

Self-Defense and the Dignity of States

Prof. George P. Fletcher

Prof. George P. Fletcher is the Cardozo Professor of Jurisprudence at Columbia University School of Law.

I live in Israel, but I have been a professor of criminal law and of jurisprudence at Columbia University in New York for the last twenty-five years. In the United States my record has largely been a liberal record of opposing the Bush administration on issues of Guantanamo and the use of military commissions. In 2006 I wrote the winning brief in *Hamdan v. Rumsfeld*, the first decision by the Supreme Court against President Bush's circumventing civil liberties in his war on terror. Four Justices accepted my argument that the law of war limited the jurisdiction of military tribunals and that conspiracy – the charge used against Hamdan – was not a crime under the law of war. The majority of the Court held that the military could not try suspects without conforming to the principles of fair trial mandated by common Article Three of the Geneva Conventions. In particular, the military tribunals could not violate the defendant's right to confront the witnesses against him

In my writings I have consistently attacked the position of the Bush administration, which has developed a parallel system of international law that emphasizes concepts like enemy combatants, unlawful combatants, and uses a set of terminologies that are not found in the traditional law of war. I am very much opposed to the alternatives to international law that the U.S. administration and courts have developed in the last decade. I hope that as soon as possible we shall return to the language of international law that has basically defined relations among states for the last hundreds of years, and, in my opinion, has been a great friend to the State of Israel.

Many people in Israel criticize international law for what it can do for the politics of Israel. I think this is a major mistake. I recall in the major controversy before the International Court of Justice about the defensive wall, Israelis refused even

to enter an appearance. Israelis recently made the same mistake by refusing to cooperate with the Goldstone Commission. The general fear is that international bodies will not treat Israel fairly and therefore we should not cooperate with them.

This fearful and condescending attitude has only hurt Israelis in their dealings with other countries. We should recognize that our best friend in the international arena is not a set of people but a set of institutions, a set of principles, a set of ideas that are incorporated in the United Nations Charter. Let me just review carefully what those principles are and why we in Israel, as the State of Israel, should be committed as strongly as possible to these principles underlying international law.

Everybody in the international arena agrees that no country should have to tolerate attacks against its territory and that it is entitled to use defensive force to repel aggression.

The first principle in armed conflict is the principle of self-defense. This is the one provision recognized in Article 51 of the Charter as a basis for the legitimate use of force when an armed conflict occurs. Everybody in the international arena agrees that no country should have to tolerate attacks against its territory and that it is entitled to use defensive force to repel collective or individual aggression against its territory. It does not matter for these purposes whether the aggression is collective and conducted by a state or whether it is conducted by an organization like Hamas, or whether it is conducted by a group of volunteers; the principle is basically the same. Self-defense lies at the core of the idea of a set of mutually recognizing independent states.

There has been a lot of discussion lately about human dignity in the law of war, and when in various military operations it might be possible to attack the dignity of the civilians or the soldiers on the other side. The point that is frequently left out of the discussion is the human dignity of states. For a state to maintain its dignity it must have a complete right to defend its borders against external attack.

Self-defense, in this sense, is a sacred institution that expresses the state's capacity for dignity. When we tolerate invasions of our territory, or if we tolerate missile attacks upon our territory, then we surrender our dignity as an independent entity in the international arena.

How we classify defense is another question. Whether it is defense against a nation, defense against an armed band, defense against a terrorist organization; whether it is asymmetrical or symmetrical warfare, all of these are technical questions which international law can solve. The most important thing for Israel is to think of itself as being in a position of an individual that claims its essential human dignity by being able to preserve the integrity of its external boundaries. This is a principle that all nations of the world understand and all express.

In addition, Israel should welcome critiques of its position by the other side. There are rumors that the Palestinians might try to bring a lawsuit in the International Criminal Court against Israel based upon Article 12.3 of the Rome Statute which enables non-member entities to sue in the ICC for violations of the law of war and for crimes against humanity. This would be the best possible thing for Israel if this legal attack occurred. The most important thing to recognize about initiatives under Article 12.3 of the Rome Statute is that the party who goes to Rome to complain about an incident opens itself up to all related crimes connected with that incident.

There is no way that Hamas can go to Rome and complain about Israeli behavior without, at the same time, opening the door to a litigation about all the crimes against humanity, all the war crimes, all of the suicide bombings, all of the illegitimate cases of targeting that the Palestinians have committed against Israelis and to which they have never been called to account. So, the more Israel emphasizes its international legal responsibility, the more it has to gain because it is only in the arena of legal responsibility that we can establish something that we know in our hearts; namely, that Israel has been the victim of discriminatory aggressive attacks from neighboring countries, and these have never been dealt with properly under the law of war. The only way in which they will be dealt with is if we can engage the other side in a legal argument in which their crimes become relevant in exactly the same way as the alleged crimes of the Israelis become relevant.