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A Veritable Battlefield: The Palestinians' Legal Warfare Strategy

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In addition to the classical theaters of war, i.e., the military arena (conventional and non-conventional) and the direct political arena, new and equally important combat theaters are developing – cyberspace, economics, and media. The purpose of all the various warfare arenas is to achieve political goals, and the warfare conducted in the respective individual spaces and in all the spaces together can do enormous damage to Israel. While in general the international legal arena has been less prominent, the Palestinians and their supporters have been using it intensively and effectively against Israel through actual action or the threat of such action. This involves resolutions by the UN General Assembly and various committees; UN special rapporteurs “for the occupied Palestinian territories”; establishment of commissions of inquiry to investigate Israel’s military actions; civil suits and criminal actions in national law courts around the world under the authority of universal jurisdiction; and an appeal to international judicial institutions, such as the International Court of Justice (ICJ) and the International Criminal Court (ICC).

The blitz of legal and political events in the past two week highlights the flooding of international politics with legal maneuvers and institutional tactics, which serves the delegitimization campaign against Israel well and detracts from Israel’s international status. Too often these measures have caught Israel unprepared, pulled in by force, and responding without adequate answers.

On December 17, 2014, a declaration was issued by the High Contracting Parties to the Fourth Geneva Convention, a week after Switzerland (in its capacity as Depositary of the Geneva Conventions and acting as a facilitator) decided to convene the countries, despite efforts by the Israel and the US to prevent it. This was the third time since 1949 that the members were convened. The two previous conferences were in 1999 and 2001; the focus of all three conferences was Israel and the occupied Palestinian territories. The conference took place after prolonged consultations by Switzerland with the countries party to the convention, in accordance with UN General Assembly Resolution 64/10, dated November 5, 2009. This resolution, passed following Operation Cast Lead, recommended, inter alia, convening the countries party to the convention in order to

adopt measures to enforce the fourth Geneva Convention in the Palestinian territories. The special rapporteurs for the occupied Palestinian territories and the commissions of inquiry appointed against Israel have also called over the years for convening the conference, and more forcefully on that occasion, but vigorous diplomatic counter efforts in the UN by Israel and its allies then and one year later prevented the convening of a conference. This time, Switzerland announced that "the consultations during the last four months had revealed a cross-regional critical mass of High Contracting Parties requesting the reconvening of a Conference, as had been the case in 1999 and 2001. A small number of High Contracting Parties expressed their opposition and did not attend the Conference." Beyond the official declaration published at the end of the conference criticizing Israel, the very convening of the conference illustrates the extent to which Israel has lost important support and backing of many European countries, and signals continuation of the deterioration in its international standing.

Elsewhere in the international legal arena, also on December 17, 2014, the European Court of Justice decided to remove Hamas from its list of terrorist organizations. The European Union announcement said that this was a legal ruling that was clearly based on procedural grounds and did not imply any assessment by the Court of the substantive reasons for the designation of Hamas as a terrorist organization: "It is a legal ruling of a court, not a political decision taken by the EU governments." This measure, however, illustrates another use of legal tools, this time by Hamas, which petitioned the European Court of Justice against the EU decision to list it as a terrorist organization.

A third event was the submission of a Palestinian proposal to the UN Security Council, despite Israel's last minute rushed diplomatic efforts to prevent the move. The proposed resolution, submitted by Jordan, calls for recognition of a Palestinian state in the 1967 borders and for an end to the occupation within two years. Following some revisions, the final draft was submitted to the Security Council on December 30, 2014, but fell one vote short of a majority and obviated the need for a US veto. Nonetheless, the very submission of the resolution and its promotional campaign is damaging to Israel, which is forced on the defensive against intensifying efforts at delegitimization by the Palestinians. In addition, the bid to the Security Council came against a background of a growing tide of European Parliament resolutions recognizing a Palestinian state. European countries friendly to Israel, such as Spain, Ireland, Sweden, the UK, and France, as well as the European Parliament, are part of this tide.

If Palestine is recognized by the Security Council as a state, this will have significant internal and international consequences: for the status of the agreements signed by Israel and the PLO, and for Israel's legal status in the territories, including the settlements in the West Bank. The status of a Palestinian state will also have far reaching consequences in the areas of citizenship, establishment of an army, membership in international

organizations and international conventions, and restriction of Israeli authority in the territories – including airspace, electromagnetic spectrum, and coastal waters. The Palestinians will thereby achieve quite a few gains that they never requested from Israel, and certainly never achieved at the negotiating table.

Underlying all these developments is the ongoing threat of legal proceedings against Israel, senior IDF officers, and senior government officials for the purpose of putting them on trial in international or national courts. It appears that the Palestinians are waiting for an opportune moment to enlist the ICC against Israel (whether by acceding to the Rome Convention or by submitting an ad hoc declaration of acceptance of jurisdiction, as was the case in 2009). It is likely that the grounds for a Palestinian request for such intervention by the Court will focus on the Jewish settlements and Israel's military operations "on Palestinian territory" starting in 2012 (when Palestine was recognized as a non-member observer state by the UN General Assembly), particularly with respect to Operations Pillar of Defense and Protective Edge. Not long ago the UN Human Rights Council established the Schabas Commission, a commission of inquiry on the Gaza war, which is scheduled to publish its findings in the coming months.

The weight of international law has greatly increased in recent years, part of the networking and globalization processes and the resulting increase in intervention by the international community within nations' sovereign territory. Israel, which has consistently obeyed international law, is being subjected to an unprecedented attack, based on a well-orchestrated campaign.

As evidenced by the recent military operations in the Gaza Strip, including Operation "Protective Edge", in conventional warfare conducted in densely populated urban areas, every victim, whether Israeli or Palestinian, is "useful" to the Palestinians, who are able to leverage this "achievement" for their benefit on the political and media fronts. The encroaching legal front that has emerged is thus no less than a battleground. For the Palestinians, it is based on strategy and a theory of warfare that includes tactical and strategic moves during the course of the fighting itself, and with greater force after it, combined with manipulations, intertwined disciplines, and various components, such as active diplomacy, mass media, intelligence, incitement, boycotts, and sanctions. Against this challenging front, Israel appears patently unprepared and incompetent.

The organized legal warfare conducted against Israel demands careful attention and proactive and creative preparation. In tandem, the Israeli government should launch a political initiative to end the conflict so that it does not appear that its main mission is to combat the attacks on it and repel what will inevitably be increasing attempts to force a settlement on it. A sophisticated policy should be formulated and implemented gradually that includes: multilateral regional dialogue, bilateral negotiations with the Palestinians, and independent measures to delineate the country's borders around a democratic and

secure national home for the Jewish people. The elements of this approach should be reflected in concomitant efforts that complement each other or present viable alternatives. Progress through each of these tracks should involve interim steps and transition periods that will achieve progress towards a partial agreement and a reality of two nation states, even in the absence of a long term agreement.

