Lawyers in Warfare: Who Needs Them?

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In recent years, lawyers have become increasingly involved in issues relating to warfare. This manifested itself in both the greater use of legal counsel in real time and in the growth of retroactive enforcement (investigations and prosecutions). The purpose of this article is to respond briefly to some of the criticism of this phenomenon.

"Let the IDF Win"

In Israeli public discourse today it is often said that the increasing involvement of lawyers prevents the IDF from achieving victory. Implicit here is the argument that if in the past lawyers had been as involved as they are today, Israel would not have won the wars it has won thus far.[1] Without denying the fact that there is growing involvement of lawyers and the law in issues concerning warfare, legal involvement in warfare has long been greater than people often think. This is true even in the context that is considered the most damaging to soldiers: criminal prosecution. I will attempt to illustrate this briefly by examining the scope of prosecution during the most difficult war that Israel has experienced thus far: the War of Independence.[2]

On February 10, 1948, even before the establishment of the state, David Ben-Gurion wrote the following to Yaakov Riftin, a member of the Security Committee:[3]

> I have received complaints and serious allegations of revenge and lawlessness among some members of the Palmah: robbing Arabs; murdering Poles[4] and Arabs for no reason or without sufficient reason, and in any case without a trial; unfair actions

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> toward Jews; theft; embezzlement of money; torture of Arabs during interrogation; and the like. These acts, if they are true, are a political and moral danger to the organization and to the *yishuv* [the pre-State Jewish community in Palestine] and the harshest measures should be taken to root them out.

Riftin then undertook an examination and subsequently submitted a report to Ben-Gurion that, *inter alia*, raised a number of questions and posited possible answers:[5]

1. How can disturbances be prevented from spreading? How can they be overcome? (a) By increasing educational-informational activities in the organization. (b) By a clear and effective legal procedure.
2. On what do the clarity and the effectiveness of the legal procedure depend? (a) Delivery and receipt of accurate information on crime (b) The possibility of a fast and comprehensive investigation of the complaint (c) Someone to handle the complaint immediately and prosecute if necessary (d) The proper observance of law.

The Riftin report was one of the main factors influencing the establishment of the Military Advocate General (or as it was originally called, the "Legal Service"), which was very active during the War of Independence. The size of Israel's military force in that war was some 70,000 soldiers, and according to a report submitted by Minister of Justice Pinhas Rosen to the Knesset, between July 1, 1948 and June 15, 1949, 2,424 verdicts were handed down by the IDF's Courts-Martial, with seventy-nine of them against officers.[6] In addition, according to a report summarizing the work of the Military Advocate General for 1948, an average of 400 court-martials took place every month.[7] If we assume that not every investigation begun at that time ended in prosecution, we arrive at even more impressive statistics on how often criminal investigations were conducted during the War of Independence. To be sure, it is true that a large number of these legal proceedings did not deal with violations of the laws of war. Furthermore, most of the verdicts that dealt with war crimes (other than those that dealt with pillage) are censored to this day, and therefore it is not possible to know precisely how many prosecutions there were. However, there are various indicators that this was not an insignificant phenomenon[8] – and nonetheless, the war was won.

In other words, there was always a need for relatively extensive legal involvement (including prosecutions) in order to prevent and punish war

crimes, which, as Ben-Gurion put it, "are a political and moral danger" to Israel. Moreover, without denying the increased legal involvement in warfare in recent years, activity of this sort was far from unusual. The underestimation of the scope of legal activity in the past stems in part from the fact that the outcomes of much of this involvement were censored, and thus forgotten.

"In the End, Every Soldier Will Need His Own Personal Lawyer"

Opponents of the growing legal intervention in issues surrounding warfare often say that increasing juridification will lead to a situation in which every soldier needs his own personal lawyer.[9] The implicit argument here is similar to the argument behind the slogan "let the IDF win," i.e., that the growing legal intervention will hurt the effectiveness of the fighting by creating a restraining effect (by making soldiers and commanders fearful about acting and taking the initiative) and a tendency to "see no evil, do no evil" (out of fear of acting and taking the initiative in general, or at least, without obtaining legal advice in advance, which means loss of leadership and harm to the effectiveness and speed of the military response).[10]

There are a number of responses to this argument, and here too the first response is based on history. Those who make use of this slogan assume that today, soldiers and commanders still do not require a personal attorney, and that it is only the growing threat of prosecution (whether by the Israeli justice system or the international community) that is liable to lead to this. However, the sting of this expression is dulled to a large extent when we realize that this claim has been made for many years. The earliest source I located is from 1837, when British officer C. J. Napier wrote a statement to this effect in his book, *Remarks on Military Law and the Punishment of Flogging*.[11] Napier believed that during operational activity (combat and riot-dispersal), the soldier has a duty of absolute obedience to his commander's orders (meaning that he must obey even illegal orders of any kind). He argued that accepting the legal position that there are (illegal) orders that the soldier must refuse to carry out is inappropriate, since

> if this be true, such a principle dissolves the army at once … in such law there is neither sense nor justice. … If such is law, the army must become a deliberative body, and ought to be composed of attorneys, and the Lord Chancellor should be made the commander in chief. [12]

Napier's position was rejected long ago, and although over 175 years have passed since then, the British army remains alive and well.[13] In Israel, the earliest source (known to me) in which this claim is made was during the Kafr Kassem trial.[14] The fact that this expression has such a long pedigree, as well as the fact that it has been used in the past in the context of acts and views that are today perceived as fundamentally unacceptable (i.e., obeying illegal orders to carry out atrocities) indicates that the fear that the day is approaching when a soldier will need a personal lawyer is not justified, and this warning is largely an empty threat.

Nevertheless, there is partial truth in the fear that the increasing involvement of the law could create a chilling effect. Such an effect is a chronic problem in any case in which criminal law is used and enforced. Any law, because it is based on language, is destined to suffer (to one extent or another) from a problem of being overly or insufficiently inclusive.[15] In other words, sometimes, it will prohibit an action in a situation in which most would agree that it is better for the action to be performed, and sometimes it will permit an action to be performed in a situation in which most would agree that it were better not performed. Furthermore, it is as naive to think that completely unambiguous legal rules can be formulated as it is to think that from the outset the law can predict each and every possible situation that may take place.[16] By the same token, it is also naive to think that people (especially those who are not lawyers) will be familiar with every clause of every law.[17] Consequently, people sometimes refrain from performing actions that are perfectly legal for fear of being prosecuted,[18] while at times, individuals break the law without being aware that they are committing a crime.[19]

Precisely given these problems, legal systems attempt to word their laws as clearly as possible.[20] However, such problems have never led legal systems to abandon the use of criminal law[21] because the price is too high. Many times, in the absence of a legal norm accompanied by the threat of prosecution, even good, intelligent, moral people are likely to be tempted to violate core moral precepts. Psychological studies have even shown that the temptation to do so is especially great in times of war, as noted by Muñoz-Rojas and Frésard:[22]

> The perception that there are legal norms is more effective than the acknowledgement of moral requirements in keeping combatants

> out of the spiral of violence … While attempts at justification… can enable combatants to switch off guilt feelings in the face of inhuman acts and to stretch moral values by legitimizing such acts, they cannot confer legality on such behaviour. The norm draws an easily identifiable red line, whereas values represent a broader spectrum which is less focused and more relative.

In addition, the recognition that legislation can never be worded "perfectly"[23] has led modern human societies to actually encourage acquisition of legal knowledge and the use of legal advisors. This encouragement is meant to reduce the uncertainty that the law can create,[24] along with the recognition that many times, without a legal advisor to mention that there is an obligation to obey the law, even good, intelligent, and moral people will be tempted to break it.[25]

As for the fear of a "see no evil, do no evil" tendency, we should distinguish here between two types of concerns: the first is lack of initiative out of a fear of prosecution, and the second is lack of initiative as a result of the over-involvement of lawyers throughout the decision making process. In reality, both types of fear are exaggerated.

Regarding the first type of fear, it is precisely the growth in legal education and the increased involvement of legal advisors in the decision making process in real time that reduces this fear. Thus, for example, Yehuda Meir-Roth, who expressed concern that the increasing use of criminal enforcement could lead to reduced initiative among combatants in the IDF, concluded:[26]

> Since the first intifada, the IDF has been fighting mainly among a dense civilian population, in which the enemy and the uninvolved civilian are very close to each other. These are situations that tend to lead to complications. There is a need to train soldiers to cope in this battlefield. The training must include, among other things, the study of international and criminal law and an analysis of relevant legal precedents. A military lawyer should be permanently attached to any Brigade Staff or Division Staff. His presence on these Staffs is essential in a situation where many military operations are liable to cause criminal or international law-related complications for those who gave the orders and those who carried them out. In other words, there is a need for preventative action. It would be an error to bring a

> military lawyer into the picture only after the incident occurs. Officers should be able to consult in real time with an attorney serving in the Brigade or Division Staff.

As to the concern that commanders will avoid taking the initiative because of real-time involvement by legal advisors, this concern seems to be based on a lack of understanding, both of the nature of the legal advice and the nature of the decision making process in the army. One of the great leaps forward in the development of modern militaries was the establishment of the Staff alongside the commander, which stemmed from an understanding that the commander cannot be an expert in every area of activity that is needed to fulfill the military mission. The role of the commander must be, then, to lead and chart the way on the basis of information provided to him by various experts who are members of the Staff. The existence of the Staff does not harm the leadership status of the commander. On the contrary: it provides the commander with information and tools that allow him to make leadership decisions.[27]

It can be argued that the nature of the relationship between the legal advisor and the commander is different from that between the commander and, say, an artillery officer, because only the legal advisor can tell the commander that he may not perform a particular action and that if he does so, he may be prosecuted. However, this difference is not as great as it appears to be at first glance. First, even an artillery officer will sometimes say to a commander that an action the commander is eager to undertake cannot be carried out, for example, because the necessary ammunition is not available.[28] Second, as anyone who is even minimally familiar with the law knows, legal norms are only rarely phrased in absolutes. Many times, there is a legal gray area where it is not entirely clear whether the action is legally permitted or prohibited, and therefore, the choice of one way rather than another only creates a legal risk (as opposed to a certainty of breaking the law). Furthermore, in many other cases, the law does not prevent or interfere with achieving the result the person seeks (in this case, the commander). Rather, it outlines the different ways in which the desired result can be obtained legally. In these two types of cases (and these represent most cases), there is no concern at all that consulting with a lawyer will harm the commander's status. On the contrary, it provides the commander with a complete picture of the tools available to him and the risks and obstacles he faces.[29]

Perception vs. Legal Reality

"There are elements working to terrorize Israel from this angle [legal warfare]. However, Israel's situation is better than we usually imagine."[30]

Since the 1990s, the international community has undergone a drastic change in mindset regarding the necessity of enforcing the laws of war, and as a consequence, international criminal law has been revived after years of slumber.[31] This revival is manifested primarily in two ways that have ramifications for the Israeli soldier. The first way is the establishment of the International Criminal Court (ICC). Despite the fact that Israel is not party to the treaty under which the ICC was established, under certain circumstances, Israeli officials might find themselves being prosecuted in the ICC.[32] The second way is evidenced by the increasing attempts to bring about the prosecution of Israeli officials in foreign countries by virtue of "universal jurisdiction." According to international law, every country in the world has the authority to prosecute people who are suspected of war crimes, even when the prosecuting state has no connection to the event that led to the suspicion that a crime had been perpetrated. Universal jurisdiction is intended to end impunity for war crimes, and in the past, Israel very much supported the use of this legal doctrine out of a desire to increase the chances that Nazi war criminals will be punished.[33] Since the 1990s, many states have begun to make increasing use of universal jurisdiction. As a result, various Israeli officials have found themselves threatened with prosecution for war crimes in these countries because of actions by a variety of pro-Palestinian organizations that have submitted complaints against them in these countries.[34]

One of the main explanations cited by Israeli legal officials for the need to increase their involvement in areas that relate to warfare is the (aforementioned) changes that have taken place in the international arena. Supreme Court justices explain that they must increase the scope of judicial review on issues concerning warfare in order to reduce the likelihood that IDF officers (and Israeli government ministers) will find themselves candidates for prosecution abroad.[35] In turn, officials from the State Attorney's Office argue that they must be more involved, both for the reason mentioned by the Supreme Court and because, they claim, their involvement reduces the chances that security agencies will "lose" in petitions filed against them in the Israeli Supreme Court.[36]

However, about two decades have passed since international criminal law began once again to flourish and, thus far, no Israeli has found himself prosecuted abroad. If so, has the time not come to wonder whether true cause for concern exists? Have lawyers misled officials in the army and the Israeli government?[37] Is it possible that these officials have enabled lawyers to be increasingly involved in warfare because of an exaggerated or even groundless fear?[38]

Here legal officials suffer the consequences of a known psychological bias, which is that people tend not to attribute sufficient importance to events that have not taken place (non-events).[39] This phenomenon has frequent consequences in politics as well. For example, experience proves that a politician who has failed to prevent war but has led his country to victory in that war usually receives more credit from the public than a politician who, in analogous situations, has succeeded in preventing war at the cost of certain diplomatic concessions. This is true even if the price of victory in war (in the first instance) is heavier than the price of diplomatic compromise (in the second). One of the reasons for this is that while in both cases the price of achieving the result is tangible, only in the first case is the result itself tangible, as noted by Melson:[40]

> A catastrophe averted is likely not to be seen as a catastrophe. A predicted event that fails to materialize is a non-event, something that did not happen, and politicians who have expended wealth and lives on something that failed to happen cannot be expected to reap the rewards of their decisions. On the contrary, politicians who risk lives and wealth to avert catastrophes … run the risk of being vilified and punished for their efforts: To the extent that their actions succeed in averting a catastrophe, there will be no evidence of their success—only of the costs of their efforts.

In reality, a situation in which no Israeli official has been prosecuted outside of Israel is not evidence of legal hysteria. To a large extent, the reason for this is the increased involvement of Israeli lawyers in warfare-related issues. A clear example of the success of legal activity can be seen in connection with lawsuits filed in Spain on the basis of universal jurisdiction against senior Israeli officials for the targeted killing of Saleh Shehadeh. In that case, the proceedings ended with a determination by the Spanish

courts that since the Israeli judicial system had handled the case credibly, the Spanish justice system did not need to intervene.[41]

Conclusion

The involvement of legal officials in warfare-related issues has grown in recent decades. This article has attempted to respond briefly to some of the main arguments raised against this process. The claim that the State of Israel would have lost its wars in the past if lawyers then were involved to the extent that they are today is mistaken, since in practice lawyers' wartime involvement was extensive even in the past, and this did not interfere with Israel's ability to achieve victory. Similarly, Israel need not fear reaching the point where every soldier needs a lawyer, and the fact that this scare tactic has been used for many decades is perhaps the best evidence that it is a false claim. Finally, there is a real need to make use of lawyers: they help commanders in the decision making process and prevent soldiers from yielding to the temptation to break the law. Furthermore, they have succeeded, at least thus far, in protecting Israeli soldiers (and other government officials) from criminal prosecution abroad.

Notes

1 See, for example, Yisrael Harel, *Lawyers vs. Soldiers*, Haaretz, October 29th, 2010, http://www.haaretz.co.il/misc/2.444/1.1227418.

2 The data presented here is part of a more extensive study that is in its very early stages: Ziv Bohrer, *The Normative Implications of the Forgotten War Crimes Trials of 1948* (forthcoming).

3 See Tzvi Inbar, *The Military Advocate General: Historical Aspects*, 15 Mishpat VeTzava 7, 11 (2001), http://www.law.idf.il/SIP_STORAGE/files/8/278.pdf.

4 Apparently, this refers to the murder of a Polish arms dealer.

5 Inbar, *supra* note 3, 13.

6 Tzvi Inbar, Sword and Scales of Justice: the Foundations of Military Law in Israel 130 (vol. 1, 2005).

7 *Ibid*., 243.

8 In my forthcoming article (*supra* note 2), I intend to discuss these indicators. As examples of cases, revealed in recent years, in which soldiers were prosecuted for war crimes during the Israeli War of Independence, see Benny Morris, 1948: The History of the First Arab-Israeli War 189 (2010) (prosecution for rape); Inbar, *supra* note 3, vol. 2, 662 (prosecution for injuring a prisoner of war), but see also the complex case of First Lieutenant Lahis, discussed *ibid.* at 659-661. Concerning the prosecution against acts of pillage, it should be noted that it is sufficient to skim Inbar's book in order to realize the extensiveness of the phenomenon. See also Appeal 147/50 *Sergeant H. and Second Lieutenant R. v. Chief Military Prosecutor*

(1951) *in* Ziv Bohrer, *The Defense of Justification for Obeying an Order and Clearly Illegal Orders in Israeli Law*, 433 (forthcoming, 2014) (a verdict that dealt with a case of rape and murder that occurred several months after the end of the War of Independence and was prohibited from publication until 2005). In another verdict, which dealt with the same incident, the soldiers who were present at the outpost but did not participate in the rape and murder were also punished. These soldiers were placed on trial for the military offense of "failure to prevent a crime," even though their commander was a leading participant in perpetrating the criminal acts. *See* Appeal 49/50 *Corporal B. and Seventeen Others v. Chief Military Prosecutor* (unpublished and prohibited from publication until 2005).

9 For example, Yehoshua Breiner, *Following Investigation of Death of Palestinian in Qusra, IDF Officer Dismissed*, Walla! News, October 24th, 2011 (quoting the position of the 'Council of Samaria Settlers'). *See also*, Akiva Bigman, *Combat Inhibitors*, News1, December 11th, 2011.

10 Government Commission of Inquiry to Examine the Events of the Campaign in Lebanon 2006 488 (Final report - June 2008; in Hebrew; [the Winograd Commission]) ("We fear that the increasing reliance on legal advice during military operations could cause the diversion of responsibility from elected officials and commanders to [legal] advisors, which is liable to disrupt both the fundamental quality of the decisions and the operational activity [itself]"). Yehuda Meir-Roth, *The Phenomenon of 'Seeing No Evil,' in the IDF*, 441 Maarachot 62 (2012).

11 Major-General C. J. Napier, Remarks on Military Law and the Punishment of Flogging (1837).

12 *Ibid*., 22-23.

13 Regarding obedience to orders given during riot-dispersal, the comment by Napier was erroneous even in its time. In regard to obedience to illegal orders given during combat, there is no doubt that at the very least, since the Second World War, Great Britain (like most countries in the world) has rejected the position that soldiers must give blind obedience. *See* Ziv Bohrer, *England and the Superior Orders Defence—Choosing the Middle Path*, 12 Oxford University Commonwealth Law Journal 273 (2012-13).

14 Ruvik Rosenthal, *Who Killed Fatma Sarsour: Background, Motives, and the Sequence of Events in the Case of Kafr Kassem in* Kafr Kassem: Myths and History 11, 45 (Ruvik Rosenthal, ed., 1st ed. 2000). Rosenthal quotes an article in *Maariv* newspaper from February 27, 1959, in which an IDF officer was reported to state that he had come to the courtroom to hear the verdict in the case of Colonel Shadmi because: "I came to hear if in the event of a future war, the commanders will need to go into battle with a personal lawyer for each of them."

15 Frederick Schauer, Playing by the Rules 15-37, 100-02 (1992).

16 Seaford Court Estates Ltd v. Asher [1949] 2 KB 481, 498-99 ("Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity.") It is impossible to argue with the fact that certain norms of the laws of war suffer especially from problems of a lack of agreed interpretation. However, this does not mean that these norms can tolerate any interpretation. *See* Arthur D. Watts, *International Law and*

International Relations: U.K. Practice, European Journal of International Law 157, 164 (1991). In addition, it is important to note that there is a gradual process of clarification of the laws of war (or at least, of some of them). *See* Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 European Journal of International Law 144, 156 (1999).

17 Paul H. Robinson, *Fair Notice and Fair Adjudication*, 154 University of Pennsylvania Law Review 335, 361 (2005-2006).

18 Larry Alexander and Emily Sherwin, The Rule of Rules 31-32 (2001).

19 Heidi Hurd, *Justifiably Punishing the Justified*, 90 Michigan Law Review 2203, 2238-39 (1992).

20 In the state context, sometimes, a clause in the law will even be annulled by the courts when it suffers from especially serious problems of ambiguity or over-inclusiveness. See a discussion on this in Israel High Court of Justice Case 6358/05 *Vanunu v. OC Home Front Command* (2006) (para. 20 of the verdict by Judge Procaccia).

21 Israel High Court of Justice Case 1397/03 *State of Israel v. Shimon Sheves*, para. 30 of the verdict by President Barak: "The level of [legal] certainty … must be higher in the penal realm. However, absolute certainty is not required; the maximum degree of certainty that can be achieved, considering the type of matter being resolved, should be required (…). We should not expect total certainty").

22 *See* Daniel Muñoz-Rojas and Jean-Jacques Frésard, The Roots Of Behavior In War: Understanding and Preventing IHL Violations 15 (2004).

23 *See* Frederick Schauer, *Rules and the Rule of Law,* 14 Harvard Journal of Law & Public Policy 645, 662-65 (1991).

24 *See* Re'em Segev, *Justification, Rationality and Mistake: Mistake of Law Is No Excuse? It Might Be a Justification!* 25 Law & Philosophy 31, 56-61, 67-74 (2006) (Segev argues that legal systems should do even more in the direction stated).

25 See David Luban, *That the Laws Be Faithfully Executed: The Perils of the Government Legal Advisor,* 38 Ohio Northern University Law Review 1043, 1044-45, 1055 (2011-2012).

26 Meir-Roth, *supra* note 10, 69.

27 For the history of the military "Staff," see *Encyclopedia Britannica* (11th ed., 1911), as presented in http://www.1911encyclopedia.org/Staff. For the role of the Staff, see Department of the Army, Staff Organization and Operations 1-1 (1997, FM 101-5); Boaz Zalmanovitz, *Who Needs a Chief of Staff?* 435 Maarachot 68, 68-70 (2011).

28 The example cited in the text is of course simplistic. In practice, in a modern military, the scope of discretion and the responsibility of Staff Officers is much greater than might be inferred from that example. See Morris Janowitz, The Professional Soldier 67 (1960). This fact only narrows the difference that exists in reality between the nature of the relationship between the commander and the artillery officer on the Staff and the nature of the relationship between the commander and the legal advisor.

29 *See* Luban, *supra* note 25, 1044-45. Needless to say, broader ethical and legal obligations are imposed on the State's lawyers than on those in private practice. See Watts, *supra* note 16, 164; Uri Shoham, *The Military Advocate General and*

the Attorney General: Between the Sadiel Affair and the Avivit Attia Petition to the High Court of Justice, 16(2) Mishpat VeTzava 203, 341, 361, 407-08 (2002).

30 Giora Eiland, *The Foundations of Israel's Response to Threats*, 2(1) Military and strategic affairs 57, 62 (2010).

31 *See* Antonio Cassese*, On the Current Trends toward Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 European Journal of International Law 2 (1998).

32 *See* Yuval Shany, *The Entry into Force of the Rome Statute: What are the Implications for the State of Israel?*, 9 HaMishpat 51 (2004); International Criminal Court Office of the Prosecutor, *OTP Update on the Situation in Palestine* (April 3rd, 2012), http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf; John V. Whitbeck, *Palestine and the ICC*, The Palestine Chronicle (April 6th, 2013), http://palestinechronicle.com/palestine-and-the-icc/#.UX9nJl_fodU.

33 *See* Orna Ben-Naftali and Keren Michaeli, *Universal Jurisdiction and the National Legal Discourse*, 9 HaMishpat 141 (2004).

34 For a review of some of these cases, see Diane Morrison and Justus Reid Weiner, *Curbing the Manipulation of Universal Jurisdiction*, Jerusalem Center for Public Affairs (2010), http://jcpa.org/text/universal-jurisdiction.pdf.

35 Naomi Levitsky, The Supremes: Inside the Supreme Court 176 (2006); Amihai Cohen, *The Impact of International Law on Israel in the Era of Global Jurisdiction*, 65 Parliament (2010) (a copy of the article can be found on the website of the Israel Democracy Institute, http://www.idi.org.il).

36 Elyakim Rubinstein, *On Security and Human Rights in the Era of the War on Terror*, 16(4) Mishpat VeTzava 765, 776-778 (2003).

37 *See* Avi Becker, *The Delegitimization of Israel: A New Secular Religion*, 24 Kivunim Hadashim 35, 41(2010) See also a more general discussion in Gad Barzilay, *The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence, and Dissent*," 15(1) HaMishpat 193, 212 (2010).

38 *See* Cohen, *supra* note 35; Eiland, *supra* note 30, 62; Amir Oren, *The Goldstone Report on Operation Cast Lead: Fear is the Best Legal Advisor*, Haaretz, September 16th, 2009, http://www.haaretz.co.il/misc/1.1280927.

39 James Parkin, Judging Plans and Projects: Analysis and Public Participation in the Evaluation Process 42 (1993).

40 Robert Melson, *Churchill in Munich: The Paradox of Genocide Prevention,* 3(3) Genocide Studies & Prevention 297, 298 (2008). On other psychological biases that lead to greater public sympathy for a politician who has failed to prevent war than one who has prevented it, see Daniel Kahneman and Jonathan Renshon, *Why Hawks Win*, 158 Foreign Policy 34 (2007).

41 See the discussion of this incident in Ido Rosenzweig and Yuval Shany, *Update on Universal Jurisdiction: Spanish Supreme Court Affirms Decision to Close Inquiry into Targeted Killing of Salah Shehadeh*, 17 Terrorism and Democracy (April 5th, 2010), http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-17/update-on-universal-jurisdiction-spanish-supreme-court-affirms-decision-to-close-inquiry-into-targeted-killing-of-salah-shehadeh/; Ido Rosenzweig and Yuval Shany, *Update on Universal Jurisdiction: Spanish Court of Appeals Decides to Close the*

Inquiry into the Targeted Killing of Salah Shehadeh, 8 Terrorism and Democracy (July 17th, 2009), http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-8/update-on-universal-jurisdiction-spanish-court-of-appeals-decides-to-close-the-inquiry-into-the-targeted-killing-of-salah-shehadeh/. For a discussion of another case in which the attempt to prosecute Israelis abroad failed, see Ido Rosenzweig and Yuval Shany, *Universal Jurisdiction: Dutch Court Dismisses Appeal Petition on Torture Allegations against Ami Ayalon*, 11 Terrorism and Democracy (November 2009), http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-11/universal-jurisdiction-dutch-court-dismisses-appeal-petition-on-torture-allegations-against-ami-ayalon/.