

THE US IS DEFENDING NOT JUST ITS CLOSEST ALLY IN ISRAELI RAID, BUT ALSO APPROACH TO WAR

I think there's more to America's defense of Israel's attack on the Free Gaza flotilla than simply more blind support for Israel. By defending Israel's attack, members of the US elite are also defending a problematic legal stance—one that the US has adopted in its own counterterrorist efforts.

Let's start with this premise: the only way Israel's attack on the flotilla was legal under international law was if it can argue that it is at war with Gaza—which also means that the only way the attack was legal was if Israel treats Gaza as a state. A number of people have made this observation, but for our purposes Craig Murray's explanation will suffice.

Every comments thread on every internet site on the world which has discussed the Israeli naval murders, has been inundated by organised Zionist commenters stating that the Israeli action was legal under the *San Remo Manual of International Law Applicable to Armed Conflicts at Sea*.

They ignore those parts of San Remo that specifically state that it is illegal to enforce a general blockade on an entire population. But even apart from that, San Remo simply does not apply.

The manual relates specifically to legal practice in time of war. With whom is Israel at war?

There is no war.

Israeli apologists have gone on to say

they are in a state of armed conflict with Gaza.

Really? In that case, why do we continually hear Israeli complaints about rockets fired from Gaza into Israel? If it is the formal Israeli position that it is in a state of armed conflict with Gaza, then Gaza has every right to attack Israel with rockets.

But in fact, plainly to the whole world, the nature and frequency of Israeli complaints about rocket attacks gives evidence that Israel does not in fact believe that a situation of armed conflict exists.

Secondly, if Israel wishes to claim it is in a state of armed conflict with Gaza, then it must treat all of its Gazan prisoners as prisoners of war entitled to the protections of the Geneva Convention. If you are in a formal state of armed conflict, you cannot categorise your opponents as terrorists.

But again, it is plain for the world to see from its treatment and description of Gazan prisoners that it does not consider itself to be in a formal position of armed conflict.

Israel is seeking to pick and choose which bits of law applicable to armed conflict it applies, by accepting or not accepting it is in armed conflict depending on the expediency of the moment.

This is the same principle that says we can't simultaneously argue CIA can target Predator drones at people in countries we're not at war with, while at the same time insisting that when Omar Khadr allegedly threw a grenade during hostilities it was illegal.

Yet as last week's UN report on targeted killings makes clear, both Israel and the US (and some other countries) have tried to make similar claims as they expand the application of targeted killings, including the use of Predator drones. The report traces the use and dubious legality of targeted killings by Israel against Palestinians to the 1990s and by Russia against Chechnyans to 1999. It's in that tradition that our own program of targeted killing started shortly after 9/11.

The report goes on to explain why both the US and Israel might be inclined to treat their actions against terrorists as an armed conflict.

47. On the other hand, both the US and Israel have invoked the existence of an armed conflict against alleged terrorists ("non-state armed groups").⁹⁵

The appeal is obvious: the [international humanitarian law] applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State's domestic law, and generally provides immunity to State armed forces.⁹⁶

Because the law of armed conflict has fewer due process safeguards, States also see a benefit to avoiding compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist in another State. IHL is not, in fact, more permissive than human rights law because of the strict IHL requirement that lethal force be necessary. But **labeling a situation as an armed conflict might also serve to expand executive power both as a matter of domestic law and in terms of public support.**

48. Although the appeal of an armed conflict paradigm to address terrorism is obvious, so too is the significant potential for abuse. Internal unrest as

a result of insurgency or other violence by non-state armed groups, and even terrorism, are common in many parts of the world. If States unilaterally extend the law of armed conflict to situations that are essentially matters of law enforcement that must, under international law, be dealt with under the framework of human rights, they are not only effectively declaring war against a particular group, but eviscerating key and necessary distinctions between international law frameworks that restricts States' ability to kill arbitrarily. [my emphasis]

Israel is currently asserting its commando team is immune from laws about murder and piracy. And the reference to the appeal of an armed conflict as a rationale to expand executive power really sums up the last nine years of American history.

Where the US and Israeli preference to treat counterterrorism as armed conflict really goes astray of the law is in the definition of whom they may target.

58. In international armed conflict, combatants may be targeted at any time and any place (subject to the other requirements of IHL).¹⁰⁸ Under the IHL applicable to noninternational armed conflict, the rules are less clear. In non-international armed conflict, there is no such thing as a "combatant."¹⁰⁹ Instead – as in international armed conflict – States are permitted to directly attack only civilians who "directly participate in hostilities" (DPH).¹¹⁰ Because there is no commonly accepted definition of DPH, **it has been left open to States' own interpretation – which States have preferred not to make public – to determine what constitutes DPH.**

59. There are three key controversies over DPH. First, there is dispute over the kind of conduct that constitutes “direct participation” and makes an individual subject to attack. Second, **there is disagreement over the extent to which “membership” in an organized armed group may be used as a factor in determining whether a person is directly participating in hostilities.** Third, **there is controversy over how long direct participation lasts.**

60. It is not easy to arrive at a definition of direct participation that protects civilians and at the same time does not “reward” an enemy that may fail to distinguish between civilians and lawful military targets, that may deliberately hide among civilian populations and put them at risk, or that may force civilians to engage in hostilities.¹¹¹ The key, however, is to recognize that **regardless of the enemy’s tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does not constitute direct participation.**

61. Some types of conduct have long been understood to constitute direct participation, such as civilians who shoot at State forces or commit acts of violence in the context of hostilities that would cause death or injury to civilians. Other conduct has traditionally been excluded from direct participation, even if it supports the general war effort; such conduct includes political advocacy, **supplying food or shelter**, or economic support and propaganda (all also protected under

other human rights standards). Even if these activities ultimately impact hostilities, they are not considered “direct participation.” But there is a middle ground, such as for the proverbial “farmer by day, fighter by night”, that has remained unclear and subject to uncertainty. [my emphasis]

The report goes on to note that expanding this secret definition of what constitutes someone directly participating in hostilities is what gives the US (and Israel) their self-rationale for targeting those far from actual terrorism.

68. The failure of States to disclose their criteria for DPH is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing. It also leaves open the likelihood that States will unilaterally expand their concept of direct participation beyond permissible boundaries. Thus, although the US has not made public its definition of DPH, it is clear that it is more expansive than that set out by the ICRC; in Afghanistan, the US has said that drug traffickers on the “battlefield” who have links to the insurgency may be targeted and killed.¹²⁰ This is not consistent with the traditionally understood concepts under IHL – drug trafficking is understood as criminal conduct, not an activity that would subject someone to a targeted killing. And generating profits that might be used to fund hostile actions does not constitute DPH.

Thus, using the Israeli and US approach, you can target and use lethal force with those providing humanitarian supplies. Or—piggybacking on Jeremy Scahill’s must-read elaboration of the WaPo’s story on expanded counterterrorism operations

this morning—you can use covert force in places (like Georgia or Bolivia) where the threat may have more to do with organized crime, drugs, or even anti-energy forces.

And of course, the UN report is only treating targeted killing. But the US has been expanding its definition of a combatant in its detention practice, as well, not only to include those who provide shelter or money or propaganda, but potentially also to groups not covered under the AUMF.

Now all this is something the US is fairly explicit about.

So while the largely uncritical support in DC for Israel feels like more of our typical uncritical support for Israel, the US has something else at stake here: the underlying justification Israel used for this attack largely matches the expansive rationale the US uses in its own counterterrorism actions.

And that's why this attack may be significant for more than just the opportunity to provide Gaza with some humanitarian relief. US support for Israel here—against a NATO ally—has isolated us even more than our previous support for Israel has. Perhaps as a result, Craig Murray notes, this Israeli attack has freed America's European allies to start talking about how problematic the larger American approach on Afghanistan and counterterrorism generally has been.

“Nobody but the Americans doubts the U.S. position on the Gaza attack is wrong and insensitive. But everyone already quietly thought the same about wider American policy. This incident has allowed people to start saying that now privately to each other.”

While it's by no means clear that the fallout from the Israel attack will directly challenge US abuse of counterterrorism power, it may focus more attention on it.

Update: I made a bunch of small edits to this after I posted and planted some tomatillo plants.