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Cover
The Universal Declaration of Human Rights. Among its drafters was French jurist René Cassin, a founder of IAJLJ.

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President's Message

Dear Friends,

In February 2011, I will be ending my second and final term as president of our Association. When I was elected by you in March 2004 I could have not imagined how difficult but challenging, complex but inspiring, and surprising but satisfactory this role would be. During this period, our Association has not only become more significant for its members but also for Israel and for world Jewry. The agenda of our Association has also altered due to the changing realities that dictate our agenda.

As I previously have written, the State of Israel faces new threats to its existence.

First and foremost is the threat from Iran, a country whose leaders openly declare their wish to wipe Israel off the map and who aid those who seek to harm Israel and the Jewish people – led by Hamas and Hezbollah. In addition to the financing and aid that Iran provides to these organizations, Iran is working to develop nuclear weapons that will threaten not only Israel, but the entire free world. Iran's activities necessitate the appropriate legal response.

Our Association also serves to promote and further a worldwide dialogue on the legal actions that need to be taken against terror and the countries aiding terror, such as Iran. This issue is not only a concern of the Jewish people and the State of Israel, but also of the entire free world.

Another important issue on our agenda is the implementation of public international law with respect to the Middle East conflict. Israel faces a worldwide legal battle in which our Association has decided to take an active role.

These are just a few examples of what our Association has become, the challenges it faces and the activities in which it is involved. In a nutshell, an important, active, up-to-date organization that fights constantly in the legal arena to protect the legal rights of both Israel and the Jewish people, doing what our founders set out to do and to accomplish those tasks through dialogue and legal means.

It is with great satisfaction that I am able to note that over the last few years our Association has hosted several important and fruitful conferences at the highest professional level. For the first time in our Association's history we met in Washington, D.C., London, Budapest, Madrid, Sofia and Buenos Aires. In addition our member organizations have expanded to include our United Kingdom, Argentinean and Chilean members.

Last but not least, I would like to end my final address on a personal note: I have befriended people from all over the globe. Jurists who share the same professional, ethical and moral values. Jurists who share the same history, and who have a desire to be part of a better future for the Jewish people and the State of Israel.

It has been a privilege and great honor to serve as your president, to have met you and to have become your friend.

Alex Hertman
President

Resolutions passed at the London conference

The following resolutions were passed at IAJLJ's London conference, held June 30-July 4, 2010.

The International Association of Jewish Lawyers and Jurists calls upon the governments and legislators of democratic countries to prevent the abuse of universal jurisdiction for promoting political rather than human rights causes.

The International Association of Jewish Lawyers and Jurists calls upon all democratic states to use all existing international legal procedures against Mahmoud Ahmadinejad and other Iranian officials with regard to their incitement to genocide.

Democratic and legal norms in the age of terror

Universal jurisdiction, the Goldstone Report, terror's challenge to democracy and academic boycotts sparked lively debates at IAJLJ's London conference

Western democracies are today increasingly forced to grapple with the dilemmas arising from the growing terrorist menace and the need to confront it effectively while preserving the basic norms of democracy, human rights, and international humanitarian law. To reinforce these norms, legal means and institutions – including universal jurisdiction and international criminal procedures – were adopted with the aim of denying impunity to those who would flout our collective conscience most flagrantly. Ironically, however, these legal processes have been cynically exploited against the very democracies – and most prominently, Israel – that seek most assiduously to abide by the democratic ethos including in wartime.

The present challenges of asymmetric warfare are unprecedented in character and scope. They have, therefore, understandably engaged the attention of academics, lawyers, defense officials and other governmental practitioners. Against this background, the International Association of Jewish Lawyers and Jurists, in cooperation with the United Kingdom Association of Jewish Lawyers and Jurists, held a conference in London in July 2010 on the theme of "Democratic and Legal Norms in the Age of Terror." For several days legal scholars and practitioners discussed the new challenges, their ramifications, and the ways in which states might more creatively deal with them.

The conference began with a reception and presentation at the Honorable Society of Gray's Inn, one of London's four Inns of Court. Greetings were proffered by Ambassador of Israel to the Court of St. James's Ron Prosor; IAJLJ President Alex Hertman and Deputy President Irit Kohn; and UKAJLJ Chairman Dennis Levy and IAJLJ and UKAJLJ Board Member Jonathan Lux. Member of Parliament Denis MacShane, P.C., a former minister of state for Europe and author of "Globalizing Hatred: The New Anti-Semitism" delivered the keynote address.

The following day, two sessions were devoted to universal jurisdiction at the University of London's School of Oriental and African Studies, whose facilities were made available through Colin Shindler, a professor of Israeli studies there. The first session, dealing with the Israeli perspective, was moderated by IAJLJ Board Member Dov Shefi, and included presentations by Ron Prosor, IAJLJ Vice President Yaffa Zilbershats, Irit Kohn, Ambassador of Israel to France Daniel Shek, and NGO Monitor President and political scientist Gerald Steinberg.

The conference opened at the Honorable Society of Gray's Inn

The second session, on the perspectives of other jurisdictions, was moderated by IAJLJ Board Member and President of the American Association of Jewish Lawyers and Jurists Stephen J. Greenwald. Presenters included Michael Caplan, QC, who defended former Chilean president Augusto Pinochet, and legal scholar Malcolm Shaw, QC.

A full session, chaired by legal scholar Amos Shapira, addressed the Goldstone Report. Presentations were made by legal scholars Anne Bayefsky, Mordechai Kremnitzer, Abraham Bell and Robbie Sabel.

Attacks on the legality of Israel's actions and on the very legitimacy of the state have spawned and invigorated boycott campaigns and especially academic boycotts. Oxford University's Michael Yudkin, long active against academic boycotts, moderated a special session on the subject. Presenters included political scientist Jonathan Rynhold and Anthony Julius, lawyer and author of "Trials of the Diaspora: A History of Anti-Semitism in England."

A session on democracy coping with terror was moderated by Baroness Ruth Deech, Chairman of the Bar Standards Board for England and Wales. Presentations were made by legal scholar Daphne Barak-Erez, Israeli Judge (Ret.) and former president and Honorary President of IAJLJ Hadassa Ben-Itto, Irish historian Lord Paul Bew, and Lord Peter Goldsmith, QC, former attorney general for England and Wales and Northern Ireland.

IAJLJ Deputy President Irit Kohn, Ambassador Ron Prosor, and then-Ambassador to France Daniel Shek

A month prior to the conference, the MV Mavi Marmara and other vessels attempted to breach Israel's naval blockade of Gaza. The outcry that followed the Israeli Navy's boarding of the ship and attendant loss of life and injuries prompted a special discussion in which Yaffa Zilbershats and Abraham Bell participated.

IAJLJ and UKAJLJ Board Member Jonathan Lux (l.) and UKAJLJ Chairman Dennis Levy

Closing the conference was a presentation titled "The Danger of a Nuclear, Genocidal and Rights-Violating Iran: The Responsibility to Prevent," delivered by legal scholar Irwin Cotler, P.C., O.C., M.P., former minister of justice and attorney general of Canada.

– Paul Ogden

London conference attracts young lawyers

The average age of participants attending IAJLJ's London conference was substantially lowered by the involvement of a dynamic group of young legal scholars representing the World Jewish Diplomatic Corps (WJDC) Task Force on the Law and Policy of Armed Conflict.

The WJDC provides outstanding young academics and professionals from around the world with opportunities to engage in emerging areas of concern to the Jewish people, through learning, writing, and public diplomacy. By doing so, the WJDC extends the impact of the World Jewish Congress and nurtures future thought and diplomatic leadership for the benefit of world Jewry.

The WJDC Task Force on the Law and Policy of Armed Conflict was established in April 2010 to prepare a cadre of "Jewish diplomats" to help shape public, academic and diplomatic discourse regarding the legal, ethical and policy dilemmas of twenty-first century warfare. A voluntary, grassroots initiative, the Task Force was established in view of the growing use and abuse of universal jurisdiction, international law and institutions as means of both attacking Israel and exempting anti-Western states and non-state actors from humanitarian rules.

Five members of the Task Force – from Belgium, Germany, Israel, Italy and Portugal – participated in the conference.

"The IAJLJ London conference was a tremendous learning experience for us," said Dr. Amichai Magen, director of the Institute for Democracy, Law and Diplomacy at the Shalem Center, Jerusalem, and

'Jewish diplomats' with Canadian MP Irwin Cotler (l to r): Rafi Korn (Italy), Nuno Whanon Martins (Belgium), Amichai Magen (Israel), Meital Nir-Tal (Israel) and Eugene Balin (Germany)

head of the WJDC Task Force on the Law and Policy of Armed Conflict. "By bringing together outstanding legal experts and policy-makers to examine some of the most vital issues facing Israel and the wider Jewish world – combatting terrorism while upholding the rule of law, fighting new forms of anti-Semitism, universal jurisdiction, the Goldstone and Turkish flotilla campaigns, divestment, boycott, and sanctions – the IAJLJ conference provided an invaluable public service at a critical time."

Other members of the young lawyers' group emphasized the importance of ensuring inter-generational continuity in the activities of IAJLJ through the active engagement and recruitment of legal practitioners and academics in their 20s, 30s and 40s. "The IAJLJ Conference demonstrated for me the importance of networking and mentoring," said a WJDC Task Force member from Germany, 27-year old Eugene Balin. "We hope to work together closely with IAJLJ in the future."

NGOs, soft power and demonization in the 'lawfare' strategy

The universal moral principles on which the 1948 Declaration of Human Rights was based must be re-established and the inversion of aggressor and victim must be exposed

Gerald M. Steinberg

In October 2009, the founder of Human Rights Watch, Robert Bernstein, published an article in the "New York Times" in which he denounced his own organization for playing a leading role in turning Israel into a "pariah state." Bernstein's condemnation was based on the central role of Human Rights Watch (hereinafter "HRW") and numerous other powerful non-governmental organizations, or NGOs, in the cynical exploitation of moral claims and international law. These activities helped lay the foundations for the Goldstone Report[1] (whose chairman, Judge Richard Goldstone, was a member of HRW's board), and dozens of 'lawfare' cases around the world; and they have promoted the demonization of Israel through intensive and well-funded campaigns based on double standards and false claims as part of the political warfare.

This intense exploitation of moral and legal frameworks is highly destructive in terms of international norms, and also in terms of being a major threat to the existence of Israel as the nation state of the Jewish people, and its sovereign equality among the nations. An examination of the evidence, rather than reliance on ideological filters, refutes the pretense that the numerous false claims of Israeli war crimes are simply responses to the post-1967 occupation, settlements, and related issues. Similarly, there is no basis for the speculative belief that had Israel agreed to cooperate with a series of UN-appointed and biased "investigations," the allegations of "war crimes" would have been mitigated. An equally persuasive thesis would posit that any Israeli submissions to the Goldstone commission[2] on the Gaza war, for example, would most likely have been twisted and distorted to suit the predetermined conclusions.

No army is entirely free from violations of human rights and international law, particularly in complex asymmetrical warfare, but Israel is subjected to unique criticism and standards that are highly discriminatory. Anthony Julius explains that this new "anti-Zionism," as adopted by the NGO network at Durban,[3] is "predicated on the illegitimacy of the Zionist enterprise." Israel, in this view, was "established by the dispossession of the Palestinian people…enlarged by aggressive wars waged against militarily inferior forces, and…maintained by oppression and brutality."[4]

The organizations and individuals that lead this political warfare declare their goal clearly – the destruction of Israel as a Jewish state and the defeat of the Zionist movement – and when the post-1967 "occupation" is mentioned, it is transparently an excuse. In contrast to the façade of "civil society," many of the most active NGOs, including at least 100 Israeli and Palestinian groups, receive major support from the European Union and its member states through highly secretive decision-making processes.

The objectives of this intense campaign were clearly stated at the NGO Forum at the 2001 Durban conference, which involved 1,500 groups, including HRW and Amnesty International (hereinafter "Amnesty"). The Final Declaration of the Forum called for the NGO network to impose "a policy of complete and total isolation of Israel as an apartheid state," using "sanctions and embargoes" and "the full cessation of all links (diplomatic, economic, social, aid, military cooperation, and training) between all states and Israel."[5] The participants in the NGO Forum called for the use of legal processes against Israel and the establishment of a "war crimes tribunal."

The NGO transnational advocacy network, in close coordination with the UN Human Rights Council (hereinafter "UNHRC"), is central to this strategy. NGOs have played a key role in lawfare cases in Belgium (most prominently, in the 2002 case against former Israeli prime minister Ariel Sharon, in which HRW was very active), Britain, Spain, Canada, the U.S., and other western countries; their influence is also felt

in global forums, including the International Court of Justice (hereinafter "ICJ") and the International Criminal Court (hereinafter "ICC").[6] In these cases, the universal jurisdiction statutes are exploited in order to press charges against Israel, based on false allegations of "war crimes," systematic violations of "international humanitarian law," and the law of armed conflict. In this process, NGOs claim expertise – which, in most cases, their officials do not possess – in the fields of military technology, strategy, tactics, and law. (For example, the heads of the Middle East and North Africa division of HRW are political activists rather than experts on international law, and the competence of HRW's former "senior military analyst," Marc Garlasco, appeared to be very limited. These individuals have led HRW's obsessive focus on attacking Israel.[7])

The use of the lawfare strategy, which also targets the United States and NATO countries in the context of conflicts in Afghanistan, Iraq and elsewhere, highlights the accumulation of NGO soft power. Initially, organizations such as Amnesty and HRW (originally called Helsinki Watch) were established to campaign on behalf of prisoners of conscience and the abolition of torture,[8] particularly in closed societies. With the support of the United States and other Western governments, these NGOs gained entry into and influence in the UN and other political institutions. As their budgets grew, international NGOs with supposed human rights agendas have increased their power and influence.[9]

Thus, NGOs constitute an unregulated and nebulous sector aptly described as "fuzzy at the edges,"[10] but highly influential. Due to the NGO "halo effect," many journalists, UN officials and academics automatically and unquestioningly repeat and highlight the military and legal analyses presented by NGOs.

In addition, many NGO leaders (particularly those affiliated with universities and research institutions) share a post-colonial ideology that gives preference to "victims" of Western imperialism and capitalism while criticizing liberal democratic societies. The ideological tilt among NGOs is reflected in their publications and analyses, particularly with respect to the selective applications of international law and human rights. As legal scholar Kenneth Anderson has noted, groups such as Human Rights Watch "focus to near exclusion on what the attackers do, especially in asymmetrical conflicts where the attackers are Western armies" and tend "to present to the public and press what are essentially lawyers' briefs that shape the facts and law toward conclusions that [they] favor…without really presenting the full range of factual and legal objections to [their] position."[11] These critical perspectives are rampant in the activities of HRW, Amnesty, FIDH (France), Christian Aid (U.K.), and the Geneva-based International Commission of Jurists, as well as their local and regional partners. In Israel, these groups include Gisha, PCATI, Yesh Din, PHR-I, B'Tselem, ICAHD and many others.

In promoting their selective agendas, which are inconsistent with the universality of human rights norms, NGOs exercise a great deal of soft power – defined by former dean of the Kennedy School at Harvard University Joseph Nye as "the ability to get what you want through attraction rather than coercion or payments."[12] These soft-power resources have been mobilized through NGOs for the political war against Israel, using the language of human rights, vehicles such as "universal jurisdiction," and highly politicized institutions such as the UNHRC, the ICC, and the ICJ.[13]

For Europe, soft power is the primary form of international influence, and funding for political-advocacy NGOs is a central vehicle for exercising this power. The term "non-governmental organization" notwithstanding, European governments and the European Union provide hundreds of millions of euros annually to NGOs in order to promote specific policy goals.[14] The European Instrument for Democracy and Human Rights – with an annual budget of 160 million euros, provided via the EuropeAid Cooperation Office – is among the frameworks that provide funds to political advocacy NGOs.[15]

In contrast to the "fair application of human rights principles," political-advocacy NGOs tend to focus on a smaller group of targets, where their influence is amplified. Israel has become the primary target of these influential political and ideological NGOs, which work to powerfully reinforce the agenda of the Organization of the Islamic Conference, which dominates the United Nations human rights frameworks. In his detailed analysis, "Human Rights and Politicized Human Rights: A Utilitarian Critique," legal theorist Don Habibi demonstrates that "at the UN, Israel is singled out for more intense scrutiny and held to higher standards than any other country."[17]

Major international NGOs, such as HRW, Amnesty, the International Commission of Jurists, FIDH (France) and similar groups submit numerous reports and statements to the UNHRC. These publications often cite reports by Palestinian NGOs, such as the Palestinian Center for Human Rights (hereinafter "PCHR"), al-Haq, and al-Mezan, which, in turn, rely on unverifiable claims made by Palestinian witnesses. In many cases the context of the conflict is omitted.[18] As political scientist Volker Heins notes, in such NGO reports, it is

"not the event, but the event's telling that counts," and "the process of establishing the facts of victimhood plays itself out through language (including pictures), which implies that it is inherently contestable."[19]

For example, in March 2002 following numerous Palestinian mass terror attacks, which led to the IDF operation 'Defensive Shield,' Palestinian officials claimed that the IDF had committed a "massacre" in the Jenin refugee camp. NGO officials quickly repeated these claims. Al-Haq, a Palestinian NGO funded by a number of European governments, published a statement charging that "the Israeli government has launched a new campaign of aggression against the Palestinian people that threatens the lives of the whole of the civilian Palestinian population."[20] Le Monde repeated HRW's claims of Israeli "war crimes"and demands for appointment of an "independent investigative committee."[21] An Amnesty statement declared that "the evidence compiled indicates that serious breaches of international human rights and humanitarian law were committed, including war crimes," and also demanded an immediate inquiry.

HRW was particularly active in this campaign,[22] issuing 15 press releases and lengthy "research" reports condemning Israel in 2002,[23] based largely on unverifiable "eyewitness testimony" from Palestinians.[24] Only one sentence mentioned the justification for the operation, noting that "the Israelis' expressed aim was to capture or kill Palestinian militants responsible for suicide bombings and other attacks that have killed more than seventy Israeli and other civilians since March 2002."[25] In contrast, HRW's detailed indictment against Israel contained allegations that "IDF military attacks were indiscriminate… failing to make a distinction between combatants and civilians...the destruction extended well beyond any conceivable purpose of gaining access to fighters, and was vastly disproportionate to the military objectives pursued." Much of this language was inserted into the report from the UNHRC investigative commission on Jenin.[26] This text closely followed the submissions from Amnesty, PCHR, al-Haq and other NGOs.

After Jenin, the NGO networks supported and often led UN condemnations of Israel that mirrored the Durban strategy, particularly in the human rights frameworks. In parallel, HRW also supported the sanctions and boycotts of the Durban NGO declaration. In a 10 December 2002 CNN interview, HRW Executive Director Kenneth Roth called for "conditioning" or cutting American aid funds to Israel.[27] In October 2004, HRW published "Razing Rafah," based on unverifiable Palestinian allegations and unsubstantiated security judgments. "Razing Rafah" also provided the foundation for the participation of HRW officials (specifically head of the Middle East and North Africa division, Sarah Leah Whitson) in anti-Israel boycott campaigns. In parallel, NGO soft power was a significant factor in sessions of the UNCHR – both at the biannual and emergency sessions. At the 58th Session in 2002 some 300 NGOs participated, and many of them – such as PCHR, [28] al-Haq and others – strongly advocated pro-Palestinian positions. [29]

In 2006, in response to the widely perceived bias of the existing system, the UN Human Rights Council was created to replace the Commission on Human Rights.[30] Israel remained the only country on the UNHRC's permanent agenda, and this institutional reshuffling had little impact on the role of the NGO community. The First Special UNHRC Session in July 2006 clearly followed the earlier pattern. Statements by officials from Amnesty, HRW and many other NGOs repeated accusations of "deliberate and disproportionate attacks" by Israel amounting to "war crimes," and "collective punishment" [31] in Gaza.

The UNHRC-NGO activities targeting Israel were also prominent during the 2006 Lebanon War. Statements were submitted by Badil, Amnesty, ANND (Arab NGO Network for Development), HIC (Habitat International Coalition) and others. An examination of the texts shows that most NGO statements ignored the context of the conflict, with very little mention of the Hezbollah missile attacks that deliberately targeted civilians and led to the Israeli response designed to end these attacks.

NGO officials, in concert with Arab and Islamic delegations (Egypt, Saudi Arabia, Indonesia, Qatar, Bahrain, Pakistan, and others) again pressed the UNHRC to establish a commission of inquiry, with a mandate focusing only on allegations against Israel. The Commission report repeated the language of the NGOs in their written statements, including accusations of "collective punishment" and "excessive, indiscriminate and disproportionate use of force by the IDF."[32]

The NGO role in 'lawfare'

In the decade since the 2001 Durban NGO Forum, lawfare has become the primary vehicle for implementing the "policy of complete and total isolation of Israel as an apartheid state."[33] NGOs have often taken the lead in promoting lawsuits in the domestic courts of Western states, utilizing statutes that provide for universal jurisdiction and require no connection between the forum state and the persons and events to which the suits relate. Examples include the 2001 suit in Belgium against Ariel Sharon (for Sabra

and Shatila); suits in the U.K. against Doron Almog (2005) for the 2002 targeted killing of Hamas leader Salah Shehade, and against Ehud Barak (2009) and Tzipi Livni (2009) for the Gaza war; the 2008 case in Spain against seven Israeli officials (also on Shehade); and the 2005 civil suits in the U.S. against Avi Dichter (citing Shehade) and against former IDF chief of staff Moshe Ya'alon for a 1996 operation in Lebanon against Hezbollah.

Cases have also been filed against those doing business with Israel such as the U.S. lawsuit brought by the parents of Rachel Corrie against Caterpillar (2005); the 2008 case in Canada against companies involved in West Bank construction; and two suits filed (2006, 2009) against the U.K. government to block arms export licenses to companies doing business with Israel. While all the cases have been dismissed in the preliminary stages, the propaganda impact and damage have been significant.

In the various anti-Israel court battles, the NGOs leading the attack included PCHR (cases in Spain, the U.K., New Zealand, and the U.S. over the Shehade killing and the Gaza War), the New York-based Center for Constitutional Rights (Dichter, Ya'alon and Corrie cases), al-Haq (Barak, Canada cases), al-Mezan (Barak case), Yesh Gvul (Shehade cases in the U.K.) and Adalah (Spain case). Michael Sfard, Israeli attorney and legal advisor for Yesh Din, Breaking the Silence, and others, is also a prominent actor working with al-Haq and other NGOs on the 2008 case in Canada, and potential filings in the U.K.

The Gaza war (December 2008-January 2009) was accompanied by an expansion of the NGO soft power campaign targeting Israel, again based on "war crimes" allegations.[34] From the first day, HRW, Amnesty and other NGOs condemned the Israeli operation and presented a chronology that downplayed or erased the context of Hamas attacks that preceded the Israeli incursion. The NGOs were also central in the Special Session of the UNHRC held in January 2009. Statements from al-Haq declared Israel guilty of "war crimes" and "crimes against humanity." Amnesty, HRW and the International Commission of Jurists accused Israel of "indiscriminate" and "disproportionate" attacks.[35] Libyan-linked Nord Sud XXI charged Israel with participating in an "intentional effort ongoing for more than 60 years by an illegal occupier and its allies to destroy the Palestinian people,"[36] with the aim to commit genocide.[37] As in the past, they campaigned for the appointment of an inquiry commission, headed by Judge Richard Goldstone – a member of the HRW board, a close friend of Kenneth Roth, and a consistent critic of Israel.

The commission received numerous NGO submissions from, among others, the Public Committee Against Torture in Israel, Physicians for Human Rights-Israel, Adalah, Association for Civil Rights in Israel, Bimkom, Gisha, HaMoked and Yesh Din.[38] The NGO submissions accused the IDF of having "deliberately and knowingly shelled civilian institutions," supporting the legal claim that "Israel deviated from the principle that allows harm only to military objectives, and carried out strikes against civilian sites in an effort to achieve political ends."[39]

The Goldstone Report, published on 15 September 2009, strongly echoed these NGO statements. The text cited over 50 NGOs, with 70 references each for B'Tselem and PCHR, 27 for Breaking the Silence, and more than 30 each for al-Haq, HRW and Adalah. Significantly, many of these citations refer to speculative issues unrelated to the conflict in Gaza; they seek to brand Israeli democracy as "repressive," widen the scope of the condemnations and thereby magnify the damage of the ensuing political campaigns.

The international legal claims[40] closely mirrored NGO rhetoric, particularly with respect to collective punishment, distinction and proportionality, and the use of human shields. Goldstone adopted the disputed legal claim published by the PLO Negotiation Affairs Department, and promoted by NGOs such as B'Tselem, HRW and Amnesty, that Gaza remained "occupied" after the Israeli 2005 disengagement.[41]

Civilian casualty claims were also based largely on NGO allegations and estimates, with references to PCHR, HRW, Amnesty, B'Tselem, and others; and the Report asserted (erroneously) that the "data provided by non-governmental sources with regard to the percentage of civilians among those killed are generall consistent…"[42] (B'Tselem's data differs significantly from PCHR's, though both are unverifiable. PCHR's list characterizes Hamas military figures, including Nizar Rayan and Siad Siam, as civilians.[43])

Goldstone also followed the NGO network in promoting a core moral inversion, in which Hamas – a terrorist organization that deliberately targets civilians – is subject to far less criticism and accusations of "war crimes" than the State of Israel, whose defense forces seek to minimize civilian casualties. The avowed policy of groups like Hamas is to maximize death and injury to civilians (not only among their enemies, but also to their own populations). By inverting this basic distinction, the NGOs that exploit the rhetoric of morality and human rights, as well as the members of the Goldstone mission, have further damaged the moral foundations of human rights and international law.

After the publication of the Goldstone Report, the NGO network campaigned, particularly in the United States and Western Europe, for the adoption of the

Report's punitive recommendations. At the time of this writing, such lobbying efforts continue, with as yet undetermined results.

Restoring the universality of human rights norms

As demonstrated, the "lawfare" campaign directed particularly at Israel and led by a network of powerful political NGOs, all claiming to promote human rights and international law, is a central element of the Durban strategy of political warfare. The goal is "the complete isolation" of Israel internationally. These NGOs exercise influence through public discourse, political advocacy and legal proceedings. Using their soft power, and most damagingly, their preferential access to the media and diplomatic mechanisms, NGOs set agendas and frame factual and legal allegations.

NGO power and its abuse are facilitated by the absence of accountability and transparency, particularly with respect to funding. In contrast to democratic governments, there is virtually no system of checks and balances on the power of NGOs, and systematic analyses have only just begun, particularly through independent organizations such as NGO Monitor. In order to restore the universal moral principles on which the 1948 Declaration of Human Rights was based, the exploitation of these values for political warfare against Israel, and the inversion of aggressor and victim must be exposed.

Gerald M. Steinberg is a professor in the Department of Political Studies at Bar-Ilan University, founder of the university's Program on Conflict Management, and President of NGO Monitor. This article is based on a presentation made by the author at IAJLJ's London conference on 1 July 2010.

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***See NGOs, soft power and demonization in the 'lawfare' strategy**, page 26*

Sliding towards universalism?

The rise of international war crimes courts and tribunals is to be commended, though there is always a danger of politicization and scapegoating of unpopular or vulnerable states

Malcolm N. Shaw

It is a fact of life that courts, consciously or unconsciously, suffer from mandate drift. To this probably inevitable inclination, we owe some of the great jurisprudence and constitutional developments of the modern era. International courts are subject to the same impulses, but the constraints of the international system are heavy. The question is whether such expansionist tendencies are operative with particular regard to the relatively new International Criminal Court (hereinafter "ICC") and indeed whether this may be seen as a good thing.

The traditional grounds of jurisdiction, that is those grounds upon which a domestic court may act in a way permitted by international law and therefore be accepted by the international community and other states, can be briefly described as follows: the territorial principle (i.e., a state has competence over alleged offenses committed within its territory and on ships and aircraft registered in its territory); the nationality principle (i.e., a state may exercise jurisdiction over its nationals even for offenses committed abroad); the passive personality principles (where a state may exercise jurisdiction to try an individual for offenses committed abroad that have affected or may affect nationals of the state) and the protective principle (i.e., a state may exercise jurisdiction with regard to acts committed abroad deemed prejudicial to the security of the state).[1]

Of this list, the first two are universally accepted and applied (although variably with regard to nationality), while the other two are more controversial in scope and are subject to significant constraints. Beyond these, there lies what may be termed the quasi-universal principle where, by international treaty, contracting states agree to exercise jurisdiction over an alleged offender found in their territory with regard to particular offenses. Examples include torture and a host of what are generically termed anti-terror treaties, such as those concerning the taking of hostages, attacks on aviation, attacks against internationally protected persons, suppression of terrorist bombings and so forth. A state not bound by such a treaty is thus not tied into this expansive jurisdictional net. It is not universal jurisdiction as such but jurisdiction founded upon particular treaty provisions. In any event, such provisions need to be incorporated into local law.

Universal jurisdiction arises where each state is permitted by international law to exercise jurisdiction over particularly heinous crimes irrespective of where committed or by whom or against whom. Piracy and war crimes are accepted by the international community as falling within this category. Whether the offender need be present within the jurisdiction is a matter for domestic law and different states take different views on this, but the Institut de Droit International resolution of 2005 takes the view that the presence of the offender is required for the exercise of such jurisdiction, while the perceived dangers of overt politicization of the process has encouraged some states to modify jurisdiction without presence.[2]

The above is necessary background to the present topic, which is related not to the exercise of jurisdiction by domestic courts but to the competence of international courts and tribunals. The Nuremberg Tribunal and the perhaps less successful Tokyo Tribunal mark the start of the story, but attempts to create a permanent criminal court in the early years of the United Nations failed, despite the 1948 Genocide Convention[3] assuming there would be one.

In the last 20 years, the environment has radically changed and the establishment of specific tribunals for the prosecution of individuals accused of heinous crimes in particular regions has proliferated. Starting with the war crimes tribunals dealing with the Former Yugoslavia and Rwanda, we have had tribunals of various kinds with regard to Sierra Leone, East Timor, Cambodia, and Kosovo. All of this has culminated in the creation of a permanent court, the International Criminal Court. Before turning to this, a few words need be said about these tribunals, for each has pushed the process forward and each has emphasized the need

felt by the international community for the creation of an objective process of justice in situations of high pressure conflict.

The war crimes tribunals for the Former Yugoslavia and Rwanda were established in a political climate of failure to act to prevent the heinous crimes committed and in a manner to assuage feelings of guilt by Europe and the United States in particular. Both tribunals were established by binding resolutions of the UN Security Council, being the quickest way to act in a way that did not require the consent of the relevant parties, something that was unlikely to be given in the circumstances. Such a drastic approach was acceptable to UN member states since the remit of the tribunals was very localized. Such an approach could not have happened with regard to the creation of the ICC.[4]

The jurisdiction of the two tribunals was very carefully constrained. The Yugoslav Tribunal, whose statute was adopted by the Security Council in Resolution 827 (1993), is competent to try cases involving individuals accused of war crimes, crimes against humanity and genocide committed after 1 January 1991 on the territory of the Former Yugoslavia, thus allowing, for example, the tribunal to exercise competence with regard to events in Kosovo. The tribunal has taken a number of important decisions as to its remit, including declaring that the Security Council could validly create it and establishing that its jurisdiction over war crimes included those committed in both international and non-international armed conflicts. Of particular importance has been the constitutional relationship between the tribunal and national courts. The statute expressly provides for the primacy of the tribunal over national courts and accordingly the tribunal may and indeed has requested states to defer to it any proceedings that they were contemplating or undertaking. Now, as the process moves towards its twentieth year, the pressures are all the other way and apart from some high-profile prosecutions (such as Karadzic currently and Mladic hopefully to come), cases are being remitted to relevant national jurisdictions. This is being accomplished as part of an agreed completion strategy, which has also included the appointment of *ad litem* judges, the use of senior lawyers to deal with certain pre-trial matters, a re-focus upon high-level offenders and the expansion of the tribunal's Appeals Chamber.

A similar trajectory has characterized the Rwanda Tribunal. Established by the Security Council in 1994, the mandate of this tribunal was very similar to that of the Yugoslav Tribunal in being granted competence over war crimes, crimes against humanity and genocide – although it should be noted that there was an additional requirement of discrimination for all crimes against humanity and the jurisdiction over war crimes was limited to those in non-international armed conflicts. Jurisdiction, however, was tightly limited to crimes committed in Rwanda or by Rwandans in neighboring states between 1 January and 31 December 1994. Like the Yugoslav Tribunal, the Rwanda Tribunal has primacy over domestic courts and may remit cases to domestic jurisdictions, although serious problems with the government of Rwanda over local conditions have hampered this. Despite a difficult start, however, replete with mismanagement and financial indiscipline complaints and accompanied by political problems with the Rwandan government, the tribunal has produced a robust jurisprudence, discussing in some detail, for example, the requirements of the crime of genocide, analyzing the treatment of sexual offenses and establishing the responsibility of the controllers of mass media for incitement to commit genocide.

A range of other international courts and tribunals has been created to deal with heinous crimes. These tribunals constitute a discrete category in being established formally by way of cooperation between international and domestic systems. The Special Court for Sierra Leone, for instance, was set up following an agreement between the UN and Sierra Leone in 2002. Its composition includes a majority of judges appointed by the UN secretary-general and others by the Sierra Leonean government. Its jurisdiction covers persons bearing the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of that state since 30 November 1996. This competence also included offenses committed by peacekeepers and related personnel present in the country pursuant to international agreements. The decisions of this tribunal's Appeals Chamber, for example, are guided by decisions of the Yugoslav and Rwanda appeals chambers.

Perhaps less successfully, mixed tribunals were established in Kosovo and in East Timor in 2000 and 1999 respectively. The Extraordinary Chambers of Cambodia were established following an agreement between that state and the UN in 2003. Again, there is a mixed judiciary of international and local judges with jurisdiction in relation to both international humanitarian law and Cambodian law. It has now started hearing its first case alleging commission of genocide.[5] In 2005, the Bosnia War Crimes Chamber was established as a mixed panel to hear cases remitted from the Yugoslav Tribunal.

All of these tribunals have sought to fulfill a domestic and international need for a mechanism to accomplish justice in the circumstances, while integrating international and domestic law and procedures. All of these examples have been very specific, but have also been part of an evolving environment in which the creation of international mechanisms has become, if not usual, then not unusual. Resort to some variation of such tribunals has now become a regular refrain in traumatic international situations.

This brings us to the International Criminal Court. This is a very different court, although clearly resting in part upon the establishment and work of the Yugoslav and Rwandan tribunals.[6]

It is a curiosity that the trigger for the creation of the ICC was the proposal by Trinidad and Tobago in 1989 to establish a permanent international criminal court that would deal with drug offenses. The matter was sent by the General Assembly to the International Law Commission (hereinafter "ILC"), which, by now operating in a completely different environment and in particular following the outbreak of the Yugoslav wars, re-focused upon war crimes. Ultimately, the 1998 Rome Statute, which established the ICC, eliminated both the original drug offenses jurisdiction suggestion and the notion of treaty crimes that included drugs and general terrorist offenses as proposed by the ILC. The crimes within the jurisdiction of the ICC are thus war crimes, crimes against humanity and genocide. Aggression is also on the list but only after its definition has been agreed by the states parties to the Rome Statute. Earlier this summer, the Kampala Review Conference adopted a resolution providing an agreed definition and establishing mechanisms that will allow in due course for the exercise of jurisdiction over individuals with regard to the crime of aggression.

The ICC is an open-ended institution, building upon, but unlike, the other tribunals noted earlier. For this reason, adoption by Security Council resolution would not have been acceptable politically. Accordingly, the court was established by means of an international treaty, coming into force on 1 July 2002, when the required 60 ratifications were obtained. Currently, there are 114 states parties to the Rome Statute. A short review of the court follows by way of a number of brief comments.

The ICC is not an inter-state court

The first point to underline is the obvious one that the ICC is not an inter-state court. It is not to be confused with the International Court of Justice, which is an inter-state court. The jurisdiction of the ICC is therefore with regard to individuals and not states. However, individuals are nationals of a state and commit acts within the territorial boundaries of states. The interrelationship between individual and state within the ICC framework, an issue which has received additional impetus recently with the consensus definition of aggression and the putting into place of a system for indicting individuals accused of being involved in state aggression, is evolutionary and much remains to be clarified.

The prevention of impunity

The whole ethos of the court is to prevent impunity and this provides an impetus to inclusion or, if you like, expansion. It is an over-arching principle of great significance to how the court sees itself. It can be, and has been, used as part of the interpretative framework of the Rome Statute. It infuses its work. It also marks a connecting link with the exercise of universal jurisdiction by domestic courts.

Jurisdiction of the ICC

The jurisdictional scope of the Rome Statute reflects traditional international law in focusing upon territoriality and nationality. It requires that in order to be able to exercise its jurisdiction, either the state or the territory of which the conduct occurred is a party to the Rome Statute or the accused is a national of a state party. Despite some unresolved issues, such as the problem of a dual national, where one of the states of nationality is a party to the Rome Statute and another is not, there is little innovation here. Immediately noticeable is that the Rome Statute does not refer to universal jurisdiction at all, nor indeed to jurisdiction based on the nationality of the victim nor upon any argued protective principle. The reason for this is that in order to have the Rome Statute accepted by as many states as possible, it was felt advantageous to restrict the jurisdictional factor to the overwhelmingly accepted common denominator.

The Rome Statute also allows for a state that is not a party to the statute to declare that it accepts the jurisdiction of the court for the crime in question. This is not controversial or unusual. However, the Palestinian Authority (hereinafter "PA") in its declaration of 22 January 2009 purported to accept the jurisdiction of the court under this provision. Implicitly the argument is that the PA constitutes a state. A further refinement upon this argument is that whether or not the PA is a state under general international law, it may be so regarded for the specific purposes of the Rome Statute. The website of the Office of the Prosecutor published a number of opinions on this matter on 3 May 2010 and the issue is under continuing examination.[7] Should the

ICC Prosecutor conclude as a result of his preliminary examination that the PA is to be regarded one way or another as a state, the issue will have to go to the Pre-Trial Chamber in order for an investigation of the allegations made with regard to the post-2002 Palestine situation to be authorized. This would no doubt involve re-consideration of the status issues, as would any later reference to the Trial and Appeals Chambers.

The question is not one that can be confined to the Israel/Palestine issue. The decision to be taken by the ICC Prosecutor will have important ramifications. For example, should he conclude that Palestine is a state under international law and should this conclusion be upheld by the other organs of the court, this would have important consequences for other entities claiming statehood in controversial situations, including, among others, the "Turkish Republic of Northern Cyprus," the "Republic of Nagorno-Karabakh," Abkhazia, South Ossetia, the "Transdinistrian Republic," and Chechnya. Less unlikely is the position that could be adopted whereby as a matter of interpretation of the Rome Statute, the PA is to be regarded as a "state" for the purposes of the ICC. This would be a more sophisticated, but equally dangerous, response for two essential reasons. First, from the international perspective, it would create a sub-class of entities that might be recognized as states for the purposes of particular treaty regimes. It would act as a powerful stimulant to such entities to deposit similar declarations in the hope of increasing their status. Human rights observance would doubtless appear somewhere in the equation. Secondly, it would throw a rock into the already turbulent pool of Middle East relations. It would effectively place a question mark over the structures and principles of the Oslo Accords with all that this would entail.

Above and beyond these considerations, such a decision would mark a dramatically proactive approach on the part of the court, one that would increase, as a matter of practice, the scope of its jurisdictional reach on the back of a highly flexible resort to treaty interpretation. How this may impact on the views of states parties and non-party states is hard to prefigure.

The role of the prosecutor

Under the Rome Statute, the ICC Prosecutor has competence to initiate investigations on his own initiative. This power is a significant one, albeit circumscribed by the jurisdictional requirements of the Rome Statute as noted earlier. It is also contained by the need to obtain the authorization of the Pre-Trial Chamber and the necessity to inform all states having jurisdiction before commencing such an investigation. Although the ICC Prosecutor may be quite assertive, in practice he has been cautious about initiating investigations. Currently, the Office of the Prosecutor is conducting a preliminary analysis of situations in a number of countries including Afghanistan, Georgia, Guinea, Côte d'Ivoire and Colombia (as well, of course, as the PA). Of the five situations that are being actually investigated, only Kenya is being investigated as a result of the ICC Prosecutor's direct initiative and in this case, the Pre-Trial Chamber authorized such investigation in March this year.

The main basis for the court to acquire jurisdiction is by way of self-referral, that is, it is the state itself that raises the matter before the ICC Prosecutor, who may then conduct a preliminary examination. This has happened with regard to Uganda concerning the Lord's Resistance Army operating in the north of the country; the Democratic Republic of the Congo concerning crimes committed in its territory; and the Central African Republic with regard to the situation there during the armed conflict of 2002-3. Self-referral relates to a "situation," so that, for example, in the response of the ICC Registrar to the Palestine declaration, it was made clear that the purported acceptance of jurisdiction by the PA would include all crimes within the jurisdiction of the ICC "of relevance to the situation" (i.e., "post-2002 Palestine"), thus, assuming the matter were to proceed, including allegations of violations of relevant crimes by the PA and those for whom it would be seen as responsible. The point to be underlined here is that once an investigation has been authorized, its remit may be a lot broader than those bringing the situation before the court might have intended.

Referral by the Security Council

Beyond investigations initiated by the ICC Prosecutor, and through self-referrals, the Security Council may also refer a matter to the ICC. This is the clearest manifestation of a potential universality of jurisdiction.

The Security Council, acting under Chapter VII of the UN Charter and thus by adopting a binding resolution, may refer situations to the ICC. Since a binding resolution is involved, there is no need for the consent of the state concerned, whether territorial or national state, nor does it matter whether or not that state is a party to the Rome Statute. This has happened with regard to Sudan concerning the situation in Darfur. The Security Council referred the situation to the ICC Prosecutor on 31 March 2005. A preliminary examination was conducted and three months later an

investigation that lasted 20 months was opened. This resulted in summonses issued against two individuals followed by the issuance of arrest warrants in April 2007. In addition, an arrest warrant was issued against the serving president of Sudan in March 2009. The court formally informed the Security Council on 25 May 2010 of Sudan's continuing non-cooperation. A second arrest warrant was issued in July 2010.[8] Although it cannot be said that this process has been crowned with success, it has had a significant political impact – and not just in Sudan and Africa.

The main point, for our purposes, is to note that the jurisdictional constraints on the court can be circumvented by a Security Council resolution, for which all that is needed is a majority of nine votes (out of fifteen) and the absence of a negative vote from any one of the five permanent members.

The ICC and domestic courts

My sixth brief comment is with regard to the relationship between the ICC and domestic courts, for all is not what it seems. It will be remembered that the relationship between the Yugoslav and Rwanda tribunals with domestic courts is one of the primacy of the former so that the domestic courts can be, and indeed have been, requested to remit individuals to The Hague. However, the principle adopted with regard to the ICC is apparently the opposite. It is the domestic court that has priority, the ICC being able to exercise jurisdiction only where the relevant domestic courts cannot or will not exercise jurisdiction. This is termed the principle of complementarity. The preamble to the Rome Statute announces the duty of all states to exercise their own criminal jurisdiction over international crimes. It is indeed clear that it is normally the state on whose territory the crime was committed that should be in the best position to prosecute, bearing in mind the likely presence of witnesses and forensic evidence. The importance of complementarity was reaffirmed very recently by a resolution of the Kampala Review Conference.

Essentially, the rule is that a case will be inadmissible and the ICC unable to exercise jurisdiction where a case is being investigated or prosecuted by a state that has jurisdiction over it, unless that state is unwilling or unable genuinely to carry out the investigation or prosecution; secondly, where the case is being investigated or prosecuted by a state, which decides not to prosecute, unless the decision results from the unwillingness or inability of the state genuinely to prosecute; and, thirdly, where the person concerned has already been tried for conduct that is the subject of the complaint, unless the proceedings were brought for the purpose of shielding the person from criminal responsibility for crimes within the jurisdiction of the ICC or where those proceedings were not conducted independently or impartially. It is for the ICC to decide upon such issues and not the domestic courts.

In some ways, these provisions are akin to the requirement to exhaust domestic remedies present in human rights treaties, and again the onus is essentially upon the state concerned and the decision is one for the relevant court or other organ in question.

Finally, I wish to note that whereas within domestic legal systems the question of immunity, whether sovereign or diplomatic, may well arise in any particular claim, the international courts and tribunals have taken a very conscious decision to refuse to accept any claim to immunity – even that of a serving head of state. This marks a clear divergence from the traditional rules of international law founded upon state sovereignty and equality of states.

The waters of impunity have receded far and we should applaud this. The effort to ensure that war criminals do not escape retribution is an ongoing battle in which many have participated. It is a struggle at levels both domestic and international. The rise of international war crimes courts and tribunals in an effort to bring justice to specific conflicts is not to be gainsaid, but there is a balance to be struck. There is always a danger of politicization and scapegoating with regard to unpopular or vulnerable states. Action before the ICC can be taken as part of a political campaign, much as was seen in Belgium during the 1990s before its legislation was amended. We must be careful, however, not to take this too far. The key is to ensure that domestic legal systems are sufficiently in tune with international standards and sufficiently credible with regard to the investigation and prosecution, if necessary, of those within its jurisdiction accused of the requisite heinous crimes. Only if this cannot be achieved should the ICC be involved, and despite certain indications of a slide to a universal jurisdiction this basic constitutional structure should not be threatened.

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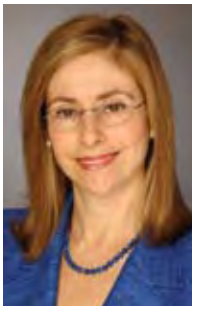
The Goldstone Report and its UN fatherland

The report's claim that Israel deliberately set out to murder the civilians is a green light to hate and terror directed towards Israelis

Anne Bayefsky

The Goldstone Report[1] did not materialize in a vacuum. It was commissioned in a partisan political context and produced by a group of individuals hand-picked as reliable enablers of a pre-determined goal. Neither the legal veneer nor the whiff of morality can mask the malevolent intent of its political masters, or the nefarious ends to which the report has predictably been put.



The report was written at the behest of the UN Human Rights Council (hereinafter "HRC" and "Council").[2] The Council is composed of 47 member states that are elected by the General Assembly (hereinafter "GA") from among five regional groups. Members of the African and Asian regional groups, taken together, form the majority of Council members, and elections have given the states from the Organization of the Islamic Conference a majority in both of these regional groups. Thus, the balance of power on the Council is held by Islamic countries.

The Council is the United Nations' lead human rights body. A country's actual respect for human rights has nothing to do with its electability to the Council and its resulting influence over international human rights policy. Members include numerous states with among the world's worst human rights records – like Saudi Arabia, Kyrgyzstan, Libya, Angola, Cuba, China and Russia – to name a few. According to Freedom House rankings, fewer than half of Council members are fully free democracies.[3] From the moment the Council was created in 2006 to replace the widely discredited UN Human Rights Commission, it has had a single dominant aim – the demonization and delegitimization of the state of Israel. The statistics speak for themselves:

- The Council has a standing agenda of ten items. One is reserved specifically for condemning Israel.[4] One is for all of the other 191 UN states, should anybody consider situations in these states to raise what the agenda calls "human rights situations that require the Council's attention."[5]
- The Council has had 14 regular sessions on human rights issues everywhere and six special sessions to condemn Israel alone.[6]
- The Council has had only one "urgent debate" on human rights anywhere – and it was dedicated to alleged human rights violations by Israel.[7]
- The Council has adopted more resolutions and decisions condemning Israel than all other 191 UN states combined.[8]
- By comparison, countries like Iran, Syria, Zimbabwe and Libya have never been the subject of a single resolution.

The Council currently sponsors three investigative bodies on Israel alone[9] – while 184 of the remaining 191 UN members merit nothing at all. Nothing – despite the billions of people affected, for example, by Saudi Arabia's gender apartheid, Egypt's systematic torture, China's iron fist, and Russia's predilection permanently to silence human-rights defenders. In fact, in just four years the Council has deliberately terminated investigations or examinations of such human rights models as Cuba, Belarus, Democratic Republic of the Congo, Liberia, Kyrgyzstan, Uzbekistan, Islamic Republic of Iran, Turkmenistan, and Guinea.[10]

In addition to this staggering array of discrimination and double-standards applied only to Israel, the old-fashioned kind of anti-Semitism is never far from the surface of the Council's bogus moral disapprobation. In June 2010 during the Council's 14th session, the Syrian representative made the following public statement: "Israel…is a state that is built on hatred…Let me quote a song that a group of children on a school bus in Israel sing merrily as they go to school and I quote 'With my teeth I will rip your flesh. With my mouth I will suck your blood."[11] The president of the Council, Belgian Ambassador Alex Van Meeuwen, was in the chair during this crude and unmistakable blood libel. Finding nothing unusual in the speech, he had only two words in response – "thank you" – before turning his attention to the next speaker. Ambassador Van Meeuwen has had no difficulty castigating speakers at the Council who

are critical of the Goldstone Report, for failing to exhibit appropriate "dignity and respect in this Chamber."[12] To detractors of the report Van Meeuwen has injected himself into Council proceedings and lectured: "Tolerance and respect should be the key words of the Council's work."[13]

This, then, is the character of the body that initiated the Goldstone inquiry and delineated its mandate. The Human Rights Council never changed the mandate, despite South African jurist Richard Goldstone's utterly false declarations that he had modified it himself by way of a behind-closed-door conversation with the Council's president.[14] The Council resolution setting up the inquiry begins by "strongly condemn[ing] the… Israeli military operation…" and finding "massive violations of human rights of the Palestinian people." Then it goes on to order an investigation, or more specifically: "Decides to dispatch a…fact-finding mission…to investigate all violations of international… law by…Israel against the Palestinian people…"[15] In other words, the Council demanded a report on Israel's guilt. And not surprisingly, that is exactly what it got.

In order to ensure that the so-called inquiry would satisfy the agenda of the Council's political bosses, it was necessary to appoint participants who could be relied upon to deliver the preordained verdict. So they looked for individuals who had already put on record their views on the very subject to be investigated. Christine Chinkin of the London School of Economics had signed a letter published in The Times in January 2009, which stated: "Israel's actions amount to aggression, not self-defense…contrary to international law."[16] Chinkin would never have been permitted to participate in an inquiry constituted by a democratic society. From the perspective of the Council, she was perfect.

Goldstone, and the two remaining members of the inquiry, all but begged for the job. These three signed an open letter in March 2009, addressed to the UN secretary-general and key UN ambassadors, calling for an investigation and claiming Israel had "committed" "gross violations of international humanitarian law" and "crimes perpetuated against civilians."[17] Goldstone also had another appealing qualification – he was Jewish – and appointing a Jew as hangman would help to camouflage the certain path to the gallows. As the Lebanese Ambassador Nawaf Salam reminded the General Assembly while urging it to endorse the report – which it did shortly thereafter – "Richard Goldstone identifies himself first and foremost [as]…a Jew…"[18]

These four couriers delivered the anticipated message to their Council patrons right on cue. Others at this conference have delved into various details of the report and its specific flaws. My aim is to situate the report in the overall political framework, conditions that lawyers frequently pretend are irrelevant or not their problem – an especially dangerous blind spot when the messenger is wrapped in the flag of human rights.

Overall, the Goldstone Report deliberately propels the United Nations full circle. It introduces the language of crimes against humanity when assessing Israel's response to eight years of rocket attacks aimed at its civilian population.[19] The UN, of course, rose from the ashes of Jewish victims of crimes against humanity. Today, the Goldstone Report promotes the allegation that the exercise of self-defense to protect Jews is itself a crime against humanity.

The central abomination in the report is its finding that Israel "deliberately…terrorize[d] a civilian population."[20] And again, Israeli "violence against civilians w[as] part of a deliberate policy."[21] This is not an accusation that mistakes were made in the course of war, or that the force used in response to years of rocket attacks against Israel's own civilian population was somehow disproportionate. It is the suggestion that instead of being motivated by self-defense, Israel set out to murder the people most deserving of protection.

The claim that Israel aimed to kill civilians is reminiscent of painful lies from other centuries, such as the infamous blood libel and the Protocols of the Elders of Zion. The allegation is not only false and defamatory. It is a green light to hate and terror directed towards Israelis. Below are a few examples of how UN members clearly understood the Goldstone Report.

The consideration of the report at the Human Rights Council on 29 September 2009 was an opportunity for countries like Egypt, Malaysia, Pakistan, Iran, Cuba, Venezuela and Libya to repeat Goldstone's reference to "crimes against humanity," and to accuse Israel of "willful killings," "brutal massacres" of "defenseless people," and "genocide."[22] The discussion prompted Yemen and Syria to analogize Israelis to Nazis, Yemen referring to Israel's "premeditated" "Gaza Holocaust," and Syria describing "Gaza [a]s the biggest concentration camp in the world."[23]

The endorsement of the report by the General Assembly in November licensed the same firestorm of hate speech. Algeria, Bangladesh, Venezuela, and Cuba spoke of Israel's "insidious plans" to commit "crimes against humanity" and a "policy of extermination" against the Palestinian people.[24] Malaysia, Libya, Sudan, Iran, and Nicaragua said Israelis killed "in cold blood," committed "genocide," "ethnic cleansing," "barbaric" "indescribable massacres," and "brutal…" "atrocities."[25]

None of this was just innocuous hot air. The punch line – and the point of the UN commissioning the Goldstone Report – was always in plain sight. The Human Rights Council's debate and endorsement of the report were accompanied by speeches by Pakistan on behalf of the Organization of the Islamic Conference and the League of Arab States announcing that the root cause of the Gaza war was occupation.[26] (They hadn't noticed that the only Jew "occupying" Gaza, Israeli soldier Gilad Shalit, is there against his will.) At the General Assembly, the report's endorsement came after a barrage of statements disputing Israel's right to exist. Iran referred to Israel's "lack of legitimacy for more than 60 years."[27] Mauritania, Nicaragua, and Tunisia referred back to 1947 and Israeli crimes for six decades.[28] And from Libya came: "Zionist crimes in Palestine began with the arrival of the first Zionist settlers in Palestine. They're not something new, and they've become systematic since the establishment of what is called Israel…These Zionist occupiers have used every form and method of terror against Palestinians for over 60 years."[29] The Arab and Islamic states that engineered the Goldstone Report intended it to serve as an integral part of a campaign to delegitimize and destroy the State of Israel through lethal politics.

The general threat posed by the report is perhaps clearest when watching those who care nothing for democracy use it to commandeer the legal systems of democratic states. The report is being invoked to hound and to prosecute those responsible for defending and protecting Israel from very real enemies. The legal verbiage cynically employed is of accountability and an end to impunity. This packaging is a subterfuge for a political reality that needs to be accurately labeled – it is the launch of a modern day pogrom against the individuals at the helm of Jewish self-determination.

Here are today's champions of "accountability" and an "end to impunity." When the Human Rights Council considered the Goldstone Report in September, Sudan announced: "We fully support the recommendations by the fact finding mission…Impunity leads to repeated crimes…there are serious consequences when putting a state above the law."[30] This is the same country governed by a president who roams free despite an outstanding warrant for his arrest on charges of crimes against humanity and genocide issued by the International Criminal Court. Iran lectured the Council: "We strongly believe [in]…holding accountable perpetrators of such heinous crimes and to put an end to the persistent situation of absolute impunity."[31] That's the same government that kidnaps foreign nationals at will, brutally suppresses its own population, and whose president gallivants around the world advocating genocide.

During the General Assembly meetings on the report, the Lebanese ambassador said: "Impunity is a prerequisite for justice that is needed for comprehensive and abiding peace."[32] That's the same country where former Lebanese Prime Minister Rafiq Hariri's murder remains unsolved and the likelihood of ever elucidating the full extent of Syrian and Hezbollah involvement or exacting from them a serious price is remote. Libya told the General Assembly it was concerned that under "The justice system in Israel … there's no way for the criminals and perpetrators to be held accountable for their crimes..."[33] That's the state whose president greeted the Lockerbie mass murderer with a hug. Cuba ranted about the alleged "impunity enjoyed by the government of Israel"[34] – notwithstanding that systematic governmental impunity is endemic in Cuba. And the League of Arab States demanded: "The time has come for the international community to put an end to the culture of impunity…and hold the perpetrators of violations of international law and human rights law accountable."[35] Those are the phony sensibilities of a spokesperson for 21 states not one of which is free and democratic.

But then the pushers of the Goldstone Report aren't really driven by a desire for accountability for criminal acts perpetrated against Palestinians. They aren't complaining about impunity for the Hamas thugs who throw undesirable Palestinians off high-rise buildings,[36] or impunity for exploiting Palestinian children and encouraging them to commit suicide in order to kill Jews, or impunity for the murderers of Palestinian women who are alleged to have brought dishonor to their male relatives.

The target of the report, from its conception, is Israel. Though the battleground has been painted over to look like a courtroom, the battle is political. And the United Nations is now entering the next phase of this sixty-year war – euphemistically known as 'follow-up.'

In February 2010, the UN secretary-general responded to the fall General Assembly resolution endorsing the report.[37] That resolution had called for follow-up to the Goldstone Report and "credible" investigations within a three-month period. For information, Israel gave the UN a report running more than 60 pages detailing its continuing supervision and evaluation of the actions of the Israel Defense Forces, in accordance with the rule of law. The Palestinian side responded to the General Assembly's deadline by submitting a piece of paper from Palestinian Authority leader Mahmoud Abbas. He announced that he had set

up a committee a few days before the deadline to begin to plan an investigation. The Palestinians who run Gaza and the terror campaign against Israeli citizens in the south of Israel, namely Hamas, did nothing at all. In response, the General Assembly extended the deadline and demanded another Secretary-General's report by the end of July on follow-up to the Goldstone Report.[38]

In March the Human Rights Council adopted still another resolution creating yet another follow-up committee.[39] The Council resolution stated that Israel – and only Israel – committed unlawful acts and established a committee of experts to monitor and assess all proceedings taken by Israel and the mysterious "Palestinian side."

The three committee members of the Council's latest concoction were appointed in June 2010.[40] It is a cozy affair of associates of the International Commission of Jurists (ICJ). Its report is also predictable, since this NGO has already pronounced itself on the topic to be adjudged. The members of this committee were appointed by the UN High Commissioner for Human Rights whose legal advisor is Palestinian Mona Rishmawi, former executive director of the Palestinian NGO al-Haq and until 2000 the director of a unit of the ICJ.[41] Committee members Christian Tomuschat and Param Cumaraswamy were members of the ICJ's Executive Committee during Rishmawi's term at the ICJ and currently remain Honorary Members. (Cumaraswamy was ICJ Vice-President until 2006.)[42] Mary Davis, the third member of the team, is currently on the board of the American Association for the ICJ.[43]

Shortly after the appointment of the three ICJ-affiliates to the Goldstone follow-up committee, the ICJ issued a public statement in defense of Goldstone, his apartheid past, and his report.[44] In January 2009, the ICJ made a statement to the Human Rights Council that included conclusions about why and how Israel had violated international law specifically during the Gaza conflict.[45] And in October 2009 the ICJ made a statement to the Human Rights Council specifically calling Israeli investigations into the Gaza conflict "ineffective as they lack safeguards of independence and impartiality…"[46] The mandate of the follow-up committee is to assess the "independence" and "effectiveness" of Israeli proceedings and their conformity with international standards.[47]

So now we have an anything-but-independent committee charged with investigating "the independence" of Israel's investigations. But then again, why would anyone expect the UN to appoint individuals for follow-up to Goldstone any more independent or objective than the Goldstone committee itself?

This latest crew will have plenty of support should the International Commission of Jurists fail to supply them with sufficient ammunition. For the UN now has in operation at least five other mechanisms dedicated to finding Israel guilty of every imaginable law and all involved in maximizing the reach of the Goldstone Report:

- the standing UN Committee on the Inalienable Rights of the Palestinian People
- the standing UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People
- the UN Special Rapporteur on the situation of human rights in the Palestinian Territories
- an entire UN Secretariat Division for Palestinian Rights
- the new Human Rights Council committee created to focus on Israel's alleged crimes connected with the naval blockade of Gaza.

Challenging the legal *bona fides* of the Goldstone Report and its progeny, and exposing the venality of the political agenda inseparable from them, presents democratic states and international lawyers with a stark choice. They can put domestic and international legal systems at the disposal of those who have no genuine interest in the rule of law. They can pretend the law has nothing to do with politics and stand by while the essentials of public policy are ravaged. They can imagine the discrimination against the Jewish state and the demonization and isolation of Jewish leaders is some kind of harmless pastime.

Or they can finally follow the straight line between the perversion of law and the threat to the defense of freedom that the report and its aftermath represent – and take the necessary steps to stop it.

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Notes:

1. Report of United Nations Fact Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, UN Doc. A/HRC/12/48 (Advanced Edit Version, 15 September 2009) (hereinafter: Goldstone Report) *available at* www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf (last visited 4 October 2010).

2. Human Rights Council (HRC) Resolution S-9/1*The*

grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip, 12 January 2009 A/HRC/S-9/2 (27 February 2009) *available at* www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/A-HRC-S-9-2.doc (last visited 4 October 2010).

3. *Freedom in the World 2010*, Freedom House, January, 2010 *available at* www.freedomhouse.org/template.cfm?page=363&year=2010 (last visited 4 October 2010).

4. HRC Resolution 5/1, *Institution-building of the United Nations Human Rights Council, see* Part V.(B) Agenda Item 7: *Human rights situation in Palestine and other occupied Arab territories,* 18 June 2007, *available at* www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.20.pdf (last visited 10 October 2010).

5. Agenda Item 4: *Human rights situations that require the Council's attention at supra* note 4.

6. Special Sessions on Israel were held: 5 and 6 July 2006; 11 August 2006; 15 November 2006; 23 and 24 January 2008; 9 and 12 January, 2009; 15 and 16 October 2009.

7. "Urgent Debate" was held under the HRC Agenda Item 1: *Organizational and procedural matters*: 1 and 2 June 2010, *supra* note 4.

8. The HRC has adopted 39 (51.3%) resolutions and decisions critical of Israel and 37 critical of the human rights records of all other states in the world, updated following the 14th session that ended 18 June 2010.

9. Committee of Independent Experts to monitor compliance with the Goldstone Report (HRC Resolution 13/9 *Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict,* A/HRC/RES/13/9, (25 March 2010*), available at* www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.RES.13.9_AEV.pdf (last visited 10 October 2010)); independent international fact-finding mission to investigate the May 2010 incident concerning the effort by Turkish-backed extremists to end Israel's naval blockade of Gaza (HRC Resolution 14/1 *The Grave Attacks by Israeli Forces against the Humanitarian Boat Convoy,* A/HRC/RES/14/1, (2 June 2010), *available at* www2.ohchr.org/english/bodies/hrcouncil/docs/14session/RES-14-1.doc (last visited 10 October 2010), and the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (Commission on Human Rights Resolution 1993/2 A, *Question of the violation of human rights in the occupied Arab territories, including Palestine*, 19 February 1993; HRC Decision 1/102, *Extension by the Human Rights Council of all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights,* 30 June 2006, *available at* http://ap.ohchr.org/documents/E/HRC/decisions/A-HRC-DEC-1-102.doc (last visited 10 October 2010).

10. The Council has terminated investigations that had been started by the Human Rights Commission (and were initially permitted to continue when the Council was first created): on Cuba (ended 18 June 2007), on Belarus (ended 18 June 2007), on the Democratic Republic of the Congo (ended 28 March 2008), on Liberia (ended September 2008). The Council has also terminated the consideration of human rights situations that had occurred under the ECOSOC 1503 Complaint Procedure on Kyrgyzstan (ended 2 October 2006), Uzbekistan (ended 26 March 2007); Islamic Republic of Iran (ended 26 March 2007), Turkmenistan (ended 23 March 2009), Guinea (ended 26 March 2010).

11. Rania Al Rifaiy (Syria), First secretary, UN HRC Webcast, 8 June 2010 *available at* www.un.org/webcast/unhrc/archive.asp?go=100608 (last visited on 20 October 2010).

12. 12th session of the HRC, in response to Anne Bayefsky's statement**,** Webcast, 29 September 2009, *available at* www.un.org/webcast/unhrc/archive.asp?go=090929 (last visited 20 October 2010).

13. 12th session of the HRC, in response to NGO speaker, Webcast, 22 March 2010 *available at* www.un.org/webcast/unhrc/archive.asp?go=100322 (last visited 20 October 2010).

14. Goldstone told reporters, for instance: "The original mandate was biased, but the president of the Human Rights Council agreed with me to change it." Ian Williams, *The NS Interview: Richard Goldstone,* New Statesman, 30 December 2010, *available at* www.newstatesman.com/middle-east/2010/01/interview-israel-law (last visited 10 October 2010) and again "I refused the original mandate because I thought it was biased against Israel and the president of the Human Rights Council asked me to write literally my own mandate, a mandate that I considered fair and even handed and I did that and he said well that's the mandate that I'm giving you. He took it to the Human Rights Council, there was no objection and of course since then, very importantly, our whole report based on that mandate has been adopted by the Human Rights Council." *Goldstone answers his critics,* ABC News, 22 October 2009, *available at* www.abc.net.au/pm/content/2009/s2721744.htm (last visited 10 October 2010). In fact, the president of the Council had no authority to change the mandate himself and the Human Rights Council took no decision whatsoever to alter it.

15. HRC Resolution S-9/1, *supra* note 2.

16. *Israel's bombardment of Gaza is not self-defense – it's*

a war crime, The Sunday Times, 11 January 2009, *available at* www.timesonline.co.uk/tol/comment/letters/article5488380.ece (last visited 10 October 2010).

17. *Gaza investigators call for war crimes inquiry,* Open Letter to UN Secretary-General Ban Ki-moon from Amnesty International, 16 March 2009, *available at* www.amnesty.org.au/news/comments/20572/ (last visited 10 October 2010).

18. *Statement by Ambassador Nawaf Salam (Lebanon)* at the General Assembly on the Follow-up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict, GA/10882 4 November 2009, *available at* http://unispal.un.org/UNISPAL.NSF/0/10E252495D71DE0A85257665004E6CD9 (last visited 10 October 2010).

19. Goldstone Report, *supra* note 1, at 26, para. 75; p. 284, para 1335; p. 423, para 1968.

20. Goldstone Report, *supra* note 1, at 408, para 1893.

21. Goldstone Report, *supra* note 1, at 258, para 1215.

22. Webcasts of Statements to the HRC *available at* www.un.org/webcast/unhrc/archive.asp?go=090929 *see* Statement by Egypt, HRC, 29 September 2009; Statement by Malaysia, HRC, 29 September 2009; Statement by Pakistan on behalf of the Organization of the Islamic Conference, HRC, 29 September 2009; Statement by Iran, HRC, 29 September 2009; Statement by Cuba, HRC, 29 September 2009; Statement by Venezuela, HRC, 29 September 2009; Statement by Libya, HRC, 29 September 2009.

23. Statement by Yemen, HRC, 29 September, 2009; Statement by Syria, HRC, 29 September 2009.

24. GA/10882 *supra* note 18, Statement by Algeria, GA, 4 November 2009; Statement by Bangladesh, GA, 5 November 2009; Statement by Venezuela, GA, 5 November 2009; Statement by Cuba, GA, 5 November 2009.

25. *Id.*, Statement by Malaysia, GA, 5 November 2009; Statement by Libya, GA, 4 November 2009; Statement by Sudan, GA, 4 November 2009; Statement by Iran, GA, 4 November 2009; Statement by Nicaragua, GA, 4 November 2009.

26. *Supra* note 22, Statement by Pakistan on behalf of the Organization of the Islamic Conference, HRC, 29 September 2009; Statement by the League of Arab States, HRC, 29 September 2009.

27. *Supra* note 18, Statement by Iran, GA, 4 November 2009.

28. *Id.*, Statement by Mauritania, GA, 4 November 2009; Statement by Nicaragua, GA, 4 November 2009; Statement by Tunisia, GA, 4 November 2009.

29. *Id.*, Statement by Libya, GA, 4 November 2009.

30. *Supra* note 22, Statement by Sudan, HRC, 29 September 2009.

31. *Id.*, Statement by Iran, HRC, 29 September 2009.

32. *Supra* note 18, Statement by Lebanon, GA, 4 November 2009.

33. *Id.*, Statement by Libya, GA, 4 November 2009.

34. *Id.*, Statement by Cuba, GA, 4 November 2009.

35. *Id.*, Statement by the League of Arab States, GA, 4 November 2009.

36. *Palestinian gunmen target Haniyeh's home in Gaza: Fatah, Hamas activists pushed off buildings* Associated Press, 7 June 2010, *available at* www.haaretz.com/news/palestinian-gunmen-target-haniyeh-s-home-in-gaza-1.222703 (last visited 10 October 2010).

37. U.N. Secretary-General, *Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict: Report of the Secretary General* A/64/651-S/64, (4 February 2010), *available at* http://unispal.un.org/UNISPAL.NSF/0/5E96A25E79E3C35C852576C1004E5C30 (last visited 10 October 2010).

38. General Assembly Resolution 64/254 *Second Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict,* A/RES/64/254 (26 February, 2010) *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/477/07/PDF/N0947707.pdf?OpenElement (last visited 10 October 2010).

39. HRC Resolution 13/9 *supra* note 9.

40. *Committee to monitor investigations into Gaza conflict named,* UN press release, 14 June 2010.

41. *See* biography: www.icrc.org/web/eng/siteeng0.nsf/html/review-editorial-board (last visited 2 November 2010 – ed.).

42. *See International Commission of Jurists web-site detailing biographies of Honorary Members*: www.icj.org/default.asp?langage=1&nodeID=389 (last visited 2 November 2010 – ed.).

43. *See American Association for the International Commission of Jurists* website: http://icj-usa.org/mary_mcgowan_davis (last visited 2 November 2010 – ed.).

44. *Statement on the harassment of Justice Goldstone,* 24 June 2010: www.icj.org/dwn/database/ICJ-GoldstoneStatement-24062010.pdf (last visited 2 November 2010 – ed.).

45. *International Commission of Jurists Intervention on serious violations of Human Rights Law and grave breaches of international Humanitarian Law during the Israeli military operations in Gaza,* 9th Special Session of the HRC, 12 January 2009: www.eyeontheun.org/assets/attachments/documents/8753International_Commission_of_Jurists.pdf (last visited 2 November 2010 – ed.) and Council webcast.

See ***The Goldstone Report and its UN fatherland,*** *page 48*

A suggested moral analysis of the Goldstone Report and its aftermath

If Israel is dedicated to protecting both its own civilian population and those of its enemies in time of war, it cannot restrict the collection of information on actions that appear to contradict this value

Mordechai Kremnitzer

I propose to set out here a few fundamental precepts which, to my mind, bear crucially on the moral aspects of the Goldstone Report,[1] Israel's stance with respect to it, and more broadly to international criminal law today.

The requirement of a factual basis

My first proposition is that findings that assign moral or legal responsibility, even if tentative and preliminary (but serious enough to justify a demand for further investigation), must have a basis in fact. The Goldstone Report dealt with a military combat operation and purported to reach initial findings of this sort, findings that attributed horrendous criminal intentions and acts to Israel's political and military echelons. It did so with no demonstrable basis in fact to support the findings. Israel refused to provide the Goldstone Commission[2] with its own version of the Cast Lead operation, and it is not my intention to pass judgment on that decision. Regarding Palestinian evidence as well, the commission itself wrote that witnesses were reluctant to speak about military operations by Hamas. The result was that those who drafted a report on a military operation did so without any notion of the nature of the military actions that took place in that operation. What were the goals set for these actions, and what means were used to achieve them? What risks were taken into account beforehand, and what were the real risks faced by IDF soldiers once the operation got under way? Without answers to these questions, no conclusions can be drawn about the proportionality of the actions taken by the IDF, and certainly not about any criminal intent behind these actions. Without a minimal basis in fact, the Report's findings are of no value.

No factual basis of any value can be achieved without a suitable investigation. This logic applies to Israel as well. Israeli citizens will never know which option was preferable: ending Operation Cast Lead after three days, for humanitarian reasons, as the minister of defense recommended, or prolonging it for an additional 17 days, as was actually done. The reason is that the Israeli government refused to appoint an independent, autonomous commission to investigate the war. This sort of commission should have been appointed prior to the establishment of the Goldstone Commission,and the fact that the Goldstone Report recommended the creation of such a commission is a poor reason for not doing so afterwards.

Military briefings cannot be a proper response to the grave charges leveled against Israel's government officials and military commanders. Military briefings are aimed at drawing lessons for the future. They are not suited to ascertaining the truth regarding war crimes. Not addressing these charges could be interpreted as acknowledging them, since they cannot be authoritatively refuted. This, in my view, was a historic mistake. Israel missed a golden opportunity to influence the development of international legal rules governing justifiable responses to threats emanating from terror-based nations and entities.

"You shall have one law" (*Leviticus 24:22*), or beware of double standards

My second proposition is that rules and positions must be instituted uniformly and evenly. In other words, double standards — the application of different criteria to similar situations — are to be avoided. One clear weakness of the Goldstone Report is its failure to adhere to this principle. The commission was quick to ascribe the worst possible criminal motives to Israeli authorities. However, it evidenced overwhelming and inexplicable caution in attributing any nefarious motives to Hamas. The commission was cautious even when that group's actions clearly warranted

such attribution, as, for example, when it employed civilians as "human shields" for its military operations. While the commission did not hesitate to give full weight to declarations by Israeli politicians during the course of the operation (even though these statements were probably a means of "letting off steam" at home or threatening Hamas, rather than an expression of policy), it refused to give any credence to the statement of a Palestinian minister affirming that the Hamas police were taking part in Hamas's combat activity.

We must always keep this principle in mind: Those who, like Israeli philosopher Asa Kasher and General Amos Yadlin, maintain that no additional risk should be imposed on our own soldiers in order to avoid harming the enemy's civilian population, must be ready to have the same standard applied by our enemies. Anyone who claims, for example, that a strike on an ammunition storehouse justifies the killing of 20 civilians (even though the other side has no trouble replenishing its arms supply) must be aware of the wider implications of this equation, such as the extent of justified collateral damage to Israeli civilians caused by an attack on the IDF headquarters. Those who determine that Palestinian civilians who attempt to protect military targets as human shields by creating a legal barrier to a possible attack thereby become "the enemy" and can be targeted as such (as the Israeli Supreme Court has ruled), come close to claiming that Israelis who purchase apartments adjacent to the IDF headquarters face a similar fate. Just to be clear: I am not referring to those who provide an actual cover for a military target by hiding it or otherwise preventing physical access to it, but rather to those whose actions make it legally difficult to justify attacking the target. In assessing the proportionality of the attack, account should be taken of the question whether the civilians likely to be injured are those who deliberately act as human shields. But to regard those who pose no danger to IDF forces as enemy targets is another matter. Similarly, some recommend broadening the conventional definition of "enemy" to include quasi-enemies — such as Hamas members who take no part in the movement's military operations but are active only in a religious, educational, or social welfare capacity as civilians, or people who simply support or sympathize with the movement. Before adopting this approach, one must recognize its implications. Following this path, and applying this logic symmetrically, leads to classifying as enemies Israeli reservists (even those who are not on active duty) and anyone permitted by the government to carry weapons. If the definition of enemies also includes potential enemies, the same logic applies to them. This rationale will serve the enemies of Israel to justify any attack on Israeli citizens who are not elderly. The prohibition against any attack on non-combatant civilians is not only a moral precept of the highest order, which is reason enough to abide by it; it is also essential from a pragmatic point of view. The struggle against terror is doomed to fail if the civilian population from which the terrorists emerge is itself defined as terrorist. Armed attacks on civilians serve the interests of terrorists because they result in the creation of additional terrorists.

If we take seriously, as we should, the obligation to ensure that in a war against armed terrorists, non-combatant civilians are not harmed, we must consider the question of how the Israeli public—including IDF soldiers—relates to the Palestinian population in general, particularly to the residents of Gaza. Given the current state of affairs, Israelis could come to view all residents of the Gaza Strip as enemies, mirroring the same tendency on the other side of the border. Unless deliberate educational, informational, and command-level steps are taken, these tendencies will develop even further. When the state, by law, denies compensation to a child living in the occupied territories who is injured as a result of an action performed by security forces – does it not turn this child, as well as other children, into enemies? When, again by law, the state prohibits a "mixed" Palestinian couple (an Israeli citizen and a resident of Gaza or the West Bank) from living in Israel, the message that comes across is that everyone from the other side is an enemy. The same message is conveyed by the imposition of a civilian blockade against all Gaza residents (alongside the military blockade which is justified for defense reasons). The benefit of this policy is highly doubtful, and its potential for breeding hatred against Israel is significant.

Israel's official position with regard to the International Criminal Court and the principle of universal jurisdiction also creates the uncomfortable sense of a double standard. There is a widely perceived mismatch between Israel's stance in the past (the very wide-scale incidence of Israeli penal law outside its borders; the capture and trial of Adolf Eichmann, a milestone in the conceptual development of universal jurisdiction) and its current position regarding developments in international criminal law. The resulting impression is that Israel behaves one way when it perceives itself as a victim and another way when it believes it, or someone acting on its behalf, is

*See **A moral analysis of the Goldstone Report and its aftermath**, page 27*

הארגון הבינלאומי של עורכי־דין ומשפטנים יהודים
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS

Israel as a Jewish and Democratic State

IAJLJ *14th Congress* ✡ Jerusalem and the Dead Sea, February 2-5, 2011

Wednesday, February 2, 2011

18:00	**Welcome Reception**
18:45	**Opening Session**
Opening Address:	**Adv. Alex Hertman**, President, IAJLJ
Moderator:	**Adv. Irit Kohn**, Deputy President, IAJLJ
Greetings:	**Mr. Gideon Saár**, Minister of Education, Israel
	Chief Justice Ms. Dorit Beinisch, President, Supreme Court of Israel
Keynote Speaker:	**Prof. Ruth Gavison**, Haim H. Cohn Professor of Human Rights, Law Faculty, The Hebrew University of Jerusalem; Founding President of the Metzilah Center for Zionist, Jewish, Liberal and Humanist Thought

Thursday, February 3, 2011

09:00-11:00	**Morning Assembly:** Elections / Address by the new president
11:00-11:30	Coffee Break
11:30-12:15	**Opening Presentation** To be announced *The State of Israel as a Jewish and Democratic State*
12:30-13:20	**1st Session: The State of Israel as a Jewish and Democratic State**
13:30	Light Lunch
16:00-18:30	**2nd Session: The State of Israel as a Jewish and Democratic State**
20:00	Gala Dinner

Friday, February 4, 2011

09:30-12:00	**3rd Session: The State of Israel as a Jewish and Democratic State**
12:00	Coffee Break

Saturday, February 5, 2011

18:00	Cocktail Reception

Program is subject to change.
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IAJLJ raps ICRC at worldwide Shalit rallies

Members and friends of the International Association of Jewish Lawyers and Jurists demonstrated at offices of the International Committee of the Red Cross around the world on Friday, December 10, to protest the ICRC's failure to visit and uphold the rights, under the International Declaration of Human Rights and the Geneva Conventions, of Israeli soldier Gilad Shalit, held captive by Hamas in Gaza since June 25, 2006.

The demonstrations took place on International Human Rights Day, the day of the 1948 signing of the International Declaration of Human Rights. René Cassin, one of IAJLJ's founders, was among its drafters.

"The International Committee of the Red Cross must push harder to uphold Gilad Shalit's rights," said IAJLJ President Alex Hertman. "Denial of access is a gross violation of human rights and in clear contradiction of the rules of international humanitarian law applicable in armed conflict."

The demonstrations, led by IAJLJ, and in some cities with the participation of Hadassah, Wizo, B'nai B'rith and others, took place in New York, Milan, Vienna, Brussels, Zurich, Berlin, Paris and Tel Aviv. Supporting activities took place in Athens, Santiago, London, Johannesburg and Buenos Aires. In each city a letter to ICRC President Jakob Kellenberger was submitted.

Speaking to Gilad's family and some 200 demonstrators in Tel Aviv, Jewish Agency Chairman Natan Sharansky, recalling his many years as a Soviet prisoner, emphasized the importance of continuing to write letters to Gilad Shalit even though he might not receive them. IAJLJ Deputy President Irit Kohn and Board Member Dr. Meir Rosenne, a former Israeli ambassador to Paris and Washington, also spoke.

At a large rally at the ICRC offices in New York, convened in association with the World Jewish Congress, Hadassah-Women's Zionist Organization of America and Stand With Us, speakers included AAJLJ President and IAJLJ Executive Committee Member Stephen R. Greenwald and AAJLJ Board Member Marc Landis; WJC Executive Director Betty Ehrenberg, Hadassah New York Region President Ruth Gursky, Stand With Us Regional Coordinator Avi Posnick and members of Congress Jerrold Nadler and Carolyn Maloney. Greenwald and Posnick presented petitions to ICRC Delegate Pierre Dorbes, formerly deputy head of the ICRC mission in Israel.

Demonstrators in Milan, led by IAJLJ Board Member Maurizio Ruben, held a candle lighting ceremony and met with Italian Red Cross Commissioner Alberto Angelo Alfredo Bruno.

IAJLJ Honorary Vice President Joseph Roubache led a demonstration in Paris in cooperation with

Photo by: Mario Folizia

Milan: Candle lighting ceremony for Gilad Shalit

Berlin: German Red Cross Secretary General Clemens Graf von Waldburg-Zeil receives IAJLJ petition from IAJLJ German Section Chairman Dr. Peter Diedrich (l.)

New York: Hundreds demonstrate at ICRC offices

Tel Aviv: IAJLJ Deputy President Irit Kohn and Jewish Agency Chairman Natan Sharansky address the crowd

Tel Aviv: IAJLJ Board Member Meir Rosenne and Gilad Shalit's father Noam

Brussels: ICRC Brussels delegate Francois Bellon accepts a blanket for Gilad Shalit from activist Sarah Daum

Vienna: Jewish Community President Ariel Muzicant speaks to demonstrators

Avocats Sans Frontières, represented by Gilles-William Goldnagel, and France-Israël Alliance Général Kœnig. Letters from IAJLJ and from the president of the Paris Bar Association were deposited with the Red Cross. In Brussels, Jewish community activist Sarah Daum presented a blanket for Gilad Shalit to Francois Bellon, head of the ICRC delegation in that city. In Athens, IAJLJ member Stella Salem presented a letter to the Red Cross.

In Zurich, in cooperation with the Augustin Keller Lodge of B'nai B'rith, 250 people expressed their solidarity with Gilad Shalit. Annlis Knoepfel, the local representative of the Red Cross, accepted a letter to be forwarded to ICRC President Jakob Kellenberger, along with a woolen blanket for Gilad Shalit. In Vienna, Ariel Muzicant, president of that city's Jewish community, spoke to some 250 demonstrators in front of a large mockup of a prison cell with a prisoner inside.

In London, UKAJLJ Chairman Dennis Levy and IAJLJ and UKAJLJ Board Member Jonathan Lux, together with Jamie Slavin of the Board of Deputies of British Jews and Adrian Korsner from the UK Zionist Federation, met with Michael Meyer, head of international law at the British Red Cross, and presented the protest letter to him.

In Berlin, members of IAJLJ's German Section presented a petition to the General Secretariat of the German Red Cross, as well as a blanket for Gilad Shalit. Speaking at the demonstration in Berlin were Dr. Peter Diedrich on behalf of IAJLJ, Israeli Ambassador to Germany Emmanuel Nahshon, Berlin Jewish community representative Lala Süsskind, Secretary General of the Central Council of Jews in Germany Stephan Kramer, and German-Israeli Society/Berlin and Potsdam Branch Chairman Jochen Feilcke and others. Rally supporters also included the Center Judaicum, the Federation of Jewish soldiers, Scholars for Peace in the Middle East, the Polish-German Jurists Association and the Society for Christian-Jewish

Cooperation in Berlin.

In Buenos Aires, a formal claim was filed by AAJLJ and the Zionist Organization of Argentina with the Argentinean Red Cross and the local delegation of the International Red Cross. In Santiago, the letter was delivered to the Chilean Red Cross by members of the Chilean Association of Jewish Lawyers.

IAJLJ will continue to protest the ICRC's failure to visit and uphold the rights of Gilad Shalit.

See www.intjewishlawyers.org to view the protest letters and more photos of the demonstrations.

– Paul Ogden

London: IAJLJ and UKJLJ Board Member Jonathan Lux (r.) presents protest letter to British Red Cross representative Michael Meyer

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18. Amnesty International, *The 58th Session of the UN Commission on Human Rights* 39 (2002) *available at* www.amnesty.org/en/library/asset/IOR41/021/2002/en/c7ca49b0-d802-11dd-9df8-936c90684588/ior410212002en.pdf (Last visited 4 November 2010).

19. Volker Heins, Nongovernmental Organizations in International Society 24 (2008).

20. The founder of al-Haq, Charles Shamas, is also on the board of Human Rights Watch.

21. Martin Seiff, *"Analysis: Why Europeans bought Jenin myth"*, UPI (20 May, 2002) *available at* www.upjf.org/detail.do?noArticle=1668&noCat=115 (Last visited 4 November, 2010).

22. HRW officials argued that international humanitarian law did not apply to non-state actors and "militant groups." Transcript of interview with Urmi Shah from HRW, broadcast in *Jenin: Massacring the Truth* (Martin Himel, Elsasah Productions, July, 2004) *available at* www.ngo-monitor.org/article.php?id=1023 (Last visited 4 November 2010).

23. Human Rights Watch, *News: Israel and the Occupied Territories* (2002) *available at* www.hrw.org/en/news-filter/228?page=16 (Last visited 4 November 2010).

24. Human Rights Watch, *Jenin: IDF military operations* (May 2002) *available at* www.hrw.org/reports/2002/israel3/ (Last visited 4 November 2010).

25. *Id.*

26. United Nations, ES-10/10 *Report of the Secretary-General prepared pursuant to General Assembly resolution, available at* www.un.org/peace/jenin/ (Last visited 4 November 2010).

27. Interview with Kenneth Roth, CNN, December 10 2002.

28. Palestinian Center for Human Rights, Letter to Mary Robinson. UN High Commissioner for Human Rights (22 April 2002) *available at* www.pchrgaza.org/Interventions/robinson_22april2002.pdf (Last visited 4 November 2010).

29. UN Commission on Human Rights: *"Report on the Fifty-Eighth Session,"* 18 March-26 April 2002, *available at* www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.2002.23++E.CN.4.2002.200.En?Opendocument (Last visited 4 November 2010).

30. United Nations, GA/10449, March 15, 2006, *available at* www.un.org/News/Press/docs/2006/ga10449.doc.htm (Last visited 4 November 2010).)

31. Database of written statements submitted to the United Nations Human Rights Council *available at* http://ap.ohchr.org/documents/sdpage_e.aspx?b=10&se=1&t=7 (Last visited 4 November 2010).

32. United Nations General Assembly, *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council resolution S-2/1* at 16 (23 November, 2006) *available at* www2.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.3.2.pdf (Last visited 4 November 2010).

33. Herzberg, *supra* note 3.

34. Gerald Steinberg ed., *The NGO Front in the Gaza War,* NGO-Monitor Monograph Series (February 2009) *available at* www.ngo-monitor.org/data/images/File/NGO_Front_Gaza.pdf (Last visited 4 November 2010).

35. UNHRC Ninth Special Session, Oral Statements (12 January 2009) *available at* http://portal.ohchr.org/portal/page/portal/HRCExtranet/9thSpecialSession/Oralstatements/120109. Username: hrc extranet; password: 1session (Last visited 4 November 2010).

36. *Id.*

37. UNHRC Ninth Special Session, A/HRC/S-9/NGO/2 (8 January 2009) *available at* http://unispal.un.org/UNISPAL.NSF/0/DC9AD14F2973AC668525753C006CE580 (Last visited 4 November 2010).

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a potential "victimizer." Israel is correct in demanding that universal jurisdiction must be closely monitored when applied by other countries. In other words, enforcement decisions must made by the highest criminal prosecution authority, as under Israeli law, where the authority rests with the attorney general. It is safe to assume that any reasonable chief prosecutor will refrain from involving his or her country in criminal proceedings against a government official of a country that is committed to the rule of law, that conducts thorough criminal investigations, and that ensures proper criminal proceedings for those charged with and later accused of crimes under international law. In this context, it is worth recalling the weakness of universal jurisdiction. Given the enormous backlog of criminal cases in most legal systems, a problem that countries are hard-pressed to solve, why would a country seek to apply its own criminal process to an act that has no link to the country where the suspect is located?

The attempt to limit universal jurisdiction to cases of genocide and crimes against humanity (of which Jewish people have been victims) is unconvincing, to my mind. The logic behind the appropriate application of universal jurisdiction in cases of serious crimes that violate fundamental human rights is that there is an inherent failure in the handling of these crimes in the countries of the perpetrators. The classic cases are crimes of this type committed on behalf of a country by its leaders, its security services, or its army. This scenario applies, for example, to war criminals and to state-sponsored torture (as in the case of Chilean dictator Augusto Pinochet). Claiming that the country itself should handle these types of crimes implies that they are not treated with the proper degree of seriousness. Obviously, there is an inherent and substantial flaw in the ability of a country to respond properly and genuinely to actions that are committed in its name and that, to some degree, are its own.

Universal jurisdiction clearly serves as a necessary means of whipping nations into doing what, in any case, they are obliged to do but tend to do only as a last resort. The Israeli experience proves that the presence of universal jurisdiction does, indeed, spur the military to abide by the precepts of international law. It is not at all certain that Israel's High Court of Justice would have ruled as it did on the use of West Bank Palestinian residents as human shields without being able to invoke international criminal law.

In particular, it is our ambivalence towards war crimes that should make us wary of applying double standards. When war crimes are committed against us, we are filled with anger and quick to express our moral indignation. When we ourselves are accused of war crimes attributed to our "good boys" in uniform, our reaction is far more complex and lacks the element of trenchant denunciation. It seems that the right response to war crimes committed against us must also be the right response to war crimes committed by us. More on that later.

Israel's reticence with regard to universal jurisdiction is especially puzzling given the wide acceptance of the principle in its own laws. In this context it is said: "Justice begins at home." Those who demand that others limit the scope of universal jurisdiction must abide by the same standard in their own backyard.

Given the inherent connection between the development of international criminal law and the horrors of World War II, and especially the Holocaust, I deem it unfitting for Israel, as the Jewish State, to turn its back on or express hostility toward that law. It is true that international criminal law evidences serious weakness today. We would be hard-pressed to claim that it excels in mechanisms that ensure equal treatment for all. On the contrary, we must admit that its enforcement capabilities depend on the international power and status of the very countries from which the suspected criminals emerge. Nevertheless, in my opinion, a flawed international criminal law is better than no law at all.

Beware of the blind spots

My third proposition is to beware of blind spots—factors that do not enter into our moral equation despite their relevance. If we ignore a relevant consideration or piece of information, we are likely to reach the wrong conclusion. This principle is more difficult to apply since it requires greater effort to stretch our imagination to the greatest extent possible.

The major blind spot of the Goldstone Report is the nature of Hamas and the essence of Hamas rule in the Gaza Strip. As portrayed in the Report, Hamas is an organization of freedom fighters. There is no mention of it as a terror organization whose charter calls for the annihilation of the State of Israel, and no characterization of Gaza's rulers as a genocidal group of terrorists.

From a moral perspective, the principle of proportionality in connection with collateral damage – which dictates that harm to civilians must not be excessive when weighed against the gains of a military operation—requires the avoidance of injury to innocent persons unless there is no other choice. To

reduce the danger posed by ignoring a blind spot, we must distinguish between three situations: 1) There is no concrete knowledge of civilians who are likely to be injured by an attack on a military target, but we can surmise, objectively, that this danger exists; 2) In the subjective assessment of a military commander, there is a real probability that civilians will be injured; and 3) There is concrete knowledge of certain, or close to certain, injury to civilians that will result. There can also be different probabilities regarding the chances of a military operation achieving its objectives. Relevant factors to be considered are if the gains to be made by the operation are viable or short-term, and the level of urgency of the operation – whether it must be immediate, or it can be postponed to a time when little or no injury will be caused to civilians.

Those who attempt to assess the functioning of Israel's civil society organizations (Arab/Palestinian and Jewish) with no appreciation of the fundamental moral injustice of a nearly-two-generation military occupation and the denial of basic rights caused by it have done more than ignore a blind spot; they are guilty of complete moral blindness. Those who fail to see the moral corruption as an essential characteristic of the occupation, and the notion that Palestinians are both hostile and inferior that is instilled among Jews because of the occupation, are escaping reality in favor of their own, more comfortable virtual reality. It is only natural that the backdrop of discrimination against residents of the occupied territories, and the need to justify the denial of their rights, will lead to the emergence of an approach that robs these residents of their full humanity.

However unpleasant the task, we must remember that for many years, since 1967, Palestinians and human rights organizations have been claiming that Israel tortures terror suspects. Officially, and at all levels, Israel vehemently denied this charge. Years later, after the Bus 300 incident, General Security Service (now the Israel Security Agency, hereinafter "ISA") personnel admitted before the Landau Commission of Inquiry that they used physical and psychological pressure as a matter of course in interrogations and regularly denied the use of these methods in courts of law. We can only wonder whether the truth would have been revealed had the Bus 300 incident not occurred and whether we would still be living with the lie that the establishment, and consequently the public, adopted as the truth.

Even after the Landau Report, the ISA continued to use physical pressure in its interrogations. The practice persisted until, in response to a petition filed by human rights organizations, the High Court of Justice ruled that such methods were unlawful. Since the Court retained a narrow exemption to be used under exceptional circumstances, it is still unclear exactly what transpires behind closed doors in interrogations of suspected terrorists. The lessons we can draw from this matter are that not every charge of criminal activity cast against Israel and denied by Israel is false. Even if an official inquiry reveals no evidence to support the charges, there still may be some truth to them, given the difficulty of discovering the facts or the lack of motivation to do so. Human rights organizations, both Palestinian and Israeli, deserve praise for their efforts in this area. We must be wary of painting a comfortable, one-dimensional reality in which our side is all white and the Palestinian side is all black.

Similarly, we must avoid the tendency to justify every despicable act with a myriad of arguments when these acts were sanctioned by us or carried out in our name. The role of civil society organizations—particularly those outside the national consensus, with their own perceptions of reality and their own value systems—is a worthy and weighty one. There is no way to be certain that the majority's perception of reality is correct. Without the challenging of existing social conventions which can only emerge from individuals and organizations outside the establishment, there is no chance of revealing the truth, and an entire society can believe the lies fed to it by the government in power. The most important value in a democracy is the multiplicity of voices, perceptions, and opinions.

If Israel is dedicated to the value of protecting both its own civilian population and those of its enemies in time of war as a basic value of human civilization, it cannot restrict the steps taken by organizations to collect information on actions that appear to contradict this value. The position stating that war crimes are reprehensible acts for which all legal means—in Israel and abroad—must be taken to bring the perpetrators to justice is a moral and patriotic position. It is no less patriotic than the position stating that the country should not "air its dirty laundry" outside its borders. A law-abiding country that also adheres to international law can ignore neither the international dimension of these crimes nor the tendency of the establishment to refrain from handling them with the required degree of determination. Therefore, the use of coercive means to prevent the airing of such "dirty laundry" is out of the question, whether made through a smear campaign or by means of legislation aimed at preventing information from reaching outside sources. Such tactics are characteristic of totalitarian regimes. How would we respond if another country were to take legal action

to prevent the collection or use of information that could play a role in criminal proceedings for war crimes committed against us? It is only natural that Palestinian victims would turn to these organizations rather than to official Israeli investigatory institutions, which do not even open avenues of access for these people. These organizations may be the sole address available to them. The Military Advocate General has more than once expressed appreciation for the contribution of these organizations in gathering evidence that might otherwise not be received.

It is important to stress, in this context, that military briefings are not meant as a tool for gathering evidence about war crimes. Their purpose is to provide information that can be used to improve military performance in the future. Under no circumstances can they be used as a substitute for criminal investigations when there is reasonable suspicion that a crime has been committed. And we know, given the brotherhood of combat soldiers and the conspiracy of denial and silence it creates, that even vigorous criminal investigations can face roadblocks on the road to discovering the truth. We can only conclude that exceptional effort is required to expose war crimes. The harassment of organizations that contribute to the fact-finding effort is an additional obstacle on the road to truth-finding. It is a clear expression of hostility toward international law.

One argument made in the attack on civil society organizations in Israel is that they have great power, greater even than that of governments. Therefore, it is claimed, these organizations require the same degree of monitoring and control that is required for democratically elected governments. There is no greater distortion than this. The claim that these organizations are more powerful than governments, which can decree who will live and who will die, is totally groundless. The use of governmental mechanisms to supervise and control civil society organizations fits a totalitarian regime and serves a deathblow to Israeli democracy.

Another blind spot, one of momentous proportions and also well within the comfort zone of Israelis, is the position that the country faces monolithic hostility worldwide, which negates its legitimacy as the nation-state of the Jewish people, regardless of its actions or policies. Without a doubt, there is hostility toward Israel in the world that is unfounded and unrelated to the country's actions. Nevertheless, the perception of sweeping hostility is a case of blindness. Many people and countries around the world have friendly, or at least proper and fair attitudes towards Israel. For them, a decisive factor in these relations is the manner in which Israel conducts its affairs. And those who judge Israel's conduct are interested in two crucial issues: the country's continued control over occupied land and people, and its true willingness to establish peaceful relations with its neighbors. In the near future Israel will also be judged by its treatment of the Arab-Palestinian population within the state of Israel.

Israel's blind policy not only closes off any chance of tempering hostility against the country. It also undermines Israel's standing in the world, even among its friends. This reading of the situation is based on an important moral premise: We are not entitled to evade responsibility for our actions; nor can we expect others to relieve us of it.

"Moderate in judgment" (*Pirkei Avot*)

The final principle, which I will discuss briefly, is that of moderation or restraint. When standards are set for the actions of individuals or nations, they should not be so high as to be unattainable. I do not claim that the standards must mirror the current reality, and I would also caution against placing them too low. However, investigatory bodies, particularly those that are internationally sanctioned, may be tempted to set demands that are unreasonable.

The Goldstone Commission clearly yielded to this temptation in criticizing Israel for bombing and damaging the Hamas parliament building in Gaza—at night, when it was unoccupied. If even the empty institutional structures of a terrorist regime are not legitimate targets for attack, how are law-abiding nations supposed to defend themselves against terrorist states? If the place where blueprints for terrorist acts are drawn up is granted immunity because the site doubles as a parliamentary institution, then terrorist organizations would be well served to take control of civilian territory as a base for building a terrorist state. That is an obviously unreasonable standard. It appears that those who apply it fail to understand that the psychological dimension is critical in fighting a war against a terrorist organization. Moreover, the Goldstone Report in general ties the hands of a state under attack and thus eliminates its effective self -defense.

To rob a law-abiding country of its ability to defend itself effectively is to grant a terrorist state the power to defeat that country. The question of what a law-abiding country is permitted to do against a terrorist state or a terror-supporting state (such as Lebanon), is critical to Israel's existence and security. In a press interview

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An opportunity missed?

Reflections on the Goldstone Report and international law

Robbie Sabel

Israel was not legally obliged to cooperate with the Goldstone Commission[1] (hereinafter "the Commission"), whose mandate and composition were blatantly biased. Nevertheless a question can be raised as to whether Israel should have participated in the work of the Commission. Although it is highly unlikely that official Israeli participation would have changed the outcome, such participation might have at least shamed or badgered some members of the Commission into discussing issues of the law of armed conflict that arise from an army fighting a terrorist organization in a built-up area.

Israel was apprehensive that its participation would award legitimacy to the Commission but experience tends to show that Israeli participation, or otherwise, has little effect on how the world subsequently treats an anti-Israeli resolution or conclusion. Playing *broigez* (an expressive Yiddish word for boycotting on the basis of being offended) seldom brings diplomatic dividends. The object of this paper is to raise some of the legal issues of the laws of armed conflict that a conscientious, unbiased international commission of enquiry (a phrase that does not describe the Goldstone Commission) should perhaps have examined.

Attacks on governmental institutions

The Report[2] states that although the Hamas in Gaza has a military arm, its governmental institutions, including police and prisons, are not legitimate targets.[3] The report states that an Israeli attack on the police was a war crime since the police are civilians. The report rejects Israel's claim that the police and government institutions were part of the Hamas military infrastructure and control system.[4] The report does not express incredulity at the fact that "civilian" policemen were armed with anti-tank weapons.[5] But beyond this factual argument, a question arises: Do governmental institutions and authorities, in principle, enjoy immunity in wartime?

The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (hereinafter: "Protocol I") states, "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used." The list of civilian objects that possess presumptive civilian status does not include broadcasting stations, means of transport or government institutions. An indirect definition of permitted targets appears in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter "1954 Hague Convention"), wherein it is noted that that cultural treasures may not be stored near "industrial centers, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication."[7] This definition seems to imply that the establishments referred to are themselves legitimate targets. Government institutions such as health, welfare and courts are clearly not legitimate targets, but the destruction of institutions such as the offices of the prime minister, the executive, presidents or the treasury, are likely to provide a clear military advantage to the attacking party. Even on the assumption that Israel attacked Hamas governmental institutions intentionally, it is thus not at all clear that that this is a forbidden category of attack. Legal scholar Ingrid Detter reflects common sense when she writes that "It is questionable whether government buildings are excluded under any clear rule of law from enemy attack."[8]

Use of civilians as human shields

The Report does not attempt to condone the use of civilians by the Hamas as a human shield, presumably since the laws of war expressly provide that

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations,

> in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.[9]

Such use is included in the list of grave violations of laws of war under the jurisdiction of the International Criminal Court.[10] The Report does not however attempt to examine how the opposing party should react to such an illegal exploitation of civilians.

Legal scholar Yoram Dinstein proposes that civilians who have volunteered to be human shields thereby become illegal fighters and legitimate targets.[11] Support for this attitude could be inferred from the court decision concerning former Yugoslavia that stated "The protection of civilians and civilian objects provided by modern international law may cease entirely or be reduced or suspended…when civilians abuse their rights."[12] An International Committee of the Red Cross (hereinafter "ICRC") representative argues against this interpretation on the questionable basis that civilians who are acting as a human shield are not trying to harm the enemy and so they cannot be perceived as fighters.[13]

A more reasonable interpretation would seem to be that civilians who volunteer to act as a human shield are analogous to civilian workers in defense industries. These civilians are not a legitimate target in themselves, although during their working time in the defense industry, it is unnecessary to relate to them as civilians, i.e., during their work hours it is not necessary to exercise the rule of proportionality. Perhaps support for this position can be found in the official ICRC commentary on Protocol I, according to which "Civilians who are within or in the immediate vicinity of military objectives run the risk of incidental effects."[14] Another interpretation, of the commentators Bothe and others, is that when civilians are present of their own free will at a military site, proportionality obtains, but to a limited degree.[15] This is also the position of the British Ministry of Defense Manual, which states:

> Any violation by the enemy of this rule [using a human shield] would not relieve an attacker of his responsibility to take precautions to protect the civilians affected, but the enemy's unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage anticipated.[16]

Reciprocity and reprisal actions against civilian targets

The Report does not attempt to deal with the problematic issue of a regular army in conflict with fighters who knowingly disregard the fact that it is forbidden to attack civilians.[17] International law and in particular laws of armed conflict have very limited means of enforcement and the desire for mutuality is one of the elements that motivates hostile parties to respect the laws of armed conflict. For example, the 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter: "Third Geneva Convention"), obliges the release of all prisoners at the end of "active hostilities."[18] The language of the Third Geneva Convention does not authorize states to demand reciprocity. Common sense, however, dictates reciprocity and indeed that is what happens in practice. The ICRC has never, in practice, demanded from one state that it release prisoners except against a reciprocal release by the other party.

The right to execute acts of reprisal (apart from a number of absolute prohibitions such as the murder of prisoners of war) has been recognized in the past and was the legal basis to the justification of the air bombardment by the Allies of German cities during World War II.[19] Modern laws of armed conflict reject the reciprocity element in most circumstances, yet the 1949 Geneva Conventions did not outlaw reprisal actions against civilians in enemy territory.[20] Protocol I, however, innovated a rule that "attacks against the civilian population or civilians by way of reprisals are prohibited."[21] This new rule did not reflect customary law at the time[22] and the commentators Bothe and others note that "existing conventional law does not prohibit reprisals against enemy combatants and enemy civilians in territory controlled by the enemy."[23] The British government added a reservation to this innovation when it ratified Protocol I stating that Britain retains the right to attack civilians or the enemy's civilian targets in reprisal against such attacks against her, solely in order to force the enemy to cease from such attacks and after having warned the enemy, and stating further that the decision to carry out such an act of reprisal must be made at the highest levels.[24] This reservation is reflected in the order found in the British Army Manual.[25] Germany and Italy also added statements similar to the British reservation, although couched in vaguer terms.[26] No state sent an objection to the Swiss government regarding the British reservation. During the debate on the Article at

the diplomatic conference that drafted the Protocol, the American representative remarked that "by denying the possibility of a response and not offering any workable substitute, the Protocol is unrealistic and, in that respect, cannot be expected to withstand the test of future armed conflict."[27] The criminal tribunal for the former Yugoslavia examined the legality of reprisal acts against civilians and eventually rejected the legality,[28] but commented that "the protection of civilians and civilian objects…may cease entirely or be reduced or suspended…at least according to some authorities, when civilians may legitimately be the object of reprisals."[29] It becomes clear that the innovative prohibition against acts of reprisal is not considered a rule of *jus cogens*.[30] Furthermore, there is no prohibition in customary law on acts of reprisal against civilians in enemy territory.[31] It is to be noted however that in Operation Cast Lead, the Israel Defense Forces did not carry out acts of reprisal against civilians and did not maintain that it was entitled to do so.

Besieging a town

The report condemns as illegal the siege enforced by Israel on the Gaza Strip.[32] In the past, a siege was an accepted element in warfare and even today, when a civilian community forms part of the enemy's defense structure, the town undeniably becomes a legitimate target.[33] In the opinion of Dinstein, Protocol I prohibits a siege, although in his opinion, such a prohibition is unreasonable since "the practice of states will not confirm the sweeping abolition of siege warfare affecting civilians."[34] Rogers believes that there is no unambiguous prohibition on holding a siege and "the interests of humanity are better served if the besieging commander proceeds as suggested [siege] rather than attempting to take the besieged town by bombardment and assault."[35] This problem of the legality of holding a siege reflects a dilemma since it is possible that a general prohibition against siege will force an army to conduct battles in enemy towns, an action that might eventually cause more civilian casualties than holding a siege.

Gaza as occupied territory

The Report states unequivocally that Gaza is an occupied territory under the effective control of Israel.[36] The Report states that the "ultimate authority" is still in Israel's hands since not all aspects of authority have been handed over to the local authorities. The Report refrains from relating in any way to the classic definition by which a territory is considered as occupied when it is under the authority of an occupying army.[37] The Report disregards the fact that the IDF has absolutely no authority regarding the Gaza Strip and its residents. There is no Israeli military government, no Israeli army commander and there are no decrees issued by any Israeli commander. The Hamas government in Gaza clearly does not see itself as deriving its authority from the Israeli armed forces. In the ICJ decision in *Congo v. Uganda*, the court ruled that in order to determine if a certain territory in the Congo was under Ugandan military occupation, it was necessary to prove that not only were Ugandan forces stationed in the areas of the Democratic Republic of Congo under discussion, but that they exercised authority that replaced the Congolese governmental authority.[38] A British court has ruled categorically that "the State of Israel has withdrawn from Gaza so that it is not an occupied Palestinian Territory."[39] The Israeli Supreme Court has ruled that "since the month of September 2005, Israel has no further effective control over matters in the territory of the Gaza Strip."[40]

As a result of its conclusion that Israel's status is that of an occupying state, the Report condemns the fact that Israel limits freedom of passage across the border between Israel and Gaza. This results in, on the one hand, the Report determining that there was actual warfare and that Israel is compelled to act according to laws of warfare, and on the other hand that Israel is compelled to leave her border with Gaza open. This is an unreasonable conclusion in time of warfare.

Warning civilians

The Report criticizes Israel for not issuing effective warnings to the civilian population prior to attacks.[41]

Protocol I states that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."[42] Regarding the reference to circumstances that do not permit such warning, the ICRC gives as an example air bombardment or artillery fire when the element of surprise is important.[43] The Report notes the Israeli actions attempting to warn civilians of impending attack, but states that sending telephone messages and leaflets "lacked credibility and clarity."[44] This comment was made despite the fact that the Red Cross interpretation of the Protocol relates specifically to the possibility of warning by radio broadcast.[45] In order to try and persuade civilians to leave houses that the IDF intended to bombard, a system of "tapping on roofs" was employed. According to this system, non-lethal weapons were aimed at the roof of a house, preceding the real bombardment, in order to warn civilians in the house and give them sufficient time to vacate before the real attack. There is no doubt that this is a "clear

and credible" warning, but the report states that the use of this system is untenable because "it may cause terror."[46]

Laws of human rights and regulations on methods of warfare

In a large number of instances the Report condemns Israeli conduct during the warfare, relying on laws of human rights and not on laws of war. Decisions of the UN General Assembly are cited as judicial sources, despite the fact that according to the UN Charter they are not binding and there is no state in the world that regards them as legally binding.[47] In one instance, the killing of the Daya family, the IDF admitted to having mistakenly fired upon a civilian building instead of a neighboring building in which armaments were being stored. The Report states that since the firing was deliberate, even though aiming at the wrong target by mistake, Israel breached commitments to safeguard civilian lives, the responsibility for which flows from the 1966 International Covenant on Civil and Political Rights to which Israel is a party and that "no exception is made for acts during war."[48] The Report appears to attempt to replace the laws of war with laws of human rights. It might be added that if laws of war are to be replaced with the laws of human rights, then the right of Israeli citizens to a life free of the threat of terrorism and the right to life of IDF soldiers should also be taken into consideration.

There is a case for the claim that laws of human rights should be applied in circumstances where laws of war are not applicable.[50] On the other hand, it is inappropriate to exchange laws of war for laws of human rights in warfare. The laws of armed conflict are the *lex specialis* that applies to an armed conflict. The Israeli Supreme Court has ruled that where this law is lacking, it can be complemented by international human rights law.[50] This interpretation appears more reasonable than the wholesale attempt of the Report to apply the whole of human rights law in addition to the laws of war.

Thoughts for the future on the status of prisoners of war

An issue pertinent to the wider debate on the status of terrorists under international law is the status of irregular fighters who have been captured but are not eligible for the status of prisoners of war. This issue is not dealt with by the Report.

Justice Aharon Barak, retired president of the Israeli Supreme Court, has ruled that "between Israel and various terrorist organizations that operate from Judea, Samaria and the Gaza Strip, there has been a continued state of armed dispute or armed conflict since the first Intifada.[51] The question could be asked if it is pertinent to differentiate between those irregular fighters who might only target combatants and military targets and those who deliberately attack civilians. According to the situation in Israel and in other states, there is no difference between an irregular fighter in uniform, who might be fighting against armed forces, and a terrorist in civilian dress who places a bomb in a cafe. According to the Third Geneva Convention and even according to Protocol I,[52] in the Gaza situation, irregulars fighting against the IDF are not entitled to POW (prisoner-of-war) status, even if they were to carry their weapons openly and to wear uniforms. According to Israeli law, if a security need exists, any such person can be held in custody after the expiry of his sentence.[53]

It could be argued that a differentiation should be made as to types of combatants offered in "prisoner exchanges," i.e., a differentiation could be made between combatants who complied with the laws of war and may be exchanged and those combatants who targeted civilians and should be held to serve the full term of their prison sentences. In the opinion of this author, Israel has an interest in making such differentiations in the future. It is not suggested that Israel should grant them POW status, a status that international law does not grant them. On the other hand, if the question of exchange of "prisoners" should arise, it could be worth considering that the Israeli standpoint should be that whosoever fights against the IDF is indeed a combatant, despite being illegal, for whom exchange of prisoners is possible. On the other hand, a terrorist who has intentionally attacked civilians should be judged as an ordinary criminal and in the same way as no deals are made to exchange prisoners with regard to robbers and rapists, no deals are made with regard to murderers of civilians.

Closing remarks

The Report of the Commission refrains from examining the many legal questions that arise regarding combat in a built-up area against irregular combatants who ignore the laws of war. Nevertheless, the Commission decided that Israel had violated the laws of war and the laws of human rights. Given the biased prior mandate of the Commission, it is likely that Israeli cooperation would not have changed the outcome, but, such cooperation might, perhaps, have induced the Commission to, at least, examine some of the thorny legal issues involved.

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Notes:

1. The United Nations Fact Finding Mission on the Gaza Conflict.

2. Report of United Nations Fact Finding Mission on the Gaza Conflict, *"Human Rights in Palestine and Other Occupied Arab Territories,"* UN Doc. A/HRC/12/48 (Advanced Edit Version, 15 September 2009) (hereinafter: "Goldstone Report") *available at* www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf (last visited 4 October 2010).

3. *Id.*, at 384-390.

4. *Id.*, at 372.

5. For detailed information on the intertwining of the civilian and military elements of the Hamas infrastructure *see, Hamas and the Terrorist Threat from the Gaza Strip: The Main Findings of the Goldstone Report Versus the Factual Findings,* Intelligence and Terrorism Information Center (March 2010): www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/g_report_e1.pdf (last visited 4 October 2010).

6. *See* art. 52(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 *U.N.T.S.* 3 (hereinafter: Protocol I) *available at* www.icrc/org/ihl.nsf/CPM/470-750065 (last visited 4 October, 2010); The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 75 *U.N.T.S.* 973 (hereinafter: "Fourth Geneva Convention").

7. Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 8(1), Hague, 14 May 1954, *available at* www.icrc.org/ihl.nsf/FULL/400?OpenDocument (last visited 11 October 2010).

8. Ingrid Detter, The Law of War 294 (2d ed. 2000).

9. Protocol I, *supra* note 6, at art. 51(7).

10. *See* art. 8(2)(b)(xxiii) of the Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (17 July 1998); 2187 UNTS 90 (hereinafter: Rome Statute) *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm (last visited 11 October 2010).

11. Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict 130 (2004).

12. Prosecutor v. Kuprekić, Case No. IT-95-16-T, Judgment, para. 522 (International Criminal Tribunal for the Former Yugoslavia, 14 January, 2000) *available at* www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf (last visited 4 October 2010).

13. Stephanie Bouchie de Belle, *Chained to cannons or wearing targets on their T-shirts: human shields in international humanitarian law*, 90 Int'l. Rev. Red Cross 883-906 (2008), *available at* www.icrc.org/Web/eng/siteeng0.nsf/htmlall/reviwe-872-p883/$File/irrc-872-Bouchie-de-Belle.pdf (last visited 4 October 2010).

14. International Committee of the Red Cross, *1973 Commentary to Draft Article 46 of Protocol I.*

15. Michel Bothe, Karl Josef Partsch & Waldamar A. Solf, New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949, 295 (1982).

16. *U.K. Ministry of Defense, The Manual of the of the Law of Armed Conflict*, 5.22.1 (*2004*): www.mod.uk/NR/rdonlyres/82702E75-9A14-4EF5-B414-49B0D7A27816/0/JSP3832004Edition.pdf (last visited 4 October 2010).

17. "The compliance by a regular army with the laws of war is essential to the effective execution of an adversary's strategy to exploit it." Jefferson D. Reynolds, *Collateral Damage on the 21st century battlefield: Enemy exploitation of the law of armed conflict, and the struggle for a Moral High Ground*, 56 A.F.L. Rev. 1, 79 (2005). See also Mark Osiel, The End of Reciprocity, Terror, Torture and the Law of War, 36 (2009).

18. Art.118 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 *U.S.T.* 3316; 75 *U.N.T.S.* 135 *available at* www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e63bb/6fef854a3517b75ac125641e004a9e68 (last visited 4 October 2010).

19. *See* Protocol I, *supra* note 6.

20. Osiel, *supra* note 17, at 36.

21. Protocol I, *supra* note 6, at art. 51(6).

22. *Supra* note 15, at 299.

23. *Id.*, at 312.

24. United Kindgom, *Reservation/Declaration text – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977,* (2 July 2002), *available at* www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument (last visited 4 October 2010).

25. *Supra* note 16.

26. "The Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means

admissible under international law in order to prevent any further violation." Germany, *Reservation/Declaration text – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, (14 February 1991), *available at* www.icrc.org/ihl.nsf/NORM/3F4D8706B6B7EA40C1256402003FB3C7?OpenDocument (last visited 4 October 2010). "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation." Italy, *Reservation/Declaration text – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, (27 February 1986) *available at* www.icrc.org/ihl.nsf/NORM/E2F248CE54CF09B5C1256402003FB443?OpenDocument (last visited 4 October 2010).

27. ICRC, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-1977, Summary Record of the Fifty-Eighth Plenary Meeting, 81, CDDH/SR.58.

28. Prosecutor v. Kuprekić, *supra* note 12, at 531.

29. *Id.*, at 522.

30. Osiel, *supra* note 17, at 56.

31. Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 250 (2000); U.S. Navy, The Commander's Handbook of Naval Operations, NWP-1-14M, 6.2.3.3 (1995) *available at* www.gistprobono.org/sitebuildercontent/sitebuilderfiles/humanization.pdf (last visited 4 October 2010).

32. Goldstone Report, *supra* note 2, at 1296.

33. *Supra* note 15, at 307.

34. Dinstein, *supra* note 11, at 137.

35. A.V.P. Rogers, Law on the Battlefield 63(1996).

36. Goldstone Report, *supra* note 2, at 276.

37. Regulations annexed to the Fourth Hague Convention Respecting the Laws and Customs of War on Land, art. 42, 18 October 1907.

38. Armed Activities in the Territory of the Democratic Republic of Congo (DRC v. Uganda) 2005 I.C.J. 168, para. 173.

39. R. (on the Application of the Islamic Human Rights Commission) v. Civil Aviation Authority [2006] 132 EWHC 2465 (Admin) para. 15, International Law Reports.

40. HCJ (High Court of Justice) 9132/07 Gaber Albasyouni Ahmad Others v. the Prime Minister and the Minister of Defense, para. 12. (27 January, 2008), *available at* http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf (last visited 4 October 2010). In a later court ruling, in the case of HCJ 201/09 Physicians for Human Rights and others v. the Prime Minister and others, paras. 14-15 [19 January, 2009] *available at* http://elyon1.couet.gov.il/files_eng/09/010/002/n07/09002010/n07.pdf (last visited 2 November 2010); the question of whether during Operation Cast Lead, part of the Gaza Strip was once again under IDF control was left open by the court, although in practice the court examined IDF actions according to laws of warfare and not according to laws of occupation.

41. Goldstone Report, *supra* note 2, at 524-540.

42. Protocol I, *supra* note 6, at art. 57(2)c.

43. "In the case of bombardment by long-distance projectiles or bombs dropped from aircraft, giving warning may be inconvenient when the element of surprise in the attack is a condition of its success. For this reason the rule allows for derogation." ICRC, *Commentary: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* – 686 para. 2223, 8 June 1977 *available at* www.icrc.org/IHL.NSF/COM/470-750073?OpenDocument (last visited 4 October 2010).

44. Goldstone Report, *supra* note 2, at 529.

45. "Warnings may also have a general character. A belligerent could, for example, give notice by radio that he will attack certain types of installations or factories. A warning could also contain a list of the objectives that will be attacked." *Supra* note 43 at 686 para. 2225.

46. Goldstone Report, *supra* note 2, at 531.

47. For statements on the "illegality" of Israeli settlements in the West Bank, Gaza and East Jerusalem, *see* Goldstone Report, *supra* note 2, at 533.

48. Goldstone Report, *supra* note 2, at 862.

49. Theodore Meron & Allan Rosas, *Current Developments: A Declaration of Minimum Humanitarian Standards*, 85 AM. J. INT'L L. 216 (1991).

50. *See* HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel at para. 18 (11 December, 2005) *available at* elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf (last visited 4 October 2010).

51. *Id.*, at 16.

52. To which Israel is not a party. *See* CrimApp 8780/06 Abed-Al-amid Sror v. the State of Israel (Unreported, 2006).

53. *See* Incarceration of Unlawful Combatants Law, (Israel), 5762-2002 *available at* www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf (last visited 4 October 2010).

A loophole that must be repaired

The abuse of universal jurisdiction in the British courts, part of the battle to delegitimize Israel, is a danger to every Western democracy. We must stand up to this moral inversion and insist on restoring common sense to common law

Ron Prosor

All of us long for the day when a discussion of the English courts at the start of July revolves around the sporting action at the All England Club in Wimbledon. For those of us who attended the London conference of the International Association of Jewish Lawyers and Jurists, however, it was the more alarming matters regarding the English law courts that dominated our discussion as we addressed the current anomaly within the English implementation of universal jurisdiction.

Anti-Israel activists are abusing the British legal system to wage a propaganda war against the State of Israel. Our adversaries have crossed the line. Like Frank Lampard's shot against Germany, millions saw it but those whose decision counted were powerless to make the correct decision.

The State of Israel supports universal jurisdiction. We have no interest in seeing real perpetrators of crimes against humanity walk free. More than that, we have been instrumental in the development of universal jurisdiction as a guiding principle of international law. It was, after all, a valuable legal tool in bringing to justice Nazi war criminals, the perpetrators of the greatest crime against humanity ever committed. One of the great paradoxes we see today is that legal principles which emerged from the horrific experience of the Jewish people are now being abused to attack the Jewish state.

Most recently, the issue rose to prominence when an arrest warrant was issued for the leader of Israel's opposition, Tzipi Livni, before a planned visit to the United Kingdom. An international stateswoman who should be welcomed at the Palace of Westminster was, instead at risk of appearing at Westminster Magistrates' Court.

Tzipi Livni's experience contained an additional irony. In most countries of the Middle East, opposition leaders are far more likely to be arrested and mistreated at their own airport, long before touching down at Heathrow. The official opposition is unlikely to be headed by a globally respected woman, and more likely to be beheaded by the state security apparatus.

Following on from Minister of Defense Ehud Barak's near miss in September 2009, and the case of Major-General (res.) Doron Almog in 2005, the following is clear: there is a loophole in the British system that anti-Israel activists are exploiting and abusing, and they will continue to do so until the loophole is closed.

As it stands, any individual can walk into a British police station and accuse a foreign national of war crimes. The police or the individual can then go to a magistrates' court to request an arrest warrant. All they need to launch this process is prima facie evidence. Even the flimsiest document, a spurious report found online for instance, can be cited for this purpose. But for a criminal prosecution to take place, the consent of the attorney general is required. In all the cases – Almog, Barak and Livni – such consent would never have come forth.

The campaigners targeting Israeli officials know they have no chance of getting a prosecution, let alone a conviction. Instead, they are seeking a media circus and PR victory for the sole purpose of vilifying the State of Israel. With no real prospect of prosecution or conviction, this constitutes exploitation, abuse and harassment.

There is a wider context. A well organized, well resourced and concerted attempt is taking place in Britain to demonize, criminalize and delegitimize Israel in every area of public life. The abuse of universal jurisdiction in the British courts is just one front in that battle. The language of human rights and international law has been hijacked by radical agendas, pushing the demonization of Israel dangerously close to the mainstream.

British university campuses have become hotbeds of anti-Israel militancy. We see British churches pushing for boycotts of Israeli goods and British NGOs expending disproportionate time and resources waging a campaign of double standards against Israel.

*See **A loophole that must be repaired**, page 46*

Democracy coping with terror: the British perspective

Our basic freedoms and values, part of the very strength that secures our safety, should not be seen as obstacles to protecting us in an age of terror

Peter Goldsmith

[At the author's request, Justice is publishing the verbatim text of his presentation at IAJLJ's July 2010 London conference.]

I was appointed Attorney General three months to the day before 9/11 and served thereafter through a turbulent time: two major wars in Afghanistan and Iraq and the continuing aftermath of both, terrorist attacks in so many parts of the world, against commuters in Madrid, against school children in Beslan, tourists in Bali, ordinary people going about their lives in Saudi, Israel, India and elsewhere and of course the terrorist attacks on the London transport system which broke on 7th July 2005 during the course of a cabinet meeting. I remember that day vividly as we watched the unfolding events from the command centre beneath our Whitehall Cabinet Office.

We had to face and are still facing what is the greatest challenge for the democratic countries based on the Rule of Law: how to balance the issue of the protection of the lives of our citizens – national security if you will – and the basic values and fundamental freedoms on which our societies are founded: civil liberties and fundamental values. And so it was much in mind as I confronted with Cabinet colleagues and others these issues. And as we went through debates and counter-debates about the right powers to tackle terrorism and the legislation we needed. And so it was we passed two new Acts and debated others.

My personal starting point is that I believe that Governments have a dual obligation: to protect both our national security and our fundamental human rights. Our societies are based on these values; on commitment to liberty and to the Rule of Law; to our democratic way of life; to freedom of expression and thought; freedom from arbitrary arrest and to fair trial. They are actually freedoms and liberties and values which the terrorists would destroy. This makes it all the more important that we continue to hold them dear and preserve them. Yet striking this balance is not easy for the threats from terrorism are large.

The first time I had really to focus on this question of balance – and how the law intervenes in these areas – in a real practical sense was, I suppose, on the 11th September itself when watching the horror of the Twin Towers unfold on the TV. I had to think at that moment with my staff: what if there is an aircraft heading now for Canary Wharf or for the Houses of Parliament with terrorists on board? What advice do I give the Prime Minister? Are we going to be able to shoot it down? Should we shoot it down? How do you balance the loss of innocent lives on board compared with the many more who could be killed on the ground? How do you weigh up those considerations?

But from that moment on, these questions kept coming back: the legal and policy issues we were faced with in Government became greater and greater. Domestic legislation and international cooperation. Debate inside and outside Government. My personal ideas crystallised as events changed…as events continued…as initiatives, which we thought could be the solution, did not live up to their original promise. And because we continued to be faced with very difficult issues I came to the view – I came to it when in Government – that we need a new approach, an approach, which takes much more account of the messages we are putting out in the battle of ideas and values, if we are ultimately to succeed in stemming the tide of extremism with which the world is increasingly faced.

The question of balance between security and values does not mean that these things have to be seen as one or the other. It is not a question of either/or. One clear example of this is in the need to have strong and competent legal systems around the world. Because having independent systems, in which people have

confidence, is not only a bulwark against tyranny and a support for basic human dignity and human rights but also an essential condition for prosperity and the creation of wealth. And both injustice and poverty are causes of unrest.

Let me clear two preliminary propositions out of the way. The first is that actually nothing has changed; that terrorism has always been here and that you do not need to make any changes to your laws or ways of tackling terrorism. This proposition therefore says: 'leave the law as it is'. Having seen the extent of the terrorist threat, the number of active plots which our intelligence agencies have identified, I am clear that although Osama Bin Laden did not invent terrorism, things have changed: in scale, in the methods and aspirations of the terrorist and in the way that terrorism is conducted with modern technology and with suicide bombs. These have all changed the landscape of terrorism. So it is reasonable to ask if the law is adequate to provide protection.

The second proposition, with which I also disagree, is the concept of the War on Terror. I increasingly came to the view that this term is not only misleading but positively dangerous. That does not mean I think there is no threat, On the contrary there is.

It is the expression. As a slogan to demonstrate the extent of the commitment and the need to deal robustly with the problem in hand, like the 'War on Want' or the 'War on Crime' it is acceptable. But my worry is that 'War on Terror' is used not as a slogan but as a legal diagnosis. I have a real problem with that. This is quite a complex area of law. Those actually engaged in armed conflict on the battlefield of Afghanistan, before there was a legitimate government, will have fallen in some respects under the laws of war concerning the use of offensive military action and even, to a point, whether they could be detained as prisoners of an international conflict including in Afghanistan. But, what I have a problem with, is then saying 'War on Terror' then justifies holding people without trial after the international armed conflict has come to an end until this amorphous 'War on Terror' has come to an end – and who is going to say when it has?

This is not a narrow academic question. It was precisely the argument put to me by the US administration in 2003 when I was negotiating about the conditions of detention at Guantanamo. It was put to me that we in the UK should accept the philosophy of the "war on terror" and agree to hold any detainees released to us on the basis that they were "prisoners of war" and could be detained until the end of this "war". I refused. Indeed it went further because at one stage the administration lawyers and officials were saying that even if a detainee was acquitted before a military commission still they could, and indeed would, detain him until they deemed that the "war on terror" was over. It was deemed a concession to me to agree that this would not apply to British nationals as long as we allowed them to be tried by the military commissions. I regarded this proposal as outrageous and said so.

It was also only later, and particularly when I read the arguments advanced to the Supreme Court in cases like Rasul v Bush that I appreciated the significance that the term "war on terror" had in US jurisprudence on this issue. In particular, if the issues could truly be characterised as military then under the US doctrine of separation of powers they fell to the President as executive decision maker and as Commander in Chief to make the decisions and not Congress or the courts.

There is another risk too of the expression. If you talk of the 'War on Terror' you risk dignifying the cause of the terrorists. You risk treating them as soldiers and not as criminals. I don't want people in British prisons to be treated as prisoners of war. This gives rise to a sympathy in outside and local communities.

So I return to the basic question: How do you then strike this balance? It cannot just be on the basis of numbers – simply denying the few basic rights in favour of the security of the many cannot be the answer. There needs to be a more principled approach.

And in this principled approach the law plays a critical role.

In part this is obvious. You need the law to deal with offenders and so it is correct that we have strengthened our criminal law to meet the conditions of modern terrorism; and that we have invested significantly in our frontline law enforcement agencies and security and intelligence services.

But it is also right to consider whether changes to existing laws are needed. Here the great and difficult question becomes how far you can or should change existing laws which protect civil liberties now to protect human life.

Note here that even the great human rights instruments of the world, such as the Universal Declaration of Human Rights – in Article 29 – and the European Convention of Human Rights – in many individual articles and in Article 15 particularly – recognise that sometimes rights have to be adjusted, or exceptionally derogated from, in the interests of the community more widely.

But this does not give an unlimited licence to throw away our values for the sake of expediency. It can only be undertaken, as I say, in a principled way. I have

suggested that there are three key principles.

First, we must respect the Rule of Law. That means adhering to our domestic and international legal obligations. These cannot simply be ignored or set aside. Respecting the Rule of Law also means subjecting executive action to the scrutiny of the democratic institutions and of the Courts. Judicial scrutiny is a key part of the Rule of Law. It was to us shocking that until the Supreme Court ruled otherwise in the Rasul v President Bush decision it was thought appropriate to assert that the legality of detentions in a US facility under US control could not be the subject of consideration by the US courts.

Second, it is essential to maintain the commitment to fundamental values and freedoms. That means that whilst there are some rights which are subject to adjustment to safeguard the rights of others – the right to privacy, for example, must allow for exceptions to help fight crime or preserve the legitimate rights of others – other rights are non-negotiable.

The third principle is that, in those cases where it is permissible to adjust the way in which rights are protected to meet a new challenge or even to derogate from them, changes should only be allowed when they are necessary to meet the new challenge – not merely desirable – and when they are proportionate to it.

When it comes to non-negotiable rights, in my view, the prohibition on torture is one such right.

Recent events have focused attention again on how far our abhorrence of torture may have been compromised during recent years and, whether, the United Kingdom itself might have been complicit. I refer particularly to the allegations made by the returning Guantanamo detainee Binyan Mohammad. He has publicly alleged that, although he was not tortured by UK officials from MI5, they were in effect complicit in his torture by orchestrating his questioning.

I do not know the truth of this allegation but I do regard it as a very serious one. And I welcome the inquiry now announced. When I first began to negotiate about Guantanamo in the summer of 2003 the public did not know of the term "extraordinary rendition" or of "CIA black holes" or of people kidnapped for torture in those places. Nor I have to confess did I. It was only later that we heard of the complaints about Abu Ghraib and indeed Guantanamo itself. It was only later that evidence started to emerge of the black holes and the secret rendition flights. Now it is clear that a lot was going on. Indeed some who have investigated this suggest that the earliest secret rendition flight had already taken place in mid-October when a Gulf Stream 5 jet registration N-379P arrived in the dead of night in Karachi and took away a hooded and shackled detainee.

I need not use my poor words to describe why torture is both one of the greatest affronts to human dignity but also an extremely unreliable method of obtaining evidence. Which are both the reasons why its admission in evidence is banned by the Convention against Torture. I am very clear that condoning torture was strictly contrary to the United Kingdom's stated approach and indeed contrary to what at least the law officers were being told was the position of the United Kingdom in practice. I very much hope that an inquiry into the allegations made will not reveal that, after all, we were misled and secretly the UK was being complicit with torture programmes. I will return to this issue a little later.

The right to a fair trial is another non-negotiable right. In this respect my view of the original Military Commissions for those detained at Guantanamo Bay are well known. When British nationals were slated for trial I went to Washington to negotiate. My position was simple: put them on trial, a fair trial in accordance with international standards or release them. I considered the rules and regulations in detail over a period of months in the summer and fall of 2003. My clear conclusion was that the Military Commissions did not provide such guarantees. I advised that we should not allow our citizens to stand trial in such circumstances and insisted that they be returned to the UK – which ultimately they were.

Changes were later made. Congress passed the Military Commissions Act. Later some of the changes were welcome – such as the removal of the possibility that detainees would be convicted on the basis of evidence heard in secret which they had not seen or had a chance to contradict; and the amendments made in the Senate to exclude evidence obtained by torture – though there remain some definitional questions of importance. But there were major problems that remained: a law which treats aliens in a different way from American citizens; which still allows coerced evidence to be used in certain cases; which excludes the application of habeas corpus; which allows evidence that would not be admitted normally to be relied on… and others.

So I was greatly encouraged that President Obama as one of his first acts ordered the closure of Guantanamo but disappointed this has still not occurred.

In the denunciation of Guantanamo many have complained that this was not for an outsider to say. That this is America's decision. I do not agree. I should explain why.

The struggle against global extremism and terrorism is one that ultimately we will not win by conventional means alone. We will only win in the end if we can win the battle for ideas and values. We need to win this struggle at the level of values as much as force. In a major speech given in Los Angeles in the summer of 2007, Prime Minister Tony Blair said that to win the war of values we must show that "our values are stronger, better and more just, more fair than the alternative" and that "we are even handed, fair and just in our application of those values to the world." Against an Al Qaeda narrative of 'all that the West does is designed to oppress Muslims' we must show that our values are actually those of justice, tough and fearless but fair, and of equality; of the democratic way of life; of the Rule of Law and of freedom. The presence of Guantanamo makes it so much more difficult to do this for all of us.

So too in relation to other areas of our activity. We must show that our values of democracy, tolerance, acceptance of diversity and justice are strong. This battle for ideas and values is then of the greatest importance for our future. It means that our basic freedoms and values should not be seen as obstacles to protecting us, as things to be worked around, but ultimately a part of the solution.

So my basic point is that law plays a hugely important part in working out the key issues confronting democratic countries today. It plays a huge part in determining what are the correct measures which can help us both protect our freedoms and our security.

But law is not everything. Law of course plays a big part as do the courts in determining the boundary between executive decisions and civil liberty. The Human Rights Act has increased the tension in these areas.

So there are difficulties in finding the line of demarcation between what judges decide and what ministers should decide – and these difficulties are growing. This is most visible in the field of national security because these are high profile cases where some will hope that judges will take a different view on national security. The position generally established in this field has been expressed in a number of decisions of high authority; for example. In SSHD v Rehman where Lords Slynn of Hadley and Steyn made clear that the Secretary of State was in the best position to judge what national security required; as Lord Hoffman explained under our constitution issues of national security are issues of judgement and policy for the Executive branch of the State and not for judicial decision and a court should not differ from the opinion of the Secretary of State on such an opinion provided there is an evidential basis for that opinion.

But this principle of judicial restraint or deference to the decisions of ministers is not limited to the issue of national security but will apply too, and has been applied, to other areas where the availability of methods of assessment of policy choices, the availability of expertise, information and advice to minsters which is not available to judges, means that as a matter of common sense (as Lord Hoffman said) rather than constitutional impotence judges will pay especial respect to the conclusions of ministers. As the law reports and the newspapers show of course that still leaves plenty of room for judicial intervention and – which is as important – the possibility of intervention which focuses attention at the time of ministerial decision making on whether it will withstand a legal challenge. There were many occasions where policies were rejected because advice was that they would not withstand a legal challenge.

The importance of this dividing line has increased with the Human Rights Act which requires judges to enter more openly into the merits of a particular decision.

But my concern is that we may have lost sight of the non-legal arguments. This means bringing liberty back into the centre of policy-making.

This means placing a greater value on liberty and freedoms in the balance to determine the right policy to face difficult problems than I fear in recent years we have been doing. It does not mean that everything must remain as it was in the 18th or 19th centuries. The world has changed; it produces different threats and our responses to those may need to be different.

The 90 and 42 days debates are good illustrations of that principle. The demand for 90 days was wrong not least because it was not supported by evidence showing it was necessary nor proportionate to the threat. But it was at least something that the police had requested – it was at least something that a law enforcement agency was saying they wanted better to protect the public. But the second attempt to extend the time for pre-trial detention – which became the bewildering proposal for 42 days – was no such thing. It was under debate for a long time but there was never a clear demand for it from law enforcement officials and the police appeared in the end as against the proposal as many others if only because its complexity and unworkability.

The proposal got into that position through a some would say cynical need to appear to be tough on terrorism rather than through realising that these liberties are only adjusted, if they are at all, because of a clear and urgent need for that change. The failure to

treat the freedom from detention without charge as one of our key values and liberties and to bring that value to the centre of the policy debate was at the heart of that failure.

So, the 42 days proposal failed to recognise that the terrorists are seeking to take away our freedoms and liberties in many different ways and we must not therefore destroy those freedoms ourselves.

And there is the further compelling reason: that we will not win the struggle against terrorism by bullets and police powers alone – the history of the world shows that – ultimately you need also to win hearts and minds.

I can recall many examples of policies which were amended or even disappeared because of advice that they would not be upheld by the courts. What I find more difficult to recall is policies being scrapped because they were not the "right thing to do" because they infringed on fundamental freedoms. These arguments tend to be dismissed as liberal thinking lawyer speak. A new approach – the new approach I would like to see – would cast away embarrassment about these points – would see Cabinet and Parliament tackling these issues head on. Just because something can be done lawfully does not mean it should be.

Bringing our values and liberties back into the centre of the policy debate means above all a recognition that our liberties and freedoms are not an obstacle to securing our safety, they are not an obstacle to be overcome and got round, they are part of the very strength which secures that safety.

So my concern, in summary, is that law on its own is not enough. Political judgment and a sense of what is right and wrong are necessary. Law and lawfulness is a necessary condition before we take the action we do but not in itself sufficient.

Peter Goldsmith, Baron Goldsmith, PC, QC, is a former Attorney General for England and Wales and Northern Ireland.

Sliding towards universalism?
from page 14

Notes:

1. *See* Malcom N. Shaw, International Law at ch.12 (6th ed., 2008).

2. Justitia et Pace Institution of International Law, Krakow Session 2005, Seventeenth Commission, Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes (26 August 2005) *available at* www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf (last visited 4 November 2010).

3. United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

4. *See* William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone (2006).

5. A list of court documents is *available at* www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs&Default_Case=nuon_chea, home page of the Extraordinary Chambers in the courts of Cambodia (last visited 4 November 2010).

6. *See* William A. Schabas, An Introduction to the International Criminal Court, (3rd ed., 2007) and William A. Schabas, The International Criminal Court: A Commentary (2010).

7. Report of the International Criminal Court, Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements (3 May, 2010*) available at* www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/palestine/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20national%20authority%20meets, website of the Office of the Prosecutor (Last visited 4 November 2010).

8. The Prosecutor v. Omar Hassan Ahmad Al Bashi ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (12 July 2010) *available at* www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB (Last visited 4 November 2010).

Combating the Iranian four-fold threat

Action to hold Ahmadinejad's Iran to account is not simply a policy option. It is an international legal obligation of the first order

Irwin Cotler

Mahmoud Ahmadinejad's Iran – and I use that term to distinguish it from the Iranian people, who are themselves the targets of massive domestic repression – has emerged as a clear and present danger to international peace and security, to regional stability, and increasingly – and alarmingly so – to its own people.

Simply put, we are witnessing in Ahmadinejad's Iran the toxic convergence of four distinct, yet interrelated, threats: the nuclear threat; the genocidal incitement threat; the threat of state-sponsored terrorism; and the systematic and widespread violations of the rights of the Iranian people.

Accordingly, a consortium of international law scholars, human rights advocates, former government leaders, parliamentarians and Iranian activists for democracy and freedom – the "Responsibility to Prevent Coalition" – have come together to endorse an international report titled the "Danger of a Nuclear, Genocidal, and Rights-Violating Iran: The Responsibility to Prevent Petition" (the "Report").[1] The Report – anchored in the Responsibility to Prevent and Responsibility to Protect in international law – is organized around two main themes.

First, the Report contains the most comprehensive, authoritative, and up-to-date witness testimony and documentary evidence respecting the fourfold Iranian threat – what might be termed the "critical mass of threat" of Ahmadinejad's Iran.

Second, the Report calls upon states in the international community – as well as the United Nations and related inter-governmental bodies – to heed their legal obligations to hold Ahmadinejad's Iran to account, pursuant to the panoply of legal remedies mandated under UN Security Council resolutions and international law generally.

The nuclear threat

Let there be no mistake about any of these threats. Iran is in standing violation of international legal prohibitions against the development and proliferation of nuclear weapons; Iran has already committed the crime of incitement to genocide prohibited under the Genocide Convention; Iran is a leading state-sponsor of international terrorism; and Iran is engaged in massive suppression of the rights of its own people.

Recent developments have served only to expose and magnify this critical mass of threat. For example, in the matter of Iran's nuclear weaponization program, Iran is in standing violation and defiance of international law, with continued deception of its serial violations, which include: the significant expansion of its uranium enrichment to nuclear weapons-grade capability; the concealment of its uranium enrichment site at Qom; planned development of an archipelago of enriched uranium centers; utilization of more powerful centrifuges to accelerate weaponization; and production of more than 4,500 pounds of low-enriched uranium that – if further enriched to a weapons-grade level –would be enough for two nuclear weapons.[2]

In light of these developments, the International Atomic Energy Agency ("IAEA") expressed concern that Iran "was advancing in its efforts to construct a nuclear warhead, to develop a missile delivery system for such a warhead, and a mechanism to detonate such a weapon."[3] Simply put, the IAEA and arms-controls experts have reported Iran's enrichment of enough nuclear fuel to build nuclear bombs.

The genocidal incitement threat

In the matter of state-sanctioned incitement to genocide, Iran continues its advocacy of the most horrific of crimes, namely genocide; embedded in the most virulent of hatreds, namely, anti-Semitism; underpinned by the illegal pursuit of nuclear weapons; articulated by a warning to Muslims that if they recognize Israel they "will burn in the 'Umma' of Islam"[4] – the whole dramatized by the parading in the streets of Tehran of a Shihab-3 missile draped in the emblem "Wipe Israel off the Map." What one may not

perhaps have read about are the other four words added to this exhortation, "As the Imam says," namely, that this is a religiously sanctioned incitement to genocide, with Ahmadinejad denying the Nazi Holocaust as he incites to a new one, while exhorting crowds in chants of "Death to Israel."

In the last few months alone, while defying the international community on the nuclear issue, both the Supreme Leader Ayatollah Khamenei and President Ahmadinejad – in no less significant though surprisingly ignored threats – have reaffirmed their incendiary calls for Israel's disappearance, with the Supreme Leader stating that "God willing, its obliteration is certain,"[5] while Ahmadinejad has threatened to "finish [Israel] once and for all."[6] Indeed, more recently, on Iranian Press TV, Ahmadinejad chillingly elaborated on these themes, referring to Israel as the "most criminal nation in the world…placed in our region with lies and fictional tales…[and] with Allah's help, this regime will be annihilated."[7] Underpinning this call to genocide are the dehumanizing and demonizing epidemiological metaphors characterizing Israel as a "cancerous tumor" that must be excised, and the Jewish people as "evil incarnate" and "defilers of Islam" – the whole as prologue to and justification for Israel's impending demise.

State-sponsored terrorism

In the matter of state sponsorship of international terrorism, the Iranian international footprint is not always recognized. The threat here is not only – though that would be danger enough – of the arming, financing, training and instigation of terrorist groups like Hamas and Hezbollah. For these groups are more than just terrorist militias. They have an objective that is genocidal, an ideology that is anti-Semitic – not because I say so, but because their own covenants and charters affirm this – and they use terrorism to implement this agenda. Simply put, in supporting, aiding, and abetting groups such as Hamas and Hezbollah, Iran is also supporting, aiding, and abetting genocidal incitement.

Moreover, Iran responded to U.S. President Barack Obama's outstretched hand during 2009 – the so-called "Year of Engagement" – with a clenched fist, as exemplified in the appointment of Ahmed Vahidi as minister of defense. Vahidi is the object of an Interpol arrest warrant for his role in the planning and perpetration of the greatest terrorist attack in Argentina since the end of World War II, the bombing of the AMIA Jewish Community Center. As Iranian minister of defense, he is responsible for overseeing the Iranian nuclear program and weapons development.

Furthermore, the Iranian Islamic Revolutionary Guard Corps ("IRGC") bears responsibility for the murder of political dissidents both outside and within Iran. The IRGC has thus emerged as the epicenter of the four-fold threat, including state-sponsorship of terrorism abroad and massive domestic repression at home.

The systematic and widespread violations of the rights of the Iranian people

In the matter of human rights violations, the Report documents[8] ten categories of widespread and systematic violations, including: beatings, executions, killings, torture, and other inhumane treatment of Iranians; the imprisonment of the Baha'i leadership and the assault on this targeted minority; the exclusion of, and discrimination against, religious and ethnic minorities generally; the persistent and pervasive assault on women's rights; the murder of political dissidents; the assault on freedoms of speech, assembly, and association, including assaults on students, professors, activists, and intellectuals and the imprisonment of more journalists than any other country in the world; the crackdown against cyber dissidents; the assault on labor rights; the wanton imposition of the death penalty, including the execution of more juveniles than any other country in the world; and the denial of gay/lesbian rights. These deprivations, overladen with show trials and coerced confessions, constitute crimes against humanity under international law.

Lessons from history

And so the question then becomes: What is to be done?

As it happens, we are presently marking important moments of remembrance: the 65th anniversary of the United Nations Charter, intended to save succeeding generations from the scourge of war but assaulted again and again; the eve of the 60th anniversary of the effective date of the Genocide Convention – sometimes spoken of as the "Never-Again Convention" – but which has in fact been violated again and again; and the eve of the 75th anniversary of the Nuremberg Race Laws, which institutionalized anti-Semitism and racism as law. And so, we must ask ourselves: What have we learned? What must we do?

There are several important historical and juridical lessons which converge in respect of the fourfold threat from Ahmadinejad's Iran.

The first lesson is the danger of state-sanctioned incitement to genocide. The enduring lesson of the

Holocaust and the genocides that followed, from Srebrenica to Rwanda, is that they occurred not only because of the machinery of death, but because of the state-sanctioned incitement to hate. As the Supreme Court of Canada recognized, and as echoed by international criminal tribunals in the former Yugoslavia and Rwanda, the Holocaust did not begin in the gas chambers; it began with words.[9]

The second lesson is the dangers of indifference and the consequences of inaction. The Holocaust, and the genocides thereafter, occurred not only because of the machinery of death and a state-sanctioned culture of hate, but because of crimes of indifference and conspiracies of silence. What makes the Rwandan genocide so unspeakable is not only the horror of the genocide, but that this genocide was preventable. Nobody can say we did not know. We knew, but we did not act, just as no one can say that we did not know what was happening in Darfur. We knew, but we did not act to protect the victims, ignoring the lessons of history, betraying the people of Darfur, and mocking the responsibility-to-protect doctrine.

The third lesson is the danger of a culture of impunity. If the last century was the age of atrocity, it was also the age of impunity. Few of the perpetrators were brought to justice. Just as there cannot be a sanctuary for hate or a refuge for bigotry, neither can there be a haven for war criminals and for the perpetrators of the worst of crimes against humanity. Yet, as I mentioned, Ahmad Vahidi – a former leader of the IRGC and now under an Interpol arrest warrant – has been named by Iran as its minister of defense to oversee its nuclear weapons program, while IRGC leaders enjoy exculpatory immunity.

The fourth lesson is the cruelty of Holocaust and genocide denial – an assault on memory and truth, a criminal conspiracy to whitewash the worst crimes in history. This most obscene form of genocide denial actually accuses the victims of falsifying this "hoax," a phenomenon now being repeated in the case of the denial of the Rwandan genocide.

Necessary sanctions

Accordingly, though I initially supported Obama's year of engagement, the 2009 end-of-year international deadline for Iranian compliance has come and gone. Engagement cannot continue with "business as usual" given Iran's increasing and continued defiance, particularly in 2010. The international 'carrots' offered have been repudiated by Iranian 'sticks' – by the panoply of repression.

What is so necessary now is a set of comprehensive, consequential, and targeted sanctions to combat the critical mass of threat. The focus hitherto on the nuclear threat, while understandable and necessary, should not thereby overshadow, marginalize, or sanitize the other three dangers described above. Simply put, the critical mass of threat requires a response with a critical mass of remedy.

It is necessary to enact a set of generic sanctions to address and redress the critical mass of threat. These sanctions must include: targeting the IRGC, which controls an estimated 80 percent of Iran's foreign commerce, as well as its construction, banking, and communication sectors, and which has emerged as the epicenter of all four threats; targeting imports of gasoline and other refined petroleum products – Iran's economic Achilles heel; targeting those who facilitate such imports – i.e., the shipping and insurance industries; curtailing investment in Iran's energy sector and giving companies incentives not to do so; monitoring and enforcing a broad arms embargo on Iran and ordering a complete suspension of its ballistic missile program; targeting the Central Bank of Iran, the nerve center of the Iranian banking industry; sanctioning companies that enable Iranian domestic repression; banning the export to Iran of dual technologies (i.e., technologies that have both benign and repressive uses); denying landing permission to the Iranian transportation industry; requiring disclosure of all business dealing with Iran; and sanctioning all those who do business with the IRGC.

In addition to generic sanctions, threat-specific measures should also be implemented. In the matter of Iranian human rights violations, governments must regularly express public condemnation of objectionable actions taken by the Iranian leadership; provide moral and diplomatic support for the democratic movement in Iran; sanction Iranian officials engaged in repression, including imposing travel restrictions, asset seizures, and other controls; keep the issue of Iranian human rights violations on the international agenda in any and all bilateral meetings with Iran; hold Iran to account before the UN Human Rights Council (incredibly, not one resolution of condemnation has ever been adopted by that body against Iran); and work to ensure that Iran is not elected to the Council – or to any UN body, as Iran outrageously was elected to the UN Commission on the Status of Women while at the same time being engaged in the persecution of women and the massive repression of their rights.

In the matter of incitement to genocide, state parties to the Genocide Convention such as Canada and the United States should refer the matter of Iranian incitement to the UN Security Council for deliberation and accountability – a modest remedy that astonishingly

has yet to be pursued; initiate an inter-state complaint before the International Court of Justice against Iran, also a state party to the Genocide Convention; and should ask the UN Security Council to refer the situation of incitement to genocide to the International Criminal Court for prospective investigation and possible prosecution, as this incitement also violates the Treaty for an International Criminal Court.

It is a tragic paradox that, as the critical mass of threat intensifies and the violations of international law and of the rights of the Iranian people multiply, the necessary action has not been forthcoming. As of this writing, there has been – incredibly – no sanction of the Iranian four-fold threat. None. Only the nuclear threat has been the subject, belatedly, of a UN Security Council resolution. The other three threats continue to be ignored – and thereby sanitized – with no attendant sanctions. Moreover, the UN Security Council resolution also contemplated the resumption of negotiations with Iran, if Iran were merely to suspend its enrichment of uranium – thereby immunizing Iran from accountability respecting its genocidal incitement, its sponsorship of terrorism, and its human rights violations – the whole fostering a culture of impunity and a betrayal also of the victims of Iranian human rights violations.

The time has come – indeed it has passed – to sound the alarm, to send a wake-up call to the international community. Silence is not an option. Action to hold Ahmadinejad's Iran to account is not simply a policy option; it is an international legal obligation of the first order.

The integrity of our commitments to the rule of law and international peace and security – and to the rights of the Iranian people – are at stake. If not us, who? If not now, when?

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Notes:

1. *Available at* http://irwincotler.liberal.ca/files/2010/05/2010_11_17_-_R2P_IRAN_REPORT.pdf (last visited 30 June 2010).
2. Report, *id*, at 9. Based on witness testimonies given at the Subcommittee on International Human Rights of the Parliament of Canada.
3. Report, *id*, at Executive Summary.
4. Quote from President Mahmoud Ahmadinejad cited in "Iranian leader: Wipe out Israel," CNN, 27 October 2005, available at http://articles.cnn.com/2005-10-26/world/ahmadinejad_1_israel-jerusalem-day-islamic-world?_s=PM:WORLD (last visited 30 June 2010)
5. *Israel is going downhill: Leader*, Tehran Times, 8 February 2010, *available at* www.tehrantimes.com/index_View.asp?code=213925 (last visited 30 June 2010).
6. Sam K. Parks-Kia, *Ahmadinejad Says Finish Israel Off – If Repeats Mistakes*, Press TV, 20 February 2010, available at http://edition.presstv.ir/detail/119024.html (last visited 30 June 2010). Similarly, *see also* Fredrik Dahl, *Ahmadinejad warns Israel against any military move,* Reuters, 11 February 2010, *available at* www.reuters.com/article/idUSDAH12274820100211 (last visited 30 June 2010).
7. *Iranian Website: Iranian Nuclear Bomb Spells Death to Israel*, Middle East Media Research Institute, Special Dispatch No. 2826, 25 February 2010, *available at* www.memri.org/report/en/0/0/0/0/0/0/3989.htm (last visited 30 June 2010).
8. Report, *supra* note 1, at 58.
9. Report, *id*, at 6.

***NGOs, soft power and demonization in the 'lawfare' strategy** from page 26*

38. The Association for Civil Rights in Israel, Gisha, The Public Committee Against Torture in Israel, HaMoked: Center for the Defense of the Individual, Yesh Din, Adalah, Physicians for Human Rights-Israel, *Submission of Human Rights Organizations based in Israel to the Goldstone Inquiry Delegation*, Adalah's Newsletter, 61(2009) *available at* www.adalah.org/newsletter/eng/jun09/goldstone%20report_and_appendix[1].pdf (Last visited 4 November 2010).
39. *Id.*
40. Bell, Abraham, *A Critique of the Goldstone Report and its Treatment of International Humanitarian Law* (30 March, 2010), American Society of International Law Proceedings; San Diego Legal Studies Paper No. 10-019. *Available at* SSRN: http://ssrn.com/abstract=1581533 (Last visited 4 November 2010).
41. Goldstone Report *supra* note 1, at 9.
42. *Id*.
43. Elihu D. Richter. MD, MPH, and Yael Stein, MD, Comments on B'Tselem's Civilian Casualty Estimates in Operation Cast Lead, NGO Monitor (14 September 2009) *available at* www.ngo-monitor.org/article.php?viewall=yes&id=2638 (Last visited 4 November 2010).

A suggested moral analysis of the Goldstone Report and its aftermath *from page 29*

following publication of his report, Judge Goldstone gave an indication of his view on this question. When asked how Israel should have responded to the attacks of Hamas on its citizens, he suggested that it should have deployed commando units to enter Gaza.

However, this strategy would almost certainly have resulted in a large number of Israeli casualties, put its soldiers at great risk of abduction (granting Hamas a victory), seriously endangered Gaza's civilian population in the event of military complications, and most definitely would have failed to stop the rocket fire on its towns and villages. In other words, following Judge Goldstone's reasoning, the fate of a defending state is doom.

The decision of the Israeli government to refrain from establishing a commission of inquiry deprived Israel of a golden opportunity to contribute to the development of international law in a way that will offer a state under attack a legally effective power of self defense.

It is unfortunate that individual interests, aimed at avoiding the possibility of personal accountability, outweighed this supreme national interest.

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Notes:

1. Report of United Nations Fact Finding Mission on the Gaza Conflict, *"Human Rights in Palestine and Other Occupied Arab Territories,"* UN Doc. A/HRC/12/48 (Advanced Edit Version, 15 September 2009) (hereinafter: Goldstone Report or Report) *available at* www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf (last visited 4 October 2010).

2. The United Nations Fact Finding Mission on the Gaza Conflict.

A loophole that must be repaired *from page 36*

Now the English courts, renowned throughout the world as a bastion of fair play and common sense, have been affected. In June, anti-Israel activists were acquitted despite admitting having caused £180,000 of damage to an arms factory near Brighton, which they accused of providing components to the IDF. In his summing up, the judge advised the jury that "you may well think that hell on earth would not be an understatement of what the Gazans suffered in that time." It is shocking that a politicized delegitimization of Israel's right to defend itself is now a legal defense for criminal damage.

Such an incident is an embarrassment for Britain, as is the current farce over universal jurisdiction. It is shameful to see the world renowned traditions and institutions of this country abused to score cheap political points. On the frontbenches of both major parties there is widespread agreement that the current use of universal jurisdiction as a weapon to attack Israel is not in the British public interest.

The tactics used to attack Israel could be used against Britain, the United States or any democracy forced to fight terror. British politicians, generals and even soldiers on the frontline in Afghanistan might also find themselves harassed by tyrants, terrorists and their sympathizers bent on abusing the legal process. When the U.S. found its officials harangued through the courts in Belgium, a small tweak to the Belgian system swiftly took place.

The United Kingdom prides itself on being a global diplomatic hub – a world center where international relations are conducted. If Britain wishes to play a constructive role within the Middle East, its ability to do so is undermined if leading Israeli figures are unable to come to London. The new government has indicated that it plans to change the law and that is to be welcomed.

The combination of the current universal jurisdiction legislation with this well resourced, sophisticated campaign against Israel's reputation is a danger to Britain, Israel and every Western democracy. All of us who care deeply about the integrity, credibility and sustainability of justice must be bold, fearless and thorough in stepping out from our ivory towers to make our case heard. We must stand up to this moral inversion of the law's purpose and insist on restoring common sense to common law.

Ron Prosor is ambassador of Israel to the Court of St. James's. This article is based on a presentation made by the author at IAJLJ's London conference on 1 July 2010.

Gaza conflict committee rebuffs IAJLJ

A UN Human Rights Council committee report makes no reference to information provided by IAJLJ about Hamas attacks on civilians during Operation Cast Lead

In mid-August, IAJLJ wrote to Christian Tomuschat, chair of the United Nations Committee of Independent Experts to Monitor Investigations into Violations in the Gaza Conflict (the "Committee"). The letter provided detailed information and supporting documentation about six Hamas rocket attacks that deliberately targeted civilians in Israel and civilian population centers between 27 December 2008 and 15 January 2009. These attacks clearly violated the principle of distinction under the Law of Armed Conflict.[1] The letter also stated that "Hamas' systematic and widespread policy of targeting of Israeli civilian population centers, demonstrated in the attacks described above, appears to rise to the level of crimes against humanity. Based on publicly available information to date, the IAJLJ is unaware of any investigations that have been conducted by Hamas or the Palestinian Authority into these incidents and policies."

The Committee was established "to monitor Israeli and Palestinian investigations into the serious violations of international humanitarian and human rights law reported by the UN Fact Finding Mission, led by Justice Richard Goldstone."[2]

After promising that the information provided by IAJLJ "will be duly taken into account in drafting (its) report,"[3] the Committee made no reference to this information in its report[4] and even omitted mentioning IAJLJ in an annex to the report that lists bodies it had been in contact with. Nineteen groups are mentioned in the annex, at least eight of which can be considered as hostile to Israel.

Immediately upon seeing the report, IAJLJ President Alex Hertman and Deputy President Irit Kohn sent a letter to Tomuschat, expressing IAJLJ's "surprise and dismay" at the omission. The rebuff is especially egregious given IAJLJ's Category II Status as a non-governmental organization at the United Nations and its standing at the Council of Europe in Strasbourg.

Tomuschat replied that "it is indeed regrettable that your organization was not mentioned in the Annex to our report. But you can be sure that the information was truthfully transmitted to my colleagues and considered by the Committee as a whole."[5]

The committee was formed on 14 June 2010. Its members included Christian Tomuschat as chair with Mary McGowan Davis and Param Cumaraswamy as members at large. All have significant experience in matters of international law, human rights and humanitarian law. Tomuschat, a professor emeritus at Humboldt University of Berlin, has held many public positions that drew on his expertise in international law, and especially human rights and humanitarian law: He is a former member of the UN Human Rights Committee and a former member and president of the UN International Law Commission.

Tomuschat resigned from the Committee on 2 December 2010.[6]

– Paul Ogden

Notes:

1. *See* Sec. 48 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

2. United Nations Human Rights Council, *Committee to monitor investigations into Gaza conflict named, available at* www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10148&LangID=E (last visited 20 November 2010).

3. Letter to IAJLJ from committee chair Christian Tomuschat, 19 August 2010.

4. United Nations Human Rights Council, Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards (2010), *available at* www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.50_AEV.pdf(last visited 20 November 2010) (hereinafter "the report").

5. Letter to IAJLJ from committee chair Christian Tomuschat, 3 October 2010.

6. Benjamin Weinthal, *Tomuschat, head of Goldstone follow-up committee, resigns*, Jerusalem Post, 3 December 2010, *available at* www.jpost.com/International/Article.aspx?id=197802 (last visited 6 December 2010).

Greek court acquits anti-Nazi activists

IAJLJ asked PM Papandreou to withdraw charges

Three human rights activists on trial in Greece for speaking out against judges who had reversed the conviction of Holocaust denier Konstantinos Plevris were acquitted on 6 December 2010 of charges of dissemination of false information through the press.

In September 2010 IAJLJ called on Prime Minister George Papandreou of Greece to use every means at his disposal to withdraw legal proceedings against anti-Nazi activists Anna Stai, Rena Koutelou and Lambis Katsiapis.

The activists, members of the Greek organization Anti-Nazi Initiative, spoke out against the Greek judicial system during the trial of Holocaust denier Konstantinos Plevris, where they testified against him. They faced prison sentences of up to five years and the stripping of their civil rights for up to five years.[1] Plevris was found guilty in 2007 of incitement to racial hatred based on statements in a book he published, but successfully appealed his conviction.

In October 2008 IAJLJ called on the Greek government to cancel a charge of high treason against Panayote Dimitras, spokesperson for human rights NGO Greek Helsinki Monitor, who wrote on the Macedonian minority in Greece. As a human rights champion Dimitras testified at the trial of Plevris and his testimony contributed to Plevris' conviction.

Several other Jewish organizations protested Plevris' acquittal and the charges against members of Anti-Nazi Initiative.

The Association's letter to Prime Minister Papandreou has been posted to the IAJLJ website.

Note:

1. *See* http://cm.greekhelsinki.gr/index.php?sec=194&cid=3708 (last visited 3 November 2010).

IAJLJ protests lack of due process in Tarabin trial

An Israeli teenager accused of spying, tried and sentenced in absentia, is serving a 15-year sentence in Egypt

Auda Sueliman Tarabin, an Israeli citizen, was only 18 when accused by Egypt of spying for Israel. Despite repeated requests, the Israeli Ministry of Foreign Affairs and Tarabin's lawyer Izhak Melzer have not been provided with any evidence of legal procedings leading to Tarabin's incarceration: investigative file, indictment, trial transcript, judgment and sentencing verdict. Tarabin knows of his "trial" and sentence only through an examination of Egypt's military intelligence law. Tarabin was arrested more than ten years ago.

In a May 2010 letter to Egyptian President Hosny Mubarak (see IAJLJ website), IAJLJ protested this miscarraige of justice and requested that Tarabin be pardoned. No response has been received to date.

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46. After endorsing all of the Goldstone Report and its recommendations, the ICJ statement asserted that the only investigations which would be consistent with international law, would have to "identify, prosecute and punish…civilian leaders and military commanders." *International Commission of Jurists Intervention on human rights situation in the Occupied Palestinian Territories and East Jerusalem*, 12th Special Session of the HRC, 16 October 2009: www.eyeontheun.org/assets/attachments/documents/8754icj12ss.pdf (last visited 2 November 2010 – ed.) and Council webcast.

47. "The HRC… Decides, in the context of the follow-up to the report of the Independent International Fact-Finding Mission, to establish a committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly Resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards," HRC Resolution 13/9 *supra* note 9.

צֶדֶק

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

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

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