



“THE MOST MORAL ARMY IN THE WORLD”: THE NEW “ETHICAL CODE” OF THE ISRAELI MILITARY AND THE WAR ON GAZA

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This article examines the content of and justification for a new “ethical code” designed for the Israeli army to take into account the “fight against terror.” It argues that the code contains two innovations: it includes acts aimed exclusively at military targets in its definition of “terrorism,” and it contains a principle of distinction that prioritizes the lives of citizen combatants over those of noncitizen noncombatants, contrary to centuries of theorizing about the morality of war as well as international humanitarian law. The article suggests that the principle of distinction played a direct role in Israel’s offensive in Gaza in winter 2008–2009, as demonstrated by a preponderance of testimony indicating that Israeli military commanders explicitly instructed soldiers to give priority to their own lives over those of Palestinian noncombatants.

AT LEAST SINCE 2005, the Israeli military has been operating with a new “ethical code” that is supposed to be particularly applicable to the “fight against terror.” While this ethical code has garnered some academic attention and has been reported on in the media, there has been no comprehensive treatment of the arguments put forward to support it, and little attempt has been made to place it in the context of Israel’s recent military history.

THE “ETHICAL CODE” OF THE ISRAELI MILITARY

The Israeli military has always prided itself on adhering to the highest moral standards and is routinely described by Israeli political and military leaders alike as “the most moral army in the world.”¹ This self-portrayal precedes the establishment of the Israeli armed forces, going back to the era of the paramilitary forces of the Zionist Yishuv, primarily the Haganah. A principal component of the ethical code that has purportedly guided Zionist forces since that time is the doctrine of the “purity of arms” (*tobar ha-nesbeq*). Though traceable to the 1930s, it is not clear if the doctrine was associated at the time with a written text, but it is generally described as recommending that force should be used only for a just cause and in self-defense.²

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A written document spelling out an ethical code for the Israeli military appears to be of relatively recent vintage. In an interview conducted in 2002, the commander of the Israeli Air Force told a journalist from the Israeli newspaper *Ma'ariv* that Israeli military personnel are expected "always to operate according to lofty values, based on the ethical codes of the IDF [Israel Defense Forces] and of the State of Israel." But the journalist went on to comment:

The problem is that the IDF doesn't have an official ethical code. The ethical code that was drawn up for the army by philosophy professor Asa Kasher and was in use for five years—up until about a year ago—was rewritten by the chief education officer, Brig. Gen. Elazar Stem, and turned into a "softer" and less binding document now called "The Spirit of the IDF"³

This article suggests that the "ethical code" drafted by Kasher—a recipient of the Israel Prize, Israel's highest honor—was in use roughly between 1996 and 2001, when it was replaced by the "Spirit of the IDF." According to the late Israeli philosopher Ruth Manor, this document was drafted after the beginning of the second Palestinian uprising "to respond to the growing 'Refusenik' movements, those who refuse to serve in the West Bank and Gaza in preserving the occupation."⁴

The document, identified in English translation as the "IDF Spirit" and described as the "ethical code of the IDF" on the official Web site of the Israeli military, contains a section titled "The Purity of Arms," which reads as follows:

The IDF servicemen and women will use their weapons and force only for the purpose of their mission, only to the necessary extent and will maintain their humanity even during combat. IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity and property.⁵

In another brief section titled "Human Dignity," the document states: "Every human being is of value regardless of his or her origin, religion, nationality, gender, status or position." The section titled "Human Life" reads in its entirety:

The IDF servicemen and women will act in a judicious and safe manner in all they do, out of recognition of the supreme value of human life. During combat they will endanger themselves and their comrades only to the extent required to carry out their mission.

Despite the emphasis on the soldiers doing "all in their power" to avoid harming noncombatants or prisoners of war, the principles are quite vague and can be interpreted in various ways. Indeed, Manor finds a contradiction between the statement that human life has "supreme value" and the statement that lives will be endangered only to the extent required for the fulfillment of the

mission, which in her view implies that the supposed “highest” value “is subordinate to the success of the military mission.”⁶ Perhaps more tellingly, the section just quoted on “Human Life” focuses on the lives of soldiers and their comrades and fails to mention the lives of noncombatants at all.

The text of the new code—designed specifically to take into account the fight against “terrorism”—is not to be found on the Web site of the Israeli military, nor does it appear to have been published anywhere in its entirety. Rather, the principles concerning the “military ethics of fighting terror” and the justification for them were detailed in two academic articles published in 2005 by Asa Kasher, the author of the first code, and Amos Yadlin, then commander of Israel’s College of National Defense (the institution that provides higher education for military commanders) and current head of Israeli military intelligence.⁷ The authors state that the principles they articulate had been “developed by a team we have headed at the Israel Defense Force (IDF) College of National Defense”⁸ and that “the final document was presented to the IDF chief of staff and to generals involved in fighting terror.”⁹

Although the ethical code was developed in the context of Israeli military imperatives, Kasher and Yadlin insist on its universality: “Our principles are not ad hoc principles, tailored for a certain party in a certain conflict. They are meant to apply universally.”¹⁰ In what follows, I will evaluate the code both on the validity of its conclusions in universal terms as well as on their applicability to the Israeli case. In the absence of the document itself, Kasher and Yadlin’s two articles spell out the main principles of the new ethical code and, more importantly, the arguments from moral philosophy that support them. Though the principles they enunciate do not seem to supersede the Israeli military’s previous code, they would appear to augment it and provide guidelines that apply specifically to the campaign against “terror.”¹¹

THE MORALITY OF “TERROR” AND “TERRORISM”

The terms “terror” and “terrorism” generally carry moral connotations, since any activity that is branded with these labels is generally considered morally blameworthy if not morally impermissible. In the extensive discussion of the morality of “terrorism,” its purported immorality is usually linked to two aspects of it, as it is commonly defined. The first is that it involves violence that deliberately targets noncombatants (either wholly or in part), and the second is that its perpetrators often do not distinguish themselves from noncombatants. The first aspect is commonly held to render “terrorism” immoral because noncombatants should not be deliberately targeted by acts of violence since they are not implicated in such acts; moreover, noncombatants generally being unarmed, it is morally reprehensible to target them when they lack the means of self-defense. The second aspect affects the morality of “terrorism” because combatants who cannot be distinguished from noncombatants are presumed to be engaging in illegitimate subterfuge either to escape engagement with their adversaries or to secure an unfair advantage over them.¹²

Kasher and Yadlin do not incorporate these two widely cited features in their definition of "terrorism." Rather, they define an "act of terror" as

... an act, carried out by individuals or organizations, not on the behalf of any state, for the purpose of killing or otherwise injuring persons, insofar as they are members of a particular population, in order to instill fear among the members of that population ("terrorize" them), so as to cause them to change the nature of the related regime or of the related government or of policies implemented by related institutions, whether for political or ideological (including religious) reasons.¹³

At first glance, it might appear that the phrase "members of a particular population" does refer to noncombatants, but the authors make clear that this is not their intention. As they go on to insist, "we define 'act of terror' in a way that makes it possible for the victims of such an act to be combatants, *even exclusively so*."¹⁴ Hence, for them, "acts of terror" and "terrorist activity" (sequences of such acts) need not involve intentional targeting of noncombatants; indeed, they may not involve any noncombatant victims at all.¹⁵ Moreover, since there is no suggestion in this definition that "acts of terror" are committed by persons who attempt to disguise themselves as noncombatants, the second feature is also absent from the definition.

According to the new ethical code, "acts of terror" need not involve intentional targeting of noncombatants; indeed, they may not involve any noncombatant victims at all.

Nevertheless, Kasher and Yadlin maintain that, even if committed for "noble" or "legitimate" (rather than "wicked") reasons, "acts of terror" in the sense in which they use the phrase are never morally permissible. They provide three distinct grounds for thinking so.¹⁶ First, they say that "acts of terror" are not acts of self-defense because they are not committed against "perpetrators" but rather against members of a population. However, since Kasher and Yadlin themselves insist that the population in question need not consist in whole or even in part of noncombatants, that population may indeed be identical with the party that has perpetrated violence against the "terrorists" or those on whose behalf they are acting. Despite their claims, then, "acts of terror" may very well be acts of self-defense, so this cannot provide a reason for thinking that "terrorism" is immoral. The second reason they give is that an act intended to terrorize a population by killing or injuring is never an act of last resort. But they provide no reason for thinking that it is not, and there is plenty of evidence to suggest that at least some acts of violence of this kind are acts of desperation, undertaken precisely because no other recourse has been left open to those committing such acts. Third, and most important according to them, an act intended to terrorize a population treats people as "means" and not "ends." However, this reason and the Kantian moral terms in which they frame it are notoriously controversial among moral philosophers. Most moral philosophers would allow that there are some circumstances in which

it would be permissible to treat a person as a means to achieve a certain end, particularly if the end itself were morally justified. The point here is not to insist that all “acts of terror” are of this character, but rather that Kasher and Yadlin cannot conclude that all “acts of terror” are morally impermissible (even if undertaken to advance a legitimate cause) simply because they supposedly treat people as means.¹⁷

We have now seen that the two features of “terrorism” generally thought to render it morally problematic are absent from Kasher and Yadlin’s definition of “terrorism.” Moreover, none of the reasons that they cite for regarding “terrorism” as morally impermissible are convincing. This raises the obvious question: Why, according to Kasher and Yadlin, does the military undertaking of fighting “terrorism” necessitate a new set of ethical principles? In the next section, I will try to ascertain whether there are other features of the fight against “terrorism,” as Kasher and Yadlin characterize it, which require the articulation of a new ethical code. I will also try to determine whether the moral principles that they enunciate as part of that code are indeed justified.

COMBATANTS AND NONCOMBATANTS

The main innovation of Kasher and Yadlin’s ethical code, and the one that has garnered the most attention, concerns their “Principle of Distinction.” This principle governs the different types of duties that the state has to different types of persons in the course of the fight against “terror.” The authors list such duties and prioritize them as follows, with the first having the highest ranking and the last the lowest:

- (d.1) Minimum injury to the lives of citizens of the state who are not combatants during combat;
- (d.2) Minimum injury to the lives of other persons (outside the state) who are not involved in terror, when they are under the effective control of the state;
- (d.3) Minimum injury to the lives of the combatants of the state in the course of their combat operations;
- (d.4) Minimum injury to the lives of other persons (outside the state) who are not involved in terror, when they are not under the effective control of the state;
- (d.5) Minimum injury to the lives of other persons (outside the state) who are indirectly involved in terror acts or activities;
- (d.6) Injury as required to the liberties or lives of other persons (outside the state) who are directly involved in terror acts or activities.¹⁸

This prioritized list of state duties is notable for the fact that it gives precedence to paragraph d.3, which concerns duties to combatants of the state, over paragraph d.4, which concerns duties to a category of noncombatants. In plain terms, the principles outlined by Kasher and Yadlin affirm that the state is morally required to attach greater importance to avoiding injury to

the combatants of the state than to noncombatants who are not involved in "terror" and are not under the state's effective control.

Kasher and Yadlin are not denying that a warring state should avoid harm to noncombatants while fighting "terrorism." Rather, they are saying that avoidance of harm to *some* combatants (namely, citizen combatants) should take priority over avoidance of harm to *some* noncombatants (namely, those not involved in "terror" and in areas outside the state's control). In this, they are breaking with centuries of theorizing about the rules of war, since the stance represented by the entire tradition of moral theory known as *jus in bello* (justice in war) draws a crucial distinction between combatants and noncombatants and prioritizes the duty to avoid harming noncombatants over the duty to avoid harming combatants. The moral basis of the distinction between combatants and noncombatants rests on two grounds. First, combatants (whether they are conscripts or not) have intentionally embarked on acts of violence and are actively seeking to endanger others, thereby forfeiting their right to security and to be left in peace. Second, combatants are armed, prepared for combat, and capable of defending themselves. This is why combatants are in a different moral category than noncombatants according to prevailing conceptions of just war theory and international law.¹⁹ This moral principle is enshrined in international humanitarian law, which makes a clear distinction between combatants and noncombatants without qualification, notably in the Fourth Geneva Convention.²⁰ By prioritizing the lives of citizen combatants over those of noncombatants who are outside the control of the state, Kasher and Yadlin knowingly break with this moral and legal precedent, saying that they "reject such conceptions."²¹ In other words, they repudiate the moral and legal principle that a state always has a greater duty to avoid harming noncombatants than combatants.

How do Kasher and Yadlin justify their repudiation of this widely accepted moral and legal principle? They seem to bring forth two considerations to support the claim, though they do not explicitly flag them as such. The first is that combatants are human beings just like noncombatants: "A combatant is a citizen in uniform. In Israel, quite often he is a conscript or on reserve duty. His blood is as red and thick as that of citizens who are not in uniform. His life is as precious as the life of anyone else."²² There are several points to make in response. The claim that soldiers are human beings does not address the basis of the moral distinction between combatants and noncombatants and is therefore irrelevant in this context. Moreover, if the argument here specifically concerns conscripts, it cannot justify the claim that *all* combatants who are citizens of the state should be given priority over noncombatants in territories outside state control. At best, it might be used to justify the claim that conscript combatants should be given priority over noncombatants (though they fail to make an argument to that effect). Most important, this first consideration as they present it would support the claim that the lives of conscript combatants have *equal*—rather than greater—weight compared to the lives of noncombatants. Hence, Kasher and Yadlin's statement that an Israeli conscript's "life is as precious as the life of anyone else" is misleading at best, since

their principle of distinction, when applied to the Israeli situation, implies that the duty to preserve the lives of Israeli combatants is to be prioritized *over* the duty to preserve the lives of Palestinian noncombatants.

The second consideration brought forth by Kasher and Yadlin to justify the claim that the lives of combatants are to be prioritized over some noncombatants is summarized in the following passage:

Where the state does not have effective control of the vicinity, it does not have to shoulder responsibility for the fact that persons who are involved in terror operate in the vicinity of persons who are not. Injury to bystanders is not intended. On the contrary, attempts are made to minimize it. However, jeopardizing combatants rather than bystanders during a military act against a terrorist would mean shouldering responsibility for the mixed nature of the vicinity for no reason at all.²³

The reasoning here appears to be as follows. In fighting “terrorism,” the state is engaged in military actions in areas outside its control. In those areas, there is a mix of combatants and noncombatants. This mix has not been created by the state that is carrying out military operations. Hence, the state should not be held responsible if, as a result of its military operations, it kills or injures the noncombatants found in that mixed vicinity.

The first thing to notice about this argument is that it appears to assume that all acts of “terrorism” emanate from areas outside state control. However, there is nothing about “terrorism,” even as Kasher and Yadlin define it, that would make this the case. It would seem that most “terrorism,” both as generally characterized and as Kasher and Yadlin themselves characterize it, is internal to states rather than emanating from areas outside their control. Indeed, this condition would seem to apply more aptly to war between states, because in conventional warfare states usually attack areas that are not directly under their own control. Hence, if sound, this argument would justify applying their principle of distinction primarily to instances of conventional warfare and not to the “fight against terror.”

More important, Kasher and Yadlin’s attempt to justify their principle of distinction does not stand up to scrutiny because it is morally irrelevant, as will be seen by considering a simple illustration. If one person attacks another or endangers the life of another in the course of pursuing a certain goal, there are certain circumstances that might exculpate the attacker or at least partially absolve him from a moral point of view. This would be the case, for example, if the attacker does not know that his actions are harming another. But the attacker’s responsibility or lack of responsibility for the location of his victim has no bearing on the morality of his action. Similarly, the fact that the state is not responsible for having placed noncombatants in an area outside of its control has no bearing on the moral responsibilities of the warring state toward noncombatants in that area.²⁴ It is worth noting that Kasher and Yadlin do not attempt to justify their principle of distinction by claiming that

"terrorists" deliberately "hide behind" civilians and that this is why they should be responsible for the death or injury of noncombatants.²⁵ The authors' claim is merely that, as a matter of fact, "terrorists" operate in vicinities outside the state's control, that the vicinities in question are mixed in the sense of including both combatants and noncombatants, and that the state is not responsible for this mix. They do not say that the adversary combatants are responsible for the mix nor that they deliberately arrange to operate in such mixed areas to escape attack. Indeed, it is just as well that they do not make this claim, because there is no way to justify it, as they must realize.²⁶

There is a further problem with Kasher and Yadlin's attempt to justify their principle of distinction that applies to Israel in particular. It is patently false that the areas in which Israeli military and "counterterrorism" operations are being conducted—predominantly the West Bank and Gaza Strip—are not under state control. These areas have been under uninterrupted military occupation since June 1967. In various different contexts, Kasher and Yadlin acknowledge that situations of belligerent occupation are ones in which the occupying state controls the territory in question.²⁷ Hence, they would seem to believe that the occupied Palestinian territories are not areas under Israeli military occupation, which simply contradicts international law and the facts on the ground.²⁸ Moreover, even a cursory look at the facts will reveal that the Israeli state does indeed bear a large measure of responsibility for the presence of civilians in areas subject to its military attacks. Concerning the Gaza Strip in particular, the majority of the population are refugees and their descendants, there by virtue of the ethnic cleansing of Palestine by Zionist forces in 1948, as is now widely acknowledged even by mainstream Israeli historians. More recently, the Gaza Strip has been under a total blockade by land, sea, and air for a continuous period as a result of an Israeli siege, so that civilians are trapped in the zone of military operations and unable to leave even if they wanted to. Hence, both distally and proximally, it is as a result of direct Israeli action that the areas in which Israel conducts its military operations in the Gaza Strip are among the most densely populated in the world and ones in which the movement of civilians is severely restricted. Similar circumstances are in place for many areas in the West Bank, where numerous checkpoints, roadblocks, and other military measures constrain the population's freedom of movement (to say nothing of the separation wall, which in many locations confines people in small enclosures, sometimes separating them from their workplaces and farmlands). Not only are these areas under Israeli control, it is simply incorrect that the state does not bear responsibility for their "mixed" nature (that is, for their containing combatants and noncombatants).

It may be thought that an obvious element of Kasher and Yadlin's justification of their principle of distinction has not been mentioned so far, namely, the fact that the combatants to whose lives the state is required to attach greater value are the state's own citizens, whereas those in areas outside its control are (usually) noncitizens, and every state is morally justified in attaching greater value to the lives of its own citizens than to noncitizens. Though Kasher and Yadlin mention this as a morally relevant consideration, they do not dwell on

it, noting merely that “our obligations to help others differ according to the relationships in which we stand to them, such as being their parents, other family members, friends, fellow citizens, and so on.”²⁹ When applied to the moral duties of a state, this principle of “special obligation” would mean that a state’s obligation to provide services to its citizens differs from its obligation to provide services to noncitizens.³⁰ However, in the case at hand, the issue is a state’s moral obligations in wartime when the state in question is actively engaged in attacks that endanger the lives of noncombatants who are not its citizens. One cannot merely assume that the moral justification for privileging citizens over noncitizens can be extended without modification to this case. A state may not be obliged to educate noncitizens or provide them with health-care, but is it justified in *endangering the lives* of noncombatant noncitizens to a greater extent than combatant citizens? Clearly, it does not follow from the general principle of special obligation, which cannot be straightforwardly applied to acts of violence undertaken during wartime and used to override the moral distinction between combatants and noncombatants.³¹

TESTIMONY AND OTHER EVIDENCE

It could be argued that armies always value the lives of their own soldiers over those of enemy civilians and that Kasher and Yadlin are merely giving voice to a principle already implicitly if not explicitly embraced by every military institution. Though they may not always say so in public, military commanders are undoubtedly prone to attach more value to the lives of their own soldiers than to enemy civilians, and to say that they ought not to do so is to live in a moral utopia. There are two points to be made in response to this argument. The first is to emphasize that Kasher and Yadlin’s project—which claims to have universal application—is one of establishing an ethical code for the Israeli military, a moral standard that military personnel *ought* to abide by. In such a prescriptive endeavor, the objective is to set an example for soldiers to follow rather than summarize the rules and principles governing actual practice.³² The second, related point is that when an ethical code has been articulated for a state’s military that explicitly sanctions privileging the lives of that state’s combatants over noncombatants on the other side, and does so on purportedly moral grounds, the consequences of enacting that code can be expected to be far-reaching. If it is indeed the case that some military commanders are predisposed to give more weight to the lives of their fellow soldiers than to enemy civilians, providing them with the ethical cover to do so would likely encourage them to err further in this direction. Significantly, numerous reports issued since Israel’s war on Gaza suggest just such an outcome.

Between 27 December 2008 and 18 January 2009, the Israeli government waged Operation Cast Lead (OCL), a wide-scale ground, naval, and air offensive on the Gaza Strip. According to the Palestinian Center for Human Rights (PCHR), 1,419 Palestinians were killed, including 1,167 noncombatants (82 percent of the total) and 252 militants (18 percent). The noncombatants killed

included 318 children (22 percent of all victims and 27 percent of noncombatants). The total number of wounded was put at 5,300, some 1,600 of them children (30 percent).³³ PCHR charged: "Throughout the course of its assault on the Gaza Strip, [the Israeli military] continuously violated the principle of distinction [in international humanitarian law] in a widespread and systematic manner. Its indiscriminate and disproportionate conduct of hostilities resulted in excessive death and injury amongst the civilian population, and the extensive destruction of civilian property."³⁴ Though the Israeli human rights organization B'Tselem has not yet published its conclusions on the conflict, it has stated: "Examination of the Israeli military's conduct during the operation raises concerns as to the extent to which Israel complied with its obligations under international humanitarian law regarding distinction, proportionality, and direct fire at civilians."³⁵ Other human rights organizations, such as Human Rights Watch (HRW) and Amnesty International, also reported incidents they considered serious violations of international humanitarian law. HRW documented in detail several cases in which Palestinian civilians were killed by Israeli soldiers, concluding: "In each of these incidents, the evidence strongly indicates that, at the least, Israeli soldiers failed to take feasible precautions to distinguish between civilians and combatants before carrying out the attack. At worst, the soldiers deliberately fired on persons known to be civilians." Similarly, an Amnesty report found that "Some of the Israeli bombardments and other attacks were directed at civilians or civilian buildings in the Gaza Strip; others were disproportionate or indiscriminate."³⁶ Most exhaustive was the report of the United Nations Fact-Finding Mission on Gaza (the Goldstone report), which found numerous "willful killings" and cases of "willfully causing great suffering" to "protected persons" (that is, noncombatants), which it said constitute grave breaches of the Fourth Geneva Convention.³⁷ According to the judgment of major Palestinian, Israeli, and international human rights organizations, the Israeli assault on Gaza either deliberately targeted noncombatants or failed to take precautions to distinguish combatants from noncombatants.

Such findings do not demonstrate a direct causal link between the ethical code and Israeli military actions, but a line of causation has been drawn by Israeli journalists as well as by Kasher himself.³⁸ Certainly, the ethical code was well known to top military commanders; as Kasher and Yadlin mention in a previously quoted passage: "the final document was presented to the IDF chief of staff and to generals involved in fighting terror." Moreover, additional evidence strongly indicates a linkage between the content of the code and the conduct of Israeli officers. Israeli organizations such as the Public Committee Against Torture in Israel (PCATI) and Breaking the Silence have amassed considerable evidence that the instructions of military commanders during OCL directly reflected the code's principle of distinction that effectively privileges the lives of Israeli soldiers over those of Palestinian

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civilians. According to the accounts collected, officers explicitly instructed the soldiers under their command not to heed the distinction between combatants and noncombatants in using military force and to treat noncombatants as though they were combatants. For instance, a television report quoting the briefing given to the Paratroop Brigade by brigade commander Colonel Herzl Halevy clearly reflects Kasher and Yadlin's principle of distinction. "First complete the mission, after defend the soldiers' lives, and finally minimize the damage to the Palestinian civilian population."³⁹ Another military commander filmed by Israeli television was quoted instructing his soldiers as follows:

I want aggression! If we suspect a building, we take down this building! If there's a suspect in one of the floors of that building, we shell it. No second thoughts. If it's either them or us, let it be them. No second thoughts. If someone approaches us, unarmed, and keeps coming despite our warning shot in the air, he's dead. No one has second thoughts. Let errors take their lives, not ours.⁴⁰

This approach is corroborated by the anonymous testimony of a soldier describing the briefing given by his commanding officer just before the attack on Gaza began:

Before the first time we went in, the battalion commander had us all stand in formation on Friday evening and said: "We cannot surprise them with our timing, they know when. We cannot surprise them with our location, they know exactly where we're coming in. What we do have . . . is fire power." And in fact all that fire power, what with air force, artillery, armored corps and the quantity of infantry that went in, the awareness of each soldier going in is simply . . . a light finger on the trigger. You see something and you're not quite sure? You shoot.⁴¹

The soldier then quotes his commanding officer as saying: "Not a hair will fall off a soldier of mine, and I am not willing to allow a soldier of mine to risk himself by hesitating. If you are not sure—shoot. If there is doubt then there is no doubt."⁴² PCATI also quoted a television interview with the commander of the Yahalom Battalion, the unit responsible for clearing routes for the ground forces and for detonating and demolishing buildings, in which he told his troops what was expected of them: "We are very violent, we use a lot of force, wherever we should against an enemy; and we don't refrain from using any means to ensure that our forces aren't harmed."⁴³

One soldier expressed the goal of the military mission as "to carry out an operation with the least possible casualties for the army, without its even asking itself what the price would be for the other side. This was the thrust of things that we heard from more than one officer."⁴⁴ In separate testimony another soldier also commented on the aim of the mission:

The point was to spare the soldiers and avoid the threat to us—obliterate it the moment it appears. I think that arrest procedure was less strict exactly for this reason, and in order to be with a “lighter finger on the trigger”—I don’t like to call it this way, but it’s true. We’re there and we’re not willing to lose men, neither wounded nor killed. Later we can worry about humanitarianism.⁴⁵

Another soldier outlined the rules of engagement: “As for the rules of engagement, we did not get instructions to shoot at anything that moved, but we were generally instructed: if you feel threatened, shoot. They kept repeating to us that this is war and in war opening fire is not restricted.”⁴⁶ Yet another soldier described the directives of his commanding officer:

This battalion commander is a good speaker, knows how to motivate us. One of the things that stood out was a subjective sense, something very permissive about the whole thing. He said we were going to exercise insane fire power with artillery and air force. We were given the feeling that we were not just being sent out there, but with enormous security and cover. He did restrain it and say, “It’s not that you’re out to carry out a massacre, but . . .”—this was the restraint to everything he had said before, and in between his own jokes which made me laugh, too. Like, “We have an Arabic-speaking grenade launcher, and a heavy machine-gun that speaks Arabic.” This was the spirit of things.⁴⁷

Finally, a soldier who was asked about the official briefing by the battalion commander before embarking on the mission described it as follows: “We were told [that] soldiers were to be secured by fire-power. The soldiers were made to understand that their lives were the most important, and that there was no way our soldiers would get killed for the sake of leaving civilians the benefit of the doubt. We were allowed to fire in order to spare our lives.”⁴⁸

Other evidence also confirms a general policy of zero tolerance for Israeli military casualties and lenient rules of engagement concerning the lives of Palestinian civilians during the attacks on Gaza in 2008–2009. A report in the British newspaper the *Independent* quoted an unnamed Israeli officer who served as a commander in the offensive on Gaza as stating that “he did not regard the longstanding principle of military conduct known as ‘means and intentions’—whereby a targeted suspect must have a weapon and show signs of intending to use it before being fired upon—as being applicable before calling in fire from drones and helicopters. . . .” The newspaper also quoted a junior officer who served at brigade headquarters during the operation as describing the Israeli military policy as one of “literally zero risk to the soldiers.”⁴⁹ Similarly, the Goldstone report on the Gaza conflict, after examining a number of incidents in which Israeli forces launched lethal attacks against civilians,

concluded: "These incidents indicate that the instructions given to the Israeli forces moving into Gaza provided for a low threshold for the use of lethal fire against the civilian population."⁵⁰

OCL is not the only recent Israeli military action that may reflect the impact of the new ethical code. Even before that operation, the ratio of Palestinians (mainly noncombatants) to Israelis (both combatants and noncombatants) killed in the occupied territories had been rising steadily, from 5 to 1 in 2002 to 48 to 1 in 2007.⁵¹ Meanwhile, on the Lebanese front, in the July-August conflict of 2006, some 1,200 Lebanese noncombatants and 49 Lebanese combatants were killed by the Israeli military, as opposed to 43 Israeli noncombatants and 119 Israeli combatants killed by Hizballah militants (a ratio of noncombatant fatalities of nearly 30 to 1). After that conflict, Israeli military commanders articulated the "Dahiya Doctrine," named after the southern suburb of Beirut (*al-dabiya al-janubiyya*), a residential neighborhood devastated by Israeli airstrikes in the course of that conflict. General Gadi Eisenkot, head of the Israeli army's northern command, told the Israeli newspaper *Yedi'ot Aharonot* in March 2008: "What happened in the Dahiya quarter of Beirut in 2006 will happen in every village from which Israel is fired on." He went on to say: "We will apply disproportionate force on it [the village] and cause great damage and destruction there. From our standpoint, these are not civilian villages, they are military bases." Though there has been no official indication that the doctrine has become Israeli military policy, Eisenkot affirmed: "This is not a recommendation. This is a plan. And it has been approved."⁵²

* * *

The argument made in this paper implies that some of the deliberate acts of violence carried out against Palestinian civilians by Israeli military forces during OCL can be traced directly to the ethical code officially approved by the Israeli military to govern the "fight against terror" and promulgated at the highest levels of the Israeli military command. The importance of this finding lies in the fact that immoral actions committed by Israel in Gaza, which have been documented by Palestinian, Israeli, and international bodies, cannot be laid exclusively at the door of lower level or mid-level Israeli military personnel acting outside the scope of their military orders. At least some of the death and injury inflicted on Palestinian civilians can be linked to the directives of senior military commanders acting in accordance with an official document of the Israeli armed forces. When members of a state's armed forces can be shown to have deliberately targeted noncombatants on the other side of a conflict, they can be accused of having failed to heed the principle of distinction as it is understood in standard just war theory and of having committed war crimes under international humanitarian law. However, when this is done not merely as a result of decisions by individual soldiers and officers, but in accordance with principles drawn up by the military leadership, the moral and legal implications are substantially different. There is a clear moral difference

between intentional violence committed against civilians and carried out by soldiers and officers at their own behest on the one hand, and premeditated violence that is undertaken in accordance with an explicit policy drafted by the military leadership on the other. There is arguably a legal difference too. Whereas deliberate violence against civilians is classified as a war crime under international humanitarian law, a widespread attack against a civilian population that is "pursuant to or in furtherance of a State or organizational policy to commit such attack" is classified instead as a crime against humanity.⁵³ It is up to international jurists to determine whether the Israeli attack on Gaza qualifies as such under international law.

ENDNOTES

1. For example, Israeli defense minister Ehud Barak described the Israeli military as "the most moral army in the world" in pledging legal aid to soldiers accused of war crimes in January 2009 (*Ha'aretz*, 27 January 2009, <http://www.haaretz.com/hasen/spages/1058509.html>). Similarly, then prime minister Ehud Olmert described Israel as having the "most moral army" in the world in a cabinet meeting in June 2006 (*Jerusalem Post*, 11 June 2006, <http://www.jpost.com/Israel/Article.aspx?id=24499>).

2. Meir Chazan, "The Dispute in Mapai over 'Self-Restraint' and 'Purity of Arms' During the Arab Revolt," *Jewish Social Studies: History, Culture, Society* 15, no. 3 (Spring/Summer 2009), pp. 89–113.

3. Vered Levy-Barzilai, "The High and the Mighty," *Ma'ariv* 23 August 2002; translated and reprinted in *JPS* 32, no. 1 (Autumn 2002), pp. 99–102.

4. Ruth Manor, "Reasonable (and Unreasonable) Goals and Strategies, and the Hope for Peace in the Middle East," *American Philosophical Association Newsletter on International Cooperation* 4, no. 1 (Fall 2004), pp. 11–13.

5. Israel Defense Forces, "The IDF Spirit," <http://dover.idf.il/IDF/English/about/doctrine/ethics.htm>.

6. Manor, "Reasonable (and Unreasonable) Goals and Strategies," p. 12.

7. Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective," *Journal of Military Ethics* 4 (April 2005), pp. 3–32; Kasher and Yadlin, "Assassination and Preventive Killing," *SAIS Review* 25 (Winter–Spring 2005), pp. 41–57. The first article was accompanied by critiques to which the

authors responded in a third article, Kasher and Yadlin, "Military Ethics of Fighting Terror: Response," *Journal of Military Ethics* 4 (April 2005), pp. 60–70.

8. Kasher and Yadlin, "Military Ethics," p. 29. However, they also write that it was "developed by a team of the Israeli Defense Force (IDF) College of National Defense, headed by Maj. Gen. Amos Yadlin." Kasher and Yadlin, "Assassination," p. 45.

9. Kasher and Yadlin, "Assassination," p. 45.

10. Kasher and Yadlin, "Assassination," p. 47. Elsewhere, they write: "the principles are suggested as universal and should be evaluated and applied as such." Kasher and Yadlin, "Response," p. 61.

11. Throughout this article, I will place the words "terror," "terrorist," and "terrorism," in quotation marks, because I will be discussing them as Kasher and Yadlin or others define them.

12. These two features, which are associated with "terrorism" in many definitions of the phenomenon, provide a prima facie case for the immorality of such acts. What is more controversial is whether these features apply to all actions or only actions that are *commonly* referred to as "terrorism." Many so-called "terrorist" groups limit themselves mainly to military targets. More crucially, it is certainly not the case that all violence deliberately targeting noncombatants is considered "terrorism": state actors, for example, often deliberately target noncombatants, yet their actions are rarely described as acts of "terrorism." This is perhaps the main reason that some writers find the term so contentious, not to say offensive, because they fail to see a

relevant moral difference between state actors deliberately targeting civilians and nonstate actors doing so. For more on this point, see Noam Chomsky, *Pirates and Emperors, Old and New: International Terrorism in the Real World* (Cambridge: South End Press, 2002).

13. Kasher and Yadlin, "Military Ethics," p. 4.

14. Kasher and Yadlin, "Military Ethics," p. 5 (emphasis added).

15. One of their justifications for this stance is as follows: "imagine an act that kills a combatant and non-combatant. Should we describe it as an act of terrorism against the non-combatant and one of guerrilla warfare against the combatant?" They hold that this "makes no sense." Kasher and Yadlin, "Military Ethics," p. 5. This argument, however, is not sound, because by the same reasoning it could be argued that there is no difference between an act of murder and an act of self-defense. An intentional act by an individual that kills two people at the same time, one who was trying to kill the individual in question and one who was not, could be described as both an act of self-defense *and* an act of murder, but it does not follow that the distinction in general no longer makes sense.

16. Kasher and Yadlin, "Military Ethics," p. 5.

17. In a reply to critics, Kasher and Yadlin seem to reverse their earlier statement on this score, since they admit: "Notice that not only the end of bringing about a change of policy can be morally pursued, but also the intermediate end of instilling fear in a population can, under appropriate conditions, be morally served." Kasher and Yadlin, "Response," p. 63.

18. Kasher and Yadlin, "Military Ethics," p. 15.

19. The moral distinction between combatants and noncombatants does not coincide exactly with that between military personnel and civilians, because the moral status of the persons involved is not determined by professional affiliation. Someone can be a member of the military yet not participate in combat in any way or substantially aid the war effort (e.g., a nurse employed in a veteran's hospital far from the front lines). Conversely, a person can be a civilian yet provide vital, or even direct, support for combat operations (e.g., a senior defense

ministry official). Hence, what determines one's moral status in times of war has to do with the role that one plays in the war effort. Although such roles may lie along a continuum, there is a widespread presumption that a meaningful distinction can be drawn between combatants and noncombatants.

20. The main sources of international humanitarian law concerning the principle of distinction are the Fourth Geneva Convention, available at <http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument>, and the Rome Statute of the International Criminal Court, available at http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm.

21. Kasher and Yadlin, "Military Ethics," p. 17.

22. Kasher and Yadlin, "Military Ethics," p. 17.

23. Kasher and Yadlin, "Military Ethics," p. 18.

24. In a response to Kasher and Yadlin written in the aftermath of Israel's winter 2008–2009 war on Gaza, Avishai Margalit and Michael Walzer surprisingly fail to make this point, though they note that the noncombatants who are located in areas outside the state's control might be citizens of the state, in which case Kasher and Yadlin would presumably have a very different attitude toward them. See Avishai Margalit and Michael Walzer, "Israel: Civilians and Combatants," *New York Review of Books* 56, no. 8 (14 May 2009), <http://www.nybooks.com/articles/22664>. A similar point is made by Bashshar Haydar, using the example of Israeli forces targeting a "terrorist" in neutral territory such as Cyprus, in the process killing and injuring Cypriot non-combatants. See Bashshar Haydar, "The Ethics of Fighting Terror and the Priority of Citizens," *Journal of Military Ethics* 4, no. 1 (April 2005), pp. 52–59. In the first case, Kasher and Yadlin respond to Margalit and Walzer by dodging the issue, emphasizing that one should take positive measures to minimize civilian casualties, without addressing the question of whether the duty to minimize casualties among combatants takes precedence over the duty to minimize casualties among noncombatants in an area outside the state's control. Kasher and Yadlin, "Israel and the Rules of War: An Exchange," *New York Review of Books* 56, no. 10 (11 June

2009), <http://www.nybooks.com/articles/archives/2009/jun/11/israel-the-rules-of-war-an-exchange/>. In the second case, they respond to Haydar with a non sequitur, stating that Cyprus "can be safely assumed not to tolerate usage of its soil for acts or activities of terror against citizens of Israel or any other state." Kasher and Yadlin, "Response," p. 67.

25. A pertinent question can be raised in this connection as to whether Kasher and Yadlin's principle of distinction can itself be used to justify the use of human shields *by one's own combatants*. As Margalit and Walzer put it: "... if the lives of 'our' soldiers really take priority over 'their' civilians, then why couldn't the soldiers use those civilians as shields? Since they have not created the 'mixed vicinity,' why can't they in turn take advantage of it?" Margalit and Walzer, "Israel: Civilians and Combatants." In other words, since, according to Kasher and Yadlin, the state has a lighter duty to protect noncombatants than citizen combatants in areas outside the state's control, certain situations may well arise in which noncombatants from the other side can be used to protect the lives of one's own combatants, at some risk to the lives of those noncombatants. Kasher and Yadlin anticipate this point by adding a "proviso" to their principle of distinction. Their proviso reads as follows: "All this [that is, the Principle of Distinction] applies when the presence of persons directly involved in terror acts or activities within the environment of other persons not involved in terror outside the state, has not been created by the state, and is of direct responsibility of a foreign power." Kasher and Yadlin, "Assassination," p. 50. In other words, they do not sanction the use of human shields because that would be a case in which the state in question is responsible for placing noncombatants in a threatening situation, and they distinguish this case from one in which the state is not responsible for placement of the noncombatants. However, as explained above, they have not shown why responsibility for putting noncombatants in a particular vicinity is a relevant moral consideration. Hence, there would seem to be nothing to distinguish an act of prioritizing the lives of citizen combatants over those of noncitizen noncombatants from an act involving the use of those noncombatants as human

shields to protect the lives of soldiers. Accordingly, their principle of distinction can be used to justify the use of noncombatants as human shields. Journalists and human rights workers who investigated the offensive on Gaza uncovered evidence regarding the use of Palestinian civilians as human shields by Israeli military forces. See, for example, Amira Hass, "Gazans: IDF Used Us as 'Human Shields' during Offensive," *Ha'Aretz*, 26 October 2009, <http://www.haaretz.com/hasen/spages/1065594.html>.

26. The United Nations Fact-Finding Mission on Gaza (headed by Justice Richard Goldstone) investigated the issue of whether Hamas militants launched attacks from urban areas during the conflict in 2008–2009 in order to shield themselves from attacks, concluding in its report: "The Mission has not been able to obtain any direct evidence on this question; nor do reports from other observers provide a clear answer;" "Report of the United Nations Fact-Finding Mission on the Gaza Conflict," p. 138. By contrast, the report documented several cases in which Israeli forces used Palestinian noncombatants as human shields; see "Report of the United Nations Fact-Finding Mission," pp. 280–300.

27. They write: "Belligerent occupation of the territory replaces the sovereign power of the territory by the military commander of the force that controls it, for as long as the occupation lasts." Kasher and Yadlin, "Military Ethics," p. 15. See also Kasher and Yadlin, "Assassination," p. 57, n. 18, for an implicit recognition of the same point.

28. Contrary to a widespread impression, the "Gaza disengagement plan" did not put an end to the Israeli occupation of the Gaza Strip. Israeli troops and settlers were pulled out of the Gaza Strip, while the Israeli military continued to rule over Gaza by controlling access to it by land, sea, and air, as well as by controlling its airspace and territorial waters. Palestinians in Gaza have no sovereignty over their own affairs, cannot leave or enter their territory without Israeli permission, cannot export or import goods at will, do not control their own electric power and water supply, and have no form of meaningful self-governance. In an important sense, and as illustrated by the attacks of 2008–2009, the evacuation of Israeli

settlers from Gaza actually allowed Israel to exercise a firmer and more violent grip on the territory.

29. Kasher and Yadlin, "Military Ethics," p. 19. In a letter to the *New York Review of Books*, Shlomo Avineri defends Kasher and Yadlin's principle of distinction on similar grounds. See Shlomo Avineri, "Israel: Civilians and Combatants': An Exchange," *New York Review of Books* 56, no. 13 (13 August 2009), <http://www.nybooks.com/articles/22979>.

30. In fact, it is implausible that the principle can be extended straightforwardly to states, since the usual justification for it is found in "commonsense" morality, following the moral philosopher Henry Sidgwick, and the extension to states is not part of our commonsense moral framework. In response, Kasher and Yadlin might modify their position and say that the grounds of the special obligations that states have to their citizens are actually contractual rather than based on special obligations. To be sure, it is more plausible to argue that a state is obligated to educate its citizens but not noncitizens because of a (possibly implicit) social contract. However, it is unlikely that the state is similarly contractually obligated to give greater weight to the lives of its citizens than to noncitizens, if need be killing noncitizens to protect the lives of its citizens. Moreover, as Bashshar Haydar observes, even if there were such a contract that bound states in this way, it would carry very little moral weight; it would be similar to "a contract that requires a body-guard to kill innocent persons in order to protect his boss." Haydar, "The Ethics of Fighting Terror," p. 55.

31. As Margalit and Walzer put it: "When one country imposes risks on innocent people in another country . . . it has to take positive measures to minimize those risks—and the measures it has to take are not dependent on the nationality of the innocents." Margalit and Walzer, "Israel: Civilians and Combatants."

32. Ruth Manor suggests that the promulgation of the original ethical code for the Israeli military had the effect of stifling moral discussion among military personnel, and furthermore, that it was designed to do so. She observes that the "IDF Spirit" was developed in order to counter the growing Refusenik movement in the Israeli military in the wake of

the first Palestinian uprising: "The Ethical Code is presented to the soldiers as an order. Its main effect is to make any moral objections to military activities both illegitimate and unethical. Its main effect is thus also to silence criticism. This time, to silence any moral criticism soldiers may have of the orders they are given," Manor, "Reasonable (and Unreasonable) Goals and Strategies," p. 12.

33. PCHR, "Targeted Civilians: A PCHR Report on the Israeli Military Offensive against the Gaza Strip," 22 October 2009, p. 10, http://www.pchrgaza.org/files/Reports/English/pdf_spec/gaza%20war%20report.pdf.

34. PCHR, "Targeted Civilians," p. 37.

35. B'Tselem, "Guidelines for Israel's Investigation into Operation Cast Lead," p. 5, http://www.btselem.org/English/Press_Releases/20090208.asp.

36. Human Rights Watch, "White Flag Deaths: Killings of Palestinian Civilians during Operation Cast Lead," 13 August 2009, p. 6, <http://www.hrw.org/node/85014>; Amnesty International, "Fuelling Conflict: Foreign Arms Supplies to Israel/Gaza," 23 February 2009, p. 5, <http://www.amnesty.org/en/library/info/MDE15/012/2009/en>.

37. "Report of the United Nations Fact-Finding Mission," p. 16.

38. See Amos Harel, "The Philosopher Who Gave the IDF Moral Justification in Gaza," *Ha'Aretz*, 6 February 2009, <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=1062127>.

39. PCATI, "No Second Thoughts: The Changes in the Israeli Defense Forces' Combat Doctrine in Light of 'Operation Cast Lead,'" November 2009, p. 14, http://www.stoptorture.org.il/files/no%20second%20thoughts_ENG_WEB.pdf.

40. PCATI, "No Second Thoughts," p. 13.

41. Breaking the Silence, "Soldiers' Testimonies from Operation Cast Lead, Gaza 2009," June 2009, p. 20.

42. Breaking the Silence, "Soldiers' Testimonies," p. 20.

43. Quoted in PCATI, "No Second Thoughts," p. 27, from Israel Channel 2 News, 7 January 2009.

44. Breaking the Silence, "Soldiers' Testimonies," p. 27.

45. Breaking the Silence, "Soldiers' Testimonies," p. 79.

46. Breaking the Silence, "Soldiers' Testimonies," p. 24.

47. Breaking the Silence, "Soldiers' Testimonies," p. 46.

48. Breaking the Silence, "Soldiers' Testimonies," pp. 104-5.

49. Donald Macintyre, "Israeli Commander: 'We Rewrote the Rules of War for Gaza,'" *The Independent*, 3 February 2010, <http://www.independent.co.uk/news/world/middle-east/israeli-commander-we-rewrote-the-rules-of-war-for-gaza-1887627.html>.

50. "Report of the United Nations Fact-Finding Mission," p. 16.

51. These figures are derived from the statistics collected by B'Tselem, which can be found at <http://www.btselem.org/English/Statistics/Casualties.asp>.

52. "Israel Warns Hizbullah War Would Invite Destruction," *ynetnews.com*, 3 October 2008, <http://www.ynet.co.il/english/articles/0,7340,L-3604893,00.html>.

53. Rome Statute of the International Criminal Court, Article 7, Paragraph 2 (a), http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm.