Army lawyers, academics debate how to make international law ‘relevant’ to today’s battlefields

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A who's who of top army lawyers and academics from around the world on Tuesday discussed how to keep international law relevant to the complex battlefield scenarios of the 21st century.

The discussion, part of the Counter-Terrorism Conference at the Interdisciplinary Center, Herzliya, focused on a new trend known as “the operationalization of law” regarding war.

Explaining this trend, US Lt.-Gen. (ret.) Michael Barbero, a former top commander and advisor to famed US commander David Petraeus in Iraq, said that “it is not enough for the rules of international humanitarian law to be practical; they must be relevant.”

He added that the US and other Western nations now faced a “new reality of asymmetric warfare” in which non-state actors and terrorists broke and abused all of the traditional rules of war, via tactics such as suicide bombings and using civilians as human shields on a large scale.

Barbero noted that one of his subordinate commanders had complained to him that even those trying to understand the dilemma usually did not fully understand, since they framed the problem as how to deal with “civilians on the battlefield” – when really the dilemma was “civilians are the battlefield,” meaning that an entire battle could take place in an urban environment filled with civilians.

The speakers at the event included top US and Belgian army lawyers with real world experience in approving targeting decisions, as well as the head of the International Red Cross for Israel and the Palestinians, and top US, European and Israeli academics.

Besides trying to fully understand the problems that asymmetrical warfare presents, the speakers said, “operationalization” is about dealing with realities that commanders confront on the ground.

Instead of taking the “theory of the ivory tower” approach to international law, which is removed from difficulties in the field, the participants addressed the nuts and bolts of targeting decisions that are integral to how commanders view the military operations they plan.

For example, some human rights advocates have claimed that sometimes an attacker who has precision-guided munitions (PGM) must use them, rather than less exact weaponry, so as to reduce civilian casualties.

Some participants hit back at this idea, noting that there may be a limited number of PGMs, and it may be necessary to save the PGMs for a later and more critical battle or a later situation in which a larger volume of civilians may be in danger.

A top Belgian army lawyer, Lt.-Col. Chris De Cock, criticized the position of some human rights groups that where adversaries can be intercepted off the battlefield, there is an obligation to capture them as opposed to killing them.

“If you’re an enemy combatant, then that is bad luck – you can be targeted from the beginning of a conflict to the end,” even if intercepted off the battlefield, he said.

In a surprising presentation, the ICRC’s Anton Camen said there was “no indication in the law as to how harm to civilian casualties becomes excessive,” and that it was “possible that numerous civilian casualties might not be excessive when the military goal is important.”

The statement was unusual, as many academics and human rights groups – the side of the debate where the ICRC usually finds itself – often make definitive statements about the point at which civilian casualties are excessive, and generally imply that a large number of casualties is nearly inherently excessive.

But some of the debate points followed standard patterns, with some participants arguing over how to judge issues like civilian casualties, military advantage and proportionality in war.

While those trending toward the “operationalization” of law tend to say that civilian casualties and targeting decisions could be justified in light of achieving an overall mission over time, those focused more on protecting civilians say that each targeting decision must be justifiable on its own terms without reference to how it might impact an overall mission down the road.