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***JUSTICE* wishes its readers**
a happy, prosperous and peaceful New Year

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PRESIDENT'S MESSAGE

Since it became aware of the atrocities committed during World War Two, the international community has been engaged in formulating international conventions and covenants, enforced by newly created international and regional tribunals, aimed at protecting individuals wherever resident. The international community wanted to make sure that even in times of war, there would never be a repetition of the horrors experienced in the past by individuals caught in the crossfire or occupied and ruled by cruel and lawless leaders.

Israel has had a special interest in this newly established world order. From its very inception, the State of Israel has faced violent onslaughts from its neighbours that have threatened not only its citizens but its very existence. We experienced the most violent forms of modern terrorism even before the world had become aware of this global danger. The first plane hijacked was an El-Al plane, Israel is openly threatened with unconventional weapons by Iraq and is the target of an unprecedented culture of suicide bombings. We also face a strategy whereby terrorists hide among innocent civilians and quote international law when such civilians are harmed in the process of rooting out terrorists.

Israel is the only country in the region committed to the rule of law; yet, it must constantly invent new ways and means of fighting terrorism, striking a balance between its obligation to protect its people and its commitment to international law and international norms.

Until September 11, 2001, we were almost alone in this battle, often unjustly criticized by those who had never experienced the threat or the horror terrorism creates. Unfortunately, it took a horrendous attack on the Unites States to convince the world that the threat of international terrorism is real and concerns all of us. As we mark the first anniversary of the attack on the Twin Towers and the Pentagon, we realize that practices, forced on Israel and often criticized by others, are now being adopted by other democracies that use even harsher means than those used by Israel.

The Supreme Court of Israel sitting as the High Court of Justice is currently busy dealing with petitions concerning various unconventional measures proposed by the government in its ongoing attempt to stop suicide bombers. In a painstaking and sometimes tortuous process, often convening a special enlarged bench, the court is slowly setting up rules of behaviour for the security forces including, recently, relocation of family members who have actively assisted their relatives in suicidal attacks on innocent civilians in Israel. A few days ago, a bench of nine justices handed down a unanimous landmark decision allowing the military commander to re-locate such relatives within the territory governed by the Palestinian authority, in certain circumstances. The Court stated that relocation of relatives cannot be allowed solely as a preventive measure, but is permissible if there is also proof of their active involvement and if they still constitute a threat to security. The Court made it very clear that the military commander must act within the context of Article 78 of the Fourth Geneva Convention.

The Court took pains to set down, as clearly as possible, its directives to the armed forces. It ruled that the army may only resort to assigning a person's place of residence "if someone carried out terrorist acts, and assigning his residence will reduce the danger he presents". The Court also stated that "one may not assign the place of residence of an innocent family member who did not collaborate with anyone, or of a family member who is not innocent but does not present a danger…even if assigning the place of residents of a family member may deter other terrorists from carrying out acts of terror".

The Court sent a clear message to the security forces that the conditions for reassigning residence will be strictly interpreted. It thus allowed the re-location from the West Bank to Gaza of a brother and sister of a suicide bomber – the brother having helped the bomber in actively preparing his suicide mission, and the sister having actually prepared the belt that held the explosives, yet prohibited the relocation of a relative of another suicide bomber, ruling that although he had known of his brother's proposed mission, his involvement was too remote, as he had only supplied him with food and shelter.

Courts in democratic countries will most probably continue to agonize over similar dilemmas, trying to reconcile legal rules formulated in another era, with new unprecedented and unforeseen circumstances.

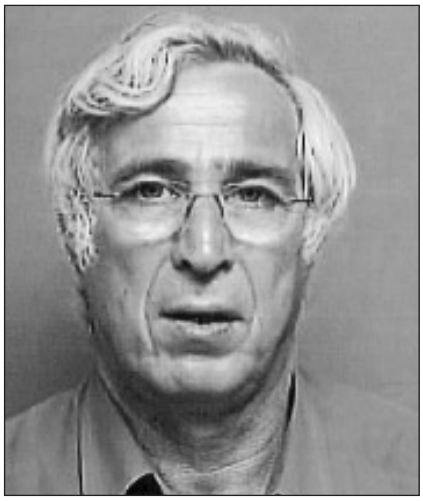
The international community must ask itself whether it isn't time to adapt the rules to the existing circumstances, in order to arm courts of law with viable sensible tools to confront this new kind of war that threatens the whole world, without compromising basic human rights.

Yadassa Ben-Yito

Use of Civilians as a Human Shield: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?

Emmanuel Gross

A democratic state fighting terrorism is required to conduct this process in accordance with principles and values which ensue from its democratic nature. Respect for human rights and at their heart the right to life and the right to dignity are the principle characteristics of a democratic state. At the same time, human rights are not a staging post for national destruction and the state must supply its citizens with the conditions which will enable them to implement their rights, *i.e.*, national security. The purpose of the democratic state's duty to provide security for its citizens is to protect the most basic right and value, namely, the right to human life. It follows that we are concerned here with the **moral duty** of a democratic state to protect its citizens and to make use of appropriate measures to preempt dangers to their security: "The moral duty of the democratic state is therefore, to fight, to exercise force, to overcome the enemy, so long as it is not possible to properly protect the lives of citizens in another way, without the exercise of force".[1]



In circumstances where the enemy of the democratic state is terror, an enemy which violates the rules of war, there is a strong likelihood that the duty of a democratic state to vanquish the enemy in order to meet its moral duty to protect its citizens will clash with other legal obligations and moral concepts of the democratic state and its soldiers. In particular we may identify a clash with two obligations: the obligation to avoid in so far as possible harm to citizens of the enemy and the obligation to protect the lives of the state's soldiers during the course of the conflict. This clash exposes moral dilemmas which I shall discuss below. First, however, I shall explain in general terms what a moral dilemma is and how it is resolved and thereafter I shall apply these principles to the circumstances under discussion here.

Moral dilemmas

In practice, a moral dilemma consists of a clash of values which makes it difficult to act, as choosing any of the alternatives will be inconsistent with the decision-maker's obligations and values.

> "Dilemmas are not situations in which a person must do something which he is forbidden to do, but where he must do something bad".[2]

In other words, it refers to a situation in which a person is

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required to perform a particular act (to protect the lives of the citizens of his state) and must also refrain from doing it (because if he protects the lives of his citizens he will be required to harm innocent civilians of the adverse party).

In a situation in which two clashing obligations occur, there are those who believe that one of the options - which one depends on the circumstances - is not a duty.

However, this type of solution is too comfortable. Clashes between moral obligations occur frequently. If we agree that in every such case one of the duties does not apply to us, we shall deprive most of the moral obligations of their effect. Accordingly, the solution must be more complex and it is difficult to guarantee that the solution to a moral dilemma will be a moral solution *per se*. The reason is that each of the possible avenues of action entails the doing of something bad:

> "Most cases, if not all, which are used as examples of moral dilemmas are cases of choices between evils. They are cases of being in a situation in which a person will do what he does, or will injury human beings, or will fail a binding duty... it is the essence of dilemmas that those facing them have no acceptable moral option".[3]

These remarks possess added weight in the types of dilemmas with which we are concerned here: moral dilemmas which require us to choose between the lives of different people (the citizens of the defending state, the citizens of the enemy and soldiers). The value of human life is a commonly held value which is expressed in the clash between the duty of a democratic state to protect the lives of its citizens and soldiers versus its duty to avoid injuring civilians of the enemy. Kant was of the opinion that dilemmas of this type are insoluble as there is a moral imperative stating that human beings are equal in value and every person must be treated as having his own value and being an end in himself.

It follows from this approach that if we succeed in proving that not all human beings are equal in value we shall be able to choose which persons to protect and thereby achieve the solution to the dilemma.

Moreover, Kant's approach is an absolute one, and as such problematic. In my opinion, if the value of human life always prevailed in any clash, doctors would be able to save all their patients and people would not die in road accidents because the state would provide the authorities with the entire budget necessary to minimize traffic accident fatalities. Reality urges us to refrain from absolute concepts and exercise discretion within the decision making process. On occasion, other considerations outweigh the value of human life.

True, the argument that human life is not an absolute value and that in particular circumstances it is possible to prefer the life of one person to that of another does not necessarily release us from a sense of moral guilt. This sense may be a sign of having committed a wrongful act which one may regret, alternatively, the feeling of regret and guilt may relate not to the violation of a duty in circumstances where the act was the only proper act from a moral point of view, but rather it may relate to the undesirable results of that violation.

The sense of moral guilt reflects moral character it does not reflect the absolute nature of a moral duty.

> "To say that act X is in the nature of a moral obligation is not to say that the validity of this obligation is not dependent on competing moral considerations. The reason for this is that on occasion moral obligations clash and in a particular situation two opposing obligations are imposed on the actor. If we had assumed that all the moral obligations are absolute in the sense that they override all competing considerations, including competing moral considerations, then in cases of conflict each of the obligations would have overridden the other, something which of course is impossible... **the validity of a moral obligation is contingent upon the validity and force of other obligations which clash with it**".[4]

In a clash between the duty to protect the citizens of the state from terrorist attacks as well as to protect soldiers' lives and the duty to avoid harm to innocent civilians themselves held by the terrorists, the former is likely to prevail. True, the killing of innocent persons is an act which is legally prohibited and morally reprehensible, "however, it would seem that only a few would be willing to accept in simple terms the duty never to kill innocent

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1. Assa Casher, MILITARY ETHICS, (Tel Aviv: Ministry of Defence Press, 1996) 37-38.
2. D. Stetman, MORAL DILEMMAS (Hebrew University Jerusalem, 1996), 175.
3. Raz, THE MORALITY OF FREEDOM, Oxford (the Clarendon Press, 1986), 359-360.
4. Daniel Stetman, *The Question of Absolute Morality Regarding the Prohibition on Torture*, 4 LAW & GOV'T (1997) 161, 162 (emphasis added).

persons. Someone who is not a pacifist and who is not blind to the modern reality of war which inevitably entails injury to the innocent, will find it difficult to argue in favor of the principle that the killing of innocent persons is always absolutely prohibited".[5]

As we shall see below moral and legal justification may be found for the killing of innocent persons within the context of military operations.[6]

If we agree that there are no absolute moral obligations, we might ask on the basis of which approach ought we to determine which moral obligation prevails.

In this article I shall focus on two primary moral approaches - the utilitarian - consequential approach versus the deontological approach.

According to the utilitarian approach the moral value of an act is determined in accordance with its impact on happiness in the world. If the actor did what brought about the greatest happiness, he fulfilled his one and only obligation, and all is proper from a moral point of view. It follows that if injury to civilians who provide a human shield for terrorists will lead to injury to the terrorists and comprises an essential measure in the war against terror which will significantly erode its force and capabilities, the injury to the innocent civilians will in effect lead to better results than avoiding harm to them. The latter course of action (avoiding harm) will lead to continued terror and further harm to the state's citizens and this alone is justification for causing harm to the innocent civilians.

In contrast, the follower of the deontological approach does not confer moral legitimacy upon a wrongful act by reason of the beneficial results which we derive from it. According to his understanding, there is a certain threshold up to which considerations of outcome are not relevant and certainly are not sufficiently strong to negate a strict moral prohibition against harming innocent persons.

These two approaches towards resolving moral dilemmas will assist us to resolve the moral dilemma under consideration here and analyze it in the context of the circumstances relevant to a democratic state's war against terror.

First, it should be clarified that the starting point for the discussion on the moral dilemmas arising in this type of war rejects the argument that war *per se* is morally reprehensible because:

> "(1) Murder is the intentional and uncoerced killing of the innocent.
> (2) Murder is by definition morally wrong.
> (3) Modern war by its very nature involves the intentional killing of innocent people.
> Therefore, modern war is morally wrong".[7]

We are concerned with a war which is consistent with the "theory of just war" by virtue of the fact that it is a war of self-defence.[8] The terror which we seek to fight is not a one-time passing phenomenon. It consists of a series of prolonged, numerous and brutal attacks which threaten the existence of states of the free world and thereby afford these states the legal and moral right to self-defence.

I reject the argument justifying terrorism and presenting it as the weapon of the weak fighting for their freedom, making use of terrorism not out of choice but out of lack of choice as the only weapon available to them. The terrorism against which we fight is not the only means available to the weak. Rather, it is the objective of a strong enemy which threatens the entire world - an enemy which does not fight for freedom but against it. Terrorists kill solely for the sake of killing.

The determination of the moral dilemmas to which we shall now turn, is likely to equalize the balance of power and even to confer an advantage on terrorism over democracy. This is because if a democratic state decides that its obligation to protect the lives of its citizens and soldiers overrides its moral obligation not to injure innocent persons from among whom the terrorists operate - there is a great likelihood that this decision will attract a heavy international political price from the defending state.

As noted, I believe that war is not a morally reprehensible state of affairs. On the contrary, it is the duty of a democratic state to go to war if that is the only possible way of protecting its citizens.

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5. *Id*., 168.
6. For example, the doctrine of double effect whereby the killing of innocent persons is not absolutely prohibited but only the **deliberate** killing of innocent persons is prohibited, and where the killing of innocent persons which is the unavoidable and undesired corollary of combat is not prohibited.
7. Jeffrie G. Murphy, *The Killing of the Innocent*, WAR, MORALITY AND THE MILITARY PROFESSION (ed. Malham M. Wakin) 1979, 343.
8. M. Walzer, JUST AND UNJUST WARS (*Am Oved Press*, 1984) 133 (Heb.) (hereinafter: Walzer). The rules of international law in which the primary principle prohibits the use of force as a mode of dispute resolution, recognizes the right of a state to launch a war in one situation only, namely, when the use of force is the outcome of the right to self-defence; see Article 51 of the UN Charter.

> "Governments have moral responsibilities to act in self-defense, in protection of innocents, in protection of the common good, and in protection of *tranquilities ordinis*, the safety and civic peace which allows citizens to go about their daily lives".[9]

The fact that this duty exists does not testify to its nature. In other words, even the moral duty to protect the citizens of the state is not an absolute duty. The hesitation shown by a democratic state regarding the means which should appropriately be taken to fulfill this duty proves that the duty is not conclusive and unqualified. It is conceivable that we shall be required to choose means which express the balance between this duty and another moral duty.

The dilemmas with which we are dealing here arise within the framework of war against an enemy which is motivated by profound hatred, possessing a religious, cultural and national character. Terrorism is characterized by the threat to engage in the daily mass killing of civilians and refuses to resolve disputes in other ways such as by negotiation or compromise. To suggest to a state the citizens of which are victims of this terror that it refrain from taking combative action is immoral:

> "Can a nation be asked, on moral grounds, to sacrifice itself - or one of its allies - rather than engage in hostilities which will produce an unpredictable (though certainly great) amount of bloodshed on both sides? The possibility that surrender would be more moral than war is not even conceded a probability".[10]

In my opinion, it would be even more morally reprehensible if the state were to choose to remain indifferent to the risks posed to its citizens. The dilemma, therefore, does not concern whether one should or should not go to war, the dilemma relates to the means chosen within the framework of the war. The principal question which therefore ensues is - even on the assumption that the moral force and binding nature of the moral duty of a democratic state to exercise force against terrorists in order to protect its citizens causes it to override other moral duties, are all acts which fall within that moral duty permissible?

Currently, the laws of war do not supply an answer to this question and to the moral dilemmas derived from it, as the laws of war are constructed on the principle of reciprocity, whereby the adverse parties respect and abide by these principles. The laws of war are not designed for wars conducted against terrorist organizations. Accordingly, even were we to agree that the law is the binding expression of social and public morality we would not be able to find a positive objective solution to the moral dilemmas which rise within the context of this war. The solution, therefore, to every dilemma is a subjective solution which is adjusted to a varying reality and to the diverse situations which comprise this reality.

In the aftermath of the events of the 11th September 2001 and President Bush's declaration of war against terror, many observers emphasized the just and essential objectives of this war concurrently with the importance of abiding by the legal rules of war and the moral principles guiding a democratic state:

> "We must respond to the September 11 tragedy in the spirit of the laws: seeking justice, not vengeance; applying principle, not merely power. We must respond according to the values embodied in our domestic and international commitments to human rights and the rule of law".[11]

Below I shall explain why not every action taken in the name of protecting one's citizens is permitted but what action may nevertheless be taken without being tainted by allegations of legal and moral impropriety - as the rules of war are not absolute inflexible prohibitions the violation of which can never be justified.

In my view one must reject the approach asserting that soldiers fighting a just war are entitled to do everything useful in that war, on the ground that it is the enemy which is responsible for the war. Such unrestricted freedom of action is dangerous and morally improper: its purpose is the absolute transfer of responsibility onto the shoulders of the enemy and improperly regards as unqualified the rights of the just so that any resulting wrongdoing is the sole responsibility of the adverse party. Even when the enemy is terrorism and the war against it is a just war, not every wrongdoing performed by the democracy is the responsibility of the terrorist opponent.

As a rule killing during the course of a war is permitted when it is an essential means of self-defence. Legal and moral principles require us to distinguish between soldiers and civilians where only

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9. Maryann Custimano, *Love, Globalization, Ethics, and the War on Terrorism*, 16 ND J.L. ETHICS & PUB POL'Y 65, 69-70 (2002).
10. Frederick R. Struckmeyer, *The "Just War" and the Right of Self-Defense*, WAR, MORALITY AND THE MILITARY PROFESSION (ed. Malham M. Wakin) 1979, 276.
11. Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 39 (2002).

the former may be harmed. According to Walzer, civilians who are not combatants are in a certain sense innocent and therefore entitled to moral immunity to which soldiers are not entitled.

This distinction between civilians and soldiers is a basic rule of the laws of war and has special importance in a war being waged by a democratic state against terror:

> "There must be no resort to general indiscriminate repression. The government must show that its measures against terrorism are solely directed at quelling the terrorists and their active collaborators and at defending society against the terrorists. A slide into general repression would destroy individual liberties and political democracy and may indeed bring about a ruthless dictatorship even more implacable than the terrorism the repression was supposed to destroy".[12]

In contrast, there are those who believe that there is no moral basis for the distinction between civilians and soldiers but only a consensual basis. In other words, the distinction reflects the common desire of the parties to limit the destructive consequences of the war - it expresses **mutual consent** to avoid inflicting harm upon the civilian population. According to this approach, if one of the parties deviates from the principle of mutuality the other party will also be released from his duty to abide by the distinction. I do not agree with this approach where the circumstances involve a war in which one of the parties is a democratic state. According to international law and in particular according to moral imperatives, a democratic state is not discharged from its duty to avoid inflicting harm upon the civilian population merely because the adverse party, the terrorists, deliberately target civilians.

Moral dilemmas in the war against terror

Dilemma 1: We have seen that terrorists use civilians as a human shield for their own protection; they operate out of civilian population centers and against them. The military forces of the democratic state which are required to defend the citizens of the state are forced to contend with very difficult battle conditions which require them, in the name of moral and practical concepts, to adhere to the laws of just war and pay the price at a very real risk to their own lives. Is it proper to require them to pay this price?

Perhaps we should rather say, for example, in the case of the State of Israel, which faces an existential risk as a result of the acts of terror directed at it as part of the declared and open plan of the terrorist leaders to destroy it, that:

> "A nation fighting a just war, which is in a desperate situation and whose very existence is in danger, will necessarily have to have recourse to soldiers who do not have moral inhibitions or an understanding of morals; and when it will no longer need them, it must repudiate them".[13]

Certainly, were the State of Israel as a Jewish and democratic state to repudiate moral values, at the heart of which lies respect for human life, such action would be completely contrary to its nature and therefore impossible and unallowable. Accordingly, it is not inconceivable that soldiers should be required to risk their lives by reason of a moral imperative which guides them in relation to the avoidance of harm to the innocent. This is a justified risk and "a justified risk is a risk which is required in order to preempt an existing risk" the army of a democratic state recognizes two types of situations in which a soldier is permitted to risk his own life and the lives of his soldiers: in the face of the enemy and in order to save human life".[14] Is it right to draw a parallel between the situation where terrorists create a dangerous situation which poses a risk to the lives of the citizens of the state, thereby requiring the state to protect them and consequently put soldiers lives at risk, and a situation where the terrorists create a dangerous situation which poses a risk to the lives of the citizens of their own state, which too compels the democratic state to protect the citizens of the enemy and to this end put its own soldiers lives at risk? Can one speak of a justified risk in both these cases? In my opinion, the two situations are not fully analogous. A democratic state must exercise the necessary force in order to overcome the military might of the enemy including where this poses a risk to its forces whose task it is to vanquish the enemy. We must not forget that the situation of harm being suffered by the citizens of the enemy is a situation which has been generated by the terrorists themselves. If we were to endanger our own forces in order avoid injury to civilians and consequently fail to harm the terrorists, the sinners would reap the benefit of their sins. The

12. William Gutteridge, THE NEW TERRORISM, (Mansell Publishing), 17.
13. Walzer, 380, describing the cruel policy of Arthur Harris, commander of the strategic aerial bombardment of Germany from February 1942 to the end of the war. This bombardment claimed the lives of 3,000,000 Germans and injured another 780,000.
14. Assa Casher, MILITARY ETHICS.

military forces of the democracy would be injured and its citizens would continue to be threatened. It follows that the moral duty to avoid injury to civilians would absolutely override the duty to protect the citizens of the sovereign state and the lives of its soldiers. In other words, the state would not be able to conduct effectively, if at all, the just war which it set out to pursue:

> "In principle, it is possible for a nation to avoid killing noncombatants, but such a policy would seriously weaken its military position, not to mention the advantage it would give to a less morally scrupulous adversary".[15]

There are those who contend that "we are not subject to any moral duty to endanger the lives of our soldiers within the framework of military action to defend against the enemy, the attacker or potential attacker, merely in order to save the attacker from fatalities or property damage".[16]

In circumstances of combat against an enemy operating out of a civilian population which supports it, it may be argued:

> "Yet if the guerrilla fighters and the population that supports them do not keep the distinction between combatants and noncombatants, why should the enemy be committed to this distinction?".[17]

As I have explained, there are no absolute duties: there is no absolute duty not to endanger the lives of our soldiers in order to protect the citizens of the enemy and there is no absolute duty not to injure those citizens. We are concerned with balances and we must find the correct balance in accordance with the circumstances of each case. In my opinion, as a rule, it is not proportional to aerially bombard places which it is known house terrorists alongside innocent civilians. It is necessary to choose less lethal means even if these are less certain and may endanger the state's military forces. The operation must aspire to pinpoint accuracy in an effort to distinguish between civilians and terrorists. More precisely, this is not the real distinction; the real distinction lies between innocent civilians and terrorists.[18]

Guilty civilians versus innocent civilians

The classic approach entails a distinction between combatants and non-combatants. It follows that protection of "innocents" is actually protection of all those who are not called "combatants". A more correct approach from a legal and more particularly moral point of view distinguishes between the guilty and the innocent in general. According to this approach, there may be cases where civilians will be deemed to be guilty. The effort must be directed at distinguishing between civilians who have lost their rights by virtue of their involvement in the war and those who have not lost their rights. The distinction which interests us is not between the participants in the war effort and those who have not contributed anything to it, but between those who supply the soldiers with whatever is needed to fight and those who supply them with whatever is needed to live; in effect, all the rest. The innocent are those who did and do nothing which would lead them to be deprived of their rights. On the other hand:

> "What is required for the people attacked to be non-innocent in the relevant sense, is that they should themselves be engaged in an objectively unjust proceeding which the attacker has the right to make his concern".[19]

This is the case of civilians who freely choose to provide shelter to terrorists, allow them to operate from their homes and provide them with protection. These civilians are none other than collaborators with the terrorists and as such loose their immunity from harm. Is it conceivable to demand from the soldiers of the democratic state that they risk their own lives in order to avoid injuring civilians who have supplied shelter and protection to terrorists and permitted them to shoot at and otherwise operate against the soldiers from their homes? This pattern of behaviour

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15. Daniel Statman, *Jus in Bello and the Intifada*, PHILOSOPHICAL PERSPECTIVES ON THE ISRAELI-PALESTINIAN CONFLICT, (ed. Tomis Kapitan), 133,152 (1997) (Heb.).
16. Assa Casher, MILITARY ETHICS.
17. Daniel Statman, *Jus in Bello and the Intifada*.
18. The distinction between combatants and non-combatants is not equivalent to a distinction between innocence and guilt. Various philosophers have argued that from a moral point of view the more correct distinction lies between "the guilty" and "the innocent", in which there may be soldiers who are innocent and civilians who are guilty. In the case of the war against terror, reference is not to soldiers in the accepted sense of the word who are comparable to soldiers of the democratic state. There can be no terrorist who is not guilty. Accordingly, in our case, it is necessary to be satisfied with a distinction between civilians who are guilty and civilians who are innocent; only the latter merit protection.
19. Elizabeth Anscombe, *War and Murder*, WAR MORALITY AND THE MILITARY PROFESSION, (ed. Malham M. Wakin, 1979), 285, 288.

serves the policy of terror. Accordingly, in my opinion, it would be improper to demand that such civilians be protected, merely because they take cover under the title "civilian" and are not officially active in any particular terrorist organization. The title "civilian" is not an empty phrase and notwithstanding that protection of enemy civilians is a legal rule having moral weight which expresses the respect due to human life, the rule is subject to an exception. The exception applies when the civilians collaborate and assist in bringing about the objectives of the terrorists who pose an imminent danger to the democratic state. Thus, the civilians become participants in the actual fighting and pose an actual danger to the forces of the democratic state and indirectly to that state's citizens.

> "Thus: combatants may be viewed as all those in the territory or allied territory of the enemy of whom it is reasonable to believe that they are engaged in an attempt to destroy you".[20]

In practice, this exception is merely a *prima facie* exception, as civilians who assist terrorists to execute their objectives are manifestly not innocent:

> "... in fact, they were more 'guilty' than ordinary soldiers. And if indiscriminate attacks against civilians are wrong because they express a lack of respect for human life, then no such lack of respect is expressed when civilians themselves are the main perpetrators of these acts".[21]

We are concerned here with civilians who are not entitled to protection but rather from whom it is necessary to seek protection. The purpose of recognizing the right of a state to self-defence is to enable it to defend itself against those who pose a threat to it or attack it - those such as the terrorists and the civilians who collaborate in achieving their objectives.

Nonetheless, I do not argue that it is necessary to deliberately attack the civilians involved in combat with the aim of killing them, if it is possible to bring their activities to a halt in another way without creating great risk to our forces. Only when such an option does not exist and the civilians pose a risk, will the obligation of a democratic state to avoid harm to these civilians be cancelled and these civilians lose their rights.

I should note that Article 52 of the Additional Protocol to the Geneva Convention defines military objectives which are legal objectives for attack, as objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. The definition is flexible and highly relative. The same objective may at one and the same time be regarded as civilian and military. Accordingly, the article provides that in case of doubt whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed to remain civilian. However, this is a presumption which may be rebutted and indeed only arises in case of doubt. In the situation under discussion here, we assume that the military forces have well-founded and reliable information which proves that a civilian home is being used by terrorists and they together with the "civilians" are operating from that location. In such a case the home becomes a military target. The outcome of this situation is that the civilians are not innocent, they are tainted by moral guilt and it would not be morally wrong to kill them: the target not being civilian and no legal blame being attached to an attack upon it.

In circumstances of war against terror in which the fighting is conducted on a house to house basis in an urban area and the civilians have been warned prior to the attack to leave their homes and vacate the area but have nonetheless chosen to remain, we must distinguish between two situations. In the first situation the civilians have freely chosen to remain in their homes with the intention of making it more difficult for the democratic state to target the terrorists, as it is clear to them that the democracy is fettered by legal and moral principles which prohibit causing harm to those civilians.

> "In such fighting which is conducted from house to house in a built-up area, there is no practical means of distinguishing between combatants and civilians. Accordingly, the assault force need not conduct detailed checks: first one shoots and afterwards one investigates who has been hit. The place of civilians is outside the battle arena. If they stay there and are hit - their blood is on their own heads".[22]

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20. Jeffrie G. Murphy at 350.
21. Daniel Statman, *Jus in Bello and the Intifada*.
22. Y. Dinstein, *The Theory of Arms in the Laws of War* THE THEORY OF ARMS (SEMINAR ISSUES OF ISRAEL'S SECURITY) (*Yad Tebenkin*, 1991) 25, 27.

Civilians who provide shelter to terrorists in order to furnish them with a military advantage over the democracy, are differentiated in one way only from civilians who are physically involved together with the terrorists in fighting from their homes. Whereas the former are passively involved, the latter are actively involved; however, their involvement exists and it is that involvement which causes them to lose their moral immunity from harm. When they choose not to escape from the battle arena, from the danger (on the assumption that they could so escape and were warned in advance) and prefer to supply the terrorists with shelter, they choose a side in the hostilities and moral blame must therefore be attached to them. The consequence is that they take upon themselves the risk that they will be treated in the same way as combatants are treated under the laws of war, *i.e*., their death will not be the death of innocents and the moral duty to protect the lives of the soldiers operating in the name of the democracy, will override.

> "... A person may be liable to suffer harm if, through his own culpable action, he has made it inevitable that someone must suffer harm. In such a case, it is permissible, and sometimes even obligatory, to harm the morally guilty person rather than to allow his morally culpable action to cause harm to the morally innocent. The interests of the innocent have priority as a matter of justice".[23]

In contrast, in the second situation in which the civilians are made hostages by the terrorists, held by them against their will and their houses used by the terrorists as a staging post to attack the democracy's soldiers, while the civilians themselves are used to shelter the terrorists from attack by those soldiers, the civilians are innocent persons who do not pose a threat to the forces of the democracy. Such a case is sufficient, in my opinion, to provide moral justification for a demand that the democracy's soldiers risk their own lives on behalf of the civilians. In this context the comments of Walzer in his book *Just and Unjust Wars* are relevant:

> "It is forbidden to kill any person for trivial reasons. Civilians have rights which supersede even this. And if the saving of civilian life means the risking of soldiers' lives, such a risk must be accepted. Nonetheless, there is a limit to the risks which we demand. We are talking, after all, of death caused by mistake and by legitimate military action and the absolute rule against attacking civilians does not apply here. War necessarily endangers civilians; that is another aspect of the inferno. We can only demand of the soldiers that they limit the risks which they impose".[24]

Dilemma II

Self-defence versus harm to civilians: in the context of this dilemma I shall consider the moral duty to avoid inflicting harm upon enemy civilians who are innocent civilians as these have been defined above.

In such a situation in which we are considering innocent persons whom the terrorists are using as a human shield, the right to self-defence will not assist us to provide moral and legal justification for injuring these civilians. The relevant legal defence is the defence of necessity. Yet, the defence of necessity will discharge us from criminal liability it will not necessarily transform the action into a moral action. The purpose here is not to identify the legal defence for an action which was performed and the outcome of which was injury to innocents. The purpose is to focus on moral justification (if one can speak of such justification at all) for the end-product of harm to innocents in situations analogous to situations of necessity in criminal law, *i.e*., in situations of clear danger to the lives of the soldiers and civilians of the democratic state which cannot be avoided save by harming innocent people.

A central concept which may assist us in drawing a balance between the duty to use one's weapons as necessary in order to vanquish an enemy which threatens the safety of the citizens of the state and the demand that injury to civilians be avoided, is the concept of *Tohar Haneshek* (a Hebrew term which loosely translated means "use of weapons in a virtuous manner" or "moral warfare") and which focuses on ensuring a moral regime within the battle arena. Its purpose is to teach us not to turn armed force into a supreme value. *Tohar Haneshek* requires that military forces restrain themselves and refrain from exercising more force than is necessary. Even when the other side does not recognize the concept of "moral warfare", it is the duty of the democratic state to act in such a way that the blood bath created in its war with terrorism is less deep.

> "It is a duty to understand and recall that the enemy too is a man, however, hostile, evil and malicious. The moral man will defend himself against the enemy appropriately. He will not concede to him. The democratic state will defend itself against him, by

23. Jeff McMaHan, *Innocence, Self-Defense and Killing in War*, 3(3) THE JOURNAL OF PHILOSOPHY, 193, 204 (1994).
24. Walzer, 186.

> means of its army, as it must, in a moral manner, as is necessary, and not beyond what is necessary. This is one way of explaining the duty to restrain oneself, in the manner of '*Tohar Haneshek*' [moral warfare], the moral duty of the democratic state, with all its structures, and among them the army".[25]

When it is not possible to vanquish the brutal enemy save by killing civilians in circumstances where drawing a distinction between civilians and terrorists is difficult and even impossible, does use of necessary force include killing civilians? Vitoria, in his book *De jure bellic* is of the opinion that it is forbidden to deliberately kill innocents. However, the killing of innocents is permitted if there is no other way to vanquish the guilty. This is the military necessity within the battle now underway. Wasserstrom is of the opinion that military necessity is a concept having a central role to play in the implementation of the laws of war and offers general justification for the breach of the prohibitions at the basis of these laws. In his view, the doctrine of military necessity transforms the laws of war into a general moral precept but enables them to be circumvented.

The doctrine of military necessity is similar to the emergency situation which Walzer describes in his book as a time in which it is possible to trample the right to life even of innocents. Even John Rawls who thought that "there is never a time when we are free from all moral and political principle and restraints" recognized emergency situations as an exception to that rule.

Accordingly,

> "Rawls, following Walzer, argues that '[civilians] can never be attacked directly except in times of extreme crisis'. Therefore, we can violate human rights - we can directly attack civilians - if we are sure that we can do some substantial good' by so doing, and if the enemy is so evil that it is better for all well ordered societies that human rights be violated on this occasion".[26]

There is no doubt that terrorism is a brutal and dangerous enemy and possibly a decision during battle that calls upon soldiers to avoid harming innocents whatever the situation will have the *de facto* consequence of sacrificing the lives of the fellow citizens of the soldiers. In such situations the sense of moral urgency which the soldiers may feel in terms of avoiding harm to innocents may retreat in the face of the sense of moral urgency to defend their fellow citizens. In exceptional circumstances, such a retreat may be legally and morally justified. Take for example the situation where the most senior wanted terrorists, who plan, send and carry out horrendous terrorist attacks, hide among innocent civilians and it is not possible to capture them or attack them save by engaging in a collective attack against the entire house and all its occupants. Must we refrain from such an attack? The question is not easy and I tend to think it should be answered in the negative. If indeed the risk posed by the terrorists is unusual, imminent and has the power to augment the weight and authority of the moral duty to protect the citizens of the state, then the latter duty will prevail in accordance with the principle of proportionality, whereby the benefit of the action (saving the life of many innocent persons who are threatened by the terrorists) exceeds the damage ensuing from it (harm to innocent persons who are held by the terrorists and damage to the state's image).

This is what distinguishes us from the terrorists: the latter's actions are designed to harm the innocent, whereas the democracy intends to strike at the guilty. Injury to the innocent, even if unavoidable, is certainly not deliberate:

> "Thus, if a country engages in acts of war with the intention of bringing about the death of children, perhaps to weaken the will of the enemy, it would be more immoral than if it were to engage in acts of war aimed at killing combatants but which through error also kill children".[27]

In our opinion the presumption that there are no absolute moral obligations, and as part of this that there is also no absolute duty not to kill the innocent, may assist us in removing the moral taint which has adhered to the killing of innocent persons. Every duty may be construed in at least two ways: as an absolute duty on one hand or as a *prima facie* duty (one which in the event of exceptional circumstances may be breached) / universal duty, on the other. The difference between them is that an absolute duty is a duty which will never clash with other duties. The characteristic of a duty as being absolute shows that there are no circumstances in which it does not exist. In contrast, a *prima facie* / universal

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25. Assa Casher, MILITARY ETHICS.
26. Darrell Cole, 09.11.01: *Death Before Dishonor or Dishonor Before Death? Christian Just War, Terrorism, and Supreme Emergency*, 16 ND J.L. ETHICS & PUB POL'Y 81, 91(2002).
27. Richard Wasserstrom, *On the Morality of War: A Preliminary Inquiry*, WAR, MORALITY AND THE MILITARY PROFESSION, (ed. Malham M. Wakin, 1979), 299, 318.

duty may fall into conflict with other duties in certain situations.

In cases where a just war is being waged, a war against terrorism, in which the duty to avoid harming the innocent and the duty to protect the citizens of the state cannot be implemented simultaneously, the moral duty not to kill the innocent is more compatible, in my view, with the case of a *prima facie* duty, which in exceptional circumstances - such as may be created during the war against terrorism - may be breached even though we are aware that our activities will lead to the death of innocents who are located in the vicinity of the terrorists.

However, the decision to prefer the democratic state's duty to protect its own citizens over its moral and legal duty to avoid causing harm to the innocent, does not mean that the latter duty should be abandoned. The prohibition on harming the innocent remains a universal moral duty which retreats in the face of another universal moral duty which has superior status in the specific circumstances that preclude us from regarding the duty not to harm the innocent as an absolute duty:

> "It seems to misunderstand the character of our moral life to claim that, no matter what the consequences, the intentional killing of an innocent person could never be justifiable - even, for example, if a failure to do so would bring about the death of many more innocent persons".[28]

This approach to resolving the dilemma is close to the consequential approach to the effect that soldiers are entitled to kill innocent civilians if the consequence of this act is to achieve the primary goal of killing the terrorists and saving the lives of an entire nation. However, permission to violate the right to life of civilians held by terrorists is not an all-encompassing permission. The decision must be subject to the principle of proportionality: the right to harm civilians is a defined, specific and limited right, which must refer to the smallest possible number of people, whose sacrifice in order to save the lives of many others is proportional, and thereby dulls the sense of moral guilt which attaches to the action.

> "... Whether it can be permissible to kill everyone in a group knowing that the group contains both guilty and innocent people. The standard response is to claim that it is permissible provided that killing the guilty alone would be justified and that the killing of the innocent is both unintended and not disproportionate to the good that it to be achieved by killing the guilty".[29]

Terrorism which challenges principles of freedom and democracy threatens and endangers all the nations of the free world, and thereby forces upon us a "regime of necessity" whereby we are compelled to put aside guiding moral principles in favour of a moral duty to protect the lives of the citizens of the free world. The significance of the refusal to concede to this moral shunting is surrender to the brutal evil of terrorism and a life lived in fear of it taking control.

Notwithstanding this, the deontological approach which recognizes rights and refrains from mathematical calculations as to the outcome, will find it difficult to justify the killing of innocent persons - a repudiation of the highest moral obligations, irrespective of the purpose of such action. Philosophical approaches at the heart of which stand rights, dignity and freedom, will apparently support the prohibition against ever killing innocent persons.

Yet, there are still those who believe:

> "For a practical maxim I am much in favor of the slogan 'Never trade a certain evil for a possible good'. However, this does not solve the issue of the principle. If the good is certain and not just possible, is it anything more than dogmatism to assert that it would never be right to bring about this good through evil means?"[30]
> "... one can accept the principle, 'never kill the innocent' without thereby necessarily being an authoritarian or a dogmatic moral fanatic".[31]

There are those who see the laws of war in general as being based upon two principles:

1. Individual persons deserve respect as such.
2. Human suffering ought to be minimized.

The first principle is consistent with the Kantian approach whereas the second one is consistent with the consequential approach. In my opinion, it would be difficult to prove that these are cumulative principles as the moment we recognize a war of self-defence to be a just war which it is a state's duty to fight, then the first principle is significantly undermined. When the purpose is to kill the enemy that is sufficient to negate the enemy's right to be treated with respect. The inevitable conclusion is that the

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28. Richard Wasserstrom, at 321.
29. Jeff McMaHan at 215.
30. Jeffrie G. Murphy, at 357
31. *Id*. 363.

second moral principle has a more dominant effect in determining moral dilemmas. A principle which may assist us to bridge the two approaches to resolving the dilemma - the consequential approach versus the deontological-Kantian approach is the principle of double effect. According to this argument, it is permissible to do an act the consequences of which it is reasonably assumed will be bad (the killing of innocent civilians) upon four conditions:

1. The act itself is good, or at least is not bad, *i.e.*, it serves our needs as a legitimate act of war.
2. The direct effect is acceptable from a moral point of view - the killing of terrorists.
3. The intention of the perpetrator of the act is good, *i.e.*, he only seeks an acceptable outcome (protection of the citizens of the state in whose name he acts); the bad outcome is not one of his objectives, and it is also not a means towards his objectives.
4. The good outcome is sufficient to compensate for causing the bad outcome, and must be justifiable in accordance with the principle of proportionality (more civilians should not be killed than is necessary from a military point of view).

According to this approach, the purpose underlying the act is important. It is possible to defend the killing of civilians who are located in the vicinity of terrorists if the intention is to achieve the good outcome of harming the terrorists.

> "Now if intention is all important - as it is - in determining the goodness or badness of an action, then, on this theory of what intention is, a marvelous way offered itself of making any action lawful. You only had to 'direct your intention' in a suitable way".[32]

Walzer is of the opinion that the third condition in the double effect principle requires modification. In his view only when both good and bad outcomes are the product of a dual intention is it possible to defend the principle of double effect. In other words, on one hand there must be an intention to achieve the "good" while the "bad" is not an objective, and on the other hand where the person performing the act is aware of the bad outcome entailed by his act he must limit it as much as possible.

In my opinion, there is indeed something problematic about a situation where a person declares that he did not intend the bad outcome of his act even though he uses lethal measures whose bad outcome is known in advance. Accordingly, Walzer's view is persuasive - you are aware of the bad of your actions and therefore you must limit it as much as possible. This approach is also compatible with the legal conditions of the law of war. We have seen the duty to give a warning before taking military action. In cases where terrorists are dispersed among the civilian population and our military objective is to harm the terrorists and not the civilians, it would be appropriate to warn the civilians prior to attacking and thereby enable them to take precautionary measures and save their lives. We are subject to a duty to limit harm to innocent civilians within the framework of the war against terror even if it is not possible to avoid such harm absolutely.

In other words, according to the principle of double effect, harm to civilians is not the means for achieving the objective of harming the terrorists (and accordingly this principle is not compatible with the consequential approach), and the harm does not ensue from disregard for the right of the innocent to live (so that this principle does not contradict the Kantian approach). We are talking of a by-product which, by virtue of our recognition of the right to life, we act to limit in so far as possible. We are talking of harm from which we may remove the sense of moral guilt:

> "If we are reasonably sure that we know where they [terrorist organizations] are hiding, then we may possibly target them, even if they are hiding out in an area populated by innocent civilians. In such a case, it is the terrorists who are targeted and not the civilians, and it is the terrorists who are to blame for the deaths of innocent people they hide among".[33]

Notwithstanding that deontological - Kantian approaches will find it difficult to justify the killing of the innocent, there are those who believe it possible to interpret Kant's approach as one which gives central importance not to the outcome of the act but rather to the purpose behind it, a purpose which is compatible with the categorical imperative of Kant:

> "Kant seems to mean that, fundamentally moral goodness is not a matter of maximizing best consequences in the world; rather, it is a matter of: 1) having the proper intention for action, namely, respect for the categorical imperative; and 2) conscientiously making serious efforts to realize this intention through action".[34]

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32. Elizabeth Anscombe, at 295.
33. Darrell Cole, at 98.
34. Brian Orend, *Kant on International Law and Armed Conflict*, 11 CAN. J.L. & JURIS. 329, 333 (1998).

Such an interpretation is very close to the principle of double effect described above. In both, the moral standard for action is determined in accordance with the purpose behind it, however, Kant's approach limits the range of objectives which are legitimate from a moral point of view and confines them to categorical imperatives. Accordingly, an action will be deemed to be morally permissible only if from a universal point of view every rational person would have permitted it and acted accordingly, and in addition it embodies respect for the rational person. The right to self-defence is a right which is universally recognized and accepted and certainly every rational person would act in accordance with this right - in order to realize the value of his life - and would defend himself against one seeking to kill him. There are those who hold the opinion that Kant's categorical imperative does not contradict the theory of a just war based on the right to self-defence, for which Kant himself expressed support:

> "[According to Kant] one may justly kill another human being in self-defence, though one is to be praised if one is able to repel the attacker in such a way as to spare his life. The most relevant conclusion to draw from this passage is that a state, *qua* moral person, would seem to possess quite similar rights to violent response in the case of an armed attack by another state which credibly threatened to seriously injure its body politic".[35]

Yet, Kant's recognition of the need to protect a person's life does not afford moral permission to harm an innocent man who does not threaten that person's life, even if harm to the innocent person is required in order to save the life of the first person or another. At the same time, notwithstanding that harm to the innocent is not moral even in circumstances where a person fully believes that causing harm to the innocent is required in order to save his own life, no punishment should be imposed upon the perpetrator of the harm.

History has shown us that there is no war in which innocent civilians are not injured. Kant certainly was aware of this and accordingly the argument that Kant supported the theory of a just war seems strange. It is even more difficult to explain the positions of those who take the view that Kant would have permitted a response which entails violence and force against a terrorist threat, since as we have seen, it is possible that such a response would involve harm to innocent persons in order to save other innocent lives. Two points may be mentioned which explain why nonetheless it is possible to fight a just war according to Kant:

1. "... while the killing of civilians is not justified (because it is a violation of their human rights), it is nevertheless excusable in times of war, given that it is simply not reasonable to expect a state and its people simply to succumb to an armed invasion".[36]
2. Kant would have supported the doctrine of double effect. In other words, a state is entitled to go to war and even to make use of measures which may injure innocent civilians if, but only if, the war and the measures used are for a just purpose and the injury to the civilians is not a means to that purpose. In such circumstances the blame for the injury to the civilians is placed on the shoulders of those who have breached the rights of the state and who by their acts have caused the injured state to implement its right and duty to defend itself against those violators of rights, by engaging in war against them.[37]

The battle against terrorism is a just battle which a democratic state wages with the intention of striking at terrorists and protecting innocent civilians on both sides. In circumstances in which civilians are nonetheless harmed, it is necessary to examine whether the harm to them has been used by the democracy as a means of injuring the terrorists. According to the Kantian approach this is the moral standard for examining the injury to the innocent. It follows that even the Kantian approach does not necessarily assert that the prohibition on harming these civilians is an absolute prohibition.

There is no doubt that war against an enemy who is interested in destroying every member of the group against which he is fighting - the citizens of the democratic state - even if in order to achieve this goal he directly or indirectly causes the death of the members of the group from amongst whom he himself operates - is a reality which clashes with theory and ideals. In this article I sought to show that this clash does not mean that a commitment towards norms and values is either impossible or other than genuine. The commitment of the democratic state to the primary value of respect for human life with its various components is profound and accordingly it is the state's duty to act in accordance with the proper balance between the moral duties derived from this value, as expressed in the special circumstances of each and every case.

35. Brian Orend at 361.
36. Brian Orend at 372.
37. T. Hill, Jr., *Making exceptions without abandoning the principle: or how a Kantian might think about terrorism in R.G.* Frey & C.W. Morris, eds., VIOLENCE, TERRORISM AND JUSTICE (Cambridge: Cambridge University Press, 1991)196, 220-24.

Human Rights and Israel's Declaration of Independence

Irit Kohn

The guarantee of human rights is a fundamental principle of Israeli society and has been recognized as a keystone of society from the very day the State of Israel came into being. Quite obviously, self-defence is an essential principle of the State of Israel, as it is of any country. Yet, unfortunately, from the days of the founding of the state, we have had to balance these conflicting principles. Our war against terror is nothing new. It is one of the constants of the Jewish presence in the Land of Israel and began with Arab terrorist attacks against innocent civilians long before the birth of the state. As is well known, most of the Arab world has yet to accept our national existence and has been waging wars and employing terrorism in order to try to force us to leave this land and give up our aspirations to sovereignty. Despite this dismal context, from the days of the establishment of the state we have incorporated the protection of human rights into the Declaration of Independence and continued to develop laws and institutions to protect the human rights of people of all religions and races.

A key passage of the Declaration of Independence illustrates this point. The Declaration of Independence of Israel of May 14, 1948 is officially entitled "The Declaration of the Establishment of the State of Israel". It includes the statement of the following goals:

> "... [I]t [the State] will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations. ...".

It is important to comprehend the security situation, which prevailed at the time of the Declaration of Independence, in order to realize the full impact of Israel's commitment to human rights. The commitment to human rights and equality which is embodied in the Declaration of Independence was made in the historic context of years of Arab terrorist attacks against Jewish civilians, the long siege on Jerusalem, and clear indications that the new state was about to be attacked by its Arab neighbours in what was to prove to be a destructive war, which would cost the lives of many of our youths.

One piece at a time since that historic declaration, we have been adding more legislation and our courts have been creating more and more legal precedent in the area of human rights. Here I will refer to only a few of the more interesting laws and judicial decisions, while noting that we still have a long road ahead of us in our quest to bring to fruition the vision of our Declaration of Independence. It is true that not even 54 years have passed since that vision of human rights was espoused by the new state, however, we not only applaud our successes we also realize our failures in this area. We know that the Arab citizens of the State of Israel feel that they have yet to receive completely equal treatment. This is a most painful failure and one which must be addressed even now, while we are coping with constant terrorist

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attacks and the threat of attacks against us by Arab states. This issue cannot be put off until a more peaceful era.

Israel does not have an organized written constitution such as exists in the United States. Instead, it has a series of "Basic Laws". Over the course of time, various Basic Laws have been enacted. This is a type of written constitution, which is in the process of evolution. Three Basic Laws which help to guarantee human rights are 'Basic Law: The Army", enacted in 1976; "Basic Law: Freedom of Occupation", enacted in 1994 and "Basic Law: Human Dignity and Liberty" enacted in 1992. The stated purpose of "Basic Law: Human Dignity and Liberty" is "... to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state". This Basic Law guarantees the protection of life body and personal dignity, property, liberty and privacy. It guarantees freedom of movement, freedom from illegal search and freedom from the "... violation of the confidentiality of conversation, or of the writings or records of a person. ...". Various laws have been enacted to ensure these basic freedoms. Examples include the law prohibiting illegal wiretaps, the laws regulating searches, the protection of privacy law, the laws involving the detention of accused persons prior to trial and the law providing for transparency and the right of the individual to examine the contents of certain data banks. There is a very clear trend in Israel of legislative development in the area of human rights. Even certain technical provisions have been amended in order to protect the individual. For example, in the past it was permitted to detain a suspect for 48 hours before bringing him before a judge. Recently, this was reduced to 24 hours.

Section 5 of "Basic Law: The Army" provides as follows:

> "The power to issue instructions and orders binding in the Army shall be prescribed by virtue of Law".

This section has vast ramifications. It establishes clearly that a grossly unlawful instruction or order is null and void, as there is no power to issue such a grossly unlawful command. This principle exists not only in the "Israeli constitution" as we call our Basic Laws but is taught to all of our soldiers. No soldier can escape individual responsibility for acting under military orders if the order is grossly unlawful. Furthermore, no soldier can be forced to perform any action in conformity to a grossly unlawful command. A soldier is legally obligated to refuse to obey an order which is grossly unlawful. We have a well-established system for dealing with complaints of soldiers who believe that an order is grossly unlawful. Since our Declaration of Independence, other Basic Laws, and various regular laws protect the human rights of individuals of all religions and races, any military order to the contrary is by definition *ultra vires*.

Despite the constant plague of terrorism we have been expanding the rights accorded to criminals, including terrorists. The long standing right to a public trial has been made into a constitutional right. Naturally, matters which must be kept secret in the interest of state security, are not aired publicly, but secrecy is applied in a most limited manner and the due process rights of criminals are observed.

There is no question that our soldiers in Judea, Samaria and Gaza are forced to deal with extremely difficult issues in the area of human rights. Along with their moral and legal obligations toward the non-combatant Palestinian population, the Israeli soldiers hold the life and limb of the Israeli civilian population in their hands, as most of the terrorists come out of these areas.

Complaints are lodged against the military by individuals who claim that they were harmed by soldiers or are about to be harmed by military policy. Israeli and international human rights organizations are also very active in this field and launch complaints against the military. Israel has a very active organization called "Betselem" which investigates and presents evidence of alleged human rights abuses. The system of review of the military includes internal review by the armed forces, military disciplinary courts, and criminal courts. It is important to note that our soldiers are not exempt from the mandates of our criminal law. Unfortunately, evidence against soldiers is not easily obtainable, in so far as they, like any other group, tend to try to protect each other and hesitate to testify against their comrades. The human rights organizations have been instrumental in gathering evidence. At this time, 21 military trials are being prepared or conducted, 8 for looting and theft, 9 for violence against Palestinian civilians and 4 involving shooting incidents.

Additionally, certain issues of the lawfulness of a particular action, policy or tactic of the military are reviewed by the Attorney General after detailed examination by the State Attorney's Office. In addition to all the above safeguards, military decisions and actions, along with many of the decisions and actions of the civilian branches of the government, are subject to the review of the Supreme Court of Israel sitting as a High Court of Justice. Recently, a special department of the Ministry of Justice was established, called the Department for Investigation of Police Misconduct. It has authority to investigate complaints against the Israel Police, border police and the General Security Service (the latter deals with terrorists in many instances). The Chief of Staff of the Armed Forces has ordered the establishment of a special

Armed Forces Headquarters to handle problems at the roadblocks in Judea, Samaria and Gaza - in order to improve the Army's performance as much as is possible, given the security situation. Even with this well developed system of internal controls, trials and reviews by the Attorney General and the Supreme Court, there is no simple solution to the fact that our soldiers face extreme difficulty in striking the proper balance between the protection of human rights of the Palestinians and the protection of the intended victims of terrorist attacks from bodily harm and death.

The recent campaign against the terrorist infrastructure in Jenin, Bethlehem, and other cities and refugee camps, named Operation Defensive Shield, led to a series of petitions to the Supreme Court, sitting as a High Court of Justice. This type of petition is known in Hebrew as "*Bagatz*".

In H.C. 2901/02, decided on April 7 and 15, 2002, the Supreme Court held that the right of a detainee to meet with his attorney is a basic right, but that the particular circumstances surrounding the apprehension of the detainees, *i.e.* acts of warfare against the terrorist infrastructure, necessitated a delay in the exercise of this basic right. The Court balanced the interest of public security and welfare against the basic right of the detainee to consult with his attorney.

On April 8, 2002, the Court decided H.C. 2936/02 and H.C. 2941/02 dealing with Palestinian claims that the IDF in the course of Operation Defensive Shield, was shooting at ambulances and hospitals. The government responded that explosives were being transported in ambulances and wanted terrorists were being harbored in Palestinian hospitals. The government explained that the IDF instructs its soldiers to respect humanitarian principles and allocates great resources and manpower to the provision and coordination of humanitarian aid for the Palestinians. The Court opined that the abuse by the Palestinians of ambulances and hospitals does not, in and of itself, justify any widespread breach of humanitarian regulations. The Court emphasized that all the IDF forces, down to the lone soldier in the field, must be re-addressed with concrete instructions, to abstain from any activity not in accordance with the principles of humanitarian assistance, but that the IDF must be allowed to take into account the prevailing military conditions. Again in H.C. 2117/02, decided on April 28, 2002, the Court dealt with claims of actual incidents of IDF shootings on ambulances. The Court held that medical staff has the right to full protection under international law only when engaged exclusively in humanitarian, medical activities. The Court specified that the IDF's soldiers were to be instructed to warn medical staff prior to taking military action against them, in so far as the military situation permitted. The soldiers in the field are to evaluate every situation individually, weighing the danger anticipated from combatant Palestinians using the medical staff as cover, against the legal and moral obligation to uphold humanitarian principles for the care of the injured and sick.

On April 9, in H.C. 2977/02, the Court decided that the Palestinians do not have a right to a prior hearing before the destruction of a building by the IDF during the course of combat. Buildings, particularly in the Jenin refugee camps were booby trapped and transformed into bunkers from which the IDF was fired upon. While expressing understanding for the necessity of destroying particular buildings, the Court emphasized that every step must be taken, as far as is feasible given the military conditions, to minimize injury to civilians.

On April 14, in H.C. 3114/02, 3115/02 and 3116/02, the Palestinians claimed that innocent civilians had been massacred in the Jenin refugee camp. The Court was petitioned to direct the IDF to refrain from examining, identifying, removing and burying the bodies of Palestinians killed during the battles in the camp. Furthermore, the petitioners requested that those identified as terrorists not be buried in a separate burial ground in the Jordan Valley, but be buried by their families. The respondents vehemently denied the allegations of a massacre and explained that the IDF had conducted house to house searches, instead of aerial bombing, in order to decrease civilian casualties. Twenty-three IDF soldiers and been killed in Jenin and tens of soldiers wounded as a direct result of this emphasis on saving the lives of Palestinian non-combatants. The Court held that the petitioners had not met the burden of proof that a massacre had been perpetrated. The Israeli military action had been mandated by the terrorist activity emanating from the Jenin camp. More than 23 suicide bombers had come from Jenin. Representatives of the Red Cross, the Red Crescent and local Palestinians were to be allowed to participate in the process of locating and identifying the bodies, in order to prevent further slander about an alleged massacre. The Palestinian families were to bury their dead, with no differentiation between civilians and terrorists. The Court stated that the location, removal and burial of corpses are humanitarian activities dictated by Israel's democratic and Jewish values.

All of the *Bagatz* decisions in this area emphasize that the IDF is to be guided by moral, democratic and Jewish values, together with due respect for the principles of international law. These moral, democratic and Jewish values are to be applied without regard to the citizenship, religion or national identity of the person involved. Even during the course of armed combat, these values must be observed, balanced against military realities in the field. The common denominator in all of the decisions is the concept

that civilians must be protected even at the cost of the lives of the Israeli soldiers, but that the right of civilians to protection is not absolute - since the terrorists have intermingled with the civilian Palestinian population, the soldiers in the field must evaluate each individual military scenario to try to strike the proper balance between human rights and military necessity.

We have been following the public debate in the United States about the advisability of using physical and psychological pressure to extract information from detainees who have links to El Queda and who are refusing to provide information. In Israel, the refusal of terrorists to provide information crucial for saving lives has been a very real problem for quite some time.

Israel is a party to the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. On September 9, 1999, an enlarged panel of nine Justices of the Supreme Court, sitting as the High Court of Justice ("*Bagatz*"), ruled that the General Security Service (hereinafter: GSS) has no legal authority to use torture against suspected terrorists, or even employ a greater than usual level of physical force during an interrogation. (H.C. 5100/94, H.C. 4054/95, H.C. 6536/95, H.C. 5188/96, H.C. 7563/97, H.C. 7628/97, H.C. 1043/99, *Public Committee Against Torture in Israel, The Association for Civil Rights in Israel, Hat'm Abu Zayda et al v. The State of Israel, The GSS, et al*.) The Court held that any infringement upon an individual's liberty or dignity, as guaranteed by the Basic Laws, must be sanctioned clearly and specifically by an appropriate statute, passed by the *Knesset* and subject to constitutional review by the Supreme Court. "An individual's liberty is not to be the object of an interrogation - this is a basic liberty under our constitutional regime. There are to be no infringements on this liberty absent statutory provisions which successfully pass constitutional muster." (*Ibid*, p. 13). The Court held that the sole authorization for the GSS to conduct interrogations is to be found in Section 2(1) of the Criminal Procedure [Testimony] Law. This statutory provision governs interrogations by ordinary police officers. Thus, the Court reasoned, there exists a statutory authorization for the GSS to conduct interrogations employing the type of ordinary and limited physical force, which is necessary to accomplish the legitimate purpose of a normal police interrogation. Thus, the Court held that the GSS has no statutory authorization to employ excessive physical or psychological pressure or to treat a person in a cruel, inhuman or degrading manner. "... [T]he individual GSS officer - like any police officer-does not possess the authority to employ physical means which infringe upon a suspect's liberty during the interrogation, unless these means are inherently necessary to the very essence of an interrogation and are both fair and reasonable." (*Ibid*, pp. 25, 26).

The Court went on to hold that authorization for the GSS to use unusual physical force against suspected terrorists must be legislated by the *Knesset* after appropriate public debate, in accordance with the norms of a democratic society. Furthermore, were the *Knesset* to pass such a law, the Supreme Court would review the statute to ensure that the limitations it would impose upon the suspect's liberty are "... befitting the values of the State of Israel", are enacted for a proper purpose, and that the infringement of liberty is no greater than required to meet a legitimate goal, in accordance with Section 8 of the Basic Law: Human Dignity and Liberty.

The Court rejected the State's argument that extraordinary interrogation methods are authorized in cases in which lives can be saved by forcibly extracting crucial information from a suspected terrorist held in detention. This is known as "the ticking bomb" scenario. Section 34(1) of the Penal Law of 1977 provides a "necessity" defence for a GSS investigator who faces criminal indictment for the use of excessive force during an interrogation, conditioned upon an after-the-fact determination that his actions were undertaken for the purpose specified in the said section. Section 34(1) states:

> "A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things, at the requisite timing, and absent alternative means for avoiding the harm".

The Court held that the above section cannot be employed as a specific statutory authorization for the use of extraordinary interrogation methods, even in cases of "ticking bombs". "In other words, general directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not from defences to criminal liability. The principle of "necessity" cannot serve as a basis of authority...

If the state wishes to enable GSS investigators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose." (*Ibid*, pp. 24-25).

The Court expressed concern that its decision would prove injurious to the ability of the GSS to fight terrorism. However, the reality of terrorist attacks would not be allowed to distort the Israeli legal system which is firmly based upon respect for human rights and democratic principles. "This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open to it. Although a

democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties." (*Ibid*, p. 26).

Many Israelis are of the opinion that the decision weighed in too heavily on the side of the human rights of suspected terrorists, unjustifiably limiting the ability of the General Security Service to prevent terrorist attacks. Others agree that a democratic society cannot be forced by savage attacks to alter its fundamental principle of respect for the dignity and liberty of the individual, regardless of whether he holds Israeli citizenship and despite evidence that connects him with the perpetration of heinous crimes against humanity. This issue is still the subject of open debate in our democratic society. A new law entitled the General Security Service Law was enacted in the winter of 2001. Section 7 of the law establishes that one of the functions and goals of the GSS is to prevent and foil any illegal activity aimed at injuring the security of the country, democracy and the country's institutions. Another function of the GSS as defined by Section 7 of the new law is information gathering in furtherance of the performance of its duties. Section 8 of the law specifically authorizes the GSS to interrogate suspects in connection both with the commission of crimes and with their prevention, particularly for the purpose of preventing the illegal activities mentioned above. It is essential to note that the new law does not deal with the methods of interrogation. The law does not grant any type of immunity from criminal prosecution to an investigator who employs torture as a method and he has no recourse other than to rely upon the necessity defence, the same defence that was available to him prior to the enactment of the new law. There are those who argue that the GSS investigators should be granted a statutory immunity from prosecution, and not be forced to rely upon a merely defensive posture in cases of investigations of "ticking bombs".

The issue of the targeted assassinations of terrorists is debated widely today. The Attorney General and the International Law Branch of the Armed Forces view targeted assassinations of terrorists as a method of self-defence. Recently, an Arab member of the *Knesset*, Mr. Baraka and others brought this issue up for review before the Supreme Court which decided, regarding the petition that the issue is not subject to judicial review. It is fair to say that in this area the consensus of Israeli public opinion is that the intended victims of terrorists also have human rights, and they outweigh the rights of terrorists to a fair trial in all cases. Two other *Bagatz* petitions in this area are open and pending before the Supreme Court. In its response to one of the petitions, the State Attorney's office defends targeted assassinations on the basis of Israel's right to self-defence and on the basis of the principles of international law. The basic position of the government is that the principles of international law of warfare apply in the present situation, and not the internal law of a country at peace.

International law grants the right to attack not only soldiers but also civilians who take a direct part in the hostilities, as long as they have not surrendered or otherwise withdrawn from the warfare. Targeted assassinations are employed by Israel only in cases in which there is no alternative means available, under the circumstances, to save human life. For examples, wanted terrorists are detained by the IDF whenever possible, rather than assassinated. The State Attorney's Office asserts that the universally recognized right to self-defence belongs also to the State of Israel and that the principle of self-defence is applicable to the issue of targeted assassinations.

There are those within Israel and abroad who argue that a democratic society will destroy its very foundations if it allows itself to assassinate persons who have perpetrated acts of violence and terror, rather than granting them a trial. Others argue that the targeted assassinations are not a method of punishment without due process of law but rather a legitimate means for the prevention of future crimes by those persons who have demonstrated their ability and intent to attack in the future. The issue is complicated further by the position that in warfare, a completely different set of rules applies. The Supreme Court might decide not to enter this arena, as the State Attorney's Office has presented weighty arguments urging the Court to abstain from deciding the issue of targeted assassinations.

Despite the severe threats which jeopardize our survival as individuals and our survival as a sovereign nation, we have reason to take pride in our democratic system of open public debates, of internal controls in our armed forces and other institutions, of an independent judiciary and review by our Attorney General and by our Supreme Court sitting as the High Court of Justice. We hope that all of these tools of a democratic society will continue to serve us well and allow us to make constant and steady progress towards fulfilling our vision of human rights as set out in the Declaration of Independence and in the Basic Laws.

- For a more detailed look at the Supreme Court decision in HC 3114/02 mentioned in this article - see the column *From the Supreme Court of Israel* at p. 42. - The Editor.

"There was no massacre in Jenin"

A Presentation by the Israel Action Centre

There was no massacre.

That is the simple and dispositive answer to the central question that gave rise to the international outcry which prompted this inquiry by the United Nations. The widespread accusations of massacre - the alleged murder of hundreds, and even thousands, of Palestinians - proved wildly inaccurate. Those baseless assertions were at best an outgrowth of what the great 19th century military theoretician Carl von Clausewitz dubbed "the fog of war" - at worst, they were a bald-faced lie.

The Events Leading up to Operation Defensive Shield

• The Oslo Accords

In 1993, the signing of the Oslo accords on the White House lawn served as a breakthrough in the decades-old Arab-Israeli conflict. It was the year the Oslo accords were signed. At core, those internationally supported agreements represented a formal and unqualified reciprocal commitment to negotiate and never again resort to violence in reaching a peaceful resolution of the conflict.

Simply put, there would be no more war or violence, only talks.

• The Camp David Summit and Taba

The Oslo accords left for last the negotiation of the most sensitive issues: Palestinian refugees, particularly those displaced in 1948; Jerusalem; the Temple Mount; and final borders. These became the subject of intense discussions during the Summer of 2000.

No agreement, in principle or otherwise, was reached - despite the sustained negotiating intensity and pressure, especially during the 15-day Camp David summit in July 2000. The Israelis presented detailed plans designed to resolve all outstanding issues, which were flatly rejected by the Palestinians. In December in Taba, Egypt, the Americans presented what they termed a compromise proposal, which the Israelis fundamentally accepted, but the Palestinians did not. Ultimately, Israel offered to transfer to the PA 96%-97% of the Territories (including a swap of 2% from pre-1967 Israel territory) and East Jerusalem, and to provide a partial accommodation and meaningful compensation for the refugees. Arafat did not offer a counter proposal.

• The Uprising Begins

What has become to be known as the *Al Aqsa intifada* was launched by Arafat shortly after his rejection of the Camp David proposals and the Taba meetings in December.

• Israel's Response to the Escalating Violence

In order to understand the evolution of Israel's reactions during the 20 months between September 2000 and May 2002, it is imperative to set the context of each stage of the IDF's actions. A twenty-month wave of Palestinian terror began on 29 September 2000. The attacks against Israel and its population, including Arab Israelis, were unprecedented in magnitude and savagery. The majority of the terror acts occurred after leading *Hamas*, *Islamic Jihad* and other terrorists were released from PA prisons. Suicide bombers actively sought out Israeli population centers, among them Jerusalem, Tel Aviv, Netanya and Hadera. Schools, restaurants, nightclubs, shopping malls, main streets and other crowded public locations were subjected to suicide bombings, shootings, rocket attacks and mortar fire.

Comparing the number of attacks against Israelis by Palestinians before and after the *Al Aqsa intifada* provides perspective on the virulence of those 20 months of terror. During the seven years (1993-2000) preceding this wave of Palestinian violence, there was a total of 793 recorded shooting incidents against Israeli civilians and IDF personnel; in the twenty months between 29 September 2000 and 6 May 2002, there were over 9,100 such shootings and a total of 12,830 terror attacks. In all, between September 2000 and 6 May 2002, 319 Israeli civilians and 155 servicemen were killed, 2,707

These are highlights from a special study conducted by the international law team of the Israel Action Center (IAC) headed by Chaim T. Kiffel. The 55 page legal analysis entitled "*Jenin and Other Palestinian Cities: Operation Defensive Shield*" was submitted by the IAC to the Secretary General of the UN on 25 July 2002 following the UN General Assembly resolution of 7 May 2002 requesting the Secretary General to report on recent events that had taken place in Jenin and other Palestinian cities.

civilians and 1,144 servicemen were wounded.

In the early months, Israel's reaction was gradual and measured in the hopes that Arafat would stand by his word, taking action to prevent terror. As it became increasingly clear that Arafat not only was not working to stop the violence but was effectively propagating it, Israel had no choice but to defend its people.

By week three, the violence became gruesome and lethal. On 12 October 2000, two IDF reservists were brutally lynched by a Ramallah mob after taking a wrong turn on the way to their base. The body of one of the soldiers was tied to a car and dragged through the streets. The grizzly murders - and the masses of Palestinians literally reveling in the blood of the victims - were captured on film by an Italian crew, who risked their lives to preserve the film in the face of Palestinian threats. These murders were followed by shooting attacks, missile launches, mortar attacks, car bombs - and eventually what became the cornerstone of the Palestinian murders, the suicide bombings. Palestinians also ransacked and desecrated at least two religious sites: Joseph's tomb in Nablus and the ancient synagogue in Jericho. Despite ten months of unabated violence, Israel's response between December 2000 and until June 2001 remained effectively symbolic bombing of empty buildings typically serving the PA security apparatus - and always only after providing fair warning to the occupants directing them to evacuate.

The next turning point came on 2 June 2001, when a suicide murderer struck the Dolphinarium Disco in Tel Aviv, leaving 21 murdered and 106 injured - almost all teenagers. Still, Israel did not declare an all-out war against the terror or invade the PA-controlled territories, but restrained its response to aerial bombing, again of vacated buildings after providing advance warning to inhabitants. The US then intensified its involvement, dispatching CIA Director George Tenet to the region. Shortly thereafter, on 13 June, the Israelis and the Palestinians accepted a security document brokered by Tenet under which both sides committed themselves to adhere to an immediate cease-fire. Nonetheless, there was once again no unequivocal public call by the Palestinian leadership to end the violence and terror attacks, with predictable results.

Inevitably, attacks intensified, culminating in the grisly 9 August 2001 suicide bombing in Sbarro, a Jerusalem pizzeria, killing 15 and wounding 90. Notably, the murderer came from Jenin. At the same time, another flash point, the southern Jerusalem neighborhood of Gilo, was sustaining intensifying shooting attacks. Since the outbreak of the cycle of Palestinian violence, the *Tanzim* - a branch of Arafat's *Fatah* group - used the neighboring Christian-Arab town of Beit Jala to launch shooting and mortar bomb attacks against the residents of Gilo. By its provocative tactics, the *Tanzim* gunmen sought to draw Israeli fire against Christian households and religious sites in order to incite the population and bring international condemnation to Israel's defensive actions.

Less than two months later, Israeli cabinet minister Rehavam Ze'evi was murdered in a Jerusalem hotel room on 17 October 2001, after which the Israeli government decided again to enter several major Palestinian towns in "Area A" in order to fight the terrorists and their dispatchers. The terror attacks continued unabated, including the twin massive suicide murders killing 25 civilians within a 12-hour period in early December 2001 in Haifa and Jerusalem. January witnessed the capture of the now infamous *Karine A* cargo ship, loaded with 50 tons of deadly and illegal explosives - inextricably linking the PA to the terror operations. At the end of the month, Pinhas Tokatli, aged 81, was killed and more than one hundred people were injured when Wafa Idris exploded a bomb attached to herself in Jaffa Street, Jerusalem, an area of shops and restaurants. Wafa Idris was the first female Palestinian "suicide bomber". *Notably, Idris served as a medical secretary with the Palestinian Red Crescent, and reportedly used that organization as a cover to enable her entry into central Israel with the explosives she utilized to commit murder, having been sent by Mohammed Hababa and Munzar Noor, both of whom worked for the Red Crescent*.

On 14 March, the US special envoy Gen. Anthony Zinni arrived in the region in an attempt to arrange a cease fire between Israel and the PA. Five days later, the IDF withdrew from all parts of "Area A" it had occupied previously, in an attempt to assist Gen. Zinni's mission.

The Palestinian reaction was an intensification of the murderous terrorist attacks against Israel. During the course of March, over 800 Palestinian terrorist attacks were recorded against Israeli soldiers and civilians. Two of the most horrific of these attacks occurred at the end of March. The first was the Passover eve massacre on 27 March, when a Palestinian suicide bomber entered a Netanya hotel and murdered 29 people in the midst of their observance of the Jewish holiday at the traditional *Seder* meal. The second was the March 31 Palestinian suicide bombing of a Haifa restaurant that left 15 dead. With these horrific attacks, the month of March became the bloodiest

month since the outbreak of the current round of ongoing Palestinian violence. In that month alone, 130 Israeli children, women and men were killed and 687 were wounded.

• The PA's Role in the Palestinian Violence

Based on substantial intelligence information, including abundant documents captured by the Israelis from the PA headquarters during its military operations and the extensive weapons cache sought to be smuggled into the PA on the *Karine A*, the Israeli government (and more recently the US government) has concluded that the PA played a direct role in orchestrating, directing, encouraging and (at a minimum) ignoring the attacks perpetrated against civilians - all the while seeking to create an atmosphere of "plausible deniability".

The general pattern has been simple and consistent: to the Western media, Arafat and the PA say all the "right stuff"; to their people, in Arabic, their tone is more frank. Arafat himself was brutally blunt when addressing his people in their mother tongue. In his own words (in Arabic):

> "Kill a settler every day. Shoot at settlers everywhere.
>
> Do not pay attention to what I say to the media, the television or public appearances. Pay attention only to the written instructions that you receive from me."

The PA fostered an atmosphere of incitement, especially of youngsters, who were urged to become "martyrs" and suicide bombers. The PA put out sickening, mesmeric television appeals glorifying the sacrifice of children who were urged to come forward and blow themselves up, and whose families were offered and paid blood money for the terrorist deaths of their brainwashed children.

Israel Embarks on Operation Defensive Shield

In light of the PA's utter refusal to act at all against the ongoing terrorist attacks, and indeed the PA's active participation in aiding and abetting these attacks, the Government of Israel decided to take the necessary defensive steps to protect its own population to halt the terrorist attacks. The Government of Israel declared PLO chairman Arafat an "enemy" and instructed the IDF to enter the main Palestinian cities in "Area A" to locate and disable the Palestinian terror apparatus - using force, as necessary.

On the evening between 28 and 29 March 2002, a large IDF force deployed in and around the Palestinian city of Ramallah, surrounding the "*Moukata*," or Arafat's office compound in the city. In the first few days of the Ramallah operations, the IDF apprehended and detained over 500 Palestinian suspects. While IDF units searched the "*Moukata*" and other locations in Ramallah, large arms caches were uncovered, including large numbers of assault rifles, rocket propelled grenades, ammunition and other weaponry. Additionally, a large number of counterfeit Israeli New Shekel notes in 100 and 200 shekel denominations were uncovered, along with plates for the counterfeiting of Israeli currency bills and coins.

From the perspective of the IDF Operation Defensive Shield produced positive and tangible results. Large amounts of weapons and explosive charges that included tens of bombs and explosive belts and hundreds of kilograms of different explosives were found. In addition, during the operation some 5,000 Palestinians, including 2,900 wanted persons, were arrested and interrogated. Documents linking the PA and its leader were discovered, proving their connection to the planning, financing, and directing of terror attacks. In short, the IDF demonstrated that it is possible to fight terror. The Palestinian terror was dealt a severe - albeit not decisive - blow, and its capabilities were substantially diminished.

The IDF Entry into Jenin

• What is Jenin?

Jenin comprises a city and a refugee camp. The city has 37,000 residents and comprises 4,500 acres. The camp, which is administered by the United Nations Relief and Works Agency, has existed since 1953; 13,055 registered refugees live in a square whose sides are about 600 meters long (about 113 acres). Significantly, the camp has about 1,900 buildings.

Even by the standards of Palestinian refugee camps, Jenin is gruesomely special. Jenin was riddled with Palestinian fighters ready and armed for suicide missions. Since the start of the *Al Aqsa intifada* in September 2000, the camp's activists, drawn from the Al-Aqsa Martyrs Brigades, *Islamic Jihad* and *Hamas*, have orchestrated at least 28 suicide attacks on Israeli targets, killing more than 60, and wounding nearly 1,000. An internal document of Arafat's *Fatah* organization, written in September 2001 and captured by the Israelis during a recent sweep, characterized the camp's people as "ready for self-sacrifice with all their means . . . . It is not strange that Jenin has been termed the capital of suicide attackers."

In February 2002, Israeli forces entered Jenin twice, following a series of Palestinian terror attacks in Israel (including an attack on a young girl's *Bat Mitzvah* celebration). As a result of the operation, Israel uncovered illegal arms caches, bomb factories, and a plant

manufacturing the new Kassam-2 rocket, designed to reach Israeli population centers from the West Bank and Gaza.

Against this backdrop, and in direct response to the Passover murders, the Israeli government was constrained to use military force in dismantling the terror infrastructure centered in Jenin. The fierceness of the ensuing battle served only to confirm Jenin's significance to the Palestinian terror organizations and the degree to which that city had become saturated with militant fighters.

- **What Happened in Jenin?**

The simple truth was this: There was a battle in Jenin. It was real urban warfare, as a modern, well-equipped army met an armed and prepared group of guerrilla fighters intimately familiar with the local terrain.

In February 2002, Israeli soldiers had twice gone into Jenin. Arriving each time along a single route and with limited force, they had encountered heavy resistance and departed quickly. This time the IDF planned to send in troops from three directions - 1,000 troops in all. The force would include units of navy seals, tanks, engineers to handle the roadside bombs that military intelligence predicted would line the alleys of the camp, and heavily armored bulldozers to carve paths for tanks. The army ruled out an air attack, to avoid mass civilian casualties.

The Palestinian fighters had made their own preparations. Booby traps had been laid in the streets of both the camp and the town, ready to be triggered if an Israeli foot or vehicle snagged a tripwire. Some of the bombs were huge - as much as 110 KGs of explosives. A core group of terrorists took up positions in the refugee camp - augmented by gunmen from the PA security forces. Well in advance, they fortified the camp, using dozens of explosive devices in waste containers and the like, and preparing other obstacles, such as downed electricity poles. Thousands of smaller bombs and booby-traps were scattered in streets and (populated) houses throughout the "fortified" area.

On Day 2 of the battle, when the town had been secured but the fight in the camp was just beginning, a huge Caterpillar D-9 bulldozer rolled along a three-quarter-mile stretch of the main street to clear booby traps. An Israeli engineering-corps officer logged 124 separate explosions set off by the vehicle. In the camp, the explosive charges were even more densely packed, and tunnels had been dug between houses so that Palestinian fighters could move around without exposing themselves on the street. Early on, the terrorists fell back to one area - the Hawashin neighborhood - while other areas were untouched by the fighting. Much of the population fled before fighting started, but some were held by the fighters. Few stayed in the battle zone after April 10. That left about 1,300 people inside the camp. According to leaders of *Islamic Jihad*, around 100 of those left were armed fighters.

The battle took shape in the environment that soldiers like least, in and around pinched alleys and houses, with ample hiding places and sniper positions. Inevitably, civilians were caught in the fray.

The Israelis offered - as they did to large degree of success in virtually every other Palestinian city they entered - the Palestinians in Jenin safe passage if they surrendered. The army gave clear warnings to all occupants, civilians and fighters alike, before entering any house. The Israelis also were said to have used camp residents to knock on doors to persuade people to come out and surrender. Unlike in the other Palestinian cities, however, the terrorists in Jenin had booby-trapped their houses and fought fiercely in their determination to make a deadly last stand.

Three days into the operation, as of 6 April, the Palestinians were still dug in. The Israelis had already lost seven men, but as they advanced, the Palestinian defenders retreated to the Hawashin district at the camp's center, where their defenses were strongest. The Israeli Foreign Office described the key events of that day as follows:

> "IDF soldiers are approached by five Palestinians in the Jenin refugee camp. The Israeli soldiers call on the Palestinians to stop. When they do not heed this call the soldiers open fire on the group, according to the regulations for arresting suspects. One of the Palestinians detonates an explosive belt he is wearing. The terrorist and two other Palestinians who are with him are killed in the explosion. Two other Palestinians are apprehended and brought in for questioning by Israeli security forces."

The Palestinian casualties were terrorist activists. Cobra attack helicopters then began to pound rooftop Palestinian positions. But the Israeli's most effective weapon was unconventional: the huge, armored D-9 bulldozer, over six meters tall and weighing more than 50 tons; its shovel can crush a car with a single blow. Eventually, a dozen of them went into action, clearing paths for the tanks and detonating booby traps.

As might be expected in light of its strategic decision to put its forces at risk in order to reduce Palestinian casualties, the

IDF also suffered substantial losses. On Day 7, a platoon was ambushed. Gunmen fired at the Israelis from a building above an alley. Nine men caught in the initial ambush died, as did four of their would-be rescuers. A few hours later, a Golani Brigade soldier was shot on the edge of the camp.

With 14 dead, Day 7 became the Israeli army's worst day of combat casualties since the Lebanon war ended in 1985. But even then, the Israelis did not call in an aerial assault that would have killed far more Palestinians while protecting Israelis. Instead they sent in bulldozers, which demolished homes and created the ugly photos carried by the press, but also carried greater risk of Israeli casualties. After eight days of fighting, 23 Israeli soldiers were dead, making Jenin among Israel's bloodiest military operations since 1973.

The D-9s rumbled farther into the heart of the camp, flattening an area 200 meters square; Human Rights Watch reports that 140 buildings were leveled, and more than 200 were severely damaged. The IDF states that 130 buildings were leveled - of the 1,900 that initially stood in the camp. As a result, on Day 9, 37 gunmen surrendered in Hawashin, the center of the camp.

The refugee camp comprises only about 20% of Jenin proper. The area in which building demolition occurred was roughly the size of a single city block, which is less than 10% of the total refugee camp area within Jenin and less than 1% of the total area of Jenin. Indeed, within that section only selected buildings were destroyed, as necessary to neutralize the fighters.

In summary, scores of well-armed Palestinians were ready when the Israelis moved in on the morning of 3 April. They had burrowed tunnels, booby-trapped doors and set up snipers. Palestinian militants also placed the civilians of the camp, including children and women, directly and deliberately in harm's way as human shields. Homes became their bunkers.

The IDF met fierce resistance every step of the way from the Palestinian gunmen hunkered down in narrow alleys, and from the master bomb-makers in the camp, who rigged up an elaborate system of tripwires all over the camp, with exploding houses, sewage covers, and even trees. They also handed out belts of explosives to would-be suicide bombers - Israel's Chief of Staff, Shaul Mofaz, said that five Palestinians, including a woman, had blown themselves up while pretending to surrender to Israeli forces.

Jenin wasn't a crime. It was another tragically bloody battle in a war started by the Palestinians 21 months ago.

The most impressive evidence of what occurred, not surprisingly, comes from the remarkably frank boasting by the Palestinians themselves - all as reported in the Arab-language media. The media quote an impressive number of leading terrorist commandos speaking, during and immediately after the fighting, about what exactly went on.

None of the survivors of those terrible days in April spoke unprompted of a massacre. Most saw it as a heroic battle. One fighter from the Iranian-backed *Islamic Jihad* said: "Israel defeated all the Arab armies in six days in the 1967 war. We fought for nine days and gave up only when our ammunition ran out."

Palestinian gunmen described the fighting to the Arab press. They openly bragged about mining roads, setting thousands of explosive devices to booby-trap houses, and having "children stationed in the houses with explosive belts at their sides." Captive senior operative of *Islamic Jihad*, Thaabat Mardawi, was excited by Israel's decision not to bomb out the 100 Palestinian fighters he said were defending the camp. "It was like hunting. The Israelis knew that any soldier that went into the camp like that was going to get killed." The fighters, he said, used guns and locally made bombs and booby traps. "There were different sizes, big ones for tanks, a few dozen of those, and others the size of a water bottle. Anti-personnel bombs, maybe 1,000 maybe 2,000 spread out throughout the camp." This made for "a very hard fight. We fought at close quarters, sometimes just a matter of a few meters in between us. Sometimes even in the same house."

What of the "civilians" - the women and children? Those that stayed took an active role in the fighting. Young children used to scout, carry explosives and throw small "*kwa*" devices (improvised pipe bombs). Several accounts made clear that Palestinians themselves were eagerly placing "civilians" in harm's way. The *Islamic Jihad* commander in the Jenin refugee camp Abu Jandal had this to say:

> "Believe me, there are children stationed in the houses with explosive belts at their sides . . . . Today, one of the children came to me with his school bag. I asked him what he wanted, and he replied, 'Instead of books, I want an explosive device, in order to attack.'"

Women were also active participants, along with the children. *Al-Sharq Al-Awsat* reported that in Jenin, a Palestinian woman named Ilham Ali Dasouqi had blown herself up among Israeli soldiers, killing two and wounding six.

This strategy also found expression in

the refusal of civilians to evacuate, when the Israeli soldiers directed them to do so for their own safety. Palestinian fighters confirmed their pride in their successful efforts to "persuade" civilian resistance against evacuation. On April 10, *Islamic Jihad's* website announced that its top man in Jenin, Muhammad Tawalbe, before blowing himself up inside his own home on 6 April as Israeli commandos moved to arrest him, had acted to prevent Palestinian civilians from fleeing the camp.

In the end what defeated the Palestinian fighters was the armored bulldozer. Israel concluded that the houses were so heavily booby-trapped that no sapper could neutralize the explosives without being killed. Before the houses were destroyed, the Israelis used loudspeakers to warn anyone inside to leave.

In short, from the mouths of the Palestinians themselves (in their mother tongue), we learn that: (1) those Palestinians who remained in the Jenin camp did so intentionally for the purpose of battling - with guns, explosives, and booby-traps - the Israeli troops; (2) civilians were offered (indeed, directed) to leave to avoid casualties and almost all did, those who stayed chose to do so, principally to join the fighting or at least to support the Palestinian side in battle; (3) civilians who complied with IDF directives and stayed away from the fighting were left unharmed and treated fairly; (4) the actual fighting by the Palestinians was fierce and determined, inflicting substantial casualties on the IDF; (5) Palestinian fighters deliberately located themselves among civilians and placed civilians in harm's way thus making it extremely difficult for the IDF to isolate civilians from the battles; and (6) Palestinian property - homes - were destroyed only as a necessary last resort to bring the fighting to an end, the choice having been made in an effort to limit potential civilian casualties.

Humanitarian Aid During the Military Campaign

Once the wild allegation of "massacre" was proven a lie, much of the inquiry became diverted to questions about the supply of humanitarian aid, particularly the accessibility by various humanitarian organizations, such as the International Committee of the Red Cross (ICRC) and the Palestinian Red Crescent (PRC). Most of the accusations in this regard are contained in reports prepared by Amnesty International and Human Rights Watch, and in various comments made by UN representatives such as Peter Hanson; for example:

Amnesty International: "The Israeli invasions of the past six weeks have seen an unprecedented attack on medical personnel. The IDF's consistent fire on ambulances traveling to the injured halted ambulances for days at a time."

Peter Hanson (Commissioner General of UNWRA in a teleconference with journalists): "There are dead people in the camps and elsewhere who have not been buried until now. Would you appeal to the religious leadership of the world to exert pressure on Israel to allow at least the dead to be buried in decency?"

Hanson: "Yes I think it is particularly appalling that religious observance in connection with death and burial have been so grossly violated. I spoke to a family in a camp recently where they had to make the burial in their own little courtyard within their shelter. These are conditions which remind me of the worst days in Angola where people in besieged cities had to bury their dead in the small piece of land still available."

On 7 April, Hanson continued to accuse and condemn. In his hyperbolic words:

"The Israeli Defense Force has made a hellish battleground among the civilians in the Balata and Jenin refugee camps. We are getting reports of pure horror - that helicopters are strafing civilian residential areas; that systematic shelling by tanks has created hundreds of wounded; that bulldozers are razing refugee homes to the ground and that food and medicine will soon run out. . . ."

Not to be outdone, the following statement was issued in a *UN Press Release* dated 11 April 2002, by the heads of the UN Office for the Coordination of Humanitarian Affairs; the UN Development Programme, the UN Population Fund; the UN Children's Fund; the UN High Commissioner for Refugees; the World Food Programme; the World Health Organization; and the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA): "This is a humanitarian crisis without precedent in its destructive impact on the Palestinian people and their institutions." *Terje Roed-Larson, UN Special Coordinator to the Middle East*, echoed these sentiments the next day, calling the Israeli actions illegitimate and morally repugnant: "Combating terrorism does not give a blank check to kill civilians. However just the cause is, there are illegitimate means, and the means that have been used here are illegitimate and morally repugnant."

Analysis

• *The Israeli Military Incursion Was a Proportionate and Justified Response to Organized Palestinian Terror* - Israel had suffered through 20 months of unabated organized terror against its civilians, and all means short of a military incursion - including incessant pleas and demands

from the entire international community to the PA to restrain the terror activities - failed. Logic, morality and the fundamental duties of government all compel the conclusion that Israel was justified in undertaking a military response to eradicate these threats to its citizens.

• *The Military Incursion Was a Necessary and Appropriate Response to the PA's Blatant Violations of the Oslo Accords* - Terror groups roamed the areas under PA control freely; illegal arms were smuggled in to the Territories; those who committed terror attacks were not detained, tried or imprisoned; incitement - even by official media arms of the PA - was rampant; violence, suicide murders and attacks against civilians were glorified as holy acts of martyrdom.

• *The Military Campaign Was a Legitimate Response to Respond to the Scourge of Terrorist Acts Against Israel Being Condoned by the Palestinian Authority* - The nations of the world uniformly have reaffirmed their "unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed." UNSCR 1377 (12 November 2001). Equally clear, "the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations."

Where terror persists, each State retains "the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001), [and] . . . the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts." UNSCR 1373 (28 September 2001).

Acting as a sovereign with jurisdiction over designated areas in the Territories, the PA had "the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts." *Ibid.*

The PA's violations of these provisions could hardly be more blatant and unabated. Having sought unsuccessfully for over 20 months to resolve these violations through less drastic measures, Israel was duty-bound to undertake the painful military steps it did.

• *The IDF Conducted Itself in Conformity with Internationally Recognized Standards and Conventions in Executing Its Military Campaign* - The plain facts are the IDF engaged in hand-to-hand, door-to-door combat, in an intensely built-up shantytown, among dozens of houses booby-trapped by Palestinian fighters, yielding a minimal number of civilian casualties. That incredible result testifies to the extraordinary scrupulousness of the Israeli army, which sacrificed 23 soldiers in battle, precisely so as to spare Palestinian civilians casualties that inevitably would be inflicted by massive aerial bombardment or artillery attacks.

• *Civilian Casualties*: Of significance here were the insidious and pervasive actions by the Palestinian fighters to hide among civilians, intentionally hiding among civilians in an effort to shield themselves and their military activities. All of these factors impacted the ability of the IDF to protect civilians, and each themselves constituted flagrant violations of international law by the Palestinian fighters.

Article 51(7) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War provides:

> "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."

The use of bulldozers was based on a decision made to minimize civilian casualties:

> "When the use of infantry is no longer possible, the use of bulldozers is preferable to other alternatives, such as aerial bombardment, artillery barrage or the use of flamethrowers. The decision to use bulldozers in the final hours of the battle stemmed from the IDF's preference to cause reparable structural damage to buildings - rather than irreparable physical damage to individuals."

This approach was perfectly consistent with international law. Article 53 of the above Geneva Convention:

> "[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State,

> or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

• *Humanitarian Aid*: Much has been said of the IDF's impeding of access to the Jenin camp by humanitarian aid organizations. In fact, the IDF played an active role in facilitating humanitarian aid and medical relief, throughout the Territories. Overall, coordination among the various entities was good, particularly considering all the circumstances. There were two special problems with the Jenin camp:

(1) The only entry to the camp from the city was heavily booby-trapped and impassable. It was not until after the Palestinian fighters were subdued and defeated that the IDF engineers were in a position to neutralize the mines and explosives on the road. These circumstances essentially prevented the entry of non-military vehicles into the camp until after the fighting subsided.

(2) The Palestinians committed repeated instances of "perfidy" by using UN insignia and Red Crescent ambulances to transport arms and explosives in the Territories. The IDF in fact filmed at least one instance where an explosives belt used by suicide bombers was discovered hidden in an ambulance stretcher and later detonated. Likewise, one of the more celebrated suicide bombers, Wafa Idris, used the cover of her work for the Red Crescent as the means for gaining entry to Israel with her explosives. These incidents compelled the IDF to require advance coordination with the various humanitarian organizations to permit entry of all such vehicles into Jenin, and it required the IDF to carefully search all vehicles and their contents before any were allowed to pass.

The IDF conduct conformed to the international law. Article 19 of the above Geneva Convention provides: "The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy."

Article 59 specifically requires that parties allow "the free passage" of "consignments of foodstuffs, medical supplies and clothing" undertaken "by impartial humanitarian organizations such as the International Committee of the Red Cross," but confers upon the party being asked to allow such passage "the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power."

Conclusion

The hysterical accusations of massacre were never based on fact. Shortly after Israel withdrew its forces and neutralized the Palestinian booby-traps so as to enable outsider observers to enter the camp, even its detractors were compelled to agree:

• *"Jenin Camp Is a Scene of Devastation But Yields No Evidence of a Massacre."* (Headline, front page, **The Washington Post**, April 16);

• *"There is simply no evidence of a massacre."* (Peter Bouckaert, senior researcher, **Human Rights Watch**, Jenin, Jerusalem Post, April 28);

• *"Holley told Agence France-Presse that he did not see any evidence of a massacre. The Israeli army was fighting against some desperate [Palestinian] fighters here."* (**Agence France-Presse**, quoting Maj. David Holley, British military adviser to Amnesty International, April 28);

• *"Palestinian Authority allegations appear to be crumbling under the weight of eyewitness accounts from Palestinian fighters who participated in the battle and camp residents who remained in their homes until the final hours of the fighting. . . . All said they were allowed to surrender or evacuate."* (**Boston Globe**, April 29);

• *"A Time investigation concludes that there was no wanton massacre in Jenin, no deliberate slaughter of Palestinians by Israeli soldiers. . . . No matter whose figures one accepts, there was no massacre, concludes Amnesty's Holley." "That said, Jenin was awful; all wars are."* (**Time Magazine**, The Battle of Jenin, 5 May 2002);

The U.N. leadership in the region is symbolic of where that bureaucracy's sympathies lie. The UNRWA Commissioner General, Peter Hanson, described the recent battle of Jenin as "wholesale obliteration," a "human catastrophe that has few parallels in human history with bodies piled up in mass graves," with some 300 to 400 Palestinians killed. He told CNN, "I had, first of all, hoped the horror stories coming out were exaggerations, as you often hear in this part of the world, but they were all too true."

If the UN wishes to defuse regional tensions and signal that terrorism is not acceptable, then there must be no equivocation. Perhaps the UN can be forgiven for not being aware that UN-funded refugee camps housed arms factories. But in a Middle East where perception is more important than reality, the U.N.'s silence is deafening and its moral equivalency is interpreted as a green light for terror. The main casualty is UN credibility.

The Use of Embryonic Stem Cells for Therapeutic Research

Special Report

It is the current view of the biomedical scientific community that human tissue can be developed from human embryonic stem cells. A variety of research projects are presently targeted to obtaining knowledge regarding the processes of differentiation involved in the development of cells and tissues from embryonic stem cells.

The scientific community expresses hope that, in the future, it will be possible to make therapeutic use of this knowledge by using replacement tissues to eliminate tissue defects.

From a normative perspective, embryonic stem cells research is supported by the basic principle of freedom of science and research. All the more so as the objective of such research is to search for potential new therapies for curing disease, thus protecting life and improving health.

At the same time, however, the very use, and inevitable destruction, of human embryos for research purposes is a matter of socio-moral controversy, since views differ as to the extent of protection to which human life is entitled during early embryonic development.

Human dignity and protection of life are cardinal values of our normative order, but to what extent should they apply to an embryo in its earliest stages of development?

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Why is this an Issue?

There is at present a considerable body of researchers who wish to engage in research on a type of human cell known as the stem cell. This research, they argue, will be immeasurably beneficial since it could lead to the development of transplantable tissues for use in the treatment of a wide range of human illnesses that are currently considered difficult or impossible to treat. However, the stem cells in which the researchers are particularly interested are derived from the human embryo, and this gives rise to the question: Is it ethically acceptable to extract cells from a human embryo prior to its implantation *in utero* (thereby ending its potential development) in order to cultivate and study these cells in the laboratory?

Ethical Debate: The Status of the Embryo

The moral legitimacy of performing research on the human embryo depends, in large measure, on the status that one attributes to the embryo. Although there are other considerations that bear on the moral question - such as the modalities of parental consent in embryo donation - the issue of how we define and categorize the embryo at its different developmental stages is crucial to the question of what we can do with it. If the embryo is a human being (or person) then our treatment of it is limited to what we are allowed to do to other human beings. If, by contrast, it is no more

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than a collection of human cells, then there are far fewer restraints on our handling of it. In the area of stem cell research, much of the moral debate in various countries has focused on the question of just what the embryo is, in particular at the pre-implantation stage.

It is clear that the embryo, even at its earlier stages of development, has a unique status in biological terms. Unlike any other cluster of living cells, this cluster has the capacity to develop into a functioning complex organism. This difference may be described as the embryo's potential - the potential to become a fully developed human being. That is, of course, only a biological fact, but it is a biological fact that has moral implications. Insofar as our moral notions depend upon the valuing of human life, then the human embryo demands respect as being causally and continuously related to human beings who deserve the utmost respect and have human rights. But how far should this respect go when considering the human embryo? Many things in nature are respected but are still permitted to be used by humankind for its benefit. Therefore, the real issue is whether embryos can be accorded full membership of the moral community to which we exclusively admit human persons and human persons alone. At what point does this full membership begin when we consider embryonic and fetal human development?

Arguments about whether or not the embryo can be considered a person have been debated in different cultural, philosophical and religious communities and are marked by a failure to reach common agreement. In one view, personhood begins with the fertilization of the ovum by the sperm [this is mainly the view of Catholics and many other Christians]. From that moment on, the admittedly primitive organism has an identity that will link it continuously to the infant, to the child, and later to the adult human being it will become. To end the life of the embryo, then, amounts to an ending of the future life of the infant and, indeed, of the child and the adult.

In the view of others, embryos are entitled to respect but would not enjoy the full personhood enjoyed by persons. It is considered that the human status is acquired at progressive stages during pregnancy and is fully achieved at birth [this is in particular the Jewish view]. From a biological standpoint, individuality is not realized at fertilization because one embryo can become two twins. Hence, individual status could be attributed to the embryo only after the day in its early development when division into normal twins is no longer possible (up to 13 days after fertilization). According to some views, ordinary personhood rests on certain conditions that correlate with properties of the human brain, in particular cognitive and emotional infrastructures. Hence, personhood would start when significant parts of that infrastructure form in the fetal brain during pregnancy (for some this may be the third trimester of pregnancy). Accordingly, a younger embryo should be treated with appropriate respect but not as a person. The older it is, the stronger should be the compelling reasons for ending its life (such as a severe threat to the mother's health).

A major area of debate is the "potentiality" of the embryo. Some argue that the embryo has the potential to become a person even if it is not yet a person. For this reason, the defenders of the protected embryo status argue that it is wrong to do anything to the embryo that will prevent it from fulfilling this potential. On the other hand, one may argue that the potential to become a human being does not endow the developing embryo with the status of a human being. Ova and sperm are components of the zygote that later becomes a fetus, but we do not accord fetal status to sperm; why, then, accord human being status to an embryo? Moreover, the potential of an embryo to develop into a fetus and a newborn child depends on natural processes that are not one hundred percent successful (for example, in nature, probably only about half of the fertilized embryos result in pregnancy). Therefore, not every embryo has the potential to become a human being.

In the case of *in vitro* fertilization (IVF), the concept of embryo potential is further complicated since direct medical intervention is needed for the embryo's implantation *in utero*. The rate of implantation is still low, and only about one-third of IVF embryos develop into implantation-competent blastocysts with the normal chromosome structure. There is also a limit to the number of embryos implanted at one time in order to avoid multiple pregnancies. As a result, a fraction of IVF embryos that will not be implanted in a uterus - for medical reasons or because the parents decide against implantation of that additional embryo - has no potential to develop into a human being.

Religious Views on the Use of ES Cells for Therapeutic Research

• The Jewish Perspective

Jewish Biblical and *Talmudic* Law holds that human status is acquired progressively during embryonic development only and not at fertilization. In some aspects, the fetus can be considered as a part of the mother's body. Of course, this part should not

be removed at will. However, if it endangers the woman's life or severely affects her health (physical and mental), then abortion has to be considered because the status of the mother prevails. The status of the fetus becomes a full human status, equal to that of the mother, only at birth. With regard to the pre-implantation embryo, according to Jewish Law genetic materials outside the uterus have no legal status since they are not even part of a human being until implanted in the womb. Moreover, even in the uterus, only after the first 40 days does the embryo acquire a status as a "formed" human fetus. The status of the embryo outside the womb is comparable to that of gametes, sperm and oocytes: namely, they should not be wasted in vain but may be manipulated for therapeutic purposes. Hence, it is preferable that the embryos be obtained from fertility treatments by IVF.

An IVF embryo has the potential to grow into a human being only if implanted in the uterus, but outside the womb (pre-implantation) it has no such possibility (at least with present technologies). If the parents express their decision against implanting certain IVF embryos, these become supernumerary pre-implantation embryos with no more potential to develop into a human being and may be used for reasonable purposes such as deriving stem cells.

The commandment to save lives supersedes many other laws in Judaism. Creating embryos by cloning for therapeutic purposes such as deriving cells for transplantation could thus be justified. Given that the materials for stem cell research can be procured in permissible ways, the technology is "morally neutral," *i.e.*, it gains its moral value on the basis of what we do with it. A clear therapeutic aim is, therefore, still essential despite the legitimacy of using pre-implantation embryos. The therapeutic aim should give us the strength not to erect "fences," *i.e.*, barriers resulting from the fear of increasing abortions or the fear of cloning, especially since such fences could prevent the cure of fatal diseases. Another issue is that of profit: health care is a communal responsibility and social justice is an important value, but one cannot request free altruism; rather one should balance the right of profit with social justice.

Man's creation "in the image of G-d" confers infinite value on every innocent human life and renders its destruction a capital offense. While this absolute inviolability only begins at birth - stage VI - from an early stage of its embryonic development the embryo enjoys a very sacred title to life, to be set aside only under exceptional circumstances.

The *in vitro* pre-implantation embryo (stage I) is different. The extremely low probability that it will reach the neonatal stage reduces its *Halachic* status; for example, the Sabbath laws are not set aside in order to save its "life." This means that the pre-implantation embryo does not enjoy the same sacred title to life as an implanted embryo. Nevertheless, as long as the *in vitro* pre-implantation embryo obtains its implantation potential, its destruction is not essentially different from the deliberate waste of semen. This interdiction is merely the obverse of the biblical precept "be fruitful and multiply"; that is, it implies a prohibition against frustrating the procreative act.

During its first 40 days following conception (stage II), the embryo is considered as "mere water" in the context of the laws of impurity. Some later authorities use this *Talmudic* source as support for minimizing the embryo's status during this initial period so that the prohibition against "destruction of potential human life" does not exist during this embryonic stage. However, according to other authorities who do not accept this concept, the Sabbath laws are set aside in order to save an implanted embryo, which means that an embryo does have some human status in contrast to the *in vitro* pre-implantation embryo.

Halachic Conclusions

1. Jewish law does not differentiate between destruction of an *in vitro* pre-implantation embryo and its use for routine scientific research. Unless done for the purpose of saving life, both are forbidden as long as the embryo's potential for implantation exists.

2. An *in vitro* embryo that has lost its implantation potential may be kept for research even if the research involves the extraction of cells, which implies ending the embryo's capacity to develop.

3. It is forbidden to use a viable implanted embryo for research purposes.

4. The creation of any embryo for such research purposes is prohibited. Nevertheless, the creation of *in vitro* pre-implantation embryos for research should be allowed if it is probable that this research will help to save human life. This includes creating embryos by the cloning technology.

5. There is a clear distinction between the pre-implantation and implanted embryo. However, Jewish law does not recognize the arbitrary 14-day limit or the distinction between embryo and pre-embryo.

• **Christian Views**

Roman and Orthodox Catholics believe that there is a continuum from the conception to the human person, and that development continues during all stages of life (through both physical and spiritual development to becoming in God's image or *Theosis* - deification), giving sanctity to all stages of development. The strongest opposition to the use of embryos for research purposes, even therapeutic, is expressed by the Roman Catholic Church. The Holy See, in a note dated 2 August 2000 on ES cells and the status of the embryo, recalls that in the Catholic view a human person comes into existence at the time of fertilization. The embryo is therefore considered as a human individual having the right to its own life. Every individual embryo should therefore be given the opportunity to develop into a mature human being. The early embryo is a human person and ending its life by human agency is unthinkable, even for therapeutic applications. IVF procedures, which routinely result in "surplus" embryos created *a priori* in larger number than will eventually develop into human persons, are not accepted as legitimate by the Catholic Church, making the very source of embryos for stem cell research illicit.

Protestant theology is pluralistic and there is not a single source of authority to which reference might be made on the issue of ES cell therapeutic research. It is part of the Protestant ethos that moral questions are determined by the individual conscience. In Protestant thought, Christians may therefore have very differing views on this issue, these views being compatible with Christian beliefs. Some branches of the Protestant tradition consider that full human status is acquired gradually and therefore might not be present in the early embryo. In recent statements, General Synods of the United Church of Christ, while regarding the human pre-embryo as due great respect consistent with its potential to develop into full human personhood, have not regarded the pre-embryo as the equivalent of a person. Hence, the derivation of human stem cells from early embryos, including the creation of embryos by nuclear transfer, should go forward with public funding and at the same time be open to intense public discussion, a discussion which they regard as an essential process of the faith.

• **Moslem Views**

In Islam the use of embryos for therapeutic or research purposes may be acceptable provided that it occurs before the point at which the embryo is ensouled, *i.e.*, from the 40th day after fertilization. According to Islamic tradition - in the Koranic sources and Law (*Shari'a*) - the embryonic journey to personhood is a developmental process, and ensoulment may take place after three periods of 40 days, *i.e.*, at 120 days or turn of the first trimester. However, the embryo is alive in the womb before it receives a soul. Summarizing the legal-ethical discussions of Muslim jurists for the NBAC report, Abdulaziz Sachedina (University of Virginia) concludes: "Most of modern Muslim opinions speak of a moment beyond the blastocyst stage when a fetus turns into a human being. Not every living organism in a uterus is entitled to the same degree of sanctity and honor as a fetus at the turn of the first trimester." Considering this wide time period, decisions in different countries of the Muslim world may vary. Nonetheless, "the following is acceptable to all schools of thought in Islam: The Koran and the Tradition regard perceivable human life as possible at the later stages of the biological development of the embryo...in earlier stages such as when it lodges in the uterus and begins its journey to personhood, the embryo cannot be considered as possessing moral status...jurists make a distinction between a biological and moral person, placing the latter stage after, at least, the first trimester of pregnancy." In conclusion, "In Islam, research on stem cells, made possible by intervention in the early stages of life, is regarded as an act of faith in the ultimate will of God as the Giver of all life, as long as such an intervention is undertaken with the purpose of improving human health."

Existing Legal and Regulatory Provisions in Various Countries

General provisions on embryos

At the international level, there are few regulatory provisions concerning research on human embryos. Many texts proclaim the right to life in general, e.g., the Universal Declaration of Human Rights of 1948 (Art. 3), the International Covenant on Civil and Political Rights of 1966 (Art. 1), and the African Charter on Human and Peoples' Rights of 1981 (Art. 4). Others more specifically proclaim the right to life of the conceived child, e.g., the American Convention on Human Rights of 1969, which stipulates that the right to life generally begins at the time of conception (Art. 4).

At the European level, the Council of Europe's Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (1997) does not resolve the issue of the permissibility of embryo research

and leaves each country responsible for legislating on this matter, while stipulating two conditions: the prohibition of producing human embryos for research purposes, and the adoption of rules designed to assure adequate protection of the embryo. An Additional Protocol to the Convention, prohibiting all forms of human cloning, was approved in 1998 and took effect on 3 January 2001 in five member states.

The Charter of Fundamental Rights of the European Union, adopted in Nice, France, in December 2000, expressly prohibits eugenic practices and reproductive cloning, but does not comment explicitly on embryo research. In a resolution on 7 September 2000, the European Parliament stated its opposition to the creation of supernumerary embryos and to therapeutic cloning. More recently, the European Group on Ethics in Science and New Technologies to the European Commission adopted Opinion No. 15 of 14 November 2000 on stem cell research, in which it advocated the allocation of a community budget to research on supernumerary embryos, while pointing out that responsibility for determining the admissibility of such research rested with each member state. On the other hand, it considered ethically unacceptable the creation of embryos for research purposes from donated gametes and deemed premature the use of nuclear transfer technology (therapeutic cloning).

At the national level, research on human embryos is permitted in some countries (with varying degrees of supervision), while it is expressly prohibited in others. The second category includes Ireland, where Article 40, §3, of the Constitution implicitly prohibits research on the embryo by stating the right to life of the "unborn child" equal to that of the mother. In Germany, the law of 13 December 1990 on Embryo Protection regards the fertilization of an ovum for purposes other than its reimplantation in the donor as an offence; it takes the same position on the fertilization of a larger number of ova than can be implanted. The situation is similar in Austria, where Law No. 275 of 1992 prohibits the creation of supernumerary embryos. In Hungary (Law No. LXXIX of 1992) and Poland (Law of 7 January 1993), the life of the unborn child must be respected and protected from its conception. In Norway, the law of 5 August 1994 prohibits research on embryos and bans their use for any purpose other than reimplantation in the donor. In Tunisia, the National Medical Ethics Committee has stated its opposition to all experimentation on the embryo, which is regarded as a "potential person" (Opinion No.1 of 12 December 1996), as well as to any form of cloning (Opinion No. 3 of 22 May 1997). In Switzerland, the Constitution (1999) prohibits the use of medically assisted reproduction for research purposes as well as the fertilization of more ova than are capable of being immediately implanted (Art. 119, letter c). In Italy, the bill on medically assisted reproduction specifically prohibits the creation of supernumerary embryos and the early splitting of the embryo for therapeutic or research purposes. The Italian National Committee on Bioethics has rejected reproductive cloning, but was unable to reach a consensus on matters relating to the use of supernumerary embryos and on therapeutic cloning (Opinion of 27 October 2000).

Recent provisions on ES cell research

In a number of other countries, the use for research purposes of embryos donated by persons following a treatment against sterility and not intended for implantation (supernumerary embryos) is permitted. In general, the conditions imposed are the prohibition of research after the 14th day of existence of the embryo and the consent of the couple that supplies the embryo. That is the case, for example, in Australia, Canada, Sweden and Finland (Law 488/1999). In Spain (Law 35/1988), research on supernumerary embryos is permitted, but their creation for this specific purpose is prohibited. In September 2000, the Observatory of Law and Bioethics of Barcelona did, however, express its support for the creation of embryos for research purposes, both by donation and by cloning techniques. In Australia, the National Health and Medical Council has formulated guidelines, which although not legally binding (the law varies between states) are influential.

Finally, certain countries are envisaging authorization of the creation of embryos for research purposes. In the United Kingdom, the 1990 Human Fertilisation and Embryology Act authorizes the use of supernumerary embryos for restricted research purposes - in particular concerning reproductive medicine and for the diagnosis of genetic and chromosomal disorders - and the production of embryos for these purposes. On 22 January 2001, the House of Lords passed a law (already approved in December 2000 by the House of Commons) that permits the cloning of human embryos to derive stem cells, thus allowing the possibility of therapeutic cloning. In France, Law No. 94-654 of 1994, which prohibits embryo research, is currently under review. In accordance with the opinions delivered by the National Ethics Consultative Committee and the *Conseil d'Etat*, the draft bill permits the production of stem cell lines from supernumerary embryos for research purposes and therapeutic cloning. In November 2000, Japan adopted a law prohibiting reproductive cloning and prescribing the adoption of directives, which should permit the use of stem cells derived

from supernumerary embryos and therapeutic cloning. In the Netherlands, a bill is currently being prepared that prohibits the production of embryos for research purposes, with many exceptions. However, the bill authorizes research into stem cells obtained from supernumerary embryos. In Belgium, similar bills are being debated in the Senate.

In the USA, although federal financing of such activities is prohibited, the authorization of research on the embryo is left to the discretion of each state. To date, nine states prohibit such research. In 1999, the National Bioethics Advisory Commission recommended that federal regulations permit research into ES cells obtained from supernumerary embryos. However, it remains opposed to therapeutic cloning and to the deliberate production of embryos for the purpose of obtaining stem cells. In August 2000, the National Institutes of Health issued guidelines on the circumstances in which federally supported scientists might engage in such research. One of the conditions to be met is that no such scientist may destroy an embryo to extract cells: this will have to be done by privately funded scientists, who will then pass the cells on to their publicly funded colleagues. On 31.7.2001, the U.S. House of Representatives voted to ban all forms of human cloning (Weldon bill), a measure that will be reexamined in the Senate.

Provisions in Israel

The currently existing Public Health (Extra-Corporeal Fertilization) Regulations, 1987, prescribe terms and conditions for the authorization of retrieving, fertilizing, freezing and implanting fertilized eggs for reproductive purposes. The proscription of ovum retrieval - save for the purpose of fertilization and subsequent implantation in a woman's womb - implies a ban on embryo research, at least in the sense of forbidding the deliberate formation of embryos solely for purposes of research and therapy. The Regulations address neither the question of the fate of frozen embryos at the end of the freezing period nor the issue of supernumerary embryos (*i.e.*, embryos initially formed in the course and for the sake of infertility treatment and not replaced or donated for implantation for some *bona fide* reason). Likewise, the currently proposed law for the regulation of the donation of eggs for purposes of *in vitro* fertilization does not address the possibilities of embryo stem cell research.

In 1999, the *Knesset* (Israeli Parliament) enacted the Prohibition of Genetic Intervention (Human Cloning and Genetic Modification of Reproductive Cells) Act. The proclaimed purpose of this Act is to prescribe a five-year period during which certain genetic interventions in humans may not be conducted, thereby facilitating an assessment of the moral, legal, social and scientific connotations of such interventions and their impact on human dignity. The banned interventions are: firstly, cloning of a human being (defined as "the creation of a whole human being who is absolutely identical, genetically-chromosomically, to another - a human being or an embryo, whether alive or dead"), and secondly, the creation of a human being through the use of reproductive cells (human sperm or egg) that were subjected to germ-line gene modification. The Act provides for the establishment of a multi-disciplinary advisory board that is mandated to follow medical, scientific and biotechnological developments in the field of human genetic research, to submit to the Minister of Health an annual report on such developments, to advise the Minister on these matters, and to offer recommendations with regard to the said prohibitions. The Act further stipulates that the Minister may authorize, by promulgating regulations, the conduct of specific genetic interventions if the Minister considers that such genetic interventions are not violating human dignity, upon the recommendation of the advisory board and subject to prescribed conditions. In such regulations the Minister may set forth the conditions and procedures for granting an authorization, means of monitoring the actual conduct of the authorized intervention, and reporting requirements. The express granting of an authorization must precede the actual performance of the specific genetic intervention in questions. Violators of the five-year ban prescribed by this Act are liable to up to two years imprisonment. Patently, the ban applies only to the two kinds of genetic intervention addressed (human cloning and genetic modification of reproductive cells), but not to other possible modes of genetic research or therapeutic genetic intervention (concerning, for instance, cells and tissues taken from aborted fetuses). Therapeutic cloning is probably not prohibited by this Act.

The Ministry of Health has established a Helsinki Committee for Genetics to examine case by case, and approve or reject applications for genetic research projects involving human beings, including research on pre-implantation embryos. The present report and the following recommendations are aimed at providing the Guidelines for the work of this committee.

Recommendations on Embryonic Stem Cell Research in Israel

ES cells from supernumerary IVF embryos

Within the framework of IVF treatments, it will be permissible

to donate supernumerary embryos that are no longer destined to implantation, and this specifically for the purpose of therapeutic research.

Donation must be attained through a process of free and informed consent, and must be regulated to ensure that all embryo donations are made with respect of human dignity, autonomy and liberty of the donors. The possibility of embryo donations should be mentioned from the beginning of the IVF process.

In addition, the regulation should aim at clearly separating the medical team responsible for the IVF treatment and donation, from the medical and scientific teams involved in embryo research who receive the donation. This to ascertain respect of IVF regulations, particularly concerning the number of embryos produced. This separation is also in accordance with the present regulations and practices for organ transplantations in general.

Pre-implantation embryos should not be sold or bought. Imperatives of justice and equality in the access to modern medical technologies must be upheld throughout.

Ethical considerations should be part of the information given to donors in the Informed Consent for donating embryos to therapeutic research. In particular:

Consideration of alternatives: One ethical consideration for the donation of pre-implantation embryos no longer destined to implantation for reproductive purposes is that the alternative is the destruction of these embryos or keeping them frozen. Present regulations allow the discarding of frozen embryos after 5 years, unless the parents instruct otherwise, in accordance with existing IVF regulations.

Morally consistent behavior: Another ethical consideration is that the removal and culture of cells from donated embryos does not entail any lack of respect for human embryos in general. In the same ethical framework, one can consider pre-implantation diagnostics, which implies selection of embryos and discarding some embryos. Pre-implantation diagnostics for genetic diseases has become a medical practice in Israel and many other countries.

ES cells obtained using cloning technologies

Although ethically debatable, the Committee considers it ethically permissible to experiment with new *in vitro* technologies to produce ES cells, such as reprogramming somatic cell nuclei by transfer into enucleated oocytes (so-called therapeutic cloning, without reproductive purposes). The renucleated oocyte is then cultured without implantation until the blastocyst stage when stem cells are derived from the inner cell mass.

Medically, this research holds the highest potential, since the use of a somatic cell taken from the patient in need of transplantation will provide autologous tissues without the danger of graft rejections.

The ethical consideration in the creation of such cloned embryonic forms for therapeutic research is that they do not result from sperm and intact ova, and are not meant to be used in any process of complete fetal development since cloning is presently not admissible for reproductive purposes. In fact, the Israeli Law of 1998 on Genetic Interventions in Humans, while prohibiting the creation of a "complete human being" by reproductive cloning, does not rule out producing cloned embryos that will not be implanted.

The sources of human oocytes for nuclear transfer should be carefully considered. Such sources could include oocytes from IVF infertility treatments. Voluntary donations of oocytes could be considered from either human donors or from frozen ovarian tissues, in accordance with existing regulations or legislation.

Sources of stem cells other than pre-implantation embryos

Scientific research to explore other sources from which human stem cells could be derived should also be continued. These other sources include human tissues taken from fetuses after abortion (embryonic germ cells) and tissues taken from living adults or from cadaver sources.

Embryonic germ cells

Pluripotent embryonic germ (EG) cells can be derived from the developing gonadal ridge of fetuses that are aborted at 5-9 weeks of pregnancy. It is proposed that regulations be considered regarding the use of such cadaveric fetal tissues for therapeutic research in accordance with the ethical safeguards that exist for research on fetal tissues and their transplantation. Particular attention should be paid to insure that in no circumstance should the advancement of science become an incentive for elective abortion.

Ethical Restraints and Conduct of Human Stem Cell Research

Research on embryos must be subject to strict supervision and to certain basic constraints. These include the obtaining of full consent on the part of the donors of the biological material and the requirement that the research and possible applications

be justifiable in terms of the benefit that it offers humanity. Confidentiality and privacy of the donors should be respected.

Research involving the derivation of stem cells from human embryos should be scrutinized meticulously in order to avoid non-scientific or unethical aims. Research should not lead to *in vitro* culturing of embryos beyond the very early stages of embryonic development (the present limit is 2 weeks).

The medical applications of stem cell-derived replacement tissues for transplantation must be restricted to well-identified therapeutic aims and not for trivial or cosmetic non-medical reasons, or *a fortiori* eugenic delusions that do not constitute treatment of a disease.

Imperatives of social justice and equality in benefiting from medical progress must be upheld, and the altruistic nature of this research must be reasonably recognized in the process of embryo donation as well as in the commercial applications of the new therapeutic means and the knowledge gained.

If needed, changes in existing legislative regulations regarding embryo or oocyte donations and other appropriate legislative steps should be prepared with the Ministry of Justice and the Ministry of Health. New guidelines and regulations specific for Embryonic Stem Cell research should be issued by the Ministry of Health, in keeping with the present recommendations. Guidelines adopted by other countries, such as the UK, should be studied and evaluated, also with the aim of regulating exchange of biological materials from country to country.

A national committee, such as the Helsinki Committee for Genetics established by the Ministry of Health, should be instructed in keeping with the present recommendations to examine and eventually approve specific research proposals using human supernumerary embryos for deriving stem cells or using other sources, including cloned "embryos," aborted fetuses and adult sources.

It is recommended that public discussions of the issues involved be encouraged in order to provide information, prevent misinterpretations, and examine ways to alleviate fears of misuse of the scientific and technical endeavor concerning human embryo stem cell research.

The recommended process is to examine the possibilities of insuring the basic human right to benefit from the advancement of science. It should be recalled that the purpose of bioethics is not to ban upfront scientific advances, particularly in the field of medicine, but to define the limits of the socially desirable and ethically permissible.

In all aspects of this embryo-related research, particular importance should be given to respect of human dignity and the moral safeguards set out as international principles in the "Universal Declaration on the Human Genome and Human Rights" by the International Bioethics Committee of UNESCO and adopted by the UNESCO General Conference (1997) and by the United Nations Commission of Human Rights (1999).

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"Are your brothers to go to war while you stay here"?

Aviad Hacohen

One of the most controversial issues in Israeli society in recent years relates to the inequities in how the responsibility for protecting the country is shared. Under the terms of an arrangement that was first established in the State's early years, the enlistment of a whole segment of the population, *yeshiva* students who are "occupied full-time in *Torah* study"[1] is deferred. Ultimately, many of them are totally exempted from military service. In addition to these, there are other groups of Israeli citizens who don't serve in the Army, for various reasons (medically or psychologically unfit; resident overseas; religious or conscientious objections;[2] married women, members of minorities, and so on).

In the light of the growing number of those eligible to bear arms who don't actually serve, and the increasing military tensions faced by the State of Israel, it is almost inevitable that the trenchant *Talmudic* challenge arises, directed at them: "What do you think, that your blood is redder than your fellow's? Maybe his blood is redder?" (*Pesahim* 28b).

The prominence of *yeshiva* students among those who refrain from serving in the I.D.F. is understandable, given their growing numbers. Recently all branches of the government - the legislative,[3] executive and judicial[4] - have been involved in setting up an arrangement for deferral of their service.

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The author dedicates this article to the memory of Noam Cohen, of the tribe of Levi, who came to the aid of the Lord among the warriors, and fell in the line of duty.

1. For the history of the arrangement and its origins, see the Report of the Subcommittee of the [*Knesset*] Foreign Affairs and Security Committee to Examine the Service of *Yeshiva* Students in the Israel Defence Forces (the Cohen Committee), August 1988; Report of the Committee to Formulate an Appropriate Arrangement in Regard to the Enlistment of *Yeshiva* Students (the "Tal Committee"), Jerusalem, 5760.
2. H.C. 734/83 *Schein v. Minister of Defense et al*, 38(3) P.D. 393. For United States judgments, see *Welsh v. United States*, 398 U.S. 333 (1970). See also L. Shelef, *Marut Hamishpat Umahut Hamishtar* [The Rule of Law and the Nature of the Regime] (Tel Aviv, 1996); Y. Zamir "*Gevulot Hatziut Lahok*" ["The Boundaries of Obedience to the Law"] in Shimon Agranat Commemorative Volume (5747), 119; articles by H. Ganz, "*Gevulot Hovat Hatziut Lahok*" ["The Boundaries of the Obligation to Obey the Law"], *Iyunei Mishpat* 13, 359; "*Bisussei Hovat Hatziut Lahok*" ["The Basis of the Obligation to Obey the Law"], *Mishpatim* 17, 353; "*Musag Hovat Hatziut Lahok*" ["The Concept of the Obligation to Obey the Law"], *ibid*., 507; Y. Kugler, "*Sarvanut Matzpun keHaganah beMishpat Pelili*" ["Conscientious Objection as a Defense in Criminal Law"], in *Herut Hamatzpun vehaDat* [Freedom of Conscience and Religion] (R. Gavizon, ed., Jerusalem 5740), 207-271.
3. Deferring Defence Service for *Yeshiva* Students Occupied Full-time in *Torah* Study (Temporary Provisions) Law, 5761-2001.
4. H.C. 24/01 *Adv. Ressler et al. v. Knesset of Israel et al*. (unpublished); in greater detail: H.C. 3267/97 *Rubinstein et al. v. Minister of Defense*, 52(5) P.D. 481. This decision details the historical and legal framework for the existence of the exemption for over half a century.

The "Tal Law" and its Implications

On July 23, 2002, the *Knesset* enacted a special rule (known as the "Tal Law"), which confirms in primary legislation the positive discrimination in favour of *yeshiva* students in anything related to their service in the Army. Under this law, *yeshiva* students will benefit from a deferral of service until they reach the age of 22. At that point there will commence a "year of decision": should they decide to enter the labour market, they will be obliged to undertake a shortened period of military service, totaling one year. If they choose to continue studying, they will continue to be exempt from military service.

In response to the passage of this law, a number of appeals have been submitted to the High Court of Justice, asking that the law be revoked. At the time of writing, these appeals are still pending before the Court.

However, in spite of the intense debate on the communal, social and democratic aspects of this issue, what is almost totally lacking[5] - particularly in the decisions of the High Court of Justice - is an examination of the issue from the point of view of Jewish law, which reflects the "values of the State of Israel as a Jewish state."

Supporters of the arrangement base themselves on the argument that this discrimination fulfills an "appropriate purpose." In their view, the *Torah* protects the Jewish people no less than the Army.[6] Moreover, *yeshiva* students who are occupied full-time in *Torah* study are thought of as "killing themselves in the tents of *Torah*." Thus, they are in the same category as the tribe of Levi, who, as suggested by *Parshat Bamidbar*, are exempted from the obligation of military service, and are not counted along with the other Israelites who are eligible for military service, because of their involvement in the Divine Service.

Below we will attempt to examine this claim, and show that this "exemption"[7] rests on rather shaky foundations, not only in terms of the fundamental democratic principle of equality, but also in terms of the "values of a Jewish state."

Those in Israel who are able to bear arms

At the beginning of *Parshat Bamidbar*, Moses is commanded to take a census of the Children of Israel, based on their suitability for military service: "From the age of twenty years up, all those in Israel who are able to bear arms" (*Num*. 1:3).

The *Torah* repeatedly (1:47, 49; 2:33) emphasizes the fact that the members of the tribe of Levi were not counted among them. *Parshat Bamidbar* does not explicitly state the reason for this distinction,[8] but other passages in the *Torah* indicate that it is due to the other duty that they had undertaken, that of the "Divine Service."

It is for this reason, too, that the Levites didn't receive a separate portion in the Land of Israel (apart from the specific towns allocated to them): "At that time the Lord set apart the tribe of Levi to carry the Ark of the Lord's Covenant, to stand in attendance upon the Lord, and to bless in His name, as is still the case. That is why the Levites have received no hereditary portion along with their kinsmen: the Lord is their portion..." (*Deut*. 10:8-9). Similarly, the tribe of Levi did not receive a portion of the spoils taken in war (*Deut*. 18:1).

Milhemet Mitzvah and *Milhemet Reshut*

Jewish law distinguishes between two types of military service: activities defined as "*Milhemet Mitzvah*" (mandatory war) and activities defined as "*Milhemet Reshut*" (discretionary war).[9] In

5. This, in spite of the accessibility of comprehensive works on this issue, foremost among them being that of Y. Cohen, *Giyus kaHalacha* [Army Service in Accord with the *Halacha*] (Jerusalem, 5753), which is totally devoted to this issue. In this context, too, mention should be made of the book by G. Y. Zeidman, *HaZechut leSharet beZahal* [The Right to Serve in the I.D.F.] (Tel Aviv, 5756), which, as well as dealing comprehensively with every aspect of this issue, includes a number of sections that look at the issue from the point of view of Jewish law.
6. A further argument, the need to rebuild the centers of *Torah* scholarship to replace those destroyed in the *Shoah*, may have applied in the early days of the State, but certainly is not applicable now, with the enormous increase in the number of *yeshiva* students, a phenomenon never before seen in Jewish history. For details of the various arguments, see Cohen (note 5, above), p. 41f.
7. In contrast to an absolute, blanket exemption, lacking in proportionality, one might give greater weight to the issue of timing of military service, and the number of recruits required, which depend on the needs of the Army at any given time, and thus the allocation of a specific, limited number of exemptions for *Torah* study might be seen as an "appropriate purpose" for which military service can be deferred.
8. Rashi attempts to make up for this deficiency, by quoting a *Midrash*: "It is appropriate for the King's legion to be numbered separately." Note that, according to this explanation, the distinction is limited to the issue of the census alone, and derives from considerations of the honor due to the Divine King - there are no other practical implications.
9. See Y. Yarden's comprehensive summary, "*Ma'amado haHilchati shel haSherut beZahal*" ["The *Halachic* Status of Service in the I.D.F."], in Cohen (note 5, above) pp. 221-233, which reviews many of the sources discussed below.

his definition of *Milhemet Mitzvah*, Rambam includes (Laws of *Kings*, 5:1) military activities that are forced on the Jewish people, such as "saving Israelites from an enemy that comes upon them," that is, defensive activity forced upon the nation. On the other hand, *Milhemet Reshut* is aggressive military action initiated by the king [corresponding, in present times, to the government] "in order to expand the borders of Israel and increase his greatness and renown."

Scholars of Jewish law have debated the question of what is the "*mitzvah*" in the term "*Milhemet Mitzvah*." Some saw it as a subcategory of the more general commandment to save lives: "From where do we know that if one sees one's fellow drowning in a river, or being dragged off by a wild beast, or being attacked by armed robbers, that he is obliged to save him? The *Torah* teaches (*Lev.* 19:17): 'Do not stand idly by the blood of your neighbour'" (*Sanhedrin* 73a). Others see it as a means for fulfilling the commandment to settle in the Land of Israel, assuming that this is, indeed, one of the commandments.

The Extent of the Obligation

According to the law, as formulated in the *Mishnah* (*Sotah* 7:8), "All must go out [to war], even the groom from his chamber and the bride from her bridal canopy." Apparently, there are no exemptions in *Milhemet Mitzvah* .

On the other hand, when dealing with *Milhemet Reshut*, there are a number of exemptions. Yet, in the passage that deals with those exempt from military service in *Milhemet Reshut*,[10] there is no mention of the tribe of Levi, and the text seems to indicate that, indeed, they are not exempt.[11] Rabbi Avraham Yeshaya Karelitz, the Hazon Ish - leader of *haredi* Jewry in Israel during the first half of the 20th century - stressed, based on statements of the Rabbis, that the various exemptions have no applicability in the case of *Milhemet Mitzvah*, even when the army has sufficient manpower:

> It would seem that the *Mishnah's* stipulation, that even bridegrooms go out to war from their bridal chamber, does not apply when their assistance is needed to achieve victory in the war, for this is obvious, since all are obligated in a case of saving lives and saving the nation. But even when their aid is not needed, and only a certain quota [of soldiers] is required, it is permitted to take the bridegroom from his bridal chamber, since those who may claim exemption have no such right in *Milhemet Mitzvah*.
>
> And similarly, they are not exempted in *Milhemet Reshut,* unless the victory is not dependent on them, and the required number of soldiers in the Army can be made up without them. But if they are needed, they are obliged to come to the assistance of their brothers.[12]

The only exemption that exists in *Milhemet Mitzvah* is an exemption on medical grounds.[13]

Torah Study as Grounds for Exemption

Apart from the formal arguments presented above, there is an additional problem in using *Torah* study as a grounds for exemption from military service. The earliest authorities censured those who used *Torah* study as a "spade to dig with," and forbade deriving any benefit from the fact that one studied *Torah*:

> Do not make the *Torah* a crown for self-glorification, nor a spade with which to dig... He who exploits the crown [of *Torah* for personal benefit] shall fade away... Whoever seeks personal benefit from the words of *Torah* removes his life from the world. (*Avot* 4:7).

Moreover, this prohibition is even stronger when the avoidance of fulfilling one's civic duty is accompanied by *Hillul Hashem* (desecration of the Divine Name),[14] caused by the "talk" within the community about those who evade their duty. As Rambam puts it:

> There are other things that are a profanation of the Name of God. When a man, great in the knowledge of *Torah* and reputed for his piety does things which cause people to talk about him, even if

10. *Deut*. 20, See also *Deut*. 24:5; *Mishnah Sotah* 8:2-4; Rambam, *Mishneh Torah*, Laws of Kings, 7:9-10. In the early years of the State of Israel it was proposed that military service be deferred for young married men, until they had been married a year. However, this proposal was rejected on the grounds that service in the Army fell into the category of *Milhemet Mitzvah*, to which this type of exemption did not apply.
11. Rambam, too, does not include the Levites among those exempt. Furthermore, many sources indicate that *Torah* students and scholars took part in war, starting with Moshe and Joshua (see, for example, *Ex*. 17:9). And, arguing *a minori ad majus*: "Even the groom from his chamber and the bride from her bridal canopy - and certainly the scholars of *Torah*" (*Sotah* 10a, and see the *'Arukh'* in the marginal notes, *ibid*.).
12. Hazon Ish, *Avodah Zarah*, Section 23, Subsection 3.
13. *Sifri*, Shoftim 190, quoted by Rashi on *Deut*. 20:1.
14. A recent article by Rabbi Aharon Lichtenstein, "*Lichyot Al Kiddush Hashem*" ["To live by Sanctification of the Name"], '*Alon Shvut Bogrim* 15 (5762), pp. 39-55, discusses the various aspects of this prohibition.

> the acts are not express violations, he profanes the Name of God... The greater a man is, the more scrupulous should he be in all such things.[15]

A practical application of this consideration can be found in a *responsum* of Rabbi David Zvi Hoffman, a 20th century German rabbi and commentator, who was asked whether it was permitted for a Jew to exempt himself from the obligation of military service, in order to avoid the possibility of transgressing the laws of Shabbat.[16] The response was firmly in the negative. Rabbi Hoffman added that one who evades military service "could cause, Heaven forbid, *Hillul Hashem*," and therefore the appropriate thing to do is "Keep to the word of the King," that is, to obey the dictates of the law and enlist in the army.

The Rambam's Approach

One of the sources constantly quoted by supporters of an exemption for *yeshiva* students who are occupied full-time in *Torah* study,[17] is the statement of the Rambam at the end of the Laws of *Shmitah* and *Yovel*. Apparently, Rambam here expands the range of the exemption, applying it to others, who are not of the tribe of Levi.

> And why did the tribe of Levi not merit a portion in the Land of Israel and in the spoils along with their brethren? Since they were set apart to stand before God and to serve Him, and to teach His righteous ways and just laws to the masses, as it says, "They shall teach Your laws to Jacob, and Your *Torah* to Israel."
>
> Therefore they were set apart from the ways of the world: They do not go out to war like the rest of Israel, nor do they inherit [a portion of the land], nor do they claim for themselves by their own force. Rather, they are the legion of the Lord, as it says, "Bless, O Lord, his substance," and He acquires on their behalf, as it says "I am your portion and inheritance."

Rambam then goes on:

> And not only the tribe of Levi, but any man in the world whose spirit impels him, and whose mind compels him, to become separated to stand before the Lord, to aid and serve Him, to know Him and act properly as He created him to, and who throws off the yolk of the many devices that men seek, he becomes sanctified as holy of holies; God will be his portion eternally, and he will merit in this world that his needs be met, as was done for the Kohanim and Levi'im. (*Mishneh Torah*, Laws of *Shmitah* and *Yovel* 13:13)

As we have said, the supporters of the exemption make constant use of this passage in justifying the exemption from military service for *yeshiva* students who are occupied full-time in *Torah* study.[18] However, a closer examination of this passage, its style and its context, will show that it has, in fact, little relevance to the issue at hand.

Firstly, consider the fact that the passage appears at the end of the Book of Seeds in the *Mishneh Torah*. Rambam made a practice in his *Mishneh Torah*, particularly at the end of each book, of including ethical and philosophical passages,[19] which, in terms of style and character, were significantly different from the bulk of the work, which is composed in a more normative style. From this, it would appear that the determination that one who desires to be like the Levites and serve God "is sanctified as holy of holies" is more a philosophical or qualitative determination, than a normative prescription that exempts such a person from keeping the other commandments.

In addition, this passage appears at the end of the Laws of *Shmitah* and *Yovel*, and not in the Laws of Kings, where Rambam deals with the laws applying to warfare. Were the focus of this passage to be the exemption of the Levites from military service, Rambam would certainly have included it there, and yet we see that he did not do so.

Moreover, just as a member of another tribe who becomes like "a member of the tribe of Levi" does not lose thereby his other rights - such as the right to inherit land - so too does he not relieve himself of his obligations.[20]

And even more so: As indicated by commentators on the Rambam, the privilege which Rambam discusses is available for "all people", and not just *Torah* scholars. Thus, the passage in the Rambam is, in effect, a utopian vision, and not a normative law

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15. Rambam, *Mishneh Tora*h, Laws of Foundations of the *Torah*, 5:11.
16. *Responsa Melamed Leho'il*, Part 1, No. 42.
17. See, for example, Rabbi E. Y. Waldenberg, *Hilchot Medinah*, Part 2.
18. A further passage discusses the exemption of *Torah* scholars from "construction and excavation works," but is not relevant to the issue of military service or war in general.
19. See Y. Twersky, *Mavo leMishneh Torah laRambam* [Introduction to Rambam's *Mishneh Torah*] (Jerusalem, 5751), p. 267f, and pp. 329-330.
20. See Y. Meizlish, N. Shenrav, "*Le'Ezrat Hashem baGibborim*" ["To the Aid of the Lord Among the Warriors"], quoted by Cohen (note 5, above), pp. 236-237.

that can be used to support the evasion of one's duties toward the community as a whole.[21]

A further argument was raised by the late Rabbi Ben Zion Hai Uzziel, the Rishon Lezion and Chief Rabbi of Israel, who was asked about the possibility of exempting Kohanim, as descendants of the tribe of Levi, from present-day Army service. Relying on various proofs, both from the *Talmud*[22] and the later *responsa* literature, Rabbi Uzziel totally rejected the opinion that the Levites are exempt from doing their share in military service:

> All the Kohanim, even the *Kohen Gadol*, are liable for service in a *Milhemet Reshut*, and it goes without saying that this is the case in a *Milhemet Mitzvah*... Based on this, the Rambam's statement, that 'they do not go out to war like the rest of Israel' [as opposed to the blanket exemption could have been written: 'they do not go out to war'], clearly means that they do not take part in a war undertaken by one of the tribes [in conquering the land, since they do have a portion in it] in the same way that the other tribes do, after the division of the land in the days of Joshua. However, in a [general] war of conquest, or in a *Milhemet Reshut* in which all of Israel are fighting, the Kohanim must enlist like every other Israelite.[23]

It seems that attempts to support the exemption from military service on the basis of other sources also fail, when examined critically. Take, for example, the *Aggadic* statement (*Baba Bathra* 7b) that "scholars do not require protection."[24] A biting criticism of this view was expressed, during the War of Independence, by Rabbi S. Y. Zevin, one of the great rabbis of the previous generation, and a member of the Chief Rabbinate Council and Editor-in-Chief of the *Encyclopedia Talmudit*:

> Master of the Universe! Is it permitted to rely on a miracle in the face of clear and present danger to life, and to say that the Sages do not require protection? Do not the events of Hebron in 5689 (may such a thing never again befall us) prove otherwise?! Were there not among the victims holy and pure young people, the choicest of the scholars and students in the *Yeshiva*? ... And why is it that the scholars joined their brethren in fleeing the border neighbourhoods that are the target of sniper fire, and not use this remedy that 'the Sages do not require protection'?... Is this indeed the *Torah's* position?

Similar sentiments were also expressed by the late Rabbi Yitzhak Isaac Halevy Herzog, the Chief Rabbi during the period of the War of Independence. In a memorandum that he sent to the *Va'ad Hayeshivot* in Eretz Yisrael, Rav Herzog expressed his disapproval of those *yeshiva* students who attempted to evade their military duty: "What will people say, that Shimon should fight to save both himself and Reuven, while Reuven can sit with his arms folded at Shimon's expense, because Reuven is a *yeshiva* student?"[25]

"Are your brothers to go to war while you stay here?"

Along with the more formal aspects of the exemption, consideration should also be given to the issue of separating oneself from the community. Aversion for one who exempts himself from his duty to the community can be found in various contexts in the sources of Jewish law. It was the prophetess, Devorah, who sharply criticized the residents of the city of Meroz, for not taking part in the war effort: "Curse Meroz!" said the angel of the Lord, "Bitterly curse its inhabitants, because they came not to the aid of the Lord,[26] to the aid of the Lord among the warriors" (*Judges*, 5:23).

Ethics, integrity, justice and "common sense" also play a role, and echoes of this can already be found in the *Torah*. When the tribes of Gad and Reuven expressed their wish to take as their portion the land on the eastern side of the Jordan, Moshe raised his voice against them (*Num*. 32:6): "Are your brothers to go to war while you stay here?"

Biblical commentators have struggled with the sharpness of this

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21. See also the note by Rabbi Y. Kappah in his commentary on this passage, in which he attacks "those of crooked heart, twisted in thought and lacking in knowledge" who attempt to derive from this statement permission to exempt *Torah* scholars from the obligation to work and involve themselves in worldly matters, in direct opposition to Rambam's statement in the Laws of *Torah* Study (3:10), which state: "Anyone who thinks in his heart that he may study *Torah*, and not do labour, but support himself from charity, such a person has profaned the Divine Name and despoiled the *Torah*, snuffed out the light of religion, caused evil for himself, and removed his life from the World to Come, since it is forbidden to derive benefit from the words of *Torah* in this world." (!)
22. See, for example, *Talmud Bavli*, *Kiddushin* 21b, which discusses the issue of permitting a "beautiful captive" to a Kohen in times of war.
23. His statement was published in the *HaPosek*, 5708, No. 1084. Quoted by Meizlish (note 20, above), p. 237.
24. See *Responsa* of Ridbaz, Part 2, Section 1752.
25. Quoted by Z. Warhaftig, *Hukah leYisrael - Dat uMedinah* [A Constitution for Israel - Religion and State] (Jerusalem, 5748), p. 235.
26. The text compares the provision of assistance to Israel with that given to God, or, as Rashi puts it *(ibid.)*: "As it were, one who assists Israel, is as though he assisted the Divine Presence."

challenge. For example, the Netziv - Rabbi Naftali Zvi Yehudah Berlin, the *Rosh Yeshiva* of Volozhin (Russia, early 20th century) - writes the following in his *Ha'amek Davar*: "Are your brothers to go to war while you stay here - should you receive a land that was already conquered by all, and then they should endanger themselves in war?"

The Normative Framework in the State of Israel

As we mentioned at the outset, service in the Israel Defence Forces has become a fundamental principle within the State of Israel, and is seen as a right and not just as an obligation. It is for this reason that the "Nation's Army" calls up even those soldiers whose contribution to the Army - both military and economic - is questionable at best.[27] Service is the rule, and any exemption therefrom - whether temporary or permanent - is the exception, and therefore must be interpreted in order to minimize its effect. Section 13 of the Defence Service [Consolidated Version] Law, 5746-1986, which uses the term *yotze tzava* (able to bear arms), taken from *Parshat Bamidbar*, establishes the obligation of service for all those who are fit to do so.

Section 36 of the law empowers the Minister of Defence to exempt any individual from service, or to defer that person's service. Section 39 establishes those exemptions that are "lawful," while Section 40 discusses the exemption for women for religious reasons.

Quite deliberately, the law does not discuss the exemption for *Yeshiva* students who are occupied full-time in *Torah* study. This arrangement "is not grounded... in any law or other written document. The exemption began as an act of kindness, went on to become part of the *status quo* arrangements applying in Israel, and ended up being fixed firmly in a coalition agreement."[28] In practice, the exemption comes under the general powers granted in Section 36(3) of the law, under which the Minister of Defence may exempt from service or defer service "at the request of the person able to bear arms."

As we have shown, a blanket exemption for students of *Torah* from fulfilling this right-obligation is not only inconsistent with democratic values, but also contradicts the "values of a Jewish state." Indeed, how appropriate are the words of Rav Zevin, who responded to the claim of those who wished to evade military service on the grounds that "the *Torah* protects them":

> "On the contrary! Let the students of *Torah* take their place in the ranks, and the merit of the *Torah* will protect them and their comrades."[29]

27. See Zeidman, *ibid.* (note 5, above), pp. 48-52.
28. M. Hoffnung, *Bitchon haMedinah mool Shilton haHok* [State Security and the Rule of Law] (Jerusalem, 5741), pp. 244-245.
29. Rabbi S.Y. Zevin, quoted by Cohen (note 5, above), p. 218.

An old Rosh Hashana Greeting Card, Palestine, beginning of the 20th Century (courtesy of the Gross Family Collection, Tel-Aviv, Israel)

War too must be conducted in accordance with the Laws of War

H.C.J. 3114/02; 3115/02; 3116/02
MK Mohammed Barake, MK Ahmed Tibi, Adalla - Legal Center for Minority Rights, Canon - Palestinian Organization for the Protection of Human Rights v. Minister of Defence, IDF Chief of Staff, IDF Commander in Jenin District
Before President Aharon Barak, Justice Theodor Or and Justice Dorit Bainish
Judgment given on 14.4.2002.

Precis

The three united petitions concerned events which took place in Jenin within the framework of the IDF's Operation Defensive Shield. The judgment provides a window into the grim events of the Jenin battle and the intervention required of the Supreme Court in its aftermath. The following short judgment was one less of principle than of practical necessity.

Judgment

President Aharon Barak

President Barak noted that at the time judgment was being given, IDF Operation Defensive Shield was still underway in the territories of Judea and Samaria. The operation, decided upon by the Government of Israel, had commenced on 29.3.2002. Its purpose was to destroy the Palestinian terrorist infrastructure and prevent the recurrence of the many terrorist attacks which had been made against Israel. During the course of the fighting, on 3.4.2002, IDF forces had entered the city of Jenin and the nearby refugee camp. The respondents had explained that a vast terrorist infrastructure had developed in Jenin and its adjacent refugee camp, from which more than 23 suicide bombers had emerged, making up about a quarter of all suicide terrorists. The Jenin terrorists had executed the attacks during Passover; in the Mazza restaurant in Haifa; the Sabaro restaurant in Jerusalem; the train station in Benjamina; the bus attack at the Mussmuss junction and at the junction near to Mahane Shmonim.

Upon entering the refugee camp, the IDF forces discovered that many of the houses were vacant. The civilian population was largely located in the center of the camp. Upon their arrival the IDF forces issued a general call to residents to leave their houses. According to the respondents, this call was not met until the night of 7.4.2002. Thereafter, about 100 people left the camp. Seeking terrorists, weapons and explosives, the IDF forces began to operate on a house to house basis, *inter alia*, in order to avoid massive harm to innocent civilians. A firefight developed. It became apparent that empty homes had been booby trapped. The battles led to 23 IDF soldiers dead. After a number of days of further house to house fighting, the IDF gained control over the camp. The respondents stated that during the battles, after calls had been made to vacate the houses, bulldozers were used to destroy the houses and a number of Palestinians were killed.

The bodies of the Palestinians remained *in situ*; they could not be removed prior to the IDF gaining complete control of the camp. After obtaining control, the IDF began sweeping through the camp, removing and neutralizing explosives which had been dispersed around the area. Up to the time of filing the petition, 37 bodies had been located, 8 bodies had been delivered to the Palestinians; 26 bodies had yet to be taken away from the scene.

President Barak noted that in the three petitions filed before the Supreme Court, the Court had been asked to order the respondents to refrain from examining and removing the bodies of the dead Palestinians from the refugee camp in Jenin. The Court was further petitioned to order the respondents to refrain from burying the bodies of those determined to be terrorists in the cemetery in the Jordan Valley. The petitioners asked that the task of locating and gathering the bodies be given to medical teams and representatives of the Red Cross. It was asked that the families of the dead be allowed to bury their dead quickly, properly and decently.

The petitions were filed in the afternoon of Friday, 12.4.2002. The State Attorney's Office had been ordered to respond immediately, and it did so in the evening. Following a review of the pleadings it was decided to hear the petition on the following Sunday, 14.4.2002. The President of the Supreme Court also gave

an interim order to refrain from removing the bodies of the dead Palestinians from the places in which they were then located until the hearing was held.

After setting out this background, President Barak turned to the issues of principle raised by the petition. He held that the fundamental starting point was that in the circumstances of this case, the responsibility for locating, identifying, removing and burying the bodies lay on the respondents. The duty was theirs as a matter of international law. The respondents accepted this duty and were guided by it. Accordingly, following preexisting procedures, teams had been put together comprising soldiers from the bomb disposal unit, medical representatives and other professionals, to locate the bodies, identify them and gather them in one place. The state was willing to allow representatives of the Red Cross to participate in the various teams. Likewise, the state was willing to consider - if the military commander agreed, taking into account changing circumstances - that members of the Red Crescent participate in location and identification of the bodies. The Court recommended that a representative of the Red Crescent indeed be allowed to participate, subject, of course, to the military commanders' discretion. The state agreed that local experts participate in the identification process, which would include photographing and documentation in accordance with IDF procedures. Such procedures would be conducted as speedily as possible consistent with displaying respect for the dead and ensuring the security of the military forces. The petitioners accepted this approach.

The respondents' position with regard to burials was that these would be conducted speedily by the Palestinians; this required the consent of the Palestinians. If it became clear that the Palestinians were delaying burial of their dead, any ensuing risk to state security would cause the respondents to consider performing the burials themselves. This would be done in a proper and respectful manner without distinguishing between the bodies of armed terrorists and those of civilians. This approach too was accepted by the petitioners.

In view of all the above, Justice Barak held that there was no real dispute between the parties. Locating, identifying and burying the bodies were extremely important humanitarian activities. They stemmed from respect for the dead. Respect for any dead person. They were based on Israel being a state possessing Jewish and democratic values. The respondents had declared that they adhered to this approach, which the Court too accepted. In order to avoid possible future slanderous accusations - it would be proper to allow representatives of the Red Crescent to participate during the stage of locating the bodies, whereas locals should be involved during the identification stage. The burials should be conducted with dignity, in accordance with the appropriate religious rites, by local persons. All agreed that these steps had to be conducted speedily; and all the stages had to be subject to prevailing security considerations and the discretion of the military commander.

President Barak noted that generally it was possible to reach agreements on humanitarian matters. Respect for the dead was important to everyone, as man had been created in God's image.

The petitioners had contended that a massacre had taken place in the Jenin refugee camp. The respondents denied this forcefully - agreeing only that a fierce battle had taken place there in which many Israeli soldiers had died. The army had fought from house to house, refraining from aerial bombing so as to avoid injury to civilians in so far as possible. The petitioners had not succeeded in meeting the burden of proving the massacre. A massacre was one thing, a fierce battle another. The respondents had repeatedly declared that they had nothing to hide and the practical arrangements reached by the parties reflected this position.

The Court approved the practical arrangement reached by the parties; that arrangement displayed respect for the living and the dead; it prevented future calumny. Of course, legal rules always applied, and in all its actions the IDF was guided by the Military Advocate General. This was right; war too had to be conducted in accordance with the laws of war. Even during battle, all measures possible had to be taken to protect the civilian population. The Court would not take a position in relation to the manner of waging war. So long as soldiers' lives were at risk, the decisions would be made by their commanders. In the instant case, it had not been argued that the arrangements reached would endanger Israeli soldiers. On the contrary, this was an arrangement desired by all those involved. Accordingly, in view of this arrangement, the petitions were dismissed.

Justices Theodor Or and Dorit Bainish concurred.

Abstract by Dr. Rahel Rimon, Adv.

In Memoriam
Haim Zadok
1913 - 2002

Life is real, life is earnest
And the grave is not its goal
Dust thou art to dust returneth
Was not spoken of the soul

Lives of great men all remind us
We can make our lives sublime
And departing leave behind us
Footprints on the sands of time

(H.W. Longfellow "a Psalm of Life")

The life of Haim Zadok was interrupted in August 2002, only three months before his 90th birthday. With his death, Israel lost one of the "Founding Fathers" of its legal profession and institutions, a staunch champion of democracy and of the Rule of Law.

The void is too fresh and one naturally goes back to his traits which lead to a relationship based on a profound appreciation of his qualities and capacities.

Zadok firmly believed that legal systems existed best where the Law was upheld primarily through non-coerced compliance by the citizenry and by the Government alike. To him the Attorney General and the State Attorney's staff and all legal advisors of the Government, were Officers of the Law, duty bound to the Rule of Law over their duty to the specific interests of the administration. Thus, when returning to the Government as Minister of Justice in 1977, Zadok quoted his predecessor, Pinchas Rosen, Minister of Justice at the time of Zadok's retirement from the Ministry in 1952, that "the Ministry of Justice is not the law firm of the Government".

Dedicated to the values of democracy, Zadok objected to any attempt to curb freedom of speech and communication. He opposed legislation forbidding Israelis to meet with PLO representatives even when those did not entail a risk to Israeli security. He favoured the establishment of constitutional safeguards to civil rights.

True to his convictions, Zadok never hesitated to speak his mind. Over the last 24 years, Zadok regularly published articles in the press, always addressing issues of principle and importance, applying the values, dear to him.

In 1989, Zadok repeated views expressed by him as early as 1968, still in the days of post Six-Day War euphoria, when addressing the dilemma posed to the democratic and Jewish State of Israel by the governing of a very significant Palestinian population in the held Territories: "Israel need not aspire to a permanent government over the Palestinian population in the held Territories. I would like such rule to end as soon as possible. I am not saying this only because of the consequences of what the protracted occupation does to the Palestinians, but also, as a Jew, as a Zionist I would say - mainly because of what it does to us".

Haim Zadok departed at a time when Israel needs him most. His was the voice of clear thinking, of decency and of integrity, potent and vibrant up to his last days.

Only three months before his death, the Israel Institute of Democracy, published a book, holding over 450 pages which captured some of the invaluable essentials of his life and thoughts, thus delivering to the future a reference to the life and thoughts of a person loved, respected and admired for his blessed mind and values.

The sorrow over the death of Zadok was capsulated by Prof. Ruth Gavison, in an article published soon after his death, in that column in *Yediot Aharonot* which was his for many years: "He taught us how it is possible to criticize with determination and consistency, and yet be part of the struggle. How one can be angry and yet be loving". It is sad when such a voice, alas, has grown silent.

Amihud Ben-Porath, Adv.

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