International Law is Not a Suicide Pact

October 29, 2014

By Louis René Beres

Arutz Sheva

<http://www.israelnationalnews.com/Articles/Article.aspx/15888#.VX4W0vlViko>

For most observers of Middle Eastern affairs, irrespective of ideology, legal ignorance is the rule. In the specific matter of Israeli self-defense against terrorism, virtually everyone gets upset whenever the Jewish State seeks to protect its deliberately targeted civilians from grievous harms. This is the expectedly general reaction, even when Israel is repeatedly obligated to retaliate against openly indiscriminate rocket attacks from Gaza.

In an increasingly chaotic region of world politics, reassuringly rhythmic mantras have become a routine stand in for facts. Almost ritualistically, and as if to underscore that any lie, if repeated often enough, can be transformed into truth, all manner of  observers unhesitatingly lament Israeli "disproportionality." In certain circumstances, such lamentations lead quite directly to "lawfare." Here, Israel's determined enemies cheerfully augment their more usual resorts to terror-violence with characteristically propagandistic and fully complementary manipulations of international law.

But even the most sacred mantras may be subject to informed challenge. Significantly, international law is one of those layered and specialized subjects about which almost everyone is quick to offer a learned opinion, but where almost no one ever has any genuine knowledge. For example, and however counter-intuitive, the legal standard of "proportionality" defined by the law of armed conflict has nothing to do with any requirement to maintain equivalent levels of suffering. If it did, many still-celebrated allied military operations conducted during World War II would have been flagrantly unlawful.

Additional nuances need to be acknowledged. Most plainly, determinations of proportionality can never be rendered in an historical or geopolitical vacuum. Instead, such judgments must always consider the extent to which an identifiable adversary (especially a terrorist adversary, whose every action is already illegal by definition) has committed prior, or even ongoing violations, of the law of war.

In the case of Hamas, Islamic Jihad, and “moderate” Fatah, there is ample evidence that these unrepentant terrorists are routinely guilty of “perfidy.” To spark Israel's recent Operation Protective Edge, Palestinian "freedom fighters" had fired intentionally and persistently at Israeli civilian targets, launching their indiscriminate assaults from Gaza schools, homes, and hospitals. As for Hamas leader Khaled Mashal, he had declined to become a shahid himself. More heroically, he had opted, yet again, for "leadership consultations" in Qatar.

For this conspicuously courageous Palestinian leader, "martyrdom" was something to be reserved for deserving others -  that is, for Gaza's endlessly manipulated and impoverished masses, for those perpetually-convenient Jihadist "sacrificers" who so fortunately lack the means of ever arranging Mashal-type emigrations to Qatar.

There is a notable footnote to this already ironic behavior. During the most recent Gaza war, Palestinian Hamas leader Ismail Haniyeh quietly chose to send his daughter for medical treatment to Ichilov Hospital in Tel Aviv, where, without a scintilla of payment or gratitude, Jewish physicians took exceptional care of his ill wife. Earlier, Haniyeh's sister Suhila's husbandhad received life-saving heart surgery at Beilinson Hospital in Petah Tikva.

In Israel, fortunately for Hamas heroes, the Hippocratic Oath is still taken seriously. Indeed, over the past several years, literally more than a hundred thousand Palestinians from all walks of life in Gaza, Judea, and Samaria, have been cared for by Jewish doctors in Israel. Authoritative data on these many cases of uncompensated care have been compiled and verified by the U.N.'s World Health Organization (WHO).

Within Hamas, however, it remains a very different story. Turning all normalcy on its head, Palestinian physicians sometimes serve eagerly as terrorist-killers. In this connection, for example, one may recall the plainly "heroic" career of Dr. Abdel-Aziz Rantisi, a Hamas founder and pediatrician. He was finally eliminated by Israel on April 17, 2004, after functioning for years as the terror-group's enthusiastic murderer-in-chief of Israeli children.

Another prominent instance of Palestinian doctors working as terrorists is the case of Rantisi's fellow Hamas founder, Mahmoud Zahar. A surgeon, Zahar devoted most of his healing energies to repairing other terrorists, including even Dr. Rantisi.

Credo quia absurdum. "I believe because it is absurd."

Still, humanitarian international law must always be expressed and appraised as if the multiple arenas of world politics were entirely rational. To be sure, deception can be acceptable in armed conflict, but certain portions of the law of war (Hague Regulations) explicitly disallow any placement of civilians among military assets or personnel. Further prohibitions of "perfidy" can be found at Protocol I of 1977, additional to the Geneva Conventions of 1949. Additionally, these incontrovertible rules are  binding on the basis of customary international law, obligations that are included in the authoritative inventory of legal sources defined atArticle 38 of the U.N.'s Statute of the International Court of Justice.

In essence, perfidy represents an egregious violation of the law of war, one that is even identified as a “grave breach” at Article 147 of Geneva Convention No. IV. The legal effect of perfidy committed by all Palestinian terrorists in Gaza – especially their repeatedly widespread resort to “human shields” - is to immunize Israel from any responsibility for collateral counter-terrorist harms suffered by Arab civilians. Moreover, even if Hamas and Islamic Jihad and Fatah did not deliberately engage in jurisprudentially perfidious behavior, any terrorist-created link between civilians and insurgent warfare would still grant Israel full justification for launching defensive military actions.

This grant is not a carte blanche. No state, including Israel, should ever be granted  a free hand in applications of armed force. Nonetheless, the reasonableness and lawfulness of these applications must always be assessed against the utterly unchanging backdrop of Palestinian perfidy.

Viewed against the extensive landscape of terrorist crimes in Gaza, Israel is not guilty of “disproportionality.” All combatants, including the terrorizing Palestinian insurgents in Gaza, are required to comply with the law of war. This key expectation stems not only from the so-called “Martens Clause,” which makes its first appearance in the Preamble to the 1899Hague Convention No. II on land warfare, but also from Article 3, common to the four Geneva Conventions of August 12, 1949.   It is further found at the two binding protocols to these particular Conventions.

It is always tempting for those who know absolutely nothing about international law to lash out viscerally at Israel. Yet, trained legal scholars do understand the profound jurisprudential significance of context.  Correct judgments under international law are never made in isolation.

It is apparent, then, that any seemingly disproportionate use of force by the Israel Defense Forces during Protective Edge was the outcome of prior perfidy committed by Palestinian terrorist forces in Gaza.  Also noteworthy is that in any careful comparison to the current U.S. led war on ISIS terror, Israeli counter-terrorist operations have remained substantially limited.

International law is not a suicide pact. Faced with Palestinian terrorists in Gaza who still make no secret of their genocidal intentions, Israel still displays persistently marked restraint. In contrast to the witting indiscriminacy of Arab terrorists in Gaza, and to undisguised Palestinian perfidy, Israel takes very great care to minimize civilian harms. This self-imposed Israeli limitation on armed force is codified and followed as IDF "Purity of Arms," even when the consequent risks to Israel's soldiers are multiplied and enlarged.

In the manner of every other country in world politics, Israel maintains an unqualified right under international law to protect its citizens. Until now, in exercising this fully "peremptory" right, Jerusalem's use of military force has remained closely measured and controlled. It follows that the international community should finally begin to shift its allegedly jurisprudential concerns from the crudely deceptive mantras of "lawfare," and focus instead on the still-escalating criminality of Palestinian terrorism.