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Globalizing Gaza

How Israel Undermines International Law Through "Lawfare"

by JEFF HALPER

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Operation Protective Edge was not merely a military assault on a primarily civilian population. As in its previous “operations” (Cast Lead in 2008-9 and Pillar of Defense in 2012), it was also part of an ongoing assault on international humanitarian law (IHL) by a highly coordinated team of Israeli lawyers, military officers, PR people and politicians, led by (no less) a philosopher of ethics. It is an effort not only to get Israel off the hook for massive violations of human rights and international law, but to help other governments overcome similar constraints when they embark as well on “asymmetrical warfare,” “counterinsurgency” and “counter-terrorism” against peoples resisting domination. It is a campaign that Israel calls “lawfare” and had better be taken seriously by us all.

The urgency of this campaign has been underscored by a series of notable legal setbacks and challenges Israel has incurred over the past decade or so, beginning with the indictment of Ariel Sharon in 2001 by a Belgian court over his involvement in the Sabra and Shatila massacres, for which he escaped trial. In the wake of Operation Defensive Shield in 2002, when Sharon’s government oversaw the demolition of hundreds of Palestinian homes in the West Bank, the utter destruction of virtually all the infrastructure of Palestinian cities, the death of 497 Palestinians

and the arrest of 7000 people, Israel was accused of war crimes, but succeeded in foiling a UN investigation.

In 2004, at the request of the General Assembly, the International Court of Justice in The Hague ruled that Israel's construction of the wall inside Palestinian territory is "contrary to international law" and must be dismantled. The ruling was upheld almost unanimously by the UN General Assembly, with only Israel, the US, Australia and a few Pacific atolls dissenting – though, again, it lacked any means of enforcement. In the second Lebanon War in 2006, after destroying the Dahiya neighborhood in Beirut, the Hizbollah "stronghold," Israel announced its "Dahiya Doctrine." Declared Gadi Eisenkott, head of the IDF's Northern Command,

What happened in the Dahiya quarter of Beirut in 2006, "will happen in every village from which Israel is fired on.... We will apply disproportionate force on it and cause great damage and destruction there. From our standpoint, these are not civilian villages, they are military bases.... This is not a recommendation. This is a plan. And it has been approved."

And it was applied again. The Goldstone Report on Operation Cast Lead concluded that

The tactics used by Israeli military armed forces in the Gaza offensive [of 2008-2009] are consistent with previous practices, most recently during the Lebanon war in 2006. A concept known as the Dahiya doctrine emerged then, involving the application of disproportionate force and the causing of great damage and destruction to civilian property and infrastructure, and suffering to civilian populations.

The Dahiya Doctrine violates two cardinal principles of IHL: The Principle of Distinction and the Principle of Disproportionality. The Principle of Distinction, embodied in the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, lays down a hard-and-fast rule: civilians cannot be targeted by armies. On the contrary, they must be protected; violence to life and person is strictly prohibited, as are "outrages upon personal dignity." The Principle of Proportionality, also embodied in the 1977 Protocols to the Fourth Geneva Conventions considers it a war crime to intentionally attack a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage. "The presence within the civilian population of individuals who do not come within the definition of civilians," says Protocol I, Article 50 (3), "does not deprive the population of its civilian character."

Not only were these principles violated yet again in the current round of fighting – and the Israeli government, aware of this, has carefully prepared its defense before the UN Human Rights Council's international committee of inquiry as well as before the International Criminal Court, should the Palestinian Authority turn to it – but an additional doctrine of intentional disproportionality has also been declared and perpetrated: the Hannibal Doctrine. This states that when an Israeli soldier is captured, rescuing him becomes the main mission, no matter how many civilians are killed or injured, how much damage is caused, or even if the captured soldier himself is killed or wounded by "friendly" fire. When, then, it was believed (falsely, it turned out) that an IDF soldier had been captured by Hamas in the Rafah area, the entire urban area

came under massive Israeli artillery fire and air strikes, in which hundreds of buildings were destroyed and at least 130 people killed.

Violations of the Principles of Distinction and Disproportionality constitute grave breaches of international law – and we can only imagine what states would do if they were eliminated from the legal code or significantly watered down. But this is precisely what Israel aims to do. Using the Palestinians as their guinea pigs in a bold and aggressive strategy of “fixing” international law, it wants to create new categories of combatants – “non-legitimate actors” such as “terrorists,” “insurgents” and “non-state actors,” together with the civilian population that supports them – so that anyone resisting state oppression can no longer claim protection. This is especially relevant when, as British General Rupert Smith tells us, modern warfare is rapidly moving away from the traditional inter-state model to what he calls a “new paradigm” – “war amongst the people” – in which “We fight amongst the people, not on the battlefield.” A more popular term used by military people, “asymmetrical warfare,” is perhaps more honest and revealing, since it highlights the vast power differential that exists between states and their militaries and the relative weakness of the non-state forces confronting them.

But “the people,” those pesky “non-state actors,” also have rights. Back in 1960, the UN General Assembly’s Declaration on the Granting of Independence to Colonial Countries and Peoples endorsed the right of peoples to self-determination and, by extension, their right to resist, even by armed force, “alien subjugation, domination and exploitation.” The push-back by governments over the years, and certainly since 9/11, led by the US and Israel, has been to delegitimize the right of non-state actors to resist oppression. Thus, when Obama or the EU uphold Israel’s right to defend itself, they do not include as part of that right that of an occupied people to defend itself. Indeed, non-state actors are cast as “terrorists” (the category into which Israel dumps all insurgents, revolutionaries and, by extension, any protesters threatening the powers-that-be), thus deprived of any legitimacy as “a side” to a conflict with whom negotiations are possible. When they seek the protection of international law, as did the people of Gaza, and take steps to hold state actors accountable for their illegal actions, they are engaging in what Israel defines as “lawfare”: when “terrorists” employ international law as a weapon against democracies. Israel’s campaign against lawfare attempts to cast non-state actors as the villains, of course, but “lawfare” best describes Israel’s own efforts to bend IHL to its needs – a kind of asymmetrical lawfare to remove all constraints on states in their attempts to pursue wars against peoples.

Israel’s lawfare campaign is led by two Israeli figures. One is Asa Kasher, a professor of philosophy and “practical ethics” at Tel Aviv University, the author of the Israeli army’s Code of Conduct. Indeed, attaching a professional ethicist to the IDF provides the basis for Israel’s oft-stated claim to have the “most moral army in the world.” The second figure is Major General Amos Yadlin, former head of the IDF’s National Defense College, under whose auspices Kasher and his “team” formulated the Code of Conduct, and today the head of Military Intelligence.

It is completely appropriate and understandable that Israel should be leading the campaign to remove the protections enjoyed by non-combatant civilians, Kasher vigorously asserts. “The decisive question,” he says,

is how enlightened countries conduct themselves. We in Israel are in a key position in the development of law in this field because we are on the front lines in the fight against terrorism. This is gradually being recognized both in the Israeli legal system and abroad.... What we are doing is becoming the law. These are concepts that are not purely legal, but also contain strong ethical elements.

The Geneva Conventions are based on hundreds of years of tradition of the fair rules of combat. They were appropriate for classic warfare, where one army fought another. But in our time the whole business of rules of fair combat has been pushed aside. There are international efforts underway to revise the rules to accommodate the war against terrorism. According to the new provisions, there is still a distinction between who can and cannot be hit, but not in the blatant approach which existed in the past. The concept of proportionality has also changed....

I am not optimistic enough to assume that the world will soon acknowledge Israel's lead in developing customary international law. My hope is that our doctrine, give or take some amendments, will in this fashion be incorporated into customary international law in order to regulate warfare and limit its calamities.

In order to provide a philosophical basis for undermining the Principles of Distinction and Proportionality, Kasher and Yadlin put forward a "new doctrine of military ethics" based on their version of a "Just War Doctrine of Fighting Terror." Basically they privilege states in their conflicts with non-state actors by giving them the authority to deem an adversary "terrorist," a term lacking any agreed-upon definition in IHL, thereby depriving it of any legal protection. They define an "act of terror,"

as an act, carried out by individuals or organizations, not on 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.

If we remove the words "not on behalf of any state," this definition of a terrorist act conforms precisely to Israel's Dahiya Doctrine. According to Major General Giora Eiland, attacks against Israel will be deterred by harming "the civilian population to such an extent that it will bring pressure to bear on the enemy combatants." Reducing a popular struggle to a series of discrete acts, moreover, makes it possible to label an entire resistance movement "terrorist" purely on the basis of one or more particular acts, with no regard to its situation or the justness of its cause. Once this is done, it is easy to criminalize non-state resistance, since terrorism is, in Kasher's words, "utterly immoral."

Israel's attempts to have the Iranian Revolutionary Guards declared a "terror organization," even though it is an agent of a state, shows the tendentiousness of Kasher's and Yadlin's philosophical definitions, since it does not fit into their very own "state/non-state" dichotomy. What, then, would prevent the international community from naming the IDF and various covert Israeli agencies such as the Mossad or the Shin Bet (the General Security Services) as "terror

organizations”? The Goldstone Report itself concluded that Israel’s offensive against Gaza during Operation Cast Lead was “a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population.”

Having de-legitimized state-defined “acts of terrorism,” Kasher and Yadlin then go on to further legitimize state actions such as those taken by Israel against Hizbollah, Hamas or, indeed, all Palestinian resistance, by invoking “self-defense” – again, a claim which, according to Just War Theory and Article 51 of the UN Charter, only a state can make. In order to do so, they begin the narrative of events leading up to the attacks on Gaza with the discreet acts that the “terrorist” organization had done by launching rockets on Israel without any regard whatsoever for 47 years of occupation, 25 years of closure, seven years of a self-described regime of semi-starvation and the attacks on Hamas that preceded the rocket fire – or, for that matter, the right of Palestinians to resist “alien subjugation, domination and exploitation.”

Kasher and Yadlin also imply that states cannot engage in terrorism – only because they are states which have a “legitimate monopoly” over the use of force. In fact, the non-state “terrorism from below” which so concerns them pales in scale when compared to “terrorism from above,” State Terrorism. In his book *Death By Government*, R.J. Rummel points out that over the course of the 20th century about 170,000 innocent civilians were killed by non-state actors, a significant figure to be sure. But, he adds,

during the first eighty-eight years of this [20th] century, almost 170 million men, women and children have been shot, beaten, tortured, knifed, burned, starved, frozen, crushed or worked to death; buried alive, drowned, hung, bombed or killed in any other of the myriad ways governments have inflicted death on unarmed, helpless citizens and foreigners. The dead could conceivably be nearly 360 million people.

And that, written in 1994, does not include Zaire, Bosnia, Somalia, Sudan, Rwanda, Saddam Hussein’s reign, the impact of UN sanctions on the Iraqi civilian population and other state-sponsored murders that occurred after Rummel compiled his figures. It also does not account for all the forms of State Terrorism that do not result in death: torture, imprisonment, repression, house demolitions, induced starvation, intimidation and all the rest.

“We do not deny,” Kasher concedes, “that a state can act for the purpose of killing persons in order to terrorize a population with the goal of achieving some political or ideological goal.” However, he adds,

when such acts are performed on behalf of a state, or by some of its overt or covert agencies or proxies, we apply to the ensuing conflict moral, ethical and legal principles that are commonly held to pertain to ordinary international conflicts between states or similar political entities. In such a context, *a state that killed numerous citizens of another state in order to terrorize its citizenry* would be guilty of what is commonly regarded as a war crime [italics added].

Kasher’s caveat – “a state that killed numerous citizens of another state in order to terrorize its citizenry” – does not relate at all to a state that terrorizes its own citizens, and lets Israel off the hook, since the terrorized population of Gaza are not citizens of another state.

Israel's strategy of lawfare rests on repeating illegal acts while continuing to justify them with "new military ethics." "If you do something for long enough," says Colonel (res.) Daniel Reisner, former head of the IDF's Legal Department, "the world will accept it. The whole of international law is now based on the notion that an act that is forbidden today becomes permissible if executed by enough countries.... International law progresses through violations. We invented the targeted assassinations thesis [that extra-judicial killings are permitted when it is necessary to stop a certain operation against the citizens of Israel and when the role played by the target is crucial to the operation] and we had to push it. Eight years later it is in the center of the bounds of legality." "The more often Western states apply principles that originated in Israel to their own non-traditional conflicts in places like Afghanistan and Iraq," says Kasher, "then the greater the chance these principles have of becoming a valuable part of international law."

A few years ago (2005) the The Jerusalem Post published a revealing interview with an Israeli "expert in international law" who, choosing to remain anonymous, explained:

International law is the language of the world and it's more or less the yardstick by which we measure ourselves today. It's the lingua franca of international organizations. So you have to play the game if you want to be a member of the world community. And the game works like this. As long as you claim you are working within international law and you come up with a reasonable argument as to why what you are doing is within the context of international law, you're fine. That's how it goes. This is a very cynical view of how the world works. So, even if you're being inventive, or even if you're being a bit radical, as long as you can explain it in that context, most countries will not say you're a war criminal.

This, again, is serious stuff. Just as Israel exports its occupation – its weaponry and tactics of suppression – to such willing customers as US and European militaries, security agencies and police forces, so, too, does it export its legal expertise in manipulating IHL and its effective PR/hasbara techniques. Gaza itself represents little more than a testing ground for these varied instruments of suppression of Gaza. It is the globalization of Gaza that is a key Israeli export. Exports, however, need local agents to package the product and create a market for it in the local economy. Thus, B'nai Brith in the US spawned "The Lawfare Project" under the slogan "Protecting Against the Politicization of Human Rights" <<http://www.thelawfareproject.org>>, whose main strategy is to enlist prominent legal experts to delegitimize attempts to hold Israel accountable for its crimes under IHL.

Globalizing Gaza in both military and legal terms raises the slogan "we are all Palestinians" from one of political solidarity to literal accuracy. Its collolary also highlights a key element of international politics of which we must be keenly aware: our governments are all Israel.