Redefining the Law of Armed Conflict? Legal Manipulations regarding Israel's Struggle against Terrorism

Maj. Gil Limon

Maj. Gil Limon, former Legal Advisor for the Israeli Mission to the United Nations, heads the Legal and Security Affairs Section in the International Law Department of the IDF Military Advocate General's Office.

Introduction

In recent years – and especially since the IDF Operation in Gaza (Operation Cast Lead) – the State of Israel has been confronting an extensive hostile legal campaign. This legal campaign (also known as "lawfare") is being conducted on a number of fronts at the initiative and with the participation of various actors, in particular, NGOs and certain countries that seek to denounce Israel in any way possible in the international arena. This lawfare includes – among other things – the publication of one-sided reports on IDF activities, and continued efforts to pursue legal proceedings in both national courts and international tribunals. Beyond the direct intention of damaging Israel's image, this campaign is also designed to question the very legitimacy of the use of force by states against terrorist organizations and to deny those states any effective ability in such a struggle.

The said lawfare is closely linked to the political disagreement on the subject of terrorism and in particular to the question of whether the causes underlying certain acts of terrorism makes them justifiable. Although there is no universally agreed-upon formal definition of the term "terrorism," most definitions to date have four elements in common: an act of terror is an *act of violence*, it is *illegal*, it is intended to *promote a political end*, and it employs some method of *intimidation*.

For many years the struggle of states against terrorism emphasized the illegality of such acts, thus, focusing on *law enforcement* measures and on bringing terrorists to trial. But more recently – and especially following the attacks of September 11th – more attention has been given to the element of violence. This shift in focus came about because of the increased power of terrorist

organizations and technological developments which have contributed to placing the strength of terrorist organizations on a par with that of regular armies. Accordingly, states began to take military action against terrorist organizations, using their armies within the framework of the *use of force* model.

The difficulty in applying these two afore-mentioned models – law enforcement on the one hand and the use of force on the other – derives from the third component in the definition of an act of terrorism: the political objective which such an act aims to promote; and the subjective attitude of states towards terrorist organizations operating in the name of different political objectives (hence the well-worn phrase: "one man's terrorist is another man's freedom fighter").

In the context of law enforcement, such political dissent has – thus far – resulted in failed efforts undertaken over many years to produce a comprehensive international convention that will ban any acts of terrorism whatsoever. In the case of the use of force, the same dissent produces ongoing attempts to undermine the legitimacy of the use of force by states against terrorist organizations, and to re-define the Law of Armed Conflict in such a way as to deny nations the ability to make effective use of force against terrorist organizations. These attempts are conducted simultaneously on several levels. They are motivated by various special interest groups using many different techniques.

The legal campaign against the State of Israel in the wake of the operation in Gaza led this campaign to new extremes, which I would like to illustrate in different contexts.[1]

UN Security Council Resolution 1368, adopted immediately after the 9/11 attacks, recognized the right of states to act in self-defense against terrorist organizations.

Undermining the Right to Self-Defense against Terrorist Organizations

One of the most important changes in international law following the September 11th attacks was the recognition by the international community that states have the right to take defensive action against non-state organizations engaging in armed attacks against them. The international community came to the understanding that terrorist organizations had acquired a destructive power similar to that of national armies and that, accordingly, international law needed to be adapted for this new reality. Such an adaptation did not require any formal change in the written laws: Article 51 of the United Nations Charter, which stipulates the inherent right of states to self-defense, does not condition that right on the armed attack being conducted by a state. Moreover, the famous "Caroline" Affair of 1837-38, which established the principle of self-defense, expressly addressed the use of force against a non-state actor (i.e., a rebel organization). Accordingly, Security Council Resolution 1368, which was adopted immediately after the September 11th attacks, recognized the right of states to act in self-defense against terrorist organizations. On this basis, there was no disagreement among the countries of the world regarding the legality and legitimacy of the U.S.-led Operation Enduring Freedom in Afghanistan.

Nevertheless, when the issue of the use of force against terrorist organizations was brought before the International Court of Justice in the advisory opinion case on "the wall in the occupied Palestinian territory" (the General Assembly's term for the security fence), the Court ruled as follows:

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.[2]

This position without a doubt stands in contravention of the written laws and the practice of states. It came under harsh criticism from some of the International Court judges (most notably Judges Higgins and Buergenthal),[3] many legal scholars,[4] and the Israeli Supreme Court.[5]

During the Gaza War a group of reputable jurists published a letter in the British *Sunday Times* under the title: "Israel's Bombardment of Gaza is Not Self-defence – It's a War Crime."[6] The article stated:

> The rocket attacks on Israel by Hamas, deplorable as they are, do not, *in terms of scale and effect* amount to an armed attack entitling Israel to rely on self-defence. (Emphasis added – G.L.)

Let us recall that this refers to 8,000 rockets and mortar shells fired at Israel since the year 2000, of which 3,000 were fired in 2008 alone. The claim that such a quantity of rockets and mortar shells does not justify the employment of force in self-defense has no basis in law and is designed to hinder any possibility of acting in self-defense against terrorist organizations.

The *Sunday Times* letter continues: "Israel's actions amount to aggression, not self-defence, not least because its assault on Gaza was unnecessary."

The claim that Operation Cast Lead was an *act of aggression* on the part of Israel was mentioned by several states in debates held at the United Nations in the course of the operation. The interesting point is that the same countries that made that claim also consider Gaza as an occupied territory. International law, as widely accepted today, defines an act of aggression as the unlawful use of force by one state against another. In other words, in positive law a state cannot perform an act of aggression against a territory which is – arguably – under its control. However, neither the authors of the letter to the *Sunday Times*, nor the states criticizing Israel at the United Nations, were disturbed by this legal "detail."

To sum up this point, we see a clear attempt to re-define the rules of international law in such a way that the prohibition on the use of force is absolute in certain situations. It particularly attempts to define the Gaza Strip as a territory against which Israel may not legally take any military action, even if that territory is being used as a base to fire thousands of rockets at its civilians.

Legitimizing Acts of Terrorism

The mirror image of the efforts to undermine Israel's right to self-defense is the effort to legitimize terrorist attacks against Israel, relying on the "legitimacy" of the motivation underlying those attacks. This is in clear contravention of the express determination – by both the UN General Assembly and the Security Council – that terrorist acts are unlawful and unjustified, whatever the motives behind them. In the Israeli-Palestinian context, some parties seek to deviate from this determination on the basis of the "just" struggle of the Palestinians "to oppose occupation."

The long ongoing campaign to establish the right of peoples to oppose occupation and foreign rule is far from new in the international sphere. It has its roots in various resolutions of the General Assembly from the 1960s and 1970s; since then it has had the consistent support of the developing countries, many of which were at that time emerging from colonial rule. However, whereas there was previously a consensus that the right to oppose occupation was subject to the principles of the UN Charter – including the prohibition of the use of force[7] – in more recent years there has been a concerted effort to instill the perception that the very presence of occupation justifies acts of terror against the occupying power.

For instance, Prof. John Dugard, the former Special Rapporteur of the Human Rights Council on the situation of human rights in the "occupied Palestinian territories," wrote in 2008:

> Common sense, however, dictates that a distinction must be drawn between acts of mindless terror, such as acts committed by Al Qaeda, and acts committed in the course of a war of national liberation against colonialism, apartheid or military occupation. While such acts cannot be justified, they must be understood as being a painful but inevitable consequence of colonialism, apartheid or occupation....
>
> Acts of terror against military occupation must be seen in historical context. This is why every effort should be made to bring the occupation to a speedy end. Until this is done peace cannot be expected, and violence will continue....
>
> Israel cannot expect perfect peace and the end of violence as a precondition for the ending of the occupation.[8]

Incidentally, in an article published in 1973 titled "Towards the Definition of International Terrorism," the same Prof. Dugard wrote the exact opposite:

> There are two principles, however, drawn from past experience, which...need to be stated more clearly: first, that motive is irrelevant in determining whether an act of terrorism has been committed.[9]

As part of the efforts described here to legalize and legitimize terrorist acts carried out as part of a struggle for national liberation, some countries have delayed – for several years now – an agreement on a comprehensive convention against international terrorism. The delay is based on the claim that such a convention should not apply to such type of activity. If that approach is accepted, the result will be a *carte blanche* to terrorist organizations to perform violent attacks against states, whereas the state under attack will be banned from implementing its right to self-defense and responding with military force.

Measures Available for States While Fighting Terrorism – The Law of Armed Conflict

The Applicability of the Law of Armed Conflict in the Struggles of States against Terrorism

For many years states fighting terrorist organizations refused to accept that the Law of Armed Conflict applied to the situation, fearing that such acceptance would legitimize the use of military force by those organizations. These countries preferred to define their counter-terrorism activities as law enforcement. Developing countries, on the contrary, sought to broaden the application of the Law of Armed Conflict to include also the struggle of peoples against occupation and foreign rule, in their quest to legitimize the use of force by national liberation movements. The

most notable outcome of this effort is Article 1(4) of Protocol I of the Geneva Convention, adopted in 1977, which determines that "peoples fighting against colonial domination and alien occupation" shall be considered as engaged in international armed conflict.

The attacks of September 11th, which led to wider implementation of military measures by states in their counter-terrorism activities, turned this reality over. States who fight against terrorist organizations began to support the implementation of the Law of Armed Conflict on their activities in order to obtain the powers provided to states only during hostilities (such as the use of lethal force against members of the enemy's armed forces, and the possibility of attacking military targets). On the other hand, those who justify the activities of terrorist organizations sought to block the application of the Law of Armed Conflict to such situations so as to restrict the ability of states to employ military force against these organizations.

One example of such efforts is the report of a Human Rights Inquiry Commission set up by the Human Rights Council in 2000 to investigate the Israeli response to events that occurred during the "Al Aqsa Intifada."[10] In order to prevent the application of the Law of Armed Conflict, the report denied the existence of an armed conflict, by ignoring the level of violence that resulted from the terrorist attacks against Israel at that time, stating:

> [S]poradic demonstrations/confrontations often provoked by the killing of demonstrators and not resulting in loss of life on the part of Israeli soldiers, undisciplined lynchings...acts of terrorism in Israel itself and the shooting of soldiers and settlers on roads leading to settlements by largely unorganized gunmen *cannot amount to protracted armed violence on the part of an organized armed group.* (Emphasis added – G.L.)

As in the *Sunday Times* article mentioned earlier, which rejected Israel's right to defend itself during Operation Cast Lead, here too there is an attempt to set a legal threshold that has no grounds in the written laws or the practice of states, in order to deny Israel the possibility of taking military action against terrorist organizations.

In the "Wall in the Occupied Palestinian Territory" case, the International Court of Justice chose a different legal technique in order to deny the application of the Law of Armed Conflict to Israel's struggle against terrorism.[11] The Court applied Article 6 of the Fourth Geneva Convention of 1949 – which is generally considered to have been revoked within the framework of Protocol I of the 1977 Geneva Conventions – and introduced an innovative interpretation which denied Israel the right to take any military action in its administered territories.[12]

The Fundamental Principles of the Law of Armed Conflict

During Operation Cast Lead, in light of the extent of hostilities and the use of military force on both sides, it was difficult to argue that this was not an armed conflict subject to the Law of Armed Conflict. Accordingly, the main emphasis of the campaign to limit Israel's ability to deal effectively with terrorist organizations turned to manipulating the rules themselves.

The Law of Armed Conflict is based on four fundamental principles: military necessity, distinction, proportionality, and humanity. Regarding each and every one of them, there is a continuous effort to interpret and apply it in such a way as to limit states' ability to effectively fight terrorism.

According to the *principle of military necessity*, the Law of Armed Conflict permits the parties to an armed conflict to take the measures necessary to weaken the enemy's military power in order to win the conflict, subject, of course, to the other applicable rules and principles. This

principle dominates the overall normative framework of the Law of Armed Conflict and by virtue thereof, the fighting parties have the right to attack combatants and military targets of the adversary, destroy private property for military purposes, restrict the freedom of movement of civilians, and so forth. Nonetheless, in a number of instances, it was argued that Israel is not allowed to undertake security measures, even where there is a clear military necessity that justified them. Here are two examples:

1. In May 2009 the UN published the summary of a report prepared by a Board of Inquiry set up by the UN Secretary General to "review and investigate" damages to UN installations in Gaza that occurred during Operation Cast Lead.[13] The Board of Inquiry was asked, *inter alia*, to determine when such damages would be Israel's responsibility. The Board's conclusion was that any damage to UN installations is absolutely forbidden and this prohibition remains in force even in the face of military necessity during an armed conflict. This – in the Board's opinion – means that even if terrorist operatives hide within a UN installation and fire at a military force from there, that force is still prohibited from responding with fire that may cause damage to the UN facility. This is an absurd result that does not correspond with the Law of Armed Conflict or with the practice of states.

2. Another example of undermining the principle of military necessity can be seen in the advisory opinion – mentioned above in more than one context – handed down by the International Court of Justice in the matter of the "the wall in the occupied Palestinian territory." The opinion determines that because of the illegality (in the Court's opinion) of the settlements, it is not possible to build a security fence to protect their residents. Hence it would appear to follow that the principle of military necessity is not applicable, even in a situation where there is without doubt a military necessity to protect Israeli citizens in those towns and villages from the threat of terror. This conclusion was harshly criticized by academics,[14] as well as the Israeli Supreme Court.[15]

The *principle of distinction* directs the parties to an armed conflict to distinguish between civilians and civilian objectives on the one hand and combatants and military targets on the other, and to aim their attacks only at the latter. It represents the most significant challenge for states fighting terrorist organizations, since the activity of such organizations is inherently based on a systematic violation of this very principle. They direct their attacks at the opposing party's civilian population, while at the same time masking their activity within the civilian population they claim to represent. By doing so, they intentionally endanger not only the opposing party's civilians, but also civilians under their own control.

It might have been expected that human rights organizations, which are committed to promote the protection of civilians in armed conflict situations, would move to expose the phenomenon of using civilians as "human shields" and openly condemn such occurrences. But regrettably, in many cases this phenomenon is ignored – or worse – relied upon to forbid any military activity on the part of the state fighting the terrorist organization.

One such instructive example is mentioned in the report submitted in February 2009 to the United Nations Human Rights Council by Richard Falk, the Special Rapporteur on the human rights situation in the "occupied Palestinian territories."[16] The report includes a section entitled: "Inherent Illegality: Legally Mandatory Distinction between Civilian and Military Targets Impossible in Large-Scale Attacks on Gaza Commenced by Israel on 27 December 2008." In other words, instead of condemning the illegal activity of Hamas, which located its bases in densely populated areas of the Gaza Strip, the Special Rapporteur chose to validate and legitimize such

actions and conclude from it that any military activity by Israel against those targets would be considered unlawful.

A further example of overlooking illegal Hamas actions in the Gaza Strip in the name of human rights is the report of the Fact-Finding Committee established by the Arab League to investigate acts of warfare in the Gaza Strip during Operation Cast Lead.[17] Despite many reports testifying to the use of human shields, this Committee found no evidence of such an action by the terrorist organizations in the Gaza Strip.

Under the principle of proportionality, the Law of Armed Conflict recognizes the legality of incidental damage or injury to civilians and civilian objectives.

This *modus operandi* of terrorist organizations – depending on civilian infrastructure to protect their own forces – presents a serious challenge to states fighting terrorism, not only in connection with the principle of distinction, but also in the context of the *principle of proportionality*. According to this principle, the Law of Armed Conflict recognizes the legality of incidental damage or injury to civilians and civilian objectives, provided that at the time of taking the decision to attack, the anticipated incidental damage was not expected to be excessive in relation to the projected military advantage. This refers to an advance estimation carried out by the military commander on the basis of information available to him at the time of taking the decision to attack. This approach is well illustrated in the report submitted to the prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the matter of NATO bombings in the former Yugoslavia.[18] According to the report:

> It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants ... the determination of relative values must be that of the reasonable military commander.

Notwithstanding this unambiguous approach, we can see that the many reports which examined the IDF's actions during the operation in Gaza and sought to apply the principle of proportionality did not even attempt to take into account projected military necessity or anticipated incidental injury to civilians. For the authors of those reports, the very fact that injury or damage to civilians and civilian objectives was incurred sufficed to reach the conclusion that the use of force was "disproportionate." As mentioned previously, this approach lacks any foundation in law and is in clear contravention of the practice of states.

Summary

The Law of Armed Conflict is the outcome of international conventions and accepted rules formulated over many decades in a persistent attempt by the international community to find a proper balance between the legitimate military needs of the fighting parties and the humanitarian need to minimize injury and damage to civilians and civilian objectives as far as possible. As we saw above, in recent years there has been a concerted attempt to deflect that balance so as to deny states the effective ability to use military force against terrorist organizations. In addition to the examples already listed, there is also an effort to apply human rights laws to combat

situations. Since those laws are incumbent only on parties to armed conflicts which are states, their application creates a lack of symmetry between the legal obligations of both parties to the conflict, while further restricting the ability of the party that is a state to fight terrorism.

The coalition of actors seeking to "snatch" international law away from states should face an opposing coalition of states which object to legal manipulations of the type described above. An alternative dialog should be established to highlight the correct manner in which international law and the Law of Armed Conflict in particular regulate the activities of states within the framework of the struggle against terrorism.

The conference that we are attending today is an important step towards that end.

Notes

1 This lecture was written and delivered prior to the report of the Goldstone Commission, which was appointed by the UN Human Rights Council with a mandate to investigate "the grave violations committed by the Occupying Power, Israel, in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip" (from the text of UN Resolution A/HRC/S-9/1, January 12, 2009). The Goldstone Report, published in September 2009, went to new lengths of manipulative description and presentation of the Law of Armed Conflict, as part of the ongoing anti-Israel campaign following Operation Cast Lead (see Laurie R. Blank, "Finding Facts But Missing the Law: Goldstone, Gaza and IHL," *Yearbook of International Humanitaran Law* (2009, forthcoming).

2 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion,* 2004 I.C.J. reports 136, 194 (para. 139).

3 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra* note 2, separate opinion of Judge Higgins, 215 (para. 33); declaration of Judge Buergenthal, 242 (para. 6); separate opinion of Judge Kooijmans, 229-230 (para. 35).

4 S.D. Murphy, "Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?," 99 *AJIL* 62, 62-63 (2005).

5 HCJ 7957/04 Maraba *et al* v. Prime Minister of Israel *et al*, Judgement O(2) 477, 502-503.

6 http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece.

7 E.g. Article 7 of Resolution 3314 of the General Assembly, 1974.

8 *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967,* John Dugard, UN Doc. A/HRC/7/17 (21 January 2008), pp. 5-6 (para. 4-5).

9 J. Dugard, "Towards the Definition of International Terrorism," 67 *Proceedings of the American Society of International Law,* 94, 99 (1973).

10 *Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000,* UN Doc. E/CN.4/2001/121 (March 2001).

11 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra* note 2, 185 (para. 125).

12 For criticism of the International Court of Justice's interpretation of Article 6, see O. Ben-Naftali, "*A La Recherche du Temps Perdu*: Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion," *Israel Law Review* 211, 214-220 (2005).

13 http://www.innercitypress.com/banrep1gaza.pdf.

14 Y. Shany, "Capacities and Inadequacies: A Look at the Two Separation Barrier Cases," 38 *Israel Law Review* 230, 243-244 (2005); D. Kretzmer, "The Advisory Opinion: The Light Treatment of International Humanitarian Law," 99 *AJIL* 88, 91-94 (2005).

15 HCJ 7957/04 Maraba *et al* v. The Prime Minister of Israel *et al, ibid.*, note 5, 499-500.

16 Richard Falk, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967,* UN Doc. A/HRC/10/20 (11 February 2009).

17 http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf.

18 http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf.