Friendly Fire: A Response and Rejoinder

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Peter Berkowitz, Jeremy Rabkin

A Response

I thank my friend Jeremy Rabkin for the words of praise for my short book, *Israel and the Struggle over the International Laws of War,* in the first several paragraphs of his review. I salute him for the radical gestures, observations, and prescriptions he puts forward in the remainder of the review. And, reluctantly, I am compelled to criticize him for allowing the axe he was apparently determined to grind to come between him and fulfillment of the most basic obligations of a reviewer of books.

Rabkin chose to take the occasion of his review to throw down the gauntlet on a deep issue that raises fundamental political and philosophical questions. I argue for reforming the modern international laws of war. He is keen to overthrow them. It could be a fascinating debate. Unfortunately, Rabkin's revolutionary fervor prevents him from restating my arguments accurately and criticizing my views cogently.

One would think from reading Rabkin's review that the purpose of my book was restricted to, in Rabkin's flippant phrase, "getting Israel off the hook" in connection to the Goldstone Report and the Gaza flotilla controversy. To be sure, one of my major aims was to show that contrary to the vicious accusations that it systematically committed war crimes, Israel respected the international laws of war in its Gaza operation of December 2008 to January 2009 and in enforcing its blockade of Gaza against the *Mavi Marmara* in May 2010. Readers of Rabkin's review, however, would never know that another major aim of my book was to show that the concerted effort—involving diplomats, international human rights lawyers, activists, journalists, and professors of international law—to criminalize Israel's right of self-defense is relevant to all liberal democracies and especially to the United States.

Nor would readers learn of the arguments I put forward in support of that aim. Rabkin fails to take notice of my argument that the Goldstone Report and the widespread criticism of Israel's seizure of the *Mavi Marmara* as lawless reflect a broad-based movement to shift primary responsibility for investigating and punishing war crimes from accused nation state —which is where the international laws of war as written and as reasonably interpreted place it—to international organizations. Rabkin also ignores my argument that this is unwise because the transnational elites who would presume to sit in judgment have interests of their own and lack democratic accountability, not to mention national security responsibility and expertise. And he avoids any note of my argument that the commitment to balancing humanitarian responsibility with military necessity, out of which modern international laws

of war arose, is imperiled by diplomats, international lawyers, activists, journalists, and law professors determined to elevate the claims of humanitarian responsibility and depreciate or deny those of military necessity.

In addition to these substantial omissions, Rabkin criticizes opinions that he ascribes to me, although they are nowhere to be found in my book. For example, he takes issue with me for "grounding" the authority of the international laws of war in a multi-volume study of international humanitarian law (also known as the law of armed conflict) by the International Committee of the Red Cross (ICRC). I do no such thing and Rabkin offers no evidence that I do. While I cite in footnotes the ICRC study as a source for working *definitions* of the international law of war principles of distinction and proportionality, I do not rely on ICRC *interpretation* of those principles, let alone treat them as authoritative. To the contrary, I explicitly argue that those principles are authoritative for Israel and the United States because those countries recognize them as such.

Rabkin's omissions and additions form a pattern and serve a purpose. They enable him to portray my analysis as one that, despite scoring points on Israel's behalf, remains securely ensconced within a poisoned perspective that is inherently inimical to Israel's and the United States' interests and which "does not alert readers that there are serious ongoing disputes about what the law of war is and where it applies." This tendentious misrepresentation provides Rabkin with a convenient foil that serves to sharpen the contrast he is eager to draw with his approach, which purports to boldly grasp the hopelessly compromised conventional wisdom and to proffer a robust alternative to the modern international laws of war.

Rabkin's main criticism is that I do not appreciate that the principles of distinction and proportionality, which I describe in my book as the "master concepts of the international laws of war governing combat operations," are historically contingent, lack legitimacy, and grievously impair the ability of liberal democracies to wage war. These criticisms do not withstand scrutiny.

The principle of distinction forbids the direct targeting of civilians, and the principle of proportionality prohibits attacks on legitimate military targets that would produce excessive civilian harm. Rabkin's historical animadversions concerning their emergence over the last one hundred years or so are beside the point. The question is whether I was correct to assert that *today*, in the world in which we actually live, Israel and the United States recognize distinction and proportionality as binding and authoritative law.

Rabkin laments that the Israel Defense Forces, consistent with my claim, do recognize distinction and proportionality. But he also suggests that the American military is skeptical about them. If Rabkin were right about America, this would call my claim into question. What is Rabkin's evidence for American skepticism? He states that he has "met quite a few American military specialists who concede (at least in private) that international legal standards are sometimes just a nuisance to get around." So what? Lots of businessman and

lawyers will grumble in private, and in public too, that many elements of contract law are sometimes just a nuisance to get around. That doesn't make them skeptical of the lawfulness of fundamental elements of contract law. Moreover, the U.S. military officers with whom I have spoken—representing the Army, Navy, Marines, and Air Force—have invariably affirmed that the principles of distinction and proportionality are essential to their training and a source of pride in their mission. But my private conversations are no more a proof that distinction and proportionality are master concepts of the international laws of war than is Rabkin's anecdotal evidence that they are not.

I do, however, consider decisive the opinion elaborated in *The War on Terror and the Laws of War: A Military Perspective*, edited by Michael W. Lewis, a law professor who spent the better part of a decade in the U.S. Navy flying F-14s, and whose five co-authors, all veterans of the United States Armed Forces, served in the Judge Advocate General's Corps in senior positions dealing with the laws of war. In the book, Geoffrey S. Corn—a law professor who served in the U.S. Army for twenty-one years, first as a tactical intelligence officer, later as Chief of International Law for the U.S. Army Europe, and retiring as a Lieutenant Colonel in the Judge Advocate General's Corps—explains that so central are the principles of distinction and proportionality to the U.S. armed forces that since before the al-Qaeda attacks of September 11, "U.S. military policy dictated compliance with" distinction and proportionality "even if those principles did not apply as a matter of law."

The centrality of distinction and proportionality has been recently reaffirmed in the *Law of War Deskbook,* published by the Judge Advocate General's Corps in 2011. Similar formulations can be found in the law of war handbooks for the U.S. Army, Navy, and Air Force. As for Rabkin's contention that the principles of distinction and proportionality should be rejected because they prevent the Israeli and U.S. militaries from adopting the harsh measures sometimes necessary to defeat their enemies, he provides no arguments to show that this must be the case. Nor does he address my claim that restoring an appreciation of military necessity, a concept built into the principle of proportionality, would give liberal democracies the flexibility they need to lawfully defeat their enemies, conventional and unconventional. Rather, he offers Israel radical advice: it should see itself as subject only to its own law, about whose origin, contours, and claims to authority Rabkin says next to nothing other than that it is "older" and will permit Israel to do what is in its judgment necessary to prevail.

The crux of the matter for Rabkin is that I have provided a "sugarcoated" account that timidly refuses to acknowledge that the modern international laws of war are "an impractical set of ideals, universally lauded in speech and routinely disregarded in practice" and that fails to face up to the brutality of the strategy and tactics that Israel and the United States will be compelled to adopt to meet the grave military threats they confront.

Rabkin seems to suppose that his approach, by contrast, is frank, realistic, and tough-minded. But it is not frank to distort the views of others the better to grind one's own axe. It is not realistic to suppress or cavalierly disparage the principles that soldiers and officers in free and democratic societies proudly embrace and for which they take serious risks to protect the other side's civilians. And it is not tough-minded to dismiss opportunities to reform laws whose assumptions and principles are widely shared in liberal democracies while advocating a vague and idealized alternative law of war whose ground principles and provisions one cannot specify but of whose superiority one entertains no doubts.

As in politics generally, so too today in the struggle over the international laws of war: Israel and the United States should eschew the temptation of revolutionary change and instead pursue the path of prudent reform.

Peter Berkowitz is the Tad and Dianne Taube Senior Fellow at the Hoover Institution, Stanford University.

A Rejoinder

I think a defense of Israel's compliance with the laws of war ought to acknowledge that there is ongoing dispute about what that body of law actually requires. I think Peter Berkowitz's book is deficient for not addressing that indisputable fact. I did not, in my review, argue for ignoring such traditional restraints on war as the principles of distinction and proportionality. I merely emphasized that, historically, these principles have been applied with exceptions and qualifications—particularly with opponents who did not adhere to them.

Along with Professor Yoram Dinstein and the Supreme Court of Israel, I think reprisals against civilian objects (that is, buildings and equipment) are sometimes reasonable, even though a literal application of distinction and proportionality principles might seem to prohibit such tactics. I do not at all favor indiscriminate attacks on civilian persons. I do favor more acknowledgement of complexities in the application of general principles.

I do not understand why Berkowitz says my view reflects "revolutionary fervor," while he favors "prudent reform." As I pointed out in my review, it is Berkowitz who ends his book with the observation that "vastly greater legal supervision" of war tactics reflects "a *revolution* in military affairs" since World War II and that "*revolution* has accelerated over the last several decades and continues apace" [emphases added]. My review indicated reasons for thinking that "revolution" has been misguided. Why am I the "revolutionary" here?

And in what sense does Berkowitz favor "prudent reform"? His book does not offer a single concrete example of a provision in current treaty law (or even in Red Cross interpretations of customary law) that he proposes to "reform." It would be hard to understand from his book why, for example, neither Israel nor the United States has ratified the 1977 Additional

Protocol to the Geneva Conventions. His book does not offer any objection to any provision in this treaty, nor to the Red Cross extrapolations from the treaty to what it now calls "customary international humanitarian law," supposedly binding on non-parties to the 1977 treaty.

What Berkowitz does emphasize in his book is that "primary responsibility" for investigating and punishing war crimes should rest with accused nation-states. He complains here that I did not discuss this argument in his book. He is right about that—I didn't discuss it in my review. I confess I did not pursue that argument because I thought it was too misguided to take very seriously. Since Berkowitz insists on pressing the point, I'll offer a brief account of why I think that.

The historic mechanism for enforcing restraints in war was reprisal—that is, retaliation in kind. That didn't normally involve any kind of deference to the other side's legal investigations. The 1949 Geneva Conventions, partly to discourage reprisals, imposed a duty on all signatories to "search for persons alleged to have committed or . . . ordered . . . such grave breaches [of prohibitions in the conventions] and . . . bring such persons, regardless of their nationality, before its own courts" or extradite them to other signatory states willing to prosecute. Not one word so much as gestures toward the Berkowitz doctrine of deferring to the courts of the accused nation. The 1977 Additional Protocol extends the list of breaches to be punished, but adds nothing about deference to home states. Even the U.S. statute (War Crimes Act of 1996, 18 U.S. §2441) authorizes prosecution for a "grave breach of the 1949 Geneva Conventions" (and other specified war crimes) against "individuals" of any nation, if the victims of the crimes were U.S. nationals. Again, there is not the slightest acknowledgement of the Berkowitz principle of deference to the home state of the accused.

Finally, even if there were such a general principle, the Goldstone Report does not obviously violate it. The Goldstone Report may have been libelous but it was not legally binding (as Goldstone, himself, repeatedly and accurately stressed). The Human Rights Council, which sponsored the report, hurls all sorts of accusations about all sorts of international legal claims. No one says a condemnation by the Council runs counter to the "primary responsibility" of states to investigate and punish human rights violations by their own public officials. The Council is not a judicial tribunal but simply a political forum.

What I think was egregious about the Goldstone Report was that it invoked interpretations of international law that are not generally accepted—such as the supposed duty to give more than one warning to civilians before attacking a building in which they are present. But that problem is in no way unique to the Human Rights Council. Human Rights Watch, the International Red Cross, and other advocacy groups invoke comparably extreme interpretations of relevant legal standards.

Still, I am not in favor of imposing a ban on criticism by non-governmental organizations. I imagine even Berkowitz does not view such a ban as "prudent reform"—or in any way feasible in today's world. For that reason, I hope he will soon come around to my view that we need to talk more in public about the content of legal standards in this area—and not just complain about who gets to "investigate."

Jeremy Rabkin is professor of law at George Mason University, where he teaches courses on international law and the law of armed conflict.