

# Assault on Israel Shifts From Warfare to Lawfare

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By **Peter Berkowitz** - November 28, 2014

TEL AVIV -- Last summer Hamas launched against Israel another round of warfare. The Jewish state responded with Operation Protective Edge. In the wake of that 50-day military conflict, international actors are launching against Israel another round of “lawfare.”

U.N. bodies, international and domestic courts, diplomatic circles, NGOs, and the European and American legal academies are preparing the coming attack on Israel, a continuation of war by means of law and legal institutions.

In theory, calling Israel to account seeks to safeguard human rights, uphold international law, and constrain the inherent brutality of war. In practice, it criminalizes Israel's right to defend itself and abuses key principles of international law. Also, by rewarding Hamas, which commits the double war crime of militarizing urban areas in Gaza and targeting civilian populations in Israel, the lawfare aimed at Israel incentivizes terrorism and weakens the ability of the United States and the West to defend themselves.

To defend itself while also bolstering the long-term interest of other liberal democracies engaged in the struggle against transnational terrorism, Israel should undertake a preemptive strike, both in the legal arena and in the court of public opinion. The facts and the law are on Israel's side.

The de facto headquarters for the international legal aggression against Israel is the United Nations Human Rights Council in Geneva. Its membership includes authoritarian states such as China, Cuba, Pakistan, Russia and Saudi Arabia. In actions that can only be understood through an Orwellian prism, this U.N. body routinely heaps praise on regimes like Iran, the world's leading state sponsor of terrorism, for their human rights records.

The UNHRC authorized the scurrilous 2009 Goldstone report. Despite a lack of relevant factual findings, the report rendered the spurious judgment that Israel committed war crimes and crimes against humanity by deliberately adopting in its December 2008-January 2009 conflict with Hamas a strategy designed to terrorize the Palestinian population of Gaza. In 2011, Justice Richard Goldstone, head of the UNHRC team, withdrew the odious accusation. But much damage had been done to Israel's reputation in the court of international public opinion.

The UNHRC is obsessed with the Jewish state. Although Israel is one out of the 193 member states of United Nations and its population of 8.2 million represents approximately 0.1 percent of the world's approximately 7.2 billion people, the UNHRC devotes more attention

in the form of country-specific resolutions and condemnations to Israel's alleged violations than it does to any other country's, by far.

True to form, in a July 23 resolution promulgated in the midst of last summer's fighting, the UNHRC proclaimed Israel to be in violation of international law and authorized an investigation of Israel's conduct.

The UNHRC's rush to investigate is almost as invidious as its rush to judgment. That's because the international laws of war accord states considerable deference in dealing with serious accusations of war crimes. Only if a state shows itself unable or unwilling to conduct investigations consistent with the rule of law do international institutions properly intervene. Yet the UNHRC gave Israel no opportunity to demonstrate its obvious ability and willingness to fulfill its legal obligations.

When the UNHRC wants to, it observes the principle of deference—to a fault. In May 2009—one month after improperly authorizing the Goldstone mission to investigate a conflict in which fewer than 1,500 Gazans, including fighters and civilians, were killed—the UNHRC declined to launch an investigation in Sri Lanka. Credible reports at the time indicated that government forces killed some 20,000 Tamil civilians—subsequent estimates have put the death toll much higher—in its final defeat of the Tamil Tigers. Yet the UNHRC resolution commended the Sri Lankan government, noting its “continued commitment” to human rights.

The UNHCR also exposed its animus by appointing Canadian William Schabas to head the current investigation of Israel. An international law professor at Middlesex University in London, Schabas in 2012 called for Israeli Prime Minister Benjamin Netanyahu to be hauled before the International Criminal Court.

Human rights eminence Aryeh Neier -- founding director of Human Rights Watch, former head of the ACLU, and president emeritus of George Soros' Open Society Foundation -- declared that “any judge who had previously called for the indictment of the defendant would recuse himself.” Law professor Schabas purports to be puzzled by the concern and the UNHRC sees no problem.

Apparently, that's because when it comes to Israel impartiality isn't the goal. The UNHRC doesn't even bother with attempting to appear impartial. Georgetown law professor Christina Cerna suggests that the UNHRC chose Schabas *because* of his pronounced bias.

On November 5, Amnesty International released a report that provides an inkling of what to expect from the Schabas commission. Its purpose was to “examine targeted Israeli attacks carried out on inhabited civilian homes in the light of Israel's obligations under international humanitarian law, specifically the rules on the conduct of hostilities.” It concluded that “there was a failure” by Israel “to take necessary precautions to avoid excessive harm to

civilians and civilian property." Although Amnesty's report admits that it lacked information about Israeli targeting decisions, it failed to recognize that lacking such facts invalidated its legal judgments.

Israel's Ministry of Foreign Affairs promptly responded: "the report ignores documented war crimes perpetrated by Hamas, including the use of human shields, as well as ammunition storage and firing at Israeli civilian population centers from within schools, hospitals, mosques and civilian neighborhoods in Gaza." Yet Hamas's reprehensible tactics are critically relevant to determining the level of force Israel was entitled to use in self-defense.

In this hostile international environment, knowledgeable Israelis are concerned about the March 2015 publication of the Schabas report. Either from lack of familiarity with the international laws of war or out of misplaced sympathy for the conventional view, some intellectuals here, including law professors, are tempted to conclude that Israel has few legal responses. They seem to believe that Israel should contritely accept the UNHRC's factual findings, legal conclusions, and practical recommendations and concentrate on damage control.

There is no chance that Netanyahu's government will adopt that approach, nor should it. Whether it will launch an offensive against the UNHRC's kangaroo court is another question.

Here are five defective claims likely to inform the Schabas commission, and outlines of the replies that Israel should be honing for a preemptive strike in advance of the commission's forthcoming report.

**Hamas's military actions against Israel are defensive because, despite its 2005 withdrawal, Israel continues to occupy the Gaza Strip.** Under international law, an area is occupied if hostile forces exercise over it "effective control" -- that is, have boots on the ground and discharge the functions of government. Since no Israeli soldiers are in Gaza and Hamas governs Gaza, Israel does not occupy it.

**Israel's maritime blockade of Gaza is illegal.** The U.N.'s 2011 Palmer Commission report (dealing with the 2010 flotilla controversy) concluded that since Hamas is waging war -- its 1988 charter declares a war of annihilation against Israel -- Israel has a right to impose a maritime blockade in self-defense to prevent the importation into Gaza of weapons and materials for weapons production, provided it allows for the basic humanitarian needs of Gaza's civilian population to be met, which Israel does. Similarly, Israel's control of some Gaza land borders (Egypt controls a land border as well) and air space are legitimate defensive measures under the laws of war; they seek to protect against Hamas' armed aggression, which includes the firing of mortars, rockets, missiles, and the construction and exploitation of cross-border attack tunnels.

**Israel used disproportionate force during Operation Protective Edge because approximately 2,150 Palestinians were killed while fewer than 75 Israelis were killed.** Proportionality is not determined by counting casualties. It requires that the force used to eliminate military threats not be excessive. Earlier this month, Gen. Martin Dempsey, chairman of the Joint Chiefs of Staff, stated his opinion that in Operation Protective Edge, “Israel went to extraordinary lengths to limit collateral damage and civilian casualties.” Since Hamas's unlawful launching of thousands of rockets from civilian areas caused them to lose their immunity, Palestinian civilian deaths should presumptively be understood as Hamas's responsibility.

**Israel erred in not cooperating with Goldstone and should cooperate with Schabas.** Israel declined to cooperate with the 2009 UNHRC investigation and should decline to cooperate this time too. Israel is the only nation for which the UNHRC demands such investigations in the midst of battle. Israel should not collaborate in the creation of a special body of law for it alone, particularly given the UNHRC's gross bias.

**The Israeli legal procedures for investigating war crimes are inadequate.** The Israeli system compares favorably with those in the United States, the United Kingdom, Canada, Australia and elsewhere among the family of liberal democracies.

To counter the coming blow to its good name being readied by the Schabas commission, Israel should continue with its own investigations and preemptively issue a preliminary report on the 2014 Gaza conflict, including photographs and videos documenting Hamas war crimes and illustrating Israel's efforts to minimize civilian casualties. Israel's ambassadors should explain the report's findings in op-eds in leading European and American newspapers. And the ambassadors should flood the airwaves with radio and TV appearances. That the facts, the law, and the interests of liberal democracy are on Israel's side hardly ensures victory. But it helps in rallying the home front and winning support of the decent and the reasonable abroad.

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