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**THE INTERNATIONAL ASSOCIATION
OF JEWISH LAWYERS AND JURISTS**



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More than 80 missiles hit Tiberias and the Sea of Galilee region during Hezbollah's assault on Israel last summer.

Photo: Israel Government Press Office

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President's message

The new Human Rights Council, which replaces the discredited Human Rights Commission as the UN's civil human rights body, was appointed on 9 May 2006. Unfortunately, the Council is dominated by human rights abusers and by countries that have traditionally fought against the mere existence of Israel. This is not a surprise as, in fact, only 89 UN member states are fully-fledged democracies out of its 192 members (i.e., 46 percent).

In 2005, Israel was subject to more UN human rights' criticism than any other country, including Sudan and other countries where it has been recognized and acknowledged that human rights offenses are being carried out daily.

It came as no surprise that the Human Rights Council decided to convene, on 5 July 2006, a special session to deal with human rights offenses purportedly carried out by the Israeli army in response to terrorist attacks committed by Hamas against Israel. A written statement on behalf of IAJLJ was submitted in response.

In this statement, we pointed out that:

- *Making concessions to the patent attempt of the group of Arab and Islamic States to enable the promotion of its own political agenda is a throwback to the troubling sessions of the former Commission on Human Rights, whose disreputable record of sterile politicisation brought about its downfall.*
- *The very terms of reference on which the request was based are a complete travesty of the facts. For a year, the Hamas and Fatah terrorist groups have been repeatedly firing Kassam and other rockets aimed indiscriminately at civilian targets in Israel, particularly Sderot and, more recently, Ashkelon and other population centers. These are cities in the heart of Israel whose sovereignty is undisputed. To this must be added the deliberate and unprovoked attack into Israeli territory from the Gaza Strip of another Hamas terrorist group at the end of June, which abducted an Israeli soldier whose fate is unknown. At the same time, other Hamas-related terrorists abducted an 18-year old Israeli civilian whom they promptly murdered.*
- *Hamas, whose charter calls for the politicide of Israel and the genocide of its population in unmistakably*

explicit terms rivalling those of Hitler's Mein Kampf, has accepted responsibility for the kidnapping of the soldier and other terrorist actions. Its terrorist leader, who masterminded this attack, resides in Damascus, sheltered by the Syrian authorities.



- *The response of the Israeli government and the Israel Defense Forces is firmly based on Article 51 of the UN Charter, which stipulates the inherent right of self-defense against the armed attacks that have been repeated throughout the past year since Israel's withdrawal, on its own initiative, from the Gaza Strip, in the form of unceasing rocket attacks, suicide bomb attacks in crowded areas and other terrorist actions, renewed by the recent assault and kidnapping incidents already cited.*

It is worthwhile noting that only following my protest in a letter addressed to the Commissioner of Human Rights and to the UN Secretary General was the IAJLJ statement, reflecting all these comments, distributed among the Human Rights Council members.

The Second Lebanon War gave the Human Rights Council an opportunity to demonstrate once again its one-sidedness and lack of any intention to achieve truly objective and professional goals.

During this war, the Human Rights Council established a three-person Commission of Inquiry for the purpose of examining a list of alleged Israeli violations. The commissioners were recently appointed and the inquiry is up and running. To be sure, the mandate of inquiry, as presently drafted, is entirely one-sided, presuming Israeli guilt and looking only towards Israeli "offenses." The decision totally disregards the attacks on the Israeli army in Israeli territory that were the cause for the outbreak of the war; it totally disregards the attacks aimed at Israeli civilians in an effort to cause death and injury to civilians as well as destruction to Israeli cities and towns; and it totally disregards the responsibility of the Lebanese government to the acts of terror and attacks committed against Israel from Lebanese soil.

Our Association will do its utmost to challenge this pathetic and absurd inquiry, whose terms of reference are simply and outrageously provocative.

See *President's Message*, page 47

Do justice, love kindness, and walk humbly with thy God

Five Jewish United States Supreme Court justices made remarkable contributions to society, said Associate Justice Ruth Bader Ginsburg at Newport, Rhode Island's Touro Synagogue, at the August 2004 commemoration of the 350th anniversary of Jewish communal life in America.

Ruth Bader Ginsburg

Some years ago, the Supreme Court Historical Society sponsored, and later published, a lecture series on the first five Jewish justices, from Louis Brandeis to Abe Fortas. I will speak of those jurists, and then endeavor to explain why I believe there will be no supplement to the Historical Society's lecture series ranking Justices Ginsburg and Breyer as the sixth and seventh Jewish justices.

In the introduction to the Historical Society's publication of the lectures, I wrote of an age-old connection between Judaism and law. For centuries, rabbis and other Jewish scholars studied, restudied, and ceaselessly interpreted the Talmud, producing a vast corpus of juridical writing. Jews have always prized the scholarship of judges and lawyers in their own tradition, and when anti-Semitic occupational restrictions lessened, Jews were drawn to the learned professions of the countries in which they lived. Law figured prominently among those professions.

Law became and remains an avenue of social mobility, a field in which intellectual achievement is rewarded. And, as it evolved in the United States, law also became a bulwark against the kind of oppression Jews have encountered and survived throughout history. Jews in large numbers became lawyers in the United States, and some eventually became judges. The best of those lawyers and judges used the law not only for personal gain, but to secure justice for others. So it was with the first five Jewish justices. I will recall in quick snapshots the lives in the law of those justices, and the legacies they left.

The first Jew to be seated on the Court was Louis D. Brandeis, but he was not the first Jew offered the post. The man who might have preceded Brandeis by some 63 years rejected the offer. His name was Judah Benjamin. In 1853, he declined nomination to the

Court by President Millard Fillmore. Benjamin had just been elected U.S. Senator from Louisiana and he preferred to retain his senate seat. (His preference for the Senate suggests that the Supreme Court had not yet become the co-equal branch of government it is today.) Benjamin later became a leader in the Confederacy, eventually serving as Jefferson Davis' Secretary of State. (Although he achieved high office, Benjamin lived through a time of virulent anti-Semitism in America. Political enemies called him "Judas Iscariot Benjamin.")

When the South lost the Civil War, Benjamin fled to England, surviving a peril-filled journey. There, in his middle fifties, he started over, enrolling as a student at Lincoln's Inn. In time, he became an acclaimed barrister. *The Times* of London, in an obituary, described Benjamin as a man with "that elastic resistance to evil fortune which preserved [his] ancestors through a succession of exiles and plunderings."

The historical first thus fell to a man with a more secure start in life, Louis Dembitz Brandeis. During his days at the bar, Brandeis was sometimes called "the people's attorney," in recognition of his activity in the great social and economic reform movements of his day. Raised in Louisville, Kentucky, Brandeis already showed signs of greatness when he was graduated from Harvard Law School in 1876 at age 20, with the highest scholastic average in that law school's history. Practicing law in Boston, he became a leading champion of the progressive era, a prominent defender of trade unions, proponent of women's suffrage, and promoter of business ethics.

Brandeis was also a founder of the pro bono tradition in the United States. Spending at least half his working hours on public causes, Brandeis reimbursed his Boston law firm for the time he devoted to non-paying clients. He made large donations of his wealth from practice to good causes and lived frugally at home. A friend



recounted that, whenever he went to the Brandeis house for dinner, he ate before and afterward.

Brandeis helped shape President Woodrow Wilson's "new freedom" economic doctrine. In 1916, Wilson appointed him to the Court after a stormy confirmation process. Franklin Delano Roosevelt, among others, called Brandeis, not "Judas," but "Isaiah." Admirers, both Jewish and Gentile, turned to the scriptures to find words adequate to describe his contributions to U.S. constitutional thought. At the Court, however, Brandeis encountered an openly anti-Semitic colleague. James Clark McReynolds, appointed by Wilson two years before Brandeis, rose and left the room when Brandeis spoke in Conference. No official photograph was taken of the Court in 1924, because McReynolds refused to sit next to Brandeis, where McReynolds belonged based on seniority.

Brandeis was not a participant in religious ceremonies or services, but he was an ardent Zionist, and he encouraged the next two Jewish justices – Benjamin Cardozo and Felix Frankfurter – to become members of the Zionist Organization of America. Brandeis scholar Melvin Urofsky commented that Brandeis brought three gifts to American Zionism: organizational talent; an ability to set goals and to lead men and women to achieve them; and above all, an idealism that recast Zionist thought in a way that captivated Jews comfortably situated in the United States.

Jews abroad who needed to flee from anti-Semitism, Brandeis urged, would have a home in the land of Israel, a place to build a new society, a fair and open one, he hoped, free from the prejudices and economic disparities that marked much of Europe, a state where the prophetic teachings of justice, charity, and lovingkindness could be made real. Jews well established in the United States, he counseled, would have a complementary mission, an obligation to help their kinsmen build that new land. Brandeis' very stature attracted legions of others. Jews here could say, if it was all right for Brandeis to be a Zionist, then it was OK for them as well.

When Brandeis retired from the Supreme Court in 1939, at age 83, after 23 years on the High Court bench, his colleagues wrote in their farewell letter:

Your long practical experience and intimate knowledge of affairs, the wide range of your researches and your grasp of the most difficult problems, together with your power of analysis and your thoroughness in exposition, have made your judicial career one of extraordinary distinction and far-reaching influence.

That influence continues to this very day.

Brandeis served for a time with Benjamin Cardozo, who was appointed to the Court in 1932. Tutored in his youth by Horatio Alger, Cardozo learned to treasure words and to thrive on hard work; it is rightly said that he approached his calling to the legal profession with "ecstatic consecration." Cardozo's fine hand adjusted the common law to meet the needs of an evolving society. He served with unmatched distinction for 18 years on New York's highest court – the last five as Chief Judge – before President Herbert Hoover named him to the U.S. Supreme Court. "What doth the Lord require of thee," the prophet Micah said, "but to do justice, to love kindness, and to walk humbly with thy God." Cardozo's life and work exemplified that instruction. "It has been said that genius consists in the ability to make clear the obvious which has never been understood before." In this sense, Cardozo's opinions and other writings are indeed works of genius.

(Cardozo remained a member of New York's Spanish and Portuguese Synagogue all his life. But like Brandeis, he was not a participant in religious observances, and his seat was mainly used by relatives. As a young lawyer, he once gave an address in which he urged the congregants to reject a proposal to end the separation of women from men at services. His eloquence may have carried the day: There is still separate seating in that synagogue. One of its congregants is today Chief Judge of New York's highest court, Judith Kaye.)

Cardozo died in 1938, after only six years on the Supreme Court. The Chief Justice at that time, Charles Evans Hughes, said of him:

His gentleness and self-restraint, his ineffable charm, combined with his alertness and mental strength, made him a unique personality. With us who had the privilege of daily association there will ever abide the precious memory not only of the work of a great jurist but of companionship with a beautiful spirit, an extraordinary combination of grace and power.

Felix Frankfurter, appointed by Franklin Delano Roosevelt in 1939 after Cardozo's untimely death, had been a Harvard Law School professor for 25 years. No cloistered academic, he was an ardent advocate of the right of labor to organize, a founder of the American Civil Liberties Union, a member of a National Association for the Advancement of Colored People (NAACP) advisory lawyers committee, and a defender of Sacco and Vanzetti, the anarchist shoemaker and

fishmonger accused of murder in Massachusetts.

As a Supreme Court justice, the onetime liberal crusader became a strong proponent of judicial restraint. In some quarters, he was criticized as excessively restrained. Yet Frankfurter was the first justice to employ an African-American law clerk, William T. Coleman, Jr., in 1948. (Coleman remains, to this day, a prominent practicing attorney.) Frankfurter was also the justice who wrote: “[B]asic rights do not become petrified as of any one time . . . It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right.”

After Frankfurter retired in 1962, Arthur Goldberg joined the Court. A Kennedy appointee, Goldberg had been counsel to labor unions at a time when strikers were prey to the harassment of armed thugs. A long-time legal adviser to the steelworkers union, he was considered the architect of the trade union merger that created the AFL-CIO.

Goldberg was the only Jewish justice to have experienced childhood poverty (his father, who died when he was eight, sold produce in Chicago, from a wagon pulled by a blind horse). Goldberg was the sole member of his large family to continue his education beyond grade school. And unlike Brandeis, Cardozo, and Frankfurter, Goldberg was a keeper of religious ceremonies. At Passover seders in his home, Goldberg would relate the story of the Israelites in Egypt to the story of all the oppressed and outcasts of the world. My colleague, Justice Stephen Breyer, was among the few privileged to clerk for Justice Goldberg during Goldberg’s less than three-year tenure on the Supreme Court. He resigned in 1965 to become Ambassador of the United States to the United Nations.

(Some years ago, I came upon a story Goldberg once told the congregation of Temple Emanu-El in Honolulu in the early 1960s. The Justice was in Chicago visiting his mother, who had become active in several Jewish organizations. He was sleeping late one morning when the telephone rang for him. His mother answered the phone and asked, “Who’s this?” The caller replied, “This is the President.” Goldberg, barely awake, heard his mother inquire, “Nu, president from which shul?”)

Succeeding Goldberg in 1965, Johnson-appointee Abe Fortas had been a steadfast defender of people smeared by Senator Joseph McCarthy at the height of the Cold War Red Scare, and counsel to people who had nowhere else to turn. Although religious observance was not a prime part of Fortas’ family’s life, it was thanks to a scholarship established by a rabbi in his hometown of Memphis, Tennessee, that this brilliant man was able to attend college.

Among other pro bono endeavors, Fortas’ successful argument in *Gideon v. Wainwright* secured his legacy as a shaper of the rights of every person, no matter his station. (*Gideon* was the 1963 Supreme Court decision that guaranteed impecunious defendants in criminal cases the right to counsel paid from the public purse.) Fortas’ time on the Court was cut short after Johnson, in 1968, nominated him to succeed Earl Warren as Chief Justice. That nomination was filibustered by a coalition of conservative Republicans and southern Democrats. A year later, under attack for apparent ethical lapses, Fortas resigned from the Court and resumed law practice.

Law as protector of the oppressed, the poor, the minority, the loner, is evident in the life body of work of Justices Brandeis, Cardozo, Frankfurter, Goldberg, and Fortas. Frankfurter, once distressed when the Court rejected his view in a case, reminded his brethren, defensively, that he “belong[ed] to the most vilified and persecuted minority in history.” I prefer Arthur Goldberg’s affirmative comment: “My concern for justice, for peace, for enlightenment,” Goldberg said, “stem[s] from my heritage.” The other Jewish justices could have reached the same judgment. Justice Breyer and I are fortunate to be linked to that heritage.

I suggested earlier that Justice Breyer’s situation and mine is distinct from that of the first five Jewish justices. I can best explain the difference by recounting a bit of history called to my attention in remarks made a few years ago by Seth P. Waxman. Seth served with distinction as solicitor general of the United States from 1997 until January 2001.

Seth spoke of one of his predecessors, Philip Perlman, the first Jewish solicitor general. Perlman broke with tradition in the 1940s and successfully urged in a friend of the Court brief the unconstitutionality of racially restrictive covenants on real property. The case was *Shelley v. Kraemer*, decided in 1948. The brief for the United States was written by four lawyers, all of them Jewish: Philip Elman, Oscar Davis, Hilbert Zarky, and Stanley Silverberg. All the brief writers’ names, save Perlman’s, were deleted from the filed brief. Perlman’s name was listed together with just one other: Attorney General of the United States (and, later, Supreme Court Justice) Tom Clark. The decision to delete the brief drafters’ names was made by Arnold Raum, Perlman’s principal assistant and himself a Jew. “It’s bad enough,” Raum said, “that Perlman’s name has to be there.” It wouldn’t do, he thought, to make it so evident that the position of the United States was “put out by a bunch of Jews.”

Consider in that light President Clinton’s appointments in 1993 of Ruth Ginsburg and in 1994 of

Stephen Breyer as the 107th and 108th justices. Our backgrounds had certain resemblances: we had taught law for many years and then served on federal courts of appeals for some 13 years. And we are both Jews. In contrast to Frankfurter, Goldberg and Fortas, however, no one regarded Ginsburg and Breyer as filling a Jewish seat. Both of us take pride in, and draw strength from, our heritage, but our religion simply was not relevant to President Clinton's appointments.

The security I feel is shown by the command from Deuteronomy displayed in artworks, in Hebrew letters, on three walls and a table in my chambers. *Zedek, Zedek, tirdof*—“Justice, Justice shalt thou pursue,” these art works proclaim; they are ever present reminders of what judges must do “that they may thrive.” There is also a large silver mezuzah mounted on my door post. It is a gift from the super bright teenage students at the Shulamith School for Girls in Brooklyn, New York, the school one of my dearest law clerks attended.

Jews in the United States today face few closed doors and do not fear letting the world know who we are. A question stated in various ways is indicative of large advances made. What is the difference between a New York City garment-district bookkeeper and a Supreme Court justice? Just one generation, my life bears wit-

ness, the difference between opportunities open to my mother, a bookkeeper, and those open to me. Where else but in the USA could that happen?

True, as press reports daily document, anti-Semitism's ugly head remains visible in our world. Even so, Jews in the United States seldom encounter the harsh anti-Semitism that surrounded Judah Benjamin, or that touched Brandeis when the U.S. Senate debated his nomination. I pray we may keep it that way.

Just as we draw inspiration from the letter exchange between this congregation and George Washington, may I conclude these remarks with counsel a wise woman of that age, Abigail Adams, gave to her then young son, future President John Quincy Adams. Her words seem to me suitably fitted to the experience of Jews, now for some 350 years, in America:

These are the times in which a genius would wish to live. It is not in the still calm of life, or the repose of a pacific station, that great characters are formed. The habits of a vigorous mind are formed in contending with difficulties.

Ruth Bader Ginsburg is an Associate Justice of the United States Supreme Court.

A beacon of religious freedom

U.S. Supreme Court Associate Justice Ruth Bader Ginsburg delivered her address at the Touro Synagogue, the oldest synagogue in America, whose building commenced in 1759. Its history actually started a century earlier, when, in the spring of 1658, fifteen Spanish Portuguese Jewish families arrived in Newport, Rhode Island, most likely from Curacao in the West Indies. For a hundred years the members of the congregation worshipped in private homes. In 1759 the congregation undertook the building of a synagogue, selecting renowned architect Peter Harrison for the work. Harrison succeeded in erecting a synagogue of outstanding beauty and dignity – charging no fee for his services – that stands at an acute angle to the street so that the Holy Ark could face Jerusalem. The interior architecture is of classical colonial style, incorporating some features of traditional Spanish Portuguese synagogues, and bears some similarity with a Sephardi synagogue erected in Amsterdam, Holland, in 1675. Touro Synagogue has received national acclaim for its architectural and historical distinction. In 1946, by an Act of Congress, President Harry S. Truman proclaimed Touro Synagogue a National Historic Site. In 2001, Touro Synagogue became one of only 21 properties in the collection of the National Trust for Historic Preservation. In each of these cases, it was the first religious structure to receive such recognition. On 21 August 1790, U.S. President George Washington responded to a letter written by Moses Seixas, Warden of the Hebrew Congregation of Newport, proclaiming religious freedom as a tenet of the new United States of America. Both letters can be read at www.tourosynagogue.org.



John Hopf

The Touro Synagogue is built at an angle to street so that the Holy Ark can face Jerusalem.

In pursuit of peace with Lebanon

Lebanon, riven by sectarian strife and manipulated by other states, has been party to a series of agreements, arrangements and understandings with Israel for more than three decades. The Intelligence and Terrorism Information Center at the Center for Special Studies (CSS) has analyzed them and their aftermath in the field. The analysis is made more pertinent by the current crisis and the diplomatic efforts underway to resolve it.

This article examines the agreements, arrangements and understandings with respect to Lebanon in which Israel was involved during the past 30 years. Most were reached after military actions taken by Israel during its war against Lebanese-based terrorism. Three periods are examined: the period before the Lebanon War, during which Israel battled Palestinian terrorism in Lebanon (1975-1981); the period of the Lebanon War itself (1982-1985); and the period of the so-called “security zone” (1985-2000). This article ends with the lessons learned and conclusions drawn from agreements reached in the past, which are, in our assessment, relevant to the current situation.

Lebanon was and remains an ideal arena from which to use terrorism as a weapon against Israel. First, local topography makes it ideal as a location from which to attack populated areas of Israel. Second, an economically and socially deprived Shi’ite population, with terrorist organizations in its midst, lives near Israel’s northern border. Similarly, the Palestinian refugee camps in Lebanon are a hotbed of Palestinian terrorist activity. Further, the delicate internal sectarian balance of Lebanon and its government’s inherent weakness hamper the government and the army’s ability to enforce their authority in south Lebanon. Most important though, is the influence of certain Middle Eastern states’ sponsorship for terrorism. For them, Lebanon is a convenient springboard for terrorist activities against Israel that promote their own strategic interests.

Israel has been unable to achieve a lasting peace agreement or other arrangement with Lebanon for several decades. This is chiefly due to internal factors in Lebanon and its overwhelming dependence on Syria, as well as Hezbollah’s close relations with Iran. Israel has had no choice but to use force, and during the past 30 years it has undertaken a wide range of military actions, including targeted attacks on terrorist bases and comprehensive operations. Those operations yielded, at best, feeble agreements that failed to resolve the basic problem of Lebanon-based terrorism.

Despite their temporary nature, the agreements, arrangements and understandings were essential for Israel because they provided breathing space and periods of relative quiet. They quickly dissolved when Israel was forced to take up arms against Lebanese-based terrorist organizations, a result of three central weaknesses that led to their erosion and eventual collapse.

- A. The basic discrepancy between Israeli and terrorist organization worldviews: Israel regarded the agreements and arrangements as a means of stopping terrorist attacks from Lebanon so that residents of the north could live normal, routine daily lives. The terrorists, both Palestinian and Lebanese, regarded them as a response to political and military pressures and as a way of gaining time to reorganize and prepare for a renewal of terrorism – their only justification for existence.
- B. The Lebanese government, the partner to most of the agreements and the side charged with enforcing the arrangements, was unable to do so effectively because it was too weak in the face of internal Lebanese dynamics, the terrorist organizations (Hezbollah among them) and their sponsoring countries (primarily Syria and Iran). In the absence of the Lebanese government’s ability and desire to enforce its authority, attempts were made to support it by stationing international forces.
- C. The international forces have been a resounding failure, whether because the United States and France were unwilling to shed their own soldiers’ blood (removing, under terrorist pressure, their units from the multi-national force) or because from the beginning UNIFIL (the United Nations

Interim Force in Lebanon) was not mandated to act against the terrorist organizations. To do so might have caused UN soldiers to clash with them. In the absence of effective Lebanese or UN enforcement, the Israel Defense Forces had no choice but to remain in Lebanon for long periods after the Lebanon War and from there to struggle against terrorism with the help of friendly Christian militias. This was an extremely problematic solution, as it drew Israeli casualties while failing to prevent Katyusha rockets from being fired into Israel from areas north of the zones occupied by the IDF, the Israel Defense Forces.

All through this period, the terrorism-sponsoring countries, with Syria at the fore, proved their ability to hinder and even sabotage agreements and arrangements to which they were not a party and which were contrary to what they viewed as their interests. (An exception to this was Syria's involvement in the Grapes of Wrath agreement.)

During the 15 years between the Six Day War (1967) and the Lebanon War (1982), Palestinian terrorist organizations strengthened their territorial base in Lebanon, especially south Lebanon and west Beirut, turning Lebanon into a launching pad for attacks against Israel. The Lebanese and Arabs took justification for such attacks from the Cairo Agreement of 1969 signed by Lebanon and the PLO (Palestine Liberation Organization).

Lebanese-based Palestinian terrorism increased after the civil war broke out in 1975. This was due to the collapse of Lebanese government institutions and the subsequent exploitation by the Palestinian terrorist organizations of the vacuum to strengthen their military power and political influence, thus creating a state within a state. It was during this period that Syria took over large areas of Lebanon.

Between 1975 and 1982 there were no direct agreements between Israel and Lebanon, but there were agreements and arrangements in which non-Lebanese elements played a central role.

April-May 1978: Indirect understandings between Israel and Syria

During April and May 1976, at the height of the Lebanese civil war and on the eve of the Syrian invasion of Lebanon, Israel and Syria held an indirect exchange of messages mediated by the United States. This resulted in an unwritten understanding accord-

ing to which a red line was drawn in Lebanon from Sidon to Kafr Houne (south of Jezzine) to Hatzbaia (in the eastern sector). In essence, Syrian forces were given freedom to act north of the red line, and Syria de facto recognized Israel's security interests in south Lebanon.

That understanding prepared the ground for the Syrian invasion of Lebanon in June 1977, aimed at the Palestinian-Leftist coalition and thus receiving the Christian leadership's blessing. It was also the basis for Israel's policy in Lebanon during the period before the Lebanon War, but it had eroded by the spring of 1981 and collapsed during the Lebanon War (during which Israel and Syria were dragged into a direct military confrontation on Lebanese soil).

March 1978: Operation Litani

Operation Litani began in March 1978, following a massive terrorist attack on the coastal road north of Tel Aviv in which 37 bus passengers were killed and 78 were wounded. The operation was the most ambitious action taken by the IDF against the terrorist infrastructure in south Lebanon before the Lebanon War, and it captured, with the exception of the Tyre enclave, all of south Lebanon as far as the Litani River and the eastern sector. The operation ended with UN Security Council Resolutions 425 (adopted on 19 March 1978) and 426 (adopted on 20 March 1978), which contained three interrelated provisions: an immediate Israeli ceasefire and withdrawal from all of Lebanese territory; the return of effective Lebanese government authority to the area evacuated by the IDF; and the establishment of a temporary UN peacekeeping force (UNIFIL) that would help the Lebanese government enforce its authority.

Resolution 425 was only partially implemented. The Lebanese government could not enforce its authority in south Lebanon as the Lebanese army had dissolved along sectarian lines during the civil war; the Palestinian terrorist organizations continued their attacks against Israel, including from areas in which UNIFIL troops were deployed; and the "temporary" UN force had insufficient muscle and no mandate to allow it to stop terrorist activities in south Lebanon. The IDF did withdraw south of the armistice line, but pro-Israeli militias from Christian villages under pressure from the Palestinian-Leftist coalition were in place along the border. The villages had asked for Israeli assistance, first as humanitarian aid but later as military support. Resolution 425 was fully implemented only in May 2000 with Israel's unilateral with-

drawal from the security zone and the collapse of the Christian forces.

1981: The American-mediated Israeli-PLO ceasefire

In July 1981, fierce fighting erupted between Israel and Palestinian terrorists in Lebanon. Israel struck terrorist headquarters in Beirut from the air, causing hundreds of casualties. Terrorist organizations fired long-range artillery and rockets at populated areas in Israel's north, with Israeli suffering many casualties and much property damage. During the fighting, the U.S. government was called upon and a special envoy was sent to the Middle East. A ceasefire with the PLO was reached with Saudi Arabian support, the first agreement of its kind.

The agreement had three provisions: No land, sea or air military aggression would be carried out from Lebanese territory against Israel; Israel would not act by land, sea or air against targets in Lebanon; and no hostile military acts would be carried out against the territory controlled by the Christian militias or from that territory.

The agreement was disputed even before it was signed and some view it as the catalyst for the Lebanon War. Israel defined it broadly, claiming that it obligated a complete cessation of Palestinian terrorism on all borders. The PLO and the Palestinian terrorist organizations defined it far more narrowly as referring only to the avoidance of terrorist attacks through the Israeli-Lebanese border. The agreement turned into a time bomb defused a number of times by the United States. Then, in June 1982, when a Palestinian terrorist shot the Israeli ambassador to Britain, the IDF invaded Lebanon.

1982-1985: Agreements and attempted agreements during Operation Peace for Galilee

Israeli policy has always sought a peace agreement with Lebanon. During the Lebanon War there was no effective Lebanese government with which Israel could sign a lasting peace agreement. Israel viewed the Christian camp and not the Lebanese government as the central partner for talks about an agreement that would enable the IDF to withdraw from Lebanon. Yet leaders of the Christian camp were unwilling, and likely unable, to deliver the goods in the face of internal Lebanese and intra-Arab coercion.

August 1982: Agreement to evict the Palestinians and Syrian army from Beirut

In August 1982, when the IDF siege of Beirut was

lifted, an American-mediated agreement among Israel, the PLO and the Lebanese government was reached to evict the Palestinian terrorists and Syrian army from Beirut. A multinational force of American, French, Italian and Lebanese army troops was established to supervise the withdrawal of the terrorists and Syrian army, and to secure the evacuated areas in west Beirut. The evacuation was carried out that month as the multinational force deployed around Beirut.

That same summer, Hezbollah was established by Iran with Syrian support in Lebanon's eastern Bekaa Valley, and it became an important tool in carrying out their policies in Lebanon. As part of Syria's campaign against Israel, Hezbollah (encouraged by Iran) carried out a series of suicide bombing attacks against western targets, focusing on the multinational force's American and French units and causing hundreds of casualties. The United States, still licking its Vietnam wounds, unilaterally evacuated its forces from Beirut and its units from the multinational force in February 1984.

1983: The Israeli-Lebanese "May 17" agreement

Even after the 1982 assassination of Lebanese President Bashir Gemayel (a Christian), Israel continued seeking a peace agreement that would enable the withdrawal of its forces from Lebanon. After an abortive attempt to formulate a secret working paper about normalizing Israel-Lebanese relations in December 1982, the two countries, with active U.S. support, met in Kiryat Shmona (in Israel) and Khalde (in Lebanon) for bilateral talks. After months of negotiations, the talks yielded what is known as the "May 17" agreement. It was more a security and less a full peace agreement, a delicate balance between the needs and aspirations of both sides.

The agreement established measures to be taken in the area south of the Awali River, which was defined as a security zone. Two brigades of the Lebanese army would make a special effort to prevent terrorist attacks. The first was the "territorial brigade," into which the Christian militias would be integrated and which would operate from the international border to the Zaharani River. The second was a regular army brigade that would deploy from the Zaharani to the Litani. These measures were supposed to enable the IDF to withdraw from Lebanon along with the other foreign forces (Syria and the PLO's "armed elements").

The agreement's diplomatic aspects were not defined as "peace" and it pointedly omitted the word "recognition," though it expressed an obligation to respect sovereignty, independence and borders. It did

include a joint statement as to the end of a state of war; an obligation to ban and prevent terrorism and incitement to acts of terrorism; and a series of arrangements preliminary to the normalization of relations between the two countries.

The weak point of the agreement was that it did not consider Syrian interests, the strong Syrian position in Lebanon and the extent of Syrian influence on the government of Amin Gemayel, brother of the slain Bashir. That government buckled to heavy Syrian physical and political pressure with a unilateral “null and void” announcement ten months after the agreement was signed. The IDF found itself stuck in Lebanon, exposed to increasing Syrian-encouraged terrorist pressure and without a political agreement to cover the end of the war.

November 1984-January 1985: The failure of the Naqura security talks

Israel was forced to abandon its hopes for a peace treaty and instead made do with an Israeli-Lebanese agreement that would ensure the safety of Galilee population centers. After the UN emissary gained Syrian, Israeli and Lebanese agreement, talks between Israeli and Lebanese military representatives began in Naqura on the Israel-Lebanon border, lasting from November 1984 through January 1985.

Israel raised a concept of security arrangements based on IDF withdrawal from Lebanon after the creation of two buffer zones: one in which the Lebanese army-based “territorial brigade” would be deployed, and the other in which UNIFIL would be deployed. The Lebanese (under Syrian influence) insisted that the Lebanese army, supported by UNIFIL, would alone maintain security in the areas evacuated by Israel. The Lebanese position was impractical, primarily because at that time the Lebanese army was too weak to prevent a resumption of terrorist attacks against Israel.

With the Naqura talks leading nowhere, criticism at home and terrorist pressure on the IDF in Lebanon, in mid-January 1985 the Israeli government decided on a unilateral withdrawal from Lebanon, an IDF deployment along the border and the creation of a security zone in south Lebanon where Christian militia forces (the South Lebanon Army, hereinafter: “SLA”) would operate with IDF backup.

1985-2000: Understandings during the security zone period

Israel considered the security zone as a way to protect the Galilee and prevent terrorist attacks originat-

ing in Lebanon. The Israeli government expected that the security zone would enable both the IDF and the SLA to deal effectively and at the lowest possible cost with terrorism in Lebanon, which had metamorphosed from Palestinian terrorism to Hezbollah-led Shi’ite terrorism. Hezbollah, backed by Iran and Syria, became the dominant Shi’ite organization, at the expense of Amal, the more pragmatic side of the Shi’ite community. Hezbollah rocket fire, now routine, became the main security threat to Galilee residents. The security zone did not provide a remedy to the rocket fire (it was never so intended), while Hezbollah attacks there inflicted considerable losses on both the IDF and SLA. Israeli public opinion was opposed to the continuing losses incurred by maintaining the security zone. When attempts to reach an understanding with Syria that would enable an agreement-based withdrawal failed, the Israeli government decided on unilateral withdrawal from the security zone, based on Security Council Resolution 425. The decision was fully implemented in May 2000.

1993: Understandings resulting from Operation Accountability

In the summer of 1993 Hezbollah stepped up its challenge in the security zone. It limited IDF freedom of action by changing its mode of operations: every time the IDF was attacked from areas north of the security zone and returned fire, Hezbollah fired a barrage of missiles into the Galilee. Hezbollah terrorism thus accompanied the Madrid negotiations being held at that time between Israel, Syria and Lebanon.

Syria, while negotiating with Israel, did nothing to rein in Hezbollah, although it had an interest in preventing a general deterioration of a situation into which Syria might be pulled.

In light of this situation, the Israeli government decided on Operation Accountability (July 25-31). Its primary objectives were to stop Katyusha attacks on the populated areas in the north and to increase the IDF’s freedom of action in the security zone. One of the ways of doing that was to damage Hezbollah bases among the population by distancing the Lebanese residents from the battle areas in south Lebanon.

At first international public opinion was restrained. However there were soon strong adverse reactions in both the United States and Western Europe to the pictures coming out of Lebanon. When the operation brought Israel and Syria to the brink of a clash, American Secretary of State Warren Christopher effected a ceasefire and brought about an understand-

ing between Israel and Syria regarding the rules of the game in south Lebanon.

On July 31 the ceasefire became effective, based on the understandings reached between Israeli Prime Minister Yitzhak Rabin and the American secretary of state. At the heart of the understanding was Hezbollah's commitment not to launch rockets into Israeli territory, and Israel's commitment not to fire on Lebanese populated areas north of the security zone, except if IDF forces were shot at from within a specific settlement.

The informal agreement contained a number of weak points. The oral agreements were vague and to a large degree dependent on Israel's determination to stand behind them. The agreement was not accompanied by a mechanism that would or could ensure inspection and enforcement. Syria refused to enforce the agreement with Hezbollah, claiming it had only limited influence on the movement. Further, Hezbollah did not commit itself to stopping its attacks, including rocket attacks, on the security zone, and it could be expected to increase pressure on the zone. Despite these weaknesses, the understandings were in force for almost three years until they crumbled and Israel was forced to undertake an additional operation, Grapes of Wrath.

1996: Understandings resulting from Operation Grapes of Wrath

Operation Grapes of Wrath was undertaken because of increased Hezbollah attacks from the security zone in frequent breach of the understandings reached after Operation Accountability. Again, Syria made no attempt to restrain Hezbollah or to curb the escalation. The objective of the operation was to damage Hezbollah and exert pressure on the Lebanese government, and through it on Syria to restrain Hezbollah. Efforts were made to destroy Hezbollah's rocket launchers, stationed in the heart of civilian areas, while encouraging residents of south Lebanon to leave the battle areas and flee toward Beirut in numbers larger than those of the previous operation. The Israeli Air Force also struck electrical installations in Beirut in response to similar attacks in northern Israel.

The operation began on 2 April and in effect was halted on 19 April. In response to Hezbollah rocket fire, IDF artillery fire mistakenly hit a group of Lebanese civilians in a shelter in a UNIFIL installation in the village of Qana, killing more than 100 people. The tragedy stoked rage and condemnation in the Arab and western worlds and resulted in an Israeli decision to end the operation. This time as well the

American secretary of state managed to bring about a ceasefire and new understandings.

These understandings were completely different from those of Operation Accountability in two important fields: they were put in writing to prevent disagreement and misunderstanding; and an international monitoring group was established, which, under American and French aegis, served as a framework for direct dialog between IDF, Syrian and Lebanese officers.

The understandings were intended to fashion new rules for conducting the confrontation in Lebanon, to prevent deterioration of the situation between Israel and Syria and to remove the threat of confrontation and violence from the civilian populations on both sides of the border. Israel and Lebanon (with Syria as an indirect party) committed to five main understandings.

1. "Armed groups" in Lebanon (i.e., Hezbollah and other organizations) would not attack Israeli territory with Katyushas or any other type of weapon (i.e., civilian and military targets in Israel were off limits).
2. Israel and those cooperating with it (the SLA) would not fire any kind of weapon at civilians or civilian targets in Lebanon.
3. Under no circumstances would civilians be the target of attack and civilian-populated areas, and industrial and electrical installations, would not be used as launching grounds for attacks.
4. It was determined that nothing in those understandings would prevent either side from exercising its right to self-defense (ensuring the IDF freedom of action should it be fired on).
5. A monitoring group would be established to oversee the implementation of the understandings and to judge complaints of the parties regarding violations.

Negotiations over the monitoring group, conducted by delegations from the United States, France, Israel, Syria and Lebanon, determined that it would comprise military representatives from the United States, France, Syria, Lebanon and Israel with a rotating chairman and co-chair who would be American and French. Reports would be issued in consensus, identifying the side responsible for violating the understandings and containing recommendations for reinforcing them. Where the group could not reach a

consensus, a report describing its deliberations would be sent to the foreign ministers for further discussion. Arrangements were made to verify Israeli and Lebanese complaints on the ground by representatives of the group's member countries (an option almost never realized).

The Grapes of Wrath understandings had weak points that led to disagreements between Israel, Syria and Lebanon. The most important disagreement was in Article 3, which was meant to ban Hezbollah military activity from civilian populated areas. According to the original version, populated areas were banned as "launching grounds for attacks." The article turned out to be open to interpretation: according to Israel (with American support) it meant that all Hezbollah military activity was banned from civilian areas. Hezbollah's narrower interpretation (with Syrian support) was that it only banned Katyusha fire from within settlements. Therefore, claimed Hezbollah, it was entitled to situate itself in civilian areas and use them as launching grounds for attacks.

The dispute was in no way theoretical, because the Israeli interpretation legitimized the IDF's responding to fire coming from populated areas, even if it meant endangering civilians.

The understandings reached after Operation Grapes of Wrath, which were unpopular with the Israeli government, were in force until the IDF withdrawal from Lebanon in May 2000. However, in that instance as well the understandings had been eroded and the monitoring group found it increasingly difficult to function because of the escalation on the ground. It ceased meeting in the middle of February 2000. Once the IDF withdrew from Lebanon the understandings became irrelevant and evaporated.

May 2000-July 2006: Epilogue: After the IDF withdrawal

While Israel was carrying out Security Council Resolution 425 in May 2000, and receiving recognition for having done so by the UN and the international community, the Lebanese government, coerced by Syria, failed to deploy effective military forces in south Lebanon or enforce its authority over the region. It also did not implement Security Council Resolution 1559 of 2 September 2004, which calls for the enforcement of Lebanese government sovereignty over all Lebanese territory and for the disarmament of the militias (i.e., Hezbollah).

Hezbollah entered the vacuum created when the IDF withdrew from south Lebanon and took over what had been the security zone. It entrenched itself behind

a line of strongholds along the border and created new excuses to continue its terrorist attacks from Lebanon (the "liberation" of the Sheba'a Farms in the central sector, an area recognized by the UN and the international community as part of Syria; and the release of Lebanese terrorists sentenced to jail terms in Israel). Those pretexts did not win a consensus within Lebanon after the IDF withdrew from the security zone.

During the six years after the IDF left Lebanon, Hezbollah, supported and aided by Iran and Syria, significantly improved its operational capabilities and built up a huge arsenal of rockets threatening Israel that, according to Hezbollah, would deter Israel from responding effectively to Hezbollah's ongoing provocations. At the same time, Hezbollah maintained a controlled level of tension along the border with Israel, trying, until the current crisis, not to go too far: it occasionally attacked Mt. Dov (the Shaba Farms), abducted and attempted to abduct IDF soldiers, fired mortars and rockets, sent in snipers, and fired anti-tank and anti-aircraft missiles.

In addition, Hezbollah increased its aid to Palestinian terrorism, both by encouraging terrorism in the Palestinian Authority and by carrying out attacks across the border from Lebanon. One of the most conspicuous attacks was the March 2002 killing of six Israelis by two suicide bombers near Kibbutz Matzuba. Hezbollah has also occasionally allowed Palestinian terrorists to fire rockets at Israel from Lebanese territory.

As part of its support of terrorist organizations in the Palestinian Authority, Hezbollah has regularly transmitted instructions to terrorist squads to carry out attacks, including suicide bombing attacks in Israeli cities, in return for the transfer of funds. It also supports the Palestinian terrorist organizations through training, by providing weapons and by using its media (chiefly al-Manar television) to disseminate pro-Palestinian, pro-terrorism and anti-Semitic propaganda.

During the past six years Israel has shown great restraint, and until recently IDF activity has been mainly defensive. Israel's response to the provocative attack in which Hezbollah abducted two IDF soldiers was extraordinary and surprised Hezbollah, and led to a confrontation unprecedented in length, scope and seriousness since the Lebanon War.

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War in Lebanon, the law of armed conflict and the UN Security Council

Israel's response to Hezbollah's July 2006 attack was loudly condemned in many quarters. Others want to see Hezbollah charged with war crimes, while UN Security Council Resolution 1701 and the role of UNIFIL raise many questions of international law.

Robbie Sabel

The recent conflict in Lebanon and the ensuing UN Security Council Resolution 1701¹ have brought to public attention a number of international law issues. Among the issues: Did the laws of armed conflict apply to the situation in Lebanon? Do the laws of armed conflict bind Hezbollah? Was the Israeli response to the Hezbollah attack disproportionate? What are legitimate targets in such a situation? Is the Lebanese Government responsible for Hezbollah activities? Is it illegal to cause civilian casualties? What is the status of UN Security Council Resolution 1701? Can Hezbollah be prosecuted for war crimes? And, can the United Nations Interim Force in Lebanon (hereinafter: "UNIFIL") take military measures against Hezbollah



Did the laws of armed conflict apply to the situation in Lebanon and did they bind Hezbollah?

The laws of armed conflict in all circumstances bind all states. It is irrelevant that Israel was the victim of an armed attack. The laws of armed conflict apply equally to the victim and to the aggressor. Hence the Israeli Army was bound to comply with all the rules applicable to an armed conflict and it has not denied such an obligation.² These rules include those relating to treatment of prisoners, treatment of wounded, prohibited means of warfare and weapons, prohibition of attacks against civilians and behavior towards civilian populations. The Lebanese army was, needless to say, likewise bound. Israel was obliged to apply these rules against all in Lebanon including Hezbollah fighters.³ This is an asymmetry peculiar to the laws of armed conflict, in that Hezbollah knowingly and deliberately targeted civilians and civilian targets in Israel, behavior that does not exempt Israel from having to apply the rules to members of Hezbollah. It makes little common

sense, however, to talk about the legal obligations of an organization like Hezbollah, an organization defined in some states as a terrorist organization.⁴ International law reflects common sense and organizations such as Hezbollah are not treated as separate international legal entities.⁵ The responsibility for actions by groups such as Hezbollah rests with Lebanon, the territorial state.⁶

Was the Israeli response to the Hezbollah attack disproportionate?

Every state has the right to act in self-defense⁷ but the right is subject to the condition of "proportionality." For example, a minor border incident only entitles a state to take measures of self-defense compatible with the severity of the incident. A recent author has commented, however, "where such activities clearly form part of a sequence or chain of events, then the test of proportionality will be so interpreted as to incorporate this."⁸ Once armed conflict develops, a state is not limited to responding only to measures chosen by its opponent. A state that has been attacked can act to eliminate the continuation of the threat against it. A state that takes aggressive armed action against another state, or permits its territory to be used for that purpose, cannot dictate the terms of the subsequent armed conflict. The proportionality of a response to an attack is to be measured not in regard to the specific attack suffered by a state, but in regard to what is necessary to remove the overall threat: "[P]roportionality...cannot be in relation to any specific prior injury – it has to be in relation to the overall legitimate objective of ending the aggression..."⁹ An aggressor state 'risks' that its armed forces will be dealt a blow disproportionate to the attack it made. Except as regards civilian casualties,¹⁰ proportionality is not part of the law of armed conflict. Wars may be fought to defeat the military capabilities of an enemy aggressor and not only as an actuarial exercise.

In the context of the recent Lebanon fighting, Hezbollah does not deny that the kidnapping of the Israel soldiers on July 12 was deliberate, premeditated and approved by the Hezbollah command. The attack was on an Israeli patrol in territory that is undisputed Israel territory. It was accompanied by a barrage of rocket attacks aimed against both military and civilian targets in northern Israel. It followed a series of earlier Hezbollah attacks and attempts at kidnapping soldiers. It would clearly appear to have been an armed attack. Since the first Hezbollah barrage on 12 July, some four thousand rockets have hit northern Israel. Among the towns hit were Kiryat Shmone, Hatzor, Safed, Carmiel, Shlomi, Haifa and Hadera. This was an armed conflict by any measure. In such an armed conflict it was legitimate for Israel to attempt to deal a blow to the military capabilities of Hezbollah. It is relevant in this context to note that Security Council Resolution 1701 not only does not condemn Israel's reaction but also refers explicitly to "Hezbollah's attack."

What are legitimate targets in such a situation?

In armed conflict, legitimate targets are those "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, offer a definite military advantage."¹¹ Hezbollah received its armaments from Iran and Syria. These armaments included long-range missiles and missile launchers and Syria has continued the supply of armaments. Roads, bridges and airports used in the supply of such weapons are legitimate military targets. Electric power stations and fuel depots are also considered legitimate targets though Israel has refrained from attacking them.¹² Hezbollah headquarters in Beirut was a legitimate target. Civilian populations and civilian objects are not legitimate targets, and it would not have been legal for Israel to attack Lebanese civilian government facilities that were not involved in the hostilities. Israel indeed refrained from such attacks.

Proportionality and civilian casualties

The rules of armed conflict are unambiguous. "The civilian population as such, as well as individual civilians, shall not be the object of attack."¹³ "Civilian objects shall not be the object of attack or of reprisals."¹⁴ However international law reflects common sense as the rule is: "The presence of a protected person may not be used to render certain points or

areas immune from military operations."¹⁵ This is particularly relevant when military targets are situated in the vicinity of civilian population and civilian objects, as is the situation in the Lebanese context where Hezbollah armaments were deliberately placed in civilian houses and installations. Missiles were hidden in houses and mosques and Hezbollah headquarters were situated in a southern suburb of Beirut. Such positioning cannot grant the targets immunity from attack. The rule, however, is that there must be proportionality as regards the amount of incidental or collateral civilian casualties. It is regrettably inevitable that there are likely to be civilian casualties when attacking such military targets. Armed forces, however, are obliged to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." The attacking army must, moreover "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."¹⁶ The Israeli warnings to civilians to vacate Hezbollah controlled villages in southern Lebanon was taken as a necessary step prior to attacking armaments in such villages. It saved countless lives of Lebanese civilians, though the sight of villagers fleeing their homes did not add to Israel's public relations image.

Prosecution for war crimes

Individuals who commit war crimes during an armed conflict are personally responsible for their crimes without reference to the organization to which they belong. Members of Hezbollah who committed war crimes or crimes against humanity are thus personally responsible and are subject to universal jurisdiction.¹⁷ Thus any member of Hezbollah who was involved in directly firing rockets at Israeli civil targets can be prosecuted for committing a war crime. International law grants every state jurisdiction to try such crimes. The International Criminal Court (ICC) in The Hague also could have jurisdiction were the UN Security Council to resolve to grant it such jurisdiction. This has been done in the case of the crimes committed in Darfur.

A distinction must be made between military hostilities conducted by Hezbollah against Israeli military targets, which are not war crimes as such,¹⁸ and the deliberate targeting of civilians, which is a war crime and subject to universal jurisdiction.

Theoretically, if Israeli soldiers had deliberately targeted Lebanese civilians, which they didn't, they would also be responsible for war crimes. Israeli law, however, would prosecute such an act, as do other democratic states. Universal jurisdiction applies only where the state involved is unable or unwilling to prosecute its own soldiers for war crimes.

Is the Lebanese Government responsible for Hezbollah activities?

The fact that the attacks were carried out by militias and not by the regular Lebanese Army does not, as such, negate Lebanese responsibility. The rules of international law against aggression apply not only to attacks by regular forces but also to "the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to an actual armed attack conducted by regular forces . . . or its substantial involvement therein."¹⁹

A state is responsible for acts of a militia operating out of its territory in one of three sets of circumstances. If the acts of the militia can be attributed to the territorial state, if the territorial state controls or adopts the acts of the militia or thirdly, if the territorial state is negligent in preventing the acts of the militia.

Hezbollah is part of the Lebanese Government coalition, there are Hezbollah members of its cabinet and elements of the Lebanese Army have collaborated with Hezbollah. Acts of Hezbollah can well be considered to be those of the Lebanese Government.

Even if Hezbollah were not part of the Lebanese Government and had acted contrary to the wish of the Government, there would still exist Lebanese responsibility for not preventing such acts. Lebanon has a relatively well-equipped army of some 50,000 soldiers although it has not even attempted to act against Hezbollah activities. Further, Lebanon is not in compliance with the UN Security Council resolution that called for "the disbanding and disarmament of all Lebanese and non-Lebanese militias" and supporting "the extension of the control of the government of Lebanon over all Lebanese territory."²⁰ Notwithstanding the direct responsibility of Lebanon, Israel refrained from attacking Lebanese targets other than those directly involved in support of Hezbollah activities, such as roads, bridges and airports used as routes for bringing military supplies to Hezbollah.

International law also attributes responsibility if a

government has "effective control"²¹ or "overall control"²² over the militia, though from the available information it is questionable whether the Lebanese Government had such control.

It should be added that even if Lebanon could prove that it had done all within its power to prevent Hezbollah activities but failed, this would not negate Israel's right to take military action against Hezbollah and its support mechanism. If a state fails to prevent armed bands in its territory from attacking a neighboring state, the neighboring state, subject to the attack, is entitled to the right of self-defense against those armed bands.

Legal status of UN Security Council Resolution 1701

In accordance with Article 25 of the UN Charter, states "agree to accept and carry out the decisions of the Security Council." The accepted interpretation of Article 25 is that only those resolutions adopted under Chapter VII of the Charter are considered to be "decisions," and thus binding. This raises the issue of whether Security Council Resolution 1701 was adopted under Chapter VII and hence a binding resolution.

Resolution 1701 was preceded by a draft resolution of 5 August 2006 proposed by France and the U.S.²³ This draft, part of the travaux préparatoires, made no reference to Chapter VII and did not incorporate language taken from Chapter VII. The draft called for "a further resolution under Chapter VII." Thus the draft, as such, clearly was not envisaged to be a Chapter VII resolution.

The preamble to Resolution 1701, as adopted, however contains the phrase "Determining that the situation in Lebanon constitutes a threat to international peace and security," language that is a quote from Chapter VII and is usually used to denote that the Council is acting in accordance with Chapter VII. Further, Resolution 1701 omits any reference to "a further resolution under Chapter VII." It could therefore be argued that the text of Resolution 1701 is the Chapter VII resolution envisaged in the draft. However the omission of an explicit reference to Chapter VII and the use of language referring to agreement of Lebanon and Israel and assistance to the Lebanese Army would seem to negate the obligatory nature of the Resolution. In any event both Israel and Lebanon have accepted the Resolution, and it hence binds them, irrespective of whether it was adopted under Chapter VII.

Another issue is whether the military contingents of the reinforced UNIFIL are permitted to use force

in implementing their mandate. In theory, the UN has always drawn a distinction between peacekeeping forces, acting under Chapter VI of the UN Charter with the consent of the parties involved and which cannot use force, and peace enforcing under Chapter VII of the UN Charter where force may be used. In practice the distinction has “eroded.”²⁴ And “UN rules on the use of force would at all times be less than clear.”²⁵

The British Army Field Manual has defined peace enforcing, under Chapter VII, as “operations carried out to restore peace between belligerents who do not consent to intervention and who may be engaged in combat activities.”²⁶ The original intent of the UN Charter drafters was that the UN would create a military force under UN command to carry out UN Security Council decisions. Such a force never materialized, and where the Security Council has authorized use of force, as in Korea and the First Gulf War, the force consisted of national military units operating with legitimacy provided by a UN Security Council Resolution.

“Peace keeping” is not mentioned in the UN Charter and has developed empirically from UN practice. It has been described as “actions involving the use of military personnel in international conflict situations on the basis of the consent of all parties concerned and without resorting to armed force except in cases of self defense.”²⁷ UN peacekeeping forces can use force only in self-defense. However, there is no agreement about what constitutes ‘self defense.’ Some states argue that it includes the defense of the mandate, while others argue that strict limitations should apply.

To effectively carry out its functions, the enhanced UNIFIL cannot only act passively as an observer, but will need to take an active role. The present Secretary General has acknowledged, for instance, that peacekeeping forces cannot operate effectively without intelligence.²⁸

Resolution 1701 explicitly “authorizes UNIFIL to take all necessary actions.” Bowett writes in this context that the formula all necessary means “is well accepted as amounting to an authorization to use force against the state upon which the coercive measures are imposed.”²⁹ The difference between *all necessary means* and *all necessary actions* does not appear to have any legal significance.

Resolution 1701 does not oblige states to send contingents to UNIFIL³⁰ nor does it oblige them to use force to carry out their mandate. The Resolution does however grant them authorization to use force.³¹

The formulation used by NATO would, presumably, be valid for other national contingents:

We confirm the preparedness of our alliance to support, on a case by case basis and in accordance with our own procedures, peace-keeping operations under the authority of the UN Security Council, which has the primary responsibility for peace and security. We are ready to respond positively to initiatives that the UN Secretary-General might take to seek Alliance assistance in the implementation of UN Security Council resolutions. We confirm the preparedness of our alliance to support, on a case by case basis and in accordance with our own procedures, peace-keeping operations under the authority of the UN Security Council, which has the primary responsibility for peace and security. We are ready to respond positively to initiatives that the UN Secretary-General might take to seek Alliance assistance in the implementation of UN Security Council resolutions.³²

UN Security Council Resolution 1701 authorizes but does not oblige UNIFIL to use force in carrying out its mandate. If the enhanced UNIFIL decides to act it has the full authority of the UN Security Council to do so. Whether UNIFIL will do so, however, depends on the policy of the various contingents.

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Notes

1. UN Doc. S/RES/1701 (2006), 11 August 2006.

2. There has been no attempt, for instance, to deny applicability of Art. 3 common to the four Geneva Conventions of August 12 1949. Art. 3, known as “Common article 3”, sets out basic norms that are applicable in any conflict even if the conflict is not an international armed conflict. See debate in the U.S. on this issue.

3. Members of Hezbollah, however, are not entitled to Prisoner of War (hereinafter: “POW”) status

on capture. They manifestly do not comply with the conditions of Art. 4 of the 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War. Israel is not a party to the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (hereinafter: "Protocol I"), and, furthermore, Hezbollah does not comply with the requirements of Arts. 43 and 44 of Protocol I.

4. Although some academics believe that there is utility in such a procedure. See L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, 151 (2002).

5. In some conflicts the International Committee of the Red Cross (ICRC) has encouraged non-state guerilla movements to declare that they will abide by the rules of armed conflict. Hezbollah has taken no such step and has avowedly declared that it is attacking civilian targets.

6. The Palestinian Authority is in this context in some ways *sui generis* since it does not operate in the territory of a sovereign state yet has many of the attributes of a sovereign state.

7. Advisory Opinion, *The Legality of the Threat or use of Nuclear Weapons*, 1996 ICJ Rep., p. 226, 245. See also *Nicaragua* case 1986 ICJ Rep. Para. 176; *Case Concerning Oil Platforms* (Iran v. United States), 2003 ICJ Rep. In its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2003-2004) the International Court of Justice (ICJ) ruled that Israel had no right of self-defense as regards acts emanating in the Occupied West Bank since it was not an armed attack emanating from a foreign state. In the opinion of this author it is an incorrect ruling, though not relevant to the Lebanese situation as Lebanon is undisputedly a sovereign state.

8. M. N. Shaw, *International Law*, 1032 (Fifth ed. 2003). Brownlie refers to an armed attack as including attacks by "powerful bands of irregulars" in a "coordinated and general campaign." I. Brownlie, *International Law and the Use of Force by States*, 279 (1963).

9. R. Higgins, *Problems and Process: International Law and How We Use It*, 232 (1995).

10. See discussion of this issue below.

11. Art. 52, of Protocol I. Though Israel is not a party to Additional Protocol I, most of its stipulations reflect customary law and hence are binding on all states.

12. Apparently with the exception of a fuel depot

at Beirut airport attacked as part of the attempt to temporarily prevent the use of the airport.

13. Art. 51 (2) of Protocol I.

14. Art. 52 (1) of Protocol I.

15. Art. 28 of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter: "Fourth Geneva Convention").

16. Art. 57 (2) (ii) of Protocol I.

17. Neither Israel nor Lebanon are parties to the Statute of the ICC hence the Court has no jurisdiction unless such crimes are referred to the Court by the UN Security Council.

18. The individual members of Hezbollah could be prosecuted under Israeli law for being unlawful combatants but not as war criminals.

19. ICJ *Nicaragua* case 1986 ICJ Rep. at para. 195 quoting with approval from UN General Assembly resolution 3314 (XXIX).

20. UN Security Council Resolution 1559 (2004). UN Doc. S/RES/1559 (2004).

21. *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States) 1986 ICJ Rep. 14.

22. The Prosecutor v. Dusko Tadic. IT-94-1-A, ICTY Appeals Chamber (Judgment of 15 July 1999),

23. Text taken from www.washingtonpost.com, 5 August 2006.

24. A. J. Bellamy, P. Williams, and S. Griffin, *Understanding Peacekeeping* 146 (2004).

25. J. T. O'Neill, N. Rees, *United Nations Peacekeeping in the Post-Cold War Era* 34 (2005).

26. *Wider Peacekeeping, Army Field Manual, British Army Headquarters Doctrine and Training*, p. 25, quoted in O'Neill, *supra* note 27, at 35.

27. E. Suy, "Peace-keeping Operations," in *A Handbook on International Organizations* 379 (R. J. Dupuy, ed, 1988).

28. K. Annan, "Challenges of the New Peacekeeping" in *Peacemaking and Peacekeeping in the New Century* 184-85 (O. Otunna & M. W. Doyle eds., 1996).

29. *Bowett's Law of International Institutions*, Para. 2-047 (P. Sands & P. Klein eds., fifth ed. 2001).

30. It is highly questionable whether the Security Council has the authority to do so.

31. See above as to discussion whether the authorization is based on Chapter VII or solely on agreement between of Lebanon and Israel.

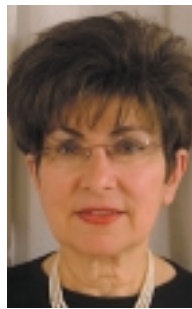
32. 14 Final Communiqué, NATO Press Service, 17 December 1992.

Israel's asymmetric wars: Through the UN looking glass, dark and distorted

Israel has had the dubious privilege of being the state whose defensive asymmetric warfare is most consistently viewed by the UN through the prism of its pernicious doctrines regarding the use of force. The UN perspective undermines international law, imperils Israel's security, and jeopardizes the attempts of the world's democracies to grapple with the scourge of rampant terrorism.

Michla Pomerance

As the threat of global terrorism becomes ever more tangible and ubiquitous, scholars and practitioners alike have naturally begun to pay increasing attention to the legal and political implications of "asymmetric warfare." In this area, as in so many others bearing on armed conflict, Israel has, sadly, served as a "laboratory" in which the contours and conundrums of the right of self-defense and of the international response to its exercise have been tested. Attitudes toward the still-continuing Palestinian terrorist war that was unleashed by Yasser Arafat in 2000, and to the offensive launched by Hezbollah on July 12 this year, are merely the latest manifestations of processes begun decades earlier. These processes have led to a skewed UN perception of both *jus ad bellum* – the rules regarding the right to resort to force – and *jus in bello* – the laws of war (or, in modern parlance, international humanitarian law).¹ And Israel has had the dubious "privilege" of being the state most consistently viewed by the world body and its organs (political and judicial)² through this new-age dark and distorted looking glass.



The "New UN Law of Self-Determination"

In the halls of the United Nations, a "New UN Law of Self-Determination" has steadily replaced both traditional international law and the law of the UN Charter. Unlike international law, it is based not on what states *practice themselves*, but on what they *preach to others*. And in lieu of the UN Charter scheme, it has emerged as a modern version of the medieval doctrine of the "just war," with its attendant evils, hypocrisy, and frequent exoneration of violence unlimited against those deemed "unjust."

The linchpin of the UN Charter is the prohibition of

the use of force by states (Article 2[4]) except in individual or collective self-defense (Article 51) or as authorized by the Security Council in accordance with Chapter VII.

It is too often forgotten that the renunciation of individual use of force was premised on a bargain: that the UN would be an effective agency of collective security, and that, if necessary, it would adopt military sanctions to shield the victim of an unprovoked threat or use of force. But although collective security remained an unfulfilled promise even after the end of the Cold War, the logical legal conclusions were not drawn. Instead of recognizing that there was a reinforced need to interpret Article 51 broadly, so as to retain, for threatened states, a measure of anticipatory self-defense,³ including the right to avert the looming perils of guerrilla warfare, the new UN doctrines moved in an opposite and pernicious direction. For *disfavored* states, the elementary right of self-defense, even against blatant "armed attacks," would be drastically curtailed.

The new UN credo, in brief, entailed the reordering of Charter priorities. "Self-determination" was posited as a "*right*" and not merely a political principle – and beyond that, as a supernorm, supplanting the non-use of force as the central tenet of the Charter. So long as force was used for promoting a cause approved by the requisite majority in the UN political organs, it could be tolerated and even praised. Thus, forcible resistance to "colonialism," "alien rule," "occupation," "apartheid" and "racist regimes" – all subjective appellations – was deemed *ipso facto* legitimate. But force exercised by those who would suppress such "legitimate" resistance was to be condemned. Those states could be effectively shorn of *their* right to self-determination and self-defense.

In this Manichean scheme, the "worthy" are assigned rights and exempted from obligations; the "unworthy" are saddled with obligations and deprived of rights. The

resuscitated “just war” framework features, as a replacement for the medieval church, self-appointed arbiters who today purport to decree the fate of states and peoples. They include UN bodies, including the General Assembly and the International Court of Justice (ICJ); other international organs; and increasingly, “human rights non-governmental organizations” (NGOs), like Amnesty International, that inappropriately assume the mantle of pure morality and objectivity.

The tendency of the UN majority to grant inordinate dispensations to favored national liberation movements spilled over from the sphere of *jus ad bellum* to that of *jus in bello*. Pursuing guidelines that the General Assembly had been urging since the late 1960s, the 1977 Conference on the International Humanitarian Law Applicable to Armed Conflicts adopted the controversial Additional Protocol I to the 1949 Geneva Conventions. Inter alia, the Protocol conferred special international standing on “self-determination” struggles against “colonial domination and alien occupation and ... racist regimes;”⁴ and it seriously attenuated the distinction between combatants and civilians by easing immeasurably the conditions for granting combatant status and relaxing even more the conditions for receiving prisoner-of-war “treatment.”

Israel, understandably, is not a party to the Protocol; nor is the United States.⁵ At the conference, Western European delegates had also strongly objected to the innovations, which they foresaw would likely undermine the observance of human rights in wartime. “The consequence,” the Swiss representative warned, “would be that the adverse party could take draconian measures against civilians suspected of being combatants.” “Military necessity,” the Italian representative feared, might be invoked “in justification of an attack on the civilian population as a whole.” The problem had been explained most cogently by Richard Baxter (then an international law professor at Harvard University and later, a judge of the International Court of Justice [ICJ]), who wrote:

The maintenance of the distinction between combatants and non-combatant civilians is of capital importance for the law of war. A combatant is required to declare himself in order to maintain the presumption that those not so declaring themselves are peaceful civilians who are entitled to immunity from attack and to the other safeguards of the law of war. If combatants disguise themselves as civilians, then civilians become suspect. Military considerations will demand that more forceful measures be taken

against them...Guerrilla activity and resistance activities by persons passing themselves off as civilians can readily change the presumption that a person not in uniform is a peaceful non-participant to a presumption that such an individual is or may be a combatant. To the extent that the line between peaceful civilians and combatants is blurred and that a combatant can disguise himself, the protection of the fundamental human rights of peaceful civilians is imperiled. To maintain strict standards for irregulars and guerrillas is thus conducive to the amelioration of the condition of warfare and to the immunity of the civilian population.⁶

During the 1960s and 1970s, there were other parts of traditional international law and UN Charter Law that proponents of the “New UN Law of Self-Determination” sought ever more to jettison. For example, they resolved to weaken the well-established legal precept regarding the culpability of states that support, give sanctuary to, or even acquiesce in, hostile activities against other states. The accepted rule, which was still accurately stated in the 1970 Declaration on Friendly Relations, was enfeebled in the 1977 Consensus Definition of Aggression, and further diluted in the ICJ’s 1986 Judgment in the suit of Nicaragua against the United States.⁷

Unsurprisingly, the new thrust has been accompanied by persistent attempts to attribute to General Assembly resolutions legally binding force that they do not possess, no matter how often they are repeated. (As Prosper Weil, professor of international law, emeritus, at the University of Paris, incisively observed, “The accumulation of non-law or prelaw is no more sufficient to create law than is thrice nothing to make something.”⁸) And to bolster the revisionist law still further, recourse is had to the non-legal, mythical concept of the “organized international community.”

All of these ideas, it should be noted, were initially resisted by the Western bloc in the UN, with the United States in the lead. But in time, for reasons both internal and external, Western European resistance weakened, as the continent passed into its current pacifist mode. At best, this has translated into misplaced exercises in moral equivalence; at worst, it has led Europe to join the jackals, and impose legally unwarranted and morally unconscionable shackles on Israel in its ongoing battle against terrorist enemies who seek its destruction.

Israel and the “New UN Law”

There is no shortage of examples to illustrate how the

pervasive trends of the “New UN Law” – conjoined with the new pacifism and a pathological anti-Israel obsession – have darkened and distorted the looking glass through which the UN regularly views Israel’s asymmetric wars. Some of the more egregious patterns may be briefly noted.

A symmetric view of the asymmetric: the “cycle-of-violence”/cease-fire mentality

When Israel responds to clear-cut terrorist provocations, the reflexive incantation of the “cycle-of-violence” mantra leads, at best, to UN calls, couched in relatively neutral terms, for an immediate “cease-fire.” (More usually, Israel, rather than those who initiated the aggression, is condemned.)

Even ostensibly “symmetrical” cease-fire resolutions ignore the important moral and legal *asymmetries* of the situation and the probable consequences of such “neutral” UN intervention. Like arms embargoes, cease-fires normally benefit one side of a conflict; and too often, they lead to the perpetuation rather than the resolution of the strife, paving the way for later, deadlier, rounds. Among the asymmetries conveniently overlooked are the terrorists’ provocative acts and threats; their incitement to violence; their targeting of civilians with methods deliberately designed to inflict maximum pain and devastation; and their glorification of death and destruction – both their own and that of Israelis. There is no counterpart in their camp to Israel’s attempts to minimize injury and loss of life on either side, and to its regularly launching of investigations when its attempts go awry and result in unintended damage to civilian life and property.

Undiscriminating pacifism, which fails to distinguish between aggressor and victim, contrasts starkly with the perspective of the Nuremberg Tribunal that tried major Nazi war criminals after World War II. “To initiate a war of aggression,” it recognized, “is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁹ The members of that tribunal – all of them nationals of states that had been victims of Nazi aggression – had no difficulty in identifying the “aggressor;” they required no definition of the term. Germany’s aggressive intentions, threats and actions sufficed.

The UN, for its part, has been engaged in efforts to define “aggression” for decades; and more recently the parties to the International Criminal Court Statute have continued the pursuit. But the enterprise, as the late Julius Stone (an eminent authority on the legal controls of international conflict) recognized long ago, is merely

a way of “conducting political warfare by other means.”¹⁰ The inevitable ambiguous formulations and omissions – relating especially to the link between self-determination and self-defense – are very convenient for those who have the weight of numbers in the UN and other international forums. In specific cases, automatic majorities can always be summoned to plug the loopholes and condemn a state whose position is that of a permanent minority. The attitude of UN organs to Israel’s self-defense can serve as Exhibit A.

Israel’s “virtual” right of self-defense

Those who would refute charges of a perverse double standard in the UN treatment of Israel sometimes cite as evidence the occasional statements by various organs, including the Secretary-General and the ICJ, affirming Israel’s right to self-defense. The argument is too facile and utterly misleading. Viewed in context, the pro forma affirmations are quite meaningless – mere fig leaves to conceal the omnipresent bias and fend off justified criticism. Far more significant are the accompanying reservations and limitations that effectively negate any consequential right of self-defense.

In its advisory opinion on Israel’s security fence (“Wall”), for instance, the ICJ gave short shrift to Israel’s security needs and military exigencies and ignored the brutal and ongoing terrorist onslaught to which Israelis were daily exposed. Without bothering to examine the facts in any serious fashion, it declared itself “not convinced” of the necessity of the “wall” and its route.¹¹ The Court went to great lengths to deny Israel the protection of Article 51 of the Charter, insisting that it permitted self-defense only against an attack by a “state;” and *for this purpose* the Court was unwilling to view Palestine as a state. (The Court did, however, extend to Palestine the *privileges* of a state in the proceedings.) Nor was the Court prepared to concede that Israel’s battle against Palestinian terrorism fell within the ambit of the Security Council’s post-9/11 resolutions on terrorism.¹² All of this rendered rather vacuous – indeed cynical – the Court’s acknowledgment, at the end, that “Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population” and “it has the right and indeed the duty, to respond in order to protect the life of its citizens.”¹³ The additional caveat, that Israel’s measures must “remain in conformity with applicable international law” – given the Court’s lopsided interpretation of that law – underscored even more the emasculation of any effective right of self-defense for Israel in its asymmetric war. While a Palestinian “right of self-determination” was seen as absolute, Israel’s right of self-defense was heavily fenced in.

The most common formula employed for limiting and essentially denying Israel's self-defensive measures is to automatically declare them "disproportionate." This has been asserted countless times by the Secretary-General, many UN members, and the usual chorus of NGOs – most recently, of course, in relation to Israel's actions in Lebanon. The issue of proportionality is a complex one, legally and morally; but there are no signs that Israel's accusers grappled with those complexities before issuing their stock condemnations.

"Proportional" to what?

Against what standard should "proportionality" be measured? The answer – as dictated by logic and state practice – depends on the context. In an ongoing armed conflict (whether or not a declared "war"), in which one side has announced its aggressive intent, it is obvious that the exercise of self-defense cannot be assessed by reference to each isolated act, but rather by the overall threat. This has been affirmed time and again by eminent jurists in the United States and Britain.¹⁴ It has also been recognized that to simply *repel* the immediate danger may be insufficient; it may be necessary to act to *remove* the danger¹⁵ – even, if need be, by government overthrow.¹⁶ Such was surely the premise of the anti-Axis acts in World War II. And the premise of *all* wars is that to win means the application of force that is *disproportionate* to that of the enemy. The idea that England would have been permitted only to stage a counter-blitz against Germany or that the United States, after Pearl Harbor, ought to have confined itself to a counter-attack on the Japanese fleet would have been ludicrous.

The aggressive – indeed genocidal – intent of Israel's terrorist enemies has been a constant; and in the case of Hezbollah and its Iranian patrons, it has become ever more explicit and strident. Their goal is not to achieve self-determination, but to obliterate Israel's, to "wipe Israel off the map" and to kill Jews worldwide. Hezbollah leader Hassan Nasrallah is reported to have made such blood-curdling statements as the following: "Israel ... is an aggressive, illegal and illegitimate entity, which has no future. ... Its destiny is manifested in our motto: 'Death to Israel.'"¹⁷ And as for the Jews, "if they all gather in Israel, it will save us the trouble of going after them worldwide."¹⁸ Even absent these annihilationist threats, the kidnapping and murder of Israeli soldiers across a UN-recognized border and the raining of thousands of rockets on Israeli cities could not be considered anything but unprovoked acts of war. Moreover, the danger that the additional thousands of rockets in the Hezbollah arsenal that it threatened to use (13,000, by Nasrallah's admission, with likely future supplements by

his Iranian and Syrian patrons) had to figure in any sane calculation of "proportionality" in Israel's defensive war. That it did not do so for so much of the world community and media was what was truly disproportionate and shocking.

Proportionality is not legally or morally a matter of body counts – especially not in the Middle East, where such counts are unverified, unverifiable, and tend to be grossly exaggerated by the terrorists and eagerly bought by the media, UN members and spokesmen, and the "human rights" NGOs.¹⁹ If the body-count measure is inappropriate when facing a conventional enemy, it is even more so when a guerrilla army cynically targets innocent civilians while situating its rockets and bases among civilians, using them as human shields. Unfortunately, the important difference between terrorist aggression against civilians and a democracy defending itself while attempting to minimize civilian casualties did not figure in the "proportionality" calculus of Israel's too-willing accusers.

Civilian casualties: always "war crimes"?

To judge by the chorus of Israel-bashing accusers, any civilian casualties inflicted by Israel in its anti-terrorist wars connote, *ipso facto*, war crimes attributable to Israel. This is based on a gross oversimplification and distortion of the rules of international humanitarian law – even if one assumes (a debatable point) that the relevant provisions of Protocol I, to which Israel is not a party, embody customary law. According to Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, the criterion for the existence of a "war crime" is whether "there is an intentional attack directed against civilians or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage."²⁰

What is "clearly excessive" is, of course, a matter of appreciation. And as the committee established to review NATO bombings in Yugoslavia acknowledged, "it is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants."²¹

In fact, in its efforts to avoid "collateral damage" to civilians, Israel has exhibited a measure of scrupulousness exceeding what states – including the NATO forces in Yugoslavia – have habitually displayed. It has done so while subjecting its own forces at times to heightened risk, evoking thereby some domestic criticism regarding the ethical justification for such action. And it has persisted despite the lack of reciprocity on the part of its

enemies. For while Israel strives mightily to apply the principle of distinction between combatants and civilians, its terrorist enemies do the opposite. They deliberately target Israeli civilians; rain rockets indiscriminately on cities; disguise combatants as civilians; and base rocket launchers, other military equipment, and command centers in civilian homes and vehicles.

Article 28 of the Fourth Geneva Convention states that “the presence of a protected person may not be used to render certain points or areas immune from military operations.” And as Yoram Dinstein (formerly of Tel Aviv University and currently professor of international law at the U.S. Naval War College) notes, “should civilian casualties ensue from an attempt to shield combatants or a military objective, the ultimate responsibility lies with the belligerent placing innocent civilians at risk.”²²

Far from recognizing this principle, however, Israel’s accusers have even seen fit to deny the legitimacy of bombing targets such as Hezbollah’s al-Manar TV station and Beirut Airport runways, despite the military significance of both. The former was used to relay messages, and for incitement; the latter could have been used to resupply Hezbollah militarily and to fly the two kidnapped Israeli soldiers out of Lebanon.

What has also remained officially unrecognized with respect to Israel’s asymmetric wars is the culpability of states harboring and supporting its terrorist enemies.

Hosts and supporters of terrorists

It might have been expected that the UN would attribute some culpability to states – like Syria and Iran, most prominently – that support terrorists, arm them, train them, and even use them as proxies for militarily confronting the West. Instead, the UN gives them a free pass, ignoring thereby the UN Charter, UN anti-terror and Lebanon-related resolutions, and treaties concluded under UN auspices, including the 1948 Genocide Convention. The fact that in the case of Israel, the terrorist groups threaten the very existence of a UN member state and its inhabitants does not carry any weight with the UN legitimizers and delegitimizers.

As for Lebanon, the UN unjustifiably views it as an innocent victim rather than as a culpable state. Yet legally, Lebanon is responsible for what occurs in its territory and for acts that it even tolerates. If it is unwilling or unable to suppress guerrilla activity originating in its territory and directed against a neighboring state, it cannot expect to enjoy impunity. Hezbollah, which forms a part of the Lebanese government, has been permitted to take over southern Lebanon militarily as a *de facto* authority – contra Security Council Resolution 1559 – and to

control border crossings. No efforts to disarm the “state within a state” were ever made, and weapons were permitted to flow freely to Hezbollah from all Lebanese access points. Moreover, Hezbollah’s pretext for launching its aggression against Israel in July 2006 – the issue of the so-called Shaba farms – far from being denounced by Lebanon, was effectively endorsed by it.²³

The real asymmetries

The military asymmetry in Israel’s asymmetric wars is one aspect of the equation – and it is one where the gap is narrowing as Syria and Iran offer ever more sophisticated arms and technologies to their proxies. But the gap that has been and continues to be most troublesome is that between moral and legal legitimacy, on the one hand, and the contorted UN legitimization on the other. It is this asymmetry that tilts against Israel so starkly and menacingly and has implications also for the global war against jihadist terrorism.

The abject failure of the current international legal order to realistically confront the impending perils begins with semantics – reluctance to define terrorism or identify its perpetrators – and ends with a perverse double standard, in which the roles of victim and aggressor are reversed. Still inspired by the clearly obsolete “New UN Law of Self-Determination,” the UN and human rights community continue to view wars on behalf of a falsely-romanticized “resistance” as essentially legitimate. Those battling in its name are endowed with rights sans obligations and their cruelty is effectively condoned. Conversely, those who would resist such “resistance” are held to such an impossibly stringent standard as to effectively negate their right of self-defense. If *any* harm to civilians, however inevitably or inadvertently perpetrated, is labeled, *ipso facto*, disproportionate and a “war crime,” then waging a truly just war becomes impossible. This is a distortion of the Nuremberg principles. It was the initiation of a “war of aggression” that the judges held to be “not only an international crime” but “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” To view a war of self-defense as equally illegitimate (if not more so) is to be an accomplice to aggression. As Inis Claude, the foremost scholar of the UN, once explained: “It appears that pacifism helps to cause war by preventing its prevention or inhibiting its inhibition.”²⁴

Understandably, some lawyers, utterly dismayed with the manner in which asymmetric wars have been handled by those who purport to apply “international humanitarian law,” have called for a reassessment and updating of that law to cope with the new realities. A

revised law would, according to legal scholar Alan Dershowitz of Harvard University, take into account “the misuse of civilians as shields and swords” and what he termed “a continuum of ‘civiliansity.’”²⁵ For others, such as Jane Dalton, who was Legal Counsel to the Chairman of the U.S. Joint Chiefs of Staff, the problem in asymmetric wars is not the law but the *absence of reciprocity* in the observance of “even the most basic principles of law, such as immunity of noncombatants from intentional attack.” And ultimately, she warned, “distorting the rules to impose greater constraints than required by the law only limits those who most diligently seek to follow the law.”²⁶

What is clear, in sum, is that for the good of Israel as well as the entire civilized world, the false mask of legitimacy should be removed from the would-be legitimizers and delegitimizers within and outside the UN. If their view of Israel’s asymmetric warfare continues to be through a dark and distorted looking glass, that of the world’s democracies surely dare not be.

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Notes

1. See M. Pomerance, *Self-Determination in Law and Practice* (1982), esp. Chap. 9.
2. See M. Pomerance, “The ICJ’s Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial,” 99 *AJIL* 26 (2005) at 37-38; M. Pomerance, “A Court of UN Law,” 38 *Isr.L.Rev.* 134 (2005).
3. For some relevant citations, see 1986 ICJ *Rep.* 14 at 348, para. 173 (Schwebel dissent).
4. Art. 1 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (hereinafter: “Protocol I”). In this context, the “Zionism is racism” resolution and its resurrection in the Durban process are significant.
5. On the Reagan Administration’s fear that Protocol I would encourage terrorism, see J. Rabkin, “The Fantasy World of International Law: The Criticism of Israel Has Been ‘Disproportionate,’” *Weekly Standard*, 21 August 2006.
6. Cited in Pomerance, *supra* note 1, at 55.
7. See J. Stone, *Conflict Through Consensus* (1977) at 73-76 (on enfeeblement of customary rule in 1974 Definition); 1986 ICJ *Rep.* at 103-104, para. 195 (Court’s view that providing arms and support insufficient to trigger right of self-defense); *ibid.* at 341-347,

paras. 162-171 (Schwebel’s criticism of Court); and *ibid.* at 108, para. 206 (his objection to Court’s implying that intervention in decolonization context would have a privileged status).

8. P. Weil, “Toward Relative Normativity in International Law,” 77 *AJIL* 413 (1983) at 417.

9. Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946 (1947), p. 186.

10. Stone, *supra* note 7, at 57.

11. See objection of Judge Thomas Buergenthal (the Court’s statements were unexplicated and hence “not convincing”), 43 ILM (2004) at 1078, para. 7.

12. See Court’s opinion, 43 ILM 1009 (2004) at para. 139; and criticism of Judges Buergenthal and Higgins to the Court’s approach to Art. 51 and to the status of “Palestine.” *Ibid.* at 1078, para. 6, and 1058, paras. 33-34. See also the trenchant critiques by Ruth Wedgwood, “The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense,” 99 *AJIL* 52 (2005) at 57-59; and S.D. Murphy, “Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?” *ibid.* at 62-76.

13. Court’s opinion, *supra* note 12, at para. 141.

14. For representative samples, see argument of British Attorney-General in *Nuclear Weapons* advisory opinion, cited by Judge Schwebel, 1996 ICJ *Rep.* at 321; response of William H. Taft IV, U.S. State Department Legal Adviser, to the ICJ’s *Oil Platforms* judgment, 98 *AJIL* 601 (2004); and Rosalyn Higgins’ understanding that proportionality “cannot be in relation to any specific prior injury – it has to be in relation to the overall legitimate objective of ending the aggression.” *Problems and Process* (1994), p. 232. For the suggestion that the proportionality measure in intense or large-scale conflicts might differ from that in skirmishes and small-scale conflicts, see F. L. Kirgis, “Some Proportionality Issues Raised by Israel’s Use of Armed Force in Lebanon,” *ASIL Insights*, 17 August 2006.

15. See R. W. Tucker, “A Reply to Critics: Morality and the War,” *New York Times*, 15 July 1982.

16. See Schwebel dissent, 1986 ICJ *Reports*, p. 299, para. 85.

17. Cited in O. F. Kittrie, “A War Crime at Qana?,” *Wall Street Journal*, 5 August 2006.

18. “If they [the Jews] all gather in Israel,” Nasrallah is reported as saying, “it will save us the trouble of going after them worldwide.” A. Bell, “Getting It Straight,” *New York Sun*, 25 July 2006.

See Asymmetric wars, page 47

Watching the watchers

Under the guise of promoting universal human rights, many non-governmental organizations exploit their position of trust among governments, the media, academics and the public to promote a strongly anti-Israel agenda while paying little heed to egregious human rights violations in other parts of the world. NGO Monitor is attempting to right these wrongs.

Gerald M. Steinberg and Sarah Mandel

The Palestinian terror campaign and war with Hezbollah have been accompanied by a parallel political campaign designed to label Israeli defensive actions as “war crimes,” “excessive use of force,” and “violations of international law.” In this massive use of “soft power,” the main combat troops are members of groups claiming to promote human rights or humanitarian assistance, known as non-governmental organizations or NGOs. Their weapons, including glossy reports, press conferences, and mass emails focus on demonization of Israel, while erasing Palestinian terror. These attacks are funded by European governments, and wealthy “charities,” including Christian Aid, the U.S.-based Ford Foundation and, in some cases, the New Israel Fund.

The impact of these NGOs is magnified by a “halo effect” that ensures that their reports and statements are routinely accepted at face value and without question by journalists, diplomats, academics and others. The “halo effect” is based, in large part, on the historical development of human rights norms, including the post-Holocaust conventions and treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1948 Universal Declaration of Human Rights. The emphasis on these norms has grown continuously, and, as Irwin Cotler, a member of the Canadian parliament and a professor of law at McGill University, has noted, human rights now constitutes the new secular religion, with NGOs exceeding the UN as defenders of this creed. These NGOs claim to have formed a “civil society” – an alternative to the prevailing “selfish and particularist interests” of states, governments, (including democracies), multinational corporations and political parties. As such, NGOs are often portrayed and present themselves as altruistic, promoting the common good, while business and political organizations are perceived as selfish and particularistic.

In reality NGO agendas are often highly politicized, and they regularly distort human rights norms to promote an extreme and biased perspective of conflict that conforms to their post-colonial ideology. This is particularly the case in their demonization of Israel.

The latest political attack came in the wake of Israel’s response to Hezbollah’s attack on Israel on 12 July 2006, and the war in Lebanon that followed. In the first three weeks of this conflict 19 NGOs, including major international players such as Human Rights Watch (hereinafter “HRW”) and Amnesty International (hereinafter “Amnesty”), issued a total of 94 reports condemning Israel for “war crimes” and “disproportionate use of force.” These NGOs deliberately distorted events and erased the context when they called on both Israel and Hezbollah to “avoid targeting civilians.” They joined the bandwagon condemning Israel’s “massacre” at Qana, relying on local “eye witnesses” who claimed that no Hezbollah attacks occurred from the area or that Hezbollah fighters were in the area. And HRW’s condemnation of Israel for the “slaughter” of civilians at Srifa stated that no Hezbollah fighters were present in the village, despite clear evidence to the contrary.¹

Later, a few token statements labeling Hezbollah’s deliberate targeting of civilians as a war crime constituted a belated attempt at balance, but they were far outweighed by the level of resources devoted to attacking Israel’s defensive measures. HRW’s calls for an “international investigation” were focused exclusively on Israel’s military actions, and the one-sided condemnations of the Israel Defense Forces (IDF) were repeated by the UN Human Rights Council in August 2006. (Amnesty International’s 15-page report on Hezbollah’s “war crimes,” not including the use of human shields, while far more substantive than the HRW statements, was published in September, after the media and diplomatic focus had shifted to other issues.²)

This political campaign followed the June 2006 incident when Israel was blamed for the deaths of eight



Palestinians in a mysterious explosion on a Gaza beach. The Palestinian version of events, which included fabricated videos and many contradictions, was supported and promoted by HRW officials who came to Gaza, organized a major press conference, and declared that Israel was responsible for the incident. Boosted by HRW's massive public relations machine (supported by an annual budget of over \$50 million), their words were immediately repeated in the media around the world, with no independent confirmation or analysis. HRW's reports, press releases and other activities on this incident simply ignored the counter-evidence from other sources, including the IDF and Israeli hospitals (where some of the injured Palestinians were being treated) and, as always, demanded an "international investigation" to find Israel guilty.

Following the standard pattern, other powerful NGOs joined the chorus, including Amnesty, as well as numerous Palestinian groups. None of these groups that claim to promote human rights, including HRW and Amnesty, issued reports on the barrage of Palestinian missiles that were launched against Sderot and other Israeli towns since the withdrawal from Gaza. The same pattern was followed in the case of Lebanon. Under the double standards of NGOs, terror attacks against Israelis are rarely classified as human rights violations, while Israeli self-defense actions are almost automatically labeled "war crimes" and "violations of international law."

NGOs and the Durban strategy

The central role of NGOs in the demonization of Israel was emphasized at the UN Conference on Racism that took place in Durban, South Africa, in early September 2001. The major participants in the NGO Forum included Miftah (an NGO established by Palestine Liberation Organization [PLO] spokeswoman Hanan Ashwari), and the Palestinian Committee for the Protection of Human Rights and the Environment (also known as LAW), which received over \$1 million from the Ford Foundation, as well as funding from the European Union and over 30 additional sponsors. Miftah and LAW led representatives of 1,500 NGOs, including HRW and Amnesty, (despite their subsequent cover-up efforts) to adopt a declaration that labeled Israel a "racist apartheid state" guilty of "genocide," called for an end to its "racist crimes" against Palestinians, and endorsed an international war crimes tribunal to try Israeli citizens. There were no references to Palestinian terror or their use of human shields in densely-populated areas to hide weapons.

On this basis, the participants agreed to "a policy of complete and total isolation of Israel as an apartheid

state...the imposition of mandatory and comprehensive sanctions and embargoes, the full cessation of all links (diplomatic, economic, social, aid, military cooperation and training) between all states and Israel,"³ i.e., a strategy of de-legitimizing Israel as "an apartheid regime," through international isolation based on the South African model.

Working closely with the Palestinian leadership, the Arab and Islamic governments, and supporters in Europe and elsewhere, the NGOs provide the platform, funds and political slogans that continue to drive this strategy. In 2002, following terror attacks such as the Passover Eve massacre at Netanya's Park Hotel, and the consequent Israeli military response, officials from Amnesty and other NGOs were quick to repeat Palestinian claims of a "massacre" in Jenin. These NGO officials, many of whom are obsessed with Israel, continue to refer falsely to Israeli "war crimes" and are also the leaders of the effort to attack the security fence by using the term "apartheid wall." NGOs that claim to promote universal human rights focus far more on condemnations of Israel, while giving relatively little attention to abuses in Libya, Saudi Arabia, Syria, Iran and Sudan. In 2004, for example, a detailed study by NGO Monitor demonstrated that HRW devoted one-third of its activities on allegations of human rights violations in the Middle East to condemnations of Israel.

NGO support for academic boycotts and divestment

The NGO network is also very active in the anti-Israel academic boycott and church divestment campaigns, particularly in the U.K. and Europe. International and Palestinian NGOs provide the language of these resolutions and speeches. In the U.K., for example, officials of Christian Aid such as Lord (Bishop) Gladwin and the Rev. Stephen Sizer are closely aligned with an NGO known as Sabeel, headed by a radical Palestinian (Naim Ateek). Ateek uses blatant anti-Semitic language in his attacks on Israel, referring, for example, to the "Israeli crucifixion system operating daily [against the Palestinians]." To claim legitimacy, Ateek often appears with an extremist Israeli, Jeff Halper, whose NGO, known as the Israel Committee Against House Demolition (hereinafter "ICAHD"), is funded by the EU. ICAHD uses demonization terms such as Israel's "state terrorism," and actively promotes apartheid rhetoric.

Similarly, Christian Aid made anti-Israel campaigns the center of its fund raising and public relations efforts in Britain during the Christmas periods of 2003 and 2004. The 2004 "Child of Bethlehem" program, featuring a photograph of a wounded Palestinian child, and no

mention of terror attacks against Israel, played on clear anti-Jewish themes and motifs. Such activities created the fertile background for the academic boycott votes of the university faculty unions, and for the church divestment efforts focusing on rhetoric that portrays Israel as racist, apartheid, and guilty of war crimes. Both tactics are core elements in the Durban process and the political war to destroy Israel as a sovereign Jewish state.

There are dozens of other very active anti-Israel NGOs operating throughout Europe, perpetuating the myth of neutral “civil society.” In Belgium, the local branch of Oxfam, which was headed for many years by a radical socialist named Pierre Galand, distributed an anti-Semitic poster in 2003 based on the theme of the blood libel, in promoting the campaign to boycott Israeli goods and Israelis themselves. Galand, now a member of the Belgian Senate, uses his influence and access to promote the activities of the European Chairman of the Coordinating Committee for NGOs on the Question of Palestine (also known as ECCP), based in Brussels. Galand is a frequent speaker at UN conferences that attack Israel, under the auspices of the UN Committee on “the Inalienable Rights of the Palestinian People.” He is also President of the Forum des Peuples, a leader of the Belgo-Palestinian Association and plays a leadership role in many other radical Belgian and European NGOs.

Another European NGO, the Euro-Mediterranean Human Rights Network, has become a platform for its extremist Palestinian members. Despite claiming to “concern itself with the whole of the Euro-Mediterranean region,” this group has published no reports on human rights abuses in the Palestinian Authority or by terrorist groups. Its focus is on attacking Israel for “collective punishment” and “violations of international law,” following the lead of the Palestinian Center for Human Rights and al-Mezan.

Funding for radical NGOs

This radical NGO activity and demonization could not take place without a great deal of money, including the generous funding provided by governments (particularly Europe and Canada). Many pro-Palestinian NGOs are able to promote their agendas under the frameworks of development support, human rights (via the European Initiative for Democracy and Human Rights and the Euro-Mediterranean Human Rights Network, also known as EMHRN), and peace advocacy. Funding for Miftah, HaMoked, the Arab Association for Human Rights, B'tselem, Physicians for Human Rights-Israel and dozens more gives these groups access to the media, diplomats (including direct involvement in UN discussions) and other public relations channels. Hundreds of

pro-Palestinian NGOs, linked together in associations such as the Palestinian NGO Network (PNGO), and closely tied to the PLO political leadership, have formed partnerships with the global NGOs.

In addition, the money provided by charities and philanthropies adds more weapons to the NGO war against Israel. The Ford Foundation, with an annual budget of half a billion dollars per year, paid for many of the NGO officials who traveled to the 2001 Durban conference. Later, after the U.S. Congress investigated this abuse of charitable funds for promoting the destruction of Israel, the president of Ford pledged to end this funding. But implementation of these guidelines is slow, not transparent, and most of these NGOs continue to receive money. Miftah, for example, received \$250,000 from the Ford Foundation in 2005, and al-Mezan received \$150,000 – and both are key promoters of the Durban strategy. In addition, the Ford Foundation transferred \$20 million to the New Israel Fund, which itself has been involved in supporting anti-Israel NGOs (such as Arab Human Rights Association, HaMoked, and I'lam) under the false flag of civil rights in Israel. The New Israel Fund gives fellowships to academics such as Shamaï Leibowitz to promote divestment and the rhetoric of “apartheid,” and has continued to allow donations via its charitable status to groups such as ICAHD.

Watching the watchers

These activities and the role of funders have been carried out in secret and without analysis. As a result of the “halo effect,” journalists and academics rarely question the interests and biases of NGOs and their officials who claim to promote human rights, peace and development. But this is beginning to change, and the NGO Monitor project has brought this activity out of the shadows.

One of NGO Monitor's central objectives is to engage with and encourage different behavior among NGOs, many of which perform positive humanitarian or human rights functions in parallel to anti-Israel demonization and promotion of the Durban strategy. In this process, NGO Monitor faces a number of challenges, not least the attempts by officials of powerful NGOs to dismiss detailed and source-based research as innately biased. HRW officials, such as its executive director Kenneth Roth, have demonstrated their contempt for accountability by engaging in virulent personal attacks against NGO Monitor, and the international headquarters of Amnesty International ordered the heads of the Israel branch not to participate in an NGO Monitor conference in June 2006. Yet these responses in themselves represent progress towards dialogue, and in some cases have already brought significant change. Following detailed

reports published by NGO Monitor, some European Union officials have begun to investigate the role of EU-funded NGOs such as ICAHD and the EMHRN in promoting anti-Israel propaganda. (NGO Monitor has initiated a research project to investigate the degree to which support for such political NGOs violates the EU's guidelines and legal requirements.)

A further challenge is the reluctance of journalists to realize the endemic NGO bias that is shaping international views of Israel. The "halo effect" that has frequently protected reports and claims of NGOs from independent investigation and questioning remains strong. However, an increasing number of researchers and journalists have begun to cite NGO Monitor's reports, and have begun to question NGO claims, particularly the unverifiable use of eye-witnesses. A series of press articles and op-ed pieces in July and August 2006 and published in a wide range of newspapers focused on these biases.⁴

As a result of NGO Monitor's detailed research on over 100 NGOs, all of which is available on the internet, critical debate is developing about the role and funding of NGOs. NGO Monitor has found that the greatest impact can be achieved by presenting donors with details of their recipients' activities, and a number of meetings with supporters of HRW have taken place. NGO Monitor is also actively documenting the implementation of the Ford Foundation guidelines for funding NGOs, issued in the wake of the investigation of the abuses in the 2001 Durban Conference. These analyses have been cited in press reports and in January 2006, NGO Monitor's letter to Susan Berresford, president of the Ford Foundation, regarding funding for a proposed conference on the academic boycott of Israel, led to the cancellation of this event. NGO Monitor has also been contacted with requests for information by individual donors and groups who have learned that their contributions to local United Jewish Appeal campaigns ultimately funded anti-Israel NGOs, and who are therefore now working to change the funding priorities of their local chapters.

In the U.K., Christian Aid has responded to NGO Monitor analyses of its highly unbalanced and politicized approach to the Arab-Israeli conflict by meeting with Sir Jonathan Sacks, Chief Rabbi of the United Hebrew Congregations of the Commonwealth, in order to prevent repetition of "past controversies" including the "Child of Bethlehem" campaign. This has not yet resulted in significant improvement in the group's approach, but it has opened lines of communication. Setting an important precedent, the U.K. Charities Commission has warned War on Want (a virulent anti-Israel "human rights" group) that its activities are inconsistent with the commission's licensing requirements.

At the UN, NGO Monitor reports have been introduced in discussions involving applications by Palestinian human rights NGOs for status in the UN's Economic and Social Council (ECOSOC). As a result of the report on BADIL, the Resource Center for Palestinian Residency and Refugees' Rights, the application of this NGO was delayed in 2005, and led to protests from European and American delegations in 2006. In addition, in the European Parliament, MEP Paul van Buitenen asked the European Commission to justify the funding for political NGOs, not only with regard to the Palestinian groups, but more widely as well. Furthermore, NGO Monitor has initiated a discussion with the Bureau of Democracy, Human Rights, and Labor of the U.S. Department of State on the use of NGO sources that lack credibility and are politically biased in compiling the annual country reports on the status of human rights. The 2005 report revealed the impact of NGO Monitor: a reduced reliance on NGOs for information on human rights. But politically biased NGOs are still cited and there is need for continued analysis and discussion regarding future reports.

These developments are only the first steps in providing transparency and independent evaluation of the political agendas pursued by human rights NGOs. In order to halt the cynical exploitation of human rights and international law to promote the demonization of Israel, the debate on the leading role of NGOs and the civil society groups in the Durban strategy must expand. Journalists, diplomats and academics must be pressed to investigate NGO claims and biases, and end the abuse of the rhetoric of human rights for this incitement. The era of the "halo effect" must be brought to an end, while legitimate activities that are shown to actually promote universal human rights, including in Libya, Sudan, and Saudi Arabia, should be encouraged and promoted.

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Notes:

1. A. Bell, "Whose War crimes in Lebanon," *Jerusalem Post*, 22 August 2006. See <http://www.jpost.com/servlet/Satellite?apage=1&cid=1154525925700&page-name=JPost%2FJPArticle%2FShowFull>

See *Watchers*, page 47

Israel or Utopia? Family reunification in a country at war

Should Palestinians from the Territories married to Israeli citizens or permanent residents be allowed to freely acquire Israeli citizenship or permanent residency status? The Supreme Court, in a 263-page decision, upheld the current law as constitutional and said no.

Abstract by Rahel Rimon

HCJ 7052/03

Adalah (the Legal Center for Arab Minority Rights in Israel) et al v. Minister of the Interior et al

Before President Aharon Barak, Deputy President Mishael Cheshin and Justices Dorit Beinisch, Eliezer Rivlin, Ayala Procaccia, Edmond Levy, Asher Gronis, Miriam Naor, Salim Joubran, Esther Hayut and Yonatan Adiel

Précis

On 14 May 2006, the Israeli Supreme Court decided by a majority of 6:5 to uphold the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003, which bars Palestinian spouses from the Territories who are married to Israeli citizens or permanent residents from acquiring Israeli citizenship or residency rights. The Court joined a number of petitions submitted by Adalah (the Legal Center for Arab Minority Rights in Israel), affected families, members of the Knesset and the Association for Civil Rights in Israel. The Petitioners argued that the Law was unconstitutional as it denied family rights, namely family reunification, based on national origin.

In a 263-page decision, the Court dismissed the petition. The majority of Supreme Court justices, who approved the Law as constitutional, were Justices Mishael Cheshin, Miriam Naor, Asher Gronis, Yonatan Adiel, Eliezer Rivlin and Edmond Levy. The dissenting judges were President Aharon Barak and Justices Dorit Beinisch, Ayala Procaccia, Salim Joubran and Esther Hayut.

Justice Cheshin, leading the majority position, held that the right to human dignity does not include any constitutional obligation compelling the state to allow “foreigners” married to Israeli citizens to enter the state. Justice Cheshin added that, in his opinion, the armed

conflict waged by the Palestinian Authority and the Palestinian population justifies the Law, which aims to prevent the entry into Israel of elements hostile to the security of the state. Justice Levy indicated that the Law is unconstitutional, but that the petitions must nonetheless be dismissed in order to give the Knesset the chance to amend it. The remaining justices from the majority position ruled that although the Law impairs constitutional rights, it is proportionate.

President Aharon Barak in his dissenting opinion held that, “[a] citizen has the right to conduct a family life with a spouse in Israel. There [in Israel] is his house, the rest of his family and his community, there lie his historical, cultural and social roots... this right is violated by the Law.”

President Barak, together with the other dissenting judges, further decided that the Law is disproportionate, as it precludes individual vetting; rather, the Law strips rights in a collective and sweeping manner, accordingly, in their view the Law is unconstitutional and should be voided.

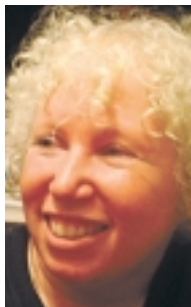
In view of the extraordinary length of this judgment, only the essential points of the conflicting opinions delivered by President Barak and Justice Cheshin are set out here.

President Barak – Dissenting Opinion

President Barak opened his opinion with an analysis of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003¹ (hereinafter: “the Citizenship Law” or “the Law”) which provides that, subject to certain limitations, the Minister of the Interior may not grant Israeli nationality or a residency permit to a citizen of the Territories nor may the Regional Commander give a residency permit to such a citizen. This provision does not apply to Israeli citizens living in the Territories.

Background

President Barak explained that this provision had



been used to prevent family reunification between Israeli Arabs and their Palestinian spouses and between Israeli parents and children registered in the Territories. The purpose of the provision was security-related and intended to prevent the reoccurrence of earlier incidents in which Palestinians taking advantage of reunification laws engaged in terrorist activities. The purpose was not demographic, i.e., intended to prevent the growth of the Israeli population in Israel. President Barak proceeded to discuss the constitutionality of this provision. He began with a description of the security and normative background of the provision, noting that between the beginning of the Second Intifada and January 2006, more than 1,500 terrorist attacks had been carried out within the State of Israel, more than 1,000 Israelis had been killed and about 6,500 injured. Israel took a number of steps to protect its citizens, including military campaigns, the separation fence and measures to prevent residents of the Territories from entering Israel. One of these measures was the Citizenship Law. This Law also imposed restrictions on the unification of families where one spouse was an Arab holding Israeli citizenship or a permanent resident of Israel (principally Jerusalem) and the other was a resident of the Territories. Underlying this arrangement was the fear that allowing residents of the Territories to settle in Israel under the umbrella of family reunification would be exploited to further the armed struggle, as had actually occurred, in practice, in 26 cases.

On a normative level, the Citizenship Law had been preceded by Israeli Government Decision No. 1813 of 12 May 2002, which had placed a moratorium on applications for family reunification between Israeli citizens and Palestinians from the Territories. The legality of this decision was never decided by the High Court of Justice because in July 2003 the *Knesset* (the Israeli parliament) enacted the Citizenship and Entry into Israel Law (Temporary Order) 2003, turning government policy into legislation, which had to be renewed yearly. The *Knesset* renewed the “temporary order” a number of times, subject to exceptions based on age and gender. The Law as it currently stood permitted Palestinian women over the age of 25 and Palestinian men over the age of 35 to apply for temporary visitor permits to be with their Israeli spouses.

The Petitioners’ Arguments

President Barak proceeded to discuss the particular circumstances of the diverse Petitioners who had been injured by the Law, some of whom had previously been undergoing a graduated process of obtaining residency status but who were now excluded by the Law. In addi-

tion, numerous public petitioners had joined the petitions including human rights groups and members of the *Knesset*.

The Petitioners had argued that the Law was not constitutional as it unlawfully violated rights anchored in Basic Law: Human Dignity and Liberty 1992 on the basis of ethnic and national affiliation. Further, they argued that the Law infringed the right of Israeli Arabs to equality and the ensuing discrimination violated their human dignity. As the vast majority of those who married residents of the Territories were Israeli Arabs, it followed that the Law primarily injured Israeli Arabs, and it therefore entailed a discriminatory negation of rights on an ethnic or national basis. Consequently, according to the Petitioners, the Law should not be regarded as merely expressing an immigration policy but as a statute violating the rights of Israeli citizens and residents. The Law tainted an entire community with the suspicion of disloyalty to the state and as presenting a potential danger. The Petitioners also claimed that the Law infringed their basic right to privacy, their right to personal freedom, the natural right to a connection between a parent and child and the right to establish a family. In this the Law infringed the provisions of international law recognizing the right to marriage, family life and family reunification. Finally, the Law infringed due process by applying retroactively to spouses whose residency status was pending.

The Petitioners argued that the violations of fundamental rights did not meet the requirements of the limitation clause in the Basic Law and consequently the Law had to be annulled. The objectives of the Law were improper and lacked inherent logic, in that the legislature was willing to permit Palestinian laborers into the country but not parents or spouses seeking family reunification. The Petitioners pointed to what they regarded as the desire of the Ministry of the Interior to prevent family reunification for demographic reasons, an objective that did not accord with the values of the State of Israel. The violations of basic rights were not proportional, in that each applicant could be vetted personally to see if he posed a danger to the security of the state, without generally negating the possibility of family reunification of an entire community by reason of the sins of a few.

The Respondents’ Arguments

The Respondents rejected these contentions and argued that the Law was constitutional and had been enacted solely for security reasons to preclude further terrorist attacks being aided by Israeli Arabs or Arabs previously resident of the Territories and now possessing

legal status in Israel by virtue of family reunification. Twenty-six such terrorists had led to the deaths of 50 Israelis and injury to more than 100. Accordingly, the security services were of the opinion that, for the present, residents of the Territories had to be prevented from entering Israel and moving around freely. These people were loyal to an entity engaged in hostile action against Israel and were also subject to pressure to act against Israel in order to prevent possible harm to family members remaining in the Territories. The Respondents emphasized that the purpose of the Law was to protect the lives of Israeli citizens. The state had a right to engage in self-defense. Preventing entry into Israel was based on concrete security fears and a nearly certain danger to public safety. The Respondents rejected the alleged absence of internal logic. True, certain Palestinian laborers could enter the country, but only in times of calm and under supervision, in contrast to Palestinian spouses who could stay permanently.

The Respondents further argued that the Law did not violate the fundamental rights entrenched in Basic Law: Human Dignity and Liberty: **first** because foreigners have no constitutional right to immigrate into Israel for any reason, including marriage. Israeli law, like the law of many countries, recognizes broad state discretion to determine its immigration policy and, in general, the state need not explain to a foreigner why it refuses to admit him. **Second**, the Basic Law had to be interpreted in accordance with the social consensus that prevailed when the Law was legislated. This consensus was that human dignity included protection against clear violation of that dignity by reason of physical or mental harm, humiliation, etc. and it should not be interpreted as including the entire scope of the right to equality or the right to family life. **Third**, in any event, the Law did not infringe the right to equality, as it made justified and material distinctions, based on affiliation to a political entity engaged in an armed struggle against the state. According to the Respondents, improper discrimination only occurred where differing treatment was accorded to citizens on the basis of immaterial differences (such as sex, religion, race or nationality). The Law, on the other hand, made no distinctions on the basis of the characteristics of the Israeli spouses but on the basis of certain characteristics of the foreign spouses. **Fourth**, the Respondents argued that the right to freedom was not impaired as the Law did not entail arrests, detentions, extradition, etc. Likewise the right to privacy was not affected as the Law merely precluded benefits within the immigration sphere and did not affect an individual's choice of spouse. Likewise, the right to family life could be realized but merely not within the territory of the

State of Israel. The international laws in this regard were not part of Israel's domestic law and in any event they were subject to national security restrictions. International law protected the right of a person resident in the state to leave or move freely; however, the right to enter was restricted solely to citizens of the state. **Finally**, the Respondents argued that even if the Law violated the Petitioners' rights, the violation met the conditions of the limitation clause because it was temporary; the right of Israeli citizens to life was a proper purpose compatible with the values of the state, and the Law was consequently proportional. The Respondents explained the difficulty of vetting each residency application individually, particularly as little security information was available in respect of many of the residents of the Territories, although this did not negate his or her involvement in terrorist activities.

The Issues to be Determined

President Barak held that the Court would determine whether the constitutional rights of the Israeli spouse had been unlawfully violated. In view of his conclusions in that regard, it was unnecessary to also consider possible violations of the rights of the non-Israeli spouse either under international treaty law or under the humanitarian law applicable to persons in the Territories.

Constitutional Aspect

President Barak held that there were three stages to the constitutional test: first, whether the Law violated a human right entrenched in a Basic Law; if yes, the Court would examine whether the violation met the requirements of the limitation clause (as a violation could be lawful). If the violation were unlawful, the Court would examine the consequences of the unconstitutionality, and this was the stage of remedies or relief.

President Barak held that this three-stage test was applicable even in times of war. The Basic Laws did not draw a distinction between times of peace and times of war, and indeed Section 50 of Basic Law: the Government, for example, expressly stated that emergency powers were not capable of permitting violation of human dignity. Israeli law did not apply special balancing formulae in times of war. Of course, human rights were not absolute and they could be restricted both in times of peace and in times of war, albeit in times of war there was a greater likelihood of damage to the public interest, so that existing standards could be applied to restrict the right. Further, President Barak noted that it was impossible to draw a sharp line between human rights in times of war and human

rights in times of peace – the line between terror and calm was a fine one; it could not be maintained over a period of time and it would be naïve to assume that once the terror had passed the clock could be set back. Consequently, an error by the judicial authorities in times of war was more harmful than an error committed by the legislature during war. The latter could be rectified, but the former remained as a hard precedent even following the restoration of peace. As U.S. Supreme Court Justice Robert Jackson put it in the *Korematsu* case:

A judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty... A military order, however unconstitutional, is not apt to last longer than the military emergency... But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need... A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image (*Korematsu v. United States*, 323 U.S. 214, 245 (1944)).

President Barak held that three initial questions arose: **first**, whether Israel recognized the right of an Israeli spouse to family life and equality. **Second**, whether these rights fell within the constitutional right to human dignity and **third**, whether the Citizenship Law breached the constitutional right to human dignity (in terms of family life and equality) of the Israeli spouse. President Barak held that indeed Israeli law recognized the right to family life and protection of the family unit and this included the right to marry, bear children and lead a unified family life. The Israeli spouse had a right to lead his family life in Israel, since otherwise he would be required to choose between emigrating from Israel or separating from his spouse (this right applied to both spouses and cohabitants). President Barak agreed that this right was not absolute but it certainly existed and formed part of Israeli law

from which rights and duties had to be derived. President Barak noted that Israeli law recognized the right of an Israeli parent to raise his child in Israel as part of the privacy and autonomy of the family unit and emphasized the importance of equating the civil status of a parent with that of his child. President Barak noted that the right to equality also formed an inseparable part of Israeli law and that its violation was one of the gravest of all evils, while discrimination undermined human relations, led to loss of self-control and destruction of the fabric of human relations and democratic society. A long line of cases had held that discrimination against Israeli Arabs by reason of being Arab violated the equality which all Israelis enjoyed. President Barak held that the right to family life was part of the individual's human dignity. The right to human dignity was a framework right, which did not particularize the types of activities which it embraced. These derivative constitutional rights could be learned from an interpretation of the open language of the Basic Law in the light of its purpose. Categorization of the rights could never and was not intended to reflect the full scope of the right to human dignity. In President Barak's view, the family was a "constitutional unit" and attracted constitutional protection which lay at the heart of the right to human dignity; it also rested on the right to privacy. One of the most fundamental components of human dignity was the power of a man to shape his family life in accordance with the autonomy of his free will, and raise his children within that framework, enabling co-existence of all the elements of the family unit. The family unit was a manifest expression of the self-realization of the human being. Thus, human dignity that was based on the individual's autonomy to shape his life led to the derivative right to establish a family unit and continue to live together as a single unit; this constitutional right gave rise to the right to establish the family unit in Israel.

President Barak discussed the right to family reunification in international law, for example under Section 8 of the [1951] European Convention on Human Rights and the 1999 Amsterdam Convention and the limitations this imposed within the immigration sphere. He also referred to the way this issue had been dealt with by the internal law of a variety of countries – France, Germany, Ireland, and the United States. Likewise, President Barak held that the right to equality was part of a person's human dignity and had always been so in Israeli common law, although it was not recognized outside the rights expressly established by the Basic Law. The right was an express one, but not all aspects of

equality were included therein. Certainly, the right of one Israeli spouse to establish a family unit in Israel, as a matter of equality compared to that right enjoyed by other Israelis, formed part of the former's right to human dignity.

President Barak then turned to the question of whether the Citizenship Law infringed constitutional rights and held that indeed an individual's right to establish a family unit or a child's right to live with both his parents was severely infringed if either was prevented from doing so in Israel, even if no impediment was placed in the way of them doing so in the Territories. Likewise, their right to equality relative to other Israelis (generally non-Arabs) was severely damaged. President Barak held that the state's argument that the discrimination was, in fact, a permitted differentiation (according to the classic Aristotelian definition of relevant inequality) was unfounded. The Citizenship Law did not merely prohibit the entry into Israel of a spouse who posed a danger to national security but prohibited the entry of every Palestinian spouse from the Territories, whether he posed a danger or not. Thus, the distinction was not based on security concerns and the differentiation was not relevant. President Barak accepted that the purpose of the Law was security-related and not intended to discriminate between Jewish Israeli spouses and Israeli Arab spouses; however, the lack of intention to discriminate did not prevent its existence.

President Barak analyzed limitation clauses generally and the limitation clause in Basic Law: Human Dignity and Liberty in particular and noted that underlying them was the concept that the constitutional validity of human rights was based on a general balance between individual right and the needs of the public and that human rights were not absolute but relative. The limitation clause was not intended to determine the scope of constitutional rights but to accord constitutional validity (within the ordinary legal framework) to ordinary laws that violated constitutional rights. National security was a public interest that could justify legislation restricting human rights.

Proportionality

One of the components of the limitation clause upon which President Barak focused was the need for proportionality and the tests for determining the existence of proportionality: **first**, a *rational connection* between the proper purpose and the means chosen to realize it; **second**, the test of *least harmful measure* reasonably available in the concrete circumstances. President Barak considered the position of "flat bans" versus the personal vetting of individuals, the need to

meet a test of "strict scrutiny," i.e., a case by case scrutiny of the question, and the requirement that exceptions be allowed to "flat bans," for example, for humanitarian purposes, even where a flat limitation of a right was essential in order to achieve a proper purpose of the legislation. The **third** test related to *proportionality in the narrow sense*, i.e., the Court would assess whether a proper balance had been attained between the benefit obtained from achieving the proper purpose of the legislation and the harm caused to a constitutional right.

President Barak noted that the three-pronged proportionality test was not precise and contained room for discretion. The outcome was not always unequivocal; rather there was a zone of proportionality (similar to the zone of reasonableness). Any choice of a measure within that zone complied with the requirements of the limitation clause. It was the function of judicial review to safeguard the boundaries of the zone of proportionality.

The Citizenship and Entry Law

President Barak held that the purpose of the Law was to lessen security risks posed by foreign spouses in Israel insofar as possible and not to reduce demographic risks. The characteristics of the security objective underlying the Law justified violation of the Arab Israeli's right to equality and to realize his family life in Israel, as the Law was intended to prevent injury to human life. This was a proper social objective and therefore the requirement of the limitation clause that the violation be for a proper purpose had been fulfilled. A rational connection existed between the purpose of the Law and the means taken (preventing entry into Israel). The next question was not whether vetting individual applicants was less injurious than a full ban but whether the purpose of the Law could be achieved by a less injurious measure, or put differently, whether vetting individuals could achieve the legislative purpose. Clearly, a full ban was the more effective measure and in current circumstances individual vetting would not achieve the constitutional purpose in the same way. Accordingly, the legislature was under no obligation to follow that course of action and was entitled to choose to enact a full ban.

Finally, looking at the central issue of proportionality, and the question of whether the additional element of security obtained by the shift, from the most stringent individual vetting of the foreign spouse legally available to a full ban on entry into Israel, stood in a proper relationship to the violation of human dignity and equality of the Israeli spouse ensuing from this shift, President Barak held that the added security component was **not** proportional. The full ban entailed too heavy a price in terms of the violation of human dignity.

ty and that primary principles dictated that the end did not justify the means. Security needs did not supersede every other principle and democracy placed limits on the ability to violate human rights.

Remedy

After considering the possible remedies available following a determination of lack of proportionality, President Barak held that in this case there was no choice but to hold that the Citizenship and Entry Law was completely void but that it would be appropriate to allow the legislature time to examine the consequences of this determination and establish alternative arrangements, by postponing the date on which the judgment would take effect.

Points of Dissension between President Barak and Justice Cheshin

President Barak ended with a comprehensive discussion of the main points of dissension between his views and those of Justice Cheshin that largely revolved around the question of whether the Israeli spouse had a supra-constitutional right to live his family life in Israel with his foreign spouse and their joint children. Justice Cheshin thought that the Israeli spouse did not have such a constitutional right and therefore the issue of the limitation clause did not arise. Likewise, Justice Cheshin thought that the Israeli spouse's right to equality was not impaired as the Citizenship Law was based on a relevant distinction. Justice Cheshin further believed that the right to family life lay at the heart of human dignity whereas the right to bring a foreign spouse into Israel in order to realize family life was a peripheral right. Moreover, considerations of public interests in determining immigration policy removed the right of an Israeli spouse to realize his family life with the foreign spouse in Israel from the scope of the constitutional right to family life. President Barak explained that Justice Cheshin's methodology would ultimately lead to a considerable narrowing of the constitutional protection afforded to human rights, whereas it was the Court's duty, at this stage of national life, to recognize the full scope of human rights, while giving full effect to the capacity of the limitation clause to enable a violation of these rights, when necessary, but without circumscribing their scope and while preserving democratic principles.

President Barak admitted that in the short term his judgment would not make the state's struggle against its enemies any easier. Understanding this made it harder to deliver this judgment but as a judge it was his function to draw a proper balance between human rights

and security and it was the fate of democracy that not all the means available to the authorities of the state were lawful.

Justice Cheshin – Majority Opinion

Justice Cheshin opened with an explanation of the points of difference between his views and those of President Barak. **First**, in his view, Israel, like every other state, was entitled to statutorily restrict the immigration of foreigners into the country, including the spouses of Israeli citizens. He refused to accept that citizens of the state were vested with a constitutional right, i.e., a right by virtue of which a *Knesset* statute could be annulled, to have their foreign spouses immigrate into Israel in consequence of marriage. Accordingly, he differed from President Barak in relation to the derivative rights ensuing from the right to marriage and family life. **Second**, in times of war every state was entitled to prevent the entry of the citizens of a hostile entity, even if those persons had married citizens of the state. The Palestinian residents of the Territories posed a danger to the citizens of Israel and Israel was entitled to enact a law protecting its citizens. The discrimination here was a permitted differentiation between citizens of the state who had married foreign citizens of a hostile entity and citizens of the state who had married citizens of non-hostile entities. **Third**, in any event in Justice Cheshin's view, the benefit afforded by the Citizenship Law to the security of the citizens of Israel superseded the harm caused by the Law to some of the citizens of the state who had married residents of the Territories and who now wished to live in Israel, and once the *Knesset* had decided that this was an efficient tool to protect the lives of Israeli citizens, it was not possible to hold that from the point of view of Israeli society, this Law was not proportional.

Bearing in mind that Palestinian residents had assisted in perpetrating numerous terrorist attacks, and had been able to do so by reason of their ability to move freely within Israel and between the Palestinian territories and Israel, following marriage, the Petitioners had no justifiable cause for annulling the Law. Israel was not Utopia, but a country engaged in a brutal armed struggle – one collective against another. Since the Israeli security authorities could not distinguish – to a reasonable degree – between residents of the Territories who might assist terrorists and those who would not, if only because the terrorist organizations sought the help of those residents **after** they received Israeli documents, the Law – which was restricted in time and subject to qualifications – denying them nationality and residency permits was constitutional and proportional. While Justice Cheshin sympathized with the desire of inno-

cent citizens who wished to pursue their family life in Israel, he held that so long as the Palestinian-Israeli armed conflict continued, so long as Palestinian terrorism continued to strike at Israel and at Israelis, and so long as the security services found it difficult to distinguish between those assisting terrorism and those who did not, it was proper for the rights of a few to establish family life in Israel to defer to the rights of all the citizens of Israel to life and security.

Justice Cheshin described the armed struggle waged by the Palestinian residents of the Territories against Israel and Israelis; the huge numbers of deaths and injuries; and the part played by the Palestinian Authority, terrorist organizations, suicide bombers (and the adulation accorded them) as well as the incitement pervading all areas of Palestinian society urging residents to engage in acts of violence against Israelis. "One who has not seen a mother praising her son who has committed suicide by behaving as a living bomb in order to murder Israelis – and who has not seen such horrors on the television screen – has never seen a surrealistic play. These are your enemies, Israel," he wrote. Justice Cheshin also described the election of the terrorist Hamas government and the holy war it sought to wage against Israel with the active aid of the Palestinian residents of the Territories. True, some Palestinians did not take part in the hostilities or even opposed them, but the total picture was one of enmity and hostility.

Justice Cheshin then proceeded to explain the security background to the enactment of the Citizenship Law: military actions that had received the approval of the Court as acts of national self-defense even when important rights of Palestinians were harmed in the process. As Israel succeeded in creating barriers to Palestinian terrorism, Palestinian residents who had received Israeli documentation or permits to travel in Israel became preferred targets for recruitment by terrorist organizations. The terrorists' efforts had succeeded and the number of Palestinian residents with Israeli documents involved in terrorist activities had increased significantly. Many of these Palestinians were approached *after* they had been vetted by the Israeli security authorities and had received Israeli residence permits.

It was against this background that the Israeli Government decided to introduce a policy denying Palestinians entry into Israel under the Entry into Israel Law, 5712-1952, subject to certain qualifications in terms of the personal characteristics of the applicants (age and gender) and time limitations – one year's validity subject to renewal for a specific period of time.

The Law did not refer to the citizens of Israel or their

rights, albeit it clearly impacted the rights of all of them. The purpose of the Law was to protect the lives and security of Israel's citizens against Palestinian terrorism; the prohibition it imposed was limited in time and subject to qualifications and it was aimed at providing an answer to a specific problem that had emerged during the armed struggle waged by Palestinians against Israel. According to the security services, the Law provided an efficient tool to limit the dangers posed by these Palestinians. The government and the *Knesset* had considered the harm which the Law might cause to some of the citizens of Israel but believed that in the prevailing security situation such harm was inescapable. At the same time the government and the *Knesset* had acted to reduce the harmful impact of the Law. Consequently, according to Justice Cheshin, the government and the *Knesset* had reached a formula drawing a proportional balance between various considerations within the framework of the Law.

Considering the Petitioners' arguments, Justice Cheshin held that so long as the state of enmity existed, no legal obligation existed on the state (towards its citizens) to permit residents of the Territories married to Israeli spouses to enter Israel and stay there. The residents of the Territories were the subjects of a hostile entity, they were loyal to that entity, had links to it and there was a presumption that they posed a continuing threat to Israel and its citizens. It was not possible to compel the state to take the risk and permit the entry into Israel of all and sundry.

Marriage and the Right to Establish Family Life in Israel

Justice Cheshin noted that a person who was not an Israeli citizen, or an immigrant under the Law of Return, 5710-1950, did not have a vested right to enter or reside in Israel, save under a permit given by the authorities. This was true whether the person was single or married to an Israeli citizen. Israel recognized, in principle, the right of an individual to marry and establish a family life. Consequently, it would usually permit foreign spouses to enter and reside in the country. Nonetheless, there was no statutory right to "family reunification" in Israel. Further, where there was a fear of harm to a public interest – including harm to national security – the foreign spouse would not be allowed to enter Israel, whatever his family status. The Minister of the Interior had broad discretion to decide in the matter, in accordance with the rules of administrative law. Likewise, a foreigner could not obtain a legal status in Israel by virtue of his minor child, if he did not concurrently seek to establish family life in Israel with his Israeli spouse, i.e., there could be no family reunifica-

tion solely with a child in Israel, without an Israeli spouse. The Law did not change the legal position but merely narrowed the powers of the minister of the interior under the Nationality Law, 5712-1952, and under the Entry into Israel Law.

Justice Cheshin followed with a detailed discussion of the constitutional status of rights in the presence and in the absence of a constitution and the status of the Court *vis-à-vis* the legislature in these two situations. His conclusion was that the Court was not competent to grant normative status of a fundamental right – a right attracting normative protection of a Basic Law – to a particular right, save if the legislature expressly included it within the constitution of the state.

Human Dignity

Justice Cheshin noted that basic rights did not exist in a vacuum. They existed within a social framework – between human beings – and they were supposed to express recognition of human dignity, the autonomy of free will, and the freedom of man to shape his life as he wished in the society in which he lived. Man was a social being, and his existence, development and growth depended on the existence of a human society in which there was at least a modicum of order, security and peace. Basic rights influenced their surroundings and were influenced by their surroundings and the determination of the scope of their application was an outcome of their internal force and the impact of all those influences. According to Justice Cheshin, it would be wrong to confine the entire issue of influence to the limitation clause and the matter of the violation of basic rights. The closer to the core of the right, the greater the force of the protected values and *vice versa*; the same protection would not be given to the core of the right as to values at its periphery.

Justice Cheshin agreed that the right to marry and to establish a family, including the right of a child to be with his parents, formed the basis of society. The family unit was the basic unit of human society. This right was therefore recognized in both international law and Israeli law as a fundamental right. Even though this right was not expressly mentioned in Basic Law: Human Dignity and Liberty, it was a right derived from human dignity and an Israeli citizen also had a derived right to live with his family in Israel. It was the state's duty to enable him to do so. State sovereignty, however, meant that the state was not under an obligation to permit foreigners to enter the country and certainly not to settle there either permanently or temporarily. Of course, the state also had the right to determine the identity of its citizens.

Thus, for example, the U.S. Supreme Court decided in 1892 in *Nishimura Ekiu v. U.S.*, 142 U.S. 651,659 (1892):

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

And in the United Kingdom, Lord Denning decided in *R. v. Governor of Pentonville Prison* [1973] 2 All E.R. 741, 747:

[N]o alien has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason.

The state thus had the right to determine its own immigration policy and set conditions (economic, age, health, *nexus*, language, etc.) or quotas for the entry and naturalization of foreigners into the country, which might change from time to time. Prerogative principles meant that this also applied to the foreign spouses of Israeli citizens. While international law recognized the individual's right to marry and have a family life, it did not recognize his right necessarily to do so in his country of nationality.

Also relevant was the European Union study published in 2004 regarding the legal situation prevailing at that date in Europe, the "*Family Reunification Evaluation Project*" (Final Report, The European Commission: Targeted Socio-Economic Research, Brussels 2004) 22:

Although international documents endorse family rights, none of the declarations establishes an explicit right to family reunification. Likewise, although the Convention on the Rights of the Child demands that applications by a child or parents to enter or leave the State for the purpose of family reunification be handled in a "positive, humane and expeditious manner..." there is no specification that the provision provides the basis for legal claims to family reunification ... The second area of international law, which may be conflictual with the principle of universal family reunification, refers to the precedence of State sovereignty.

Israeli citizens did not have a constitutional right to change the face of their society and the *status quo ante* by bringing in foreigners to Israel, even as spouses. The state was the spokesman of the people and it had the right to shape society; it would not breach its borders by depositing the keys of its gates in the hands of every citizen, even if only to bring a spouse or parent into the territory of the state. The state was under the duty to establish and implement its immigration laws in a way compatible with the values and needs of the state. It could not delegate these powers (by allowing automatic immigration through automatic family reunification) because doing so would mean giving up its sovereignty.

Justice Cheshin concluded that the value of human dignity, did not *per se* accord a constitutional right to an Israeli citizen to bring a foreign spouse into Israel. The state's interest in preserving the identity of society in Israel, on a constitutional level (in contrast to the statutory level) superseded the force of the right to family life insofar as it related to the immigration of a foreign spouse into Israel. The same was true regarding a child residing in Israel with an Israeli parent. That child did not have a vested constitutional right to compel the state to permit a foreigner to enter the country merely because of his family connections, and certainly citizens did not have the right to compel the state to grant legal status to the foreigner. In any event the statute contained satisfactory exceptions in relation to children, who were entitled to reside with a custodial parent in Israel. The Law did not apply to children born in Israel to an Israeli parent, as that child obtained a status by virtue of his Israeli parent. Accordingly, the Law caused little harm, compared to the legal situation previously prevailing, and in view of the great interests opposing it.

Israel could not draw analogies from the laws prevailing in other nations, as President Barak had sought to do, because of the differences between the legal systems prevailing in those countries and Israel and because none of those countries faced the same security dangers as Israel. No other country was asked to grant automatic citizenship to the resident of a hostile, enemy entity, to which that resident naturally owed his loyalty. There was a presumption that members of a hostile entity would remain hostile and pose a threat to the state and this danger was increased seven-fold where they left family behind who might be subject to threats and pressure by the regime of the original hostile entity. The danger increased a further seven-fold where that hostile entity was bent on destroying the state which the applicant for residence wished to freely enter. Without a state, individuals would not have rights and individ-

ual rights could not be used to undermine the existence of the state.

With regard to the infringement of the right to equality, Justice Cheshin held that this right did not apply to every distinction between individuals but only to prohibited distinctions. Sometimes the authorities were required to treat different people differently, where the distinction between them was a relevant one. The Law had been enacted against the background of the armed conflict between Israel and the Palestinians and a legitimate and permitted distinction existed between those who married foreign Palestinian spouses in respect of whom there was a legitimate presumption that as subjects of the hostile entity they presented a potential risk to the security of the citizens of Israel, in contrast to those who married foreign spouses who were not subjects of a hostile entity. Moreover, in times of war, the state was entitled to categorically prevent the immigration of citizens of the enemy into its territory on the ground that the loyalty of these immigrants belonged to their country of origin, i.e., the enemy and not to the absorbing state. Perhaps those Israeli citizens who had married foreign enemy citizens felt that they had been hard done by compared to others, but could it seriously be said that they were improperly discriminated against? The Law indeed harmed a minority group mainly consisting of Arabs, but the harm ensued from their marriage to enemy citizens who might endanger the Israeli public and not from their identity as Arabs.

Finally, with regard to the three-pronged test of proportionality, Justice Cheshin agreed with President Barak that the Law met the first two tests, but thought, contrary to President Barak, that it also met the third test of benefit versus damage. In view of the huge damage posed by Palestinian terrorism, and the impossibility of vetting every Palestinian applicant for entry individually and identifying potential terrorists or abettors of terrorism, the Law provided a useful tool to limit the security risk, increase stability and prevent harm to the Israeli regime itself, while the prohibition or flat ban contained in the Law was limited to those individuals who provided a relatively high security risk. All this reflected a proper and proportional balance between the needs and interests of the collective and the harm caused to the individual.

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Notes

1. [2003] Sefer Hahukim (Statutes of the State of Israel) (No. 1901) p. 544.

The role of contemporary courts in reviewing security measures

Courts in democratic countries must balance civil liberties with the state's obligation to provide citizens with adequate security. Yet the "war on terrorism" has made it imprudent and unfeasible to rely indefinitely on a legal double-standard based on the normalcy/emergency dichotomy. An examination of responses to this issue by the United States and Israeli supreme courts.

Galit Raguean

As a result of the atrocious terror attacks of 9/11 and the renewed Intifada in the Administered Territories¹ in 2000, the supreme courts in both the United States and Israel have been confronted with a wave of petitions involving civil liberties and national security. Traditionally, courts have been called upon to defer to the discretion of the executive branch in times of emergency with regards to matters of national security. However, the nature of the ongoing "war on terrorism" has made it imprudent and unfeasible to rely indefinitely on a legal double-standard based on the normalcy/emergency dichotomy. It is instructive to consider how the supreme court in each country has attempted to balance the state's commitment to civil liberties with its obligation to provide adequate security to its citizens and residents. The courts may presently be in a relatively good position to create and develop jurisprudence surrounding such petitions beyond the doctrine of judicial deference. Their approach in the past five years may shed some light on what can be expected in the future regarding the adjudication of national security.

Scrutinizing matters of national security in Israel

Since the outburst of the 2000 Intifada the Israeli Supreme Court has addressed several issues involving matters of national security. One such issue is the Court's monumental decision regarding Israel's Security Fence,² in which it held that the Fence was being built for military rather than political reasons. Furthermore, the Court ordered that the State alter the proposed route of the Fence so as to comply with the proportionality rule in light of the expected injury to the civilian population, which would be adversely affected by the Fence's route; this, in spite of its acceptance of the State's claim that any



altered version of the route would provide less security.

The Court ruled in another decision regarding the military's use of the "early warning" procedure, by which the Israel Defense Forces (hereinafter: "IDF") enlisted the presumably voluntary assistance of Palestinian civilians in warning the inhabitants of buildings of an imminent military raid for the purpose of capturing suspected terrorists.³ The purpose of such warning was to allow innocent inhabitants to flee the house, thus preventing injury to them, and also to provide the wanted individual with an opportunity to surrender.⁴ The Court ruled that the justifications for prohibiting this practice outweighed the justifications for allowing its use.⁵ In a third petition brought before the Court regarding the involuntary assigned residence of Palestinians from Judea and Samaria to the Gaza Strip, the Court also decided the petition on its merits.⁶ It ruled that ordering a resident of Judea and

Samaria to live in the Gaza Strip was permitted under the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War; however, such an order could only be made against a person if there was a reasonable possibility that the person presented a real danger to the security of the area. Considerations of deterrence were insufficient for such an order. The Court in both the early warning procedure decision and the assigned residence decision relied on humanitarian law and principles of proportionality and reasonableness in its assessment of the military's actions.

A particularly telling example of what appears to be a shift in the Court's willingness to address issues pertaining to military and security matters involves the IDF's use of preemptive targeted killing. The Court is currently deliberating petitions challenging the legitimacy of the Israeli government's policy of targeted killings in its efforts to prevent terror attacks,⁷ the use of which increased in response to the 2000 Intifada. A similar peti-

tion previously filed in 2001 was dismissed by the Court in early 2002, after the Court deemed the policy of targeted preemptive killings non-justiciable in a short, one-paragraph decision.⁸ However, when subsequent petitions were filed later that year attacking the issue yet again, the Court requested extensive briefs from the parties addressing various questions and has since held numerous hearings. Its decision is pending.

One can speculate as to the reasons for the noticeable change in the Court's willingness to confront the question of the legitimacy of targeted killings. First, it should be noted that unlike the U.S. Supreme Court, which enjoys discretion with regard to granting *certiorari* and need not justify its denial, in Israel petitions against the State are filed directly with the High Court of Justice, which serves as the first and final instance. This accessibility accounts for the wide array of petitions filed against government decisions and policies, sometimes within hours of their announcement to the public. The Israeli Court has no discretion in choosing which petitions to hear on its docket. Therefore, its ability to avoid confronting an issue is more limited.

Reliance on procedural barriers is clearly not always an option; furthermore, the Israeli Supreme Court has distanced itself from such procedural barriers, instead extending the right of access to many who did not previously enjoy it.⁹ As for the use of the political question doctrine,¹⁰ recently retired President Barak has been an avid promoter of the "everything is justiciable" doctrine.¹¹ Resort to the political question doctrine would be uncharacteristic of President Barak, at odds with his perception of the Court's role in a democracy and of his views on justiciability.¹²

Thus, the relative accessibility of the Court, compounded with its move away from procedural barriers and President Barak's attitude towards justiciability may explain the Court's reluctance to dismiss petitions, even those involving matters of security. Furthermore, Israel's security policies with regard to the Palestinian population and the Administered Territories are constantly under scrutiny, both domestically and internationally. A passive Court that refuses to confront the issues brought before it or readily defers to executive discretion may attract additional criticism and lend to the opinion that Israel does not take its commitment to civil liberties seriously or is not a strong democracy. The Court may be concerned with the fueling of such allegations if it were to systematically avoid addressing security issues that affect civil liberties.

Moreover, the dichotomy between times of normalcy and emergency has seen much erosion in recent years. Israel has been in an official state of emergency since its

foundation in 1948. It has been in a heightened state of conflict with the Palestinians for more than five years. Perhaps the judiciary realizes that it cannot refrain from active judicial review in times of emergency, since Israel is not only in a perpetual, official state of emergency, but also currently in a prolonged state of conflict.

The Court's handling of the targeted killings petitions is indicative of a recurring pattern in its approach to high-profile petitions. The Court is initially reluctant to address certain controversial issues, yet eventually confronts questions which it had systematically refused to address in the past. Thus, with regard to the exemption of ultra-Orthodox men from military service, petitions were filed over the course of many years before the Court was willing to address the issue substantively.¹³ Such was the case with regard to the interrogation methods of the Israeli Security Agency (hereinafter: "ISA," commonly called by its Hebrew acronym, *Shabak*). Numerous petitions were filed on behalf of individuals who had been detained by the ISA and interrogated. The Court would issue specific orders to show cause and issue interim orders temporarily prohibiting the ISA from using coercive interrogation methods,¹⁴ yet refrained from addressing the issue of interrogation methods on a normative level until its monumental decision in 1999, in which it explicitly prohibited the use of certain physical interrogation methods by security forces in the future.¹⁵ Similarly, with regard to the policy of targeted killings, petitions were initially filed in 2001 and five years later the Court has yet to give its decision in the matter.

This may be a result of the Court's assessment of the public's readiness to embrace adjudication of security matters or maybe even the public's expectation that the Court address these issues substantively. At a time when legal discourse has permeated so deeply into society's consciousness and civil rights have to a great degree become synonymous with democracy, perhaps the Court feels that the public would be better served if issues of national security were no longer considered immune from judicial scrutiny, particularly in a society in which national security is a daily matter and the Court is regularly confronted with such issues. Because of the volume of petitions regarding matters of security, the Court may actually be in a relatively good position to create and develop jurisprudence surrounding such petitions beyond the doctrine of judicial deference.

The United States – five years later

In the United States, the aftermath of 9/11 brought with it, from a legal perspective, a barrage of issues, particularly regarding the scope of executive discretion and presidential war powers, many of which have reached

the courts' doorsteps. Shortly after 9/11, Congress issued a joint resolution authorizing the use of "all necessary and appropriate force" to engage militarily those responsible for the terrorist attacks of 9/11 (hereinafter "AUMF").¹⁶ The AUMF, along with the constitutional powers granted to the President as Commander in Chief,¹⁷ have served as the legal justification provided by the U.S. government for a variety of security-related policies which have been implemented, among them the controversial indefinite detention of those deemed to be "unlawful combatants" and the designation of military commissions to try non-nationals suspected of involvement in terrorism.

Unlike the case in Israel, where petitions of this nature are filed directly with the Supreme Court, in the U.S. petitions contesting the government's various policies were initially filed with district courts across the nation and subsequently appealed before the respective circuit courts of appeal. In several cases, conflicting decisions were given by different courts.¹⁸ Because of this process, the Supreme Court did not have to address these issues until 2004, more than two years after the horrific terror attacks of 9/11 had taken place. The Court granted *certiorari* in several high profile post-9/11 cases. It has addressed the merits of several of these cases.

In *Hamdi v. Rumsfeld*¹⁹ the Court concluded that although Congress had authorized the detention of combatants through the AUMF, due process still demanded that a citizen being held in the U.S. as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker. The case was remanded to the lower court for further inquiry; however, Hamdi was later released by the Government. In the matter of Jose Padilla, the only other American citizen to have been deemed an "enemy combatant," the District Court initially ruled that there was no Congressional authorization to hold Padilla.²⁰ The Government was directed to release him. The Circuit Court subsequently reversed the District Court's decision, finding that Congress in the AUMF had provided the President with powers that included the detention of Padilla under the circumstances.²¹ Padilla filed a petition for *certiorari* seeking review of the Fourth Circuit's judgment, which was recently denied in light of the fact that Padilla had, since filing the petition, been indicted for criminal charges, thus making his petition a theoretical one.²² Although the Court has avoided a direct confrontation with the Government and its contentions that the designation of Padilla as an enemy combatant and his indefinite administrative detention were legal, it appears that the Court would not hesitate to address the issue substan-

tially were it to arise again with regard to a different detainee or Padilla himself.²³

In *Rasul v. Bush*,²⁴ the Court took a fundamental and firm position regarding the rights conferred upon the Guantanamo Bay detainees when it rejected the government's contention that the federal courts had no authority to hear the detainees' applications for *habeas corpus*. A decision to the contrary would have rendered the detainees entirely helpless from a legal standpoint, as it would have left them essentially without any effective means of contesting the severe infringement on their liberty. Their release would have remained entirely up to the arbitrary will of the Executive branch with no overview or supervision.

The Government's position with regard to the legal status of Guantanamo Bay detainees suffered another blow in June 2006 when the Court handed down its decision in *Hamdan v. Rumsfeld*.²⁵ Initially, the Court of Appeals in *Hamdan* had ruled that Congress through the AUMF had authorized the president to set up military commissions to try enemy combatants.²⁶ Furthermore, it had concluded that the 1949 Geneva Conventions did not create a private right of action and their provisions could not be enforced in court.²⁷ Finally, it had ruled that Salim Ahmed Hamdan, the petitioner, did not fit into the Article 4 definition of "prisoner of war" (hereinafter: "POW") entitled to the protection of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.²⁸

The recent Supreme Court decision overturned the Court of Appeals' ruling detailed above. The Supreme Court found that the military commissions designated to try the Guantanamo Bay detainees were in violation of the Uniform Code of Military Justice (hereinafter: "UCMJ") since their procedures deviated from those governing courts-martial without justification.²⁹ The Court also ruled that regardless of the nature of the rights conferred upon Hamdan by the Geneva Conventions, it was undisputed that the conventions comprised part of the law of war, compliance with which is a condition for the authority of the court-martial (and therefore the military commissions).³⁰ Finally, it found that at least one provision of the 1949 Geneva Conventions, Common Article 3, applied to the matter of Hamdan's capture and detention and as a result dictated his legal treatment.³¹ The decision does not address the question of whether Taliban and al-Qaeda members are entitled to POW status, contrary to the president's assertion that they are not.³²

In response to the civil liberties victory embodied in the *Rasul v. Bush* decision, in December 2005 Congress passed the Detainee Treatment Act.³³ The Act enjoyed

favorable publicity due to the McCain Amendment, introduced by Senator John McCain, which prohibited the “cruel, inhuman, or degrading treatment or punishment” of detainees³⁴ and provided for “uniform standards” for interrogation.³⁵ However, the Act also purports to remove the federal courts’ jurisdiction over detainees wishing to challenge the legality of their detention, stating that “no court, justice or judge shall have jurisdiction to hear or consider” an application for a writ of *habeas corpus* filed by or on behalf of an alien detained at Guantanamo Bay or any other action against the U.S. relating to any aspect of the detention at Guantanamo Bay.³⁶ The Act raises serious constitutional questions regarding Congress’ ability to suspend the writ of *habeas corpus*.³⁷ The Act also raises concerns regarding maintaining separation of powers.

As a result of the Act, the U.S. government raised the argument in several pending cases before the federal courts involving Guantanamo Bay detainees that the new law had retroactively stripped the federal courts of their jurisdiction to hear pending *habeas corpus* petitions challenging detentions at Guantanamo Bay and that all pending cases should be dismissed. This claim was recently denied by the U.S. Supreme Court in *Hamdan v. Rumsfeld*.³⁸ However, while the Supreme Court’s ruling in *Hamdan* clarifies the matter of federal jurisdiction over pending *habeas corpus* petitions, the fate of future *habeas corpus* petitions, other actions relating to aspects of the detention at Guantanamo Bay and of judicial review of final decisions of military commissions remains unclear.

The potentially far-reaching ramifications of the Act are evident in a recent petition filed by a Guantanamo Bay detainee claiming that force-feeding tactics used against him constituted torture.³⁹ Ironically, although acts amounting to torture or cruel, inhuman or degrading treatment are explicitly prohibited by the Act, the Government claims that since the Act removes general access to the courts, detainees cannot claim protection under its anti-torture provisions. Justice Department lawyers argue that even if the tactic were considered in violation of the Act, detainees at Guantanamo Bay would have no recourse before the federal courts. As one human rights advocate grimly concluded, “...the government’s right; it’s a correct reading of the law...The law says you can’t torture detainees at Guantanamo, but it also says you can’t enforce that law in the courts.”⁴⁰

The future of judicial review

Congress, through the Detainee Treatment Act, has signaled to the U.S. Supreme Court that it would be prudent to abstain from judicial oversight. The Act rais-

es concerns regarding Congress’ willingness to curtail the courts’ authority in matters pertaining to security. This could adversely affect the Court’s willingness to confront such issues in the future, although thus far the Court seems to be withstanding such pressure judging by its ruling in *Hamdan*. It will be interesting to witness Congress’ response to the *Hamdan* ruling in the coming weeks and months. More legislative backlash like the Detainee Treatment Act could deter the Court from making another ruling that could be revoked by Congress, undermining its authority and tarnishing its stature in the public eye.

The Israeli Supreme Court has not been free of unpleasant backlash from the direction of the legislature either. In response to the Court’s activism in the 1990s, some politicians proposed the establishment of a constitutional court in Israel that would limit the current Supreme Court’s jurisdiction over constitutional matters.⁴¹ Furthermore, in 2002 a bill was proposed in the *Knesset* (the Israeli parliament) that would have rendered military matters of an operational or combat character non-justiciable. The bill did not pass.⁴² The proposal of such a bill in the first place may have been a not-so-subtle signal to the Supreme Court that it would be prudent to avoid addressing the merits of matters of a security or military nature. Nonetheless, its failure to pass may indicate that in spite of the security threats faced by Israel, the Israeli legislature refuses to create a legal black hole that would be above the law or simply under its radar.

In early October 2006, in response to the U.S. Supreme Court decision in *Hamdan* discussed above, Congress enacted the Military Commissions Act of 2006, so that the legal basis for the military commissions is now grounded in statute rather than presidential military order. The Military Commissions Act unequivocally revokes the federal courts’ jurisdiction to hear pending as well as future *habeas corpus* petitions (contrary to the Supreme Court’s ruling on this matter). It also prohibits reliance on the Geneva Conventions as a source of rights in any *habeas corpus* or other civil action against the U.S. in a U.S. court. Another round begins in the struggle between the branches of the U.S. government to strike the appropriate balance between security and liberty.

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Notes

1. In this article I refer to the “Occupied Territories” as “Administered Territories.”
2. HCJ 2056/04 Beit Sourik Village Council v. The

Government of Israel, 58(5) *Piskei Din* (Reports of Israel Supreme Court; hereinafter: *P.D.*), 807.

3. HCJ 3799/02 Adalla v. Central District Commander [2005] (unpublished). An abstract of this judgment appeared in 42 *Justice* 37-44 (2006).

4. *Ibid* (paras. 16-18).

5. Then-President Barak based his ruling on several central rationales. First, he noted that an important principle of the laws of belligerent occupation was the prohibition of using the protected civilian population as part of the military actions of the belligerent army. This included using civilians to convey messages on behalf of the military. Another principle of humanitarian law was the separation between civilian population and military activity, which led to the conclusion that a local civilian may not be put within the proximity of a military action, even with his consent. Third, in light of the imbalance of power between the belligerent occupier and the local civilian, Barak assumed that a civilian could not be realistically expected to refuse to assist the military. Therefore, the procedure could not be soundly justified in light of the element of consent, which often was not sincere. Finally, it was impossible to know in advance if conveying the warning would endanger the civilian. When calculating the risk to the civilian, the added risk of being portrayed as a collaborator with the IDF was also a consideration in addition to physical danger from gunfire.

6. HCJ 7015/02 Ajuri v. IDF Commander in the West Bank, 56(6) *P.D.* 352.

7. HCJ 762/02 The Public Committee Against Torture v. the Government of Israel (pending).

8. HCJ 5872/01, 3114/02 Barakeh v. Prime Minister and Minister of Defense 56(3) *P.D.* 1.

9. See A. Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy," 116 Harv. L. Rev. 16, 108, 153-156 (2002); A. Guiora, Symposium, "Terrorism on Trial: Targeted Killing as Active Self-Defense," 36 Case W. Res. J. Int'l L. 319, 326 (2004).

10. The political question doctrine assumes that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution. Although these issues may be in essence legal, their resolution is given over to other branches of government. As a result, courts hold such questions to be "non-justiciable" and will neither approve nor reject the judgment of the political branches; see M. H. Redish, "Judicial Review and the 'Political Question'," 79 Nw. U. L. Rev. 1031 (1984).

11. Barak, *supra* note 9, at 98-101.

12. It is interesting to note that Justice Barak was not on the panel of judges that dismissed the first petition contesting the legality of the targeted killings policy.

13. HCJ 3267/97 Rubinstein v. Minister of Defense 52(5) *P.D.* 481.

14. B'TSELEM, The Israeli Center for Human Rights in the Occupied Territories, Torture – Background on the High Court of Justice's Decision, <http://www.btselem.org/english/Torture/Background.asp> (as of 18 December 2005).

15. HCJ 5100/94 Public Committee Against Torture v. Israel 53(4) *P.D.* 817.

16. Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).

17. U.S.. Const. A. II, § 2, cl. 1.

18. See *Detroit Free Press v. Ashcroft*, 303 F. 3d 681 (6th Cir. Mich. 2002) (affirming the grant of a preliminary injunction by the district court which found that the blanket closure of deportation hearings in special interest cases was unconstitutional); *contra* N. Jersey Media Group v. Ashcroft, 308 F. 3d 198, 201 (3d Cir. N.J. 2002) (affirming the Attorney General's blanket order blocking public access to immigration hearings of "special interest" cases) ("The only Circuit to deal with these issues has resolved them in favor of the media...However, we find ourselves in disagreement with the Sixth Circuit"). See also *Al Odah v. US*, 321 F. 3d 1134 (D.C. Cir. 2003) (affirming the district court's ruling that the Constitution did not entitle detainees being held in Guantanamo Bay to due process rights, and that they were therefore precluded from seeking *habeas corpus* relief in U.S. courts); *contra* Coalition of Clergy v. Bush, 310 F. 3d 1153 (9th Cir. 2002) (the Court held that the district court had erred in its jurisdictional holding that there was no U.S. court that could entertain any of the *habeas corpus* claims of the detainees).

19. 542 U.S. 507 (2004).

20. Padilla v. Hanft, 389 F. Supp. 2d 678, 688-689 (D.S.C. 2005).

21. Padilla v. Hanft, 423 F. 3d 386, 397 (4th Cir. S.C. 2005).

22. See Hanft v. Padilla, 2006 U.S. LEXIS 2705 (2006); Charles Lane, "Justices Won't Review Padilla Case," Wash. Post, 4 April 2006, at A6; Bloomberg.com, Padilla Rejected by U.S. High Court on Enemy Combatant Status, <http://www.bloomberg.com/apps/news?pid=10000103&sid=awICSSpNTAOM&refer=u> s (as of 4 April 2006).

23. See Editorial, "Permission to Back Down," Wash.

See *Contemporary Courts*, page 47

The role of the SNCF under occupation: guilty or not guilty?

A French administrative tribunal recently cleared the way for a suit against SNCF, the French national railway company, for its role in the deportations of French Jews to death camps during the Second World War.

Joseph Roubache

Two hundred families are preparing to sue the Société Nationale des Chemins de fer Français (hereinafter “SNCF”)¹ and the French Republic at the Administrative Tribunal of Paris for their role in the deportation of the Jews in France during the Second World War.

They recently claimed reparations for torts to themselves or their close relatives as they were transported under inhuman conditions, especially during the summer of 1942, from the Free Zone through Drancy to the death camps.

The families base their action on the verdict given on 6 June 2006 by the Administrative Tribunal of Toulouse,² which rejected the statute of limitations claim submitted by the SNCF, and had the State and the SNCF pay €62,000 to the family of European Deputy Alain Lipietz.

This decision was an important first, and a crack made in the procedural wall against which these suits have been colliding.

Indeed, the Paris Court of Appeals to which Kurt Werner Schaechter, the son of one of those deported, had appealed, refused to examine his symbolic €1 claim for compensation for the tort he incurred as a result of the deportation of his father and mother, sent by rail in the SNCF convoys of 4 March 1943 and 30 May 1944, to the Polish extermination camps of Sobibor and Auschwitz, from which they never returned.

This ruling was based on the Ten Year Statute of Limitations, according to which a responsibility claim is unacceptable if it has been filed more than ten years after the occurrence of the facts.

Besides, according to this court, the deportee transports and the conditions to which they had been subjected have been known for over 60 years.

By putting aside the procedural obstacle of the Statute of Limitations, the recent ruling of the Administrative Tribunal of Toulouse will allow for legal proceedings, which until now have been impossible.

Once again, this state institution finds itself at odds with its history.

Is the SNCF guilty or not guilty?

Two French jurisdictions have reached opposite conclusions.

What is to be thought of this?

Two notes should be taken.

First, there is an evident contradiction in the existing position of the SNCF, squeezed between its declared wish to establish “the truth” about this dark period of its history and its refusal to recognize its responsibility.

Secondly, there is the degree of deep involvement of this institution in this gruesome operation.

The contradictory position

Following the extensive media coverage given to the 1991 finding of Kurt Werner Schaechter, of invoices on the basis of which the SNCF was being paid for the deportee transports, the SNCF directors have multiplied their initiatives to demonstrate their wish to attain the truth, to wit:



- A conference concluded on 18 November 1992, with the Centre National de Recherche Scientifique, aiming to formulate a report on its role during the Second World War – the Christian Bachelier report published in September 1996;
- A conference held 21 and 22 June 2000 at the National Assembly, presided by René Rémond with the participation of eminent specialized historians, regarding “A Public Institution during the War: The SNCF 1939-1945”;
- An exhibition at the Gare de l’Est in June and July of 2000;
- The publication of the National Assembly Conference minutes in May 2001;
- A traveling exhibition at the Gare Saint-Lazare in June and July of 2002, a discrete but important contribution of the Holocaust Foundation.

All of these initiatives, not surprisingly, are favorable to the SNCF.

At the opening of the conference of 21 and 22 June 2000, Louis Gallois, president of SNCF, citing the “trains of liberty” and then the “trains of death” said: “The collective memory has retained the first and hidden the other; this conference is a step on the road to recognition; it proves the clear desire of the SNCF to assume the integrity of its heritage.”

He concluded with these apt words: “We are hereby placing ourselves resolutely with the line defined by the President of the Republic in July 1995.”

France had then recognized its responsibility: “Yes,” the President of the Republic, Jacques Chirac, had said, “the criminal folly of the occupier was seconded by Frenchmen, by the French state.”

Why then, alone among the large French organizations, does the SNCF insist, in order to deny its responsibility, to pretend to have been itself a victim of the constraints imposed on it by the occupier?

Article 13 of the Armistice Convention of 22 June 1940, which the SNCF invokes for its defense, certainly did place the SNCF “at the full and complete disposal of the German Chief of Transportation.” But this was only in the Occupied Zone, and not in the Free Zone.

However, the greatest deportations (16,000 Jews) took place in July and August of 1942, from the Free Zone to Drancy and then on to Auschwitz via Metz, where the French railroad men were replaced by their German colleagues, who, after having delivered their “human merchandise” to the death camps, returned the cars, empty and ready for new transports.

A collaboration of the state railroad

In reality, the most recent research, especially the Christian Bachelier report, has made evident that, as Michel Margairaz, a professor of history at Université Paris 8 has put it, a real “collaboration of the state railroad” had taken roots in the SNCF.

“It had to do (for the SNCF) with the conservation of a part of its sovereignty, at whatever cost, be its price as it may, especially since it involved groups considered as negligible, such as Jews and strangers.”

The president of the SNCF at the time, Pierre Eugène Fournier (at the time also responsible with the control of organizing Jewish property) declared in 1941: “France, while it has its reservations, is prepared to find a practical solution which would let the SNCF provide help for Germany, within the framework of the policy of collaboration, provided that the vital needs of France be assured.”

The “vital needs” he had in mind, as indeed did Jean Berthelot, State Secretary of Communications, and Robert Le Besnerais, Director General of the SNCF, were control over the railroad network, ownership of sufficient wagons and locomotives, and, finally, control over the railroad men.

As to the “help” to be provided to Germany, that would entail the transportation of Jews to the death camps.

Christian Bachelier’s report revealed a series of vital documents that illustrate the profound implication of the SNCF and its management in the organization and meticulous execution of the deportations from the Free Zone.

Legal proceedings of the SNCF technical delegation

These are the proceedings regarding five meetings held at Vichy by the “Technical Delegation SNCF” from July until August of 1942, which reveal, for example, that the trains of the deportees were required to make their stops outside the main train stations (Marseille, Toulouse and Avignon), in order to avoid public compassion, as the only true concern of the management regarded the departure and arrival timetables of the death convoys.

According to a circular of the Director of the Municipal Police, dated 15 September 1942, it is the SNCF that “shuts and seals the wagons of the deportees.”

Finally, it is Henri Rouso, director of l’Institut d’histoire du temps présent at Centre National de Recherche Scientifique, who summarizes the discussion by outlining the principal questions: “What was at the time the margin of maneuver of the SNCF? It was certainly small, but still it existed. Was it used for action in the matter of the trains of deportation? The answer is obviously in the negative.”

By transporting the deportees in inhuman conditions towards a destination from which they would not return, the SNCF abused an inalienable right, that of the respect for human dignity.

Justice must conclude these painful proceedings.

Joseph Roubache is president of the French Committee of the International Association of Jewish Lawyers and Jurists.

Notes

1. Société Nationale des Chemins de fer Français, formed in 1938, operates almost all of France’s railways.
2. An English translation of the verdict is available at www.acaccia.fr/-Translation-in-English-.html.

Human rights in a constitutional framework

Judicial review is a hotly contested topic in many countries, and activist courts, especially in the United States and Israel, have been heavily criticized by those who feel the courts are usurping the functions of the legislature. Prof. William M. Treanor, Dean of Law at Fordham University, New York, traced the history of judicial review in the United States at the inaugural Justice Haim H. Cohn Lecture on 24 May 2006. Prof. Daniel Sinclair of Israel's College of Management, where the lecture was delivered, has prepared a synopsis of the lecture.

Daniel Sinclair

Judicial review is not explicitly provided for in the United States Constitution. There are, arguably, a number of English cases from the seventeenth century that can be seen as instances of judicial review. The most celebrated of these is that of Dr. Bonham, decided in 1610. In that case, Sir Edward Coke, Chief Justice of England's Court of Common Pleas, stated that "in many cases, the Common law will control Acts of Parliament, and...when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common law will control it, and adjudge such Act to be void." Justice Coke's dictum was, however, largely disregarded, and at the time of the American Revolution in 1776, the dominant British doctrine was the principle of parliamentary supremacy championed by British jurist and educator Sir William Blackstone. Under that doctrine there was certainly no room for the notion of judicial review found in the earlier cases.

The most prevalent view of the origins of judicial review in the United States is that it was created by Chief Justice Marshall in the 1803 case of *Marbury v. Madison*. In that case, Justice Marshall struck down a congressional statute, the Judiciary Act, 1789, on the grounds that it invested the Supreme Court with a jurisdiction to hear cases that it was not allowed to hear under the Constitution. After making it absolutely clear that the United States Constitution is valid law, Justice Marshall proceeded to assert that "an act of the legislature repugnant to the Constitution is void." It is the Court which is entrusted with the power to declare such laws invalid, and according to one view, Justice



Marshall's discursive and prolix opinion provides the basis for regarding judicial review as a new and unique supervisory function of the Court with respect to the doctrine of the separation of powers, and the proper operation of the Constitution. Under this view, most prominently articulated by Prof. Alexander Bickel of Yale Law School, judicial review is, in fact, anti-democratic in its origins, and is almost a kind of judicial coup d'état, in which Justice Marshall, through a remarkable act of political finesse, was able to establish a countermajoritarian institution not contemplated in the Constitution. *Marbury* is also seen – not simply as establishing the principle of judicial review – but as reflecting a strong conception of such review: Once again, in the words of Justice Marshall: "It is emphatically the province and duty of the judicial department to say what the law is."

Prof. Treanor's research¹ into the origins of judicial review in the United States leads to a dramatically different picture. Rather than being established in *Marbury*, judicial review emerges in the revolutionary era. There were eight judicial review decisions in the years between the start of the American Revolution (1776) and the drafting of the Constitution (1789). Significantly, the analytic framework of these opinions is not anti-democratic. To the extent that they have an analytic framework, they rest on the view that the written constitution is a more fundamental and superior expression of the popular will than the legislative act that is challenged. Also significantly, the decisions are formal in character: judicial review is aggressively exercised to protect the structures of constitutional government – all but one of the cases involved either the jury trial right or judicial autonomy.



Israel Hadari

Justice Aharon Barak, recently retired President of Israel's Supreme Court, greets Prof. William Trainor, Dean of Law at New York's Fordham University. Prof. Trainor delivered the inaugural Justice Haim H. Cohn Lecture.

While the Constitution did not explicitly mention judicial review, most of the comments on this subject at the Philadelphia Convention of 1787, and in the legislatures of the states ratifying the Constitution, were in favor of the legitimacy of judicial review. Bolstering the idea that judicial review was part of the original understanding of the Constitution is the great number of judicial review cases decided between the drafting of the Constitution and *Marbury*. Prof. Treanor found 29 cases from this period in which a statute was invalidated, and six more in which at least one judge concluded that a statute was unconstitutional.

Consistent with the basically democratic analytic approach of the revolutionary era cases, the body of case law from the early republic reflects the two different levels of judicial scrutiny commonly found in American constitutional law.

The first is in relation to formal due process and national authority, and in this area, scrutiny is strong, and the slightest suspicion of an infringement of a constitutional right is sufficient for the Court to strike down the statute. Courts repeatedly – 29 times – overturned statutes that cut back on jury trial rights, or judicial autonomy, or that implicated national power, and they did so even though in most of these cases – 22 according to Prof. Treanor's count – there were plausible arguments in favor of their constitutionality. Of this group, perhaps the most surprising decisions are seven cases in which federal courts struck down state statutes that affected national authority; in six of these cases, there were plausible arguments on behalf of the constitutionality of the statutes in question.



Israel Hadari

Should courts have the power to abrogate legislation? A capacity crowd came to the College of Management in Rishon Letzion to learn about the history of judicial review in the United States.

The second characterizes matters other than formal due process and national authority, and in this area, the court was far less keen to overturn legislative enactments. Most of the cases involved what has been called the “concededly unconstitutional” approach. Under this approach, unless a statute is clearly unconstitutional, it should be upheld. In almost all of the decisions on judicial review in the early republic in this area, the statutes attacked were not struck down.

In sum, these cases from the early republic, like the cases from the revolutionary era, reflect an aggressive use of judicial power to establish the foundations of the constitutional order: the jury trial right, judicial independence and national supremacy. Like the earlier cases, the later cases also reflect the view that judicial review is ultimately grounded in popular authority because judicial review involves using the Constitution to trump statutes, and the Constitution has a superior claim to authority than legislative acts.

Marbury continues these basic trends. Chief Justice Marshall's invalidation of the Judiciary Act, 1789, has been criticized, but his determination that Congress could not expand the Court's jurisdiction is consistent with the earlier case law that had invalidated statutes affecting jurisdiction. His appeal to the superiority of the Constitution to the statute echoed previous decisions finding in the Constitution an expression of popular will that courts had to follow. Prof. Treanor's research provides the basis for grounding *Marbury* in the earlier case law, rather than seeing it as a thoroughly innovative

departure from previous precedents.

Two major points emerge from this research into the origins of judicial review in the United States and its analysis. First, judicial review was part of the original understanding of the Constitution, and its acceptance was revealed by subsequent practice. Second, this understanding involved a particular conception of judicial review according to which general deference to legislature was to be the rule except in areas that are foundational to constitutional governance, i.e., the autonomy of the juries and courts that enforce the rule of law and the superiority of the national government over state governments in its area of authority.

According to Prof. Treanor, the modern thinker whose approach is most similar to that of the founding generation, and who succeeds in linking this original understanding of the Constitution with modern constitutional theory most authentically, is legal scholar John Hart Ely, the champion of process theory. In Ely's vision, courts are deferential to legislation, except to protect the political process, or where that process fails. Something similar is reflected in the early case law. Courts generally deferred to the legislature, except in those cases in which their intervention was necessary to ensure that the basic elements of constitutional governance – juries, courts, and the national government – were protected.

Turning to the question of the lessons, if any, that Israel, a fledgling nation in constitutional terms, might be able to learn from this analysis of early judicial review in American constitutional law, Prof. Treanor pointed out that in the United States, the relevance of historical analysis is clear, because originalism is such a strong movement in constitutional theory.

In Israel, this is not the case, but there are two ways in which this study of the origins of judicial review in the United States may be relevant. First, the early case law reflects a conception of judicial review that basically defers to democratic decision-making, and only strikes down legislation when it threatens the preconditions of constitutional governance. Second, the early history of the United States offers a case study as to how judicial review can win popular acceptance. Courts in the United States protected the core of constitutional decision-making while avoiding confrontation. Although perhaps not adopted for reasons of pragmatism, this approach played a critical role in the establishment of judicial review.

In Israel and in other countries where judicial review is comparatively new, courts and lawyers, con-



Israel Hadari

College of Management Dean of Law Prof. Tamar Gidron (left), then Israeli Supreme Court President Aharon Barak, Fordham University Dean of Law Prof. William Trainor and IAJJ President Adv. Alex Hertman at the inaugural Haim H. Cohn Lecture.

sidering the U.S. model, might therefore consider two linked questions: First, would this approach prove as successful in other countries as it has proved in the United States in establishing the institution of judicial review? Second, does this potential for success make this model attractive, or, is the model too limited in scope, and too limited in its protection of the range of individual rights, to merit emulation, despite its pragmatic advantages?

American history thus provides a model and a case study. It leaves open the question whether a change in context would change the success of this model of judicial review, and, at least as important, it leaves open the normative judgment about the attractiveness of the approach that helped establish judicial review in the United States.

Daniel Sinclair is a professor of Jewish Law and Comparative Biomedical Law at the Law School of the College of Management, Rishon Lezion. Prof. Sinclair wishes to thank Prof. Treanor for supplying his lecture outline.

Notes

1. Prof. Treanor developed his approach to the historical development of judicial review in three principal articles. They are: W.M. Treanor, "The Case of the Prisoners and the Origins of Judicial Review," 143 *U. Pa. L. Rev.* 491 (1994); W.M. Treanor, "The Original Understanding of the Takings Clause and the Political Process," 95 *Colum. L. Rev.* 782 (1995); and W.M. Treanor, "Judicial Review Before Marbury," 58 *Stan. L. Rev.* 455 (2005).

President's Message
from page 2

The complete correspondence between IAJLJ and the involved UN organs can be found at <http://www.intjewishlawyers.org/html/ShowPolicy.asp?DocID=16350>.

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This issue of Justice is being published to coincide with Remember Budapest, the Association's conference commemorating the Jewish lawyers and jurists who perished in Hungary during the Holocaust. Remember Budapest continues a series convened in Greece, Germany and Poland, and is sponsored by the Secretary General of the Council of Europe with the collaboration of the Hungarian Bar Association and the Budapest Bar. On behalf of the IAJLJ Presidency and the Executive Committee and Council, I extend a warm welcome to all our members and our guests.

Alex Hertman
President

Asymmetric wars
from page 23

19. Jenin was a case in point. On the distortions of NGOs in the latest Lebanese war regarding body counts and the "civilian" nature of the casualties, see the NGO Monitor website; recent articles by Avi Bell, Alan Dershowitz, and Gerald Steinberg, in *Jerusalem Post*. On the media, see T. Gross, "The Media War Against Israel," *National Post*, 2 August 2006.

20. The statement was made in his public reply regarding war-crime allegations during the March 2003 invasion of Iraq; cited by D. Taub, "Responding to Hezbollah Attacks from Lebanon: Issues of Proportionality," 25 July 2006, Israeli Ministry of Foreign Affairs website.

21. Final Report to the Prosecutor by the committee established to review NATO bombing campaign in Yugoslavia, para. 50; cited *ibid*.

22. Y. Dinstein, *Conduct of Hostilities under the Law of International Armed Conflict* (2004) p.130.

23. See further, on Lebanese complicity, A. Dershowitz, "Amnesty International Redefines War Crimes," *Jerusalem Post*, 31 August 2006.

24. I. L. Claude, Jr., "Just Wars: Doctrines and Institutions," 95 *Political Science Quarterly* 86 (1980).

25. A. Dershowitz, "Arithmetic of Pain," *Wall Street Journal*, 19 July 2006.

26. 2003 *ASIL Proceedings* 193-194.

Note to readers: A quotation mistakenly attributed to Ruth Wedgwood in the penultimate paragraph of this article in the print edition of Justice 43 has been removed from the Internet edition. A correction notice will be published in Justice 44.

Watchers
from page 27

2. Amnesty International, "Under fire: Hizbullah's attacks on northern Israel," as of 14 September 2006 at <http://web.amnesty.org/library/Index/ENG-MDE020252006>

3. Art. 425 of the NGO Declaration at the Durban Conference.

4. See J. Muravchik, "Human Rights Watch vs. Human Rights: The cynical manipulation of a worthy cause has a history," *Weekly Standard*, Volume 011, Issue 48 (11 September 2006); other examples are listed by NGO Monitor at www.ngo-monitor.org/archives/infofile/hrw_criticised_for_israel_attacks_280806.html

Contemporary courts
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Post, 4 April 2006, at A22, ascertaining that although the Supreme Court decision leaves in place the Fourth Circuit decision upholding the Government's authority to detain a U.S. citizen as an enemy combatant without charge or trial, the majority also made clear that "the courts reserve the right to jump in again if the government plays more games with Mr. Padilla's status."

24. 542 U.S. 466 (2004). The case was heard and decided together with *Al Odah v. U.S.*; *supra* note 18.

25. 165 L. Ed. 2d 723 (2006).

26. *Hamdan v. Rumsfeld*, 415 F. 3d 33, 38 (D.C. Cir. 2005).

27. *Ibid* at 39-40.

28. *Ibid* at 41-42. The Court based its ruling on the president's determination that the conflict with al-Qaeda was international in scope (therefore ruling out conflicts covered by Common Art. 3, which are not of an international character), but that al-Qaeda is not a High Contracting Party to the Convention, therefore ruling out the application through Art. 2 as well.

29. *Hamdan v. Rumsfeld*, 165 L. Ed. 2d 723,

769-774 (2006).

30. *Ibid* at 775.

31. *Ibid* at 776-778.

32. White House Memorandum on Humane Treatment of al-Qaeda and Taliban Detainees (7 February 2002), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>; Memorandum from John Yoo, Deputy Assistant Attorney General to William J. Haynes II, General Counsel, Department of Defense on the Application of Treaties and Laws to al-Qaeda and Taliban Detainees (9 January 2002) *available at* <http://antiwar.com/news/?articleid=2637> (on file with author).

33. Detainee Treatment Act of 2005, 109 P.L. 148.

34. §1003.

35. §1002.

36. §1005.

37. For a discussion of the ramifications of an attempt to suspend the writ of *habeas corpus*, see Memorandum by Jennifer K. Elsea & Kenneth

Thomas, Congressional Research Service, on Guantanamo Detainees: *Habeas Corpus* Challenges in Federal Court 15 (7 December 2005), *available at* <http://www.fas.org/sgp/crs/natsec/RL33180.pdf>.

38. 165 L. Ed. 2d 723 (2006).

39. Mohammed Bawazir, a Yemeni national being held at Guantanamo Bay since May 2002, who was on a hunger strike, was strapped into a special restraint chair for nearly two hours and force-fed through a large tube in his nose. Bawazir's attorney claims that the military deliberately made the process painful and embarrassing, noting that Bawazir soiled himself because of the approach; Josh White & Carol D. Leonnig, "*U.S. Cites Exception in Torture Ban*", Wash. Post, 3 Mar. 2006, at A04.

40. *Ibid*.

41. Y. Dotan, "*Does Israel Need a Constitutional Court?*" 5 Law & Government 117 (2000) (in Hebrew).

42. Barak, *supra* note 9, at 106 (footnote 334).

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צדק

ENGLISH: 1. justness, correctness. 2. righteousness, justice. 3. salvation. 4. deliverance, victory.
[**ARAMAIC:** צדק (he was righteous), **SYRIAC:** זדק (it is right), **UGARITIC:** ṣdq (= reliability, virtue), **ARABIC:** ṣadaqa (= he spoke the truth), **ETHIOPIIC:** ṣadaqa (= he was just, righteous)] Derivatives:
צדקה **POST-BIBLICAL HEBREW:** alms, charity. Cp. **ARAMAIC** צדקתא (= justice). **PALMYRENE** צדקתה (= it is right).
צדק 1. just, righteous. 2. pious.

After Ernest Klein, A Comprehensive Etymological Dictionary of the Hebrew Language for Readers of English. 1987: Carta/University of Haifa

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