



Wanted: An Israeli anti-‘lawfare’ strategy

The Palestinian campaign includes legal efforts, mass media manipulation, active public diplomacy, incitement, boycotts and sanctions

THE PALESTINIAN legal and diplomatic offensive over the past several weeks reflects the rapidly changing nature of the Israeli-Palestinian conflict and should not be underestimated.

Through Palestinian manipulation the focus is shifting from the political arena – where a solution could serve the interests of both sides – to the legal domain, where there can be only one winner. Where bilateral and regional negotiations held out the promise of gradual progress toward a potential win-win two-state reality, the current Palestinian “lawfare” approach is a zero-sum game.

The overarching Palestinian strategy is designed to curb Israel’s military power through savvy exploitation of the media, diplomatic channels, international institutions and international law.

It is doubtful whether it will bring the Palestinians any closer to independent statehood. But it fuels the delegitimization campaign against Israel, helps erode its international standing and invites an internationally imposed solution to the conflict.

Yet despite the seriousness of the challenge, Israel seems to have been caught off guard and has so far failed to come up with anything like an adequate response. Nor is it likely to before the March 17 election.

Recent examples highlight the extent to which Israel has been losing diplomatic and legal ground.

In mid-December, Switzerland, in its capacity as depository of the Geneva Conventions, decided to convene the High Contracting Parties – virtually the entire international community – to discuss Israel’s ongoing occupation of Palestinian

territories. The conference went ahead despite fierce Israeli and American opposition. It was only the third time since the conventions were adopted in 1949 that the parties were convened. The two previous occasions were in 1999 and 2001. All three conferences focused on Israel and the occupied territories.

The basis for the latest conference was a UN General Assembly resolution passed five years ago in the wake of Israel’s Operation Cast Lead in Gaza. It recommended convening the High Contracting Parties to explore ways of applying the Fourth Geneva Convention to the Palestinian territories.

Over the years, special UN rapporteurs for the occupied Palestinian territories and the various commissions of inquiry appointed to investigate alleged Israeli war crimes had urged similar steps. But Israel with the support of its allies in the UN was invariably able to preempt them. The fact that this time it was not able to do so illustrates just how much things are changing.

On December 17, the same day the High Contracting Parties convened in Geneva, the Luxembourg-based European Court of Justice ordered the EU to remove Hamas from its list of terrorist organizations. The EU insisted that this was a legal ruling based solely on procedural grounds and did not entail any substantive assessment of Hamas by the court. Nor, said the EU, was it a political decision taken by EU governments. Nevertheless, it was another instance of adroit Palestinian use of legal tools, this time by Hamas, which had petitioned the European Court and which, in the wake of the court’s ruling, claimed a

“real victory” for the Palestinian cause.

In late December, the Palestinians made their most significant diplomatic-legal move to date. Acting on their behalf, Jordan submitted a resolution to the UN Security Council calling for recognition of a Palestinian state in the 1967 borders and for an end to the Israeli occupation within three years. Although the proposed resolution fell one short of the required nine-member vote, its very submission served Palestinian efforts to promote their cause and stigmatize Israel as an occupying power.

Palestinian Authority President Mahmoud Abbas has made it clear that he will soon make another attempt to get the recognition resolution passed. And if, in a future vote, Palestine is recognized as a state by the Security Council, there will be significant domestic and international consequences. Key agreements signed between Israel and the Palestinians, for example Oslo 2 (the 1995 interim agreement on the West Bank and Gaza Strip, which governs virtually all Israeli-Palestinian relations), as well as Israel’s legal standing in the occupied territories and the legal status of Jewish settlements in the West Bank, will be affected.

There will also be favorable consequences for the Palestinians with regard to citizenship, establishment of an army, membership in international organizations and international conventions. Furthermore, recognition of Palestine would entail restriction of Israeli authority in the territories – including airspace, the electro-magnetic spectrum and coastal waters. The Palestinians would secure gains they never



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requested from Israel and certainly never achieved at the negotiating table.

At the heart of the Palestinian lawfare strategy is the ongoing threat of legal proceedings against Israel, high-ranking IDF officers and senior government officials in international or national courts. In the wake of the initial Security Council rejection of the Palestinian recognition bid, Abbas quickly acceded to the Rome Convention, paving the way for Palestinian representations against Israel at the International Criminal Court, which wasted no time in launching a preliminary probe into possible Israeli war crimes.

It seems the Palestinians are just waiting for an opportune moment to enlist the ICC against Israel, either directly or through a third party.

Likely grounds will be Jewish settlement and Israeli military operations on “Palestinian territory,” starting from 2012 when Palestine was recognized as a non-member observer state by the UN General Assembly. This would apply in particular to operations Pillar of Defense (November 2012) and Protective Edge (July-August 2014) in Gaza. The Schabas Commission of Enquiry set up by the UN Human Rights Council to investigate the 2014 Gaza war is due to publish its findings in March. This could trigger Palestinian approaches to the ICC.

But it will not be plain sailing. The next investigative phase by the ICC prosecutor’s office (OTP) to determine whether there is a case to answer could take several years. Moreover, any Palestinian appeal to the ICC would be in breach of the Oslo Accords. And by turning to the ICC, the Pal-

estinians would be laying themselves open to war crimes’ charges.

Nevertheless, any ongoing ICC process against Israel will encourage the Boycott, Divestment and Sanctions movement (BDS). Moreover, any state eligible to file claims at the ICC could take the Palestinian case against Israel to court. There is a precedent: In the wake of the 2010 Mavi Marmara Gaza flotilla affair, the Comoros Islands, where the vessel was registered, instituted proceedings against Israel.

The Palestinians have long been able to leverage the results of warfare conducted in densely populated urban areas for diplomatic and media gains. Every victim, whether Israeli or Palestinian, serves their propaganda and legal purposes – since, in the international community, no real distinction seems to be made between regrettable collateral casualties unintentionally caused by Israel and premeditated, indiscriminate Palestinian targeting of civilians. Indeed, the emerging legal front is nothing less than an extension of the battlefield.

The Palestinian approach is based on a theory of total warfare that includes legal efforts combined with mass media manipulation, active diplomacy, incitement, boycotts and sanctions. Against this rising tidal wave of legal, diplomatic and economic warfare, Israel appears patently unprepared, incompetent and reactive.

Israel cannot afford continued passivity in the face of an increasingly serious threat.

There must be careful attention to detail, creative thinking and a proactive approach. This should include the following elements:

- A bold diplomatic initiative to end the

conflict or at least create a two-state reality. This would show the international community that Israel’s goal is not simply to combat the attacks against it in the name of the status quo and would help preempt attempts to impose a settlement.

- The initiative should include a multilateral regional dialogue, bilateral negotiations with the Palestinians and measures taken independently by Israel to delineate the country’s borders around a democratic and secure home for the Jewish people.

- Progress through each of these tracks should involve interim steps and transitional periods. This will help create a reality of two nation states on the ground even in the absence of a long-term final peace deal.

In other words, Israel must seize the initiative even if this means taking coordinated unilateral steps to create an occupation-ending two-state reality. This would have the tactical merit of blunting Palestinian judicial warfare against Israel. And, even more importantly, it would have the strategic merit of creating conditions for the two-state reality essential for Israel’s survival as the democratic homeland of the Jewish people. ■

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