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An Innocent Murder? The Laws of International Armed Conflict
and the 2006 Tragedy at Qana



Photo following Israeli strike on Qana, Lebanon – July 30th, 2006.

Brendan Groves

Abstract

In the early morning of June 30, 2006, Israeli warplanes struck a civilian apartment complex in Qana, Lebanon, killing some 28 persons, none of whom were thought to have been Hezbollah militants. Footage of the attack was streamed instantly across the world, leading many to decry Israel's tactics in its conflict against Hezbollah. But did the attack actually violate the Laws of International Armed Conflict? Or, worse, does the attack epitomize the notion of an innocent murder—terrible, perhaps immoral, but lawful? Furthermore, do Hezbollah's violations of the LOIAC excuse reactionary violations by Israel? This paper offers an analysis of the incident at Qana, drawing from the LOIAC, reports by international observers, and statements from involved parties to determine that Israel's attack did not likely transgress the LOIAC, demonstrating the limits of international law and its relative detachment from morality.

When bombing dug-outs or cellars, it was always wise to throw the bombs into them first and have a look around them after. But we had to be very careful in this village as there were civilians in some of the cellars. We shouted down to them to make sure. Another man and I shouted down one cellar twice and receiving no reply were just about to pull the pins out of our bombs when we heard a woman's voice and a young lady came up the cellar steps...She and the members of her family...had not left [the cellar] for some days...If the young lady had not cried out when she did, we would have innocently murdered them all.¹

I. The Search for Legal Responsibility

Tales like that above seem to be the exception rather than the rule in modern warfare. The increasing role of airpower and other long-range weapons² may decrease the ability of belligerents to call out in search of civilians.³ Avoiding the killing of innocent civilians in keeping with the Laws of International Armed Conflict (LOIAC)⁴ often relies on well-meaning speculation known as “intelligence information.”⁵ In the worst cases, such information proves faulty. Similar to a grenade thrown in a cellar full of innocents, some modern militaries have sent munitions into structures housing only civilians.⁶ Yet

¹ Frank Richards, *Old Soldiers Never Die* (New York: 1966), 198, quoted in Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1997), 152.

² Good examples of this kind of weapons system are cruise-missiles or a Predator drone armed with Hellfire missiles. Such weapons can be exceedingly impersonal. They cannot “ask” if civilians are present before striking. The presence of civilians can only be discerned through intelligence obtained by pictures, signal-based information or human sources, among other means.

³ Further information on this point can be found in Chris af Jochnick and Roger Normandm “The Legitimation of Violence: A Critical History of the Laws of War,” 35 *Harv. Int'l L.J.* 49, 91-92 (1994).

⁴ For a discussion of the LOIAC, see Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 1.

⁵ Brigadier General (Israel) Amir Eshel, “Israeli Defense Forces Press Conference Following the Kafr Qana Incident,” Israel Ministry of Foreign Affairs, July 31, 2006 <<http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/IDF+press+conference+following+the+Kafr+Qana+incident+30-Jul-2006.htm>>.

⁶ The United States killed some 290 civilians in a strike on the Al Firdos bunker in Baghdad in 1991. Thomas Keaney, “Collateral Damage in the Gulf War: Experiences and Lessons” (paper presented at a conference on the Use of Force at the John F. Kennedy School of Government at Harvard University, Cambridge, MA, June, 2002) <http://www.ksg.harvard.edu/cchrp/Use%20of%20Force/June%202002/Keaney_Final.pdf> (19 November 2006). Keaney writes that, “Hundreds of civilians were killed in the bombing of the Al Firdos bunker in Baghdad, because targeteers did not know that civilians had taken shelter there.”

under the penumbra of the LOIAC, some of these attacks, though shockingly tragic, may be a form of “innocent murder.”

The related principles of discrimination and proportionality are behind this reality. Explaining the interaction of the two principles, Leslie Green writes that “the most basic rule of armed conflict is that civilians and civilian objects must not be made the object of direct attack, although incidental injuries caused to such persons or objects in the course of a legitimate attack must be proportional.”⁷ These principles represent the evolution of traditional *jus in bello* (justice in war) thinking from moral principles to the status of codified international law. A recent incident places this idea in context.

On July 30th, 2006, the world awoke to television images showcasing appalling destruction. Early that morning, Israeli warplanes demolished a civilian complex in Qana in its war against Hezbollah, killing at least 28 civilians.⁸ International news media beamed footage across the globe of charred human bodies mangled in a cascade of burning concrete. Human rights organizations were quick to respond to the situation. Human Rights Watch declared that Israel had committed a “war crime”⁹ in the attack on Qana, inasmuch as it had violated the international proscription on “indiscriminate attacks.”¹⁰ The organization’s claim is especially serious. Looking at the pictures of the destruction wrought at Qana, one hopes that the LOIAC would not allow this. And yet,

⁷ Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed. (Manchester, UK: Manchester University Press, 2000), 124, quoted in Michael L. Gross, “Killing Civilians Intentionally: Double Effect, Reprisal, and Necessity in the Middle East,” *Political Science Quarterly* 120, no. 4 (2005-2006): 558, <<http://poli.haifa.ac.il/~mgross/Killing%20Civilians%20Intentionally.pdf>> (19 November 2006).

⁸ “Counting the dead in Lebanon: A dangerous and often imprecise task,” *The Associated Press*, August 3, 2006 in LexisNexis Academic <<http://www.lexisnexis.com/academic/>>.

⁹ Human Rights Watch, “Israel/Lebanon: Israel Responsible for Qana Attack,” news release, July 30, 2006 <<http://hrw.org/english/docs/2006/07/30/lebano13881.htm>> (19 November 2006).

¹⁰ Perhaps the most cogent presentation of this obligation is presented in Article 51 of Additional Protocol I of the Geneva Convention. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977 <<http://www.unhcr.ch/html/menu3/b/93.htm>> [hereinafter referred to as Protocol I].

having created such undeniable suffering and death, did Israel violate the LOIAC in its strike on Qana on July 30th, 2006? Or, did Israel's strike epitomize the notion of an innocent murder—terrible, perhaps immoral, but lawful?

When analyzing this strike, any neutral critique must include the conduct of the Hezbollah militia. Throughout the war lasting through the late summer of 2006, Hezbollah purposefully exploited Israel's adherence to the LOIAC. Its fighters routinely commingled military and civilian persons and objects, taking advantage Israel's adherence to the LOIAC.¹¹ It may be that Israel also violated the letter and spirit of the LOIAC, as potentially evidenced in the following examination of its strike in Qana. If this is the case, did Hezbollah's own violations of the LOIAC excuse any of Israel's violations?

Each of these questions will be treated in this essay. This paper will first discuss the evolution and modern interpretation of those restraints in war discussed in the LOIAC. Next, Hezbollah's actions during the 2006 conflict and its possible actions to precipitate the strike on Qana will be explored. Israel's own conduct in executing the attack on Qana will then be evaluated according to the LOIAC. Source-documents and the work of various commentators will favor prominently in the analysis.

This inquiry will reveal that Israel's 2006 attack on Qana was very likely legal under the LOIAC. Though legal, the attack fits the mold of an innocent murder—an attack that was legal but inhumane. In contrast to this conclusion, Hezbollah's actions were likely illegal under the LOIAC. The illegality of Hezbollah's conduct, though, does not lend legal legitimacy to the Israeli response.

¹¹ SarahLeah Whitson, "Hezbollah Needs to Answer," Human Rights Watch, October 5, 2006 <<http://hrw.org/english/docs/2006/10/05/leban014335.htm>> (19 November 2006).

II. *Jus in Bello*: Principles and Positivism

When examining the legality of a contemporary incident of war, it is helpful to remember the relative novelty of this task. Harvard Law School professor David Kennedy wrote recently about the “astonishing way the legitimacy of war and battlefield violence has come to be discussed in similar legal terms, by military professionals and outside commentators alike.”¹² This confluence of terms “shapes the politics, as well as the practice, of warfare.”¹³ It was not always this way. Indeed, this development is largely a product of the trend, begun in the 19th century and strengthened in the 20th, promoting the creation of positive law relating to the conduct of states in war. Before the evolution of positive law, most thinking on the subject existed in the form of moral arguments and principles.

The idea of the “just war” was first posited by Christian moralists, and Augustine in particular, during the waning years of the Roman Empire.¹⁴ Paul Ramsey suggests that just war theory originated from ruminations by Christian thinkers regarding “the ethics of Christian love.”¹⁵ Beginning with the biblical parable of the Good Samaritan,¹⁶ it was reasoned that the pacifistic tendency inherent to the Christian faith did not necessarily override efforts to protect the weak like the beaten man on the road to Jericho.¹⁷ Indeed, the notion of proportionality derives from this paradox. Widely

¹² David Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006), 7.

¹³ *Ibid.*

¹⁴ Paul Ramsey, *The Just War* (New York: University Press of America, 1983), 142.

¹⁵ *Ibid.*

¹⁶ Luke 10:25-37

¹⁷ Ramsey, *The Just War*, 142-3.

considered the father of canonical just war theory,¹⁸ “Augustine argued for a proportionate response to the threat represented by the criminal (who injured the beaten man in the parable of the Good Samaritan) from carrying out his evil intention by defensive measures designed to thwart whatever the criminal may try.”¹⁹

Thomas Aquinas expanded Augustine’s ideas about just war. Aquinas is credited with honing the conception of proper or right intention in war. He wrote that a sovereign must pursue war for one of two aims: “either the furthering of some good or an avoidance of some evil.”²⁰ War made towards these objectives leaves little room to harm non-combatants.²¹ After all, war must be made only to secure the safety of persons like the abused man in the parable of the Good Samaritan. Wars brought to ensure the security of the state also qualified as just. In this way, the principle of proportionality, with its attendant aim of protecting the weak in a war, came to be paired with the principle of non-combatant immunity.²² Later intellectuals would draw from eclectic sources—among them, “natural law, international law, civil law, [and] divine law”—to build the framework upon which contemporary international law stands.²³

The work of these scholars would advance the notion that a just war could not be an unlimited war. Thus, reasoned restraint in war became the hallmark of *jus in bello* considerations.²⁴ Scholars such as the 16th century’s Hugo Grotius and Francisco de Vitoria were some of the first to elucidate these ideas of restraint. Later thinkers, such as

¹⁸ James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religion and Secular Concepts* (New Jersey: Princeton University Press, 1975), 8.

¹⁹ James Turner Johnson, *Can Modern War Be Just?* (New Haven: Yale University Press, 1984), 4.

²⁰ Brother John Raymond, “The Just War Theory,” Monks of the Adoration, < <http://www.monksofadoration.org/justwar.html> > (19 November 2006).

²¹ Johnson, *Can Modern War Be Just?*, 4.

²² Ibid.

²³ David Kennedy, *Of War and Law*, 48-9.

²⁴ Kennedy, *Of War and Law*, 48,.

Switzerland's Emerich de Vattel, would expand such notions, using them to advance a more circumspect notion of limited conduct in war.²⁵ Though the LOIAC owes its moral and intellectual core to those early theologians and scholars, the fairly recent trend of legal positivism has greatly affected the evolution of international humanitarian law.

Positivism asserts that principles of restraint in warfare should be agreed to and codified by those states and actors to whom it applies. State-centric codes of military conduct precipitated earliest attempts at positivism. The Lieber Code governing the conduct of the Union Army in the American Civil war is foremost among such codes. Promulgated by President Lincoln in 1863, the Lieber Code applied *jus in bello* principles to the war against the Confederate forces. Certain provisions of the Code deserve attention.

Article 16 narrowed the scope of military necessity by prohibiting “any acts of hostility which makes the return to peace unnecessarily difficult.”²⁶ Given the horrendous shelling of Atlanta and other tragedies, this prohibition may have been interpreted more as a suggestion than an obligation. The code also has its moral low-points. Starvation is legitimized as a weapon of war and the failure to encourage civilians to move out of a city before bombardment may be overlooked in favor of “surprise.”²⁷ Even so, the Code “strongly influenced the further codification of the laws of war and the adoption of

²⁵ Ibid., 53.

²⁶ United States of America, *Instructions for the Government of Armies of the United States in the Field*, April 24, 1863, Art. 16 <<http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>>.

²⁷ Ibid., Arts. 17, 18.

similar regulations by other states,”²⁸ such as the Hague Conventions to follow in 1899 and 1907.²⁹

The Hague Conventions set forth measures of restraint in warfare now regarded as reflective of customary law.³⁰ “[I]nspired by the desire to diminish the evils of war,”³¹ the states party to the convention advanced the seminal stipulation of what became the LOIAC: “The right of belligerents to adopt means of injuring the enemy is not unlimited.”³² The Conventions were not always followed. World Wars I and II showed the limits of positivism in the face of total war. Only after the scourge of World War II would the international community agree to a series of conventions that, it was hoped, would not stand silently during the wars to follow.

Commonly known as “Geneva Law,” the Geneva Conventions are a series of four international agreements drawn up in 1949.³³ The Conventions, *inter alia*, expand upon conceptions of non-combatant immunity and the principle of discrimination by providing

²⁸ International Committee of the Red Cross, “Introduction [to the] ‘*Instructions for the Government of Armies of the United States*,’” 1988 < <http://www.icrc.org/ihl.nsf/73cb71d18dc4372741256739003e6372/a25aa5871a04919bc12563cd002d65c5?OpenDocument>> (19 November 2006).

²⁹ Some other influential agreements preceded the Hague Conventions. The St. Petersburg Declaration, for instance, banned the use of “dum-dum” bullets. *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weigh.*, Saint Petersburg, November 29, December 11, 1868.

³⁰ *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, Hague, July 29, 1899 < <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument>>; *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, Hague, October 18, 1907 < <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>>.

³¹ *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, Preamble, October 18, 1907 < <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>>.

³² *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, Art. 22, July 29, 1899 < <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument>>.

³³ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, August 12, 1949; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Geneva, August 12, 1949; *Convention (III) relative to the Treatment of Prisoners of War*, Geneva, August 12, 1949; *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, August 12, 1949. The text of each convention can be accessed at < <http://www.icrc.org/ihl.nsf/TOPICS?OpenView#Victims%20of%20Armed%20Conflicts>>.

enhanced protection to those categories of persons who are not party to a conflict or whose combatant status no longer holds. These conventions were affected by an international agreement whose provisions will prove paramount in the inquiry at hand: Additional Protocol I of the Geneva Conventions.³⁴

This first Additional Protocol, followed by a second Protocol which will not be discussed here,³⁵ builds upon the principles enshrined in the Hague Conventions. Many of these provisions are strengthened while the occasional new provision is added.³⁶ The provisions in Additional Protocol I most relevant to Israel's strike on Qana are those discussing valid military objectives and the principle of discrimination.³⁷ Though Israel and Hezbollah are not parties to Additional Protocol I, its provisions are "generally regarded as customary law" and thus binding even on non-signatories.³⁸ Indeed, considerations of customary law cover "most of the rules of the LOIAC [that govern] the conduct of hostilities."³⁹ In the specific examinations that follow, Additional Protocol I and other facets of the LOIAC—comprising both codified and customary law—will be applied to the conduct of Israel and Hezbollah concerning the tragic incident at Qana.

III. Before the Tragedy: Hezbollah's Conduct in the Light of the LOIAC

³⁴ Protocol I.

³⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, Geneva, June 8, 1977 <<http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>>.

³⁶ It is fair to say that the prohibition of reprisals in Additional Protocol I is a "new" addition to the LOIAC. This prohibition is chiefly submitted in Article 6, Article 51 (6) and Article 56 (4).

³⁷ Protocol I, Arts. 48, 51. Article 48 contains the clearest formulation of the nexus of these two principles, discussing each of them under the important heading of a "Basic Rule."

³⁸ Anthony Dworkin, "Apparent Violations of International Law During Israeli Actions in the West Bank," Crimes of War Project, April 5, 2002 <<http://www.crimesofwar.org/onnews/news-mideast2.html>>.

³⁹ Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 5.

Hezbollah waged a war of asymmetry in its fight against Israel in July and August of 2006. Facing an opponent with superior military might, Hezbollah depended on striking the Israeli forces at their weakest points, including their adherence to the LOIAC. The legal dimensions of Hezbollah's conduct are many and varied. This inquiry into the legality of their conduct will first discuss the applicability of the LOIAC to Hezbollah. Finding that the LOIAC does apply, certain principles from this body of law will be applied to Hezbollah's actions, particularly those that could have precipitated the Israeli attack on Qana.

Determining whether the LOIAC applies to Hezbollah's conduct first requires determining whether the LOIAC applied to the conflict between Hezbollah and Israel. The LOIAC applies to two main forms of armed conflicts: "international and non-international."⁴⁰ Not being a conflict between two states, the hostilities between Hezbollah and Israel following the former's capture of two Israeli soldiers on July 12th, 2006 may qualify as a non-international armed conflict. The International Committee of the Red Cross defines this category of armed conflict as involving "hostilities between government armed forces and organized armed groups or between such groups within a state."⁴¹ The phrase, "such groups within a state," appears to preclude the Israeli-Hezbollah conflict. A recent law review article submits the term "extra-state armed conflict" to denote a conflict between a state and a non-state actor.⁴² Deciphering the

⁴⁰ "The Relevance of IHL (International Humanitarian Law) in the Context of Terrorism," Official Statement, International Committee of the Red Cross, July 21, 2005 < <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705>>.

⁴¹ Ibid.

⁴² Roy S. Schondorf, "Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?" 37 NYU Journal of Law and International Politics, 1-78 (2004).

applicability of the LOIAC in this case may not require delving into these legal difficulties.

It seems that the LOIAC explicitly applies to Israel but applies to Hezbollah only implicitly, chiefly through the ability of Israel (or another state) to prosecute Hezbollah fighters who commit war crimes through universal jurisdiction.⁴³ One culprit is to blame for this incongruence: the fact that the LOIAC “in all circumstances bind all *states*.”⁴⁴ Non-state entities like Hezbollah fall outside of the traditional, state-centric conceptions of conflict.⁴⁵ Even so, states may take it upon themselves to try and punish those in Hezbollah who commit crimes of war or crimes against humanity.⁴⁶ In this way, each party to the conflict has an obligation to adhere to the LOIAC—one out of international legal compulsion, the other, if for no better reason, out of fear of possible punishment. International law also avoids awarding legal personality to an organization like Hezbollah. The sovereign state of Lebanon is legally responsible for Hezbollah’s conduct in the international scene, evidenced by United Nations Security Council Resolution 1559 that calls on the Lebanese government to assert its control over its state and disband the militias therein.⁴⁷

But Hezbollah is directly responsible to some provisions of the LOIAC. As a party to a conflict, Hezbollah has an obligation to follow those tenets of the LOIAC

⁴³ Robbie Sabel, “Hezbollah, Israel, Lebanon and the Law of Armed Conflict,” *Jurist: Legal News and Research*, University of Pittsburgh School of Law, July 27, 2006 < <http://jurist.law.pitt.edu/forumy/2006/07/hezbollah-israel-lebanon-and-law-of.php#8>>.

⁴⁴ *Ibid.* Emphasis mine.

⁴⁵ One could submit that Hezbollah ought not to be considered as a non-state actor under the LOIAC, inasmuch as it receives much of its funding from the Iranian regime. Although Hezbollah may be a proxy of Iran, it is a self-governing entity capable of coordinating and directing planned attacks against a military opponent. It has all the characteristics of an “armed group” and more.

⁴⁶ Dr. Sabel expands on this point while discussing the applicability of the LOIAC to Hezbollah. Sabel, “Hezbollah, Israel, Lebanon and the Law of Armed Conflict,” University of Pittsburgh School of Law.

⁴⁷ United Nations, Security Council, Resolution 1559, S/RES/1559 (2004), September 2, 2004 < <http://daccessdds.un.org/doc/UNDOC/GEN/N04/498/92/PDF/N0449892.pdf?OpenElement>>.

generally regarded as customary law.⁴⁸ This includes Common Article Three of the Geneva Conventions and the many provisions of Protocol I.⁴⁹ Further validating this claim, Amnesty International reported recently that Hezbollah has “accepted some of the core rules of international humanitarian law” in the past. One such agreement concluded in 1996 obligated Hezbollah to ensure that “under no circumstances will civilians be the target of attack and that civilian populated areas and industrial and electrical installations will not be used as launching grounds for attacks.”⁵⁰ Though this particular agreement is no longer enforced, it demonstrates Hezbollah’s past willingness to accept and follow some common standards of International Humanitarian Law. Having established that the LOIAC do apply to Hezbollah, its conduct in and around the incident at Qana merits careful evaluation.

Judging Hezbollah’s conduct—in wartime or anytime—is difficult. One recent article by Human Rights Watch (HRW) notes that “little is known about the conduct of [Hezbollah’s] forces inside Lebanon and whether its own actions put Lebanese civilians at risk.”⁵¹ Despite this qualifying statement, the article notes that HRW researchers found numerous violations of the LOIAC by Hezbollah. These acts included “storing weapons” and conducting operations in “civilian homes” and its habit of “firing rockets from populated areas.”⁵² These infractions controvert the LOIAC and place Lebanese

⁴⁸ *Israel/Lebanon: Out of All Proportion, Civilians Bear the Brunt of War*, Amnesty International, November 21, 2006 < <http://web.amnesty.org/library/index/ENGMDE020332006>>.

⁴⁹ Even the United States considers most of Protocol I reflective of customary law. Even so, the United States, like Israel, has yet to ratify the convention. Jefferson D. Reynolds, “Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict and the Struggle for a Moral High Ground,” 56 A.F.L. Rev. 1, 10 (2005).

⁵⁰ United States of American, *Israel-Lebanon Ceasefire Understanding*, April 26, 1996 < http://telaviv.usembassy.gov/publish/peace/documents/ceasefire_understanding.html>.

⁵¹ Whitson, “Hezbollah Needs to Answer.”

⁵² *Ibid.*

civilians at incredible risk. Yet it is the intentional operational of offensive weapons from within the civilian population that applies most directly to the Israeli strike on Qana.

This practice, *inter alia*, caused Hezbollah to violate its obligation to discriminate in war and make proper preparations for defense.⁵³ Though these practices certainly did not ‘cause’ or ‘necessitate’ the tragedy at Qana, they may have made such an occurrence more likely. A video accessible through the Israeli Ministry of Foreign Affairs displays an example of Hezbollah’s failure to abide by “basic rule” of Additional Protocol I: the duty of belligerents to “distinguish between the civilian population and combatants and between civilian objects and military objectives.”⁵⁴ Taken by an Israeli drone during the conflict, the film shows a Hezbollah mobile rocket launcher firing its weapons near Qana, only to flee into a civilian structure after depleting its rounds.⁵⁵ Brigadier General Amir Eshel, Chief of Staff of the Israeli Air Force, stated in a press conference following the attacks on Qana that “approximately 150 missiles have been fired from [the] immediate environs” of Qana and even “inside the village itself.”⁵⁶

Firing missiles from inside the town and hiding launchers within civilian facilities explicitly violates Article 58’s requirement for belligerents to take “precautions against the effect of attacks.”⁵⁷ Hezbollah’s repeated use of civilian centers in southern Lebanon as its basis of operations controverts the prohibition on “locating military objectives

⁵³ Protocol I, Art.48, Art. 58(b).

⁵⁴ Protocol I, Art. 48.

⁵⁵ “Hezbollah Claims They Don’t Shoot Rockets Out of Kafr Qana,” Israel Ministry of Foreign Affairs, online video from a military drone, July 31, 2006 <http://www.mfa.gov.il/MFA/Pages/MediaPlayer.aspx?MediaUrl=/NR/ronlyres/11A0342E-ECB3-4F80-A282-D9A853CA48E1/0/qana.wmv&LANGUAGE_NAME=En> (17 November 2006).

⁵⁶ Brigadier General Amir Eshel, “Israeli Defense Forces Press Conference Following the Kafr Qana Incident,” Israel Ministry of Foreign Affairs, July 31, 2006 <<http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/IDF+press+conference+following+the+Kafr+Qana+incident+30-Jul-2006.htm>> (17 November 2006).

⁵⁷ Protocol I, Art. 58.

within or near densely populated areas.”⁵⁸ When such actions occur, it is too often the civilian population that truly suffers the consequences.

The Lebanese population paid dearly for these violations of the LOIAC by Hezbollah.⁵⁹ Commingling military and civilian operations contributed to the legitimacy of attacks on Lebanese civilians by Israel, inasmuch as the presence of military forces makes such civilian areas legal targets under the LOIAC. Article 51 of Additional Protocol I, in a harsh concession to the realities of war, states that “the presence or movements of the civilian population” cannot be used to “render certain...areas immune from military operations.”⁶⁰ An attack on targets where military personnel or equipment are known to exist alongside civilians, if it would “make an effective contribution to military action,” would therefore be lawful.⁶¹

The important, though imprecise, exception to this rule occurs when any “incidental”⁶² effect on civilians would be “excessive in relation to the concrete and direct military advantage anticipated.”⁶³ When Hezbollah commingled military and civilian assets, its opponents gained legal authorization (in most cases) to strike these areas as long as the incidental damage expected fell short of the target’s importance. This balancing act requires an unscientific calculus, one in which the value of potentially innocent human lives are weighed according to the value of military objectives. As realized shockingly in the attack on Qana, the scales of war sometimes favor the latter over the former with devastating results.

⁵⁸ Protocol I, Art. 58(b).

⁵⁹ Amnesty International reports that 1,191 Lebanese civilians perished in the war and many thousands more were injured. *Israel/Lebanon: Out of All Proportion, Civilians Bear the Brunt of War*, Amnesty International, November 21, 2006 < <http://web.amnesty.org/library/index/ENGMDE020332006>>.

⁶⁰ Protocol I, Art. 51(7).

⁶¹ Protocol I, Art. 52(2).

⁶² Protocol I, Art. 51 (5)(b)).

⁶³ Protocol I, Art. 52(2).

Hezbollah's efforts potentially weighed down the scale of military necessity on the part of Israel. Even so, Hezbollah's actions cannot be thought to legitimize any possible Israeli violation of the LOIAC. Hezbollah violated several provisions of the LOIAC—the principle of discrimination and the duty to take precautions to protect civilians when defending an area, chief among these—in its fight against Israel. Though the exact actions of Hezbollah before the strike on Qana are not publicly known, it appears that Hezbollah conducted offensive operations from the city. Thus, some structures that would have otherwise been protected under international law may not have been. The following analysis explores whether Hezbollah's opponent violated the LOIAC in its own actions, especially in its disturbing strike on Qana.

IV. Behind the Tragedy: The Legality of the Israeli Strike on Qana

Assessing whether Israel acted lawfully in its attack on the house in Qana requires noting the principles and provisions of the LOIAC that pertain to this type of offensive operation. A host of legal principles apply to strikes against civilian centers within a densely populated area. These notions affect the legality of Israel's decision to strike several targets in Qana, among them the structure that became the tomb of 28 civilians, none of whom are thought to have been combatants.⁶⁴

This inquiry will examine only those legal considerations that should guide a strike of this nature. Among the most important factors to consider are military necessity and the principles of proportionality and discrimination. A conclusion on the legality of

⁶⁴ *Israel/Lebanon: Out of All Proportion, Civilians Bear the Brunt of War*, Amnesty International, November 21, 2006 < <http://web.amnesty.org/library/index/ENGMDE020332006>>.

Israel's strike in Qana will be reached upon consideration of legal sources, the input of humanitarian organizations and freely available descriptions of the strike and the subsequent investigation by the Israeli government.

In its completed inquiry into the "July 30th Incident at Qana," the Israeli Defense Forces (IDF) declared that the house in Qana was "targeted in accordance with the military's guidelines regarding the use of fire against suspicious structures inside villages whose residents have been warned to evacuate and which were adjacent to areas from where rockets were fired towards Israel."⁶⁵ Stated succinctly, the house was viewed as a legitimate military objective. But can a strike against a military objective that ends in the deaths of twenty-eight noncombatants be lawful under international law?

The definition of military necessity helps to answer this question. As discussed above, Additional Protocol I presents a definition of military objective that is commonly regarded as being customary law⁶⁶: "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, neutralization, in the circumstances ruling at the time, offers a definite military advantage."⁶⁷

On the basis of this definition, the legality of the strike in Qana becomes somewhat clearer. Two key inquiries guide the inquiry: 1) why Israeli intelligence perceived that the "nature, location, purpose," of this structure would "make an effective

⁶⁵ "Fire" is a military term that denotes the use of weaponry to affect lethal force. Israeli Defense Forces, "Completion of Inquiry into July 30 Qana Incident," Israel Ministry of Foreign Affairs, August 2, 2006 <<http://www.mfa.gov.il/MFA/Government/Communiques/2006/Completion+of+inquiry+into+July+30+incident+in+Qana+2-Aug-2006.htm>> (15 November 2006).

⁶⁶ Dinstein, *The Conduct of Hostilities under the Law of Armed Conflict*, 83.

⁶⁷ Protocol I, Art. 52 (2).

contribution to military action” if struck, and 2) what “definite military advantage” was sought in the destruction of this structure.⁶⁸

An Israeli press conference relayed what its intelligence considered to be the “purpose” of the house.⁶⁹ It believed that the house was being used “as a hiding place for terrorists” and “was not inhabited by civilians.”⁷⁰ Thus, striking the house would likely kill Hezbollah militants and possibly deter future rocket attacks from the area. These outcomes could effectively contribute to military actions by destabilizing Hezbollah’s base of operations and disrupting the organization’s ability to launch attacks from Qana. Of course, these intelligence assumptions proved incorrect.

The second key inquiry, that of “definite military advantage,” relates to the military objectives sought through the strike. This “definite advantage” might center on the destruction of a mobile rocket launcher or a militant trained in the use of an RPG that might prove deadly to invading IDF forces. According to the information Israel released on the incident, it appears to have sought legitimate objectives and even a “definite military advantage” in the attack. But these advantages proved non-existent. Knowing now that the house in Qana should have been classified as a civilian structure (and thus subject to protections from intentional attack by the LOIAC,⁷¹ did Israel violate the LOIAC in this strike? Answering this question requires analysis of the related principles of proportionality and discrimination.

⁶⁸ Ibid.

⁶⁹ Israeli Defense Forces, “Completion of Inquiry into July 30 Qana Incident,” Israel Ministry of Foreign Affairs, August 2, 2006 <http://www.mfa.gov.il/MFA/Government/Communiques/2006/Completion_of_inquiry_into_July_30_incident_in_Qana_2-Aug-2006.htm> (15 November 2006).

⁷⁰ Ibid.

⁷¹ Protocol I, Art. 48.

Proportionality prohibits attacks which “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects...which would be excessive in relation to the concrete and direct military advantage anticipated.”⁷² This definition precludes any attack that could be expected to produce catastrophic consequences. The definition presumes that attacks will not be deliberately directed against civilians in its use of the term “incidental.”

These considerations in mind, Qana seems the prototypical example of an attack prohibited by the principle of proportion. Perhaps the Israeli attack would have been legally justified had it been attempting to kill Hassan Nasrallah⁷³ or another figure whose death might end the hostilities. Israel gave no indications that the military objectives it sought were so great as to make the deaths of 28 civilians less “excessive” on balance. Yet a closer reading of the definition of proportionality in Additional Protocol I reveals that Israel may not have violated the legal proscription on disproportionate attacks.

The first words of the definition of proportionality, “may be expected to cause” mean that intentions—and not effects—are the basis for judging disproportionate conduct in war. Thus, it is not enough for 28 civilians to have perished following a strike based on flawed intelligence. General Eshel’s comments to the press following the Qana incident highlight this reality. He notes that “had we known there [were] uninvolved persons, certainly this number, we would not have attacked.”⁷⁴ Assuming that Israel told the truth in its press releases after the event and did not intend to kill civilians in the house in

⁷² Protocol I, Art. 51 (5)(b)).

⁷³ Hassan Nasrallah is the Secretary General of Hezbollah.

⁷⁴ General Amir Eshel, “Israeli Defense Forces Press Conference Following the Kaft Qana Incident.”

Qana, it did not violate the principle of proportionality.⁷⁵ The grotesque consequences of its actions are counter-balanced by its legally defensible intentions. Does the principle of discrimination similarly refuse to condemn Israel's actions?

Like the principle of proportionality, violations of the principle of discrimination do not rest on the "body count" resulting from attacks.⁷⁶ Article 51 (4) of Additional Protocol I defines prohibited indiscriminate attacks according to three broad categories. The first category of attacks, "those which are not directed at a specific military objective," is relevant to the instant analysis.⁷⁷ Yoram Dinstein writes that "the key to a finding that a given attack has been indiscriminate is the state of mind of the attacker."⁷⁸ This finding differs slightly from the analysis of violations of the principle of proportionality. To offend the principle of discrimination, one must prove that the belligerent was primarily unconcerned with the damage done to civilians in an attack. Perhaps the belligerent, for example, denies "that there are any noncombatants" in a conflict and thus no civilians to attack.⁷⁹ William V. O'Brien notes that denial occurs often among revolutionaries and in counter-insurgency campaigns.⁸⁰

It should come as no surprise, then, that the Israeli Minister of Justice declared on July 27th that "All those now in south Lebanon are terrorists who are related in some way to Hizbullah."⁸¹ Besides being manifestly false,⁸² Minister Ramon's words provide the

⁷⁵ If it can be proven that Israeli war planners knew of the Lebanese civilians in the house and still recommended the strike in support of a relatively insignificant military objective (like killing one 19-year-old militant, for instance), then Israel may have violated the principle of proportionality.

⁷⁶ Dinstein, *The Conduct of Hostilities under the Law of Armed Conflict*, 117.

⁷⁷ Protocol I, Art. 51 (4)(a).

⁷⁸ Dinstein, *The Conduct of Hostilities under the Law of Armed Conflict*, 116.

⁷⁹ William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger Publishers, 1981), 179.

⁸⁰ *Ibid.*

⁸¹ "Israel Approves Calling up [to] 30,000 Reservists," CTV News, July 27, 2006 < http://www.ctv.ca/servletArticleNews/story/CTVNews/20060725/Israel_lebanon_fighting_060727/20060727?hub=CTVNewsAt11>.

strongest evidence to suggest that Israel may have violated the principle of discrimination in its war against Hezbollah. If the Israeli military acted in the operational mindset that noncombatants were nonexistent, Israeli war planners may not have given sufficient concern to the possibility of civilian deaths or injuries. Perhaps this was the case in the strike on Qana. The circumstances are suspicious, as the Justice Minister's comments were voiced a mere two days before the eve of the attack. Even so, no specific information exists to establish a causal connection between his words and the attack itself. Certainly, an inquiry into this matter must be made. Only by examining the true intentions of the strike at Qana can justice be done for the families of those who lost loved ones beneath the rubble of that house. This is a form of justice which the LOIAC, *per se*, is not designed to effectuate.

Therefore, examining the LOIAC shows that Israel did not likely commit a war crime in its attack on Qana.⁸³ Should the IDF's press releases and inquiries following the incident reflect the facts behind the incident, Israel does not appear to have committed a violation of the LOIAC. Specifically, the IDF purported to have a legally defensible military objective in mind and did appear to be unaware of the presence of the 28 civilians. Most importantly, no publicly available information proves that Israel's intention in the strike was something other than the pursuit of genuine military advantage.

⁸² Amnesty International's report presents numerous stories of Lebanese civilians who genuinely appear to have been uninvolved with Hezbollah's activities but were still struck by Israeli attacks. *Israel/Lebanon: Out of All Proportion, Civilians Bear the Brunt of War*, Amnesty International.

⁸³ Of course, this conclusion could be possibly changed by finding any link between Minister Ramon's declaration and the military's actions in Qana. To prove a war crime, one must prove that Israel either knew of the civilians at Qana—and did not care about them—or did not know of the civilians—and did not care to learn of their existence.

Israel seems to have acted based upon evidence that can only be evaluated in the context of the “circumstances ruling at the time.”⁸⁴

Despite such evidence against any overt LOIAC violation, an inquiry should be made into the link between Minister Ramon’s comment and the incident at Qana a few days later. His words were nearly tantamount to a declaration that southern Lebanon qualified as a “free-fire zone,” in the words of Human Rights Watch Executive Director Kenneth Roth.⁸⁵ The effects of this declaration must be investigated and the results made public. These results, of course, are likely to be of little solace to those who suffered in the tragedy at Qana.

V. To Condone or Condemn: Humanity and the LOIAC

Israel may not be legally culpable for its strike on Qana but legality, in this sense, is detached from morality. The LOIAC do not intend to *end* suffering and death in war, only to reduce and control it. This examination should not be seen as “legally legitimizing” Israel’s actions in Qana. Rather, this examination proves that the LOIAC do provide a sound prism through which questions of law can be decided.

Hezbollah’s conduct in its 2006 conflict against Israel violated numerous provisions and principles of the LOAIC. Its refusal to fight apart from the Lebanese civilians—those whom Hezbollah purports to protect—evidences an abject disregard for international law, if not common morality altogether. These actions contributed to Israel killing many innocent civilians in the war by making it more difficult for IDF forces to

⁸⁴ Protocol I, Art. 52 (2).

⁸⁵ “Israel/Lebanon: Israel Responsible for Qana Attack,” Human Rights Watch, news release, July 30, 2006 < <http://hrw.org/english/docs/2006/07/30/lebano13881.htm> > (21 November 2006).

distinguish civilian objects and persons from military object and combatants. Israeli Minister of Defense Ramon was wrong to assert that every Lebanese left in southern Lebanon was a combatant but he was right to hint that civilians and combatants looked very much alike. Nonetheless, Hezbollah's repeated violations of the LOAC—including its operation of offensive weapons from civilian centers—do not excuse a single violation of the LOIAC by Israel.

And finally, the LOIAC does not attempt to *moralize* war. Instead, the LOIAC attempts to *humanize* war by establishing commonly-agreed upon grounds to legally evaluate the conduct of humans whose goal is to do each other harm. The humanizing force of the LOIAC, with its emphasis on reasoned restraint in war and on the protection of the unprotected, can be difficult to see through the smoke and fire of attacks that do not exhibit the hallmarks of restraint.

It can be similarly difficult to see how the LOIAC would 'legitimize' the tragedy of Qana. One wonders why the LOIAC would stand silently as Israel committed such terrible, if innocent, murder. It must be known, though, that the LOIAC does not condemn Israel for its strike on Qana—but neither does the LOIAC condone it.⁸⁶

⁸⁶ By stating that the LOIAC does not "condone" the strike on Qana, I mean that the LOIAC does not make the attack "permissible." Innocents will be killed in war. This does not mean, however, that it is "ok" or "permissible" for innocents to be killed in every situation. The LOIAC cannot legally condemn Israel for the strike but its failure to condemn Israel does not mean that it underhandedly allows the strike. World public opinion and other factors that cannot be codified all contribute to whether or not an attack like this is condoned. The LOIAC makes no such interpretation.