INTERNATIONAL LAW: WHERE HAVE WE BEEN; WHERE ARE WE GOING?

AMOS N. GUIORA

1. INTRODUCTION

International law, much like the law of nation-states, is in a state of flux. There is great uncertainty regarding its applicability in what I (and others) refer to as the “post 9/11 world.” Needless to say, not all agree with me that the world significantly changed that Tuesday morning. They suggest that the Bush Administration response is best defined as a “massive over-reaction,” and that history will show the attacks to be no more than a blip on history's pages.

My hero, Winston Churchill, would no doubt scoff at such an analysis and would—perhaps—offer these commentators a black umbrella, the famous accessory of the Nazi-appeasing former Prime Minister of the United Kingdom, Neville Chamberlain. While Chamberlain was horribly wrong and extraordinarily naïve, I do not suggest that those who disagree with me are that. I would argue that the significance of 9/11 is as yet unknown and that history will judge. While I carry the name of the Old Testament prophet, Amos, I am—as the phrase goes—neither a prophet nor the son of one.

I am, however, a student of history with significant professional experience in the legal and policy aspects of operational counterterrorism. I have also spent innumerable waking hours with Palestinian terrorists in the West Bank and Gaza Strip. Conversations with those Palestinians lead me to the following convictions: terrorists are hell-bent on achieving their...
goal and compromise with terrorists is extraordinarily complicated. Exceptions exist—the IRA-British Agreement is the obvious one—but they require brave political leadership and a confluence of mutual self interests. Both, as I shall discuss, are hard to come by.

Yitzhak Rabin was wont of saying, “we shall fight terrorism as if there is no peace process and we shall fight for peace as if there is no terrorism.” While Rabin was known to loath Yasser Arafat, he understood that the occupation (following the 1967 Six-Day War) of the West Bank and Gaza Strip had become untenable for Israeli society politically, morally and financially.

This understanding was his primary motive for going forth with a process of which he was most skeptical. His skepticism was deeply rooted and was not—as some have suggested—predicated on his fundamental distrust of the Accord’s architect and his long-time political rival, Shimon Peres. Rabin came to understand what the Israeli philosopher Yeshayahu Leibowitz said in the immediate aftermath of the War: “the occupation will be a cancer on Israeli society.” Leibowitz was spot on, to say the very least.

How Israel has articulated its positions in the context of international law has been the subject of innumerable articles, conferences, polemics, and diatribes. Some have been justified, others not. What is critical—from the perspective of this Article—is how the nation-state conducts operational counterterrorism on multiple fronts while seeking to respect international law. Israeli counterterrorism is complicated by the occupation of the West Bank and Gaza Strip. However, it is critical to remember for purposes of historical accuracy that Palestinian terrorism did not begin in June 1967; the Palestinian Liberation Organization was established on January 1, 1965 and Palestinian terrorists (previously referred to as fedayeen) have been attacking Israel since its creation in May 1948).

This background serves as the basis for a discussion regarding the essence of international law, and to what ends and means it is used. The follow-up question is whether international law meets the test of contemporary and future relevance. This is not a loaded question but rather an attempt to analyze the current state of international law.

Two more, relevant, personal points of introduction are in order. During the course of my Israeli Defense Force (“IDF”) career I was deeply involved in “on the ground” implementation of the Oslo Accords—(when I served as the Legal Advisor to the
Gaza Strip)—and I had significant interaction with the foreign media regarding Israeli legal policy with respect to the Gaza Strip and West Bank. These postings obligated me to understand how to best implement international law and how to explain such implementation. The challenge of explaining the international law rationale of Israeli policy to a skeptical media corps was sometimes only matched by the difficulty of explaining international law obligations and responsibilities to IDF commanders; whose primary focus, naturally, was on their operational considerations.

A final comment before delving in: these words are written against the following back-drop—I recently lectured to my eighteen year-old son’s IDF peer group on the legal aspects of counterterrorism. That group will be inducted into the IDF during 2009, many of them will be the next generation of junior commanders charged with implementing international law in what is literally a “mission impossible.” How they will balance operational considerations with humanitarian responsibilities will determine—in many ways—their success as soldiers and commanders. It will also define their morality and respect for the rule of law.

The need to operationalize international law from the perspective of the commander is, I suggest, an absolutely critical requirement of academics, policy-makers, human rights organizations, and military commanders (junior and senior alike). Otherwise, the commander will be stuck with yesterday’s rules in today’s—and tomorrow’s—conflict. The inherent unsuitability of these rules to the conflict will both make public international law increasingly irrelevant from the perspective of the single most important practitioners—the commanders—and will do a fundamental disservice to those who most critically need its protection—innocent civilians.

Operationalizing international law sets the guidelines and parameters for the new conflict, thereby providing the commander with the most appropriate and relevant tools of the trade. Otherwise, tragedy is inevitable. SNAFU and FUBAR must not re-enter our lexicon in a military context. That is the ultimate thesis this Article seeks to convey. The requisite first step is, with all due haste, operationalizing international law.
2. OPERATIONALIZING INTERNATIONAL LAW

The innocent civilian is entitled to international humanitarian law protections. That is obvious. If the individual is a combatant and therefore meets criteria to be defined as legitimate target then, all bets are off, with the caveat that the soldier must act when dealing with this combatant in accordance with the critical principles of international law: proportionality, alternatives, military necessity, and collateral damage. But what is the soldier to do when the scenario is in the hazy, foggy middle that defies easy categorization and classification? The extremes are easy, the middle is complicated. Classic international law and international humanitarian principles are clear with respect to the former; I suggest they are unhelpful regarding the latter. Unfortunately, operational counterterrorism is most complicated in the haze that is all but inevitable when facts are unclear, how is the soldier to act? Relying on time-honored principles developed in different operational contexts may not provide sufficient guidelines.

I suggest the critical word in examining international law is balance. Perhaps advocates of theoretical international law will take exception to that suggestion. Fair enough and understood. However, I suggest the practical application of international law requires tweaking the term by adding the word “operational.” That is—the field-level interpretation and implementation of international law is best described as “operational international law.” That is the answer to the question posed in the title of this Article, “Where We are Going?”

3. HOW DO WE GET THERE?

Balance has become a magical word in describing government policy in response to government action. As I have written elsewhere, there is a need to balance between the rights of the individual and the equally legitimate national security rights of the state. My colleague and friend, Dean Hiram Chodosh suggests using the term “maximizing” rights. Whether we “balance” or “maximize,” we seek to articulate that not all rights will be fully preserved, protected, and respected in the context of government and response. One of the important questions from an operational perspective is to whom international law protections are to be extended and under what circumstances? The easy answer is “everyone.” That, of course, is Pollyannaish and impossible.
Some, such as Professor David Cole, have argued that constitutional protections should be extended to non-Americans detained by the United States. While that is a minority position, it raises important questions concerning the expansion of constitutional rights to an otherwise unprotected class. Two of the most important issues in operational counterterrorism are: (1) when is an individual a legitimate target, and (2) how is direct involvement defined? While relevant international law principles regarding military necessity, proportionality, alternatives, and collateral damage are well-known and often discussed, I am increasingly of the belief that they are insufficient in most effectively setting the parameters of operational counterterrorism.

Civil democratic societies—if they are subject to the rule of law—must internalize the limits of power in conducting operational counterterrorism. The limits of power are translated into respect for international humanitarian law and the commander’s subsequent obligation to conduct military operations in accordance with agreements to which the government is a signatory. However, the critical question is, does international law and international humanitarian law sufficiently take into account the ever-changing nature of conflict?

I have argued that the post 9/11 conflict is not “war on terrorism” but rather that the correct (albeit clumsy) terminology is “armed conflict short of war.” The essence of operational counterterrorism is a soldier standing opposite someone (male or female, young or old) dressed in civilian clothes, and literally until the last moment the soldier does not know whether that civilian is innocent or not. The resulting question is critical to the discussion—does he wait an extra second before shooting? After all, that one extra second can be the difference between life and death for the soldier. On the other hand, it can lead to the inadvertent killing of an innocent civilian.

How do we resolve this dilemma? I suggest the following three paradigms: (1) if the soldier killed an individual later determined to be an innocent civilian and there was no justification for the shooting, then the soldier must be court-martialed; (2) if the soldier shot an individual later determined to be an innocent civilian but the conduct objectively raised the soldiers suspicion (manner of dress, body language, field circumstances, etc.), then the decision whether to bring the soldier before a disciplinary hearing or a court martial depends on a careful analysis of the facts and thoughtful application of the law; and (3) if the soldier killed
an individual determined to be a combatant, then there need be no judicial or disciplinary process. The quantum of evidence required is, I suggest, reasonable suspicion that the individual presented a life threatening situation to the soldier or other unprotected individuals in the "zone of combat."

4. BY WHAT MEASURE DO WE EVALUATE THE SOLDIER'S ACTIONS?

The question is what conduct do we expect from soldiers' in the zone of combat. The following vignette best explains this proposition: in my last position in the IDF I had command responsibility for the development of an interactive video teaching soldiers how to conduct themselves vis-à-vis a civilian population. The video taught a ten point "code of conduct" based on international law, the IDF code and Israeli law. In conjunction with commanders, I demonstrated the video to field units. In early 2004, I was invited to show the video to a paratroop battalion. After the soldiers viewed the video, the commander said the following: "if you [the soldier] are unsure as to whether the individual standing opposite you is an innocent civilian or combatant, you will wait an extra second before shooting." The soldiers responded in unison attacking the commander for unnecessarily endangering their lives and having, in essence, signed their death sentence (the IDF is known for its open and frank discussion philosophy between commanders and soldiers). The battalion commander repeated himself and the soldiers repeated themselves, at which point the commander said the following: "by my order—and this is the order of the day—you will wait an additional second."

That is not to suggest that international law is not relevant to certain operational engagements and contexts. My point is simply that it is not wholly helpful to the soldier standing opposite an individual who he does not know, and in large part cannot assess whether he presents a threat or not.

Re-stated, I am increasingly concerned that the haziness that typifies operational counterterrorism is not addressed by international law. To that end, I suggest re-thinking international law and adopting a more operational approach. While some will argue that extending the reach of the law is problematic, the reality is that there is a direct relationship and confluence between the law and operational counterterrorism. Commanders and others can kick and scream, but their operational reality must include legal

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considerations and limitations imposed by the law—like it or dislike it.

5. THE ROLE OF INTERNATIONAL LAW IN ENABLING OPERATIONAL COUNTERTERRORISM

That being said, the law must help them out. Otherwise, tragic mistakes will be made that will result in unnecessary deaths of soldiers and innocent civilians alike. By operationalizing international law the intent is to enable commanders to conduct aggressive, operational counterterrorism subject to legal limitations given contemporary realities. After all, the reality of the modern age is the absolute need to conduct operational counterterrorism. To think otherwise is either misbegotten or disingenuous. Precisely because that is the reality and because multiple audiences require protection, there is a need to define terms in a manner that enables operational counterterrorism while protecting the innocent.

Perhaps this is a difficult task, but there is no choice or alternative. While terms such as proportionality are known to commanders and soldiers alike, what do they actually mean to them? How are they to translate it operationally? These concepts imply restricting the scope of operational engagement, but it is equally important to clearly articulate what soldiers and commanders are permitted to do. That is, not only say “no to this and that” but “yes under such and such circumstances.” Guidelines must also enable action, not only forbid it.1

To that end, operational international law must enable soldiers and commanders to engage a broad range of individuals involved in terrorism. That is the essence of what I propose should be the guiding spirit of operational counterterrorism. Simply stated, terrorist organizations involve numerous categories of individuals without whom terrorism cannot exist. It is well-nigh impossible to plan and execute a terrorist attack (other than lone wolf actors) otherwise.

Case-in-point, the extraordinarily sophisticated, well-planned and well-executed attack in Mumbai on November 26 and 27, 2008 involved countless individuals. Those involved went far beyond the terrorists who actually carried out the simultaneous attacks.

1 This was brought home to me on numerous occasions when asked to speak before IDF soldiers regarding international law. Their frustration was that so much of the language is “prohibitory” rather than facilitating.
The legitimate targets extend to the planners, logisticians, financiers, and supporters. Those individuals are direct participants. What constitutes participation is a matter to be defined tactically. The strategic decision is whether to define legitimate target broadly or narrowly. I suggest applying the broad definition is the only way operational counterterrorism can be conducted. However, the definition can not be open-ended for that would reflect lawlessness.

To concretize the discussion and to highlight how extraordinarily problematic the issue can be, I suggest the following two vignettes, which are based on press reports. (While this means that that their veracity is questionable, they nevertheless serve as useful discussion points).

**Vignette #1:**

According to initial reports, the Mumbai attack was financed by an Indian citizen living in Saudi Arabia.

**Vignette #2:**

According to initial reports, the Mumbai attackers had established—months in advance—command centers in the Taj Mahal and Oberoi hotels (there is no such report with respect to the Bet HaBAD).

Before delving into an analysis of who presents a greater threat, the financier or the logistician, I would suggest that the same reasonable suspicion test articulated above is relevant in this context. In applying this test to the four international law principles previously mentioned, the question is when and under what circumstances are these individuals legitimate targets. Indeed, these actors—financiers and logisticians—represent the “new actor” for whom international law must provide commanders with an operational checklist. That checklist—or guidelines—will most effectively enable the commander to target those who must be targeted while seeking to protect the innocent.

Targeting is problematic word for it implies, frankly, killing someone. My support for “targeted killings” is conditioned on the following: that the target presents a significant threat to national security, that there are no alternatives to neutralizing the threat (such as arrest), and that the collateral damage will be, at the most,
minimal.2 With those conditions articulated and implemented, then the reasonable suspicion test suggests that both categories are legitimate targets. The issue becomes who implements the targeting and to what extent? I suggest that if the financier (according to media reports) is in Saudi Arabia then the natural choice is the Saudi’s, as it is all but impossible to expect the royal family to allow Indian special operation commandos to perform a hit on Saudi soil. On the other hand, in the context of “anything is possible” I would suggest not ruling that option out. That same possibility exists should the individual choose to travel internationally and if he operationally presents himself.

How does international law—as presently construed—define the “financier”? Truth be told, it does not precisely do so because international law was designed to address state-to-state issues. The financier as a legitimate target represents an increasingly important operational counterterrorism issue. As I have argued elsewhere, if intelligence is the basis for counterterrorism then finance is the core of terrorism. Simply put, without financiers terrorist attacks, such as Mumbai, do not occur. Perhaps easier to execute, less sophisticated attacks do occur, but absent the correct financing multi-target attacks carried out after months of planning involving tens (if not more) individuals will be less likely to occur. If the financier is essential to the attack is he not equivalent to a combatant? The answer, in my opinion, is yes.

Indeed he is more than a combatant because the terrorists conducting the actual attack are numerous while the financier is a single individual. Thus, he is more important than any single, specific individual actually shooting and killing unarmed, innocent civilians. To that end, in an expansive view of operational international law, I suggest that, predicated on reliable and valid intelligence information and in the absence of any practical alternatives (primarily detention), the financier is a legitimate target when involved both in planning how to finance and in executing financial measures. The financier meets an expanded definition of direct participation that goes beyond the actual zone of combat.

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2 See Amos N. Guiora, Targeted Killing as Self Defense, 36 CASE W. RES. J. INT’L L. 319, 322 (2004) (defining “targeted killing” as a deliberate decision to order the death of a terrorist or other person who presents a serious threat to public order and safety as established by criminal evidence or reliable corroborated intelligence).
That is not to diminish the significance of the logistician but rather to highlight the extraordinary importance of the financier. Press reports indicate that there was one financier involved in the Mumbai attack, while there are an unknown number of individuals involved in various aspects of planning and logistics. In the context of carefully identifying who is a legitimate target I would suggest that a lawful, expansive articulation of operational international law will not tolerate excess. The operative terminology that must be adopted should be a careful and prudent approach that expands the definition of legitimate target.

Perhaps it is more accurate to say in articulating an expansive view of operational international law that the zone of combat is wherever terrorist attacks are planned and executed. The logical corollary to that is whoever is in that zone of combat is a legitimate target. But international humanitarian law must act as a buffer or as a restraint in determining who is a legitimate target and when. This buffer concept takes on added importance in the expansive view of operational international law that I am suggesting. In proposing an expansive view I am deliberately not addressing critical issues of self defense, as I have done elsewhere, for the purpose of this Article is to raise a separate—albeit related—issue of the functionality of operational international law. Needless to say, self-defense is the essence of lawful state action, but my proposal at its core is limited to re-defining international law.

6. DEALING WITH THE LOGISTICIANS

What about those involved in the planning? How should my proposed expansive definition be applied to those who reserved hotel rooms for extended periods, enabling the establishment of command centers? If we can establish that they knew, then they too are direct participants. However, are they legitimate targets? Even in an expansive view of international law, I would suggest that those responsible for logistic arrangements are not legitimate targets to the same extent as the financier, without whom the operation cannot proceed. However—and the however is critical—the logisticians can not get a free ride. They are an

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intrinsic element of the attack; their efforts are crucial to its success.
Borrowing from an air force example, while they are not the pilots, they are responsible for the plane’s “readiness.” Any combat pilot knows that without a superb ground crew team the most expensive and sophisticated F-16 will not be combat ready. I suggest that the same holds true in the terrorist paradigm. If, indeed, a command center was established in the two hotels and if that facilitated the attacks, then those responsible for creating the centers were direct participants. If they are alive and arrested, then the Indian legal system must mete out punishment according to the Indian criminal code.4

That is obvious and does not, I believe, require re-articulating international law. What is relevant is asking whether they were legitimate targets while engaged in the act of—for instance—reserving the hotel rooms or bringing supplies to the rooms. The easy answer is that they fall into the detainable category. This is obvious. However, what if for operational reasons they were not able to be arrested, and the only way to neutralize their activity was to kill them? That is the harder question. It is also an uncomfortable question as those reserving hotel rooms have not traditionally been considered terrorists or legitimate targets.

Advocates of traditional international humanitarian law will vigorously shake their heads and steadfastly argue that expanding the definition of “direct participation” and “legitimate target” is nothing more than the beginning of a slippery slope. They will suggest that such an idea is “GITMO” re-incarnated, and that expansiveness will result in unconscionable violations of human rights. On many levels, they are right, and in respect to many issues, I wholeheartedly agree with them. However, in analyzing the Mumbai raid and its affect on future terrorist attacks, I suggest it is too easy to automatically say “no” to expanding definitions.

With respect to the financier, I am convinced of the need to expand the definition. However, with respect to logisticians, I am less convinced: they may well be the beneficiaries of international humanitarian law protections and guidelines. That said, the Mumbai attack clearly shows the critical role played by those not traditionally considered combatants. While they are not holding the gun, these individuals make holding the gun a possibility. In that sense, they are participating, and perhaps directly so. They

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4 For a discussion of Indian counterterrorism policy see AMOS N. GUIORA, GLOBAL PERSPECTIVES ON COUNTERTERRORISM 167–72 (2007).
are not innocent by-standers who deserve immunity and they are not entitled to protections offered non-combatants. Whether or not they are combatants as traditionally understood is an issue that going forth must be discussed because sophisticated terrorist operations depend on them.

As to innocent bystanders, there is no need to expand international law beyond the accepted understanding of collateral damage. While innocent civilians invariably and inevitably pay the price for terrorism and counterterrorism alike the nation state is obligated to minimize that price. It is far too easy (and unreasonable) to say that operational counterterrorism must result in zero loss of innocent life. But, it is reasonable to demand commanders to respect the principle of minimizing. However, under no circumstances can commanders order a deliberate attack on innocent civilians. No expansive definition of operational international law can or should tolerate such an order. It is blatantly illegal (if indeed given) and requires the immediate intervention by commanders and law enforcement alike. International humanitarian law need not, and must not, bend with respect to the protection of innocent civilians.

However, international humanitarian law and international law must understand that post 9/11 there is a need to re-articulate existing definitions to enable the state to conduct aggressive operational counterterrorism. That is most effectively facilitated by developing, articulating and implementing operational international law in response to attacks such as Mumbai. These attacks are the wave of the future. Existing principles and definitions do not adequately meet the new challenges posed by such attacks.

7. **ONE FINAL WORD**

As with any controversial proposal, debate is a must. There is a clear need to consider, analyze, and understand the significance of events such as Mumbai. They are not going away.

I wish to thank the editors of the *Journal of International Law* for providing me the forum and opportunity to raise my proposal. Needless to say, I look forward to sharpening my argument and thesis in response to comments and questions.