

BOFAXE

Retaliatory Strikes as a Reaction to Cyber-Attacks? (Part 1)

The recent Israeli Airstrike against Hamas CyberHQ from an IHL perspective

Between Friday (3 May 2019) and Sunday (5 May 2019) violence erupted again between Israel and Hamas in the Gaza Strip. In the course of a severe exchange of violence between the two conflict parties, the Israel Defense Forces (IDF) conducted a physical attack countering an offensive cyber operation by Hamas. According to IDF, the air strike was conducted against the Hamas Cyber Headquarter and a reaction to a cyber operation. Some accounts took this information up and claimed a [precedent](#), arguing that it was the first time a nation reacted to an ongoing cyber operation with a physical strike. In this two-part Bofax, I will discuss some of the relevant questions of the law of armed conflict (LOAC) and show that the airstrike does not constitute a legally relevant precedent. International humanitarian law and/or law of armed conflict (LOAC) is applicable in international and/or non-international armed conflicts (common [Art. 2 GC I-IV](#), [Art. 1 \(3\), \(4\) AP I](#) – int. armed conflict; and [Art. 3 GC I-IV](#), [Art. 1 AP II](#) – non-int. armed conflict). Both legal frameworks have nearly identical basic sets of rules, which are [accepted](#) as [customary international law](#). At least the [cardinal principles of humanitarian law](#) – the principle of distinction and the prohibition to cause unnecessary suffering – are in common.

Without prejudice to the legal status of the Gaza Strip the applicability of the LOAC requires an armed conflict. According to the definition of an armed conflict by the [ICTY](#) the exchange of rockets, artillery fire and the air strikes between the conflict parties constitute protracted armed violence between governmental authorities of Israel and the Hamas as organized armed group – OAG. Besides the highly controversial topic of ['Palestine' as a State](#), the Gaza Strip and the governing Hamas predominantly are not considered as a State on their own. Thus, the conflict most likely is non-international. In any case the conflict amounted to the necessary level for the applicability of LOAC and the cardinal principles.

Besides the rules of the weapons law, meaning the rules that prohibit certain types of weapons and their effects, compare [Art. 35 \(2\) AP I](#), [Art. 51 \(4\) lit. b](#) and c AP I and [Art. 35 \(3\) AP I](#), the legality of airstrikes is governed by the so called *'targeting law'*. The term refers to the set of rules which regulate attacks directed at a certain target. [Art. 57 AP I](#) contains a paradigmatic targeting process in accordance with LOAC. *Inter alia* the following rules have to be respected concerning airstrikes. Attacks on targets in an area where civilians live, in particular, have to respect the principle of distinction. The principle obliges to differentiate between civilians and combatants, civilian objects and military objectives, thus, between unlawful and lawful targets ([Art. 48](#), 51 and [52 AP I](#)). According to [Art. 51 \(3\) AP I](#) civilians shall be protected and attacks may not be directed at them, unless and for such time as they directly take part in hostilities (the Direct Participation in Hostilities Rule or *'DPH-Rule'*). Civilians which directly participate in hostilities become a lawful target for the duration of their participation. When they fulfill a continuous combat function this loss is retained. Members of OAGs generally [are assumed](#) to have a continuous combat function and may be attacked at all times just the same as regular combatants (compare the ICRCs DPH study). Likewise, originally civilian objects that are used for military purposes can be attacked. On the other side it is prohibited to hide military targets between civilians, in civilian objects ([Art. 58 AP I](#)) and to use civilians as protective shields against attacks ([Art. 51 \(7\) AP I](#)). It constitutes a violation of LOAC if protected areas or objects like hospitals, mosques, schools (...) are abused for military gains as in [Art. 51 \(7\)](#), [54 \(3\)](#), [58 AP I](#).

Before and during the attack certain precautions have to be taken. Especially in inhabited areas warnings should be issued before an attack, see [Art. 57 AP I](#). Finally attacks are prohibited if they may be expected to cause incidental loss of civilian life, injury to civilian objects (...), which would be excessive in relation to the concrete and direct military advantage anticipated, see [Art. 57 \(2\) \(a\) \(iii\) AP I](#). Therefore, parties of a conflict are obliged to use a minimum of force in civilian surroundings.

Concerning the airstrikes of 5 May there is no information about either the weapons used by the IDF, nor about the specific content, course and effects of the Hamas cyber operations. Thus, solely targeting law can be evaluated here. The airstrikes were conducted against a building in the Gaza Strip, a densely populated area. LOAC obliges to use special care and a minimum of force if attacks are conducted in civilian surroundings. In this regard, the IDF air force [claims](#) to use smart bombs and precision-guided munition (PGM) for airstrikes.

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