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New Wars in Search for New Laws: International Law and the Contemporary Battlefield

Transcript from the Herzliya Conference session on international law

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When we speak about the law of war or indeed about international humanitarian law, we must remember, not only is it a feature of the post World War II community, but it is a feature of an active part played by Jewish scholars and thinkers. Actually, when the universal declaration of human rights was authored, journalists asked the French author René Cassin, what inspired him. And he said: "I just redrafted the ten commandments." A new version, up to date. And actually when you read the opening statement about all men who were born equal in dignity and rights, this is a translation of the Jewish idea that all men and women were made in God's image, and hence, the right cannot be taken away from them. And indeed, when you look at the genocide convention and the refugee convention Jewish lawyers and Israel lawyers were very active in formulating them.

What went wrong? Two things went wrong. One was that human rights and the law of war and international humanitarian law were hijacked. Hijacked by bodies that do not pay any attention to the very first requirement of a legal system: neutrality and objectivity. Secondly, the laws which were formulated in Geneva in the wake of the Nazi tragedy and holocaust didn't foresee all kinds of conflict.

So let's start with the first thing that went wrong. If you want to see how things went really bad, look at the human rights commission in Geneva. If you can. It really is a pitiful side. Not long ago this commission decided that there was no human rights issue in the case of Sri Lanka. There were fifty or sixty thousand people who became homeless. There were thousands of dead civilians and wounded people all over the place. The commission refused to deal with this. No reason was given, no objective yardstick, nothing. Instead there was another number one-hundred-and-twenty decision against Israel. Israel has become a standard textbook for this commission. But not only the commission.

If you read Amnesty International's report of the year 2009, an interesting document. First of all, all the countries appear there, including such democracies as Scandinavian countries, Denmark, Finland, the UK of course, all of their flaws. And when you compare for example the chapter on Finland and the chapter on Denmark, there is little difference between them. The style is the same, pontifical, nu nu nu...Yes it is true, Denmark doesn't have executions, but it opens up without proper authorization letters, and it doesn't give the right procedure to asylum seekers. And the standard is very high, and no country comes clean. But the second thing is that there is no hierarchy between human rights. In international human rights law everything is equal. If you listen to a telephone illegally, it is more or less the same thing as man slaughter. Read the chapter on Israel and the Palestinian territories. Needless to say, Israel is crucified on the counter of its illegal cruel brutal war Cast Lead on the Gaza Strip. But no word about the breach of international war with regard to Gilead Shalit. Gilead Shalit under any possibility suffers from a breach of international law. He wasn't allowed visits by the ICRC. And the authorities in Gaza, as the Goldstone Report refers to them, used the capture of Gilead Shalit, not in accordance with international law, as a means towards an exchange of prisoners, but as a means of extortion. Nothing about it. It is mentioned twice, without any recommendation for a sanction, without any reprimand, without any pejorative word. The same thing about the siege of Gaza. The siege of Gaza appears I think a hundred of times in the Amnesty

report. There is nothing about the border, which is open between Gaza and Egypt, with its nickname in Arabic "Masr al-Umm" (Egypt the mother). Nothing about that, and nothing about the closure of that border. So here we see the double standard being applied in a very brutal way.

But in addition to that, we have real problems of lacunae, in international humanitarian law and in the law of war. And I would like to mention some of them, and the need to follow them, maybe with further discussions, in addition to a very important statement by Professor Fletcher and Casesse. There is no provision for effective sanctions against NSA, non-state actors. Non-state actors theoretically are responsible for war crimes. But there is nothing, not even financial sanctions, not even punishing states which encourage non-state actors. And that is something without which there is no meaning to the law of war in our day of asymmetrical wars. There is nothing about terrorism and suicide bombers. Now suicide bombers are a major problem because the Geneva Convention, like all legal instruments, treats life and the provision of life as the ultimate punishment. If this punishment is self-inflicted, how can you deter these crimes? Nothing about it. A major problem which was in the Goldstone Report is the issue of human shields. Now there is a prohibition to a certain extent in the war statute, which makes it an international crime, to a degree which has not been ascertained. There is also something which is in the first protocol and in the fourth Geneva Convention. But there is nothing which is really effective. And not only that. Even, suppose we have a crime of using a human shield, suppose we hold Hizballah, or the Syrians or Hamas, or whoever, or the Afghans, or Bin Laden, criminally responsible for placing their guns within civilian population. There is nothing which relaxes the obligation to be proportionate with regard to people attacking these targets. In other words, the duty of any army to be proportionate with regard to civilian losses remains intact.

There is one proposal, which I would like to advocate, by a German professor, Michael Schmidt, published in Colombia Transnational Law Review, which says: a distinction must be made between voluntary human shields and non-voluntary human shields. Voluntary human shields, people who accept the idea that they should serve the purpose of their aggressors, of their attackers, are not protected. Involuntary human shields are protected. The people of Dresden would be protected nowadays, Hezbollah villages in Lebanon, a border case. That is a very useful proposition. I would add to it the duty to warn even the voluntary population of effective action. If you combine effective caution and limiting the right to hurt civilians with regard only to voluntary human shields, that is something which I think is absolutely necessary in order to remedy the pathologies of present day laws of war. And finally I would like to say that there is nothing about preemption. Professor Alan Dershowitz wrote a book about this. Can Israel or the US preempt a terrorist attack by bombing secret armaments? International law doesn't recognize preemption. And yet the Cold War was based, at least for thirty years, on preemption. And there is nothing about it. In other words, I think the laws of war, international humanitarian law, need rethinking and rephrasing.