Human shields – an ever-present dilemma

By AMNON RUBINSTEIN

Now that a somewhat fragile ceasefire has silenced the rocket-throwers in southern Israel, it is appropriate to comment on a major problem both the US, NATO and Israel are facing in their asymmetrical wars against non-armies and non-states. In Gaza, Afghanistan, Yemen and War-in-Progress, the use of human shields has become a major issue in international humanitarian law.

The law is clear: the use of human shields in any armed conflict is a war crime. The party which attacks a military target so shielded, however, must do so according to strict rules of proportionality. The Goldstone Report adopted this principle and blamed Israel for ignoring it in Operation Cast Lead.

The Israeli government, although criticizing this report in strident language, now acts according to the principles spelled out by this report. The instructions given to the IDF were clear: avoid bombing all civilian targets unless they were military targets or placed in harm’s way. Human mine-like wooden shields and other purely military targets were, of course, cases where civilians – including women and children – were killed in Gaza by Israeli aerial bombardment, but generally this was either the result of navigational errors or because civilians were caught in cross-fire because of their presence at a purely military site.

Thus, the Israeli Air Force did not resort to carpet-bombing areas from which mines were launched against Israeli civilian targets. Had the air force done this, the results would have been more controversial for Israel and the number of alarms and direct hits would have been higher. In all likelihood, however, there would have been casualties and there would have been condemnation by the international community and media for slaughtering innocent civilians.

Thus, a party attacked by human-shielded weapons is deemed to have violated the human shield and damned for its weakness by its suffering civilians if it doesn’t.

Two issues need clarification: first, the media and international lawyers have overlooked the fact that any party using human shields – whether the Taliban or Hamas – is guilty of a war crime at least equal in severity to the party which attacks a target so shielded.

Secondly, the issue of proportionality should be balanced against the right of self-defense. In other words, a state fighting an asymmetrical war against non-armies has a duty not to react disproportionately to attacks against its civilians, but also has the right under international law to defend these civilians (or soldiers) against enemy action.

How can we balance the two duties? There are two possible answers to this paradox: one is compensating and bringing legal action against a party that uses human shields. Secondly, we should interpret proportionality differently in cases of self-defense as compared to cases in which a military target which does not endanger the lives of your civilians or soldiers is attacked.

In an article published in the Stanford Review of Law and Policy, this author, together with Yaniv Levinai, an expert in international law, suggested that while retaining the duty to protect civilians who may be attacked because of their proximity to military targets, proportionality in cases of self-defense should acquire a specific meaning, i.e. that the attacking party could only use force that would not exceed the amount of force required to silence the enemy force – even when protected by human shields. This interpretation would reduce the distance between legal theory and military reality.

The author is a professor of law at the Hebrew University (Jerusalem, Israel). He is the author of numerous articles and booklets, as well as the recipient of the 2006 Israel Prize in Law.

AFGHAN POLICEMEN hold a meeting before an operation against the Taliban at a police camp. The Taliban are one of many groups accused of using human shields. (Reuters)