

**On Criticism & Prejudice:
The Arab-Israeli Conflict and the Assault on Israel's Legitimacy**
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Introduction: Two Fronts, Shared Implications, Get out of the Arab-Israeli Conflict Vacuum

There are 2 fronts in war on terror/extremism/Islamism/radical Islam, in the war between Israel and the Arabs, in the war between totalitarian dictatorships and democracies, there are two fronts, the violent and the non-violent, and the greatest non-violent threat posed against not just Israel but all democracies is *lawfare*, the use of the law as a weapon of war to, amongst other things, (i) delegitimize the right of democracies to defend themselves against terrorism and (ii) to exert sovereign control over its territory.

And this is especially true for the United States and Israel, for which every act of delegitimization *lawfare* has shared implications.

I will never forget a conversation I had with a colleague in the U.S. military about the Goldstone Report. When the report first came out, everyone was speaking about the legal and political implications it would have for Israel. I complained to my colleague over the telephone about how international law was being deliberately manipulated and misapplied to delegitimize Israel's right to exist as a sovereign state for the Jewish people, with equal rights in the world community.

As I continued, my colleague interrupted me and said "Brooke, you've got it wrong. The Goldstone Report, isn't just about Israel, it's about setting precedents in international law that can and will be used against U.S. and coalition forces fighting in Iraq and Afghanistan," forces which are using the same methods that Israelis are using on the battle field, against the same type of terrorist that engage in asymmetric warfare, the use of human shields and suicide bombings, etc.

And the more I think about it, the more I agree with him!

Because Israel is being used *now* on the legal front, just as it has been used on the physical battlefield, as the canary in the coal miners' tunnel, as a guinea pig and as a legal testing ground, for actions aimed at frustrating and hindering the ability of a democratic state to fight and win the war against terrorism.

The greatest mistake we can make as a legal community and as human beings with an interest in upholding principles of human rights law, is to analyze *lawfare* actions like the Goldstone Report, like the ICJ fence decision, like the flotilla incident, like the BDS movement, in an Israel-centric vacuum.

And the number one impediment, the critical hurdle we face in convincing the world community not to accept *lawfare* aimed at delegitimizing Israel as binding precedent, is the mistaken belief that these standards will only be used against Israel. They won't. And frankly, they are not.

Examples of Shared Implications:

If immunity can be stripped from, and trumped up "war crimes" charges can be brought against Israeli government officials in England, Spain, Belgium, Switzerland, New Zealand, Denmark, the Netherlands, and Canada, what's stopping the same groups from using the same universal jurisdiction laws and effecting similar prosecutions against democratically elected officials from the U.S., Britain and France?

Nothing. In fact Belgium did attempt to prosecute both former president Bush and former U.K. Prime Minister Tony Blair for the war in Iraq, the prosecution only dropped the case when the U.S. threatened to pull NATO headquarters out of Belgium. A Spanish judge, likewise attempted to prosecute six former legal officials in the Bush administration for the "crime" of providing legal advice to the President. Not so long ago, the U.S. Supreme Court broke with precedent and interpreted the Foreign Sovereign Immunity Act to deny foreign officials immunity from prosecution for war crimes, potentially opening up the floodgates for politicized prosecution of allied state officials on U.S. soil. And, just a couple days ago, former Pres Bush cancelled a trip to Switzerland after groups reportedly submitted a 'war crimes' complaint to a Swiss court over waterboarding.

If an Israeli border-security fence is illegal under international law, as the International Court of Justice (ICJ) decided in 2004 (while pointedly ignoring the fact that the fence contributed to a sharp decline in the loss of human lives) what effect, will such precedent have on any fence built on the US-Mexican border?

If, according to the UN HRC, boarding a flotilla to search for weapons and other materials being smuggled to specially designated terrorist group Hamas is an "outrageous and grave attack" which requires an "an international independent fact finding mission to investigate violations of international law," what then is the US military's drone program? Would a UN commission or an international court / fact finding mission agree with the ACLU that the targeted killing of terrorists by drone may run afoul of international law?

If the International Criminal Court (ICC) succeeds in erroneously declaring jurisdiction over Israel's Cast Lead Operation in Gaza, despite the fact that Israel has not signed the Rome Treaty, what then would prevent the ICC from declaring jurisdiction over the United States which has also refused to ratify the treaty out of the very fear that the court would be used as a political tool against it?

There are shared implications for every act of delegitimization targeting Israel using legal processes.

Shouldn't Americans be concerned when we have organizations with 501(c)(3) tax-exempt status operating within the U.S., funding ships carrying construction material and which are aimed at breaking a legal maritime blockade against Hamas, all the while operating in violation of material support for terrorism statutes, yet the American government has thus far turned a blind eye to this activity?

Shouldn't Americans be concerned when people are engaging in BDS against Israeli products are doing so in violation of provisions of the Export Administration Act and state statutes that prohibit commercial discrimination based on race, religion, ethnicity and national origin?

And how about parallel efforts aimed directly at delegitimizing the US and eroding the traditional right of a state to hold enemy combatants for the duration of hostilities? Such as the Al Qaeda manuals that instruct captured militants to file false claims of torture in order to reposition themselves as victims in the eyes of the law and media,

We cannot analyze nor should we fight the delegitimization engine of lawfare in an Arab-Israeli conflict vacuum, as the title of this panel suggests. Rather, lawfare efforts against Israel must be seen as an interconnected whole played out by parties with an interest in delegitimizing not just Israel but democracies at large and the ability of democracies to defend themselves against terrorism.

If we fail to draw the parallels and point out the shared implication we risk minimizing the threat and losing potential allies to fight against it.

Negative Effects on the Mainstream:

Now to the point of this panel as I understand it, what have been the effects of the assault on Israel's legitimacy on the mainstream public?

1) Well, why pursue delegitimization through non-violent means in the first place? Because those who are unable to seriously confront let alone defeat Israel militarily, can realize their objectives through legal means. Their strategy, to undermine public support for the IDF's defense measures by making the public believe that those measures are being conducted, in an unfair, inhumane way. Because the troops a democracy, unlike those of a dictatorship, derive their legitimacy and their will to fight from the support of the electorate, which is essential to a democracy's successful military intervention, as well as the perception of such. IDF soldiers are citizen soldiers in every sense of the term. So, the number one effect on the mainstream is an attempt to undermine public support for the IDF, to paint Israel as a perpetrator of war crimes as opposed to a nation engaged in a defensive war to protect its citizens.

This type of delegitimization complements the goal of actually tying the hands of the IDF and constraining the ability of IDF soldiers to fight effectively. As I understand, partially as a response to legal attacks against Israel, the IDF now deploys lawyers within each of its divisional commands to advise officers on the front lines as to which targets they can and can not attack under international law, which isn't necessarily a bad thing but can lead to split second hesitations which may mean the difference between life and death, the difference between capturing a mass murderer or letting him go. And wasn't that the case with the Mavi Marmara where the first wave of troops boarded the vessel wholly unprepared for the attack they faced? This is what lawfare does.

2) The second effect on the mainstream has been confusion. When human rights language and terms like 'apartheid,' 'genocide,' 'terrorism,' and 'Nazism' are deliberately misapplied it is done with the goal of diluting their meaning and feeding the inability to distinguish between real instances of human rights violations, and actions done in the defense of human lives, between terrorists that target civilians and the soldiers that fight to protect them. When concepts, like the 'disproportionate use of force,' 'collective punishment' and the unlawful targeting of civilians, are routinely thrown at Israel, but are less examined, if examined at all vis-à-vis the actions of terrorist groups, and the banks and states that sponsor them, it prevents any type of genuine dialogue much less prosecution of states that actually commit these crimes.

When lies are repeated over and over again it becomes the truth. When the NY Times publishes the term illegal settlements hundreds of times, it becomes the truth. When Zionism is equated with Nazism, the goal is historical revisionism, and when Israel is labeled an Apartheid state the desired effect is for history to repeat itself, for Israel to follow in the footsteps of the South African apartheid regime due to economic, political and social isolation. Apartheid is a term that you can look up in the dictionary and which is so obviously non applicable to Israel, but for some reason too a large of majority of the mainstream public is unable to make this distinction.

The effect on the mainstream has been an absence of logic - how could a gay pride parade in Toronto justify distributing T-shirts with slogans equating Israel to Nazi Germany when Israel is *the* only country in the Middle East that affords its gay citizens with equal protection under the law? Queers for Palestine, is this group not doing gays who are tortured and murdered in Islamist countries and in Gaza a disservice by ignoring their plight and focusing resources and undue attention on Israel? This illogic feeds the BDS movement, which derives its legitimacy from the false premise that Israel is the number one greatest human rights violator on the world stage, which is obviously factually untrue, but no matter, logic does not apply here.

It's no secret that international law isn't really understood in its complexity by the mainstream public, that's why it is particularly susceptible to politicization and why its easy to create a viscous cycle where assertions regarding international law become mainstreamed and then the mainstream public demands to know why these 'laws' aren't being enforced.

The goal is to effect confusion, revisionism, to make misinformation mainstream, to create a new language and to shift attention away from the real human rights violators and onto Israel, to put Israel on the defense, to make us waste time parsing line after line of the Goldstone Report when the UN could be producing a report on the genocide occurring in Sudan or the persecution of Christian minorities in Muslim majority countries.

3) The third major of effect of delegitimization *lawfare* against Israel has been to erode respect for due process, the sanctity of human rights law and to undermine the western legal system itself all the while complementing terrorist actions. It's an attack on the rule of law itself, even though its proponents publicly claim to be looking to strengthen the rule of law.

When over 100 U.N. Resolutions are issued to condemn Israel, yet not one Resolution is even offered to criminalize the murder of innocent Muslim children as suicide bombers, we are sending the green light to terrorists that they may continue their actions with impunity.

What kind of credibility do we give a UN HRC that is being manipulated by the OIC, a 57 member-voting block that is currently lobbying to exclude the targeting of American and Israeli civilians from any international definition of the crime of terrorism? Which by the way, is the same group that has successfully lobbied the UN pass resolutions which attempt to ban the blasphemy of Islam as a crime against humanity every year for over a decade.

What kind of credibility do we give the ICJ which took the security barrier case regardless of the fact that it did not have jurisdiction over the PA which is not a state or Israel which did not consent to Jurisdiction, and which solicited testimony from the OIC, the Arab League and PLO but refused testimony from Israeli terror victims? Not to mention the fact that the ruling was an advisory opinion, a fact that is all too often ignored.

What kind of credibility do we give a U.N. that elects Saudi Arabia to a four-year seat on its Commission on the Status of Women?

What kind of impression is given when little to no legal accountability is demanded of Hezbollah and Hamas, and their agents remain relatively free to cross European borders, while at the same time Tzipi Livni and Dutch politician Geert Wilders are threatened with arrest if they travel to England? Does this not evidence bias in the application of the law if not a complete disregard for the concept of equality before the law?

In general, when international law is interpreted to prove an inadequate guarantor of the basic right to self-defense and the bodies tasked with applying the law are controlled by groups with a special interest in demonizing Israel, the mainstream perception of international law and its organs becomes one of distrust, contempt and, ultimately, indifference. This outcome is *not* in the interests of any democracy.

Positive Effects on the Mainstream:

Legal challenges to Israel's legitimacy have also had some positive effects.

It has prompted some to call for changes and updates in the substance of international law when it comes to the law of armed conflict, which has not evolved in my opinion, as quickly as asymmetric warfare tactics have. Some have been asking publicly whether a U.N. voting bloc comprised largely of non-democratic member should indeed have the power to dictate customary norms of international law. A robust debate has begun about what legal limits should be placed on those who fight the war against terrorism and what rights we should be granting the terrorists we are fighting.

Lawfare has prompted the UK to consider changing its domestic laws concerning who can file an arrest warrant for foreign officials. We are seeing calls for an international standard of due process, for accountability and transparency when it comes to NGOs who have crowned themselves the arbiters of human rights law but are receiving foreign funding with political strings attached and often from states who themselves engage in massive HR violations.

How to Distinguish Between Criticism and Prejudice:

Lastly, how do we distinguish between criticism and prejudice? How do we distinguish between that which constitutes a constructive, legitimate legal battle from that which is a counterproductive perversion of the law?

I don't think there is any clear formula for drawing a straight line - The delineation is not as simple as - lawsuits against terrorists are good, and legal actions against the U.S. and Israel are bad.

Examples of *lawfare* aimed at delegitimizing Israel must be determined on a case-by-case basis, and the question should be one of mens rea, intent. The question is not 'Who is the target?' but 'What is the intention?' behind the legal action: Is it to pursue justice, to apply the law in the interests of freedom and democracy, or is the intent to undermine the very system of laws being manipulated? What are the intentions of the party behind the action? Are they exhibiting bias in the application of the law? Is there an ulterior motive?

And finally, does the action fall within a greater lawfare strategy to attack not just Israel but to challenge the legitimate rights of a democracy to defend itself and exert control over its territory.