

Peter Berkowitz on Goldstone, the flotilla incident and more

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Peter Berkowitz, a senior fellow at the Hoover Institution and holder of a PhD in political science and a J.D. from Yale, is out with a new book, “Israel and the Struggle Over the International Laws of War.” The slim volume does not lack intellectual heft. It is must-reading for those interested in international law, Israel and multilateral international bodies. Peter agreed to answer a number of questions about the book. The depth and thoughtfulness of his answers are representative of his body of work, which ranges from political philosophy to Zionism.

How does compliance with international law comport with America’s system of constitutional democracy?

It depends. International law includes a variety of bodies of law dealing with, among other things, trade, transportation, communication, the environment and human rights. The international laws of war form one such body.

One source of the international laws of war is the long-standing or customary practice of nations based on their sense of legal obligation. Customary international law is consistent with constitutional democracy because it is grounded in the consent of states, in their decision to follow a practice not merely out of convenience or courtesy but out of their recognition of its legally binding character.

Much of the international laws of war has been codified in treaties, most notably the four Geneva Conventions. When, in accordance with Article II, Section 2 of the Constitution, the President and two-thirds of the Senate enter into treaties governing the laws of war — as in the case of the Geneva Conventions — America is properly bound.

However, two large problems have arisen concerning the democratic legitimacy of the international laws of war. First, lawyers, scholars, and diplomats increasingly argue as if speculations derived from moral philosophy and political theory about what the law ought to be constitute a binding part of customary international law. Second, lawyers, scholars, and diplomats increasingly seek to shift responsibility for interpreting the obligations of states under the international laws of war from states themselves — where the international laws of war place it — to entities that are not only unelected and unrepresentative but in many cases boast officers and judges who represent authoritarian states.

You write that international laws are “a vital component of a freer, more peaceful and more prosperous world order.” But does Israel’s experience with Goldstone and the flotilla suggest otherwise?

Israel’s bitter experience with the Goldstone Report and, in the end, better experience with the Gaza flotilla controversy — both of which concerned Israel’s operations against Hamas, which is the ruling authority in Gaza and which is sworn to Israel’s destruction — involved the attempt by influential actors on the international stage to criminalize Israel’s inherent right of self-defense. All liberal democracies must combat this abuse and corruption of the international laws of war.

At their origins and properly conceived today, the international laws of war seek to balance the legitimate claims of military necessity and humanitarian responsibility. Liberal democracies such as Israel and the United States, which are engaged in a long struggle against transnational terrorism and depend on their armed forces on a daily basis to defend their ways of life, have a special interest in the struggle over the international laws of war. That’s in no small measure because soldiers and officers imbued with the principles of freedom and equality justly take pride in honoring laws of war rightly understood. The laws of war rightly understood take seriously both combatants’ obligation to defend their nation and their obligation to minimize harm to noncombatants.

Is the proper application of international law possible without a majority of liberal democracies in the international community?

Yes and no. It is certainly possible for the liberal democracies such as the United States and Israel to operate in accordance with the international laws of war, in part because the international laws of war accord states with competent judicial systems considerable responsibility for investigating and punishing war crimes. However, to the extent that the international laws of war are coopted by authoritarian states and transnational elites with their own political agendas, liberal democracies will be compelled to assume even greater responsibility for interpreting, upholding, and defending the international laws of war. The recognition of laws of war that are binding on all nations should not be confused with the obligation to vest in some mythical international community the authority for defining and punishing violations of the laws of war.

The Goldstone Report got the facts and the law wrong. The report was so contrary to international law (e.g., in failing to defer to national sovereignty and law) one has to wonder how Goldstone got so far off track. Was this pure bias?

I don’t know what motivated Goldstone or the other members of his mission — London School of Economics professor Christine Chinkin; Colonel Desmond Travers, a former officer in Ireland’s Defense Forces; and Supreme Court of Pakistan advocate Hina Jilani. But when intelligent people go wildly astray, when they sign their names to a document that twists the

facts, misapplies the law, and indeed proceeds on the basis of a mandate lacking proper legal foundations, and all their errors operate to demonize one side, then bias becomes a plausible hypothesis.

You discuss and debunk the notion that Israel is “occupying” Gaza. Is Hamas an occupying power, and if so what recourse is there?

Hamas shouldn't be considered an occupying power in Gaza, though its actual status is unclear. In January 2006 elections, it won a majority of seats in the Palestinian Authority parliament. And in June 2007, Hamas violently seized control of Gaza, expelling its rival Fatah from the government. While not recognized by international law as head of a sovereign state, Hamas, unfortunately, appears to enjoy the support of the Palestinians of Gaza. In these circumstances, friends of freedom should join with Israel in ensuring the humanitarian needs of the people of the Gaza Strip are met while isolating Hamas, which refuses to recognize Israel, renounce terror, and abide by agreements with Israel into which the Palestinian Authority has entered.

In its Presidential Statement of May 31, 2009, did the U.N. Security Council violate the international laws of war by failing to recognize that Israel had the primary right and responsibility to investigate the incident itself?

The failure of the Presidential Statement to recognize that states accused of war crimes have the right and primary responsibility to undertake investigations, conduct trials, and mete out punishments is not itself a violation of the international laws of war. However, it betrays a determination to effectively rewrite the international laws of war by shifting responsibility from states to international entities.

Actually, in the case of the Gaza flotilla, the UN acted with greater respect for Israel's rights and responsibilities. In the case of the Goldstone Report, the UN General Assembly, through its subsidiary organ, the notorious Human Rights Council, abridged Israel's rights and interfered with its responsibilities under the international laws of war by launching an investigation before Israel could have been expected to complete more than the preliminary stages of its own. In contrast, in the case of the Gaza flotilla the UN waited for Israel to complete its investigation and drew on Israel's analysis and findings before it issued its own report. That was proper. The Palmer report found that Israel's blockade of Gaza was clearly legal while concluding, on a matter over which reasonable people could differ, that in the case of the Mavi Marmara Israel used excessive force in defending its legal blockade.

Nevertheless, the enemies of Israel, who form a powerful voting bloc at the UN, have an interest in eroding the claims of national sovereignty and limiting the rights and responsibilities of states in the event of war crimes allegations.

And progressive opinion wants more judicial power to be vested in international entities to investigate and punish war crimes on the supposition that they are more impartial and reliable. But that supposition is dubious. The transnational elites that would stand in judgment have interests and ambitions of their own; they lack democratic accountability and national security responsibility; and they operate in many cases without agreed upon authority for adjudicating disputes and enforcing the law.

In our imperfect world, when a liberal democracy is accused of committing a war crime, the judicial system of that liberal democracy is, all things considered and according to the international laws of war rightly understood, the best forum for vindicating the international laws of war.