

International Law and Military Operations in Practice

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Over the last several years, after I retired from the army in 2004, I have been asking myself a lot of questions about what I think and how I classify myself. In a lecture at Kiryat Ono College I said that I should classify myself as a human rights lawyer. Now, to anyone who knows my background and how many years I spent in counterterrorism, that doesn't seem like an obvious choice, but I have two things to say about this. The first thing is, I have a very good friend who is an expert in labor law, but he only represents large-scale companies. I have a partner in my firm who is a world expert on environmental law, but she only represents polluting companies. But no one argues that they are experts in their field. So how come when I say that I am a human rights expert, everyone says, no, it can't be. That's not your field, you don't do human rights, you violate human rights. You help governments violate human rights.

There is a joke about the priest, the rabbi, and the Israeli taxi driver who all died and went to heaven. They were told that they would receive housing on the basis of their contribution to the holy cause, and the priest got a very nice apartment with a very good view. The rabbi got an even better apartment on a higher floor with a better view, and suddenly both of them see that the Israeli taxi driver gets a huge villa on a hill. So they both go to the angel in charge and say that they dedicated their lives to God, how come he gets the villa? And the angel said that with his driving he puts the fear of God into more people than they ever did.

In that respect I am the taxi driver because I think the people who work in our field do more for human rights than probably most of the human rights lawyers working in the field. But the problem is that what I say now will not be accepted by them, and this is the crux of my discussion. There are clubs in

international law, as in international politics, which you cannot join and will not be asked to join if you don't hold the right opinion.

Until 2000 Israel classified the fight against terror as a criminal law enforcement scenario. In the West Bank or Gaza Strip, during the first intifada, during all the operations up to the year 2000, the goal of IDF soldiers when entering the West Bank or Gaza was to arrest suspected terrorists. IDF rules of engagement during that period, and I have drafted them for quite a long time, had different names. They were called rules for the detention of suspects. There were no rules of engagement in military parlance in effect in the West Bank or Gaza Strip, except that soldiers were allowed to use their rifle in self-defense. IDF soldiers were using their capabilities solely as policemen, and that is the format with which Israel fought Palestinian terrorism after 1967. In 2000, when the Second Intifada broke out, we saw that the scope of the fighting was immense. It did not look like sporadic stone-throwing, Molotov cocktail-throwing, or riots. In addition, the type of equipment being used was not that of criminals, but rather military hardware, such as live fire from machine guns, mortars, surface-to-surface missiles, and one-ton bombs hidden under the asphalt when the tanks came into the town.

The terrorists were not fighting in sporadic groups. Some of them were quite organized into guerilla or militia armies. It was happening everywhere – in the West Bank, Gaza, and Israel. And finally, from a statistical perspective – one Israeli out of 800 was either killed or injured in a terror attack during a five-year period. If I translate that ratio to the U.S., that would be the equivalent of 300,000 American casualties, which is one hundred times the scope of 9/11.

In 2000, with the Second Intifada, Israel concluded that the Palestinian violence was no longer a law enforcement issue because people were firing machine guns at us – and that we were now in the world of armed conflict.

In 2000, Israel, including Israel's lawyers, came to the conclusion that this is no longer a law enforcement issue, that we are no longer required to send our soldiers as policemen to arrest the people firing the machine guns at us. It was decided that we had passed a certain as yet undefined and undesigned threshold and that we are now in the world of armed conflict.

We had to sell this new idea to other countries, and I want to mention two examples of my failure in this regard. First, there was a meeting with the British deputy minister of defense in 2002, and he had a British general with him who, two weeks later, would be commanding British forces in Iraq. I explained to them my idea of crossing the threshold into the world of armed conflict against terrorism and told them that we are now allowing the Israeli army to use military hardware, technology, techniques, and *modus operandi* to fight terrorism. The deputy minister said that terrorism is not a military affair and it does not address international law, but rather it is an internal matter. I believe that he was comparing it to Northern Ireland, and the general agreed with him. I then asked this general would he still agree with his colleague in one month, after the first Iraqi suicide bomber attacked his forces? He answered that then he would probably agree with me.

The second failure was after Camp David in 2000, when President Clinton decided to appoint a fact-finding commission, of which he asked two questions. Why had the violence broken out, and how was it possible to bring the peace process back on line? Senator George Mitchell was in charge of that committee. I appeared before the committee, explained our concept of

war against terrorism, and the fact that we need to change our perspective and to address the question of what laws apply. However, the committee's recommendations to the new president, George Bush, called for the State of Israel to take back its classification of the dispute with the Palestinians as an armed conflict, and to go back to the law enforcement approach. It took four months and four aircraft to change the mind of the U.S. government, because after 9/11 the world changed for a moment, and the Americans got it. The American response to Israel's idea of unlawful combat was that now they understood what we were talking about.

However, 9/11 did not solve Israel's problems. Some time following 9/11, I received a letter from a British lawyer who wanted my help in defending a certain Serb general accused of war crimes in the former Yugoslavia. He turned to me because he felt that what that general was charged with was what Israel was doing to the Palestinians. He had no idea that he was being anti-Semitic, because he actually thought that what he wrote was true. From his perspective it seemed like the same complaints. As far as he was concerned, I was working for the bad guys.

Because of the media, people never ask questions deeper than who are the good guys and who are the bad guys, and they don't really care, as long as they have a soundbite, and they know who are the good guys and the bad guys.

After being interviewed for British television by an antagonistic journalist, I confronted him. He thought that if it were not for Israel, this part of the world would be quiet. I asked him if he was aware of the fact that for many Israelis, we liken ourselves to Sparta, that we are the three hundred crazy people stopping the flood of Islamic fundamentalists from swooping over Europe, and that we are covering your back. He laughed and said that we can't really believe that is true. It hit me again that people really don't believe us when we say what we believe, which is a problem, because if they don't think you are serious, they don't take you seriously.

There is another problem. Military people, armies, and people like us are no longer in favor. In this new world we live in, the majority of the people have outgrown wars, or at least they think they have. Therefore, we are viewed as the old guard, the people who are still fighting while the rest of the world has moved beyond that.

Several years ago, a United Nations organization responsible for cultural property was convening a conference on the protection of cultural property in wartime. This is a very important topic for Israel as well, because cultural property can mean a mosque, for example. There are a lot of things you have to be careful about and I wanted to know what the developments were, and I went to the conference, which was in Paris. There were about 300 or 400 people from 150 countries in the room. They were talking about the fact that there should be a new protocol which should totally prohibit any damage to cultural property in warfare, even at the cost of a soldier's life. I am saying to myself, I can understand Mona Lisa, but if you are talking about a religious icon which someone hand-sculpted for twenty years and put in a church somewhere, no, I am not going to sacrifice a soldier's life for this.

On the second day of the conference, I asked the following questions: What happened to the principles of military necessity, the fact that there should be a balance? And if you are allowed to kill civilians inadvertently in conflict, how come you can't destroy cultural property in conflict? Only then did I understand, and actually I was shocked to learn that I was the only military person in the entire conference. Everyone else was a museum curator, and only they had been invited. It was my idea to come. No one was presenting the other side of the argument, and as a result of my participation we came back in force the next time. All of the Western countries came in with military lawyers, but the organizers tried to shut me up, and put me in charge of drafting a part of the protocol. I helped draft the protocol and then I made sure we never signed it.

It is extremely important that Israel's positions be heard. There is a huge tendency among people to say that we have already lost the fight. If we don't engage we will lose the legal fight and the war crimes fight. Most of the normal people don't hate us in person once they get to know us, but they do hate us in principle because we are the bad guys.

I have three recommendations: The first is, before we engage anyone, we must make sure that we are whiter than white, and I don't think we've done enough on that. I am uncomfortable with the fact that the speed of the investigations about the allegations against IDF forces is so slow that when we come up with results no one believes them because they are six months old. I cannot accept that it takes six months to find out what happened in a conflict, although I know it does. We have to find a way to come up with a quicker response than we do today. We need to look at the way we actually investigate ourselves because I am not sure we have found the right balance yet.

However, once we understand what we did right and what we did wrong, armed with that moral and legal ammunition, we should actively engage public opinion everywhere, even if we are the odd man out. I have been the odd man out on more than one occasion at international conferences where I felt like the sacrificial lamb. It is worth it. If we expect our soldiers to enter Gaza and to risk their lives, then a lawyer can go into a hostile environment where the maximum that can happen is that he will be booed.

The third thing we should be doing is to recognize the fact that we are not alone. Almost every single military officer and military lawyer in the world actually thinks we are right. If he does not think we are right on the details, he thinks we are in the right area. He may have a disagreement with us on how to use force, and exactly what proportionality means, but the language is the same. These are people who are like-minded and not because they like Israel. I have had good friends from countries which have absolutely no basis for a very favorable relationship with Israel. It is because they have been where we have been and they understand the dilemma, and once they understand the dilemma they are willing to actively engage in finding a solution. That is a target group that we should actively engage, and create a coalition of like-minded states, not pro-Israel states. They could all be countries that don't like us, but the people there who make a difference are the people who know what we are talking about.

There is safety in numbers. The more important, intelligent, and understanding people from different countries see that the Israeli viewpoint is not crazy, and that we are not the bad guys, the less there will be a tendency to associate us with the bad guys.