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A Human Rights-Oriented Approach to Military Operations

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1 Introduction

Counterinsurgency is the dominant aspect of US operations in Afghanistan, and since ISAF—the NATO-led security and assistance force—has assumed growing security responsibility throughout the country, it is also a mission for the Europeans.[1] The frame in which military operations are conducted is *irregular warfare*, a form of conflict which differs from conventional operations in two main aspects. First, it is warfare among and within the people. Second, it is warfare in which insurgents avoid a direct military confrontation, using instead unconventional methods and terrorist tactics.

Insurgents are difficult to distinguish from non combatants until combat erupts. This circumstance entails a need of caution in the conduct of operations for which international humanitarian law (IHL), or the law of armed conflict, seems not tailored. Despite the considerable increase in the number of subjects covered by the law of armed conflict those rules—when compared to the complexity of modern warfare—are insufficient.

In 2003, a panel headed by Mary Kaldor—the Study Group on Europe's Security Capabilities—pleaded for a new legal framework to govern operations on the ground, build on the domestic law of the host and sending States, international criminal law, international human rights law and international humanitarian law[2] in order to provide a *human rights-oriented approach,* conducive to a better human rights protection regime. The core principle of a human rights-oriented approach is *minimal and precise force*, even if the use of such limited force puts troops at more immediate risk than using overwhelming force.

This essay intends to contribute to this vision by summarizing the outcomes of the jurisprudence of the European Court of Human Rights

[1] US Army, *Field Manual FM-3.0* (2008), at 2-1.

[2] *A Human Security Doctrine for Europe,* The Barcelona Report of the Study Group on Europe's Security Capabilities, Barcelona, 15 September 2004, at 24-25.

(ECtHR) on the use of deadly force by state's agents. Despite the fact that the European Convention system is a commitment to the rule of law and human rights limited to the members of the Council of Europe, thus eminently concentrate in the European legal space,[3] the results of its case-law are universally accepted as authorities. We subscribe here the idea that regional human rights treaties and the jurisprudence developed there under are persuasive authority which may be of assistance in applying and interpreting IHL. In particular, they are evidence of international customs.[4]

We are mindful that any assessment on the impact of the ECHR on matters inherently belonging to domestic or international law must be done with care. The ECtHR is a regional court with no competence on law of war issues, with a subsidiary role in assuring the rights set forth in the 1950 Convention and at which the appellant demands to condemn a State to pay compensation. There are, however, undeniable parallels between the jurisprudence of the Court and other jurisdictions where the right to life is protected and it cannot be said that the ECtHR decisions have no relevance beyond the Convention's system.[5]

Self-defence, distinction and proportionality in carrying on attacks and the use powerful weapon systems will be the focus of the reading.

2 The European Court's Approach to Military Operations

Since its first decision concerning violations of the right to life by state's agents—case of *McCann and Others v the UK*[6]—the ECtHR has examined a consistent number of incidents relating to security and military actions. In numerous cases, it found that the use of lethal force was inconsistent with the Convention. In each judgment, the lawfulness of a killing has been tested considering the two aspects of the conduct of the operation—the actions of the soldiers and the operational responsibility of the chain of command—in order to determine whether soldiers in the circumstances used

[3] *Banković and Others v Belgium and Others*, ECHR (2001), No. 52207, 80.

[4] ICTR, *Barayagwiza v the Prosecutor*, Case No. ICTR-97-19-A, Appeal Chamber, Judgment, 3 November 1999, 40. According to OSIEL, the effort to infuse the law of human rights into that of warfare, to the point of supplanting it, is largely misconceived. M. OSIEL, *The End of Reciprocity* (2009), at 111.

[5] F. LEVERICK, *Killing in Self-Defence* (2006), at 177.

[6] *McCann and Others v the United Kingdom*, ECHR (1995) Series A, No. 324.

disproportionate and excessive force and whether the State's authorities failed to plan and control the operation (deliberately, recklessly or carelessly) in such a way as to minimise casualties. In its decisions the Court has long avoided any explicit reference to humanitarian law, while just in the recent case of *Varnava,* it held that Article 2 requires States to protect the lives of civilians in accordance with international humanitarian law treaties which have attained the status of customary law.[7]

So far, in its decisions the Court applied the Convention and its own precedents, independently from any consideration on conflict intensity or any qualification given to the armed confrontation. It has put on the same level law-enforcement, counter-terrorism operations and large battles.[8] It has not excluded *per se* measures requiring the deployment of army units equipped with powerful combat weapons—including aviation and artillery—as necessary to suppress an illegal armed insurgency, even when opponents were formally civilians.[9]

3 Issues Concerning Self-defence

The focus here is specifically on self-defence as a defence to homicide. The perspective is a rights perspective, which is the most productive route to establishing the permissibility of self-defensive killing.[10] The primary interest is the substantial implications of Article 2 of the European Convention on the correct interpretation of the rule permitting soldiers to kill in self-defence. The core assumption is that current regulations are close to

[7] See *Varnava and Others v Turkey,* ECHR (2008) Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90,16070/90, 16071/90, 16072/90 and 16073/90, 130: "International treaties, which have attained the status of customary law, impose obligations on combatant States as regards care of wounded, prisoners of war and civilians; Article 2 of the Convention certainly extends so far as to require Contracting States to take such steps as may be reasonably available to them to protect the lives of those not, or no longer, engaged in hostilities."

[8] On this issue, a comprehensive analysis in W. ABRESCH, A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya, *European Journal of International Law* (2005), Vol. 16 No. 4, 741–767.

[9] This point is related to the question of unlawful combatants. HCJ 769/02, *Public Committee against Torture in Israel v. Government of Israel*, 27 – 28. H. MOODRICK EVEN-KHEN, Unlawful Combatants or Unlawful Legislation? An Analysis of the Imprisonment of Unlawful Combatants Law (2002), *The Hebrew University of Jerusalem,* Faculty of Law, Research Paper No. 3-06, May 2006.

[10] LEVERICK *supra* at note 5, at 2.

maintain that a soldier on the battlefield—as in law-enforcement interventions—can only fire in response to life-threatening conducts.[11]

Governments regulate troops serving abroad through a set of rules of engagement (ROE). ROE are directives issued by competent military authorities which delineate the circumstances and limitations under which troops will initiate and/or continue a combat engagement. ROE encase domestic and international law.[12] They do not affect soldier's inherent right to self-defence. It means that any soldier is able to use the force that the relevant law—normally his/her own municipal criminal law—permits. In doing so he/she has to respect the standards of necessity and proportionality, while is to commanders and ROE drafters to provide further clarifications, which may include issues on the admissibility of using lethal force to arrest/detain individuals or protect properties.

A. The Use of Force in Defence of Life

The concept of self-defence encased in ROE documents includes the right to react to an imminent threat. "Imminent" means a necessity of self-defence against a threat which is instant, manifest and overwhelming, in accordance with the so-called Webster's doctrine of anticipatory self-defence (normally referred to State-to-State relations).[13] Force must be proportionate. If there is no imminent risk of death or serious (bodily) harm to servicemen or other persons, the use of fire is disproportionate and not in compliance with the rules of engagement.

ROE provisions tread municipal law. At common law as well as in civil law (or continental) systems self-defence—as intended in the relevant law and doctrine, corroborated by judicial decisions—is that defence which is required in order to tackle an unlawful attack that is happening or about to happen. A reaction to an attack which will happen—namely a pre-emptive reaction—will be unlawful. The action in self-defence must be necessary to

[11] The idea that a soldier on the battlefield can only fire in individual self-defence has been recently forwarded by some authors. See M. OSIEL, *supra* note 4, at 119.

[12] ROE governing the use of lethal force by British troops in Iraq in 2004 were the subject of guidance contained in a card issued to every soldier, known as "Card Alpha" (*Card A – Guidance for opening fire for service personnel authorised to carry arms and ammunition on duty*). See *Al-Skeini and Others v the United Kingdom*, ECHR (2007) No. 55721/07.

[13] See L. ROUILLARD, The Caroline Case: Anticipatory Self-Defence in Contemporary International Law (2004) *Miskolc J. of Int'l Law* 1, No. 2, at 104-120.

ward the attack and must be proportionate to its nature and intensity and reasonable in the circumstances.

Proportionality requires a comparison between the object of the protection—which can be life or limb but also other recognized legal interests—and the object which has to be sacrificed.[14] The judgment on proportionality must be objective, keeping in mind that an individual under attack *non habet stateram in manu* (he is not holding a balance).

Both in Anglo-Saxon tradition and in the European systems, self-defence is a defence if the agent has at least an honest belief that he/she is going to be attacked and reacts with proportionate force.[15] In this regard the defence must be considered from the offender's own viewpoint.

In the ECHR system the acceptable use of force is that *absolutely necessary* and the admissible degree of force is that *strictly proportionate*.[16] Requisites for self-defence under the Convention are thus *proportionality*, *absolute necessity* and an *imminent threat* to human life. In several occasions, the ECtHR has considered what different European systems require for self-defence and found no incompatibility between the conduct of States agents and Article 2, claiming conversely a recurrent lack of accuracy in the way in which operations in defence of any person from unlawful violence were supervised.

Self-defence under the ECHR includes situations in which agents have a genuine and honest belief in the need to fatally shoot.[17] The perception of a real and immediate risk to life legitimizes the use of lethal force and makes unfounded any claim of disproportionate use of force.[18] The assessment of the situation is that of the officers who are required to react in the heat of the moment.[19] To hold otherwise would be to impose an unrealistic burden on personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.[20]

A standard of justification such as "reasonably justifiable", which the current standard in several European systems—although less compelling than Convention's "absolutely necessary" standard—is acceptable. The use of

[14] Court of Cassation (Italy), First Criminal Division, 10 November 2004, n. 45407.
[15] *R v Palmer* (1971) 55 Cr App R 223 (P.C.).
[16] *McCann, supra* note 6, 149.
[17] *Ibidem*.
[18] *Bubbins v the United Kingdom*, ECHR (2005) No. 50196, 140.
[19] *Usta and Others v Turkey*, ECHR (2008) No. 57084, 59.
[20] *McCann, supra* note 6, 200.

lethal force based on soldiers' honest belief corroborated by *good reasons* is thus justified.[21]

B. The Use of Force in Defence of Property

The rules of engagement for the British personnel deployed in Iraq in 2004 significantly prescribed that, when guarding property, a soldier must not use lethal force other than for the protection of human life.[22]

The use of lethal force in protecting property is formally permitted in all domestic legal systems, but this matter remains highly controversial, as the courts in different States consider pivotal the proportionality of the reaction. According to the main jurisprudence, the use of arms in defence of goods is lawful only whereas the defender acts to prevent a credible prejudice at his/her physical integrity.[23]

A strong argument in favour of this orientation results from the literal formulation of Article 2 of the ECHR, according to which deprivation of life is not regarded as inflicted in contravention of the right to life when it results from use of force absolutely necessary in defence of *any person* from unlawful violence. The European Court stressed in numerous occasions that that rules—which ranks as one of the most fundamental provisions in the Convention—must be strictly construed.[24] In the second paragraph there is no reference to the defence of property as a ground for excluding State's responsibility for violation of Article 2.

Referred to military deployments, this issue is quite relevant. Military compounds content valuable items, for insurgents but also for deprived civilians, whose intrusions are mostly dictated by distress. Significantly, a British logistic compound in Bashra was known as *Breadbasket Camp*. An argument in favour of the right to open fire to protect goods results from the Statute of the International Criminal Court. According to Article 31, the use of force to defend property which is essential for the survival of the agent or another person or property which is *essential for accomplishing a military mission*, excludes the individual responsibility of the offender, even if the behaviour results in a war crime. Perhaps, it is an excessively permissive standard.

[21] *McCann*, *supra* note 6, 140.
[22] *Al Skeini and Others v U.K*, ECHR (2007) No. 55721.
[23] Court of Cassation (Italy), First Criminal Division, 8 March 2007 no. 16677.
[24] LEVERICK *supra* note 5, at 181.

3. The Use of Firepower and the Conduct of Hostilities

A second order of questions discussed here concerns firepower. Operations in asymmetric conflicts are conducted among civilians.[25] Contingents are mostly lodged in urban areas while outposts are often close to agricultural compounds. Insurgent gunmen feign civilian status, use perfidious tactics and terror. These factors expose the civilian population to high risks. In Afghanistan, civilians have been repeatedly hit by aircraft in "troops-in-contact" interventions or caught in armed clashes between coalition forces and insurgents.[26]

In Helmand and Kandhar provinces NATO forces and the US-led coalition have been hard-pressed since 2006. The mounting insurgency makes difficultly avoidable the choice for air power over riskier deployments of ground troops. It is not in the scope of this article to search an explanation on why "Western forces hooked on air power in Afghan war."[27] An answer would require an entire volume. The main opinion asserts that commanders, with more *boots on the ground*, would have less reason to use air power.[28] Preoccupied by the high rate of civilian casualties, the UN Security Council calls on ISAF and other international forces to continuously review tactics and procedures, but steps to take in this regard remain uncertain.

In the conduct of hostilities, States are bound by the rules of international humanitarian law (IHL). Obligations are those resulting from the treaties they ratified and from customary international law. A core rule is Article 51 of the 1977 Additional Protocol (I) to the Geneva Conventions: "Civilians shall enjoy the protection afforded by this section [General

[25] According to the US Army Field Manual FM-3.0 (Operations), *supra* note 1, at VII: "Soldiers operate among populations, not adjacent to them or above them. They often face the enemy among non-combatants, with little to distinguish one from the other until combat erupts. Killing or capturing the enemy in proximity to non-combatants complicates land operations exponentially. Winning battles and engagements is important but alone is not sufficient. Shaping the civil situation is just as important to success." D. Kennedy wrote that "[t]here are civilians all over the battlefield-not only insurgents dressed as refugees, but special forces operatives dressing like natives..." D. KENNEDY, *Of War and Law* (2006), at 113.

[26] Human Rights Watch, *Troops in Contact: Air-strikes and Civilian Deaths in Afghanistan* (2008), 1-56432-362-5. Available at URL http://www.hrw.org.

[27] M. JOHN, Reuters, Thu Jul 5, 2007.

[28] Boots on the ground, The Economist, Feb 21 2009, at 29.

protection against effects of hostilities] unless and for such time as they take a direct part in hostilities." The ICJ qualified this principle of distinction as constituting the *fabric* of humanitarian law.[29] Attacks violating the principle of distinction are indiscriminate. Closely related to the rule of distinction is the prohibition of disproportionate attacks. Loss of innocent lives during military operations is not *per se* excluded, as IHL prohibits attacks which may be expected to cause *incidental* loss of civilian life and injury to civilians, which would be *excessive* in relation to the concrete and direct military advantage anticipated. A disproportionate attack is considered by Article 51.5.a of the Protocol I as indiscriminate. During internal armed conflicts, Protocol II applies. In fact neither the nature of the conflict nor the actors involved have relevance, as Articles 51 of Additional Protocol I and 13 of Additional Protocol II constitute a reaffirmation and reformulation of the existing customary norms.[30]

The arguments are in particular over the nebulous content of these norms. The translation into concrete rules raises many questions. As an *aide-memoir*, the rules of engagement are formulated as synthetic statements. However, the clear meaning of a rule such "Use of indirect fire and crew-served weapons is authorized" presupposes several warnings. In particular, the authorization cited above implies the (obvious) obligation to refrain, to the possible extent, from harming civilians; it includes the absolute prohibition to shoot on or shell civilian gatherings, even if there are armed elements among them, if they do not pose an immediate danger to life; it considers the operational environment, for example a situation of active warfare and danger to troops in an area densely populated with civilians, where the combatants do not differentiate themselves from the civilian population, but conceal themselves within it, and so on. Those caveats must be taught to, and internalized by, all soldiers.

Unless such rules are properly articulated and enriched through a background resulting from case studies, practices for minimizing collateral damage are difficult to formulate. The optimal solution would be that of the *Rafah* case. The petition, which claimed violations of various aspects of international humanitarian law, was lodged to the Supreme Court of Israel

[29] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996), Reports, 78.

[30] See, *inter alia,* ICTY, *The Prosecutor v Strugar*, IT-OT-42-T-22, 31 January 2005, 220: "A conventional provision could have an extra-conventional effect to the extent that it codifies or contributes to developing or crystallizing customary international law." *The Prosecutor v Kunarac et al.* IT-96-23 and IT-96-23/1, 405.

while the fighting continued. The hearing was set for the next day, and most of the judgment was intended to guide the army effective immediately.[31] This possibility to verify the coherency between ongoing operations and the legal framework was linked to the unique situation in Gaza and the West Bank. However, also the review of commanders' decisions in retrospect, as well as the analysis of inquires and judgments on the use of lethal force may help to increase precautions.

In 2005 the ECtHR delivered some interesting decisions relating to the second conflict in Chechnya. It considered various facets of the incidents, finding that, in all cases, operations had not been planned and executed with the requisite care, stressing on the extreme firepower unlashed in areas congested with civilian, which determined the collective targeting of the population without credible efforts to distinguish between combatants and civilians. The Court applied the 1950 Convention, treating large battles as episodes of law-enforcement.[32] Its reasoning, however, touched on the humanitarian law concepts of distinction, proportionality and the prohibition against indiscriminate attacks. The Court's right-to-life standards resemble international norms on the use of force in an armed conflict, but precautions are more compelling. Only circumstances render the use of lethal force inevitable, and the so called collateral damages are admissible only if victims are mistakenly but reasonably believed to be combatants or unintentionally killed by nearby fighting, notwithstanding all feasible precautions to avoiding or minimising incidental loss of civilian life.

The first decision on these issues concerned the death of civilians during an air strike against a convoy of vehicles which were attempting to leave Grozny in October 1999.[33] The second dealt with the shelling of the village of Katyr-Yurt, crowed of displaced civilians, attacked by federal forces to drive out several hundreds of rebels.[34] The Court admitted that counter-insurgency can require even strong measures, including heavy combat weapons and air power, even outside wartime. It made clear, however, that the use of indiscriminate weapons—such as missiles with impact radius that exceeds 300 metres, free-fall bombs or howitzer's shells—in a populated

[31] HCJ 4764/04, *Physicians for Human Rights v. The Commander of IDF Forces in the Gaza Strip* [The *Rafah* Case].

[32] The Court explicitly classified the situation in Chechnya as an armed conflict only in 2008. See *Akhmadov and Others v Russia*, ECHR (2008) No. 21586/02, 97. The expression used in precedent cases was "Illegal armed insurgency".

[33] *Isayeva, Yusupova and Bazayeva v Russia* (2005) 41 E.H.R.R. 39, 199.

[34] *Isayeva v Russia* (2005) 41 E.H.R.R. 38, 191.

area, and, above all, without prior evacuation of civilians, sounded fully incompatible with the aim of protecting life from unlawful violence. The Court noted that the planes carried free-falling high-explosion bombs *by default*. The employment of means of combat such those used in the siege of Katyr-Yurt, was tantamount to direct targeting of civilians.[35]

As a case study, the shelling of the village can be of some utility. It offers some guidelines to move from open-ended legal standards designed to protect civilians to effective measures. At a certain level fighting terrorism is analogous to war. The civilian population in a target area is to be warned, but the killing of civilians in a village or in a compound whose residents has been warned cannot be considered legally justified if it is a reasonable possibility that civilians are *de facto* hostages of the rebels. The assumption that once a warning is issued, a strike against civilians can be validated is fallacious, as they do not become combatants. When troops warns civilians to leave before an attack, it must ensure that they have a safe exit and somewhere to go. Warning is ineffective if attackers use fighter jet—equipped with free falling bombs by default—or mortars, which are considered 'statistical weapons' (meaning that they are inaccurate). Accuracy depends also on circumstances. Following a call in air support, it is possible that many civilians will be hurt if the area is crowded.

As observed by the Court in the recent *Akhmadov*, an armed conflict [such as that in Chechnya] may entail developments to which State agents are called upon to react without prior preparation. [36] It is necessary however to make a clear distinction between a situation in which troops, spotting presumable hostile elements, open fire in the honest belief to be under attack, and the case in which instead of acting in their own motion, they obey to their superiors' order.

The European Court dealt with this last issue in the recent *Khatsiyeva and Others v. Russia*.[37] The honest belief of those who spot a presumable menace, for officers in the command centre becomes an adequate assessment on the situation and on the subsequent necessity to employ lethal force. In that case the crew of a helicopter who eventually opened fire on civilians reported before to the command centre. Instructions given to the pilots

[35] In 1922, the Air Warfare Rules—never adopted in legally binding form—provided that "where military objectives were situated so that they could not be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from the bombardments." (Article 24 (3), Air Warfare Rules).

[36] *Akhmadov, supra* note 32, 97.

[37] *Khatsiyeva and Others v. Russia* (2008) No. 5108/02, 134-137.

rendered inevitable the use of lethal force. It is worth to note that the pilots observed the suspected rebels through a target control system of tenfold magnification, from a distance of two kilometres and at an altitude of 100-150 metres. It is barely credible that they were under threat. Between the moments in which the crew spotted the alleged menace and the order for opening fire 15 minutes elapsed. All circumstances which are incompatible with the standards of self-defence, necessity and proportionality. [38]

Asymmetric warfare entails the risk to remove any distinctions between civilians and combatants. As observed by Orna Ben-Naftali, the implication is to validate the use of almost unlimited force in a manner that is totally at odds with the basic goal of humanitarian law.[39] Sufficient precautions include measures to protect civilians from being caught up in the conflict and due consideration of the fact that, in an asymmetrical confrontation, insurgents could respond with no restraint.[40]

A further aspect concerns episodes in which victims are deprived of their lives as a result of their failure to comply with instructions concerning personal safety in an area, for example ignoring a signal/order to stop. The Court, leaving open the question whether the use of lethal force against civilians, for mere failure to comply with official safety instructions, could be justified under the Convention, assumed that the solution depends primarily on circumstances. The burden to apprise residents of the conduct required when confronted with servicemen lies however on military authorities operating in the area.[41]

4 Concluding Remarks

In the solutions adopted by the European Court the general rule is always Article 2 of the ECHR. As seen above, self-defence implies a threat to life no less than imminent. In situations of individual self-defence, the existence of an "absolute necessity" is barely contended. A calm analysis of potential human costs is quite inconceivable. However, combatants are threatened

[38] *Ibidem*, 136. Among the situational elements, the Court indicated whether the soldiers had or could have come under an armed attack and whether the situation required any urgent measures.

[39] Reported in *Consent and advise,* by Y. FELDMAN AND U. BLAU, *Haaretz*, February 05, 2009.

[40] See on this point *Ergi v Turkey* (ECHR) No 23818/94, 79-80. The case concerned the killing by misdirect fire of a young woman, during an ambush mounted against PKK terrorists.

[41] *Khatsiyeva, supra* note 37, 139.

throughout but only in specific circumstances do they find themselves with their backs against the wall, having no alternative but to violate the law.[42] Disregard for the safety of the civilian population in pre-planned operations or errors committed for recklessness are viewed as premeditated attacks on civilians.

Provisions on the use of force in combat situations aim at setting up mechanisms to minimize mistakes and verify legitimate targets, fulfilling the obligation to refrain, to the extent possible, from harming civilians, and the (positive) obligation to ensure that civilians are not harmed from opposing forces.

Actually, operations are today conducted amidst civilians and in populated areas. Risks among population derive from different factors. Insurgents use perfidious tactics and terrorist means. In response of these threats air power becomes ubiquitous while a sense of diffuse insecurity drives to a reduction of cautionary measures. Easing the rules of engagement in relation to the incertitude of a risky environment means externalizing risks unto civilians. Recently, even the overall US Commander in Afghanistan urged his troops to minimize civilian casualties, even at risk to themselves.

Under the current framework, civilians are protected against *excessive risks*. The next step should be to protect them against *risks*, through solutions based on an importation of human rights into the law of war framework to limit the scope of military action in the direction of a *human rights-oriented approach*.

Rules of engagement consistent with all the international obligations and a less "kinetic" approach are considered adequate because save innocent lives and spread the rule of law. From a utilitarian point of view, they disrupt consensus towards those who are using perfidious means, win hearts and minds of battered populations and facilitate soldiers in returning home safely.

Colonel (res.) Daniel Reisner told Haaretz after Operation Cast Lead that international law progresses through violations.[43] We think that law progresses through restrain.

[42] E. BENVENISTI, Human Dignity in Combat, *Is.L.R.*, Vol. 39 No. 2, 2006, , at 106.

[43] Y. FELDMAN AND U. BLAU, *supra* note 39.