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The International Association of Jewish Lawyers and Jurists

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Justice is one of the goals of the International Association of Jewish Lawyers and Jurists. Thus, the Association works to advance human rights everywhere, addressing in particular issues of concern to the Jewish people through its commitment to combat racism, xenophobia, anti-Semitism, Holocaust denial and negation of the State of Israel.

We invite you to join a membership of lawyers, judges, judicial officers and academic jurists in more than fifty countries who are active locally and internationally in promoting our aims.

As a new or renewing member, you will receive a subscription to Justice and a free, one-month trial subscription to The Jerusalem Post. You will be invited to all international conferences of the Association and may vote and be elected to its governing bodies. You may also have your name and other information appear in our online directory linked to our main website.

Help make a difference by completing the membership form on the opposite page and mailing it to us together with the annual membership fee of US$50 or NIS200.

The International Association of Jewish Lawyers and Jurists
10 Daniel Fried Br., Tel Aviv 64731
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ENGLISH: 1. justness, correctness. 2. righteousness, justice. 3. salvation. 4. deliverance, victory. [ARAMAIK: ידיע (he was righteous), SYRIAC: כוח (it is right), UGARITIC: ṣdq (= reliability, virtue), ARABIC: ṣadaqa (= he spoke the truth), ETHIOPIC: ṣadaqa (= he was just, righteous)] Derivatives: הדרון POST-BIBLICAL HEBREW: almeh, charity. Cp. ARAMAIK ḥakir押金 (= justice). PALMYRENE: ידיע (it is right). ידיע 1. just, righteous. 2. pious.
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President's Message

The year 2009 was challenging and stirring for the International Association of Jewish Lawyers and Jurists. It was particularly noteworthy in 2009 marked the fortieth year of IAJU’s founding by Supreme Court Justice Haim Cohen of Israel and Arthur Goldberg of the United States and Nobel Prize laureate René Cassin of France. It was a great pleasure and honor for me to chair our association and to follow the vision of our Founders. I believe in IAJU’s cause and have strived to see that its goals and ideals are served properly.

I wish to highlight a number of activities and events over the past year and to provide you with an overview of our programming for 2010.

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On September 9, a legal opinion prepared by a well-known jurist regarding the declaration of acceptance of the jurisdiction of the International Criminal Court made by the Palestinian Authority’s minister of justice was sent to the prosecutor of the ICC. Our Association explained how this application should be overruled as the Palestinian Authority is not a state and therefore the jurisdiction of the ICC does not and cannot apply. This matter is of great importance for the State of Israel and for the Jewish people at large.

In October, IAJU, in association with the France-Israel Foundation, hosted a delegation of 22 well-known French judges and lawyers, headed by Jean-Claude Magendie, the president of the Court of Appeals in Paris. Joseph Roubache, Chairman of IAJU’s French branch and Representative to the Council of Europe in Strasbourg, was the driving force behind this event. The delegation met with Israeli Minister of Justice Yaakov Neeman and Speaker of the Knesset Rivlin. During its visit, the delegation learned about the Israeli legal system and also met with Supreme Court Justice Edna Arbel. Another aim of the event was to ensure that the French delegates better understand the reality that Israel confronts every day. During their visit, the delegates also enjoyed a successful symposium entitled “Ethics and Law in the War against Terror” prepared by IAJU in cooperation with Bar-Ilan University.

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In an effort to be more involved on the internet, our website was launched, enabling greatly improved access to our online materials, including JUSTICE magazine. We hope that you find the new site attractive and useful. As well, we have recently obtained a donation that will allow the publication of JUSTICE twice each year, and anticipate publishing the next edition in October.

As we go to press, our Association, together with the Intelligence and Terrorism Information Center, is scheduled to hold a symposium in Israel on transitional justice, with presentations by Sigal Honwitz, formerly a Legal Officer with the United Nations International Criminal Tribunal for Rwanda and currently completing a doctorate at the Faculty of Law of the Hebrew University of Jerusalem; by Charles Cazana, former Assistant U.S. Attorneys and Federal Prosecutor, and currently Project Manager of the Justice Sector Assistance Project led by the U.S. State Department in the West Bank; and by Ilai Argelb, a senior correspondent with Israel’s Channel Two television program “Uvda” (a news, current affairs and documentaries magazine), and a journalist covering armed conflicts worldwide who received the Sokolov Prize, the highest award for journalism in Israel, for his work covering the conflicts in Croatia and Bosnia.

As many of you know, this year we parted from a very dear friend, Daniel Lack, who served as a Vice President of IAJU and was a Permanent Representative to the United Nations in Geneva. Over the years Daniel contributed mightily to our association and was seen by many as an ambassador for Israel in the Diaspora. We will cherish him always and ensure that his legacy is honored. Helping to serve that purpose is our tribute to Daniel on the pages that follow. Now serving as IAJU’s Permanent Representatives to the United Nations in Geneva are his son Jeremy and Michael Hessel. We wish them both much success.

Our forthcoming international conference is now in the final stages of planning. Bearing the theme “Democratic and Legal Norms in the Age of Terror,” the conference will be held in London June 30-July 4 of this year, with an opening reception at Gray’s Inn. England has a highly developed legal system that recognizes universal jurisdiction and it is important to review the many arrest warrants issued against visiting Israeli army officers and political leaders. Also to be considered, among other topics, are the boycotts declared by British universities and professional organizations against Israeli institutions in response to its hold on the West Bank and Israel’s reaction to terror attacks. We have assembled a stellar group of jurists to address these and other matters in presentations and panel discussions. I urge you to participate in this important event, where you will meet old friends and make new ones as you learn of the immense human rights challenges with which all democracies must now contend. The conference schedule and registration information appear on Pages 32-33.

As you know, much of the work of our Association is undertaken by volunteers, yet in the course of that work we incur many expenses that our membership fees do not cover. I am pleased to inform those of our members who file income tax returns in the United States that they may now claim donations under the 501(c)(3) regulations of the Internal Revenue Code. Full information appears on Page 34. I also remind those who have not renewed their membership for 2010 to do so, and to try as well to bring new members to our Association.

Finally, I extend to all of you my very best wishes for Passover and Easter, and look forward to seeing you in London.

Alex Horman
President

Spring 2010
President’s Message

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Finally, let me add of all of you my very best wishes for Passover and Easter, and look forward to seeing you in London.

Alon Herman
President

Spring 2010

No. 47
IAJLJ celebrates forty years

A little over 40 years ago, in September of 1969, the first World Congress of Jewish Lawyers and Jurists convened in Jerusalem and founded the International Association of Jewish Lawyers and Jurists. The congress was spearheaded by Foreign Jurist and Nobel Peace Prize laureate René Cassin, president from 1965 to 1968 of the European Court of Human Rights and a principal author of the Universal Declaration of Human Rights; Israeli Supreme Court Justice and Israel Prize laureate Haim Cohn (later president of the Association for Civil Rights in Israel); and United States Secretary of Labor and later Supreme Court Justice and U.S. Ambassador to the United Nations Arthur Goldberg.

Among delegates speaking at the opening session of the congress were Israeli Supreme Court President Shimon Agranat, American Bar Association President Bernie Segal and Israeli Bar Association President Joshua Rosenzweig.


Airplane hijackings, which had averaged about five events per year over the previous decade, took a huge climb to 33 occurrences in 1968 and 75 in 1969, prompting the Association to set up an international committee "to effect a study of acts of aerial piracy, of measures for its prevention and eradication, and of national and international legislation existing, contemplated and required."

Justice E. Rubinstein noted that the criminal population had suffered considerably as a result of the IDF's combat operations. The operations were taking place in densely populated areas. Consequently, many of the victims were civilians who were not involved in the dispute and were paying a high price. Because of the circumstances in which the hearing had taken place, the Court had not received all the information needed to clarify the position, but it could not be denied that a strenuous effort had to be made to discharge the humanitarian obligations of the State of Israel. It was true that the IDF forces were fighting against a terrorist organization that did not comply with international law or respect humanitarian obligations. There was no channel of communication with it that might further the implementation of the principles and laws that governed parties involved in an armed conflict of the type waged here. The Court noted that a compromise seemed to be forthcoming; nonetheless, it held that while the conflict continued and as long as Israel had control over the transfer of resources and the supply of humanitarian needs to the Gaza Strip, it was bound by the obligations enshrined in international humanitarian law, which required it to allow the civilian population to have access, inter alia, to medical facilities, food and water, as well as additional humanitarian goods needed to maintain civilian life.

President Benshlem expressed her hope that the State would do its best to comply with Israeli and international law in order to alleviate the suffering of the civilian population in the Gaza Strip, which had been seriously affected by the combat operations. This suffering was a result of the conduct of the cruel terrorist organization that controlled the Gaza Strip and operated from within the civilian population while endangering it. Nonetheless, even in the face of a terrorist organization that had declared its goal of harming the civilian population of the State of Israel indiscriminately, Israel was under an obligation to carry out its duty to uphold the principles and values underlying its existence as a Jewish and democratic state that cherishes human rights and humanity.

Subject to the above, the petitions were denied.

Justice E. Rubinstein
basic obligations were not absolute and had to be balanced against security considerations.

The Court noted that de facto there was no dispute between the parties with regard to the binding legal arrangements applicable to the combat operations being carried out in Operation Cast Lead.

The prohibition against intentionally harming medical personnel

The Court considered the various treaty provisions for the protection of hospitals, medical personnel, the wounded and members of international organizations, but noted that this protection was not absolute and would be lost if use was made of medical facilities for non-humanitarian purposes, or if they were exploited for military purposes. Thus, medical personnel were only entitled to full protection when they were exclusively engaged in the work for, collection, transport or treatment of the wounded or sick, and similar matters (Articles 24-26 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 [hereinafter: “First Geneva Convention”]), whereas the protection of medical facilities would cease if they were used "to commit, outside their humanitarian duties, acts harmful to the enemy" (Article 21 of the First Geneva Convention; Article 19 of the Fourth Geneva Convention).

The duty to allow evacuation and medical treatment of the wounded

President Beinisch noted that international humanitarian law also required the parties to allow the evacuation and medical treatment of the wounded (Article 16 of the Fourth Geneva Convention). Article 15 of the First Protocol provided that medical personnel should be allowed access to any site where they were needed, subject to supervision and security measures that were essential to the relevant party.

The duty to ensure the needs of the civilian population

The Court explained that one of the fundamental principles of international humanitarian law was the principle that distinguished combatants and military targets from civilians and civilian targets, and granted protection to the latter. The protections given to the civilian population included the duty to allow free passage of humanitarian medical supplies, subject to several conditions (Article 23 of the Fourth Geneva Convention). Article 70 of the First Protocol provided a more general and broader duty, whereby parties to a conflict were obliged to allow the passage of articles that were essential for the civilian population at the earliest opportunity and without delay. Article 30 of the Fourth Geneva Convention required parties to a conflict to allow citizens to contact the Red Cross or similar organizations in order to receive assistance.

From the general to the specific

The Respondents did not repudiate the above international law obligations. However, the conflict was complex, and the Human Rights Chamber for the Stocktake of the Unknown, a body established by UN Human Rights Council in 2004, was not able to give a clear answer to the question of whether the measures taken were in accordance with the applicable law.

The Court considered the preparations made to ensure the humanitarian needs of the local inhabitants. It referred to the detailed evidence about the establishment of special health operations room set up to coordinate the evacuation of the wounded and the dead from the area where hostilities were taking place and that in fact professional matters arising in the operations room were decided by a physician who was available around the clock to receive communications from Palestinian inhabitants, the Palestinian health coordinator, the Red Cross and human rights organizations.

In view of the establishment of the humanitarian mechanisms, the Court concluded that the serious effort would be made to improve the evacuation and treatment of the wounded, and the establishment of a clinic in the vicinity of the Gaza crossing, President Beinisch stated that there was no further reason to grant relief in the form of an order nisi at this time.

Regarding the electricity supply to the Gaza Strip, the Court had been told that an infrastructure operations room had been set up, staffed twenty-four hours a day and responsible for responding to infrastructure problems in the combat areas, obtaining an up-to-date picture of the economic situation and coordinating consignments of humanitarian aid to the Gaza Strip. Where necessary, the operations room coordinated the arrival of Palestinian technical personnel at the site of the problem, together with an international organization.

President Beinisch reviewed the position concerning the supply of electricity to the Gaza Strip, but noted that the ten electricity lines that transmitted electricity from Israel to the Gaza Strip had been repaired and

For many, IAJLJ has meant a lifelong commitment. Its first office-holders included honorary Deputy President Frédéric Neveu and, until recently, Representative to the Council of Europe in Strasbourg Joseph Roulouche. Many of the Association’s first office-holders held or were to hold distinguished positions. Beyond founders Romain Cassini, Haim Cohen and Arthur Goldberg, they included the late Supreme Court of Canada Chief Justice Bora Laskin, former President of the Supreme Court of Israel Meir Shamgar, the late Justice of the Supreme Court of the Australian state of New South Wales Simon Isaacs, the late Connecticut Superior Court Judge Samuel Melville, former Canadian Minister of Justice and current Member of Parliament Irwin Cotler, the late Israeli Attorney General and lead prosecutor in the Adolph Eichmann trial Gideon Haasner, the late President of the Canadian Zionist Federation and Member of Parliament Judge Philip Ginsver, the late Israeli Bar Association President Joshua Rotenstreich, the late Master of the Bench of the Inner Temple of England and Wales E. Asher Lincoln, and former President du Comité de coordination d’organisations juives de Belgique Marcus Fardos.
Daniel Lack 1930-2009

Daniel Lack, Vice President and for many years Permanent Representative of the International Association of Jewish Lawyers and Jurists to the United Nations in Geneva and to the Council of Europe in Strasbourg, died suddenly on June 7, 2009 while visiting Israel with his wife Esther (née Polach).

Daniel was a vigorous defender of Israel before the hostile United Nations Human Rights Commission and its successor, the UN Human Rights Council. He represented the Association at the World Conference against Racism, held in Durban, South Africa, in 2001, together with his close friend and colleague Anne Baysky. They collaborated again in combating the obscene messages emanating from the Durban Review Conference (known as Durban II) that took place in Geneva only weeks before his demise. He was also a frequent contributor to JUSTICE, writing most of the policy statements published in the Association's journal.

Daniel was born in London in 1930. He received his secondary education at Dame Alice Owen's School in Harlington, obtaining his School Certificate (Matriculation Exemption) in 1946 and his Higher School Certificate (Intermediate Exemption) from the University of London in 1948. Admitted to Lincoln College, Oxford, in 1949, he read law at the Honour's School of Jurisprudence, graduating with an MA Oxon. in 1953. Thereafter, he pursued graduate studies in European institutions and public international law at the Collège d'Europe in Bruges (1953-1954). After returning to England, he was called to the Bar of England and Wales in 1959.

A lawyer with a mission

After starting practice as a barrister in London, Daniel served as Legal Adviser (General Counsel) to the American Jewish Joint Distribution Committee, the humanitarian aid agency founded in 1914, working first in Paris and later in Geneva. The Joint, as it is often called today, was very active in the years immediately after WWII conducting aid operations worldwide, including refugee rescue and providing relief for displaced persons. One of his first mandates was to establish a list of homeless assets of Jewish refugees from Arab and North African states, and to initiate compensation claims for displaced persons from these countries.

Daniel also negotiated global restitution and indemnification settlements, primarily with the competent authorities of the Federal Republic of Germany and its constituent states. He did so on behalf of victims of Nazi persecution and successor organizations created to claim and take possession, as trustees, of heirless property for humanitarian purposes and for the benefit of charitable institutions.

He also dealt with issues relating to the international protection of refugees, improving the consequences of statelessness, and questions of immigration law.

During this period, he was also responsible for addressing legal problems arising from the Joint Distribution Committee's operations, most notably in Eastern and Western Europe, North Africa and the Middle East. Conducting protracted negotiations with national authorities, when necessary, he also initiated legal proceedings in cooperation with local counsel in several national jurisdictions to protect the rights and to maintain and protect religious and cultural properties and the organizational structures of dwindling minority communities.

Daniel also served on an appellate panel of the United Nations High Commissioner for Refugees, awarding funds under the terms of an agreement between the UN and the Federal Republic of Germany to eligible claimants persecuted on grounds of nationality. In 1964, at the request of the U.S. President Lyndon Johnson and the International Council of Voluntary Agencies, he served on a mission to Vietnam on behalf of the U.S. Agency for International Development. His task was to assess the possibility of establishing an international refugee program for people uprooted and displaced by the Cold War conflict in Southeast Asia.

In 1971, Daniel convened a Round Table Conference of Experts under the auspices of the Council of Europe. The conference, organized in Strasbourg on behalf of the International Standing Conference on Philanthropy, dealt with the fiscal treatment of NGOs and their donors. Following this, he co-authored a draft of the open international convention on the legal personality of non-governmental organizations, subsequently adopted by the Council of Europe and which, following ratification by member states, entered into effect.

From 1973 to 1975, while continuing his international legal consultancies, he served as Managing Director of Privaco Trust Services S.A., providing express private trust facilities for clients wishing to combine this legal instrument with Swiss bank asset management.

During this period, Daniel also extended his practice in estate planning by developing opportunities for investment within specially designed trust structures in appropriate common law jurisdictions.

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In 1991, Daniel co-created UN Watch, an NGO based in Geneva whose mandate is to monitor the performance of the United Nations by the yardstick of its own Charter. He did so with Ambassador Morris B. Abram, the former U.S. Permanent Representative to the United Nations in Geneva. While maintaining his activities for the WJC and UN Watch, Daniel then joined the Geneva law firm Lindenfeld & Grumbach to advise as part-time counsel on matters of common law, including trusts, drafting of commercial instruments and corporate affairs. In 1998 Daniel moved to Ziegler, Perlitz and Grumbach, where he continued to act as a part-time consultant until the day he died.

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See Daniel Lack 1930-2009, page 10

Daniel and Esther

Devoted to family - left to right: Daniel (and Esther) and grandchildren Sam, Jonathan and Eden

Spring 2010
Daniel Lack
1930-2009

Daniel Lack, Vice President and for many years Permanent Representative of the International Association of Jewish Lawyers and Jurists to the United Nations in Geneva and to the Council of Europe in Strasbourg, died suddenly on June 7, 2009 while visiting Israel with his wife Esther (née Podach).

Daniel was a vigorous defender of Israel before the hostile United Nations Human Rights Commission and its successor, the UN Human Rights Council. He represented the Association at the World Conference against Racism, held in Durban, South Africa, in 2001, together with his close friend and colleague Anne Bayelet. They collaborated again in combating the obscene messages emanating from the Durban Review Conference (known as Durban II) that took place in Geneva only weeks before his demise. He was also a frequent contributor to JUSTICE, writing most of the policy statements published in the Association’s journal.

Daniel was born in London in 1930. He received his secondary education at Dame Alice Owen’s School in Harlington, obtaining his School Certificate (Matriculation Exemption) in 1946 and his Higher School Certificate (Intermediate Exemption) from the University of London in 1948. Admitted to Lincoln College, Oxford, in 1949, he read law at the Honours School of Jurisprudence, graduating with an MA Oxon. in 1953. Thereafter, he pursued graduate studies in European institutions and public international law at the Collège d’Europe in Bruges (1953-1954). Following admission to the Middle Temple, he was called to the Bar of England and Wales in 1955.

A lawyer with a mission

After starting practice as a barrister in London, Daniel served as Legal Adviser (General Counsel) to the American Jewish Joint Distribution Committee, the humanitarian aid agency founded in 1914, working first in Paris and later in Geneva. The Joint, as it is often called today, was very active in the years immediately after WWII conducting aid operations worldwide, including refuge rescue and providing relief for displaced persons. One of his first mandates was to establish a list of list of heirless assets of Jewish refugees from Arab and North African states, and to initiate compensation claims for displaced persons from these countries.

Daniel also negotiated global restitution and indemnification settlements, primarily with the competent authorities of the Federal Republic of Germany and its constituent states. He did so on behalf of victims of Nazi persecution and successor organizations created to claim and take possession, as trustees, of heirless property for humanitarian purposes and for the benefit of charitable institutions.

He also dealt with issues relating to the international protection of refugees, improving the consequences of statelessness, and questions of immigration law.

During this period, he was also responsible for addressing legal problems arising from the Joint Distribution Committee's operations, most notably in Eastern and Western Europe, North Africa and the Middle East. Conducting protracted negotiations with national authorities, when necessary, he also initiated legal proceedings in cooperation with local counsel, in several national jurisdictions to protect the rights and to maintain and protect religious and cultural properties and the organizational structures of dwindling minority communities.

Daniel also served on an appellate panel of the United Nations High Commissioner for Refugees, awarding funds under the terms of an agreement between the UN and the Federal Republic of Germany to eligible claimants persecuted on grounds of nationality. In 1966, at the request of U.S. President Lyndon Johnson and the International Council of Voluntary Agencies, he served on a mission to Vietnam on behalf of the U.S. Agency for International Development. His task was to assess the possibility of establishing an international refugee program for people uprooted and displaced by the Cold War conflict in Southeast Asia.

In 1971, Daniel convened a Round Table Conference of Experts under the auspices of the Council of Europe. The conference, organized in Strasbourg on behalf of the International Standing Conference on Philanthropy, dealt with the fiscal treatment of NGOs and their donors. Following this, he co-authored a draft at an open international conference on the legal personality of non-governmental organizations, subsequently adopted by the Council of Europe and which, following ratification by member states, entered into effect.

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See Daniel Lack 1930-2008, page 10

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Devoted to family: left to right, Daniel (and Esther) and grandchildren Sam, Jonathon and Eden
A great humanitarian

Anne Bayefsky (Eulogy given in English)

Daniel Lacks was first and foremost the most decent human being that I – and I would venture to say, many of you – have ever known. His integrity, honesty, and loyalty made him a trusted source and wise counsel for intellectuals, historians, and advocates around the world.

For more than twenty-five years, Daniel shared his deep knowledge and powerful insights into international affairs with all those who sought his help. He always made time for what mattered. He set aside greater financial rewards and personal rest in a constant effort to do the right thing.

His generosity – along with that of Esther, his life partner, was legendary. Their open home – known to visitors over the globe as Chez Lacks – is a doorway into real friendship. Chez Lacks is where one can step and smell the roses. But more than that, it is a place where flowers are planted, trees grow, and bloom. For hundreds of visitors on hundreds of visits it has been a key to re-energize and renew a commitment to Daniel’s lifelong passion, the welfare of the Jewish people.

For Jews everywhere, whether they knew him personally or not, Daniel was a true hero of Zion. A hero for what he did; a hero who poured the middle of the night; a hero to whom the world was a better place.

Daniel’s modesty left many of his accomplishments known to a few. Too few. But in some ways, he knew that his ability to leave much unsaid meant his impact would be that much greater. His actions were like seeds dropped in the middle of the night, where the waves knew little of how they came to the shores, but the only reason their arrival was what began with Daniel Lacks.

He was a great humanitarian – assisting thousands of Jewish refugees after the war years and despairs Jewish victims from Morocco to Iran. An indefatigable champion of justice, for long years Daniel was the only non-governmental representative who spoke in Israel’s defense at the United Nations in Geneva. Surrounded by enemies of the Jewish people, under constant pressure to abandon his work, Daniel did none of the above. In his beautiful English prose – joined by his brilliant Oxford-educated American who could write eloquently in nine other languages – he spoke truth to power.

He was a lawyer, a lawyer who took care to be accurate and precise so that his words could not be dismissed by the many bullies who came and went. He continually wrote detailed reports on anti-Semitism occurring in international arenas, a serious threat that he single-handedly refused to let pass.

Daniel – elegant Daniel, always impeccably dressed as an English gentleman – was never intimidated. What he learned from Daniel was freedom from fear.

Formally a lawyer, he was spiritually a mentor. He encouraged a generation of advocates, diplomats, and young people in the ways of international diplomacy and helped them craft the tools to protect Israel from the storms that blow through Geneva with great regularity.

His Judaism was a guiding light, softly carried through thick and thin. His gentle strength meant few and non-jew, religious and secular alike, felt his warmth and his courteous open-hand. He made it an ideal communicator, secure in himself but empathetic and patient with those who were different.

I will remember Daniel asleep upright at the computer or in a chair in the two hours of the morning, not wanting to miss a minute of communicating, learning, reading and contributing. He worked harder and longer than any person I have ever met. And he worked for you, and me, and for all of us who care deeply about Israel and its future.

Though Daniel deserved more earthly recognition for his heroism, let us remember that he was comforted by the respect and love of those around him, and the knowledge that he succeeded time and time again in saving individual and the people of Israel from events which would have been far worse without his intervention. For many of Daniel’s voluminous achievements exemplified that highest form of tribute, where the donor’s identity is known only to God. And for that we are proud and grateful to have had these many years to call him our friend.

Anne Bayefsky, M.A., LL.B., M.Litt, is Director of the institutes for Human Rights and the Holocaust Center Felonies at the Hudson Institute, and Editor of www.377874.com.

Humanitarian law and Operation Cast Lead

Israel’s Supreme Court denied petitions claiming that the state, in violation of customary international humanitarian law, the constitution of the International Criminal Court and Israeli public law, held back aid to Gaza Strip residents and hindered the repair of its public utilities during Operation Cast Lead.

Abstract by Rachel Riman

In the Supreme Court

Sitting as the High Court of Justice

HCJ 248/09

Before: President D. Beinisch, Justice Gruens, Justice Rubinstein

Physicians for Human Rights et al., Petitioners in HCJ 248/09

Gisha: Legal Center for Freedom of Movement et al., Petitioners in HCJ 248/09

Against

Prime Minister et al. Respondents in HCJ 248/09

Minister of Defense Respondents in HCJ 248/09

JUDGMENT

President Beinisch explained that about eight years the towns adjacent to Gaza had been subject to the threat of rockets and rocket-propelled grenades fired by terrorist organizations operating in the Gaza Strip. Following the announcement of Hamas to power, terrorist activities had multiplied and strengthened, and the range of fire had spread over a considerable expanse of Israel, leading to civilian deaths and wounding the lives of all the residents of south-west Israel.

On 27 December 2008 the Israel Defense Forces (hereinafter: "IDF") had begun a broad military campaign in the Gaza Strip aimed at ending the rocket and grenade fire directed at southern Israel and changing the security situation caused by Hamas. During the course of military activities the Israel Air Force attacked targets serving the Hamas regime and on 3 January 2009 ground troops, armored divisions and engineering forces joined the fighting inside the Gaza Strip. The military targets were located within areas populated by civilians and sometimes even inside houses. Unfortunately, the local civilian population suffered greatly as a consequence thereof.

Petitioner’s claims in HCJ 248/09

The Petitioner’s claimed that since the military campaign had started, on 27 December 2008, there had been many cases in which IDF forces had fired on medical teams engaged in performing their functions. Petitioners further alleged that the Palestinian Red Crescent Society and the International Red Cross had encountered severe difficulties that could last for hours in coordinating the transfer of wounded for medical treatment, contrary to provisions of customary international humanitarian law, the constitution of the International Criminal Court and Israeli public law.

Petitioner’s claims in HCJ 248/09

This petition focused on the shortage of electricity in the Gaza Strip. Petitioners claimed that since 27 December 2008 the State of Israel had prevented the supply of any industrial diesel fuel to the Strip, with the result that as of 30 December 2008 the power station in the Strip (which supplied one-third of the electricity required by Gaza residents) had been completely shut down. Petitioners complained of damage caused to electricity lines leading from Israel and Egypt to Gaza, resulting in the disruption of power to residents, hospitals, the sewage facility and other essential facilities. Plaintiffs alleged that repairs were impossible because Israel was preventing the movement of necessary spare parts and because of the continuous battle that prevented Palestinian workers from being in the area. Petitioners specified the humanitarian damage to the civilian population resulting from the lack of electricity. Petitioners claimed that the control exercised by the State of Israel over the supply
27. See the U.S. Department of State Foreign Affairs Manual 7 – Consular Affairs, 7 FAM 1820 – Hostage Taking and Kidnappings: www.state.gov/documents/organization/58685.pdf (last visited 17 Nov. 2009). What is noteworthy in this document is that private individuals are also instructed not to pay ransom to kidnappers, and, if they do so, they will not be entitled to the cooperation of the U.S. authorities. See also the Winograd Report, p. 505, para. 23.

28. This is, for example, the policy of the British authorities. See the document published by the Foreign and Commonwealth Office in March 2009, in which it is noted (p. 22) that it is government policy not to make significant concessions in order to free travelers taken hostage. The document is available at www.fco.gov.uk/resources/en/pdf/286592.pdf/English (last visited 31 Dec. 2009).

29. This definition may be inconsistent with the principles of international law, in respect of declaring a state of war, but it is undoubtedly consistent with the principles of Jewish law.

30. Unless the state’s military and political leadership assess that the morale of the soldiers and that of the nation as a whole is so low, that a loss in a single battle is needed to ultimately win the war. It is difficult to imagine that the situation could be so bad, and it is also to be hoped that we will never reach such a point. Appropriate steps should be taken to provide correct information, in the face of media pressure, so as not to reach such a situation (see also the Winograd Commission Report, p. 507, para. 32), for if not, Israel’s ability to survive in the face of its enemies would be called into question, as understood by the Winograd Commission.
fountain of knowledge who knew the lay of the land like the back of his hand and always enthusiastically responded to our requests to speak out at the United Nations, to give advice, to bring clarity to complex situations or to approach the right person in order to support Israel's
With the passing of generations, people of Daniel's caliber are a dying breed, just at a time when Israel's challenges are mounting. He will be sorely missed by all his friends and colleagues at the Ministry of Foreign Affairs, and especially by us, the Israeli diplomats in Geneva.

When I searched for words to describe you, Daniel, the wonderful poem of Nathan Yonatan came to mind and I realized that there were no better words to describe you than his:

Where are there men Like that men
Who was like the excepting loneliness

Hadasa Ben-Itto is Honorary President of the IAJU and a retired Israeli judge.

Daniel with Association President Alex Hertman

development at an early age, Daniel also became active in the foundation of the Swiss Suzuki Institute and served as its first president. He was a keen Alpine walker, and other favorite leisure pursuits included cross-country skiing and especially tennis.

Dan will be missed by all our members as a friend and an outstanding leader of our Association.

Daniel Lack (from page 7)

by an investigation undertaken by the New York Attorney General. Following the discovery of even more irregularities, the WJC finally changed its management. Daniel was never reinstated by the WJC, nor was his role in uncovering the truth ever acknowledged.

Married to Esther since 1956, and following the birth of their three children, Gildean, Dina and Jeremy, Daniel became aware of the complexities arising from the provision of secondary school education in an increasingly cross-cultural world. This led to his election in the early seventies to the Governing Board of the Geneva International School Foundation, on which he served for two four-year terms, and during which he played an active role in promoting the now firmly established International Baccalaureate curriculum.

A believer in the importance of music as part of children's

deciding to pardon one of the terrorists is to be freed as part of a prisoner exchange). HJC 180/3 Yosi Katz v. Government of Israel, P.D. 45/3 393. More recently, however, the view has been expressed that the justices should not necessarily refrain from examining the reasonableness of the prisoner releases. See HJC 974/04 International Organization of Victims of Arab Terror v. Prime Minister Ariel Sharon, Tak El 2004(1) 791 (Justice Cheshin ruled that the decision regarding the release was unreasonable). HJC 605/08 Yousef Shachar et al. v. Government of Israel, Tak El 2006(3) 741 (the Court recognized the importance of establishing a clear policy on the issue, as recommended by the Winograd Commission, but emphasized that its scope for intervention was limited). HJC 636/07 B'riya note 3 Justice Rubinstein called for each release to be examined on its own merits, and for the value of the policy of releasing terrorists to also be considered, but his opinion was not accepted. See also Wygoda, supra note 1, p. 26. The author thanks his colleague in the Department for Jewish Law, Kobi Sagi, for collecting the comparative materials mentioned here and below, and for his instructive comments.

5. See the bibliographic list collected by N. Rakkover, Otzar Hamishpat, Paris 1-2, v. 8, Pulpox shevaham.


9. MINAMO, CITIG, 44.

10. Tikkun olam is generally translated as "repairing the world" or "perfecting the world."

11. TALMUD, GITT, 44a.


13. Rabbi Shaul Yisraeli, May one accrue to extenuation in referring capital and hostages?, TOHAR SHEBA'AL PASEHT 17 (5735), pp. 69-76 (Hebrew).


15. The bulk of Rabbi Yosef's discussion (supra note 12) is devoted to this question.


17. In regard to this threat, see Winograd Commission Report (supra note 6). See also Y. Stern and A. Sagiy, How Much is an Israeli Prisoner Worth?, HAAZERET, 5 DEC 2006, which also examines the traditional Jewish view of this issue. www.haazeret.com/hatzaf/sparages/794473.html (Hebrew) (last visited 13 Dec. 2008).

18. MAIKENEN, LAW OF EXCHANGE AND TRAIT WORK, 51.

19. This distinction was correctly identified by Rabbi Y. Zoldan, Ma'akim Yehuda Yosef (Merkaz Shapira, 5762), ch. 21, Prisoner Exchanges, p. 338 et seq., when he emphasized that all previous cases should be viewed not from the perspective of the customary private halakhic considerations, but rather from the general public considerations of the laws of war. See also Rabbi Y. Ariel, To Ohalot ule Torah, Vol. 4 (Kfar Danam 5763), ch. 19, sec. 10 (p. 166). "Both the Rothun Letter, Rav Ovadia Yosef, and his colleague, Rav Yaacov, in spite of their different conclusions, were in agreement in formulating the problem of the risk to the state in releasing terrorists as opposed to the risk of hostages being killed, and discussed it based on the customary halakhic principles of the risk to one person as opposed to the risk to another, on the private level. In contrast, we have seen that we have to relate to war from a communal perspective, in which other rules apply." Regarding the laws of war in Jewish Law, see N. RAKKOVER, SELF-RISK AND SACRIFICE: THE BIBLICAL BASIS FOR THE MAND (Jerusalem 5760), p. 123, and the sources noted therein.

20. See also Rabbi Y. Ariel (supra note 19), ch. 19, 11 (p. 166): "in war one does not take into account considerations of risk to individuals, and any action required for the success of the war, for raising morale and for persevering with the task at hand is part of Klalim hamahaneinu and it is a mitzvah to give one's life for it."

21. Regarding this limitation, see Wygoda, supra note 1.


23. In the story of Lot's liberation, mentioned at the beginning of this essay.

24. See, e.g., Rabbi Eliezer Yehuda Waldenberger, RIMPAH TEELE TALMUD, Part 12, ch. 57, id. Part 13, ch. 101: Rav Ovadia Yosef (supra note 12), Sec. 22-23, p. 37; Rabbi Shaul Yisraeli (supra note 16), from sec. 6, p. 130. This is the basis for the rejection of Rabbi Y. Zoldan's position (supra note 19, p. 340), which equates the two and gives both halakhic legitimacy, and leaves the choice between them to the discretion of the authorities.

The UN’s challenge to democracy

Clever maneuvering by totalitarian states at the UN puits international morality at risk.

Only by reaching out directly to friendly governments can their manipulations be countered, including the UN’s obsessive attempts to delegitimize Israel.

Richard Schiffer

As the first decade of the 21st century approaches its end, we need to note that in recent years millions of civilians have been killed in interethnic warfare in the Democratic Republic of the Congo, hundreds of thousands in Sudan, tens of thousands in Sri Lanka, and many thousands in Somalia and elsewhere.

The United Nations, which under its Charter is to take “effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression,” has been highly ineffective in discharging this most important of its missions. It should, therefore, not be surprising that it has taken no action to stop the acts of aggression against southern Israel that have for years emanated from Gaza.

But when Israel finally resorted to military action in self-defense, the United Nations system sprang into action, producing what has come to be called the Goldstone Report and committing to stay engaged in this most recent restatement of the blood-libel. Nor is the Goldstone Report the only conspicuous recent anti-Israel engagement on the part of the UN.

In April 2009 we also witnessed a conference in Geneva that was dubbed Durban II, an event purportedly organized to deal with the issues of racism, yet clearly designed to single out Israel for castigation.

These recent UN activities, with their anti-Israel and anti-Semitic underpinning, are only the tip of the UN iceberg.

It is only right that the United Nations General Assembly, with its clearly anti-Semitic membership, be suspended from the debate and its past contributions be reined in.

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1. idem, idem.
3. idem.

The Emperor’s words were heard but no meaningful action was taken. The League quietly faded from the world scene as World War II approached. It had failed in its missions. When the League’s successor, the UN, was created in 1945, it was hoped that it would function far better than its
predecessor. Now, 66 years later, as we look at the UN Charter’s very first statement of purpose, that of maintaining international peace and security, we can hardly say that the UN’s record in that field has been a resounding success. International morality remains at risk.

The world’s inability to use the UN to advance the cause of human rights and security does not mean that none of the purposes of the Charter have been served by the UN system. Progress was made in its early years in the attainment of another purpose set forth in Article 1, Section 3 of the Charter: “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in encouraging respect for human rights and for fundamental freedoms.”

The Security Council was hamstrung, from the very start, by the Soviet Union’s “veto” to any effort to maintain international peace and security, except for one instance: the Soviets’ tactical error, when North Korea invaded South Korea, of absenting themselves from the Security Council, allowing the Council to take meaningful action. The General Assembly, by contrast, was able to function effectively. The world’s democracies, constituting a majority of the General Assembly in the early years of the UN, saw to it that Article 1, Section 3 of the Charter was implemented. Following up on the Charter’s promise that the UN would promote respect for human rights, the UN’s Economic and Social Council established in 1946 the UN Human Rights Commission.

Under the leadership of Eleanor Roosevelt, the Commission promptly went to work on drafting the document that became known as the Universal Declaration of Human Rights and which precisely spelled out what was meant by the term “human rights.” It is noteworthy that in 1948, when the Universal Declaration was adopted by the UN General Assembly through the affirmative vote of 48 of its 56 members, no member voted “no.” Eight members, six Soviet bloc states plus Saudi Arabia and South Africa, abstained.

In these early years, the UNGA also created other entities whose task it was to implement the UN’s commitment to humanitarian work, such as the World Health Organization, the United Nations Children’s Fund, and the Office of the United Nations High Commissioner for Refugees, all three of which have done highly useful work and function well to this day.

The truly creative period of the UNGA ended in the early 1970s. This happened as a result of the extraordinarily clever maneuvering of the totalitarian governments represented at the UN and the failure of the democracies to match their manipulations. From the founding of the UN until 1960, the Soviet bloc had consistently been outvoted by the democracies. That was no longer to be the case.

To be sure, the diplomats representing the Soviet Union and its East European satellites at the UN lacked the finesse needed to succeed in a parliamentary setting in which more bluntly transparent methods will get much the same result as those who are in fear for their lives involves placing others at risk. For the Government, being elected by the public, has the authority to do that which an individual may do. It has the final word in all instances requiring a decision, as the representative of the public as a whole. Hence, the Government’s agreement in this case did not contravene the laws of the Torah and the Halahah [emphasis in the original – MW].

From Rabbi Ya’akov Yitzchok Kaminetzky’s comments, the apparent conclusion is that, even though Jewish law does not require the release of terrorists in exchange for the release of prisoners, it does not prohibit it. If it falls into the category of reduc, discretionary action, and it is given to the decision makers to determine what would be in the interests of the state, and to consider the relative profit and loss involved in such a move. However, this conclusion ignores one critical fact, as we shall explain below.

The laws of war

The fact that the soldiers were taken prisoner by the enemy in a war against terror, in which the kidnapping of soldiers or civilians becomes a strategic threat to the state, rather than merely a criminal act against the community, is a decisive consideration that demands the establishment of clear limits to the price that can be paid for their release. In such a case, not only is there no obligation to do everything to release the prisoner, but it is even forbidden to acquiesce to every dictate of the captors. If private override public interest, our chance of victory in a war imposed on us is lost.

Hamas were to demand, for example, that in return for the release of a kidnapped soldier, we supply them weapons, tanks and aircraft, would anyone consider according to their demand? The answer, of course, is no, and not only because of the risks involved.

 capitalized to the enemy’s demands to free terrorists in return for the release of prisoners is not just a painful cost, but a loss in battle. After all, we are commanded to fight enemies that come to attack Jews, and in war a unique set of halachic principles, binding on the community as a whole, comes into play. Under these principles, the duty of saving individuals, which applies so strongly in peacetime, makes way for pursuing victory by the nation as a whole. In wartime, it is even a mitzvah for the individual to give his life to save the many.” Hence, one may not yield to the enemy for some private interest that is in danger, no matter how important or precious it may be. This is a basic, universally accepted principle in the conduct of war. A leader who does not follow it may doom his people to servitude. This is especially true in regard to soldiers. After all, every soldier is required to endanger his life to protect his homeland. If so, why should things change when the soldier is taken prisoner? It is really appropriate that a country undertake to free him, notwithstanding the risks to its security.

This idea also appears in the writings of the late Rabbi Yaakov Kaminetzky, one of the leading rabbis and heads of Agudat Yisrael in the United States. Rabbi Kaminetzky opposed the payment of an enormous ransom for the release of Rabbi Yitzchok Hutter, who in 1970 was on an airplane hijacked when flying between Israel and the United States and forced to land in Zanzibar, Jordan. Rav Hutter’s students collected an enormous sum of money, and attempted to induce the U.S. administration to ransom him. They based their efforts on a halachic ruling that the principle that “captives should not be redeemed for more than their value” did not apply in respect to outstanding rabbinical scholars. Rav Kaminetzky opposed their actions, and stated his objections as follows:

"For this calculation is not correct at all. The whole law of redeeming captives only applies in peacetime, but in wartime one cannot say that one is obligated to cease fighting in order to ransom the captives. By doing so one aids the enemy in the middle of the war, for by giving large sums of money to the enemy they will be able to further strengthen their military position.

This is all the more so in regard to the release of terrorists.

There are those who would argue that it is necessary to pay any price to release captured soldiers, if for not, this would have a negative effect on the morale of our troops and their willingness to fight. In response, one may say that it is indeed important for soldiers’ morale that they know that, if God forbid they shall fall into enemy hands, the Government of Israel and the IDF will take all possible operational steps to release them, as in the Entebbe operation or the operation to free Nachshon Wachtman. Such operations, which
rescue their loved ones. But the national leadership must take responsibility not only for the kidnapped soldiers and their families, but also for the public as a whole. We believe that the Israeli public is cognizant of these issues, and can accept them, with all their implications, if they are explained, consistently, responsibly and sensitively... It should be noted that, if the social ethos were such that the majority of the public believed it appropriate to pay any price to release a kidnapped soldier, this would raise serious questions regarding Israel’s ability to survive in the region where it is located. Broad, sincere public support for the families’ pain is not identical to a belief that the right thing for Israel to do is to move to free the kidnapped soldiers under all conditions and at all costs.

Let us examine the Jewish sources that touch on this sensitive, painful issue.

Rabbinic edicts in the past
From time immemorial, Jewish communities were known for spitting no effort in attempting to redeem captives. However, concerning the current situation, it could be argued that the demand of the captives would be to free the captives, and thus the benefit of this important mitzvah would be at the expense of other important values. As a result, even by Second Temple times, and notwithstanding the general recognition of the supreme importance of redeeming captives, the Talmud instituted what appears to be a cruel edict: that the demands of the captives should not be entertained at any price, or, as the Mishnah puts it, “Captives should not be redeemed for more than their value, for the sake of 60,000.”

In the Talmud,2 opinion was divided whether the concept of tikum olam, which underlies this regulation, is an economic consideration to prevent the unbalanced distribution of available funds, or whether the framers of this ruling acted on the basis of security considerations, to prevent there being an incentive for future kidnappings. Whatever its basis, it may be concluded that the Talmud chose the public interest (security and economics) over the interest of the captive. Thus, it is incorrect to say that Jewish tradition requires that everything be done and any price be paid to rescue a captive. It is more accurate to say that they prefer the public benefit over the individual benefit, even to the point of instituting a regulation to this effect, so that the public interest could withstand the pressure to give preference to the private interest.

It may be argued that the ruling, that “captives should not be redeemed for more than their value,” is not relevant in the present case. This may be because it does not apply when the life of the captive is in danger, as held by certain halachic authorities, or because it does not apply to soldiers, as held by Rabbi Shalom Yeruchami,3 or because the circumstances today are totally different from those of the times of the Sages, in that kidnapping for purposes of forcing ransom, as in the cases described by the Sages, is radically different from kidnapping as part of a nationalistic struggle. The question remains: What would be low, in the absence of an established rule in regard to the danger involved in releasing terrorists? Is it obligatory to do everything to save the life of the prisoner, including making a “payment” that involves a future danger of increased terror and that creates an incentive for additional kidnappings? Or is it perhaps forbidden to do anything that may pose a future danger to others? Or is Jewish Law neutral on this issue, thus making the redemption of captives in these circumstances a matter left to the discretion of the country’s decision makers, who could then take the national interest into account?

Rescuing another at risk to one’s own life
The question of whether a person is obligated to put himself at risk to save another from certain danger has been discussed at length by the rabbis.4 Those authorities who considered the question of freeing terrorists in order to obtain the release of Jewish prisoners gave a great deal of thought to this issue.5 A wide range of Talmudic sources was cited in support of both sides of the argument. We will suffice with presenting the conclusions drawn from those discussions.

In the view of the majority of Halakhic authorities, a person is not obligated to place himself in a position of real danger in order to save another, but he is permitted to do so. There would thus apparently be no impediment to releasing terrorists in order to save soldiers or civilians, even if release would entail a possible future risk. In other words: the community, through its elected representatives, may choose to accept this risk. This position is described by Rabbi Yeruchami.4 And it appears that just as the individual is permitted to endanger himself in such a case, so too the Government was able and allowed to do so, and to agree to

on South Africa to end the apartheid regime. The clamp that had began to manipulate the UN chose Burundi to offer an amendment that referred to the "unfriendly" behavior of various countries, including South Africa’s, against the Jews and their allies in the struggle against apartheid. The amendment was adopted by a two-thirds majority. By linking Zionism with South African racism, many of the non-aligned nations who had hitherto been isolated into the newly formed "New International" and "African" bloc in the UN, this was the first shot in the drumfire that has continued to the UN to this very day: equating Israel with apartheid South Africa.

The government of Burundi of those days brought unique qualifications to the discussion of racism. In the preceding year, its army, led by Tutsi, had killed about 100,000 Hutu, for no reason other than their ethnicity. To be sure, Burundi is a vastly different country today. In recent years its voting record on Israel-related issues at the UN has been one of the better ones. Still, the Burundi initiative of 1973, undoubtedly initiated by the UN's anti-democratic clique, was the first effort to use the issue of Israel to bring sub-Saharan African states into the anti-democratic bloc at the UN. It allowed the UN to become a subsidiary of the Soviet bloc at the UN.

Thus, in 1973, Cuba and Libya created the alliance that has dominated the UN General Assembly ever since. Daniel Patrick Moynihan, who led the U.S. delegation to the UN from 1973 to 1976, entitled the memoir of his UN days "A Dangerous Place." That remains a dangerous place to this day. Is it well illustrated by the fact that the president of the General Assembly for 2008/2009 was a Nicaraguan aligned with Cuba, and that he was succeeded by a Libyan, who is serving the 2009/2010 term.

Except for a short period of disarmament that followed the collapse of the Soviet bloc in 1989, the UNGA agenda appears to have been set by a small clique of UN officials in which Cubans play a key role. This unusually significant role played by Cubas is brought about by the Cuban foreign ministry’s personnel policy: A Cuban diplomat assigned to the UN stays there for years and truly learns the business of multilateral diplomacy. Other missions, by contrast, rotate their UN diplomats every three or four years.

But how does that small clique of operatives get its message to the large number of members who are prepared to vote the party line, known at the UN as NAM or the G-77 “consensus”? When I served at the UN, I was offered an explanation of the phenomenon by an ambassador from a NAM state. In the course of our conversation, I asked him whether I knew how the NAM consensus was formed. When I told him that I did not know, he said: “You know how that used to be on the other side.” By that he meant on the pre-Soviet side. He continued by relating that on the day preceding any meeting of the NAM caucus, which had 101 members at that time, the friends of the Soviet Union, about 17 or 18 states, would have a special meeting. When they were all assembled, a small group would enter the room with the Cubans. That group would give out instructions on how the assembled representatives should act the next day at the meeting of the full NAM caucus. Each representative would be assigned a specific task, to make a motion on a position to be taken by the NAM, to be the first speaker in support of a motion, or to be the second speaker in support. Then, the next day, when the full caucus met, the whole scenario would be played out. My colleague concluded his account of NAM procedure by saying: “And there sits the silent majority and just goes along.”

There is another aspect to the Cuban performance. While there are missions to the UN that operate under specific instructions from their respective governments, there are many other missions that receive no specific instructions, allowing their representatives at the UN to make their own decisions on how to vote. It is that aspect of the UN system that has been fully utilized in building the anti-democratic bloc. For one, arrangements are made for missions to be rewarded for their cooperation by being elected to positions in the UN system that are of special interest to them. For another, an informal job placement service operates at the UN that enables relatives of cooperating diplomats to obtain jobs at the UN Secretariat. As one diplomat once said to me: “After you’ve been at the UN for a little while, you start playing the UN game and you forget about your country.”

I also recall an incident from the time I represented the United States at the UN Human Rights Commission. Having do the needleswork very slowly, I had gotten a resolution adopted that the Cubanans and the Soviet bloc had opposed. Immediately following the vote, the Cuban representative rose to accuse me of having behind some of the representatives so that they would vote with the United States. After the meeting had adjourned, I asked colleagues from other missions whether that really happens at the UN. They all thought I was terribly naive. “Of course it happens,” they said, “The Cubans do it all the time. So do the Libyans.”

To return to the events following the 1973 Burundi amendment to the anti-apartheid resolution: as we know so well, having developed the theme of correlating Zionism with apartheid, the other side...
did not let go. At the International Women’s Year Conference in July 1975 in Mexico City a resolution was adopted that called for the elimination of Zonism, apartheid and racial discrimination. The news from Mexico City focussed, on course, the emphasis on the step that had been placed on the rights of women. But it was in that setting, a setting that emphasized the need for progress for women, that another totally unrelated step had been taken in the “Zonism is Racism” campaign.

Then, in November of that year, that formula was made UN doctrine by the UN General Assembly by its adoption of the “Zonism is Racism” resolution, by a vote of 72 to 35 with 32 abstaining. Confirming the bargain that had been struck, the new controlling alliance put together by Castro and Qaddafi furnished 68 of the 72 affirmative votes. Brazil, Mexico, Cyprus and Malta provided the remaining four. A majority of the “no” votes was provided by the Western Group. The Western Group was joined by Latin American, Caribbean and sub-Saharan African states. In addition, many of these non-Western states abstained.

Haid, Mexico voted “no” rather than “yes.” Mexico was made a UN member by the General Assembly voted that the resolution was not important. That is so because with these major vote changes, the resolution would not have received the two-thirds-vote required by the Charter for important resolutions. This underlines the validity of an observation made by the Ambassador Moynihan that our side does not do the needed parliamentary spade work at the UN, work that must be done in capitals, to ask for appropriate instructions to be given to the US delegates in New York, instructions in keeping with the country’s foreign policy in non-UN settings. This failure of the democracies is in sharp contrast to the extraordinarily effective work done by the Cubans to this day. We can assume that they were well aware in 1975 of the two-thirds majority requirement and worked hard to attain that result.

Now let us fast forward to 5 November 2009, when the UNGA had before it a resolution endorsing the so-called Goldstone Report. The result was adopted by a vote of 114 to 18, with 44 abstentions, and 16 absentees. In analyzing this result, we need to keep in mind that at the UN an abstention has come to be a way of indicating that a member state is “not for” a resolution but not willing to vote “no.” Similarly, many abstentions are also indications that a member is “not for” a resolution but wants to obscure that fact by not being present to vote. Of course, some abstentions occur because a member state’s mission is unable to have a delegate present at a particular meeting. Thus, it is not always clear whether an abstention is deliberate or purely due to an inability to get the chamber to vote.

Comparing the Goldstone vote of November 2009 with the “Zonism is Racism” vote of November 1975 we can see the following similarities and differences:

1) Most of the Western states once again did not vote for the anti-Israel resolution, but many of them abstained rather than voting “no” and a few voted “yes.” The count in the West European and Others Group (WEOG) was 3 “yes,” 7 “no” and 17 “abstain.”

2) The fall of the Soviet Union had produced a fundamental shift in the East European votes, votes that in 1975 were cast against Israel. On Goldstone the East European vote was 6 “yes,” 6 “no” and 10 “abstain.”

3) The vote for the non-European members was reversed. The “yes” votes were cast by OIC members: Albania and Bosnia-Hercegovina.

4) The democratic trend was maintained. The African, Asian and Western Hemisphere states, many of them the result of the work of the anti-Israel operatives at the UN, were: 104 “yes,” 5 “no” and 17 “abstain.”

5) Absent were the Latin American abstainers and the absentees.

6) The Council had powers that, if used by the anti-democratic forces, can do serious harm worldwide.

This question electrifies public opinion. It is a source of sleepless nights for Israeli decision makers, who find it difficult to withstand the pressure of the media and of the families of our kidnapped soldiers, who demand that everything be done to release them, not only when they are alive but even if it is known that they are no longer alive.

We found that there has been almost no legal discussion or ruling on this issue, but it has been extensively considered by scholars of Halakha in the present generation.

The WIntograd Commission, set up in the wake of the Second Lebanon War, devoted a complete chapter to this issue, under the heading “Kidnappings as a Strategic Threat.” The Commission came out decisively against carrying out what it termed “insane deals.” The Commission considered both Jewish tradition and the Israeli social ethos, which apparently tend toward a different conclusion. In the Commission’s words:

"Agreement is an important expression in Jewish tradition that is important assigned to it in Halakha. This can be seen in Maimonides, who writes: “There is no greater mitzvah than the redemption of captives.” This view is echoed by R. Yosef Kars, who adds: “Every moment that one advances the redemption of captives, where one could advance it, is it as though he has shed blood.”

The WIntograd Commission Report

Present-day decision makers have had to grapple with this issue when faced with the sobering question of whether it is appropriate to release a large number of terrorists in return for a small number of captives. The alternative view is that this is a price that must not be paid, for a number of reasons: it may encourage future kidnappings; released terrorists will again take up arms against Israel and thus constitute a security threat to the country; or the release of lawfully tried and sentenced murderers negates fundamental principles of the rule of law.

No one can judge the families of the kidnapped soldiers for feeling that the major goal, perhaps the only one, is to
Our campaigns for human rights, our battles against anti-Semitism, our fight against terror and our struggles against delegitimization of the Jewish state are more important than ever. IAI/J cannot continue its vitally important work without your help.

Good News

We are delighted to announce that IAI/J members who file income tax returns in the United States may now claim donations under the 501(c)(3) regulations of the U.S. Internal Revenue Code.

Donors may send contributions to P.E.F. Israel Endowment Funds, Inc., with a recommendation that the funds be used for the International Association of Jewish-Lawyers and Jurists (#55-00222218). Directories or orders for allocation cannot be accepted.

Please mail your recommendations and check (in US dollars only) made payable to P.E.F. Israel Endowment Funds, Inc., (55-00222218) to P.E.F. Israel Endowment Funds, Inc., 317 Madison Ave., Suite 607, New York, NY 10017. The minimum contribution accepted is $25. Checks must be drawn on a U.S. bank. At this time, P.E.F. cannot accept credit cards or bank transfers of any kind.

IAI/J members who file income tax returns in Israel are also eligible for a tax credit per section 46 of the Income Tax Ordinance when they donate to the association. Please mail your check payable to the International Association of Jewish Lawyers and Jurists at the address below. The minimum contribution accepted is NIS 100.

Your donation will help IAI/J pursue its mandate: the pursuit of justice.

brought down apartheid South Africa. They want the UN to do the same to Israel, using the same devices: encouragement of boycotts, divestments and other sanctions.

Given these circumstances, is there any chance to bring this anti-Israel propaganda effort to an end? Before answering this question, let us note what makes certain anti-Israel resolutions different from the many other resolutions adopted by the UNCGA that have no practical consequences. It is that the most significant anti-Israel resolutions authorize the expenditure of UN funds for the operation of an anti-Israel propaganda apparatus that operates year-round and worldwide. As the UN Charter provides that a resolution raising a budgetary question is an "important" question and as important questions require a two-thirds vote, the UN's anti-Israel propaganda apparatus can be brought to an end if the "no" votes are more than one-third of the total number of "yes" and "no" votes cast.

That result can be attained if a sufficient number of "abstain" votes shifts to "no" and/or a sufficient number of "yes" votes shifts to "abstain." Taking the Goldstone vote as a starting point, a blocking one-third plus one vote would have been attained had 40 of the abstaining countries voted "no." There is no doubt this is a result attainable only if the EU decided to vote "no." As Germany and Italy voted "no," as did the Czech Republic, Hungary, the Netherlands, Poland, and Slovakia, it is clear that the most important votes needed for change in the EU voting pattern are France and the United Kingdom.

There is also no reason to consider all of the 114 "yes" votes a lost cause. It is appropriate to ask why countries whose entire economy is dependent on American tourism, such as the Bahamas, Barbados, and Jamaica, should consistently vote against Israel. Why should our North American Free Trade Agreement (NAFTA) partner Mexico and our Central America Free Trade Agreement (CAFTA) partner the Dominican Republic do so? And why should we find voting on the other side such states as Bermuda, Ghana, Mali, Mongolia, and Namibia, which, together, have received U.S. Millennium Challenge grants totaling close to $2 billion?

The simple answer is that the voting decisions are not made by the heads of government. It follows that it is indeed necessary, if one wants to effect vote changes at the UN, for the United States to reach out to heads of government. The Bush administration did this successfully, when, in the fall of 2006, it blocked Venezuela's candidacy for a Western Hemisphere seat on the UN Security Council. Appeals to heads of government produced not only a blocking one-third plus one but actually a majority for the competing candidate, Guatemala. It was not possible to get the needed two-thirds for Guatemala, but, after 47 inconclusive ballots, both candidates withdrew and Panama was elected, a clear victory for the democratic side.

Understandably, one cannot expect the White House to become involved in UN voting on a continuing basis. That is why a group of members of the House of Representatives, under the leadership of Majority Leader Steny Hoyer and former Republican Whip Roy Blunt, have formed a task force committed to reaching out to the heads of government of countries friendly to the United States to call upon them to review and alter their voting patterns in the UNCGA. It will take time to bring about change at the UN, but as the experience in 2006 with Venezuela's candidacy for the UN Security Council demonstrated, it is an attainable goal.

A handwritten Richard Schiffer served as U.S. Representative in the UN Human Rights Commission, as Deputy U.S. Representative in the UN Human Rights Council and as Assistant Secretary of State for Human Rights. He now chairs the Board of Directors of the American Jewish International Relations Institute.

Notes:


4. Supra note 1.

5. DAlan P. ROYNOHAN, A DANGEROUS PLACE 92-93 (1978).

6. Id.


8. G.A. Res. 64/10, (5 Nov. 2009).

9. A UN member state abstains at the UN not by being silent. When a roll call is ordered and other members vote "yes" or "no," the member wishing to abstain actually votes "abstain."

10. The Goldstone Report suggests in para. 1768, by induction, that the UNCGA give consideration to using against Israel the parliamentary device that was used against apartheid South Africa in 1981.
Encuentro Jurídico / Legal Encounter

IAJLJ members participated in a remarkable two-day conference in Madrid last June on a wide range of complex legal issues relating to universal jurisdiction.

Eli Schulman

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pplication of "universal jurisdiction" -- the doctrine whereby a state prosecutes those alleged to have committed heinous crimes, regardless of any connection to that state -- has increasingly become a hotly debated issue. Among the countries that have applied the principle most aggressively is Spain, whose internal law has for decades recognized the right of Spanish authorities to prosecute foreign citizens for crimes such as genocide, war crimes and crimes against humanity. Judges on Spain's Audiencia Nacional ("National Court"), which claims jurisdiction over certain classes of cases with national or international importance, have not hesitated to exercise that power. For instance, in 1998 Spanish Judge Baltasar Garzón Real issued an arrest warrant for former Chilean dictator Augusto Pinochet, leading to Pinochet's arrest in London.

In January 2009, a magistrate judge at the Spanish National Court opened an investigation into claims of alleged crimes against humanity by a former Israeli defense minister and six senior IDF officers. The case concerned the 2002 targeted killing of Hamas military leader Salah Shehada: an IDF bomb that killed Shehada in his Gaza City home also allegedly caused the deaths of fourteen family members and neighbors, and injured many more. Spain's embrace of jurisdiction over the matter elicited criticism from those contending, among other things, that Israel's own highly active institutions provide a more than adequate check on the IDF's use of force, rendering the exercise of universal jurisdiction illegitimate.

Against this backdrop, Spanish Ambassador to Israel Álvaro Izquierdo reached out to IAJLJ to facilitate a dialogue concerning these complex issues. This initiative resulted in the formation of a delegation of some 20 Jewish (mostly Israeli) lawyers and jurists -- including judges, professors, attorneys in private practice, and lawyers with experience in international law -- who were led by IAJLJ President Alex Hertman and Deputy President Tamar Kohn on a two-day visit to Madrid in June 2009. The delegation was hosted by Casa Sefardí Israel, a quasi-governmental institution created by the Spanish government and others, with the goal of promoting ties between Spanish and Israeli/Jewish societies.

Upon arriving in Madrid, the delegation was treated to a private tour of the historic and ornate Spanish Supreme Court, as well as the Spanish National Court. That evening, the delegation was honored as dinner guests of the Spanish Foreign Minister at his residence, the Viana Palace, together with leading figures in the Spanish legal community. Shlomo Ben Ami - Spanish historian, former member of Knesset, and Israel's first ambassador to Spain -- greeted the participants.

The following day, the delegation spent a long and fascinating day engaged in intense exchanges on the topic of universal jurisdiction with Spanish representatives -- including Spanish Attorney General Carlínico Corral Pumplio, Chief Justice of Spain's National Court Ángel Jesús Pecos, Chief Public Prosecutor of Spain's National Court Javier Zangara, and José Ricardo de Prada Solans, a magistrate at the National Court who previously served as an international judge at the Bosnia and Herzegovina criminal tribunal. The discussions included presentations by Israeli and Spanish representatives on Israel's and Spain's legal systems, Israeli and European approaches to universal jurisdiction; the laws of war; and challenges faced by democracies fighting terror.

Among the presentations by IAJLJ speakers were greetings from Alex Hertman; discussion of the Israeli approach to universal jurisdiction by Tamar Kohn, former Director of the Department of International Affairs in the State Attorney's Office at the Israeli Ministry of Justice; a comparison of American and Israeli legal responses to terrorism by Harvard Law School's Professor Gabriella Blum; and consideration of the philosophical underpinnings of universal jurisdiction by Professor Asa Kasher of Tel Aviv University, co-founder of the IDT code of ethics.

Two weeks later, on 30 June 2009, the Spanish National Court decided to abandon its investigation of Israeli officials in connection with the Shehada incident.

In November 2009, the dialogue between Spanish
Dear Friends,

I am honored to invite you to the Conference* of the International Association of Jewish Lawyers and Jurists, which will take place on Wednesday through Sunday, June 30–July 4, 2010 in London, England. The theme of this year’s conference is “Democratic and Legal Norms in the Age of Terror.” The Conference will also serve in its traditional role as an opportunity for you to meet Association members from around the world — lawyers, judges, legal advisors, academics, and many others.

This year’s Conference promises to be a particularly important one, given the battle now being fought against the delegitimization of Israel worldwide, including the use of legal procedures ("lawfare"), caused in part by Israel’s response to terrorist attacks. We will be discussing at length how legal systems and international law deal with terrorists and the legitimate rights of a sovereign state to defend itself.

A limited meeting of a few of our members dealing with international law last June in Madrid demonstrated the utility of combating these issues in a continuing dialogue.

A tentative agenda for the Conference appears on the page opposite. The opening event will take place in the historic Gray’s Inn. The panel discussions will be held at the School of Oriental and African Studies of the University of London.

I look forward to welcoming you at the conference.

Alex Hertman, Adv.
President

* All conference proceedings will be held in English.

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Judicial review of counterterrorism operations

A comparison of American and Israeli courts’ judicial review of counterterrorism operations reveals both similarities and differences in their opinions as to not only what constitutes lawful conduct, but also as to what constitutes war.

Gabriella Blum

Among the many shared aspects of the American and Israeli counterterrorism strategies, not least is the determination by both countries that the fight against terrorism is a “war,” and not in a merely colloquial or rhetorical sense. Like the “war on crime” or the “war on drugs,” “the war on terrorism” is, for both nations, an armed conflict in its legal sense. Parenthetically, despite common wisdom, the United States was not the first to declare a war on terrorism. Israel determined that it was in an “armed conflict” with Palestinian terrorists as far back as the end of 2000, in light of the new scale and effect of hostilities. The American global war on terrorism was the novelty.

The war or armed conflict paradigm is the ultimate source of contention between American and Israeli approaches to counterterrorism and those of Europe. The mainstream European view is that the threat of terrorism can and should be met through ordinary policing means and methods, just like any other crime. The cardinal reason for this divide is due to a European experience with terrorism largely limited to home-grown terrorists, rather than external threats (notwithstanding Palestinian terrorism in Europe in the 1970s that was directed mostly at Israeli or mixed Israeli-international targets). The ETA Basque separatists of Spain, the Irish Republican Army in Northern Ireland and England, the Rinder-Meinhof Group in Germany, the Red Brigades in Italy — all were or are domestic groups, engaged in sporadic acts of terrorism intended to influence their own governments’ policies. To deal with this type of threat, investigations, searches, arrests and trials, including through international cooperation, were all effective, in the same manner that American domestic law enforcement was sufficient to deal with the sporadic threats of Timothy McVeigh or Ted Kaczynski.

It is far from being the case, however, that traditional law enforcement means alone would suffice for meeting the threat of foreign terrorists, well-organized, military-trained and well-equipped, who employed sophisticated means to inflict continuous long-term substantial harm, and who consistently promised to keep doing so. Could international collaboration in searches or arrests alone succeed in meeting the threat of al-Qaeda around the world, including in countries such as Afghanistan or Pakistan where local cooperation in prevention and punishment could not be secured? In the Israeli case, a law enforcement paradigm would have been even more questionable, not to say meaningless, unless Israel were to reinstate and reoccupy Gaza and deploy thousands of troops (as well as establish a whole civic, policing and adjudicating mechanism within Gaza itself) who would conduct searches, arrests and trials.

The war paradigm has given rise to a wealth of further similarities between the Israeli and American experiences in fighting terror. The use of military power against terrorists and terrorist targets; the practice of targeted killings; the long-term detention of suspected terrorists without trial; and the infliction of inadvertent harm on civilians and civilian property; all alongside a host of law-enforcement measures such as border control, protection of installations, international cooperation in investigations and intelligence-gathering, intercepting terrorist finance and more. All of these practices were employed, in one form or another, to some degree or another, by both countries, long before the war on terrorism, but they have become much more widespread, public and entrenched in their current use.

There have also, however, been striking differences between the two countries’ experience. Some stem from objective differences in the types of war each country fights, while others arise out of the role of law, international and domestic — and even more so of courts.
JUSTICE

in shaping counterterrorism strategy.

The American global war on terror is diffuse and far-reaching; so much so that it is almost stripped of geographical boundaries. In Afghanistan and Iraq it takes the form of ongoing combat, whereas terrorism is intertwined with other types of threats, such as insurgents and rebels. Elsewhere, as in Pakistan, violence is more sporadic, and often intertwined with the Pakistani efforts to fight al-Qaeda and Taliban elements. In the Administration’s eyes — under President Bush and under President Obama — the 2001 Authorization to Use Military Force was insufficient to allow the use of military force against suspected terrorists-comrades anywhere, at any time. Where military force is not used, for instance against terrorist targets in Europe, this is for political considerations more than for legal constraints. In addition, greater cooperation in investigations, intelligence gathering, and preemption efforts is more feasible and reliable.

The Israeli war has been largely confined to the Gaza Strip and the West Bank, and in recent years almost entirely to Gaza, although the conflict is constantly fed resources from the Middle East and elsewhere. It is also, in various ways, tied to Israel’s conflict on its northern border with Hezbollah, which has a deep hold on southern Lebanon. Despite its changing appearance, it is intertwined with an at least century-old national, ethnic, religious and territorial strain that is regional as well as local. The name chosen for the Second Intifada by Israel—“26th and Flow”—denoted its varying degrees of violence, ranging from a return to a law enforcement approach in the West Bank to a full-fledged war in Gaza in the winter of 2008-2009. The nature of the enemy is, correspondingly, more clearly defined. Palestinian arms and training, although having ties to and reliant on external powers (most notably Iran and Syria), operate mostly from within the Palestinian territories against Israelis in Israel. In comparison, al-Qaeda is believed to be a geographically-distributed network consisting of many semi-independent cells operating around the world — New York, Bali, Mumbai, London, Madrid and elsewhere. Palestinian armed groups are also more easily identifiable: for the most part, their members wear uniforms, and comprehensive lists of members and activists are kept. al-Qaeda members do not wear uniforms or any other distinguishing insignia, there is no known central database of its members, and the far-and-wide nature of their associated cells makes them much harder to track.

Another crucial difference between the two wars on terrorism has been the degree of involvement of the respective civilian populations. Notably, ever since 9/11, American civilians without ties to the fighting forces have been spared from the war on terrorism — as indeed they were from the wars in Afghanistan and Iraq. However, there is an ever-present threat, and more cumbersome travel arrangements; but the fact that no Americans have been harmed by terrorist attacks (ever) until further information becomes public knowledge, the shock undoubtedly affects the design of counterterrorism strategies. Israelis — like Palestinians — are part of the war, in a direct, immediate and continuous manner. The war is not in a faraway place, but at home. Whether in the manner of suicide bombings or of rockets launched at civilian populations, no part of Israel has been immune from attack. The vulnerability of the civilian population affects the public psyche in terms of its assessment of the threat and the place of the threat in daily life, and puts heightened pressure on the government to react to its threats with force.

These differences in the characteristics of the war fought by United States and by Israel might have accounted for the differences in the legal application of the war paradigm by each country. But in practice, the differences in how the war has been fought and in which law was applied, are no less attributable to the role which the supreme courts play in each country than they are to any objective strategic variances.

In the US, a country otherwise committed to an almost religious degree to the rule of law, legal constraints (mostly, international legal constraints) have been viewed by the federal Administration as no less than a threat to US sovereignty. The Defense Strategy document of 2005 warned that “Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international law, judicial processes, and terrorism.”

Even though the American sense of frustration vis-a-vis a hypocritical manipulation of international law and the use of “lawfare” as a tactic by political opponents is something many Israelis share, it would be unthinkable for an official Israeli document to group together international law, judicial proceedings and terrorism. Moreover, whereas the notorious Office of Legal Counsel memo explains why US domestic law was irrelevant and international law inapplicable to the detention or interrogation of suspected terrorists — in effect creating a “no-law zone” for the war recently launched — the Israeli Attorney General’s position has from the start been that although existing international law was far from a perfect fit for the current war on terrorism, the fundamental principles of the laws of war parlament has passed a bill that places restrictions on the use of certain judicial authorities in Israeli courts. According to the bill, universal jurisdiction cases will require a clear Spanish nexus. This means that one of the victims must be Spanish, or the actor on Spanish soil, or there is another connection to Spain (using the bill’s own words, “presumeurs responsables se rencontrant en Espagne ou qui existent victimes de nationalité espagnole ou constatant, un lien de coopération entre Espagne”). Moreover, the case will have to be suspended in Spain if a parallel procedure has been initiated in another national or international court.

This legislation, which has received overwhelming political support from both coalition and opposition, will bring to an end the clash between the Spanish government and foreign governments, and between the Spanish judicial and legislative branches. Spanish politicians have realized that the only solution to what can be understood as judicial activism, which in practice acts against Spain’s diplomatic interests, is legislation that clearly limits judges’ authority to act. The new law, although it contains a handful of clauses, will force Spanish prosecutors to show Spanish nexus in all future cases involving Israeli citizens, a fact that significantly reduces Spain’s ability to investigate and indict Israeli citizens and legal persons.

International prosecutions against Israel and Israeli citizens abroad have had an important impact on internal Israeli legal procedures and on an Israeli society that struggles to balance protection of human rights with the fight against terrorism. Even cases that have been dismissed or de facto have been ignored by the Israeli government, have created mounting pressure on the Israeli authorities to improve their official response to allegations of human rights violations. Thus, for example, the United Nations response to house demolition and targeted killing in its own bodies has encouraged the Israeli Supreme Court to examine the legality of these actions under international law, although it had previously found them as non-justiciable. As a result, the Israeli Supreme Court has recently limited the ability of Israeli authorities to act under challenging security circumstances. Similarly, the ICC’s decision on the route of the security fence between Israel and the Palestinian Authority was imported into the Israeli legal system through several decisions of the Israeli Supreme Court, although Israel officially had rejected the jurisdiction of the ICC in this manner. The consequences of this legal act are too clear to be seen. Fewer cases in Spanish courts may lead international tribunals, such as the ICT, to take a more active role in fighting impunity, despite its limited authority and scarce resources. The threat of international procedures at these tribunals will continue to play a role in countries’ decisions to investigate such alleged crimes internally. In any case, the new environment will significantly improve Spain’s relations with a number of countries that found the Spanish courts’ decisions on universal jurisdiction in recent years extremely offensive.

Finally, universal jurisdiction has demonstrated, as a clear example of the potential tension between the judiciary and other state authorities, Spain’s broad interpretation and use of universal jurisdiction, which has a strong flavor of political influence, forced the Spanish government to seek diverse ways to maintain good diplomatic relations with its counterparts, even when these involved three states.

While legal encounters and extensive cross-border judicial meetings bring to light the differences between legal systems and the consequences of judicial decisions, they also provide the necessary grounds for self-limitation by the court of the judicial use of universal jurisdiction and the parliamentary response.

Continuing dialogue between judiciary and parliament is a proof for a functioning democracy and should not be explained as a lack of judicial independence. A crucial part of a checks and balances system is the ability to respond to legislative and judicial failures. The recent cases at the National Court of Spain are an example of the complex issues that brought about such a failure.

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Notes:
3. For an English version of the text of acceptance see www.derechos.org/mizrak/chile/juicio/juicio.html (last visited 9 Nov 2009).
4. Craig Whitlock, Universal Jurisdiction; Spain’s Judges Cross Borders in Rights Cases, High Ranking U.S. See Universal jurisdiction and global politics; the Spanish experience, page 40
fact, in addition to these structural challenges, there are weaknesses inherent to every national court that tries to implement universal jurisdiction.

For example, the ability to accumulate sufficient evidence in a foreign jurisdiction in such complex and massive cases is very limited. In addition, since it is almost impossible to manage such a legal procedure without the support of the relevant foreign government, which in many cases is impossible to obtain, the process suffers from delays and may be rendered fruitless.

These technical and substantive difficulties have made Spanish judges more sensitive to the consequences of their decisions. Yet despite these challenges, the Spanish National Court still seems eager to continue its role in fighting impunity and promoting global justice within the boundaries of the Spanish law on universal jurisdiction. This reality calls for a better understanding of the Spanish point of view and for a legislative change that is discussed below.

The tension between Spain and Israel over the use of universal jurisdiction on the national level is of special importance as the cases to date involving Israel deal with Israel’s fight against terrorism, which both Spain and Israel have, for many years, struggled against.

Both countries are sophisticated democracies seeking to develop advanced legal tools to balance their need to combat terrorism with their obligation to protect human rights.

Israel has been fighting terrorism since its establishment in 1948. During the second Intifada (2001-2004), more than 1,000 soldiers and civilians were killed or wounded in multiple and near-continuous terror attacks. The Spanish people have experienced many terror attacks by the Basque separatist organization ETA (Euskadi Ta Askatasuna – Basque Homeland and Freedom). On 11 March 2014, an al-Qaeda attack on a Madrid commuter train, an event known in Spain as 11-M, killed 191 people and injured more than 1,400. Dealing with terrorism, a growing phenomenon of human right violations, allows these countries to gain a better understanding of the crimes, develop preemptive actions against them, and prosecute them more effectively. However, different legal approaches towards terrorism could lead to controversial legal procedures.

In Israel, the military and the judiciary treat Palestinian terrorist attacks as military activities subject to the law of armed conflict. In Spain, by contrast, and influenced by its own experience, the dominant approach is criminalization of terrorism and prosecution of perpetrators under Spanish criminal law.

In fact, there are even Israeli legal scholars who look at the war on terror in Israel as a non-armed conflict.13 These two approaches, driven by different characteristics in each country, have significant consequences for the discussion of universal jurisdiction. Thus, counter-terrorism actions that can be legitimate and lawful through Israeli eyes could be considered as a violation of human rights, subject to investigation and prosecution under international law.

The Spanish National Court, however, is the first national court in the world to have jurisdiction under the so-called “universal law” doctrine. It also has jurisdiction over extraterritorial crimes.

Unlike their American counterparts, some of whom were reported to be “surprised” with the US Supreme Court’s decision in 2006, the Spanish courts have shown no intention to follow the US Supreme Court’s advice to overturn the Spanish law. This is the result of years of judicial struggle to establish the legitimacy of universal jurisdiction in Spain.

The Spanish National Court has held that the 1956 Convention on the Prevention and Punishment of the Crime of Genocide is a jus cogens, and that it therefore has the power to try cases involving genocide. In 1999, the court ruled that the 1984 Convention on the Prevention and Punishment of the Crime of Genocide, which includes Israeli perpetrators in its definition of genocide, is a jus cogens.

This is a significant development, as it means that the Spanish court can try cases involving genocide even if the perpetrators are not present in Spain. This has implications for the future of international law, as it means that a country can prosecute crimes committed outside its borders if they are considered to be violations of jus cogens.

The Spanish National Court has also held that the 1982 Convention on the Law of the Sea is a jus cogens, and that it therefore has the power to try cases involving piracy. In 2002, the court ruled that the 1982 Convention on the Law of the Sea is a jus cogens, and that it therefore has the power to try cases involving piracy.

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both wars. Somewhat ironically, the SCOTUS defined the global war that the U.S. has been conducting in faraway countries as a non-international armed conflict, subject to Common Article 3 of the Geneva Conventions of 1949. This determination was based on the residual language of Common Article 3 as applying to all cases that did not fall under the international armed conflict paradigm of those conventions. The Israeli Court, in contrast, found that the armed conflict between Israeli and the Palestinian armed groups was in fact an international armed conflict, despite its more defined and limited geographical extent and territorial proximity, and despite that, at the time, both Gaza and the West Bank were still occupied territories. Being international, the conflict was subject to the entire body of the Geneva Conventions and the Customary rules of the First Protocol Additional to the Geneva Conventions of 12 August 1949 Regarding to the Protection of Victims of International Armed Conflicts (Protocol I), 1977. The Israeli Court was motivated, by the concern of a “war without law,” seeking as much regulatory constraint as possible.

In classifying terrorists, the two courts again diverged: the SCOTUS was ready to accept the Administration’s submission that detained terrorists were enemy combatants, and unlawful combatants, for that.

The JIC stopped short, however, of allowing the IDF to target any member of a terrorist organization solely on the basis of his membership and regardless of his particular contribution to the terrorist effort, which would have foreclosed the outcome of recognizing terrorists as (unlawful) combatants and would have amounted to a judicial green light for the army to strike at any enemy soldier, regardless of the part he played in warfare. Instead, only those who took a direct, continuous, and significant part in terrorism could be targeted.

Moreover, expressing an implicit uneasiness about the full measure of the war paradigm, the Israeli Court has sought further ways to curb the employment of military power against the terrorists, ordering the state to prefer an arrest operation, whenever feasible, to a targeted killing operation.

This division between the two courts’ rulings has to do, among other things, with the different nature of the terrorist organizations in the war between Israel and the Palestinians. The Palestinian terrorist organizations, in contrast, are a paramilitary organization, while the Israeli military is itself a political and social movement of which the military wing is only a part. This difference was, in fact, what led to the disintegration of the PLO. The Israeli military also expressed their deep concerns, asking the Israeli government for an immediate suspension of the legal procedures against their senior officers and politicians. While the PLO’s media have expressed the opinion of the use of universal jurisdiction has been criticized for risking collateral damage through judicial activism, in Israel it has been condemned by leading politicians for being used by left wing parties to promote a pro-Palestinian agenda in the region without sufficient regard for the complexity of the conflict and the continuing terrorist threats against Israel.

The Spanish law permits individual prosecution, including civil groups such as human rights organizations, to directly initiate criminal procedures without executive branch screening, a reality that has emerged whereby the Spanish judicial system can be easily influenced by non-Spanish groups to further their political agendas. While providing some signs of improvements, the discussions between Israel and Spain, both in the public and behind closed doors, have to date lacked the necessary legal dialogue between lawyers and judges at both ends of the Mediterranean. It has been a general practice and deeper analysis of Spanish and Israeli law were absent, while the battlefield has been left to populistic political voices.

In late June 2009, the Spanish government acted to close this gap, and through the leadership of Casa Sefardí, a Spanish institution dedicated to fostering a closer relationship between Spain and the Jewish community, it arranged meetings (called “Legal Encounter” in the official invitation) between leading Spanish lawyers and judges and their Israeli counterparts to discuss the legal system of both countries and the use of universal jurisdiction, and especially the so-called “Spanish legal system.” I was invited to attend these meetings as the United Nations Representative of the International Association of Jewish Lawyers and Jurists. Some of my reflections on universal jurisdiction in Spain are a direct result of those meetings.

As was made clear from the outset, the principle of universal jurisdiction is rooted in both Spanish and international judicial history. The Spanish Court is well aware of its limitations and especially of the risk of losing credibility as a result of prosecuting crimes that are too particularistic, prosecuting too selectively, and creating the impression that the court is serving political goals. In
Universal jurisdiction and global politics: the Spanish experience

Leading Spanish and Israeli lawyers and jurists agree that universal jurisdiction is an important and necessary international legal tool. Yet recent cases before Spanish courts may jeopardize its credibility and the legitimacy of its use.

Efraim Chalamish

Most of us are familiar with globalization through its effects in such spheres as finance, technology and political systems. More recently, however, globalization has encroached on another area, jurisprudence. With the continuous expansion of international norms and the need to implement many of these norms on the national level, national courts frequently find themselves in dialogue with other national and international courts. The fragmentation of international and regional tribunals, such as the International Criminal Court (hereinafter “ICCD”) and International Court of Justice (hereinafter “ICJ”), empowers this dialogue.

While this phenomenon provides national courts with the opportunity to globalize law and justice, it raises serious concerns about intervention by one state in other states’ internal affairs and threatens the important principle of sovereignty. Globalization of legal norms, according to this view, can serve as a new strategic tool in the diplomatic armament of the modern state, with obvious consequences.

The recent rise in the application of universal jurisdiction in European national courts, especially in Spain, serves as an excellent example of this tension. Universal jurisdiction lets national courts prosecute people for universal crimes, such as war crimes and genocide, without a clear nexus between the crime, the offender, or the victim, on one hand, and the prosecuting country, on the other. The implementation of this principle in national courts is based on international laws, which are adopted to comply with the ratification of international legal obligations, such as the 1949 United Nations Convention against Torture.1 Universal jurisdiction is not a new phenomenon in international law and world affairs. From the Nuremberg trials following World War II to today’s burgeoning and increasingly daring maritime piracy, national and international forums investigate, indict, and prosecute universal crimes to avoid impunity when it is clear that the applicable country cannot or does not provide justice through appropriate legal procedures. However, in recent years several national courts in western Europe have used universal jurisdiction to try crimes that have been perceived as political and controversial, a matter that threatens the future of this important legal concept and its legitimacy.

Spain has found itself at the heart of the controversy. Using Article 25.4 of the Organic Law 6/1985; several judges of the Spanish National Court (“Audencia Nacional de España”) have applied universal jurisdiction to bring to justice non-Spanish individuals, for suspected human rights violations committed on non-Spanish soil. For more than a decade, the National Court has initiated investigations against non-Spaniards, such as Chilean dictator Augusto Pinochet and certain aides of American President George W. Bush, on charges of torture and other human rights violations. The broad language of the Spanish law, and especially its interpretation by the Spanish Constitutional Court (“Tribunal Constitucional de España”) in its 2003 Guatemala decision,4 have allowed the National Court to initiate a broad range of criminal procedures, including situations where the victims were not Spanish nationals. While many jurists and human rights activists praised the Spanish courts’ commitment to global justice and their fight against impunity, the political nature of many of these criminal investigations triggered diplomatic clashes with foreign governments and stirred debate among international lawyers.5

The debate surrounding Spain’s universal jurisdiction activism reached new levels in January 2009 when Judge Fernando Andreu agreed to investigate a deadly 2002 Israeli strike that targeted a Palestinian terrorist and accused a former Israeli defense minister and six senior Israeli military officers of crimes against Israel and Israeli lawyers and jurists continued, as eight Spanish officials – including judges from the National Court – visited Israel. As part of the visit, IAJL hosted a seminar titled “Democracy Fighting Terror.” The forum provided a further opportunity for the exchange of views and for the Spanish guests to hear additional perspectives on the unique challenges facing Israel in confronting terror.

Spring 2010

Notes:
5. The determination was made in the case of Hamdan v. Rumsfeld, 548 U.S. 577, 32 (2008).
8. See Public Committee Against Torture, supra note 6.

Enrique Juárez: The Legal Enforcement of Universal Jurisdiction

Future application of universal jurisdiction by Spain may be more circumscribed. Legislation is presently advancing in the Spanish legislature that would limit jurisdiction of the National Court to cases with a link to Spain, such as those where there are Spanish victims or the alleged defendants are present in Spain.

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Irregular wars

A philosophical perspective on international law and universal jurisdiction

Asa Kasher

The Law of International Armed Conflict and the conception of universal jurisdiction are legal frameworks concerned with the protection of human rights and the prevention of armed conflicts. However, understanding these frameworks and applying them in practice is often challenging due to the complexity of the legal and political instruments that underpin them.

Defining irregular war

An international armed conflict is a conflict between states that takes the form of activities of military forces of the states against each other. The major conceptual ingredients of regular wars are conflict, state and military force. An irregular war involves a conflict in which at least one party to the conflict is not a state. Often, such a party to the conflict of an irregular war is not a military force either.

The present importance of these parties is that they play a role in delineating the means and methods a state may employ during an irregular war under a given configuration of the parameters. For example, fighting a force that is controlled by the government is justifiably different from fighting a force that is dissociated from it, and both are justifiably different from fighting a force that is not the government but is practically related to it by coordination, cooperation or participation.

An additional parameter should be mentioned that also plays a major role in the moral consideration of any configuration of parameters (a)-(d). Some of the activities of Israel during the irregular war of the early 2000s took place within areas under effective control of Israel, while the Second Lebanon War and Operation Cast Lead were confined to areas in which Israel did not (and does not) have effective control. The distinction between these two kinds of areas is crucial: when a state does have effective control over an area, its military activities during an irregular war within that area are often governed, at least partially, by principles of military ethics. If the state does not have effective control over an area in which it must operate during an irregular war, its military activities are rarely guided by principles of military ethics. Hence, we add to the list of irregular war parameters (a)-(d) parameter (e), the extent of effective and moral control on the current practice of using universal jurisdiction institutions in several European states, particularly against prominent Israelis.

According to current practice, a person, A, may ask a court to start a procedure meant to lead to indictment of another person, B, on grounds of legal considerations of universal jurisdiction. The judge is not expected, let alone required, to take into account the nature of the regime within the framework of which B acted during the period in which A is interested and thinks the court should be interested. Whether B is, say, a major general in the military force of an ordinary democracy or rather in the military force of a rogue dictatorship does not matter at all.

We take this element of the practice to be conceptually wrong. If a practice is morally protected, support, nurture or enhance the protection of human dignity, then it ought to manifest respect for the difference between what is positively related to human dignity protection and what is negatively related to it. A democratic regime is positively related to human dignity and human rights protection. A dictatorial regime is negatively related to human dignity and human rights protection. The difference between them has, therefore, to be manifestly respected by a court of a democratic regime when it considers the possibility of applying legal considerations of universal jurisdiction, which is a legal instrument of the pursuit of human dignity and human rights protection. Otherwise, the court blur the distinction between being positively related and being negatively related to human dignity and human rights protection. A distinction between the two should be reflected first and foremost in the presumptions of the court, with respect to person B. The judge's eyes should not be veiled.

Hence, the present practice involves the conceptual mistake of not showing its commitment to pursuit of human dignity and human rights protection when it can and should do so. In its present form it is conceptually flawed. Moreover, since its shortcomings is directly related to its manifest relation to human dignity and human rights protection, it is also morally flawed.

Domestic laws of universal jurisdiction should, then, be significantly amended and improved.

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Mayer Gabay

Mayer Gabay, who served as director general of the Israeli Ministry of Justice between 1976 and 1980, and then as deputy attorney general for a year, was elected by the UN General Assembly to be a judge in the Administrative Tribunal of the UN in 2001, in which position he served until 2015. He was the most senior position reached by an Israeli within the United Nations.

As part of Mayer’s lifelong desire to maintain a proud position of the Jewish people and the State of Israel among the nations of the world, he served from 2000 to 2015 as the chairman of the Interreligious Coordinating Council in Israel, and until the day he died he was president of the United Nations Association in Israel.

May be in peace.
Under the usual circumstances of strictly voluntary military service, another additional question similarly arises:

Why do you maintain a system of military service in which citizens in military uniform ought to jeopardize their lives attempting to accomplish their missions? Is it morally justifiable?

On ordinary missions, a democratic state has compelling answers to these questions. On other ones, it has answers only to some of the questions. Under ordinary circumstances many states have a firm answer to the last question on the list, whether in the case of conscripts or that of volunteers.

We mention these questions not to answer them or show what it takes to convincingly answer them. We mention these questions to show that a state ought to make internal considerations when it ponder the possibility of sending citizens in military uniform to fight. A war is not just a conflict between states. A war is a conflict between states in which each state sends some of its citizens in military uniform to the battlefields, from which some of them do not return safely or do not return at all. Internal considerations are morally paramount no less than external ones.

Universal jurisdiction: Second observation

Internal considerations, which a state of a democratic regime ought to examine when it sends a war or a military operation is being pondered, are naturally looked at within the framework of some institutions of the state, usually ones of the executive branch, often also ones of the legislative branch, and sometimes of the judicial branch as well. Such institutions function within a certain constitutional framework, according to certain legal and ethical systems, on grounds of an underlying moral conception of the nature of the regime.

The major institutions of a democratic state have been shaped by the traditions that thrive in its civil society. Usually, such a tradition includes a commitment to some basic moral conception, but it also reflects the history of the civil society and the state, which includes the stories of attempted applications of the moral conception, whether proper or improper, whether partially or fully fledged, whether successful or not, whether major or marginal. Thus, different democratic regimes, such as the United States, present day Germany and Israel, while sharing a commitment to the protection of human rights as a manifestation of their commitment to protection of human dignity, differ significantly from each other in delineating, say, freedom of speech, because of their different collective experiences.

Since citizens in military uniform are, on the one hand, citizens, and on the other hand, persons who shoulder certain military responsibilities, a democratic state ought to have a carefully articulated conception of the protection of the human dignity of citizens in military uniform under combat conditions as well as other ones. It would come as no surprise that different states will have different conceptions of their combatants' human dignity and human rights protection.

Consider, for example, a problem that emerges in some irregular wars. A state faces an enemy that deliberately and constantly blurs the distinction between combatants and noncombatants. A military force faces enemy combatants who launch rockets aimed at noncombatant citizens of the state. There is a military necessity to engage this enemy activity in order to defend the citizens of the state. Assume the military force has used a variety of effective warning methods in order to remove enemy noncombatants from areas of hostilities. Assume furthermore that these methods have been found to be very effective and almost all the noncombatants have left the area. Now, should troops jeopardize their lives in searching the area for some noncombatants who have perhaps not left the area? Although it is reasonable to assume that no state will have a conception that answers this question in the default affirmative under all such circumstances, one can imagine some states having different conceptions that lead to different practical answers. For example, a conception can be imagined that encourages the troops to jeopardize their lives under certain circumstances but does not do so in this way. Another conception can also be imagined according to which troops are not encouraged to act this way but are allowed to volunteer to do so, and yet another conception can be imagined according to which troops are forbidden to do so.

As we have already realized, when we made the previous observation on universal jurisdiction, there is no justification in drawing inferences between state conceptions of combatants' human dignity and human rights protection as either right and commendable or wrong and criminal. The notion of using an institution of universal jurisdiction to adjudicate between seemingly competing conceptions of combatants' human dignity protection is utterly misguided. Universal jurisdiction was originally meant to apply and ought to be applied quite narrowly, such as a manifestation of the nature of the regime.

Universal jurisdiction: Third observation

In conclusion, we would like to make a conceptual control the state has over the areas in which its enemies act against it.

Law of International Armed Conflict

The Law of International Armed Conflict is meant to guide military activities conducted by the military forces of two or more states. It is meant to guide both the governmental or presidential conduct of waging a war or starting a military operation (jus ad bellum) and the troops' military conduct of fighting during a war or a military operation (jus in bello).

Generally speaking, the principles that are meant to guide conduct on these two levels rest on certain assumptions with respect to the nature of an international armed conflict. One can trace these assumptions by asking oneself, with respect to any given principle of the Law of International Armed Conflict, on what grounds is it assumed that (a) the principle is practicable and (b) that following the principle in practice enhances the pursuit of "alleviating as much as possible the calamities of war," to use the language of the Saint Petersburg Declaration of 1863. Thus, for example, the principle of discrimination, which introduces a distinction between what a military force may do and what it may not do facing another military force and what a military force may do facing noncombatants, is practicable only if a military force has simple practical means for differentiating combatants from noncombatants. This principle enhances the pursuit of minimizing calamities of war only if the practical means of distinction can be used under ordinary circumstances of war and not just rarely or occasionally. Wearing a distinct uniform and openly carrying weapons are, indeed, simple practical ways for drawing the distinction. During regular wars, such simple practice can be used by the troops under ordinary circumstances of the war. Adapting this practice enhances protection of noncombatants most significantly.

During irregular wars, a state military force often finds itself under circumstances in which enemy combatants do not wear any uniform, let alone a distinct one, and do not bear their weapons openly. The distinction between combatants and noncombatants is deliberately and regularly blurred by enemies that a state encounters during a typical irregular war. Other principles are similarly violated.

Under such conditions, it is natural to ponder whether the principles of the law are valid when the assumptions on which they rest do not hold. Two answers lend themselves to this grave practical question.

The first answer is in the affirmative. Although the assumptions do not hold, still the principles are valid. Since the assumptions do not hold they cannot be applied the way they have been meant to apply during regular wars. However, the principles can be applied in a novel way on grounds of a creative interpretation of their substance.

The second answer is in the negative. Principles are valid only if they are applicable in a regular, stable, and common way. Recall the maxim: "ought implies can if the assumptions of the principles do not hold, the principles are not applicable in such a manner and therefore they are not valid. Hence, new principles have to be shaped, developed, considered and then applied to the new situation.

The apparent advantage of the affirmative answer is that it maintains the principles themselves intact. The disadvantage is that the principles are rendered applicable only on grounds of some new creative interpretations thereof. Hence, the principles do not remain valid and applicable in a regular, stable and common way. They are to be taken valid only under certain creative interpretations thereof. Thus, the basic component of the law is not a principle, nor is it a principle under a common interpretation, but rather a principle-in-new creative interpretation. Since different states, military forces and international institutions can devise different new creative interpretations, the apparent picture of a system of shared principles actually evaporates. Instead of a system of principles that is applicable in a common way, we get a variety of different systems of principles under different new creative interpretations.

The clear advantage of the negative answer is that it does not involve a pretended adherence to the same principles during both regular and irregular wars. It keeps the given principles valid and applicable during regular wars only. A disadvantage of the negative answer is that it leaves open the problem of guiding military activities during irregular wars by morally and ethically appropriate principles. This disadvantage can be outweighed by the extent that the open problem can be adequately solved.

An adequate solution of this open problem would be a system of principles that satisfies several conditions. The first two have been discussed earlier: (a) the preliminary condition of the principles being practicable, and (b) the substantive condition of the principles being able, if followed, to enhance the pursuit of "alleviating as much as possible the calamities of war." Two additional conditions should be added: (c) the fundamental condition of the principles being morally justifiable obligations within the framework of the Just
War tradition, and (d) the expediency condition of the principles being as similar as possible to those that are meant to guide military activities during regular wars.

The fundamental condition is required because we take it for granted that the Just War tradition provides us with a reasonable conceptual framework and a deeply entrenched, justified approach to military activities. Notice that we here refer to the Just War tradition rather than to any Just War theory or doctrine, not only because there are different variants of the latter, but also because variations of principles, interpretations and justifications that morally or ethically improve any given theory or doctrine should remain possible.

The expediency condition is required mainly because it seems reasonable to assume that understanding and implementing a new principle is more effective the more it is similar to a principle that has already been well understood and successfully applied. Moreover, proximity of newly introduced principles to familiar others may improve future attempts to develop a unified system of principles for both regular and irregular wars.

Any system of principles meant to guide irregular wars of a certain kind and satisfy conditions (a)-(d) can become a doctrine that is commonly endorsed and applied in practical states that participate in irregular wars of that kind. It may be that the first international law of irregular wars of that kind. Under some future fortunate circumstances such a system of principles can become the core of a new International Committee of the Red Cross or United Nations Committee. In any case, conditions (a)-(d) do not form a set of equations that have a unique solution. Significantly different systems can emerge that satisfy all of these conditions. In an international custom scenario that would mean a global convention is going to enjoy universal support and commitment. In an international custom scenario it would mean that there is going to be no international custom.

Universal jurisdiction: First observation

The question discussed in the previous section, whether the principles of the law are valid when the assumptions on which they rest do not hold, has an affirmative answer and a negative one, as we have just seen. However, the affirmative and the negative answers differ from each other both conceptually and practically. They share a very important element, which we would like to briefly analyze.

The affirmative answer leaves us with a possible state of affairs in which we encounter a variety of creative interpretations of the principles that are meant to guide regular wars when they are meant to guide irregular wars as well. Within such a variety of creative interpretations some are going to be commonly held to be better than others. However, it would be a plausible assumption about the principles that the different creative interpretations of the principles there are going to be several that are not better than all the rest but not better than each other, in any general respect.

Similarly, the negative answer, with a possible state of affairs in which there is a variety of systems of principles that satisfy conditions (a)-(d). Again, within such a variety of systems of principles for irregular wars some are going to be commonly enforced over others. However, again, it would be a plausible assumption that the state of affairs that the different systems of principles there are going to be several systems that are better than all the rest but not better than each other, in any general respect.

Thus, whether concept for the affirmative answer or for the negative one and whether one endorses one creative interpretation or another, one system of principles or another, the situation involves a certain relativism, in that there is no way one can show that the creative interpretation or system of principles one endorses ought to be held better than every alternative creative interpretation or system of principles, respectively.

One reason why creative interpretations differ from each other and why systems of principles differ from each other is that each man is the author of its constitutional and normative background, which includes the fundamental values and conceptions of states and traditions. Consider, for example, conceptions of human dignity protection, as developed within the frameworks of traditions that are manifest in a variety of aspects of human life in two different states, such as their constitutional, ethical, legal, educational and military systems. Conceptions of human dignity can differ from each other, for example, in the extent to which the state is held to be under an obligation to help a person who resides in its territory under conditions of any kind. In a welfare-oriented tradition the extent would be broader than that of a liberal, non-welfare-oriented tradition. Assuming that within the framework of each of these traditions a morally justifiable delimitation of human dignity protection has been drawn, there is no external point of view, objectively set and applied, from which one state is depicted as just and exemplary while the other one is depicted as unjust and criminal.

However, any broad conception of universal jurisdiction rests on two of these assumptions: (a) that there is actually an external, international point of view that justifies delimitation of some creative interpretations or systems of principles as absolutely unjust and even criminal, or (b) that the creative interpretation or system of principles held by one state is at least as unfair as and as unjustifiable as another state's unfair and criminal act against it on some practical level.

Our discussion leads, then, to the conclusion that any broad conception of universal jurisdiction is misguided. Under some circumstances, differences between creative interpretations and differences between systems of principles should not be depicted as differences between what is just and exemplary and what is unjust and criminal, but rather between different just solutions of the very same problem within the framework of different, yet legitimate, traditions and frameworks.

On the other hand, a narrow conception of universal jurisdiction is justifiable to the extent that it deals with interpretations or principles that are justifiable from an objective or a commonly held perspective. Universal jurisdiction with respect to legal responsibility for an act of genocide is a simple example.

External and internal considerations

The Law of International Armed Conflict is meant to guide the activities of military forces of states on the level of international relations between states, Principles that have appeared within the Just War tradition have also been usually interpreted according to the level of international relations. Exercising the right of self-defense, for example, is an activity taken on this level.

From a moral point of view, the Law of International Armed Conflict can be depicted either as being by and large morally justifiable in its present form or as being morally significant because it is an improvement over the practices of warfare that had prevailed before it became part of conventional international law. We have examined reasons for preferring the latter depiction over the former, but for the sake of argument let us assume that the former depiction is correct, or even that international law in its present form is morally impeccable.

From the same moral point of view, it ought to be observed and understood that international law in its present form does not exhaust the realm of moral considerations that apply to military warfare, even if international law in its present form is impeccable, even if it shows no gap in guidance of irregular wars. The reason is an observation that has scarcely been made, though it is quite simple and incontrovertible, in the setting of each and every democratic regime: A person in military uniform has indubitable human dignity; the state, in the military force of which a person serves, has an obligation to protect his or her human dignity. To use an apt expression from the military history of the United Kingdom and the present historical conception of Germany, a soldier (sailor, pilot, marine, etc.) is a citizen in military uniform. As such, a citizen in military uniform has human rights that have to be appropriately protected by his or her military force and more generally by one's state.

Consider, for example, a decision that a government or a president is to make, whether or not to send troops to fight a present enemy force. On the one hand, considerations have to be made on grounds of international law, that is to say, by resort to facts, reasons and arguments that pertain to the level of international relations. These are external considerations. On the other hand, considerations have to be made on grounds of legitimacy, as the constitutional ones, that govern the relations between a government or a president of the state and its citizens, including citizens in military uniform. These are internal considerations. The extent to which external considerations and internal considerations are of a moral nature or of moral significance, there are both external and internal moral considerations. The full moral picture is, therefore, not exhausted by the external, international law considerations. It includes internal moral considerations as well.

Protection of human dignity is moral in nature. Protection of basic human rights is moral in nature. Protection of some social rights within an extensive welfare society is of moral significance. In a rational state, most of the major ingredients of a democratic regime are moral in nature or at least of moral significance. That accordingly, protection of human dignity of citizens in military uniform is moral in nature. Appropriately, the protection of the rights of a citizen in military uniform is an obligation of the state. The state owes its citizen in military uniform answers to crucial questions: When there are a million commands, on your behalf, sent me here, where my unit fights, knowing that there is a significant jeopardy to my life here? Is it morally justifiable? When I have my commanders, on your behalf, sent me here, where my unit fights, knowing that there is a significant jeopardy to my life here? Is it morally justifiable? Under the circumstances of conception, which is the ordinary situation in the case of Israel, an additional question appears on this list: Why do you maintain a system of conception? Is it morally justifiable?
War tradition, and (d) the expediency condition of the principles being as similar as possible to those that are meant to guide military activities during regular wars.

The fundamental condition is required because we take it for granted that the Just War tradition provides us with a reasonable conceptual framework and a deeply entrenched, justified norm approach to military activities. Notice that we here refer to the Just War tradition rather than to any Just War theory or doctrine, not only because there are different variants of the latter, but also because revisions of principles, interpretations and justifications that morally or ethically improve any given theory or doctrine should remain possible.

The expediency condition is required mainly because it seems reasonable to assume that understanding and implementing a new principle is more effective the more it is similar to a principle that has already been well understood and successfully applied. Moreover, proximity of newly introduced principles to familiar older ones might enhance future attempts to develop a unified system of principles for both regular and irregular wars.

A system of principles meant to guide irregular wars of a certain kind and satisfy conditions (a)-(d) can become a doctrine that is commonly endorsed and applied in practiced states that participate in irregular wars of that kind. We therefore identify international law of irregular wars of that kind. Under some future fortunate circumstances such a system of principles can become the core of a new International Committee of the Red Cross or United Nations Committee. In other words, conditions (a)-(d) do not form a set of equations that has a unique solution. Significantly different systems can emerge that satisfy all of these conditions. In an international custom scenario that would mean the convention is going to enjoy universal support and commitment. In an international custom scenario it would mean that there is going to be no international custom.

Universal jurisdiction: First observation

The question discussed in the previous section, whether the principles of the law are valid when the assumptions on which they rest do not hold, has an affirmative answer and a negative one, as we have just seen. However, the affirmative and the negative answers differ from each other both conceptually and practically: they share a very important element, which we would like to briefly analyze.

The affirmative answer leaves us with a possible state of affairs in which we encounter a variety of creative interpretations of the principles that are meant to guide regular wars when they are meant to guide irregular wars as well. Within such a variety of creative interpretations some are going to be commonly held to be better than others. However, it would be a plausible assumption about the dynamics that allow that among the different creative interpretations of the principles there are going to be several that are better than all the rest but not better than each other, in any general respect.

Similarly, the negative answer leaves us with a possible state of affairs in which there is a variety of systems of principles that satisfy conditions (a)-(d). Again, within such a variety of systems of principles for irregular wars some are going to be commonly held to be better than others. However, again, it would be a plausible assumption about that state of affairs that the different systems of principles there are going to be several systems that are better than all the rest but not better than each other, in any general respect.

Thus, whether or not for the affirmative answer or for the negative one and whether one endorses one creative interpretation or another, one system of principles or another, the situation involves a certain relativism, in that there is no way one can show that the creative interpretation or system of principles one endorses ought to be held better than any other creative interpretation or system of principles, respectively.

One reason why creative interpretations differ from each other and why systems of principles differ from each other is that each member both of its conceptual and normative background, which includes the fundamental values and conceptions of states and traditions. Consider, for example, conceptions of human dignity protection, as developed within the frameworks of traditions that are manifest in a variety of aspects of human life in two different states, such as their constitutional, ethical, legal, educational and military systems. Conceptions of human dignity can differ from each other, for example, in the extent to which the state is held to be under an obligation to help a person who resides in its territory under conditions of any kind. In a welfare-oriented tradition the extended would be broader than that of a liberal, non-welfare-oriented tradition. Assuming that within the framework of each of these traditions a morally justifiable definition of human dignity protection has been drawn, there is no external point of view, objectively set and applied, from which one state is depicted as just and exemplary while the other one is depicted as unjust and criminal.

However, any broad conception of universal jurisdiction rests on one of two assumptions: (a) that there is actually an external, international point of view that justifies depictions of some creative interpretations or systems of principles as absolutely unjust and even criminal, or (b) that the creative interpretation or system of principles held by one state is unjust and criminal and act against it on some practical level.

Our discussion leads, then, to the conclusion that any broad conception of universal jurisdiction is misguided. Under some circumstances, differences between creative interpretations and differences between systems of principles should not be depicted as differences between what is just and exemplary and what is unjust and criminal, but rather between different just solutions of the same very problem within the framework of different, yet legitimate, traditions and frameworks.

On the other hand, a narrow conception of universal jurisdiction is justifiable to the extent that it deals with interpretations or principles that are justifiable from an objective or a commonly held perspective. Universal jurisdiction with respect to alleged responsibilities for an instance of genocide is a simple example.

External and internal considerations

The law of international armed conflict is meant to guide the activities of military forces of states on the level of international relations between states. Principles that have appeared within the Just War tradition have also been used in international law according to the level of international relations. Exercising the right of self-defense, for example, is an activity taken on this level.

From a moral point of view, the Law of International Armed Conflict can be depicted either as being by and large morally justifiable in its present form or as being morally significant because it is an improvement over the practices of warfare that had prevailed before it became part of conventional international law. We have examined reasons for preferring the latter depiction over the former, but for the sake of argument let us assume that the former depiction is correct, or even that international law in its present form is morally impeccable.

From the same moral point of view, it ought to be observed and understood that international law in its present form does not exhaust the realm of moral considerations that apply to military warfare, even if international law in its present form is impeccable, even if it shows no gap in guidance of irregular wars. The reason is an observation that has scarcely been made, though it is quite simple and incontrovertible, in the setting of each and every democratic regime: A person in military uniform has indeniable human dignity; the state, in the military force of which a person serves, has an obligation to protect his or her human dignity. To use an apt expression from the military history of the United Kingdom and the present constitutional conception of Germany, a soldier (sailor, pilot, marine, etc.) is a citizen in military uniform. As such, a citizen in military uniform has human rights that have to be appropriately protected by his or her military force and more generally by one's state.

Consider, for example, a decision that a government or a president has to make, whether or not to send troops to fight a present enemy force. On the one hand, considerations have to be made on grounds of international law, that is to say, by resort to facts, reasons and arguments that pertain to the level of international relations. These are external considerations. On the other hand, considerations have to be made on grounds of prudential policy, as the constitutional ones, that govern the relations between a government or a president of the state and its citizens, including citizens in military uniform. These are internal considerations. To the extent that external considerations and internal considerations are of a moral nature or of moral significance, there are both external and internal moral considerations. The full moral picture is, therefore, not exhausted by the external, international law considerations. It includes internal moral considerations as well.

Protection of human dignity is moral in nature. Protection of basic human rights is moral in nature. Protection of some social rights within an extensive welfare society is of moral significance. In a rational society, the most of the major ingredients of a democratic regime are moral in nature or at least of moral significance. That accordingly, protection of human dignity of citizens in military uniform is moral in nature. Appropriate protection of the human rights of a citizen in military uniform is an obligation of the state. The state owes its citizen in military uniform answers to crucial questions:

- Why have you made a decision to send me to fight, knowing that you thereby jeopardize my life? Is it morally justifiable?
- Why have my commanders, on your behalf, sent me here, where my units fight, knowing that there is a significant jeopardize my life here? Is it morally justifiable?
- Why has my commander, on your behalf, ordered me to accomplish my present mission, knowing that it very significantly risks my life? Is it morally justifiable?
- Under the circumstances of conception, which is the ordinary situation in the case of Israel, an additional question appears on this list:
- Why do you maintain a system of conscription? Is it morally justifiable?
Under the usual circumstances of strictly voluntary military service, another additional question similarly arises:

Why do you maintain a system of military service in which citizens in military uniform ought to jeopardize their lives attempting to accomplish their missions? Is it morally justifiable?

On various occasions, a democratic state has compelling answers to these questions. On other occasions, it has such answers to only some of the questions. Under ordinary circumstances, many states have a firm answer to the last question on the list, whether in the case of conscripts or that of volunteers.

We mention these questions not to answer them or show what it takes to convincingly answer them. We mention these questions to show that a state ought to make internal considerations when it pondered the possibility of sending citizens in military uniform to fight. A war is not just a conflict between states. A war is a conflict between states in which each state sends some of its citizens in military uniform to the battlefields, from which some of them do not return safely or do not return at all. Internal considerations are morally paramount no less than external ones.

Universal jurisdiction: Second observation

Internal considerations, which a state of a democratic regime ought to examine before a war or a military operation is being pondered, are naturally looked at within the framework of some institutions of the state, usually ones of the executive branch, often also ones of the legislative branch, and sometimes of the judicial branch as well. Such institutions function within a certain constitutional framework, according to certain legal and ethical systems, on grounds of an underlying moral conception of the nature of the regime.

The major institutions of a democratic state have been shaped by the traditions that thrive in its civil society. Usually, such a tradition includes a commitment to some basic moral conception, but it also reflects the history of the civil society and the state, which includes the stories of attempted applications of the moral conception, whether proper or improper, whether partially or fully ditched, whether successful or not, whether major or marginal. Thus, different democratic regimes, such as the United States, present day Germany, and Israel, while sharing a commitment to the protection of human rights as a manifestation of their commitment to protection of human dignity, differ significantly from each other in delineating, say, freedom of speech, because of their different collective experiences.

Since citizens in military uniform are, on the one hand, citizens, and on the other hand, persons who shoulder certain military responsibilities, a democratic state ought to have a carefully articulated conception of the protection of the human dignity of citizens in military uniform under combat conditions as well as other ones. It would come as no surprise that different states will have different conceptions of their combatants' human dignity and human rights protection.

Consider, for example, a problem that emerges in some irregular wars. A state faces an enemy that deliberately and constantly blurs the distinction between combatants and noncombatants. A military force faces enemy combatants who launch rockets aimed at noncombatant citizens of the state. There is a military necessity to stop this enemy activity in order to defend the citizens of the state. Assume the military force has used a variety of effective warning methods in order to remove enemy noncombatants from areas of hostilities. Assume furthermore that these methods have been found to be very effective and almost all the noncombatants have left the area. Now, should troops jeopardize their lives in searching the area for some noncombatants who have perhaps not left the area? Although it is reasonable to assume that no state will have a conception that answers this question in the definitive affirmative under all such circumstances, one can imagine different states having different conceptions that lead to different practical answers. For example, a conception can be imagined that encourages the troops to jeopardize their lives under certain circumstances but does not in all cases.

Another conception can also be imagined according to which troops are not encouraged to act this way but are allowed to volunteer to do so, and yet another conception can be imagined according to which troops are forbidden to do so.

As we have already realized, when we made the previous observation on universal jurisdiction, there is no justification for differences in conceptions between state conceptions of combatants' human dignity and human rights protection as either right and commendable or wrong and criminal. The notion of using an institution of universal jurisdiction to adjudicate between seemingly competing conceptions of combatants' human dignity protection is utterly misguided. Universal jurisdiction was originally meant to apply and ought to be applied quite narrowly, such as where the matter under consideration is an activity of genocide or other grave atrocities.

Universal jurisdiction: Third observation

In conclusion, we would like to make a conceptual control the state has over the areas in which its enemies act against it.

Law of International Armed Conflict

The Law of International Armed Conflict is meant to guide military activities conducted by the military forces of two states. It is meant to guide both the governmental or presidencial conduct of waging a war or starting a military operation (ius ad bellum) and the troops' military conduct of fighting during a war or a military operation (ius in bello).

Generally speaking, the principles that are meant to guide conduct on these two levels rest on certain assumptions with respect to the nature of an international armed conflict. One can trace these assumptions by asking oneself, with respect to any given principle of the Law of International Armed Conflict, on what ground it is assumed (a) that the principle is practicable and (b) that following the principle in practice enhances the pursuit of "alleviating as much as possible the calamities of war," to use the language of the Saint Petersburg Declaration of 1907.

Thus, for example, the principle of discrimination, which introduces a distinction between what a military force may do facing another military force and what a military force may do facing noncombatants, is practicable only if a military force has simple practical means for distinguishing combatants from noncombatants. This principle enhances the pursuit of minimizing calamities of war only if the practical means of distinction can be used under ordinary circumstances of war and not just rarely or occasionally. Wearing a distinct uniform and openly carrying weapons are, indeed, simple practical ways for drawing the distinction. During regular wars, such a simple practice can be used by the troops under ordinary circumstances of the war. Adopting this practice enhances protection of noncombatants most significantly.

During irregular wars, a state military force often finds itself under circumstances in which enemy combatants do not wear any uniform, let alone a distinctive one, and do not bear their weapons openly. The distinction between combatants and noncombatants is deliberately and regularly blurred by enemies that a state encounters during a typical irregular war. Other principles are similarly violated.

Under such conditions, it is natural to ponder whether the principles of the law are valid when the assumptions on which they rest do not hold. Two answers lend themselves to this grave practical question.

The first answer is in the affirmative. Although the assumptions do not hold, still the principles are valid. Since the assumptions do not hold they cannot be applied. The reason why they have been mean is to apply due to the problem of regular wars. However, the principles can be applied in a novel way on grounds of a creative interpretation of their substance.

The second answer is in the negative. Principles are valid only if they are applicable in a regular, stable and common way. Recall the maxim: "ought implies can." If the assumptions of the principles do not hold, the principles are not applicable in such a manner and therefore they are not valid. Hence, new principles have to be shaped, developed, considered and then applied to the new situations.

The apparent advantage of the affirmative answer is that it maintains the principles themselves intact. The disadvantage is that the principles are rendered applicable only on grounds of some new creative interpretations thereof. Thus, the basic component of the law is not a principle, nor is it a principle under a common interpretation, but rather a principle-on-new creative interpretation. Since different states, military forces and international institutions can devise different new creative interpretations, the apparent picture of a system of shared principles actually evaporates. Instead of a system of principles that is applicable in a common way, we get a variety of different systems of principles under different new creative interpretations.

The clear advantage of the negative answer is that it does not involve a pretended adherence to the same principles during both regular and irregular wars. It keeps the given principles valid and applicable during regular wars only. A disadvantage of the negative answer is that it leaves open the problem of guiding military activities during irregular wars by morally and ethically appropriate principles. This disadvantage can be obviated to the extent that the open problem can be adequately solved.

An adequate solution to this open problem would be a system of principles that satisfies several conditions. The first two have been discussed earlier: (a) the preliminary condition of the principles being practicable, and (b) the substantitive condition of the principles being able, if followed, to enhance the pursuit of "alleviating as much as possible the calamities of war." Two additional conditions should be added: (c) the fundamental condition of the principles being morally justifiable obligations within the framework of the
Irregular wars

A philosophical perspective on international law and universal jurisdiction

Assa Kasher

The Law of International Armed Conflict and the conception of universal jurisdiction are legal frameworks conceived, developed and presumably applied in pursuit of moral ideals. Understanding their nature, evaluating their merits and reconstructing their demerits are, therefore, projects that have a significant philosophical component. It is the purpose of the present paper to shed some light, from a philosophical perspective, on moral issues related to current attempts to apply international law and universal jurisdiction to circumstances of irregular wars, such as those in which Israel has been involved since the beginning of the 21st century. Our philosophical starting points will include elements of the Just War tradition and a conception of human dignity protection.

Defining irregular war

An international armed conflict is a conflict between states that takes the form of activities of military forces of the states against each other. The major conceptual ingredients of regular wars are conflict, state and military force. An irregular war involves a conflict in which at least one party to the conflict is not a state. Often, such a party to the conflict of an irregular war is not a military force either.

There is a whole variety of irregular wars. Following are some examples from the recent conflicts that involved Israel.

First, during the early 2000s, Israel faced a wave of suicide bombing operations carried out by Palestinian terrorist organizations. The latter were not military forces. Usually the areas they used for preparation of their operations were residential areas within the Palestinian territories which are not those of a state.

Secondly, during the 2006 Second Lebanon War, Israel faced the semi-military Hezbollah, which had attacked Israel from residential areas within Lebanon, a state whose government has a military force under its control. Neither the government nor its military force took part in the hostilities.

Thirdly, if a third war with Lebanon erupts under conditions similar to those now prevailing, Israel will face a semi-military force that is controlled by a party that participates in the government of Lebanon.

Finally, during Operation Cast Lead in 2009, Israel faced the semi-military force Hamas, which acts as a de facto government of the Gaza Strip, which is not a state. It attacked Israelis from residential areas within the Strip.

Each of those four irregular wars has a unique configuration of parameters: (a) the nature of the territory, (b) the martial nature of the organization, (c) the nature of the hostile activities of the organization, and (d) the role played by the organization within the territory.

The present importance of these parameters is that they play a role in delineating the means and methods a state may employ during an irregular war under a given configuration of the parameters. For example, fighting a force that is controlled by the government is justifiably different from fighting a force practically dissociated from it, and both are justifiably different from fighting a force that is not the government but is practically related to it by coordination, cooperation or participation.

An additional parameter should be mentioned that also plays a major role in the moral consideration of any configuration of parameters (a)-(d). Some of the activities of Israel during the Irregular War of the early 2000s took place within areas under effective control of Israel, while the Second Lebanon War and Operation Cast Lead were confined to areas in which Israel did not (and does not) have effective control. The distinction between these two kinds of areas is crucial: when a state does have effective control over an area, its military activities during an irregular war within that area are often governed, at least partially, by principles of police ethics. If the state does not have effective control over an area in which it must operate during an irregular war, its military activities are rarely guided by principles of military ethics. Hence, we add to the list of irregular war parameters (a)-(d) parameter (e), the extent of effective and moral control on the current practice of using universal jurisdiction institutions in several European states, particularly against prominent Israelis.

According to current practice, a person, A, may ask a court to start a procedure to prevent to lead to indictment of another person, B, on grounds of legal considerations of universal jurisdiction. The judge is not expected, let alone required, to take into account the nature of the regime within the framework of which B acted during the period in which A is interested and thinks the court should be interested. Whether B is, say, a major general in the military force of an ordinary democracy or rather in the military force of a rogue dictatorship does not matter at all.

We take this element of the practice to be conceptually wrong. If a practice is meant to protect, support, nurture or enhance the protection of human dignity, then it ought to manifest respect for the difference between what is positively related to human dignity protection and what is negatively related to it. A democratic regime is positively related to human dignity and human rights protection. A dictatorial regime is negatively related to human dignity and human rights protection. The difference between them has, therefore, to be manifestly respected by a court of a democratic regime when it considers the possibility of applying legal considerations of universal jurisdiction, which is a legal instrument of the pursuit of human dignity and human rights protection. Otherwise, the court blurs the distinction between being positively related and being negatively related to human dignity and human rights protection. A distinction between the two should be reflected first and foremost in the presumptions of the bar, with respect to person B. The judge's eyes should not be veiled.

Hence, the present practice involves the conceptual mistake of not showing its commitment to pursuit of human dignity and human rights protection when it can and should do so. In its present form it is conceptually flawed. Moreover, since its shortcoming is directly related to its manifest relation to human dignity and human rights protection, it is also morally flawed.

Domestic laws of universal jurisdiction should, then, be significantly amended and improved.

Assa Kasher, an Israeli Prior Lecturer, a Laureate Schamez-Appel Professor Emeritus of Professional Ethics and Philosophy of Practice and Professor Emeritus of Philosophy in Tel Aviv University. He co-authored with Mayer Gabay, Maj. Gen. Amos Yadlin, now IDF Chief of Intelligence, the doctrine of the military ethics of fighting terrorism.

Notes:


Mayer Gabay 1933-2010

Mayer Gabay, 1933-2010

Momenet before going to press, JUSTICE learned of the passing on 7 March 2010 of Mayer Gabay, a long-standing member of our Association who filled many executive positions over the years.

Mayer served as director general of the Israeli Ministry of Justice between 1975 and 1982, and then until the beginning of 1994 as civil service commissioner. Earlier, between 1969 and 1976, he served as commissioner of patients, trademarks and copyright and between 1972 and 1975 as deputy attorney general.

In 1985 he was elected by the UN General Assembly to be a judge in the Administrative Tribunal of the UN and was subsequently elected president of the Tribunal in 2000, in which position he served until 2002. This is the most senior position reached by an Israeli within the United Nations.

As part of Mayer’s lifelong desire to maintain a proud position of the Jewish people and the State of Israel among the nations of the world, he served from 2000 to 2004 as the co-chairperson of the Interreligious Coordinating Council in Israel, and until the day he died he was president of the United Nations Association in Israel.

May he rest in peace.
Universal jurisdiction and global politics: the Spanish experience

Leading Spanish and Israeli lawyers and jurists agree that universal jurisdiction is an important and necessary international legal tool. Yet recent cases before Spanish courts may jeopardize its credibility and the legitimacy of its use.

Efraim Chalamish

Most of us are familiar with globalization through its effects in such spheres as finance, technology and political systems. More recently, however, globalization has encroached on another area, jurisprudence. With the continuing expansion of international norms and the need to implement many of these norms on the national level, national courts frequently find themselves in dialogue with other national and international courts. The fragmentation of international and regional tribunals, such as the International Criminal Court (hereinafter “ICC”) and International Court of Justice (hereinafter “ICJ”), empowers this dialogue.

While this phenomenon provides national courts with the opportunity to globalize law and justice, it raises serious concerns about intervention by one state in other states’ internal affairs and threatens the important principle of sovereignty. Globalization of legal norms, according to this view, can serve as a new strategic tool in the diplomatic armament of the modern state, with decided consequences.

The recent rise in the application of universal jurisdiction in European national courts, especially in Spain, serves as an excellent example of this tension. Universal jurisdiction lets national courts prosecute people for universal crimes, such as war crimes and genocide, without a clear nexus between the crime, the offender, or the victim, on one hand, and the prosecuting country, on the other. The implementation of this principle in national courts is based on national laws, which are adopted to comply with the ratification of international legal obligations, such as the 1984 United Nations Convention Against Torture.1

Universal jurisdiction is not a new phenomenon in international law and world affairs. From the Nuremberg trials following World War II to today’s burgeoning and increasingly daring maritime piracy, national and international forums investigate, indict, and prosecute universal crimes to avoid impunity when it is clear that the applicable country cannot or does not provide justice through appropriate legal procedures. However, in recent years several national courts in western Europe have used universal jurisdiction to try crimes that have been perceived as political and controversial, a matter that threatens the future of this important legal concept and its legitimacy.

Spain has found itself at the heart of the controversy. Using Article 25.4 of the Organic Law 6/1985, several judges of the Spanish National Court (“Audiencia Nacional de España”) have applied universal jurisdiction to bring to justice Spanish nationals for a series of war crimes and genocides.

The debate surrounding Spain’s universal jurisdiction activism reached new levels in January 2009 when Judge Fernando Andreu agreed to investigate a deadly 2002 Israeli strike that targeted a Palestinian terrorist and accused a former Israeli defense minister and six senior Israeli military officers of crimes against a suspect human rights violations committed on non-Spanish soil. For more than a decade, the National Court has initiated investigations against various offenders, including Chilcot Committee/Avant Garde/Chipičer and several aides of American President George W. Bush, on charges of torture and other human rights violations. The broad language of the Spanish law, and especially its interpretation by the Spanish Constitutional Court (“Tribunal Constitucional de España”) in its 2003 Guatemala decision,3 have allowed the National Court to initiate a broad range of criminal procedures, including situations where the victims were not Spanish nationals. While many jurists and human rights activists praised the Spanish courts’ commitment to global justice and their fight against impunity, the political nature of many of these criminal investigations triggered diplomatic clashes with foreign governments and stoked debate among international lawyers.

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Notes:
1. Public Law 107-405 [S. 375, 2002].
5. The determination was made in the case of Hamdan v. Rumsfeld, 540 U.S. 537, 229 (2008).
8. See Public Committee Against Torture, supra note 6.

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from page 16

and Israeli lawyers and jurists continued, as eight Spanish officials – including judges from the National Court – visited Israel. As part of the visit, IAJL hosted a seminar titled “Democracy Fighting Terror.” The forum provided a further opportunity for the exchange of views and for the Spanish guests to hear additional perspectives on the unique challenges facing Israel in confronting terror.
both wars. Somewhat ironically, the SCOTUS defined the global war that the U.S. has been conducting in faraway countries as a non-international armed conflict, subject to Common Article 3 of the Geneva Conventions of 1949. This determination was based on the residual language of Common Article 3 as applying to all cases that did not fall under the international armed conflict paradigm of those conventions. The Israeli Court, in contrast, found that the armed conflict between Israeli and the Palestinian armed groups was in fact an international armed conflict, despite its more defined and limited geographical contours and territorial proximity, and despite that, at the time, both Gaza and the West Bank were still occupied territories. Being international, the conflict was subject to the entire body of the Geneva Conventions and the Customary parts of the First Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977. The Israeli Court was motivated by the concern of a ‘war without law,’ seeking as much regulatory constraint as possible.

In classifying terrorists, the two courts again diverged: the SCOTUS was ready to accept the Administration’s submission that detained terrorists were enemy combatants, and unlawful combatants, for that.1 The HJC, however, did not accept the Administration’s submission that detained terrorists were unlawful combatants and, instead, that terrorists were “civilians taking direct part in hostilities.”2 In construing this phrase, the Israeli Court left sufficient latitude for the IDF to strike at terrorists even if the latter are not directly engaged in acts of terrorism at the particular moment of encounter (thus affirming targeted killing operations of suspected terrorists in their homes, cars, etc.). The HJC stopped short, however, of allowing the IDF to target any member of a terrorist organization solely on the basis of his membership and regardless of his particular contribution to the terrorist effort, which would have rendered the outcome of recognizing terrorists as (unlawful) combatants and would have amounted to a judicial green light for the army to strike at any enemy soldier, regardless of the part he played in warfare. Instead, only those who took a direct, continuous, and significant part in terrorism could be targeted.

Moreover, expressing an implicit uneasiness about the full measure of the war paradigm, the Israeli Court has sought further ways to curb the employment of military power against the terrorists, ordering the state to prefer an arrest operation, whenever feasible, to a targeted killing operation. This divergence in both court’s rulings has to do, among other things, with the different nature of the terrorist organizations: al-Qaeda (and to a lesser degree the Taliban) is a strictly paramilitary organization; Hamas (and to a lesser degree the Palestinian Islamic Jihad) is a political and social movement of which the military wing is only a part. This difference was to be reflected in the war in Gaza in the winter of 2008-2009, where all military members of Hamas were targeted by Israeli forces.

The legality of American targetted killing operations has never been reviewed by the SCOTUS, and is unlikely ever to be reviewed by it for all the reasons mentioned above. However, the Court’s acceptance of the “unlawful combatants” label allows U.S. forces to detain and target any person on the basis of membership in al-Qaeda and the Taliban, and/or on the basis of his actions as supporting the activities of al-Qaeda and the Taliban. Despite the name of the relevant Israeli detention law – “Incorporation of Unlawful Combatants’ Law 5767-2007” – the Israeli Court adopted, again, the “civilians taking direct part in hostilities” label, thus rejecting a membership test for detention and instead requiring a showing of the individual’s act, and direct participation in specific terrorist activity. Periodical judicial review, as well as right of appeal, is granted automatically to all detainees.

The more systematic judicial review of terrorists’ detention in Israel is, of course, not only a matter of a different judicial review process, compared to the one applying from detention taking place within Israel or the West Bank and not in the faraway battlefields of Afghanistan or Iraq or at the Guantanamo detention camp, but from greater judicial interventionism as a doctrine of the Israeli bench.

It is difficult to assess the systematic strategic or humanitarian – impact of the different judicial review processes in the two countries. Any comparison would be highly debatable due to the very different nature of both the wars, and the structure and culture of government in each case. In addition, it must be borne in mind that judicial review of terrorist detention proceedings in both countries simultaneously sets the scope of permissible measures. When the courts deem a policy or practice lawful, it becomes harder for leaders to forego that practice and appear as assuming a “softer” stance on terrorism. This is especially true where the political climate is one that demands a tougher and more aggressive stance.

One observation is, however, worthwhile; not so much with regard to judicial review but more in consideration of legal constraints more broadly. At least in the American context, the realization has been that despite the oft-voiced claims that the existing international laws of war are over-constraining humanity. This use of universal jurisdiction by the Spanish judicial elite has been perceived by the Israeli government as an intervention in Israeli’s internal affairs, especially due to its own investigation of the matter. Senior government officials and political elites immediately expressed their deep concerns, asking the Spanish government for an immediate suspension of the legal procedures against their senior officers and politicians. While in Israel, widespread media the expansion of the use of universal jurisdiction has been criticized for risking bilateral relations through judicial activism, in Israel it has been condemned by leading politicians for being used by left wingsters to promote a pro-Palestinian agenda in the region without sufficient regard for the complexity of the conflict and the continuing terror threats against Israel.

Because Spanish law permits individual prosecutions, including civil groups such as human rights organizations, to directly initiate criminal procedures without executive branch screening, a reality has emerged whereby the Spanish judicial system can be easily influenced by non-Spanish groups to further their political agendas. While providing some signs of improvements, the discussions between Israel and Spain, both in implementation of the so-called doves, have not to date lacked the necessary legal dialogue between lawyers and judges at both ends of the Mediterranean. It is an understanding and deeper analysis of Spanish and Israeli law were absent, where the battlefield has been left to populist political voices.

In late June 2009, the Spanish government went to close this gap, and through the leadership of Casa Sefarad, a Spanish institution dedicated to fostering a closer relationship between Spain and the Jewish community, it arranged meetings (called “Legal Encounter” in the official invitation) between leading Spanish lawyers and judges and their Israeli counterparts to discuss the legal system of both countries and the use of universal jurisdiction, and especially the so-called Spanish legal system. I was invited to attend these meetings as the United Nations Representative of the International Association of Jewish Lawyers and Jurists. Some of my reflections on universal jurisdiction in Spain are a direct result of those meetings.

As was made clear from the outset, the principle of universal jurisdiction is rooted in both Spanish and Israeli jurisprudence through historical precedents and legal reasoning. Israelis remember very well bringing infamous Nazi Adolf Eichmann to justice in Israel in 1961.2 Spanish also remember the debate surrounding Augusto Pinochet’s arrest in London, based on universal jurisdiction principles, after being indicted in Spain in 1998 by Extraditing Magistrate Baltasar Garzon.3 Pinochet was eventually released in London and returned to Chile in 2000.

The internationalization of both legal systems makes it possible in both Spain and Israel to prosecute suspects for alleged grave human rights violations based on each country’s universal jurisdiction national law. Though Israel is presently in a state that in principle rejects internationalization of the internal and regional conflicts, Israel was extremely influential during negotiations on the 2002 treaty establishing the International Criminal Court at The Hague. Israel eventually decided not to sign the treaty as it was not convinced that the court would be effective and impartial.

There is a significant consensus among leading Spanish and Israeli lawyers and jurists that universal jurisdiction is an important and necessary international legal tool to fight impunity and bring the world’s worst criminals to justice. Universal jurisdiction can also press national courts to try those criminals locally or bring about a policy change that allows these courts to do so. The controversy focuses on what is the preferred model for universal jurisdiction on the national level – the so-called cases in Spanish courts in fact jeopardize the credibility and the legitimacy of its use in Spain and the rest of the world.

A close examination of the Spanish experience shows that its version of universal jurisdiction suffers significant procedural deficiencies. I would like to note some of the major ones. First, the current language of the Spanish law that provides for universal jurisdiction is very broad, allowing a wide range of acts even when they have no Spanish connection.3 Second, while in most jurisdictions, such as Germany and Israel, the executive branch is involved in some way in the legal process that implements universal jurisdiction, there is no official screening process by the Spanish government.5 That gives the National Court’s judges absolute autonomy to decide which cases to investigate – without executive supervision. It also opens the door to judicial activism outside the parliamentary boundaries, which creates a threat to the legitimacy of this important principle.

The complexity of the Spanish model is recognized in many Spanish circles. As it appeared from the conversations with many of its judges during the Legal Encounter, the Spanish Court is well aware of its limitations and especially of the risk of losing credibility as a result of prosecuting crimes that are too particular, prosecuting too selectively, and creating the impression that the court is serving political goals. In
fact, in addition to these structural challenges, there are weaknesses inherent to every national court that tries to implement universal jurisdiction. For example, the ability to accumulate sufficient evidence in a foreign jurisdiction in such complex and massive cases is very limited. In addition, since it is almost impossible to manage such a legal procedure without the support of the relevant foreign government, which in many cases is impossible to obtain, the process suffers from delays and may be rendered fruitless.

These technical and substantive difficulties have made Spanish judges more sensitive to the consequences of their decisions. Yet despite these challenges, the Spanish National Court still seems eager to continue its role in fighting impunity and promoting global justice within the boundaries of the Spanish law on universal jurisdiction. This reality calls for a better understanding of the Spanish point of view and for a legislative change that is discussed below.

The tension between Spain and Israel over the use of universal jurisdiction on the national level is of special importance as the case to date involving Israel dealt with Israel’s fight against terrorism, which both Spain and Israel have for many years struggled against. Both countries are sophisticated democracies seeking to develop advanced legal tools to balance their need to combat terrorism with their obligation to protect human rights.

Israel has been fighting terrorism since its establishment in 1948. During the second Intifada (2001-2004), more than 1,000 soldiers and civilians were killed in terrorist attacks in multiple and near-continuous terrorist attacks. The Spanish people have experienced many terrorist attacks by the Basque separatist organization ETA (Euskadi Ta Askatasuna - Basque Homeland and Freedom). On 11 March 2014, an al-Qaeda attack on a Madrid commuter train, an event known in Spain as 11-M, killed 191 people and injured more than 1,400. Dealing with terrorism, a growing phenomenon of human rights violations, allows these countries to gain a better understanding of the crimes, develop preemptive actions against them, and prosecute them more effectively. However, different legal approaches towards terrorism could lead to controversial legal procedures.

In Israel, the military and the judiciary treat Palestinian terrorist attacks as military activities subject to the law of armed conflict. In Spain, by contrast, and influenced by its own experience, the dominant approach is criminalization of terrorism and prosecution of perpetrators under Spanish criminal law. In fact, there are even Israeli legal scholars who look at the war on terror in Israel as a non-armed conflict.6

These two approaches, driven by the different characteristics of terrorism in each country, have significant consequences for the discussion of universal jurisdiction. Thus, counter-terrorism actions that can be legitimate and lawful through Israeli eyes could be considered as a violation of human rights, subject to investigation and prosecution by international standards of human rights.

The Spanish National Court. We should also remember that some international law principles that may apply in these cases, such as proportionality, are in practical terms ambiguous and hard to apply, regardless of the armed nature of the conflict. This controversy around the substantive rules that should be applied in these cases adds another level of illegitimacy to the procedural ones described above, and may explain why the Israeli cases were at the heart of the debate about universal jurisdiction in Spain. When the National Court applies acceptable substantive rules to a clear case of grave crimes, supported by massive evidence and witnesses, its jurisdiction and legitimacy look less controversial. It may be the direction that Spanish courts should consider pursuing.

Looking at this complex legal-diplomatic picture, we all wonder where we go from here. The preliminary but important dialogue between lawyers and jurists from Spain and Israel was a unique opportunity for a thorough and non-political cross-examination of the judicial system and universal jurisdiction model of both countries. It also helped to better explain the struggle against terrorism in both places. Such professional encounters can avoid political pressure from both the government and the civic community, and permit discussion of the real challenges and opportunities found in the implementation of universal jurisdiction.

Indeed, in the real world outside this academic environment, several important developments have recently occurred and they place our debate in a different perspective.

First, the National Court judge responsible for the case against the former Israeli defense minister and military officers has decided to close the case and abandon the investigation.12 The National Court accepted the Spanish attorney general’s argument that there was already an investigation taking place in Israel into the air strike against the Palestinian who killed 14 civilians in July 2002. Although Israeli public opinion received this news with great satisfaction, there is no immunity against future cases in the National Court that involve alleged crimes by Israeli citizens.

Second, and more importantly, the Spanish

were applicable mutatis mutandis.

This difference in executive approaches to the law governing the war on terrorism should not be taken to denote a deeper inherent commitment of the former government to the rule of law than that of its American counterpart. Rather, it signals the cognizance by the executive branch of a singularly proactive Israeli Supreme Court, which has essentially made its mark on constitutional guarantees of standing or justiciability. In devising any and all of its counterterrorism strategy, the Israeli government takes into account the highly probable evaluation of the lawfulness of the strategy by the Supreme Court. Unlike their American counterparts, some of whom were reported to be “surprised” with the U.S. Supreme Court’s decision in Bush v. Ashcroft and thus to down the Military Commissions Act of 2006 as unconstitutional, Israeli officials may feel apprehension about the Israeli Supreme Court’s decisions, but they would not be surprised.

Over the past eight years, the United States Supreme Court (hereinafter: “SCOTUS”) has rendered only a handful of cases, in highly divided opinions, reviewing the government’s handling of terrorism; all these cases were confined to various aspects of the detention and trials of suspected terrorists. Over the same period, the Israeli High Court of Justice (hereinafter: “HJC”) delivered scores of decisions addressing the detention of terrorists, targeted killings, reliance on the local population for military operations, humanitarian protection of Palestinian civilians, the legality of preventive measures such as the security barrier, the economic blockade of Gaza and more. No aspect of the war on terrorism in its broadest contours, including military operations, the occupation of the West Bank and the varying degrees of control over Gaza, has been kept out of the sphere of judicial review.

In the United States, it would have been unthinkable for the Supreme Court to intervene in the strategic military strategy of American forces in Iraq or Afghanistan. A range of constitutional considerations might render extraterritorial reach of the Constitution to a strong commitment to separation of powers (manifested, in part, through the doctrines of justiciability or political questions), would have made any review of such operations highly improbable. But in Israel, the Supreme Court has done so several times, inquiring whether Palestinian residents had sufficient access to water, electricity, medical services and the like. The most striking example of this practice took place in April 2002: Operation Defensive Shield was a military operation to remove control of six heavily occupied Palestinian cities in the West Bank, following “Black March,” the deadline

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in shaping counterterrorism strategy.
The American global war on terror is diffuse and far-reaching; so much so that it is almost stripped of geographical boundaries. In Afghanistan and Iraq the form of ongoing combat, in which terrorism is intertwined with other types of threats, such as insurgents and rebels. Elsewhere, as in Pakistan, violence is more sporadic, and often intertwined with the Pakistan army's efforts to fight al-Qaeda and Taliban elements. In the Administration's eyes -- under President Bush and under President Obama -- the 2003 Authorization to Use Military Force was insufficient to allow the use of military force against suspected terrorists-enemies anywhere, at any time. Where military force is not used, for instance against terrorist targets in Europe, this is for political considerations more than for legal constraints. In addition, greater cooperation in investigations, intelligence gathering, and pre-emption efforts is more feasible and reliable.

The Israeli war has been largely confined to the Gaza Strip and the West Bank, and in recent years almost entirely to Gaza, although the conflict is constantly fed resources from the Middle East and elsewhere. It is also, in various ways, tied to Israel's conflict on its northern border with Hezbollah, which has a deep hold on southern Lebanon. Despite its changing appearance, it is intertwined with an at least century-old national, ethnic, religious and territorial strife that is regional as well as local. The name chosen for the Second Intifada by Israel -- "The Wall and Flow" -- denoted its varying degrees of violence, ranging from a return to a law enforcement approach in the West Bank to a full-fledged war in Gaza in the winter of 2008-2009. The nature of the enemy is, correspondingly, more clearly defined. Palestinian armed groups, although having ties to and reliant on external powers (most notably Iran and Syria), operate mostly from within the Palestinian territories against Israelis in Israel. In comparison, al-Qaeda is believed to be a geographically-dispersed network consisting of many semi-independent cells operating around the world -- New York, Bali, Mumbai, London, Madrid and elsewhere. Palestinian armed groups are also more easily identifiable: for the most part, their members wear uniforms, and comprehensive lists of members and activists are kept. al-Qaeda members do not wear uniforms or any other distinguishing insignia. There is no known central database of its members, and the far-and-wide nature of their associated cells makes them much harder to track.

Another crucial difference between the two wars on terrorism has been the degree of involvement of the respective domestic civilian populations. Notably, ever since 9/11, American civilians without ties to the fighting forces have been spared from the war on terrorism -- as indeed they were from the wars in Afghanistan and Iraq. In the War on Terror as a whole, there is an ever-present threat, and more cumbersome travel arrangements, but the fact that no Americans have been harmed by terrorist acts (excepting, until further information becomes public, the airplane attacks) undoubtedly affects the design of counterterrorism strategies. Israelis -- like Palestinians -- are part of the war, in a direct, immediate and continuous manner. The war is not in a faraway place, but at home. Whether in the manner of suicide bombings or of rockets launched at civilian populations, no part of Israel has been immune from attack. The vulnerability of the civilian population affects the public psyche in terms of its assessment of the threat and the place of the threat in daily life, and puts heightened pressure on the government to react in turn with force.

These differences in the characteristics of the war fought by United States and Israel might have accounted for the difference in the legal application of the war paradigm by each country. But in practice, the differences in how they have been handled -- in which law was applied, are no less attributable to the role which the supreme courts play in each country than they are to any objective strategic variances.

In the U.S., a country otherwise committed to an almost religious degree to the rule of law, legal constraints (mostly, international legal constraints) have been viewed by the federal Administration as no less than a threat to U.S. sovereignty. The National Defense Strategy Document of 2005 warned that "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international law, judicial processes, and terrorism." Even though the American sense of frustration vis-à-vis a hypocritical manipulation of international law and the use of "lawfare" as a tactic by political opponents is something many Israelis share, it would be unthinkable for an official Israeli document to group together international fora, judicial proceedings and terrorism. Moreover, whereas the notorious Office of Legal Counsel memo explained why U.S. domestic law was irrelevant and international law inapplicable to the detention or interrogation of suspected terrorists -- in effect creating a "no-law zone" for the war recently launched -- the Israeli Attorney General's position has from the start been that although existing international law was far from perfect for the current war on terrorism, the fundamental principles of the laws of war
Dear Friends,

I am honored to invite you to the Conference* of the International Association of Jewish Lawyers and Jurists, which will take place on Wednesday through Sunday, June 30-July 4, 2010 in London, England. The theme of this year's conference is "Democratic and Legal Norms in the Age of Terror." The Conference will also serve in its traditional role as an opportunity for you to meet Association members from around the world – lawyers, judges, legal advisors, academics, and many others. This year's Conference promises to be a particularly important one, given the battle now being fought against the delegitimization of Israel worldwide, including the use of legal procedures ("lawfare"), caused in part by Israel's response to terrorist attacks. We will be discussing at length how legal systems and international law deal with terrorists and the legitimate rights of a sovereign state to defend itself.

A limited meeting of a few of our members dealing with international law last June in Madrid demonstrated the utility of combating these issues in a continuing dialogue.

A tentative agenda for the Conference appears on the page opposite. The opening event will take place in the historic Gray's Inn. The panel discussions will be held at the School of Oriental and African Studies of the University of London.

I look forward to welcoming you at the conference.

Alex Hertman, Adv.
President

* All conference proceedings will be held in English.

Spring 2010

Judicial review of counterterrorism operations

A comparison of American and Israeli courts’ judicial review of counterterrorism operations reveals both similarities and differences in their opinions as to not only what constitutes lawful conduct, but also as to what constitutes war.

Gabriella Blum

Among the many shared aspects of the American and Israeli approaches to counterterrorism and of those of Europe, the mainstay European view is that the threat of terrorism can and should be met through ordinary policing means and methods, just like any other crime. The cardinal reason for this divide is due to a European experience with terrorism largely limited to home-grown terrorists, rather than external threats (notwithstanding Palestinian terrorism in Europe in the 1970s that was directed mostly at Israeli or mixed Israeli-international targets). The ETA Basque separatists of Spain, the Irish Republican Army in Northern Ireland and England, the Baader-Meinhof Group in Germany, the Red Brigades in Italy – all were or are domestic groups, engaged in sporadic acts of terrorism intended to influence their own governments’ policies. To deal with this type of threat, investigations, searches, arrests and trials, including through international cooperation, were all effective, in the same manner that American domestic law enforcement was sufficient to deal with the sporadic threats of Timothy McVeigh or Ted Kaczynski.

It is far from being the case, however, that traditional law enforcement means alone would suffice for meeting the threat of foreign terrorists, well-trained, military-trained and well-equipped, who employed sophisticated means to inflict continuous long-term substantial harm, and who consistently promised to keep doing so. Could international collaboration in searches or arrests alone succeed in meeting the threat of al-Qaeda around the world, including in countries such as Afghanistan or Pakistan where local cooperation in prevention and punishment could not be secured? In the Israeli case, a law enforcement paradigm would have been even more questionable, not to say meaningless, unless Israel were to reinvade and reoccupy Gaza and deploy thousands of troops (as well as establish a whole civic, policing and adjudicating mechanism within Gaza itself) who would conduct searches, arrests and trials.

The war paradigm has given rise to a wealth of further similarities between the Israeli and American experiences in fighting terror. The use of military power against terrorists and terrorist targets, the practice of targeted killings; the long-term detention of suspected terrorists without trial; and the infliction of inadvertent harm on civilians and civilian property; all alongside a host of law-enforcement measures such as border control, protection of installations, international cooperation in investigations and intelligence-gathering, intercepting terrorist finances and more. All of these practices were employed, in one form or another, to some degree or another, by both countries, long before the war on terror, but they have become much more widespread, public and constant in their current use.

There have also, however, been striking differences between the two countries’ experience. Some stem from objective differences in the types of war each country fights, while others arise out of the role of law, international and domestic – and even more so of courts.
Encuentro Jurídico / Legal Encounter

IAJLJ members participated in a remarkable two-day conference in Madrid last June on a wide range of complex legal issues relating to universal jurisdiction

Eli Schulman

A pplication of "universal jurisdiction"—the doctrine whereby a state prosecutes those alleged to have committed heinous crimes, regardless of any connection to that state—has increasingly become a hotly debated issue. Among the countries that have applied the principle most aggressively is Spain, whose internal law has for decades recognized the right of Spanish authorities to prosecute foreign citizens for crimes such as genocide, war crimes and crimes against humanity. Judges on Spain's Audiencia Nacional ("National Court"), which claims jurisdiction over certain classes of cases with national or international importance, have not hesitated to exercise that power. For instance, in 1998 Spanish Judge Baltasar Garzón Real issued an arrest warrant for former Chilean dictator Augusto Pinochet, leading to Pinochet's arrest in London.

In January 2009, a magistrate judge at the Spanish National Court opened an investigation into claims of alleged crimes against humanity by a former Israeli defense minister and six senior IDF officers. The case concerned the 2002 targeted killing of Hamas military- leader Salah Shehadeh: an IDF bomb that killed Shehadeh in his Gaza City home also allegedly caused the deaths of fourteen family members and neighbors, and injured many more. Spain's embrace of universal jurisdiction over the matter elicited criticism from those contending, among other things, that Israel's own highly active institutions provide a more-than-sufficient check on the IDF's use of force, rendering the exercise of universal jurisdiction illegitimate.

Against this backdrop, Spanish Ambassador to Israel Álvaro Inzunza reached out to IAJLJ to facilitate a dialogue concerning these complex issues. This initiative resulted in the formation of a delegation of some 20 Jewish (mostly Israeli) lawyers and jurists—including judges, professors, attorneys in private practice, and lawyers with experience in international law—who were led by IAJLJ President Alex Hertman and Deputy President Irit Kohn on a two-day visit to Madrid in June 2009. The delegation was hosted by Casa Sefarad Israel, a quasi-governmental institution created by the Spanish government and others, with the goal of promoting ties between Spanish and Israeli/Jewish societies.

Upon arriving in Madrid, the delegation was treated to a private tour of the historic and ornate Spanish Supreme Court, as well as the Spanish National Court. That evening, the delegation was honored as dinner guests of the Spanish Foreign Minister at his residence, the Villa Palace, together with leading figures in the Spanish legal community. Shlomo Ben Ami—Spanish historian, former member of Knesset, and Israel's first ambassador to Spain—greeted the participants.

The following day, the delegation spent a long and fascinating day engaged in intense exchanges on the topic of universal jurisdiction with Spanish representatives—including Spanish Attorney General Caridad Corde Pampido, Chief Justice of Spain's National Court Ángel Jannes Pecas, Chief Public Prosecutor of Spain's National Court Javier Zaragoza, and José Ricardo de Prada Salles, a magistrate at the National Court who previously served as an international judge at the Bosnia and Herzegovina criminal tribunal. The discussions included presentations by Israeli and Spanish representatives on Israel's and Spain's legal systems, Israeli and European approaches to universal jurisdiction; the laws of war; and challenges faced by democracies fighting terror.

Among the presentations by IAJLJ speakers were greetings from Alex Hertman; discussion of the Israeli approach to universal jurisdiction by Irit Kohn, former Director of the Department of International Affairs in the State Attorney's Office at the Israeli Ministry of Justice; a comparison of American and Israeli legal responses to terrorism by Harvard Law School's Professor Gabriella Blum; and consideration of the philosophical underpinnings of universal jurisdiction by Professor Assa Kasher of Tel Aviv University, codirector of the IDF code of ethics.

Two weeks later, on 30 June 2009, the Spanish National Court decided to abandon its investigation of Israeli officials in connection with the Shehadeh incident. In November 2009, the dialogue between Spanish
Our campaigns for human rights, our battles against anti-Semitism, our fight against terror and our struggles against delegitimization of the Jewish state are more important than ever. IAIJI cannot continue its vitally important work without your help.

Good News

We are delighted to announce that IAIJI members who file income tax returns in the United States may now claim donations under the 501 (c) (3) regulations of the U.S. Internal Revenue Code.

Donors may send contributions to P.E.F. Israel Endowment Funds, Inc. with a recommendation that the funds be used for the International Association of Jewish Lawyers and Jurists (950-30222218). Directives or orders for allocation cannot be accepted.

Please mail your recommendations and check (in US dollars only) to P.E.F. Israel Endowment Funds, Inc. (#950-30222218) to P.E.F. Israel Endowment Funds, Inc., 317 Madison Ave., Suite 607, New York, NY 10017. The minimum contribution accepted is $25. Checks must be drawn on a U.S. bank. At this time, P.E.F. cannot accept credit cards or bank transfers of any kind.

IAIJI members who file income tax returns in Israel are also eligible for a tax credit per section 46 of the Income Tax Ordinance when they donate to the association. Please mail your check payable to the International Association of Jewish Lawyers and Jurists at the address below. The minimum contribution accepted is NIS 100.

Your donation will help IAIJI pursue its mandate: the pursuit of justice.

brought down apartheid South Africa. They want the UN to do the same to Israel, using the same devices: encouragement of boycotts, divestments and other sanctions.

Given these circumstances, is there any chance to bring this anti-Israel propaganda effort to an end? Before answering this question, let us note what makes certain anti-Israel resolutions different from the many other resolutions adopted by the UNCA that have no practical consequences. It is that the most significant anti-Israel resolutions authorize the expenditure of UN funds for the operation of an anti-Israel propaganda apparatus that operates year-round and worldwide.

As the UN Charter provides that a resolution raising a budgetary question is an “important” question and as important questions require a two-thirds vote, the UN’s anti-Israel propaganda apparatus can be brought to an end if the “no” votes are more than one-third of the total number of “yes” and “no” votes cast.

That result can be attained if a sufficient number of “abstain” votes shift to “no” and/or a sufficient number of “yes” votes shifts to “abstain.” Taking the Goldstone vote as a starting point, a blocking one-third plus one vote would have been attained had 40 of the abstaining countries voted “no.” There is no doubt that this is a result attainable only if the EU decided to vote “no.” As Germany and Italy voted “no,” as did the Czech Republic, Hungary, the Netherlands, Poland, and Slovakia, it is clear that the most important votes needed for change in the EU voting pattern are France and the United Kingdom.

There is also no reason to consider all of the 114 “yes” votes a lost cause. It is appropriate to ask why countries whose entire economy is dependent on American tourism, such as the Bahamas, Barbados, and Jamaica, should consistently vote against Israel. Why should our North American Free Trade Agreement (NAFTA) partner Mexico and our Central America Free Trade Agreement (CAFTA) partner the Dominican Republic do so? And why should we find voting on the other side such states as Benin, Ghana, Mali, Mongolia, and Namibia, which, together, have received U.S. Millennium Challenge grants totaling close to $2 billion?

The simple answer is that the voting decisions are not made by the heads of government. It follows that it is indeed necessary, if one wants to effect vote changes at the UN, for the United States to reach out to heads of government. The Bush administration did this successfully, when, in the fall of 2006, it blocked Venezuela’s candidacy for a Western Hemisphere seat on the UN Security Council. Appeals to heads of government produced not only a blocking one-third plus one but actually a majority for the competing candidate, Guatemala. It was not possible to get the needed two-thirds for Guatemala, but, after 47 inconclusive ballots, both candidates withdrew and Panama was elected, a clear victory for the democratic side.

Understandably, one cannot expect the White House to become involved in UN voting on a continuing basis. That is why a group of members of the House of Representatives, under the leadership of Majority Leader Steny Hoyer and former Republican Whip Roy Blunt, have formed a task force committed to reaching out to the heads of government of countries friendly to the United States to call upon them to review and alter their voting patterns in the UNCA. It will take time to bring about change at the UN, but as the experience in 2006 with Venezuela’s candidacy for the UN Security Council demonstrated, it is an attainable goal.

A representative Richard Schimpert served as U.S. Representative in the UN Human Rights Commission, as Deputy U.S. Representative in the UN Human Rights Council and as Assistant Secretary of State for Human Rights. He now chairs the Board of Directors of the American Jewish International Relations Institute.

Notes:
4. Supra note 1.
5. DANIEL PATRICK MCKINHAN, A DANGEROUS PLACE 92-93 (1978).
6. Id.
9. A UN member state abstains at the UN not by being silent. When a roll call is ordered and other members vote “yes” or “no,” the member wishing to abstain actually votes “abstain.”
10. The Goldstone Report suggests in para. 1768, by induction, that the UNCA give consideration to using against Israel the parliamentary device that was used against apartheid South Africa in 1981.
Redeeming captives, but not at all cost

The public and private agony arising from the question of the cost of redeeming captives was deliberated by Jewish sages many centuries ago

Michael Wygoda

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The redemption of captives is a fundamental value within the Jewish ethos. From the earliest days of Jewish history, during the great war between the four kings and the five kings, recounted in the Torah reading of Lehi-Lechi, Abraham is noted for his military levy to save his nephew Lot from captivity.

They also took Lot, the son of Abram’s brother, and his possessions, and departed...When Abram heard that his kinsman had been taken captive, he mustered his retainers...and went in pursuit as far as Dan. At night, he and his servants deployed against them and defeated them...He brought back all the possessions; he also brought back his kinsman Lot and his possessions, and the women and the rest of the people (Gen. 14:12-16).

A concrete expression of the importance in Jewish tradition of redeeming captives is the importance assigned to it in Halakha. This can be seen in Maimonides, who writes: “There is no greater mitzvah than the redemption of captives.” This view is echoed by R. Yosef Kato, who adds: “Every moment that one advances the redemption of captives, where one could_delay it, it is as though he has shed blood.”

The Winograd Commission Report

Present-day decision makers have had to grapple with this issue when faced with the agonizing question of whether it is appropriate to release a large number of terrorists in return for a small number of captives. The alternative view is that this is a price that must not be paid, for a number of reasons: it may encourage future kidnappings; released terrorists will again take up arms against Israel and thus constitute a security threat to the country; or the release of lawfully tried and sentenced murderers negates fundamental principles of the rule of law.

This question evokes public opinion. It is a source of sleepless nights for Israeli decision makers, who find it difficult to withstand the pressure of the media and of the families of our kidnapped soldiers, who demand that everything be done to release them, not only when they are alive but even if it is known that they are no longer alive.

There has been almost no legal discussion or ruling on this issue, but it has been extensively considered by scholars of Halakha in the present generation.

The Winograd Commission, set up in the wake of the Second Lebanon War, devoted a complete chapter to this issue, under the heading “Kidnappings as a Strategic Threat.”

The Commission came out decisively against carrying out what it termed “insane deals.” The Commission considered both Jewish tradition and the Israeli social ethos, which apparently tend toward a different conclusion. In the Commission’s words:

We agree that, regarding such a crucial moral issue, which is related to the debate that, at least in part, revolves around the Jewish character of the state, it is also important to examine the unique heritage of Jewish culture and the Jewish religion, on all levels. However, as with many other issues, this very rich heritage allows one to find support for almost contradictory positions. We do not wish to expand here on this topic. Suffice it to say that the commandment of redeeming captives is of major importance in Jewish tradition, but this same tradition is very careful about not redeeming captives in a way that endangers others or the public as a whole.

The Commission’s report goes on to state:

No one can judge the families of the kidnapped soldiers for feeling that the major goal, perhaps the only one, is to
rescue their loved ones. But the national leadership must take responsibility not only for the kidnapped soldiers and their families, but also for the public as a whole. We believe that the Israeli public is cognizant of these issues, and can accept them, with all their implications, if they are discussed, consistently, responsibly and sensitively...It should be noted that, if the social ethos were such that the majority of the public believed it appropriate to pay any price to release a kidnapped soldier, this would raise serious questions regarding Israel's ability to survive in the region where it is located. Broad, sincere public support for the families' pain is not identical to a belief that the right thing for Israel to do is to move to free the kidnapped soldiers under all conditions and at all costs.

Let us examine the Jewish sources that touch on this sensitive, painful issue.

Rabbinic edicts in the past

From time immemorial, Jewish communities were known for spating no effort in attempting to redeem captives. However, concern to avoid the risk of saving captives, and thus the benefit of this important mitzvah would come at the expense of other important values. As a result, even by Second Temple times, and notwithstanding the general recognition of the supreme importance of redeeming captives, the Sages instituted what appears to be a cruel edict: that the demands of the captors should not be acceded to at any price, or, as the Mishnah puts it: "Captives should not be redeemed for more than their value, for the sake of 600 dinars." In the Talmud, the opinion was divided whether the concept of ḥiltu alam, which underlies this regulation, is an economic consideration to prevent the undistributed distribution of available funds, or whether the framers of this ruling acted on the basis of security considerations, to prevent there being an incentive for future kidnappings. Whatever its basis, it may be concluded that the Sages chose the public interest (security and economy) over the interest of the captives. Thus, it is incorrect to say that Jewish tradition requires that everything be done and any price be paid to rescue a captive. It is more accurate to say that they prefer the public benefit over the individual benefit, even to the point of instituting a regulation to this effect, so that the public interest could withstand the pressure to give preference to the private interest.

It may be argued that the ruling, that captives should not be redeemed for more than their value, is not relevant in the present case. This may be because it does not apply when the life of the captive is in danger, as held by certain halachic authorities;22 or because it does not apply to soldiers, as held by Rabbi Shaul Yisraeli,23 or because the circumstances today are totally different from those of the times of the Sages, in that kidnappings for purposes of extortion are, as in the cases described by the Sages, radically different from kidnappings as part of a nationalist struggle. The question remains: What would be law, in the absence of an established ruling in regard to the danger involved in releasing terrorists? Is it obligatory to do everything to save the life of the prisoner, including making a "payment" that involves a future danger of increased terror and that creates an incentive for additional kidnappings? Or is it perhaps forbidden to do anything that may pose a future danger to others? Or is Jewish Law neutral on this issue, thus making the redemption of captives in these circumstances a matter left to the discretion of the country's decision makers, who could then take the national interest into account?

Rescuing another at risk to one's own life

The question of whether a person is obligated to put himself at risk to save another from certain danger has been discussed at length by the rabbis. Those authorities who considered the question of freeing terrorists in order to obtain the release of Jewish prisoners gave a great deal of thought to this issue. A wide range of Talmudic sources was cited in support of both sides of the argument. We will suffice with presenting the conclusions drawn from those discussions.

In the view of the majority of Halakhic authorities, a person is not obligated to place himself in a position of real danger in order to save another, but he is permitted to do so. There would thus apparently be no impediment to releasing terrorists in order to save soldiers or civilians, even if release would entail a possible future risk. In other words, the community, through its elected representatives, may choose to accept this risk. This position is described by Rabbi Yisraeli.24 And it appears that just as the individual is permitted to endanger himself in such a case, so too the Government was able and allowed to do so, and to agree to on South Africa to end the apartheid regime. The clique that had begun to manipulate the UN chose Burundi to offer an amendment that referred to the "united alliance between African colonialism, South African racism, Zionism and Israeli imperialism." The amendment was adopted by a two-to-one majority. By linking Zionism with South African racism, many of the members of the anti-apartheid bloc had failed to enter into the new alliance. This was the first shot in the druminfire that has continued at the UN to this very day: equating Israel with apartheid South Africa.

The government of Burundi of those days brought unique qualifications to the discussion of racism. In the preceding year, its army, led by Tutulisi, had killed about 100,000 Hutus, for no reason other than their ethnicity. To be sure, Burundi is a vastly different country today. In recent years its voting record on Israel-related issues at the UN has been one of the better ones. Still, the Burundi initiative of 1973, unabashedly initiated by the UN's anti-democratic clique, was the first effort to use the issue of Israeli to bring sub-Saharan African states into the anti-democratic bloc at the UN. It allowed the Nam to become a subsidiary of the Soviet bloc at the UN.

Thus, in 1973, Cuba and Libya created the alliance that has dominated the UN General Assembly ever since. Daniel Patrick Moynihan, who led the US delegation to the UN from 1973 to 1979, entitled the memoir of his UN days "A Dangerous Place." It remains a dangerous place to this day, as is well illustrated by the fact that the president of the General Assembly for 2008/2009 was a Nicaraguan aligned with Cuba, and that he was succeeded by a Libyan, who is serving the 2009/2010 term.

Except for a short period of disarray that followed the collapse of the Soviet bloc in 1989, the UNGA agenda appears to have been set by a small clique of UN operatives in which Cubans play a key role. This unusual strong role played by Cubas is brought about by the Cuban foreign ministry's personnel policy: A Cuban diplomat assigned to the UN stays there for years and truly learns the business of multilateral diplomacy. Other missions, by contrast, rotate their UN diplomats every three or four years.

But how does that small clique of operatives get its message to the large number of members who are prepared to vote the party line, known at the UN as the "NAM or the G-77 "consensus"? When I served at the UN, I was offered an explanation of the phenomenon by an ambassador from a NAM state. In the course of our conversation, I asked whether he knew how the NAM consensus was formed. When I told him that I did not know, he said: "You know that we used to be on the other side." By that he meant on the pro-Soviet side. He continued by relating that on the day preceding any meeting of the NAM caucuses, which had 101 members at that time, the friends of the Soviet Union, about 17 or 18 states, would have a special meeting. When they were all assembled, a small group would enter the room to meet the Cubans. That group would give out instructions on how the assembled representatives should act the next day at the meeting of the full NAM caucus. Each representative would be assigned a specific task, to make a motion on a position to be taken by the NAM, to be the first speaker in support of a motion, or to be the second speaker in support. Then, the next day, when the full caucus met, the whole scenario would be played out. My colleague concluded his account of NAM procedure by saying: "And there sits the silent majority and just goes along."

There is another aspect to the Cuban performance. While there are missions to the UN that operate under specific instructions from their respective governments, there are many other missions that receive no specific instructions, allowing their representatives at the UN to make their own decisions on how to vote. It is that aspect of the UN system that has been fully utilized in building the anti-democratic bloc. For one, arrangements are made for missions to be rewarded for their cooperation by being elected to positions in the UN system that are of special interest to them. For another, an informal job placement service operates at the UN that enables relatives of cooperating diplomats to obtain jobs at the UN Secretariat. As one diplomat once said to me: "After you've been at the UN for a little while, you start playing the UN game and you forget about your country."

I also recall an incident from the time I represented the United States at the UN Human Rights Commission. Having done the needed paperwork very work, I had gotten a resolution adopted that the Cubans and the Soviet bloc had opposed. Immediately following the vote, the Cuban representative rose to accuse me of having behind some of the representatives so that they would vote with the United States. After the meeting had adjourned, I asked colleagues from other missions whether that really happens at the UN. They all thought I was terribly naive. "Of course it happens," they said. "The Cubans do it all the time. So do the Libyans."

To return to the events following the 1973 Burundi amendment to the anti-apartheid resolution: as we know, so well, having developed the theme of correlating Zionism with apartheid, the other side
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predecessor. Now, 66 years later, as we look at the UN Charter's very first statement of purpose, that of maintaining international peace and security, we can hardly say that the UN's record in that field has been a resounding success. International moral remakes its risk.

The world's inability to use the UN to advance its goals makes it more obvious that the use of force and security does not mean that none of the purposes of the Charter have been served by the UN system. Progress was made in its early years in the attainment of another purpose set forth in Article 1, Section 3 of the Charter: "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in encouraging respect for human rights and for fundamental freedoms." The Security Council was hamstrung, from the very start, by the Soviet Union's "nietz" to any effort to maintain international peace and security, except for one instance: the Soviet's tactical error, when North Korea invaded South Korea, of abstaining from the Security Council, allowing the Council to take meaningful action. The General Assembly, by contrast, was able to function effectively. The world's democracies, constituting a majority of the General Assembly in the early years of the UN, saw to it that Article 1, Section 3 of the Charter was implemented. Following up on that, the Charter's promise that the UN would promote respect for human rights, the UN's Economic and Social Council established in 1946 the UN Human Rights Commission.

Under the leadership of Eleanor Roosevelt, the Commission promptly went to work on drafting the document that became known as the Universal Declaration of Human Rights and which precisely spelled out what was meant by the term "human rights." It is noteworthy that in 1948, when the Universal Declaration was adopted by the UN through the affirmative votes of 48 of its 56 members, no member voted "no." Eight members, six Soviet bloc states plus Saudi Arabia and South Africa, abstained. In these early years, the UN also created other entities whose task it was to implement the UN's commitment to humanitarian work, such as the World Health Organization, the United Nations Children's Fund, and the Office of the United Nations High Commissioner for Refugees, all three of which have done highly useful work and function well to this day.

The truly creative period of the UN ended in the early 1970s. This happened as a result of the extraordinarily clever maneuvering of the totalitarian regimes represented at the UN and the failure of the democracies to match their manipulations. From the founding of the UN until 1960, the Soviet bloc had consistently been outvoted by the democracies. That was no longer to be the case.

To be sure, the diplomats representing the Soviet Union and the Eastern European satellites at the UN lacked the finesse needed to succeed in a parliamentary setting in which more blunt instruments can be used even if they find close allies with the skills to build a new majority bloc in the UNGA. These highly competent allies were the diplomats representing Cuba's Fidel Castro at the UN.

Castro assembled a cadre of diplomats that began building a network of international institutions that would operate in opposition to the United States. Though he was clearly aligned with the Soviet bloc, Castro had been able to get Cuba admitted to the Non-Aligned Movement (hereinafter "NAM") and in due course turned it and a parallel organization, the Group of 77 (hereinafter "G-77"), into mouthpieces for the Moscow line.

An important step on the way toward taking control of the NAM and the G-77 organizations was for Castro to link up with the Arab League and the Organization of the Islamic Conference. At its September 1973 Algiers Summit, where Castro sought to line up the NAM with Moscow, he was initially challenged by Libya's Muammar Qaddafi, who wanted the UN to remain truly non-aligned. It was then that Castro appears to have realized how he could best attain his goal, by brokering diplomatic relations with Israel and adding Israel to the United States and the entire Soviet bloc's enemies list at the UN.

Castro had no genuine interest in the Palestinian cause. The purpose of his move in 1973 and in Cuba's key role since then in the anti-Israel effort at the UN was to build a strong bloc at the UN of opponents of the United States and of the West in general. He was aware that between 1959 and 1972 the UN's membership had increased by more than 60 percent, from 52 to 132. Thirty-five of the 90 new members belonged to the Organization of the Islamic Conference (hereinafter "OIC"), founded in 1969, or were newly-independent African states, or both. What Castro understood was that by breaking ties with Israel, he would be able to get Qaddafi's help in lining up the votes of the OIC. But there was still the question of how to reach out to those African states that did not belong to the OIC.

It did not take the Castro and Qaddafi alliance very long to resolve that issue. Only weeks after the September 1973 NAM summit, the General Assembly considered a resolution that called for more pressure negotiations for the release of terrorists, even though there was serious doubt as to whether this would lead to further waves of violence, so that saving those who are in fear for their lives involves placing others at risk. For the Government, being elected by the public, has the authority to do that which an individual may do. It has the final word in all instances requiring a decision, as the representative of the public as a whole. Hence, the Government's agreement in this case did not contravene the laws of the Torah and the Halakha [emphasis in the original - MW].

From Rabbi Yisrael's comments, the apparent conclusion is that, even though Jewish law does not require the release of terrorists in exchange for the release of prisoners, it does not prohibit it. If it falls into the category of radical, discriminatory action, and it is given to the decision makers to determine what would be in the interests of the state, and to consider the relative profit and loss involved in such a move. However, this conclusion ignores one critical fact, as we shall explain below.

The laws of war

The fact that the soldiers were taken prisoner by the enemy in a war against terror, in which the kidnapping of soldiers or civilians becomes a strategic threat to the state, rather than merely a criminal act against the community, is a decisive consideration that demands the establishment of clear limits to the price that can be paid for their release. In such a case, not only is there no obligation to do everything to release the prisoner, but it is even forbidden to acquiesce to every dictate of the captors. If private overrides public interest, our chance of victory in a war imposed on us is lost. If Hamas were to demand, for example, that in return for the release of a kidnapped soldier, we supply them with weapons, tanks and aircraft, would anyone consider accepting according to their demand? The answer, of course, is no, and not only because of the risks involved.

Capitulation to the enemy's demands to free terrorists in return for the release of prisoners is not just a painful cost, but a loss in battle. After all, we are commanded to fight enemies that come to attack Jews, and in war a unique set of halakhic principles, binding on the community as a whole, comes into play. Under these principles, the duty of saving individuals, which applies so strongly in peacetime, makes way for pursuing victory by the nation as a whole. In wartime, it is even a mitzvah for the individual to give his life to save the many. Hence, one may not yield to the enemy for some private interest that is in danger, no matter how important or precious it may be. This is a basic, universally accepted principle in the conduct of war.

A leader who does not follow it may doom his people to subversion. This is especially true in regard to soldiers. After all, every soldier is required to endanger his life to protect his homeland. If so, why should things change when the soldier is taken prisoner? Is it really appropriate that a country undertake to free him, notwithstanding the risks to its security?

This idea also appears in the writings of the late Rabbi Yisrael Kaminetzky, one of the leading rabbis and heads of Agudat Yisrael in the United States. Rabbi Kaminetzky opposed the payment of an enormous ransom for the release of Rabbi Yitzchak Hutner, who in 1970 was on an airplane attacked when flying between Israel and the United States and forced to land in Zanzibar, Jordan. Rav Hutner's students collected an enormous sum of money, and attempted to induce the U.S. administration to ransom him. They based their efforts on a halakhic ruling that the principle that "captive should not be redeemed for more than their value" did not apply in respect to outstanding rabbinical scholars. Rav Kaminetzky opposed their actions, and stated his objections as follows:

For this calculation is not correct at all. The whole law of redeeming captives only applies in peacetime, but in wartime one cannot say that one is obligated to cease fighting in order to ransom the captives. By doing so one aids the enemy in the middle of the war, for by giving large sums of money to the enemy they will be able to further strengthen their military position.

This is all the more so in regard to the release of terrorists.

There are those who would argue that it is necessary to pay any price to release captured soldiers, if for not, there would have a negative effect on the morale of our troops and their willingness to fight. In response, one may say that it is indeed important for soldiers' morale that they know that, if God forbid they should fall into enemy hands, the Government of Israel and the IDF will take all possible operational steps to release them, as in the Entebbe operation or the operation to free Nachshon Wachsman. Such operations, which
The UN’s challenge to democracy

Clever maneuvering by totalitarian states at the UN puits international morality at risk.

Richard Schiffer

As the first decade of the 21st century approaches its end, we need to note that in recent years millions of civilians have been killed in interethnic warfare in the Democratic Republic of Congo, hundreds of thousands in Sudan, tens of thousands in Sri Lanka, and many thousands in Somalia and elsewhere. The United Nations, which under its Charter is to take "effectiver collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression," has been highly ineffective in discharging this most important of its missions. It should, therefore, not be surprising that it has taken no action to stop the acts of aggression against southern Israel that have for years emanated from Gaza.

But when Israel finally resorted to military action in self-defense, the United Nations system sprang into action, producing what has come to be called the Goldstone Report and committing to stay engaged in this most recent restatement of the blood libel. Nor is the Goldstone Report the only conspicuous recent anti-Israeli engagement on the part of the UN. In April 2009 we also witnessed a conference in Geneva that was dubbed "Durban II," an event purportedly organized to deal with the issue of racism, yet clearly designed to single out Israel for castigation.

These recent UN activities, with their anti-Israel and anti-Semitism underpinning, are only the tip of the UN iceberg. But, to use another metaphor, at the UN Israel is only the canary in the coal mine. The totalitarian dominating the United Nations General Assembly (hereinafter "UNGA") make full use of the Assembly and its oftshoots not merely to attack Israel but to campaign against democracy, civil liberties, and the rule of law. They are engaged in a campaign against the basic principles of the Enlightenment, principles that were enshrined in the UN Charter. In pursuing that goal, they have found Israel to be the easiest and most convenient target.

We are now witnessing the third major totalitarian attack on the principles of the Enlightenment. In its modern form the ideology of democracy and human rights emanated from the Netherlands in the 17th century. It then spread to the United States, England, France, and Germany in the 18th and 19th centuries, and beyond that region in the 20th century to such countries as India, the world's largest democracy, as well as to Japan, South Korea and many smaller non-Western countries.

In the course of the 20th century we experienced not only Hitler's attack on the Enlightenment, which led to World War II, but also Stalin's repressive and expansionist policies, which precipitated the Cold War. Both World War II and the Cold War were conflicts resulting from profound differences in ideology. And now, in the 21st century, those of us whose way of life is based on the principles of the Enlightenment are subjected to the third totalitarian attack, an attack undertaken, strange as it may seem, by an informal de facto alliance of neo-fascists and neo-communists, one that unites Iran's Mahmoud Ahmadinejad with Venezuela's Hugo Chavez.

It is in 1936 that Emperor Haile Selassie of Ethiopia, addressing the League of Nations Assembly, appealed for action against Mussolini's Italy, which had invaded his country. He warned:

It is collective security: it is the very existence of the League of Nations. It is the confidence that each State is to place in international treaties...In a word, it is international morality that is at stake.

The Emperor's words were heard but no meaningful action was taken. The League quietly faded from the world scene as World War II approached. It had failed in its mission. When the League's successor, the UN, was created in 1945, it was hoped that it would function far better than its
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fountain of knowledge who knew the lay of the land like the back of his hand and always enthusiastically responded to our requests to speak out at the United Nations, to give advice, to bring clarity to complex situations or to approach the right person in order to support Israel’s

With the passing of generations, people of Daniel’s caliber are a dying breed, just at a time when Israel’s challenges are mounting. He will be sorely missed by all his friends and colleagues at the Ministry

of Foreign Affairs, and especially by us, the Israeli diplomats in Geneva.

When I searched for words to describe you, Daniel, the wonderful poem of Natan Yonatan came to mind and I realized that there were no better words to describe you than his:

Where are there men
Like that man
Who was like the sweeping walnuts

Hadasa Ben-Israel Honorary President of the IAUJL and a retired Israeli judge.

developing to part one of the terrorists to be freed as part of a prisoner exchange; HJC 1803/91 Yoel Katz v. Government of Israel, P.D. 45(3): 383. More recently, however, the view has been expressed that the justices should not necessarily refrain from examining the reasonableness of the prisoner releases. See HJC 914/94 International Organization of Victims of Arab Terror v. Prime Minister Ariel Sharon, Tak-E 1994(1) 741 (Justice Cheshin ruled that the decision regarding the release was unreasonable); HJC 605/98 Yosef Shachar et al. v. Government of Israel, Tak-E 2006(3) 741 (the Court recognized the importance of establishing a clear policy on the issue, as recommended by the Wingrow Commission, but emphasized that its scope for intervention was limited; HJC 631/97 Supra note 3 Justice Rubinstein called for each release to be examined on its own merits, and for the value of the policy of releasing terrorists to also be considere, but his opinion was not accepted). See also Wygoda, supra note 1, para. 34. The author thanks his colleague in the Department for Jewish Law, Reuven Avodicia Yosef, and his colleague, Ray Yacov, in spite of their different conclusions, were in agreement in formulating the problem of the risk to the state in releasing terrorists as opposed to the risk of hostages being killed, and discussed it based on the customary halakhic principles of the risk to one person as opposed to the risk to another, on the private level. In contrast, we have seen that we have to relate to war from a communal perspective, in which other rules apply.” Regarding the rules of war in Jewish Law, see R. RACKOFSKY, SELF DEFENCE: SCAFOLDING THE INDIVIDUAL FOR THE MANY (Jerusalem 1983), pp. 123, and the sources noted therein.

20. See Ray Y. Ariel (supra note 19), ch. 19, n. 11 (p. 466): “In war one does not take into account considerations of risk to individuals, and any action required for the success of the war, for raising morale and for persevering with the task at hand is part of Klal Yisrael’s Hakhomer and it is a mitzvah to give one’s life for it.”

21. Regarding this limitation, see Wygoda, supra note 1.


23. In the story of Lot’s liberation, mentioned at the beginning of this essay.

24. See, e.g., Rabbi Eliezer Yehuda Waldenbourg, RMEH OTOH TSARAH, Part 12, ch. 57. Id. Part 13, ch. 101. Reuven Avodicia Yosef (supra note 12), Sec. 22-23, p. 37. Rabbi Reuven Avodicia Yosef (supra note 16), from sec. 6, p. 130.

25. This is the basis for the rejection of Rabbi Y. Zoldan’s position (supra note 20), p. 340, which equates the two and gives both halakhic legitimacy, and leaves the choice between them to the discretion of the authorities.

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27. See the U.S. Department of State Foreign Affairs Manual 7 – Consular Affairs, 7 FAM 1820 – Hostage Taking and Kidnappings: www.state.gov/documents/organization/64855.pdf (last visited 17 Nov. 2009). What is noteworthy in this document is that private individuals are also instructed not to pay ransom to kidnappers and, if they do so, they will not be entitled to the cooperation of the U.S. authorities. See also the Winograd Report, p. 505, para. 23.

28. This is, for example, the policy of the British authorities. For the document published by the Foreign and Commonwealth Office in March 2009, in which it is noted (p. 22) that it is government policy not to make significant concessions in order to free travelers taken hostage. The document is available at www.fco.gov.uk/resources/en/pdf/2885962.pdf (last visited 31 Dec. 2009).

29. This definition may be inconsistent with the principles of international law, in respect of declaring a state of war, but it is undoubtedly consistent with the principles of Jewish Law.

30. Unless the state’s military and political leadership assess that the morale of the soldiers and that of the nation as a whole is so low, that a loss in a single battle is needed to ultimately win the war. It is difficult to imagine that the situation could be so bad, and it is also to be hoped that we will never reach such a point. Appropriate steps should be taken to provide correct information, in the face of media pressure, so as not to reach such a situation (see also the Winograd Commission Report, p. 507, para. 32), for if not, Israel’s ability to survive in the face of its enemies would be called into question, as understood by the Winograd Commission.

Love of fellow man
Hadasa Ben-Itto
(Elyogt gonen in Hefeln)

There is no man who doesn’t contemplate his own mortality. I had always taken it for granted that at the end of my days, you, Daniel, will insist on talking for me, but I find myself here on this hot sunny day talking for you instead.

Only a week ago, you and Father had dinner in my own home with Hiri and Muriel Kohn and little did we realize that this would be our farewell.

Daniel, how shall I describe our friendship over all these years?

You were my friend, my brother, and for many years you were a constant presence in my life. We all admired and envied your close partnership with Esther. How did you succeed, where so many others failed, to instill in your children and grandchildren the values that guided your own lives?

Love of your fellow man, integrity without compromise, a modest way of life, endless devotion to each other and the pursuit of educational excellence not only for its own sake but for the benefit of others, and above all strong ties to your Jewish roots and a love of Israel. Even though you all live abroad your warm and enduring ties to the State of Israel were unseverable.

Esther, only you were born and raised in Israel, but collectively you, Daniel, and your children Gideon, Dinah and Jeremy, speak Barii Hebrew, and this very place, Karkur, served as the heart and nerve center of your and your grandchildren’s ties to this land.

Your house in Geneva was a global meeting point for all who cared for the welfare of Israel, a warm and open home, a warm family home for all your offspring, but also a center from which, Daniel, in your endeavouring and underestimated manner, you spread your passionate belief in the eternity of Israel.

From a young age, you linked your destiny to the destiny of the Jewish people. Today we find ourselves at a difficult crossroads and all those who care about the future of Israel will soon resist you.

All who came to know you and Esther came to know Karkur, its roots, the centrality it held in your lives, and the modest home in which you chose to spend your holidays. It is as if destiny read your mind and brought you here, Daniel, to this land, to Karkur, in order to complete the last chapter of your life and bring you to rest in the soil of the land you so loved.

You came from a dispensing generation of jurists who respected the letter of the law, but who also

6. Among these ongoing procedures we can mention cases involving Tibet, Rwanda, and Guatemala.
9. Supra note 3, art. 23.4.
10. Id.
16. Id.
17. Id.
18. See, for example, HCJ (High Court of Justice) 7/69, The Public Committee against Torture in Israel v. The Government of Israel (14 December 2006)
19. See, for example, HCJ 2056/04, Beit Sourik Village Council v. The Government of Israel, 56(5) Pisgat Din 817 (Reports of the Supreme Court of Israel).
Humanitarian law and Operation Cast Lead

Israel’s Supreme Court denied petitions claiming that the state, in violation of customary international humanitarian law, the constitution of the International Criminal Court and Israeli public law, held back aid to Gaza Strip residents and hindered the repair of its public utilities during Operation Cast Lead.

Abstract by Raelin Rimon

In the Supreme Court

Sitting as the High Court of Justice

HCJ 248/09

Before: President D. Beinish, Justice Givens, Justice Rubinstein

Physicians for Human Rights et al., Petitioners in HCJ 248/09

Gisha: Legal Center for Freedom of Movement et al., Petitioners in HCJ 248/09

Against

Prime Minister et al. Respondents in HCJ 248/09

Minister of Defense Respondents in HCJ 248/09

JUDGMENT

President Beinish

President Beinish explained that for about eight years the towns adjacent to Gaza had been subject to the threat of rockets and rock-propelled grenades fired by terrorist organizations operating in the Gaza Strip. Following the ascendency of Hamas to power, terrorist activities had multiplied and strengthened, and the range of fire had spread over a considerable expanse of Israel, leading to civilian deaths and wounds, affecting the lives of all the residents of south-west Israel.

On 27 December 2008 the Israel Defense Forces (hereinafter: "IDF") had begun a broad military campaign in the Gaza Strip aimed at ending the rocket and grenade fire directed at southern Israel and changing the security situation caused by Hamas. During the course of military activities the Israeli Air Force attacked targets serving the Hamas regime and on 3 January 2009 ground troops, armored divisions and engineering forces joined the fighting inside the Gaza Strip. The military targets were located within areas populated by civilians and sometimes even inside houses. Unfortunately, the local civilian population suffered greatly as a consequence thereof.

Petitioners’ claims in HCJ 248/09

The Petitioners claimed that since the military campaign had started, on 27 December 2008, there had been many cases in which IDF forces had fired on medical teams engaged in performing their functions. Petitioners further alleged that the Palestinian Red Crescent Society and the International Red Cross had encountered severe difficulties that could last for hours in coordinating the transfer of wounded, for medical treatment, contrary to provisions of customary international humanitarian law, the constitution of the International Criminal Court and Israeli public law.

Petitioners’ claims in HCJ 248/09

This petition focused on the shortage of electricity in the Gaza Strip. Petitioners claimed that since 27 December 2008 the State of Israel had prevented the supply of any industrial diesel fuel into the Strip, with the result that as of 30 December 2008 the power station in the Strip (which supplied one-third of the electricity required by Gaza residents) had been completely shut down. Petitioners complained of damage caused to electricity lines leading from Israel and Egypt to Gaza, resulting in the disruption of power to residents, hospitals, the sewage facility and other essential facilities. Plaintiffs alleged that repairs were impossible because Israel was preventing the movement of necessary spare parts and because of the continuous battle that prevented Palestinian workers from being in the area. Petitioners specified the humanitarian damage to the civilian population resulting from the lack of electricity. Petitioners claimed that the control exercised by the State of Israel over the supply...
of electricity to the Strip, particularly when the IDF controlled larger swathes of the Strip, imposed a greater duty on the State regarding supplying the needs of the civilian population in the Strip in particular in relation to medical, water and sovereignty facilities.

Respondents' claims

Respondents argued that the petitions should be dismissed as overly general and non-judiciable and that the Court could not adjudicate such issues while the fighting was still in progress, if only because a true picture of the dynamic situation could not be presented to the Court in real time. At the same time, Respondents stated that the IDF was complying with international humanitarian law and that they accepted that the army was under a duty to meet the humanitarian needs of the civilian population even during warfare, as decided by the Court in H.C. 7474/04 Physicians for Human Rights v. Commander of IDF Forces in Gaza, 58(3) P.D. 385.

Respondents added that since the implementation of the disengagement plan in September 2005, there was no longer a situation of occupation in Gaza and the State of Israel had no control over events within it. Accordingly, there was no longer a "military commander", within the meaning of the laws of occupation, who could act within the territory of the Strip. Further, as there was no communication between Israel and the Hamas terrorist regime, humanitarian contacts had to be conducted with international bodies and the Palestinian civil committee located in Ramallah in the West Bank.

With regard to the various mechanisms established by the State of Israel to provide humanitarian assistance to the civilian population in Gaza, the Respondents set out the extensive preparations in terms of manpower and round-the-clock humanitarian operation rooms devoted to providing real-time solutions to humanitarian problems faced by the Palestinians as well as the increased cooperation between operational personnel and communication personnel designed to achieve the said goal.

With regard to the evacuation of the wounded, Respondents claimed that the IDF had been ordered to refrain from attacking medical personnel and ambulances except in cases where it was known that ambulances were being used for the purposes of war. Intelligence information showed that ambulances had been used to perform terrorist acts and transport rockets and ammunition and that even international humanitarian law provided that the protection afforded to those bodies ended in such circumstances. Respondents claimed that if any medical staff had been injured this was not the result of deliberate actions but rather the outcome of hostilities in the vicinity.

Regarding the supply of electricity, Respondents claimed that the State and the army had made every effort to establish a completely dependable electricity network and where damage occurred, efforts were continually underway to repair the damage.

Judicial review

President Beitarik rejected the State's preliminary contention regarding non-judiciable. President Beitarik noted that the Court had already held in a long line of cases that IDF activities were not performed in a normative vacuum. There were legal norms in customary international law, in treaties to which Israel was a party and in Israeli law that applied in times of war and required the provision of humanitarian assistance and protection to the civilian population.

The Court referred to the thousands of High Court cases dealing extensively with aspects of the rights of the residents of the territories in times of war. It noted that the situation in which the High Court considered the legality of military activities in real time was not unknown in view of the state of affairs in which Israel was continuously contending with terrorism aimed at the Israeli civilian population and the need to respond while meeting legal obligations that also applied during wartime. The Court also declared that it would not take any position regarding the manner of conducting the fighting or the wisdom of military decisions, but the Court's function was to see whether, within the framework of military activities, the obligation to comply with certain legal standards was being met both within the context of Israeli law and within the context of international humanitarian law.

In the present case hostilities were still underway and there was an objective difficulty in obtaining all the relevant details in real time. Nonetheless, the Court would make the effort to consider claims in real time in a manner that would allow effective relief to be given. Where all the information could not be gathered, the Court might consider the legality of particular activities in retrospect, following collection of all the necessary data, and during hostilities themselves the Court would focus in general on adherence to the principles of customary international law, international treaties and Israeli public law.

The normative basis

The normative basis applicable to the armed conflict between the State of Israel and Hamas was complex. At its center were the international obligations governing the conflict in this way raised a number of difficulties, the Court had already referred to the conflict as an international armed conflict in a number of judgments, for example, in H.C. 769/99 Public Committee against Torture in Israel v. Government of Israel (as yet unpublished, 14 December 2000), per Justice Bank.

...It should be noted that even those who think that the armed dispute between Israel and the terrorist organizations is not of an international character hold that it is subject to international humanitarian law or international human rights law.

Alongside the laws dealing with international armed conflict, the rules of belligerent occupation might apply. In H.C. 302/85 Zeman v. Minister of Defense, 575(3) P.D. 65, the Court held in the context of the laws of occupation in international humanitarian law depended on the existence of a potential to exercise administrative powers in the territory as a result of the entry of military forces and not necessarily on the actual exercise of such powers.

Recently, in H.C. 9132/07 Almog v. Prime Minister (as yet unpublished, 30 January 2009), the Court considered the changes in the factual and normative situation in the Gaza Strip following the implementation of the disengagement plan and the termination of the Israeli military rule in the Strip. The Court held that:

Since September 2005 Israel no longer has effective control of what happens in the territory of the Gaza Strip. The military administration that governed the territory in the past was abrogated by a decision of the government, and Israeli soldiers are no longer present in this territory on a permanent basis, nor do they control what takes place there. In such circumstances the State of Israel does not have a general duty to ensure the welfare of the inhabitants of the Gaza Strip and to maintain public order in the Gaza Strip under all the laws of occupation in international law. Israel also does not have the effective ability in its present status to impose order and to manage civilian life in the Gaza Strip. In the circumstances that have been created, therefore, the above-mentioned international treaties on the State of Israel with regard to the inhabitants of the Gaza Strip derive from the state of hostilities that prevails between it and the Hamas organization, and the rules of the Strip, these obligations derive also from the degree to which the State of Israel controls the border crossings between it and the Gaza Strip and also from the connection that was created - after years of military rule of the territory, as a result of which for the time being the Gaza Strip is almost completely dependent upon the supply of electricity from Israel.

President Beitarik noted that it was not yet possible to draw conclusions with regard to the factual position in the Gaza Strip and the scope of control held by the IDF in the new situation, but this question did not need to be decided now, as the Court was of the view that humanitarian law was relevant to the petitions.

The Court held that the legal sources governing the combat operations included international humanitarian law, found mainly in the Fourth Hague Convention Respecting the Laws and Customs of War on Land, 1899 and the regulations annexed thereto, which had the status of customary international law, the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: "Fourth Geneva Convention"), the customary provisions of which constituted part of the law of the State of Israel; and the First Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 1977 (hereinafter: "First Protocol"), to which Israel was not a party, but the customary provisions of which were also part of Israeli law. In addition, the fundamental rules of Israeli public law applied. Under these rules, the army had to act, inter alia, fairly, reasonably and proportionately, while properly balancing the liberty of the individual against the needs of the public and while taking into account security considerations and the nature of the hostilities in the area.

President Beitarik held that the fundamental provision of international humanitarian law that applied while conducting hostilities was found in Article 27 of the Fourth Geneva Convention, which provided that protected civilians, rather than limited in territory that was subject to belligerent occupation or a territory under the sovereignty of the parties to the conflict were entitled in all circumstances, inter alia, to be humane treated and protected against all acts of violence or threats thereof. Nonetheless, these
of electricity to the Strip, particularly when the IDF controlled large swathes of the Strip, imposed a greater duty on the State regarding supplying the needs of the civilian population in the Strip, particularly in relation to medical, water and Sovereign facilities.

Respondents' claims: Respondents argued that the petitions should be dismissed as overly general and non-justiciable and that the Court could not adjudicate such issues while the fighting was still in progress, if only because a true picture of the dynamic situation could not be presented to the Court in real time. At the same time, Respondents stated that the IDF was complying with international humanitarian law and that they accepted that the army was under a duty to meet the humanitarian needs of the civilian population even during warfare, as decided by the Court in HCJ 4746/94 Physicians for Human Rights v. Commander of IDF Forces in Gaza, 58(5) FID 385. Respondents added that since the implementation of the disengagement plan in September 2005, there was no longer a situation of occupation in Gaza and the State of Israel had no control over events within it. Accordingly, there was no longer a "military commander" within the meaning of the laws of occupation, who could act within the Shari'a. Further, there was no communication between Israel and the Hamas terrorist regime, humanitarian contacts had to be conducted with international bodies and the Palestinian civilian committee organized in Ramallah in the West Bank.

With regard to the various mechanisms established by the State of Israel to provide humanitarian assistance to the civilian population in Gaza, the Respondents set out the extensive preparations in terms of manpower and round-the-clock humanitarian operations, devoted to providing real-time solutions to humanitarian problems faced by the Palestinians as well as the increased cooperation between operational personnel and communication personnel designed to achieve the same goal.

With regard to the evacuation of the wounded, Respondents claimed that the IDF had been ordered to refrain from attacking medical personnel and ambulances except in cases where it was known that ambulances were being used for the purposes of war. Intelligence information showed that ambulances had been used to perform terrorist acts and transport rockets and ammunitions and that even international humanitarian law provided that the protection afforded to these bodies ended in such circumstances. Respondents claimed that if any medical staff had been injured this was not the result of deliberate actions but rather the outcome of hostilities in the vicinity.

Regarding the supply of electricity, Respondents claimed that, for instance, a number of judgments, for example, in HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel (as yet unpublished, 14 December 2005), per Justice Barak:

...it should be noted that even those who think that the armed dispute between Israel and the terrorist organizations is not of an international character hold that it is subject to international humanitarian law or international human rights law.

Alongside the laws dealing with international armed conflict, the rules of belligerent occupation might apply. In HCJ 102/88 Zone v. Minister of Defense, 573(3) FID 125, the Court referred to the thousands of High Court cases dealing extensively with aspects of the rights of the residents of the territories in times of war. It noted that the situation in which the High Court considered the legality of military activities in real time was not unknown in view of the state of affairs in which Israel was continuously contending with terrorism aimed at the Israeli civilian population and the need to respond while meeting legal obligations that also applied during wartime. The Court also declared that it would not take any position regarding the manner of conducting the fighting or the wisdom of military decisions, but the Court's function was to see whether, within the framework of military activities, the obligation to comply with certain legal standards was being met both within the context of Israeli law and within the context of international humanitarian law.

In the present case, hostilities were still underway and there was an objective difficulty in obtaining all the relevant details in real time. Nonetheless, the Court would make the effort to consider claims in real time in a manner that would allow effective relief to be given. Where all the information could not be gathered, the Court might consider the legality of particular activities in retrospect, following collection of all the necessary data, and during hostilities themselves the Court would focus in its general prevision on the principles of customary international law, international treaties and Israeli public law.

The normative basis: The normative basis applicable to the armed conflict between the State of Israel and Hamas was complex. At its center were the international obligations dealing with international armed conflict. While characterizing

the conflict in this way raised a number of difficulties, the Court had already referred to the conflict as an international one in a number of judgments, for example, in HCJ769/02 Public Committee against Torture in Israel v. Government of Israel (as yet unpublished, 14 December 2005), per Justice Barak:

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the Gaza Strip derive from the state of hostilities that prevails between it and the Hamas government, the latter having agreements that these obligations derive also from the degree to which the State of Israel controls the border crossings between it and the Gaza Strip, and also from the connection that was created...after years of military rule of the territory, as a result of which for the time being the Gaza Strip is almost completely dependent upon the supply of electricity from Israel.

President Beiritch noted that it was not yet possible to draw conclusions with regard to the factual position in the Gaza Strip and the scope of control held by the IDF in the new situation, but this question did not need to be decided now, as the application of the laws of occupation in international humanitarian law depended on the existence of a potential to exercise administrative powers in the territory as a result of the entry of military forces and not necessarily on the actual exercise of such powers.

Recently, in HCJ 9132/07 Almog v. Prime Minister (as yet unpublished, 30 January 2009), the Court considered the changes in the factual and normative situation in the Gaza Strip following the implementation of the disengagement plan and the termination of the Israeli military rule in the Strip. The Court held that:

Since September 2005 Israel no longer has effective control of what happens in the territory of the Gaza Strip. The military administration that governed the territory in the past was abrogated by a decision of the government, and Israeli soldiers are no longer present in this territory on a permanent basis, nor do they control what takes place there. In such circumstances the State of Israel does not have a general duty to ensure the welfare of the inhabitants of the Gaza Strip and to maintain public order in the Gaza Strip under all the laws of occupation in international law. Israel also does not have effective ability in its present status to impose order and to manage civilian life in the Gaza Strip. In the circumstances that have been created, there is no basis to impose on the State of Israel with regard to the inhabitants of the Gaza Strip and the scope of control held by the IDF in the new situation, but this question did not need to be decided now, as the application of the laws of occupation in international humanitarian law depended on the existence of a potential to exercise administrative powers in the territory as a result of the entry of military forces and not necessarily on the actual exercise of such powers.
basic obligations were not absolute and had to be balanced against security considerations.

The Court noted that in the absence of any dispute between the parties with regard to the binding legal arrangements applicable to the combat operations being carried out in Operation Cast Lead.

The prohibition against intentionally harming medical personnel

The Court considered the various treaty provisions for the protection of hospitals, medical personnel, the wounded and members of international organizations but noted that this protection was not absolute and would be lost if it was made of medical facilities for non-humanitarian purposes, or if they were exploited for military purposes. Thus, medical personnel were only entitled to full protection when they were exclusively employed for, or in search for, evacuation, transport or treatment of the wounded or sick, and similar matters (Articles 24-26 of the First Geneva Convention for the Amendment of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 (hereinafter: "First Geneva Convention")). whereas the protection of medical facilities would cease if they were used "to carry, outside their humanitarian duties, acts harmful to the enemy" (Article 21 of the First Geneva Convention; Article 19 of the Fourth Geneva Convention).

The duty to allow the evacuation and medical treatment of the wounded

President Beninich noted that international humanitarian law also required the parties to allow the evacuation and medical treatment of the wounded (Article 16 of the Fourth Geneva Convention). Article 15 of the First Protocol provided that medical personnel should be allowed access to every site where they were needed, subject to supervision and security measures that were essential to the relevant party.

The duty to ensure the needs of the civilian population

The Court explained that one of the fundamental principles of international humanitarian law was the principle that distinguished combatants and military targets from civilians and civilian targets, and granted protection to the latter. The protections given to the civilian population included the duty to allow free passage of humanitarian medical supplies, subject to several restrictions (Article 23 of the Fourth Geneva Convention). Article 70 of the First Protocol provided more general and broader duty, whereby parties to

a conflict were obliged to allow the passage of articles that were essential for the civilian population at the earliest opportunity and without delay. Article 30 of the Fourth Geneva Convention required parties to a conflict to allow citizens to contact the Red Cross or similar organizations in order to receive assistance.

From the general to the specific

The Respondents did not repudiate the above international law obligations. However, the conflict was complex. Hamas authorities refused to allow the IDF to evacuate the wounded for treatment in Israel and cynically exploited the humanitarian ceasefires, which were initiated by the IDF, in order to rearm and carry out attacks against the IDF. Thus, it appeared that the dispute between the parties did not relate to the legal arrangements that bound Israel, but to the manner in which they were exploited to be discharged of facto.

The Court considered the preparations made to contend with the humanitarian needs of the local inhabitants. It referred to the detailed evidence about the establishment of a special health operations room set up to coordinate the evacuation of the wounded and the dead from the area where hostilities were taking place and the fact that professional matters arising in the operations room were decided by a physician who was available around the clock to receive communications from Palestinian inhabitants, the Palestinian health coordinators, the Red Cross and human rights organizations.

In view of the establishment of the humanitarian mechanisms, the declaration that a serious effort would be made to improve the evacuation and treatment of the wounded, and the establishment of a clinic in the vicinity of the Erez crossing, President Beninich stated that there was no further reason to grant relief in the form of an order at this time.

Regarding the electricity supply to the Gaza Strip, the Court had been told that an infrastructures operations room had been set up, staffed twenty-four hours a day and responsible for responding to infrastructure problems in the combat areas, obtaining an up-to-date picture of the economic situation and coordinating the provision of humanitarian assistance to the Gaza Strip. Where necessary, the operations room coordinated the arrival of Palestinian technical personnel at the site of the problem, together with an international organization.

President Beninich reviewed the position concerning the supply of electricity to the Gaza Strip: nine out of ten electric lines that transmitted electricity from Israel to the Gaza Strip had been repaired and were operating; the remaining line was to be repaired. There was no direct contact between the Palestinian Energy Authority and the Israeli Electric Corporation in order to identify problems and repair them as soon as possible. As to the two electricity lines that transmitted electricity from Egypt to the Gaza Strip, Respondents claimed that as of 13 January 2009 the two lines were intact and operational. As of 11 January 2009, the line that transmitted electricity from the Palestinian power station throughout the Gaza Strip had been repaired and the power station had returned to partial operation, and was generating 30 percent of its rated output. Significant quantities of industrial diesel oil had been brought into the Gaza Strip for the Palestinian power station; the supply of industrial diesel oil had been reduced after a tunnel was discovered near the Nahal Oz commercial site in May 2008. There was, in evidence of preparations for a major attack. Despite the risk, the supply of industrial diesel oil to the Gaza Strip had been renewed via the Kerem Shalom crossing point.

Respondents referred to diesel oil for transport, cooking gas, water hygiene and purification kits, and bottled water brought by them into the Gaza Strip, as well as the periodic cessations of hostilities in the Gaza Strip designed to allow entry of humanitarian supplies. These cessations of hostilities had been exploited by Hamas in order to rearm and carry out shooting attacks, sometimes interrupting the transfer of the humanitarian aid.

The Court also referred to the operations room designed to deal with the international organizations, coordinate the movement of the workers and vehicles of the international organizations and coordinate the transfer of humanitarian donations from international organizations to the Palestinian territories. Consequently, President Beninich noted that steps had been taken to repair the faults in the electricity network in the Gaza Strip, and despite the state of combat and the security risks, efforts had been made to facilitate the entry into the Gaza Strip of industrial diesel oil for operating the local power station, as well as additional humanitarian requirements, such as cooking gas, diesel oil for transport, water, food and medications. In these circumstances, President Beninich held that this petition too should be denied.

Conclusion

President Beninich noted that the civilian population had suffered considerably as a result of the IDF's combat operations. The operations were taking place in densely populated areas. Consequently, many of the victims were civilians who were not involved in the dispute and were paying a high price. Because of the circumstances in which the Gaza Strip was taken place, the Court had not received all the information needed to clarify the position, but it could not be denied that a systematic effort had to be made to discharge the humanitarian obligations of the State of Israel. It was true that the IDF forces were fighting against a terrorist organization that did not comply with international laws or respect human rights. There was a clear channel of communication with it that might further the implementation of the principles and laws that governed parties involved in an armed conflict of the type waged here. The Court noted that a ceasefire seemed to be forthcoming; nonetheless, it held that while the conflict continued and as Israel had control over the transfer of necessities and the supply of humanitarian needs by means of humanitarian corridors, in which there was evidence of preparations for a major attack. Despite the risk, the supply of industrial diesel oil to the Gaza Strip had been renewed via the Kerem Shalom crossing point.

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IAJLJ celebrates forty years
But let judgement run down as waters, and righteousness as a mighty stream. - Amos 5:24

A little over 40 years ago, in September of 1969, the first World Congress of Jewish Lawyers and Jurists convened in Jerusalem and founded the International Association of Jewish Lawyers and Jurists. The congress was spearheaded by French jurist and Nobel Peace Prize laureate René Cassin, president from 1965 to 1968 of the European Court of Human Rights and a principal author of the Universal Declaration of Human Rights, Israeli Supreme Court Justice and Israel Prize laureate Haim Cohn (later president of the Association for Civil Rights in Israel); and United States Secretary of Labor and later Supreme Court Justice and U.S. Ambassador to the United Nations Arthur Goldberg.

Among delegates speaking at the opening session of the congress were Israeli Supreme Court President Shimon Agrawat, American Bar Association President Bernie Segal and Israeli Bar Association President Joshua Rosenzweig.


PIRACY IN THE AIR

Boaz Elimelech

Legalist, Ministry of Transport
Lecturer, University of Tel Aviv

HP 1000 aircraft hijackings, which had averaged about three events per year over the previous decade, took a huge climb to 30 occurrences in 1980 and 75 in 1989, prompting the Association to set up an international committee "to effect a study of acts of aerial piracy, of measures for its prevention and eradication, and of national and international legislation existing, contemplated and required." Yitzhak Mintz, Legal Adviser to Israel's Ministry of Transport and a member of the Executive Committee, wrote an article on the subject for our first newsletter.

In February, 1980, the passengers and crew of an Israeli airliner were forced to land in John F. Kennedy airport in New York by hijackers who had taken over the plane. A hijacking situation was brought to us by the Israeli authorities, who asked us to condemn the hijackers and recover the passengers and crew. As a result of our intervention, the hijackers were removed to Israel, and the hijacked passengers and crew were released.

In 1980, the IAJLJ published a special report on the hijacking of the TWA Flight 847, which originated in Athens and ended in Beirut. The IAJLJ publication provided a detailed account of the events and the legal aspects involved in such cases.

The IAJLJ continues to monitor and provide updates on hijacking incidents worldwide, advocating for the safety and rights of both the hijackers and the hijacked.

Airplane hijackings, which had averaged about five events per year over the previous decade, took a huge climb to 30 occurrences in 1980 and 75 in 1989, prompting the Association to set up an international committee "to effect a study of acts of aerial piracy, of measures for its prevention and eradication, and of national and international legislation existing, contemplated and required." Yitzhak Mintz, Legal Adviser to Israel’s Ministry of Transport and a member of the Executive Committee, wrote an article on the subject for our first newsletter.

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JURIST

Avi Rachel

Assistant Professor of Law
Syracuse University

Justice Rubinstein concurred and noted that the conduct in which the State of Israel engaged was not "symmetrical" insofar as respect for the law was concerned. Israel had been forced into battle in self-defense—lawfully, in accordance with the Charter of the United Nations and international law—and it did so only after many years of restraint. It was difficult to imagine any free-world countries holding back for such a long time while their citizens were subject to the constant threat of missile fire resulting in physical injury and property damage.

See Humanitarian Law and Operation Cast Lead, page 47
In memory they yet live

On 12 November 2009, a bereaved father spoke at the dedication in Jerusalem of the Living Memorial to the victims of the 9/11 terror attacks. JUICE reproduces an abbreviated version of his remarks.

Dev Shalti

I am the proudest and the saddest father.

My son, Happy, 34 at his death, was the founder, president and chief executive officer of GoldTier, an American high technology company. After receiving his MBA, magna cum laude, from Israel's Bar-Ilan University, Happy moved to the United States in 1992, where he founded GoldTier. He was murdered just prior to delivering the keynote address at a bankers' conference being held on the 10th floor of Tower One of New York's World Trade Center. He left a wife and two children, then five and three. They are now 13 and 11. His parents and siblings live in Israel.

In the same North Tower of the World Trade Center another Israeli, Moshe Levinshar, then 29, worked at the 77th floor office of Cantor Fitzgerald. He left a wife and a baby of three weeks. The little girl is now eight years of age. His parents and siblings live in Israel. A third Israeli citizen who lost his life on that terrible day was Danny Levin, then 31. Danny, a genius and a hero, was killed onboard the American Airlines jet a few minutes before it crashed into Tower One. He was a veteran of Sayeret Matkal, the Israeli Defense Forces' elite commando unit. He listened to the hijackers sitting near him and felt something most dangerous was about to occur. With his bare hands he attacked the terrorist sitting near him without knowing that just beyond sat another who a moment later stabbed him to death. Danny was a graduate of the Massachusetts Institute of Technology and a founder of Akram Technologies, Danny's parents live in Jerusalem. Danny left a wife and two children.

A fourth Israeli victim was Alona Arvahaim, then 30, and on her first trip to the U.S. She was on the United Airlines flight from Boston that crashed into the South Tower of the World Trade Center. Alona was a lovely, talented woman who came from a warm and loving family. Alona held a degree in industrial management as well as an MBA. She left parents and siblings in Ashdod.

A fifth Israeli citizen was also murdered on that terrible day. Leon Lebov, then 51, worked for ABM Industries at the World Trade Center. He left parents and siblings in Israel.

In addition, 600 Jewish citizens of the United States were among the thousands of American victims on September 11.

The brutal attack by al-Qaeda was led by one of the greatest war criminals in history. Osama bin Laden murdered nearly 3,000 innocent and peace-loving civilians that day on American soil. He is guilty of crimes against humanity, crimes against peace, grave war crimes and breaches of the Hague and Geneva Conventions, as well as crimes against the laws of the United States. Al-Qaeda did not adhere to the most important principle of the laws of war, the distinction between combatant and non-combatant. According the laws of war, civilians may never be a lawful target as long as they do not take an active part in the hostilities. Terrorist groups are not relieved of this obligation.

Osama bin Laden must be caught and brought to trial. Every al-Qaeda supporter, financial, material or otherwise, must be held accountable and brought to trial. They should not enjoy immunity in criminal and civil proceedings, even if they are Saudi princes. It is outrageous that last May the American solicitor general applied to the Supreme Court asking that they be granted immunity for any crimes they may have committed.

The families of the victims here in Israel, as well as those in the U.S. and the other 80 countries whose citizens died in that attack, consider the Living Memorial at the entrance to Jerusalem as sacred. They showed great interest in obtaining information from me about the legal proceedings that the Jewish National Fund and I were involved with in advancing the memorial. Opponents of the memorial, local property owners, objected to its construction on the grounds that it desecrated the environment.

The family of the victims yet mourns for their loved ones. They miss them and pray daily for their souls. I suggest that the American embassy in Israel, with the consent of the State Department and the blessing of the Jewish National Fund, on the eleventh of September each year, proclaim a ceremony of memorial and prayer to which the Israeli families of the victims, and Israeli schoolchildren will be invited to attend. This would be in keeping with the law adopted this year by the U.S. Congress, which fixes September 11 as a day of prayer.

Since that terrible day in 2001, the entire world has changed. Civil liberties in democracies have been limited. The lives of 3,000 families have been changed from white to darkest black. We lost our joy and we do not stop mourning our loved ones.

The inauguration of the Living Memorial today symbolizes the identification of the State of Israel, and of the Jewish National Fund and its donors, with the thousands of families of the victims of September 11 throughout the world, with the United States, and with the City of New York. I thank every person who assisted us in overcoming the many difficulties we encountered over the last seven years.

The Jewish nation prayed in all generations of the past and will pray for many generations to come for its return to Jerusalem. I have no doubt that every tourist to Jerusalem, whether Jewish or not, but especially those who lost their loved ones on 9/11, will visit and pray for the souls of the victims at this outstanding memorial.

God bless the initiators, the donors, and every one who assisted in bringing us to this important day the inauguration of the Living Memorial to the victims of the September 11 terror attacks, in the Holy City of Jerusalem.

Brian Gen, Israel’s ambassador to the United States, on April 15, 2011.

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This Court heard without delay petitions that raised humanitarian concerns, as it had done in the present case. Often the role of the Court in such cases was to urge and monitor compliance with the provisions of Israeli and international law, even when it knew and trusted that the authorities were unreservedly committed to the appropriate legal framework; the Court had a judicial perspective that allowed it to see the whole picture. Therefore judicial review was always called for.

In hearing these petitions, the Court had been persuaded that the military establishment and the political echelon were committed to the relevant legal norms. In practice, this commitment meant a systematic and unceasing endeavor to implement these norms, to learn from failures and mistakes and to make persistent efforts to improve.

Sometimes in the fight against the enemy, even when the intelligence and planning were beyond reproach, harm was caused to Palestinian civilians, including innocent bystanders and children. Israel had also suffered such losses and seen its own children suffer, and so it deeply regretted casualties on the other side.

A concerted effort had to be made at all levels – and there was no reason to believe that it was not – to restrict negotiable accidents to a minimum, even in evil or unimaginable scenarios.

Finally, as a Jewish and democratic state, Israel was committed to the norms prescribed by Jewish law with regard to the proper attitude towards human beings, who were all created in the image of God. The Jerusalem Talmud (Sanbedot 4, 9 [20] states: "Therefore Adam was created alone, to teach you that whoever destroys one person is deemed to have destroyed an entire world, and whoever saves one person is deemed to have saved an entire world." Where matters of life and death were concerned, "nothing stood in the way of saving a life, except idolatry, sexual immorality and heresy." (Tossef, Shabbat 16, 4 [21].) This ethos had accompanied the Jewish people throughout the generations, and would continue to do so.

Justice A. Grunis

Concurring with President Beilisich on the merits of the case and therefore saw no need to address the question of practicability.

Note: A full translation of this judgment may be found at [2009] IsrLR 1

De Beliefl, Roman, former co-editor of JUICE, is a lawyer specializes in maritime law and family law.

Notes:

A full translation of this judgment may be found at [2009] IsrLR 1

In memory they yet live

On 12 November 2009, a bereaved father spoke at the dedication in Jerusalem of the Living Memorial to the victims of the 9/11 terror attacks. JJUSTICE reproduces an abbreviated version of his remarks.

Devo Shiff

I am the proudest and the saddest father. 

My son, Sagi, 33 at his death, was the founder, president and chief executive officer of GoldTen, an American high technology company. After receiving his MBA, magna cum laude, from Israel’s Bar-Ilan University, Hagay moved to the United States in 1992, where he founded GoldTen. He was murdered just prior to delivering the keynote address at a bankers’ conference being held on the 10th floor of Tower One of New York’s World Trade Center. He left a wife and two children, then five and three. They are now 13 and 11. His parents and siblings live in Israel.

In the same North Tower of the World Trade Center another Israeli, Moshe Levinshar, then 29, worked at the 77th floor office of Cantor Fitzgerald. He left a wife and a baby of three weeks. The little girl is now eight years of age. His parents and siblings live in Israel. A third Israeli citizen who lost his life on that terrible day was Danny Levin, then 31. Danny, a genius and a hero, was killed onboard the American Airlines jet a few minutes before it crashed into Tower One. He was a veteran of Sayeret Matkal, the Israeli Defense Forces’ elite commando unit. He listened to the hijackers sitting near him and felt that something most dangerous was about to occur. With his bare hands he attacked the terrorist sitting near him without knowing that just beyond sat another who a moment later stabbed him to death. Danny was a graduate of the Massachusetts Institute of Technology and a founder of Akram Technologies, Danny’s parents live in Jerusalem. Danny left a wife and two children.

A fourth Israeli victim was Alona Avraham, then 30 and on her first trip to the U.S. She was on the United Airlines flight from Boston that crashed into the South Tower of the World Trade Center. Alona was a lovely, talented woman who came from a warm and loving family. Alona held a degree in industrial management as well as an MBA. She left parents and siblings in Ashdod.

A fifth Israeli citizen was also murdered on that terrible day. Leon Leber, then 51, worked for ABM Industries at the World Trade Center. He left parents and siblings in Israel.

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According the laws of war, civilians may never be a lawful target as long as they do not take an active part in the hostilities. Terrorist groups are not relieved of this obligation.

Osama bin Laden must be caught and brought to trial. Every al-Qaeda supporter, financial, material or otherwise, must be held accountable and brought to trial. They should not enjoy immunity in criminal and civil proceedings, even if they are Saudi princes. It is outrageous that last May the American solicitor general applied to the Supreme Court asking that they be granted immunity.

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God bless the initiators, the donors, and every one who assisted in bringing us to this important day, the inauguration of the Living Memorial to the victims of the September 11 terror attacks, in the Holy City of Jerusalem.

Brig.-Gen. (Retired) Dave Shiff served as Military Advocate General in the Israeli Defense Forces between 1978 and 1994 and as General Counsel of the Ministry of Defense between 1994 and 1998. He is a lecturer on the laws of war at the Faculty of Law at Israel’s Bar-Ilan University and is a Member of the Board of Governors of the International Association of Jewish Lawyers and Jurists. The website he established to memorialize his son can be seen at www.hagayonlife.org.

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Justice A. Grunis

Concurring with President Pelesich on the merits of the case and therefore saw no need to address the question of jurisdiction.

Notes:

1. A full translation of this judgment may be found at: [2009] IsrLR 73

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