Asymmetric Conflicts and the Rules of War

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For many years my job was to provide actual legal advice to decision-makers. Today I teach international law in an academic institution. There is a link between these two occupations. International law is not a theoretical body of law. It is connected to actual practice. It is a field that is ever evolving, dynamic, flexible, and adjusting to the various changes which occur in the real world. I believe it is important to maintain this connection to reality in the academic world, without underestimating the importance of academic analysis and theoretical discourse.

We in Israel are forced to confront a situation in which we have an enemy – like Hamas – which:

- is not a state but rather a non-state entity;
- does not operate by conventional means of war, but through non-conventional and subversive means, such as hiding among the civilian population and aiming at harming and obstructing civilian life of the other side; and
- does not respect the laws of war – both by deliberately attacking civilians and civilian objects and by not distinguishing Hamas operatives from the civilian population on their side, who are used by Hamas to shield their military operations.

What do these characteristics mean in terms of the applicable laws of war?

About ten years ago, the main debate was whether the rules that apply in such situations (of fighting against terror organizations) are those of law enforcement applicable when confronting criminals, or those of the laws of armed conflict that apply when confronting an armed conflict situation. Can we employ force,

as we do in war, in order to defeat those who are defined as enemies? Or may we use force only in order to arrest or to impose order, as required in regular law enforcement situations?

Since then, the horrific events of 9/11 occurred and, as a result, the debate today has radically changed. There is little disagreement today that in certain circumstances, even when faced with a situation of fighting against a terror organization (as opposed to the armed forces of a state), one is not necessarily bound by the rules of law enforcement and that a situation of an armed conflict against a terror organization may exist in which the laws of war apply. This exemplifies a significant shift in legal perceptions which took place in a relatively short period of time – less than a decade.

Instead, the current debate focuses on the question of whether the existing laws of armed conflict are suited to dealing with these kinds of situations or whether such asymmetric armed conflicts require a new set of rules.

I disagree that new rules are necessary. The existing body of laws of armed conflict is suitable even in counterterrorism operations.

There is an argument which is often made, mainly by people who do not come from the field of international law, according to which the existing rules are unsuitable and inapplicable. This argument is based on two main tenets: Firstly, that the existing laws of armed conflict were based on a vision of armies of countries fighting against each other in situations of conventional war, but are not suitable when fighting against a non-state entity employing non-conventional methods. Secondly, that the laws were based on notions of mutuality and reciprocity and on the assumption that they are adhered to by both sides of the conflict and, thus, do not suit situations where only one side applies the rules.

The conclusion reached is that new rules are necessary and that a new treaty should be formulated in this regard. I disagree with this conclusion.

I believe that in principle the existing body of laws of armed conflict is suitable and relevant even in counterterrorism operations, and may be adapted to such situations.

I will not enter into the historic question of whether the laws of war were indeed written on the exclusive basis of conventional inter-state wars. I would mention, however, that throughout history there have been conflicts that were not conventional, which were fought against non-state actors, in which the laws of war had been applied.

As for reciprocity or mutuality, perhaps originally, at the time of their inception, the laws of war were based on notions of knighthood and chivalry. However, a long time has passed since then, conceptions have changed, and the basic principle that underlies most of the laws of war today is not respect for the honor of the other side, and whether that is infringed or not, but rather the need to protect as much as possible those who are not taking part in the fighting – namely, civilians not taking a direct part in hostilities and protected objects – and ensure that the damage they incur as a result of the hostilities is minimal. This is the fundamental rationale and this is why there is no reliance on the concept of reciprocity. Admittedly, there are still rules which are based on the concept of reciprocity, but these are the exception.

The view which insists on the need for the drafting of a new convention disregards an important way by which international law, in general, and the laws of armed conflict, in particular, are

developed. Indeed, one of the main ways by which the laws of armed conflict have been developed throughout the years is through the practice of states, the way they operate, including the way in which they explain their conduct, which generates the law. The significance of this is that when countries encounter different types of threats and situations, such as confronting terror organizations, they implement the existing principles and rules while taking into account the relevant characteristics of the situation. Such adaptation of the rules to the realities of a given situation leads to the development of the law. This is one of the principal means by which the laws of war have evolved over the years and I believe that this remains an important way by which they must continue to evolve. Indeed, today there is no real tangible alternative to this way of development, because, at present, there appears to be no feasible possibility of convening an international conference and reaching a new convention on the rules applicable to asymmetric armed conflicts.

Some contend that since the existing laws of armed conflict are unsuitable in the kinds of conflicts we are discussing, there are no applicable rules and therefore states enjoy a free hand. This is an unacceptable outcome and is not a practical option. From the standpoint of a military legal advisor, you cannot say that there are no rules. You have to give tangible, practical legal advice and you have to work on the basis of some framework of laws, and these derive from what you have. You derive them from the accepted principles, from the existing rules, and you apply them in a way that takes into account the unique characteristics of the situation in hand.

So what are the relevant principles and how do we apply them? The two major principles that are relevant to this issue are, first of all, the principle of distinction and secondly the principle of proportionality.

The principle of distinction distinguishes between a military objective that is legitimate for attack and a civilian object against which you cannot direct an attack. The definition of a military objective is flexible. It is defined by its nature, location, purpose or use, and judged by the military advantage derived from its attack. The meaning of this definition is that if a civilian dwelling is used by the forces of the enemy as a launch pad for attacks or to store ammunition or as an operational headquarters, it loses its civilian nature and may be regarded as a military objective that can be lawfully attacked (subject to the principle of proportionality which I will address shortly).

The same rationale applies with regard to "human targets." The straightforward implementation of this principle is that enemy armed forces may carry out attacks and are legitimate targets for attack, on the one hand, while civilians are not allowed to take part in hostilities and must not be the aim of an attack, on the other. However, this clear dichotomy between members of state armed forces and civilians does not necessarily exist in reality, especially in asymmetric conflict situations.

In 2001 we faced, for the first time, the question of how to define fighting elements of terror organizations in the context of the targeted killing cases. Should they be regarded as "civilians" who enjoy immunity from attack? At first, the prevalent position was that they are criminals that may be arrested but not attacked. With time this perception has changed to an understanding that once a situation is defined as an armed conflict, such persons do not enjoy civilian immunity from attack when involved in hostilities. Moreover, it was acknowledged that, in certain circumstances, they may even lose their civilian status altogether and be regarded as members of the armed forces of a party to the conflict. This is the analysis made in the interpretive guidelines of the International Committee of the Red Cross on the issue of Direct Participation in Hostilities. This is a good example of how international law develops through practice. This development

is due to the practice generated mainly by the United States and Israel, and the impact it has had on the position of other countries facing similar conflicts.

The second fundamental principle is that of proportionality. The application of the principle of proportionality generates a lot of misunderstanding and misconception. It states that an attack is legal as long as the collateral damage expected to occur to civilians, or civilian objects, is not excessive with respect to the military advantage that is anticipated from the attack. One can see that this formula seeks to achieve a realistic balance between the protection of civilians and the military necessities of war, and does not therefore prohibit collateral damage per se. When you have a densely populated area, and there is a risk that civilians and civilian objects would be harmed in pursuit of a military objective, does this mean that military forces cannot operate there at all? It seems that some of those criticizing Israel think that this is indeed the case, but that is not the law, nor the way any military in the world operates. Accepting such a result would leave states facing situations of asymmetric conflict with no legitimate choice of action except to continue being attacked with no option of a forceful response. This runs counter to the logic of the laws of armed conflict. The principle of proportionality reflects an appropriate balance reached by the laws of armed conflict. It directs the commander, who ultimately has to make the operational decision, as to what considerations he has to weigh before carrying out an attack on a target: what is the anticipated military advantage, on the one hand, and what is the expected collateral damage, on the other – and on this basis he must strike the balance. There is no exact formula. If the commander takes these elements into consideration, and he arrives at a reasonable balance, then legally he has met the proportionality test.

One example that illustrates the difficult dilemmas which arise in applying the proportionality balance is the question of the extent to which a commander may take into account the risks posed to the lives of his soldiers. Legally speaking, avoiding soldier casualties is a legitimate consideration when weighing the military advantage of a certain course of action, but this does not mean that one may disregard in such a situation the risk to the civilian population. The law requires us to always take into consideration the expected collateral damage.

However, how does one strike the balance? There is no precise formula, and accordingly, there may sometimes be circumstances in which two commanders might reach different conclusions about the appropriate balance in the same set of circumstances, and both decisions might be lawful.

In making these kinds of difficult decisions, morality and ethics come into play, and they operate alongside the law. Operational decisions are ultimately not made with exclusive reliance on either the law or morality. The law provides us with a set of considerations that must be taken into account. The final balancing process, however, also involves complex questions of ethics and morality.

The principles and rules of the laws of armed conflict are integrated into the operational plans and commands issued to IDF forces, including in operations such as Operation Cast Lead. All such plans and orders include a legal annex where the relevant rules are specified, but legal advisors are involved in the preparation of such instruments in order to make sure that the operative parts are compatible with the demands of the law, and the legal aspects are not confined to the "legal annex." There is a constant dialogue between the commanders and the legal advisors since each must understand the concerns of the other in order to reach both a lawful and workable end result.

In this context, it is important to note that the legal advisor does not (and should not) replace the commander. The legal advisor is usually not present on the battleground, but even if present, he or she is not supposed to replace the discretion of the commander with his or her discretion. Ultimately, the decision is left to the commander

As explained before, I disagree on the substantive level with statements made about the inadequacy of the existing rules and of the need to change them. Moreover, such statements are in fact damaging. They lead to a result whereby, although Israel did in fact base itself on the rules, an impression is formed as if it ignored them due to their "lack of suitability." This is only used as another tool in the effort to undermine the legitimacy of Israel's conduct.

As for the way ahead, I would make a few suggestions. First of all, we must stop saying that the rules and laws are unsuitable. I do not think that this is the case and such statements are also unnecessarily undermining our legitimacy. What we need to do is to keep working within the existing legal framework, while applying the laws in a sensible manner, after careful analysis, in a professional and thorough way. We need to have more articles and papers published explaining the Israeli practice, and in this way have a more significant impact on the development of international law.

We also should increase our dialogue with other legal specialists working in foreign governments and militaries, as well as in academia and with bodies such as the International Red Cross, with whom we already have an ongoing dialogue. We must not give up on the attempt to influence the legal arena. We have many shared interests with legal advisers of other countries, who often encounter dilemmas not so different from our own.

We might feel that the world is against us no matter what we do, but we cannot despair and quit in our efforts to explain our position and influence the legal developments in the field of the laws of armed conflict.