination of licit targets. Greenspan, for example, would allow the attack of factories producing war material even when there are probabilities of collateral damage if the targets are important to the adversary’s war effort. But “an attack on a war factory which is known to be of minor importance cannot justify the incidental destruction of the whole town where it is situated.”<sup>65</sup>

It seems clear from different sources that Israeli rules of engagement precluded artillery shelling of adversaries within 300 meters of a U.N. compound, unless there were especially compelling circumstances. By implication, this would appear to mean that Israel undertook to use more discriminating weapons in such zones and, even then, on contingencies more stringent than for other areas of the theater of conflict.

The record also provides some insight into UNIFIL’s perspective on this point. On April 15, it will be recalled, a UNIFIL soldier was shot in the chest while trying to prevent a Hesbollah from firing rockets. On April 18, the van Kappen Report indicates, UNIFIL made no effort to remove the 120 mm mortar that had been installed near the compound. The parenthetical explanation is that efforts by UNIFIL with respect to the placement of rockets three days earlier had led to injuries to UNIFIL personnel. When the UNIFIL soldiers heard the mortar fire on the day of the Qana incident, they immediately began to move the noncombatants into shelters, as they expected retaliation. Prime Minister Peres’ remarks on April 19 show that Israel also assumed that UNIFIL would promptly withdraw to shelters. This suggests that UNIFIL appreciated that its status as a protected area was not an absolute entitlement, but was synallagmatic. It depended on UNIFIL ensuring that the zones proximate to it and the compounds themselves not be exploited by one of the belligerents as a secure place from which to fire on the enemy. UNIFIL took for granted that if, despite its efforts, the zone in question were used by one of the belligerents as a platform from which to fire on the other’s troops, UNIFIL could not expect protected status. Under this construction, Israel intentionally fired on Qana in

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63. The Hague Conventions of 1899 (II) and 1907 (IV) Respecting the Laws and Customs of War on Land, in *THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907*, at 117 (James Brown Scott ed., 2d ed. 1915).

64. Rules of Aerial Warfare, Feb. 19, 1923, art. 24, para. 3, *reprinted in* 32 *AM. J. INT’L L.* 12, 24 (Supp. 1938).

65. MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 335 (1959).

accord with an operational norm, accepted de facto by UNIFIL and Israel: If and when UNIFIL did not neutralize its compounds and they were used by Hesbollah, Israel would fire on them and UNIFIL, expecting fire, would repair to its bunkers. The intended and actual targets were Hesbollah irregulars.<sup>66</sup>

Although van Kappen mentioned the April 15 shooting, he did not seem to assign to it any great importance in the events that followed. Nor did he explore what the UNIFIL command did after April 15: whether the effort to stop the rocketing on April 15 was unauthorized; whether assurances were sought from Hesbollah that there would be no recurrences in the future; whether they were given; whether UNIFIL was instructed henceforth not to try to enforce a non-belligerent zone around its compound, as it had done on April 15, in view of its inability to do so and to protect its personnel. The Security Council's drafts had sought to address this part of the problem, but all proved abortive.

The legal implication of General van Kappen's report is that the protected status of military personnel operating as a U.N. force is unconditional and absolute, an entitlement, in effect, that places entities like UNIFIL above the calculus of the law of armed conflict. It is a theoretical possibility and may have some attractiveness as a policy.<sup>67</sup> However, the implementation of the law of armed conflict depends ultimately on dynamics of reciprocity and retaliation, in which an effective protected status for U.N. areas and U.N. operatives imposes interlinked benefits and burdens. Were the United Nations to provide peacekeepers with the authority and resources to keep their zones free of belligerent activity,<sup>68</sup> however, it would inevitably change the chemistry of peacekeeping.

The international community has been reluctant to establish clear rules of protection that trump other rights that a belligerent may have under the law of armed conflict. The Convention on the Safety of United Nations and Associated Personnel, which began with great hopes, ultimately provided limited operational protection for U.N. personnel, and article 21 reserved to parties "the right to act in self-defense."<sup>69</sup> Only three states, however, have ratified the Convention; twenty-two are needed for its entry into force.

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66. See W. REISMAN, FOLDED LIES: BRIBERY, CRUSADES AND REFORMS 15-16 (1979) (comparing myth system, which is supposed to apply, and operational code, which applies in reality).

67. See, e.g., M.-Christiane Bourloyannis-Vrailas, *Safety and Security of United Nations Personnel in Areas of Internal Armed Conflict*, 48 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 95 (1995); Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT'L L. 185 (1996); Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93 (1996).

68. The initial terms of reference of UNIFIL contemplated this. See *supra* notes 2-3 and accompanying text.

69. Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, art. 21, 34 I.L.M. 482, 492 (1995).

#### IV. ATTACKS ON CIVILIANS AND THE REQUIREMENT OF WEAPON DISCRIMINATION

UNIFIL has been fired upon hundreds of times in the course of its nineteen-year history. What was distinctive in the Qana incident was the large number of civilian casualties. Noncombatants are a key object of concern of contemporary humanitarian law, yet the law is proving ineffective for incidents like these because of intersecting technical and political factors.

Article 51 of the First Additional Protocol to the Geneva Convention affords the civilian population and individual civilians "general protection," which includes a prohibition on "indiscriminate attacks."<sup>70</sup> Subsection 5 provides examples of indiscriminate attacks:

- a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town . . . and
- b) 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.<sup>71</sup>

Article 57 requires a belligerent to do "everything feasible" for verification of the presence of civilians and to take all feasible precautions in the choice of means and methods of attack with a view to avoiding injury to civilians.<sup>72</sup> Moreover, article 57(2)(b) states that

an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>73</sup>

The ICRC Commentary makes clear that, though the law of war balances the necessities of war and humanitarian requirements, the principle of proportionality is secondary to the principles of protection: "[A]n attack cannot be justified only on grounds of proportionality if it contravenes the above-mentioned principles."<sup>74</sup>

Many commentators and ICRC spokespersons suggest that proportionality should be a complex equation, taking into account factors such as the military importance or exigency of the target. A single sniper in the turret of a church or the top floor of a hospital will not justify destruction of the church or hospital; a highly destructive weapon placed there by an adversary may warrant

70. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 51, paras. 1, 4, *reprinted in* INTERNATIONAL COMM. OF THE RED CROSS, INTERNATIONAL RED CROSS HANDBOOK 216, 242 (12th ed. 1983) [hereinafter Protocol I].

71. *Id.* art. 51, para. 5, at 243.

72. *Id.* art. 57, para. 2(a)(i), at 246.

73. *Id.* art. 57, para. 2(b), at 247.

74. INTERNATIONAL COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 8, 1977 TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, at 683 (Yves Sandoz et al. eds., 1987).

it. In the first instance, the deployment of weapons that are more discriminating and less collaterally destructive is expected, even though the costs in terms of lives and casualties of the belligerent seeking to neutralize the sniper may be higher than would the use of a larger weapon, applied from a relatively safer remove.

How will that be applied to incidents like Qana? Assume the threatened destruction of part of a patrol of, let us say, twelve soldiers by mortar fire from the vicinity of a U.N. compound known to be sheltering more than 800 noncombatants. According to some commentators, knowledge of the presence of the noncombatants would severely restrict the choice of the weapons to be used to extricate the patrol because the application of a relatively indiscriminating weapon in this context, though it might be the only one that could be deployed rapidly enough to help the patrol, could cause great loss of civilian life. Even though the selection of a more discriminating weapon in this context—assuming that such weapons were available in real time—would probably increase the losses of the actor seeking to defend its unit, it is, according to this argument, legally required.

This agreement was unacceptable to Israel. The rules of engagement inferred from the record suggest that Israel was willing to defer to humanitarian considerations with respect to rockets emanating from the zone of the compound as long as there was no direct threat to its units. When such a threat eventuated, Israel responded vigorously in defense of the unit. Though it expressed regret for the deaths of noncombatants, it did not acknowledge improper action.

In circumstances like these, any democratic polity engaged in elective conflict will insist on a comparable version of the law. Its elites will encounter two potentially conflicting imperatives: on the one hand, the imperative of using force in a limited fashion in an external arena and, on the other, the imperative of retaining the support of an internal constituency to whom the relation of such an operation to national interest may not appear vividly self-evident. For such actions, it is assumed that the public's tolerance for casualties is low, in contrast to circumstances in which national security or integrity are widely believed to be at stake, and in which tolerance for casualties may, for a time, be extremely high. Because some determinate casualty figure is believed, both by the democracy and its adversary, to be the cutoff point, the democracy's political-military leadership will make every effort to keep low or "zero" casualties as its adversaries try to push them up. To an extent, democratic leadership will seek to avoid elective military action. When it cannot, it will select and deploy weapons that provide maximum safety to its own forces.

Because of the increasing legal and moral force of humanitarian law, this strategy will be justified by a touting of "smart" weapons that are supposed to increase accuracy while reducing the exposure of the soldier operating them. The promise of these weapons is true—to an extent. Silicon chips may make a weapon more accurate, but that same weapon, corrected by an operator and intervisible with the target, will be even more accurate—meaning less injury to people with the misfortune to be in the way. Yet intervisibility means "retro-



vulnerability”: The operator is more vulnerable to injury by the adversary. Hence one may hypothesize that in order to minimize retro-vulnerability, human correction will be reduced or avoided in elective conflicts in which a democratic polity’s tolerance of losses is expected to be inelastic. Unfortunately, in armed conflict, the safety equation is zero-sum: the more safety reserved for your forces, the more unintended and, of course, regrettable injury to civilians.

#### V. COMPENSATION FOR INJURIES TO CIVILIANS

The dynamic linking choice of weapons to domestic political considerations will challenge humanitarian law, which may have to develop other techniques and doctrines. One, I submit, should be a *general* obligation to compensate for unintended injuries to civilians. Article 3 of the 1907 Hague Convention on Land Warfare established the principle of compensation, and it is restated in article 91 of Protocol I: “A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”<sup>75</sup> A slightly better formula, focusing on the persons actually injured, is found in article 24(5) of the Hague Rules of Aërial Warfare of 1923: “A belligerent is liable to pay compensation for injuries to person or to property caused by the violation of its officers or forces of the provisions of this article.”<sup>76</sup> But all of these provisions make compensation conditional on a *violation* of the laws of war. This is inertial treaty law and not proactive humanitarian law, for it confuses two entirely different sanction objectives: punishing the law violator, on the one hand, and succoring the victims who suffer, on the other, whether or not the cause of their injury was a violation of the law of war.

The euphemism “collateral damage” means death and injury of noncombatants and destruction of their property. That term of art may insulate the party that has caused this damage from international *criminal* responsibility and, perhaps, moral self-doubt. It should not absolve it from a civil obligation to compensate, directly and promptly, the victims or their survivors, regardless of whether the actions of the damage-feasor violated the laws of war or merely caused “collateral damage.” An appropriate example may be found in the downing of the Iranian Airbus by the U.S.S. *Vincennes* in the Persian Gulf. President Reagan insisted that the U.S. action did not violate the law of war; nevertheless, he promptly offered compensation directly to the families of the victims.<sup>77</sup> The United States has now paid.<sup>78</sup> It is unimportant if offers and

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75. Protocol I, *supra* note 70, art. 91.

76. Rules of Aërial Warfare, *supra* note 64, art. 24, para. 5, at 24.

77. See Statement by Assistant to the President for Press Relations Fitzwater on United States Policy Regarding the Accidental Attack on an Iranian Jetliner over the Persian Gulf (July 11, 1988), *reprinted in* 2 PUB. PAPERS: RONALD REAGAN, 1988-89, at 934-35 (1991).

78. See *U.S. and Iran Settle Financial Claims*, WASH. POST, Feb. 23, 1996, at A23.

payments such as these are made *ex gratia*, as they usually are, because self-characterization of an action as lawful is not legally binding on others. What is important is that payments to innocent injured parties be made as soon as possible.

Compensation in humanitarian law should be conceived on two levels, with two measures of damages. First, and without regard to the question of violation of the law of war, belligerents must compensate injured noncombatants or their survivors promptly, in proportion to the degree to which each caused the injuries suffered. Measure of damages here may be determined by general principles of compensation for civil liability on which there is ample agreement and for which there are detailed models.<sup>79</sup> Thus, compensation will be a humanitarian instrument for repair of an injury suffered by an innocent party. The issue is not absolute liability, for a state may substantially reduce, if not eliminate, liability by using more discriminating (and hence more operator-vulnerable) weapons, thereby “internalizing” what would otherwise be collateral damage. But it is surely incompatible with the postulates of humanitarian law, indeed law in general, to allow an actor to externalize heavy costs onto innocent people—without engaging responsibility to compensate.

Second, compensation should also be conceived of as a sanction for violations of treaty terms—in short, an international expiation for criminal responsibility. Measure of damages here will be determined in sanction terms by reference to such factors as the gravity of the offense, intentionality, etc.

In particular cases, both liabilities may not be present. In some circumstances, the liability may fall heavily or even entirely on the other belligerent: for example, when it uses noncombatants as human shields. This two-level approach is needed because, without the sanction component, incentives for compliance with the laws of war will decline; without the personal compensation component, incentives to reduce collateral damage, already declining because of concern for retro-vulnerability, will sink further. A humane law of armed conflict should resist both of these tendencies.

In an incident like Qana, the party causing injury should be obliged to assume a civil liability to the victims and their survivors, proportional to its responsibility. Whether or not its actions were internationally criminal or were marked by a chain of grievous errors, innocent victims are entitled to the repair of their injuries. That repair should not come from the international community, but from the party that, arguably in ways compatible with the law of war, elected to reduce its own exposure and contain its own injuries by shifting the danger and consequent injury onto others. In imposing the costs of the engagement onto innocent parties, a belligerent should, like anyone in war or peace, be obliged to repair the injuries it has caused in a measure proportional to its contribution to them.

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79. See United Nations Compensation Comm'n, *Governing Council Decisions 14 to 23*, 33 I.L.M. 235 (1994).



