

World Upside Down

Elan Journo

PETER BERKOWITZ, *Israel and the Struggle over the International Laws of War* (Stanford, CA: Hoover Institution Press, 2012), 112 pp. \$19.95.

Israel is at the crux of a “new struggle over the international laws of war.” So argues Peter Berkowitz, a legal scholar at the Hoover Institution, in his new and important book on the subject.

Exhibit A in Berkowitz’s case is the United Nations’ putative fact-finding mission on the 2008–9 Gaza war—an investigation which culminated in the notorious Goldstone Report. Exhibit B: the furor over the 2010 Gaza flotilla. According to Berkowitz, these incidents of maltreatment of Israel and efforts to criminalize the exercise of its right of self-defense “threaten to effect legal transformations that will impair the ability of all liberal democracies to defend themselves.”

By exposing what he regards as abuses of the international laws of war, Berkowitz intends to contribute to their defense. The book’s evidence, though, renders that hope forlorn.

With lawyerly precision, Berkowitz dissects the Goldstone Report, highlighting the extent to which it is riddled with inaccuracies, half-truths, and Hamas propaganda uncritically reported at face value. For example, the report found that Israel illegitimately destroyed a family home in Gaza. But in reality, Hamas had used that home as a storage facility for weapons and ammunition, including

Grad missiles, rendering it a legitimate military target. Moreover, in the eyes of the Goldstone team, Hamas is not a terrorist organization, but merely one of several “Palestinian armed groups.” The report downplays the 8,000+ rockets and mortars launched from Gaza, as if they were causally unrelated to Israel’s decision to retaliate. Berkowitz deftly argues that the report’s application of relevant norms of war is legally unsound, and that its recommendation that the UN Security Council refer the matter to the International Criminal Court is baseless.

Procedurally, Berkowitz contends, the UN infringed on Israel’s right to apply the norms of war when it prematurely authorized an investigation, before the fighting ended and before Israel could reasonably carry out its own preliminary assessments. Stoking suspicions that the investigation’s verdict was a foregone conclusion, the UN General Assembly endorsed the Goldstone Report 114–18 (with 44 abstentions)—despite the report’s embarrassingly numerous (yet thematically on-message) factual and legal defects. Curiously, nearly a year-and-a-half later, Justice Richard Goldstone, who headed the investigation, retracted some of the most egregious claims; tellingly, however, the other UN team members unapologetically rejected the need to revise, let alone retract, the report.

What Berkowitz illustrates is a pattern wherein the international laws of war operate like a fulcrum for shifting blame from terrorists to the states fighting them.



ELAN JOURNO is a fellow and the director of policy research at the Ayn Rand Institute. His book on post-9/11 U.S. foreign policy, *Winning the Unwinnable War: America’s Self-Crippled War Against Islamic Totalitarianism*, was published in 2009.

This pattern was manifest in the outcry over the Gaza flotilla. That convoy, posturing as a humanitarian mission yet closely tied to an Islamist group, sought to pierce Israel's naval blockade of Gaza. After Israeli commandos boarded one recalcitrant vessel, the *Mavi Marmara*, a number of flotilla activists attacked them with axes, pipes, and knives. Nine activists were killed in the process, and several dozen more were injured. The chorus of condemnation was instant, shrill, and one-sided. The call for a UN investigation, Berkowitz observes, was intended not "to determine wrongdoing but rather to place an official stamp on Israel's guilt." The UN Human Rights Council—which has been notably mute over the years on incontestable violations of rights globally—bestirred itself to issue a resolution singling out Israel as the aggressor.

Critics warped the international laws of war to argue that Israel was forbidden to engage in the blockade, because it remained an occupying power in Gaza—even though Israel withdrew from Gaza completely in 2005, and Hamas violently took over the territory some two years later. Berkowitz convincingly demonstrates that Israel cannot legally be regarded an occupier, and, piece by piece dismantles the sophistry employed to deny the blockade's legitimacy.

Dismayed at how the international laws of war are deployed to undercut free nations, Berkowitz notes a paradox: no armies in the history of warfare have devoted greater attention than Israel and the United States to complying with laws of war, yet no armies today "come under greater worldwide attack for violating" those laws.

That moral inversion, Berkowitz suggests, could be rectified by clarifying and upholding the international laws of war. But on this point, the case is unconvincing. The laws of war are themselves

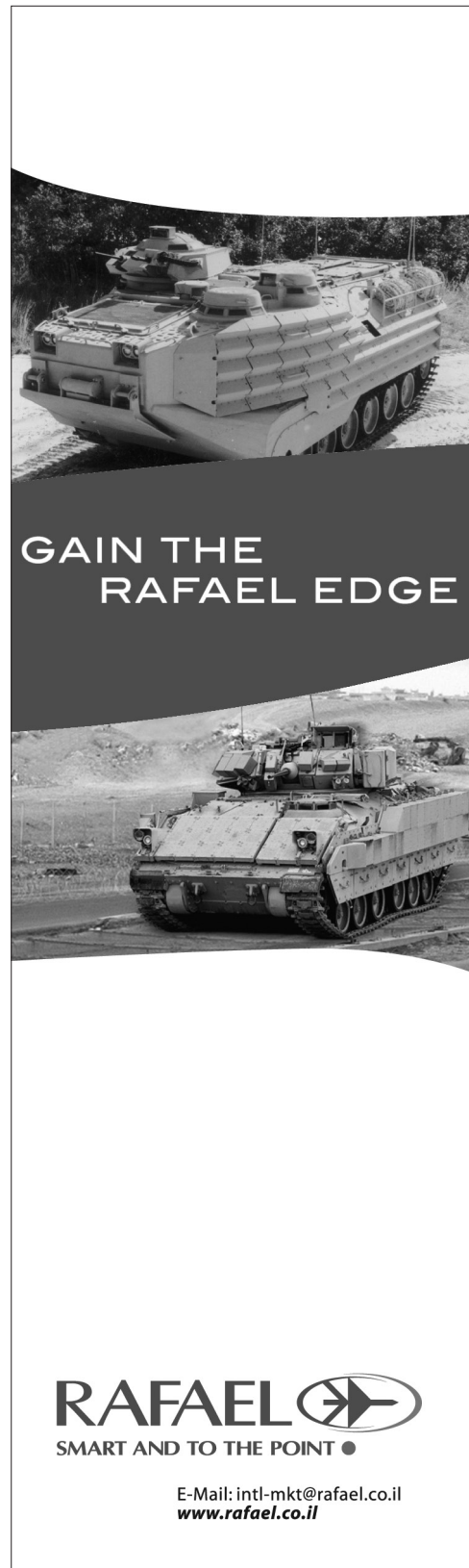
deeply problematic. Take the idea, of which Berkowitz approves, that military retaliation must be "proportional" to the attack. Arguably, that precept stands at odds with a free nation's moral right to defend its citizens' lives. In the name of proportionality, should the U.S. retaliation for Pearl Harbor have been limited to bombing the same number of Japanese warships, and nothing more? Should Israel's retaliation against Hamas be confined to firing the same primitive, imprecise mortars at Gaza, and nothing more? Berkowitz calls for a "balance" between military necessity and the need to avoid civilian casualties. But surely the fundamental moral imperative must be the military objective, with the culpability for the unwelcome but sometimes inevitable collateral damage falling to the aggressor.

Compounding the problem is that the UN and related bodies enforce these so-called laws of war. It is not the Russias or Chinas or Irans of the world, but the United States, Israel, and a small number of other free nations that strive to comply with these laws, thereby lending them moral credibility. But the UN is dominated by authoritarian and terrorist-sponsoring regimes, making subversion of those laws all but assured.


Berkowitz assumes that the international laws of war are indispensable. The book's two case studies, however, should lead the reader to question that assumption. It is true that soldiers (indeed, all citizens) of a free nation need to have a sense of justice in their military cause. Yet moral guidance in war is the task not of some international organization but of a sovereign nation's foreign policy and moral principles; these should define the objective and appropriate means in a military conflict—just as they should inform decisions on alliances, treaties, and international organizations. What Berkowitz advocates—championing the international laws of war but reserv-

ing prime responsibility of enforcement to nation-states—leaves the moral high ground open for the usual suspects to seize it anew.

With this book, though, Berkowitz has masterfully exposed how the international laws of war have become a favorite bludgeon wielded against Israel. By bringing greater attention to the nature and provisions of those laws, the book serves as an urgent reminder of the need to scrutinize this doctrine and the international institutions that have become its champions.



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