

The Goal of Victory and the Pursuit of Justice in the “Swords of Iron” War*

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This year, 2024, marks 100 years since the death of Franz Kafka. In Kafka's renowned work, “The Trial,” there is a passage which describes an encounter between the book's protagonist, Josef K., and the portrait artist for the judges. Josef notices that the painter depicts the Goddess of Justice with the traditional scales in her hand, but portrays her in an unusual manner – with wings and in motion. The painter explains that it is a depiction that combines two symbols – Justice and Victory. Josef replies: “Justice and Victory – it is not a good combination ... Justice must be steady and stationary, lest the scales sway and render a just verdict impossible.”

Israel is currently in the midst of a war, among the harshest we have known. It began with a vile terrorist attack that shook us to our core. The effects of this war on us as a society and as a state, and in all aspects of life, both national and personal, are yet to fully reveal themselves. The captivating session ahead will specifically focus on the legal aspects of this war.

At the outset of this session, I wish to emphasize that in my view, the pursuit of justice can, and in fact must occur even when the situation is not “steady and immovable,” as Kafka put it. In my eyes, the Goddesses of Justice and Victory can indeed coexist harmoniously. The ability to balance the imperative to achieve victory in war and defeat our enemies, while also ensuring adherence to the law and acting in accordance with its light, is the essence of the work of the MAG (Military Advocate General's) Corps and the entire public legal system.

Not only do the values of the pursuit of victory and respect for the rule of law not conflict with each other, they complement one another. This is not merely a phrase or a cliché; it is the reality in which we operate, a reality that guides the MAG and the military in general, even in the midst of battle, as we look towards the future warfronts, chief among them at this moment the Gaza Strip.

The law of armed conflict, as set out in international law, was conceived and codified primarily by states. These states sought to legally regulate their relations across various domains, including the battlefield. The motivation of many states, especially after World War II, was to protect civilian populations and mitigate the impact of war on them – but at the same time, they did not seek to forfeit their ability to defend themselves. The laws of war were certainly not intended to weaken states or prevent them from achieving their objectives on the battlefield.

Still, the modern battlefield is vastly different from what existed in the distant past. Armies no longer confront each other in open terrain until one surrenders. Warfare has become more complex – in the realm of diversified combat methods and within the urban sphere.

Nonetheless, the laws of war contain within them the necessary mechanisms to provide the right response, even in highly complex combat environments – such as, for example, the Gaza Strip.

This audience is surely familiar with the characteristics of the densely populated urban space within the Gaza Strip, and the despicable tactics employed by Hamas and other terrorist organizations in the area to exploit the environment. These terror organizations continue to enmesh themselves within the civilian population. This constitutes a grave and serious violation of the laws of war. This intentional violation exploits the IDF's clear and public commitment to the law and is done to make it difficult for the IDF to achieve its objectives on the battlefield.

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Even when facing a cruel enemy that does not respect the law, we are still committed to respecting the rule of law as we pursue our military objectives. Even in this setting these principles can coexist. The laws of armed conflict allow for just this. I will provide a few examples.

I first address how a military target is defined. Naturally, anything belonging to the opposing military is considered to be military. In our context, the terror armies established by terrorist organizations resemble what is more and more recognizable to us as armies. Accordingly, any part of the organized armed group we are fighting against constitutes a legitimate military target. When this terror army embeds itself deeply within the civilian population, structures and infrastructure that would otherwise be civilian by nature but that in effect are used for military purposes or are designated by the enemy for military use, become legitimate military targets under international law. Thus, Hamas systematically and intentionally turns many structures situated in the heart of the civilian population into military targets.

Over the two decades during which Hamas has controlled Gaza, they have built a military force comprised of tens of thousands of fighters, and capabilities which include tens of thousands of rockets, explosives, intelligence capabilities, observation and firing posts, command and control centers. All of this has been done mostly without building classic military bases. There are tens of thousands of military structures located in civilian buildings. And above all, or rather, beneath it, Hamas has established a sprawling tunnel system.

The tunnel system that is intended solely for military purposes has been built under densely populated urban areas – with thousands of tunnel entrances hidden in civilian homes, hospitals, UN facilities, schools, and mosques. The tunnels themselves, hundreds of kilometers long, pass between buildings, allowing Hamas terrorists to hide, coordinate fighting, and ambush IDF soldiers.

The laws of war not only prohibit Hamas's actions but also enable us – the side which seeks to uphold international law – to operate within the legal framework and strike those military targets, despite Hamas's choice to hide them within the urban maze of the Gaza Strip.

When establishing a military target, one must consider the incidental damage that may be caused to the civilian population. I do not take lightly the harm caused to civilians. However, the very fact that incidental damage is considered and regulated by the laws of war, as well as the statement that “collateral damage” must be proportional to the military gain, demonstrates that some degree of harm to the civilian population, while

regrettable, can be a possible and lawful result of engaging in combat.

Another important example is the obligation to take precautions before an attack. The recognized legal duty under customary international law is to take all feasible measures to minimize expected harm to civilians or civilian property.

This principle is naturally influenced by context. An example of this is the difference between the operations Israel has conducted in recent decades and the current war. In a short and limited conflict, like previous engagements in the Gaza Strip where the scale of the conflict and the level of threat allowed for significant resource allocation to damage mitigation efforts, the precautionary measures required, which are based on the resources at an army's disposal, are more substantial.

In contrast, in the current war, when Israel is under real and immediate threat from seven fronts, and human, technological, and logistical resources are stretched thin because they are simultaneously required to address numerous challenges (the level of feasible precautionary measures), the required level of precautionary measures under the law is different.

A good illustration of this is the extensive use that the IDF made in the past of the practice known as “roof knocking” to issue a warning before attacks. In the current war, the use of this method is relatively less frequent, as it is not feasible to use this method and these munitions for every single attack.

This does not in any way mean that the IDF is exempt from taking precautions. In fact, the IDF invests significant resources in carrying out necessary actions to mitigate harm to civilians and invests heavily in deploying appropriate precautionary measures for the characteristics of the current war.

As an example, in consideration of the scale of the fighting, and the massive number of military targets located in the urban area – and beneath it – the IDF invests heavily in evacuating civilians from combat zones for their protection. As part of this effort, over fifteen million recorded phone calls and about one-hundred thousand personal phone calls have been made to warn civilians before attacks; more than fifteen million text messages have been sent; and over ten million leaflets have been dropped over the Gaza Strip, all containing clear instructions aimed at warning and allowing the population to evacuate from combat zones. All of these serve as examples of how we uphold our obligation to take precautionary measures.

These are just two examples of how the laws of war

are influenced by context and circumstance. These laws allow the IDF to conduct its war against terrorist organizations that deliberately embed themselves within civilian populations, while also performing its mission in accordance with the law.

Indeed, the laws of war are intended to reduce the suffering caused to the civilian population by the fighting, but they were not created to prevent the side that seeks to adhere to them from achieving its objectives.

In my view, the path to victory necessarily involves adherence to the laws of war. Adhering to these laws allows us to uphold our values as a law-abiding army of a democratic state.

Operation “Iron Swords,” a war forced upon us, is a war against Hamas and other terrorist organizations, and against them alone. It is not a war against the civilian population. In this context, international law supports the achievement of the war’s objectives; it does not contradict them.

Adherence to the laws of war also allows us to maintain legitimacy with respect to our actions, as well as the continued support of our allies. Adherence to the laws of war is the metric used to assess our combat activities. Our commitment to the laws of war impacts the military’s ability to procure supplies, the degree to which we have diplomatic support for our operations, and indeed, it is a prerequisite for our ability to continue fighting.

Consider, for example, the proceedings at the International Court of Justice, where South Africa callously uses treaties and tribunals in a disingenuous manner to accuse Israel of “genocide.” The proceedings are still ongoing, but it is important to emphasize that the decisions made so far are interim decisions, primarily focusing on the necessity of allowing humanitarian aid to the civilian population – a necessity that we, as a nation, do not dispute. Although the discussion is far from over, and our ability to influence it is far from finished, our critics are already using the mere existence of the proceedings and the issuance of orders as if they indicate a determination that Israel is committing “genocide,” which is entirely untrue.

Precisely for this reason, it is important to note the words of the outgoing president of the Court, Judge Joan Donoghue, who presided over the case in its early stages. She recently found it necessary to clarify in an interview with the BBC that the Court made no findings on this matter (whether it is plausible that Israel has committed genocide).

Despite the many complexities arising from recent international legal proceedings, my opinion on this matter

is unequivocal – the most effective way to deal with these proceedings, both with the institutions themselves and especially in mobilizing influential countries and other actors on the international stage, is to double down on our commitment to the laws of war and make sure that we act in accordance with them. Without this fundamental commitment, both in principle and in practice, we will not have the necessary tools to contend with these various arenas.

A session that is included in this conference addresses the legal future of the state in the international arena. It is very difficult to know what the future will look like. I can say with confidence, however, that we in the Military Advocate General’s Corps have always worked, and will continue to work, not only to warn about developments in the international legal arena, but more fundamentally, to do our part to address them in the best way possible. We are constantly working – as we always have long before the war started – to continuously instill within the IDF the commitment to international law and all of its relevant rules.

We will continue to be integrated at various levels of the IDF force-using apparatus; advising commanders and working with them to ensure that the war’s objectives are achieved in accordance with the law. At the same time, we will continue to retrospectively examine any behavior that raises suspicions of legal violations, including the laws of war, and investigate and prosecute those responsible for such violations. This is our duty as the Military Advocate General’s Corps – a unit that operates within the IDF as a partner and also as a gatekeeper. We must fulfill our role to ensure that the IDF wins its war on all fronts, and does so while upholding the law and maintaining justice, so that the Goddess of Justice and the Goddess of Victory can coexist, as seen in the story with which I began.

I would like to conclude my remarks with words written by the late Professor Amnon Rubinstein, of blessed memory, to whom this conference is dedicated. Professor Rubinstein excelled in various fields. He devoted his academic work mainly to administrative and constitutional law. In one of his articles, he highlighted a fundamental principle that applies to the laws of war as it does to constitutional law.

He wrote: “There are those who tend to forget that even a democratic state has the right, and in fact the duty, to defend itself and its citizens from all threats – external, security-based, and other threats.”

Professor Rubinstein never forgot this fundamental truth. He believed, throughout his public and academic

career, in our right to defend ourselves, and in the ability of the law, all law, to enable us to exercise this right. We, too, are obligated not to forget this. ■

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Between 2007 and 2015, Major General Tomer Yerushalmi served as a Military Judge and Deputy President of the District Court responsible for the Home Front Command and the General Staff districts.

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