"Rule of law and national security concerns – whither human rights?"

Mr Justice Robert Jay

High Court Judge, United Kingdom

The collapse of the Ottoman Empire brought to an end the Caliphate which existed in the Middle East under Ottoman aegis since the 15th Century, until of course it was unofficially resurrected earlier this year. It was also the final roll of the dice for the great European colonial powers, the UK and France: affording both of them the opportunity to do their best, or their worst, in carving up someone else's territory. It is mildly ironic that this was taking place at about the time that the UK was relinquishing the last of its ties to the Dominions: the Imperial Crown disappeared in the Statute of Westminster of 1931.

Today is not the occasion to discuss the arbitrary nature of many of the borders in the Middle East, or the possible impact the work of Sykes and Picot has had on current problems in the region. With some trepidation, because the subject-matter is freighted by heavy political baggage, I propose to devote this address to the State of Israel. I do so in the context of the title of this conference: the rule of law, which in this context means, or means substantially, international law. It is no part of my ambition to discuss Israel's so-called 'right to exist', and the need – borne out of pragmatism and justice - for a two-state solution. Indeed, I take both of those as being close to axiomatic. Israel does exist as a nation state recognised by and under international law. The two-state solution is the only sensible means of resolving the conflict in the region, and needs to be embraced by both parties with genuine enthusiasm and alacrity.

The title of this session originally included the words 'national borders'. I need to address these because they are relevant as far as Israel is concerned both to the rule of law and to national security.

If ever there were a part of the world where the tension between the rule of law and national security is the most acute, both generally and in the context of its national borders, it is in the State of Israel. National security encompasses both the military threat (which, to the extent that it is an existential threat, now emanates solely from Iran) and the more localised terrorist threat. The senior terrorist group, Hamas, undoubtedly has existentialist ambitions, but these can only be seen as quixotic.

Israel does not have a complete set of borders which are recognised under international law. The Armistice Agreement of 3rd April 1949, made between Israel and Jordan, was on the basis of a green line drawn on the map, but was expressed by both parties to be without prejudice to where the final border should be. The same applies to the Gaza strip. The Lebanese border, although porous in recent times, is an internationally recognised border, as is the Sinai border with Egypt.

Both the Gaza strip and the West bank were part of the UN designated Palestinian area following General Assembly Resolution 181 of November 1947. During the 1948/9 Arab-Israeli war (the responsibility for which it is not my ambition to discuss) the rump of these territories were occupied by Egypt and Jordan respectively, thereby depriving the Palestinians of the remnants of their state. Jordan formally annexed the West bank in 1950. Only the UK and the USA recognised this action; the international community as a whole did not.

The Gaza strip and the West bank have been occupied by Israel since June 1967[1]. Thus, Israel is in *de facto* control of the whole of Mandatory Palestine as entrusted by the League of Nations to the UK in 1922. East Jerusalem was formally annexed in 1980 but the remainder of these territories have not. In 1988 Jordan finally waived any extant claim to the West bank.

This historical conspectus is of relevance to Israel's obligations under international law in relation to its military occupation of the West bank and the Gaza strip.

[1] Although Israel disengaged from Gaza in 2005 and removed its settlements from the territory

Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed, although it accepts that the provisions of these Regulations have become part of customary law. As was pointed out by the Israeli Supreme Court in Morar v IDF Commander in Judea and Samaria [2006] (2) IsrLR 56:

> *'The power of the military commander is derived from the rules of belligerent occupation under public international law; the military commander has the duty of ensuring the safety and security of the residents of the territories and he is responsible for public order in the territories …'*

The Fourth Geneva Convention of 1949 was ratified by both Israel and Jordan in 1951, without reservation. Israel, contrary to the view of the great majority of the signatories, does not accept that this Convention applies *de iure* to the West bank, cleaving to the view that before June 1967 these territories did not fall under Jordanian Sovereignty: the Hashemite Kingdom's annexation in 1950 was both unlawful and unrecognised in the international community.

The Israeli position is inconsistent with UN Security Council Resolution 446, of 4th March 1979, but that in itself would not be determinative. But the International Court of Justice has taken the view that the Israeli position is incorrect, and amounts to be misinterpretation of the second paragraph of Article 2 of the Fourth Geneva Convention. Adopting a purposive construction, the ICJ would appear to be right, but the wording of the relevant paragraph certainly needs to be stretched, because 'the territory of a High Contracting Party' would not as a matter of language cover territory which it has unlawfully annexed. That being said, any interpretation which creates a *casus omissus*, and leaves civilians unprotected, is to be disfavoured.

The Israeli Supreme Court has consistently recognised that the humanitarian rules of the Fourth Geneva Convention are applicable, as comprising norms of customary international law. But those rules are far more limited than the full panoply of rights and obligations conferred by this Convention.

Article 49(6) of the Fourth Geneva Convention, probably not part of these humanitarian rules, stipulates that 'the Occupying Power shall not deport or transfer part of its own civilian population onto the territory it occupies'. I shall be coming back to this, but the ICJ has taken the view that Article 49 prohibits not only the forced transfer of parts of the population by the state, but also actions that serve to organise or encourage the movement of part of the population into the occupied territory. But given that Article 49 was clearly intended to interdict the forcible migration of communities in the notorious manner prevalent in the Second World War, it might be argued that the ICR has adopted more than the teleological approach mandated by Article 31 of the Vienna Convention.

Although it has been the consistent position of the Israeli Supreme Court that Article 49 is not binding in domestic law, over the years this court has refrained from discussing the legality of the settlements within the context of the Fourth Geneva Convention, on the basis that the issue is non-justiciable. Instead, the Supreme Court has relied on a different justification for the construction of settlements – within the context of a regime which requires the identification of a rationale which would, or could, chime with customary international law. In a number of decisions (e.g. Ayoub v Ministry of Defence PD 33(2) 113; Dweikat er al v Government of Israel PD 34(1)) the Supreme Court has justified the construction of the settlements on security grounds, i.e. grounds that the military commander is entitled to consider in accordance with international law, rather than on the basis of any claim to a sovereign right to the territory.

These issues came to a head in the mid-2000's with the construction of the wall or security fence (the terminology rather depends on one's viewpoint as to its permanence) on the West bank, following years of terrorist incursion into Israel in the form of targeted human bombs. The barrier, as I shall call it, encompasses over 16% of the West bank and well over 200,000 Palestinians. Its opponents also point out that the barrier was constructed so as to embrace about 80% of Israeli settlements on the West bank, a factor which they contend cannot be a coincidence.

In its judgment handed down on 30th May 2004 (Beit Sourik Village Council v Government of Israel) the Israeli Supreme Court, Justice Aharon Barak presiding, held that sections of the barrier were unlawful under international law as striking a disproportionate balance between the exigencies of military necessity on the one hand and humanitarian considerations on the other. En route to that conclusion the Court expressly held that Article 52 of the Hague Regulations required a strict and narrow interpretation, and were not apt to accommodate political, as opposed to purely military, considerations. National security, properly understood, was one thing; Zionist ideology of settlement throughout Biblical Israel, as the Supreme Court put it, was quite another. Secondly, and no doubt more controversially, the Supreme Court held that it was illogical to posit that a barrier primarily motivated by security considerations would follow the Green line, and that a barrier which took a different course would, perforce, be actuated primarily by political considerations. Viewed superficially, this is counter-intuitive, but one may understand that security concerns might well dictate that there be space between the eastern side of the barrier and Israel proper.

Thirdly, and most interestingly, the Supreme Court observed that the principle of proportionality was a principle both of international law and of Israeli public law. As Justice Barak explained:

> *'According to the principle of proportionality, the decision of an administrative body is legal only if the means used to realise its governmental objective is of proper proportion. The principle of proportionality focuses, therefore, on the relationship between the objective whose achievement is attempted, and the means used to achieve it.'*

Justice Barak broke this down into three sub-tests: the 'rational means' test; the 'least injurious means' test; and, the 'proportionate means' test. Although the actions of the military commander could not be successfully impugned as having been taken for an improper motive or reason, segments of the barrier could still be characterised as unlawful, as being disproportionate.

On 9th July 2004 the ICJ published its Advisory Opinion on the self-same issue. If any of you were privately thinking that the Israeli Supreme Court decision might not be entirely free from unconscious partisanship, the same might arguably apply to this document. The British Judge, Judge Higgins, wisely said that the ICJ should not have exercised its discretion to opine in this manner at all. It was the view of the ICJ, amongst other things, that the barrier amounted to a *de facto* annexation of land to which the Palestinians had the right to self-determination, and that the construction of the barrier was not absolutely necessary to bring about Israel's security objectives. Scant mention was made of the need to permit an effective struggle against terrorist attacks[2], and no mention of the principle of proportionality. For the ICJ, this was an issue to be painted in primary, not shaded, colours.

In the light of the Advisory opinion, the issue returned to the Israeli Supreme Court (Mara'abe et al v Prime Minister of Israel et al, HCJ 7957/04), and on 15th September 2005 a nine-judge panel, presided over again by Justice Barak, handed down its judgment. The Supreme Court was critical of the ICJ which, it considered, had lacked sufficient factual basis properly to address the issues. As Justice Barak put it, in characteristically lapidary terms:

> *'The main difference between the two judgments stems primarily from the difference in the factual basis upon which each court made its decision. Once again, the simple truth is proven: the facts lie at the foundation of the law, and the law arises from the facts (ex facto jus oritur)'*

Indeed, the Supreme Court went so far as to accept that it and the ICJ were proceeding on the basis of a 'common normative foundation'. I do not propose to dwell on the minutiae, because to do so would risk embroiling myself in what I suspect in the final analysis was a difference in political viewpoints, or *weltanschauung*, between these two courts. However, it is worth alighting on certain interesting aspects of the 2005 judgment.

[2] Yet the number of suicide attacks decreased significantly after the barrier was created (see http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/suicide%20and%20other%20bombing%20attacks%20in%20israel%20since.aspx)

The Supreme Court held that the rationale behind the military commander's authority to construct the barrier included the need to protect the army in the territory under belligerent occupation, the defence of the State of Israel itself, and the safety of Israelis living in the settlements. Allowing myself to nudge my crown over the parapet just for an instant, I am not sure about this last one, although it is supported by a strict reading of regulation 43 of the Hague Regulations. As for the second rationale, defence of the State of Israel itself, this cannot be lightly dismissed, because the route of the barrier reflects topographical and strategic features (in the military sense of the term) which chime with national security, even if they also chime with where the majority of the settlements happen to be. The Supreme Court then undertook a close application of the principle of proportionality to various segments of the barrier, and variously concluded that some parts were lawful and others were not.

Whatever you might think of some of the conduct of the State of Israel over the years, these Supreme Court judgments certainly repay reading and analysis. President Barak's intellectual and juridical command is formidable; he would have been at home in any of the highest courts in the liberal democracies. It is necessary to use the past tense only because he has now retired from judicial service, and is a visiting professor of law both in Israel and the US.

Much less impressive though, if I may be forgiven for expressing another opinion, is the shenanigans surrounding the report of the Levy Commission, set up in February 2012 to examine the legal status of the settlements in the West bank. The Commission reported in June 2012 and concluded that the settlements are legal under international law. Its conclusions and recommendations have not gone unnoticed, particularly in Israel itself.

Unfortunately, only the conclusions and recommendations of the Levy report are available in English. For the full text, and its reasoning, a non-Hebrew speaker is reliant on other commentaries.

Levy[3] was a retired justice of the Supreme Court who was handpicked by Prime Minister Netanyahu to undertake this report. One may only speculate as to the reasons for his collar being felt in this way. Maybe it was because he was the sole dissenting justice in a case known as the Disengagement Petition where 10 out of the 11 members of the judicial panel held that Gaza was not part of the State of Israel, but was under belligerent occupation. In his minority judgment, Justice Levy said this:

> *'Prior to the entry of the State of Israel, there was no sovereign in the areas of Judea, Samaria, and the Gaza strip recognised in accordance with international law. Conversely, the State of Israel, which now holds those territories, does so not by virtue of it being an 'occupying power', but by virtue of the fact that on the one hand it replaced the Mandate government, and on the other, it is the representative of the Jewish people. As such, it enjoys not only the historical right to hold and settle these areas, about which it is not necessary to speak at length but simply to study the Bible, but also a right enshrined in international law.'*

The majority of the Supreme Court in that case held that the humanitarian rules pertaining to belligerent occupation applied, and that Israeli settlers could be evacuated by force from the Gaza strip, on the basis of political considerations.

Justice Levy was not, therefore, the ideal candidate to give a mainstream opinion on this delicate subject, and in the event that was not the opinion he gave.

As I have said, the reasoning of the Levy Commission may only be derived vicariously, but it would appear to run along the following lines. First, it was asserted that the Mandate granted in 1922 explicitly established that Palestine is the national home of the Jewish people, and that the recognition granted to non-Jewish groups in the mandate area is restricted to their civil and religious rights. Secondly, it was claimed that General Assembly Resolution 181, which partitioned Palestine along ethnic lines, was not empowered to change the Mandate in the light of its status as a recommendation only, and in view of Article 80 of the UN Charter. Thirdly, reliance

[3] Recently deceased

was placed on the illegal annexation of the West bank by Jordan in 1950. Fourthly, Levy claimed that Israel had every right to claim sovereignty over the West bank, and the only reason it had not annexed it was pragmatic, in order to enable the pursuit of peace negotiations.

Given the time, and in any event, I will content myself by making two short ripostes. First, this reasoning appears to go right back to 1922 and the League of Nations. *Pace* Levy, the purpose of the Mandate was not limited to securing a national home for the Jewish people; it included, as one of its equivalent purposes, the need to safeguard the rights to self-determination of others living within its borders. In this regard, the Balfour declaration (1917), and the Resolution of the San Remo conference of 1920 to like effect, are relevant. Secondly, Israel could of course annex the West bank if it chose to, but the fact remains that it has not.

The Levy Commission was also of the view that the West bank did not constitute an occupied territory. First, the Fourth Geneva Convention applies to short-term occupation, in contrast to Israeli control of the West bank, which has endured for decades. Yet, it has been the consistent position of all Israeli governments since 1967 that the occupation is not permanent. Secondly, the point was made, and we have seen it before, that Jordan's annexation of the West bank in 1950 was illegal, and, in any case, Jordan has long since relinquished its sovereignty over the territory.

I will return to this point in a moment, but the Levy Commission also approached the matter on the twin premises that the West bank did constitute an occupied territory *and* that Article 49 applied. In a robust piece of reasoning, the Commission opined that Article 49 was of no application because it was designed to cater for those deported or forcibly transferred to conquered territories, not to persons who settled in the West bank entirely voluntarily and pursuant to a Zionist worldview. I have already touched on this issue. Whatever the legal merits, the moral, political and pragmatic arguments are, or ought to be, clear enough.

The West bank is undoubtedly in belligerent occupation by Israel. It could have been annexed, but has not been. The prohibition in Article 49 would apply, not because this article exemplifies some principle of customary international law, but only if a purposive approach to Article 2 of the Fourth Geneva Convention is correct. If it is correct, then everything else slots into place. But even if correct, as the purposive approach probably is, the question would then arise as to whether those seeking to uphold the legality of the settlements could nonetheless rely, as the Israeli Supreme Court has done, on imperatives of national security as a freestanding justification. It is at that point that I lower my head well underneath the parapet, and refrain from expressing an opinion.

National security has been mentioned at various places in this short address, but I have not covered the interaction between it and Israel's constant battle against state-sponsored terrorism. I have quite a lot to say about terrorism in another talk, but let me do so very briefly in the current context. Israel requires its military commanders to abide by the laws of warfare, by which I mean the norms of customary international law pertaining to armed combat. These norms arose in an era where warfare between two state combatants was solely within contemplation, but that has not been the position in much of the Middle East for many decades now. ISIS, and other similar groups, is not a state combatant either, but it controls a significant swathe of two sovereign states.

Hamas does not obey the norms of customary international law when it indiscriminately lobs rockets into Israel with the aim and intention of striking at civilian targets. Israel is not absolved from compliance on account of that factor alone, and has never made that claim. Hamas also places its rocket launchers right next to civilian populations, rendering Israeli compliance all the more difficult. Ultimately, though, and notwithstanding blatant provocation, the application of the principle of proportionality is likely to be the best means of achieving a military response which is both legal and prudent, and one which is apt to engender a just and stable political solution.