Editorial

Gaza – From Warfare to Lawfare

For many years I taught a Seminar on the legal aspects of the Arab–Israeli conflict at Harvard Law School. It was unlike any other of my courses or seminars. The participants, students and researchers, were more passionate and engaged than normal. As expected, there was always a group of passionate pro-Israelis (mostly but not exclusively Jewish). There was always a group of passionate pro-Arabs, or, at times it felt, anti-Israelis (mostly but, of course, not exclusively Jewish). Sure, they came to learn, but mostly they came to learn how to sharpen the arguments for 'their' side in the conflict. 'Lawfare' – the continuation of warfare through other means – well describes the *gestalt*. There were, of course, also a few who came to learn, understand, disentangle myth from reality, sort out the facts and, normatively, seek a modicum of truth and justice in a conflict which often seems to pit right against right, and wrong against wrong. But not once did this latter group constitute a critical mass.

Law is so Janus-like: there is the advocacy face, especially in the Anglo-American tradition (in the development of which the importance of lay juries surely played a role), which passionately advocates for one side or another under the problematic theory that adversarial arguments will lead to truth. But there is also the dispassionate face of law which privileges the disinterested, so far as possible objective and clinical examination of fact and legal argument (and please, spare your breath, I, and most readers of this Journal, are all aware of indeterminacy, the conceptual and empirical problems with the notion of objectivity, etc.) There was a tug of war between these two approaches, but the first habitually crowded out the second.

The Seminar took a traditional, doctrinal orientation – perhaps a didactic error. The various legal issues, starting with the Conflict's modern genesis in World War I onwards, were identified. Balfour Declaration, Mandate, UN Partition Resolution, the status of the Jewish People (and later the status of the Palestinians) the Birth of Israel, infiltration, reprisals, Sinai 1956, 1967 – anticipatory self-defence, blockade, et cetera, et cetera. *Ad nauseam* and *ad tedium* one would be tempted to say if it were not for the rancid odour of blood which constituted the reality behind the legal issues. Who was (legally) right? Who was (legally) wrong was 'mooted' from week to week as if in a court of law. Sure, we did contextualize, examine the social and anthropological; we tried to understand the evolution and biases of international legal processes through the prism of the Conflict. But it was the doctrinal stuff, the 'right and wrong', 'lawful and unlawful' which held the students in thrall. Black and white were the favourite colours, grey had few takers. And it was, I always felt, the desire to blacken the other that was most important. 'They' are awful, 'their' actions terrible – and, of course, illegal; not simply illegal but criminal; not simple crimes, but war crimes; even worse, Genocidal!

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Perforce the seminar had a historiographical dimension as the structure and content of the 'lawfare' changed over the decades – at times in most amusing ways: for example, an earlier generation of Arab legal literature passionately contended that the UN GA Partition Resolution (seen erroneously as 'creating' the State of Israel) was of no legal effect whatsoever for all the known reasons one denies legal effect to General Assembly resolutions and a few more. Creative counter-arguments were not in short supply (the League created the Mandate, the UN was the successor of the League, etc.). And then, lo and behold, the pro-Arab legal literature resurrected GA resolutions (favouring what was seen as the right of return of the refugees and more comfortable boundaries) and the pro-Israeli literature dismissed it as, well, General Assembly resolutions to which no legal effect attaches. Other examples abound. There are, apparently, no Hague rules for the conduct of 'lawfare'.

It was easy to identify the sympathies of the participants already in the first session. It was my mischievous (and naïve) practice to assign to the pro-Israelis the task of defending Arab and Palestinian positions, and vice versa. The students rose to the challenge: the positions of opponents were articulated skilfully and persuasively but few, if any, came to doubt their original convictions about right and wrong. I have always regarded my principal vocation to be that of a teacher and educator. From that perspective the Seminar was a demoralizing failure which I finally abandoned.

Reading in recent month the avalanche of comments on the legal aspects of Gaza has brought back that demoralizing feeling. I cannot dismiss it as blogosphere ranting – seeing some of the noted and less noted jurists who have partaken in the slugfest. Make no mistake, I am all in favour of speaking up, even in loud voices, for justice as one understands and sees it. But when the guns fall silent and one turns to forensic analysis – well, surf the press and the blogosphere and what you will find is mostly 'Lawfare' (mostly – our own EJIL: Talk! in my view has been somewhat more sober, careful and judicious than many others). In most cases one look at the author is enough to predict with unerring accuracy what 'legal' conclusions to expect.

The following will give the flavour: first the opening paragraph from a widely quoted piece which put 'Israel on Trial':

> Chilling testimony by Israeli soldiers substantiates charges that Israel's Gaza Strip assault entailed grave violations of international law. The emergence of a predominantly right-wing, nationalist government in Israel suggests that there may be more violations to come. Hamas's indiscriminate rocket attacks on Israeli civilians also constituted war crimes, but do not excuse Israel's transgressions. While Israel disputes some of the soldiers' accounts, the evidence suggests that Israel committed the following six offenses….

And now this equally widely quoted statement attributed to a British senior officer:

> I don't think there has ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza.

How, at this stage of the game, with the dust of war hardly settled, and in the present state of knowledge, could either of these writers make and seriously substantiate their respective categorical assertions?

A great deal turns on facts which are hotly disputed. For example, in the grim calculus of proportionality and 'collateral damage' numbers do matter. One cannot be squeamish in this area of law. But there are huge discrepancies in the gruesome tallies. Likewise, whether or not civilian targets such as schools or mosques were in fact used by combatants or contained headquarters, or whether soldiers used captured civilians as shields as has been claimed, are hotly disputed facts for which credible verification would be indispensable for certain legal determinations.

If one surveys the Press 'trials' which have already taken place, one cannot but be struck by the contrast between the categorical nature of the claims made by the legal combatants (some of them distinguished scholars who should know better) and the genuinely disputed and unclear factual matrix which would have to form the basis for any such claims.

Gaza also throws up complex and highly contested legal issues. But to read the 'lawfare' you would never guess that there was any legal uncertainty as to, say, the legal status of Gaza (still Occupied?) or the applicable 'reasonableness' tests, or to the various ways that necessity and proportionality have been bandied around, or the difficult issue whether and/or to what degree one has to sacrifice one's own soldiers in order to minimize civilian casualties of the enemy, to list but a few.

And then there are some serious conceptual conundrums. Can it be the case, as one scholar has apparently argued, that given the demographics and the entanglement of combatants and civilians in Gaza as a matter of the humanitarian law of armed conflict *any* use of force would be *inherently* unlawful? And if so, how does this reshape the relationship between *jus in bello* and *jus ad bellum*? How does one frame the conflict from a temporal perspective – as a matter of law? As a matter of Justice? And this, too, is just the tip of the iceberg.

Gaza is important. The loss of life, not least of children, was simply awful. The endless rain of rockets preceding the invasion was intolerable. Disentangling the legal issues, establishing whether legal violations, even war crimes were committed, is not a futile exercise. To say, as I have, that often in the never-ending Arab–Israeli conflict it is right v. right rather than right v. wrong does not mean that in this specific instance very serious transgressions and crimes by either side or both sides may not have been committed. There is a role for law and, obviously, for lawyers. But 'lawfare', where conjecture is presented as established fact, where legal submission is presented as legal conclusion, where the arrow is stuck and the target is then drawn around it, brings honour to no one. Deuteronomy 16:20 inveighs: 'Justice, Justice shalt thou pursue.' Why, one has wondered for centuries and millennia, is the word Justice repeated? One appealing answer is that one must pursue it whether it serves your interest or operates against it. The opposite of 'lawfare'. To be cautious and prudent in making legal claims is not to betray one's commitment to truth and justice; it is to affirm such a commitment.

Again, make no mistake. The messy factual matrix should not mean that we throw up our hands in despair. There can and should be, and there are indications that, indeed, there will be a credible and impartial fact-finding inquiry. (As more and more areas of international law are 'judicialized' – the nature of international fact-finding

needs to adapt. The World Court itself has been hampered in recent cases such as *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* by problematic fact-finding.) Once credible facts are established the time for judging will be ripe. But already now one can begin the serious engagement with the underlying legal issues. *EJIL* would welcome submissions that could make a profound and lasting contribution to that important engagement.

In This Second Anniversary Issue

We open our second Anniversary issue with the Keynote speech given by Bruno Simma at the most recent ESIL biennial meeting in Heidelberg. 'Universality of International Law from the Perspective of a Practitioner' makes for rewarding reading, and its breadth and depth made it an easy choice as our second Anniversary article.

The Anniversary Symposium for this issue deals with various aspects of the Use of Force. Dino Kritsiotis of the University of Nottingham and Ken Anderson from American University in Washington DC may have taken on classical topics – but fasten your seat belts and prepare yourself to be challenged. Christian Tams from Glasgow and Tullio Treves of Milan (who serves, too, as Judge of the International Tribunal for the Law of the Sea) deal with the less classical: the use of force in fighting terrorists and pirates respectively. Keep those seatbelts fastened. We were not interested in the 'Law as it Stands' style pieces. These are all pieces with a view, with a thesis. We expect some disagreement.

We are planning in Issue 4 of the 20th Anniversary volume to collect reactions to the various anniversary symposia. If you are interested in contributing a reaction paper of no more than 3,000 words, please email an abstract to our Editorial office.

In this issue we continue our occasional series presenting a critical review of jurisprudence of different international courts and tribunals with, fittingly, an interesting article by Janine Clark on Plea Bargaining at the ICTY; and EJIL: Debate! returns with an exchange between Roda Mushkat and Ryan Goodman and Derek Jinks on the issue of internalization of compliance with human rights law.

Housekeeping

EJIL has been steady over the years in containing the disease of Citisis (excessive footnoting) prevalent in North American legal publishing from crossing the Atlantic. Propositions should be substantiated, authorities and secondary literature cited, but an article is meant to be by and large a solo performance, not a duet between the text and interminable footnotes. There is another North American disease which we want to nip in the bud – excessive (and phony) 'Thanks' as part of the first footnote. Very often this is not about thanking at all but about establishing some kind of 'approval pedigree' and/or a grotesque form of name-dropping. I recall sitting in a workshop and asking the speaker to clarify something that I had not heard well because of some outside noise, and then hearing my name being included in

the embarrassing litany. *EJIL*'s policy is thus thank you, but no thank you. Sure, occasionally one is obligated to thank a grant-giving authority; a really important contribution by a research assistant; a colleague that went above and beyond the normal expectation of academic collegiality. *EJIL* Contributors: if you really have to, you have to, but please keep them short and pointed. And if your conscience worries you, send a signed reprint to all the others – another North American disease (batch reprint dispatch) but we will turn a blind eye to that if the reprint is of an *EJIL* piece.

JHHW

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