

## ISRAEL

# Just and Jewish Warfare

Michael L. Gross

**P**urity of arms—the unflinching commitment to humanitarian warfare—is dogma in Israel. Jewish soldiers shield innocent civilians, do not mistreat prisoners, fight honorably and with restraint, and raise their arms only in self defense. These are the rules every young conscript, fortified by images of the Holocaust, learns to uphold. Why then are such rules so blatantly disregarded as Israel wages its war with the Palestinians by torture, assassination, and blackmail?

### Torture

In September 1999, the Israeli Supreme Court convened to hear the case of Palestinian detainees who petitioned the court to prohibit torture. This was not the first time that torture had seized public attention. Following earlier complaints raised by the press, the courts, and human rights organizations, the Landau Commission (a state commission of inquiry), had reviewed the use of torture by the General Security Service (GSS) in 1987. The very establishment of a public body to study torture is probably unprecedented, and throughout its deliberations the committee showed extraordinary sensitivity to the complexity of its mission. While acknowledging that torture might be necessary to elicit information in extreme situations, commission members were keenly aware that a democratic state, not to mention a Jewish democratic state, has a *prima facie* obligation to stand fast against the use of torture in any form.

The Landau Commission struggled with this question by formulating three options, each of which rested on the unexamined assumption that torture was necessary to meet the existential threat that terrorism posed. This assumption would be examined later but stood as given at the time.

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First, the commission raised, and then rejected, the hypocrisy of some democratic nations, like France, who practiced torture but simply pretended that they didn't. Similarly, the commission rejected any effort to carve out a special niche for the General Security Service by placing it beyond the law; doing so they thought characteristic only of less enlightened states. Instead, the commission formulated a new "Jewish-democratic" approach; in defiance of all international norms, they suggested that Israel could set standards and establish a regulatory mechanism to oversee the use of "moderate physical pressure."

Unfortunately, the details of the Commission's report were kept secret, so it was not until the Supreme Court ruled on torture in 1999 that the public came to understand what had been done. It was not pretty. Taking its cue from the British and their long running troubles with the Irish, the Landau Commission took heart from an international court ruling in 1976 that saw the British government unsuccessfully defend the use of torture to interrogate suspected IRA terrorists.

At that 1976 hearing, sufficient evidence was presented for the European Court of Human Rights to conclude that the combined use of five techniques constituted inhuman treatment and torture. The five techniques included the seemingly innocuous practices of hooding (covering a suspect's head with a filthy, opaque sack), wall standing (forcing a suspect to stand spread eagle against a wall for an extended time), noise (excessively loud music played throughout the day and night), as well as sleep deprivation

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and starvation. The Landau Commission took special note of the term “combined use,” concluding that individually employed techniques of lesser or equal savagery might constitute degradation but not torture. With this caveat, they gave the green light to the GSS. That is how the situation stood until 1999.

In the intervening years, mounting evidence indicated that the GSS was not content with the five techniques. B’Tselem, Amnesty International, and the Public Committee Against Torture in Israel published numerous reports of Palestinian detainees who were killed, beaten, crippled, and driven nearly insane by the combined use of an improved Jewish version of the techniques made famous by the British. In its 1999 ruling the Supreme Court vividly describes the interrogation techniques then in practice. These included “physical means” (beating and slapping), “shaking” (“forceful shaking of the upper torso, back and forth, in a manner that causes the neck and head to dangle and vacillate rapidly”), excessive tightening of handcuffs, the “Frog Crouch” (“consecutive, periodical crouches on the tips of one’s toes, each lasting for five minute intervals”), and, finally, interrogation in the “Shabach” position” (seating a suspect on a “small, low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspects back, and placed between the chair’s seat and back support, the second hand is tied behind the chair, against the back support”). Hooding and “powerfully loud music” were also used in conjunction with most of these techniques.

The Supreme Court was no longer impressed with the existential argument against terrorism: while they acknowledged that a democracy had to fight “with one hand tied behind its back,” they pointed out that terrorism alone would not bring down the State of Israel. Nor was the Court moved by the “ticking bomb” argument, the demand to torture a recalcitrant suspect who would not otherwise reveal information about an impending terror attack. The “ticking bomb” argument only holds if we know, with certainty, that others beside the suspect will not intervene to move the bomb to another time or place, or to change the detonating mechanism. This is rarely, if ever, the case in Israel. There are no lone, Timothy McVeigh-like terrorists among the Palestinians, whose networks are sufficiently organized to keep on ticking with or without one captured member or another. The “ticking bomb” argument could not underwrite a sweeping policy of torture, the court ruled, and so moderate physical pressure was prohibited, absent more definitive legislation.

The Supreme Court decision vindicated years of anti-torture activism in Israel. But the ruling left the door ajar

for the legislature to approve torture provided that a law infringing upon a suspect’s liberty would be “befitting the values of the state of Israel, enacted for a proper purpose, and to an extent no greater than is required.” A daunting task, to say the least. Nevertheless, this did not dissuade some legislators from trying to enact a torture law.

In the waning days of the Barak administration, forty-three opposition members, including the current prime minister, Ariel Sharon, and most members of his cabinet, drafted a law allowing the GSS to torture suspects. The law

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is couched in secrecy. No techniques are described, only “special measures” and “physical pressure.” These may be employed with written permission from the director of the GSS for a period limited to forty-eight hours but renewable. If the director is unavailable and the situation urgent, an investigator may use “special measures” for a period of not more than two hours! While the GSS and the prime minister must periodically

review the guidelines and report to the Knesset every six months, no publicly published accounting is required.

This law is probably unique in the annals of democratic legislation and, should it pass, there is every reason to believe that torture will quickly regain its status as the interrogative method of choice. It takes no imagination whatsoever to see what danger this kind of law poses to a democratically fragile nation like Israel. At this writing, the law remains suspended in committee, but the GSS approached the Justice Ministry as recently as February 2001, complaining that while it was abiding by the Supreme Court’s ban, its work is hindered by lack of interrogation tools. This is not entirely correct. While there is no renewed indication of widespread torture, complaints of abuse are again increasing, particularly as the current conflict intensifies. Recent events also have occasioned a more menacing form of deviant warfare: assassination.

### Assassination

Trying to quell the current round of violence that began following the collapse of Clinton’s peace initiative in October 2000, Israel has been publicly “liquidating” Palestinian militia leaders. Palestinians have been assassinated before (most famously those who perpetrated the attack on Israeli athletes in Munich in 1972), but the sheer number of recent assassinations—more than twenty in ten months—is unprecedented. In response, international human rights organizations have strongly condemned Israel’s policy of “extra-legal” executions. Israel has replied in the language of a just war: the Palestinians are participants in an armed conflict. Assassination, therefore, is not a result of wayward law enforcement but the legitimate, pre-emptive actions of a nation at war.

It cannot be denied that assassination has a great deal of intuitive appeal. It satisfies the need to strike back and to exact just punishment, long overdue and unattainable in any other way. Assassination is a source of pride, demonstrating Jewish military prowess as targets are picked off by the most imaginative means possible: booby trapped cell phones, rigged automobiles, and rocket and tank attacks executed with almost pinpoint accuracy. Many claim that assassination prevents imminent terror attacks and serves as a powerful deterrent, giving potential terrorists pause while convincing Palestinian locals to distance themselves from terrorists. Finally, it is said, assassination accomplishes all this with minimal civilian casualties.

Assassination sounds like the perfect military tactic—and it would be, but for the fact that all these assumptions are naive, wrong, and entirely misguided. Assassination instead erodes the basis for any future peace negotiations, deters no one, and precipitates a violent, vicious, and almost insane desire for revenge.

When terrorist bombings are viewed through the prism of ordinary criminal activity, it is—or should be—obvious that terrorists cannot be punished without the due process afforded by the criminal justice system. No one advocates summarily executing even the most heinous common criminals. The potential damage to the rule of law is simply too profound should law enforcement officers become judge, jury, and executioner. Recently, Israel was stung by fierce international condemnation as Amnesty International, B'Tselem, and the U.S. State Department denounced assassination as an act of extra-legal execution entirely proscribed by international law and common morality.

In an effort to deflect this international criticism, the Israeli government took the unusual step in February 2001 of unilaterally redefining the conflict with the Palestinians from one of “belligerent occupation” to one of “armed conflict.” By redefining Palestinians as combatants, Israel abandoned the pretext that assassinations were a form of punishment or law enforcement and claimed instead that they were legitimate, preemptive strikes. In the context of armed conflict enemy soldiers are fair game. This seemed to offer military planners a way out, reopening the door not to punish Palestinians but to assassinate them in order to preempt planned attacks and to deter others from similar designs.

Israelis are proud of their ability to preempt armed attacks. Used successfully to justify the Six Day War, the argument is often resurrected to explain all kinds of incursions. In this case, however, assassination in the guise of preemption can be dismissed if three points are kept in mind.

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*Who is going to be deterred in the face of torture, assassination, and blackmail? Who is being punished when death can be glorified so easily?*

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First, a preemptive strike is an act of war and must conform to the law of war. No one questions the right of any nation to repel an actual or imminent attack, but when armed attacks devolve to threats the situation becomes much more complex. Despite the horror of terrorist attacks, they do not pose a threat to national existence and this severely limits Israel's right to strike prior to acts of open aggression.

Second, a preemptive attack must be proportionate to the death and damage one seeks to avoid. Excessive civilian casualties make an act disproportionate. The ratio of civilian casualties to assassinated (suspected) Palestinian terrorists is now about 1:2. Is this disproportionate? Probably so. More to the point, however, is the question whether these deaths have brought any military benefit whatsoever. It seems to many people that terror attacks only increase after an assassination. At the very least the burden of proof must be on the authorities. Have attacks been foiled? No one knows. No evidence has ever been offered either to the public or to an independent commission to support assassinations. An act without visible benefit defies the test of proportionality.

Finally, nations cannot fight by illegal means. Another anachronism perhaps, but one which binds us. The laws of war are meant to limit suffering and protect civilians and it is no accident that recruiting collaborators, for instance, is banned absolutely. But assassination won't work without local informers. This, in and of itself, should be sufficient to understand the ban on assassination.

### *Collaboration*

Assassination is banned for many reasons. Most obviously, it invites retaliation unless, of course, the other side is conveniently unable to respond in kind. More importantly, assassination is condemned because it is “treacherous” and “perfidious.” These are archaic concepts, gleaned from old and obscure sources, but speak directly to the ethics of Jewish warfare.

Treachery and perfidy are violations of trust and, while there is precious little trust during wartime, some is needed if conflicts are ever to end. When soldiers hoist a white flag, they invite trust. Neither prisoners or captors are expected to shoot one another. To do so abuses the unsteady, temporary peace and undermines the entire practice of surrender. Next time there will be no prisoners. Peace negotiations work the same way. In olden days, military leaders were sometimes lured to their deaths by false promises of safe passage ostensibly offered to negotiate peace. In fact, this recently happened in Israel when soldiers attacked Mohammed Dahlan, chief of Palestinian security. After

## Learning Our Lesson

One would think that Israel might have learned a thing or two from the British, French, and Americans about attempts to quell national liberation movements through torture, assassination, collaboration, and assorted mayhem. Assassination and collective punishment are not new tactics and generated intense criticism when adopted by the United States in Vietnam. They did not win the war nor deny the insurgents sanctuary. They only destroyed the infrastructure of rural Vietnam.

The French experience in Algeria is equally instructive. "The Mediterranean runs through France as the Seine runs through Paris" was a popular saying in France in the 1950s. When war broke out the French settlers were convinced it would be short-lived if only everyone would back off and "let the army win." The war was not short-lived and the army quickly turned from conventional warfare to torture and assassination to fight mounting terrorism. Ultimately, the French, like the Americans, decided it was best to declare victory and leave. In 1963, leading French intellectual Pierre Vidal-Naquet decried torture as the "cancer of democracy" and the French continue to pick at their scabs until this very day.

In Israel, torture and assassination—both used with disastrous results to fight guerillas just a few years ago in Lebanon—now join a litany of similar policies including

returning from a negotiating session in April 2001, Dahlan's car was fired upon by Israeli troops. Israel immediately apologized, but a cartoon the next day summed up perceptions on both sides. Dahlan is depicted next to his bullet-riddled car complaining loudly to Israeli defense minister Ben Eliezar that he almost got killed. Ben Eliezar replies, "I'll check to see why the operation failed."

These are deliberate acts of treachery and are roundly condemned. But the assassinations of Palestinians are not usually treacherous in this obvious way. They are treacherous simply because they depend on traitors and cannot be accomplished without collaborators.

By all accounts, Ibrahim Bani Odeh, a Palestinian bomb maker, was decapitated when the headrest of the car he borrowed from his cousin, a known collaborator, exploded. Fatah leader Hussein Abayyat was assassinated after being fingered by four informers, and Yahiya Ayyash, the famous "engineer" assassinated in Gaza in 1996 when his cell phone blew up, was set up by a colleague's relative turned collaborator. One can easily see how the assassination of such contemptible individuals meets with little outrage. But there is a price to pay. It comes immediately in the form of vicious retaliatory raids and in the long term through the pernicious effects of collaboration on Palestinian society.

Collaboration is the mainstay of Israeli intelligence in the territories. While seemingly innocuous compared to torture and assassination, any attempt to compel "protected persons" (an occupied people is supposed to be protected) to serve in the armed forces of an occupying power is a "grave" breach of the Geneva Conventions and tantamount to a war crime. Presumably one would have little to say if Palestinians were to enlist of their own free will in the GSS, but all the evidence compiled by B'Tselem points to heavy-handed extortion and blackmail. In return for collaboration, Palestinians are offered cash, goods, and/or reduced prison sentences, while those who refuse to cooperate are threatened with loss of work permits and blocked access to medical care. No long term sociological study is required to imagine the effects that collaborators, spies, and informers must have on any close knit, traditional society. When even close friends and relatives are suspect, normal social intercourse must be impossible. Just as the trust, friendship, and loyalty that is so necessary for any normal society to function is severely undermined, so are law and order constantly subverted as Palestinian vigilantes execute collaborators along with their own political enemies and the socially undesirable.

Once used, collaboration and assassination provoke blind fury, radicalize moderates, and strengthen collective solidarity. Who is going to be deterred in the face of torture, assassination, and blackmail? Who is being punished when death can be glorified so easily? The answer, simply, is no one. It's an old lesson; we just haven't learned it yet.

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siege, collective punishment, and the limited destruction of infrastructure designed, in the words of senior officials, to “unbalance” the Palestinians, “weaken their morale,” and “drive a wedge between civilians and the Palestinian Authority.” One stares with disbelief when Raanan Gissin, the spokesman for Prime Minister Sharon, readily admits to reporters, as he did in February, that Israeli tactics are “out of the past” and then hastens to add, “but we think they can work here.” The tactics are out of the past, and they can’t work here any more than they have worked anywhere else.

### *Why Do We Do It?*

Torture, assassination, blackmail, extortion, and collective punishment. Why do we do it? Has Israel lost its moral balance? Or, is there just something about our war with the Palestinians that somehow justifies extreme measures?

The second argument is the easiest to make. The war on terror is a war of national survival and supreme emergency. “Necessity knows no law.” But this has always been a dangerous argument and remains so. The fact is that we continue to fight by the blackest means imaginable to a democratic nation because we forget our strengths. We forget, or have not yet noticed, that the existential fight for the Jewish State is won and over. But the images that sustained that fight, most frighteningly the Holocaust, the War of Independence, the Six Day War, and the Yom Kippur War, continue to haunt many who feel compelled to inculcate their children with the same angst and trepidation. While these recurrent images were essential to forge a national identity and instill a fighting spirit, they are laced with fear and loathing.

Today, Jews fear the Arabs in the same way many white Americans feared the blacks during the race riots of the 1960s. Many recall how suburban whites, and not a few Jews, nervously brandished pistols to fend off the blacks should they make their way from the inner city ghettos to the suburbs. But the pistols didn’t help, for the blacks came the very next day, ready to clean our houses and collect our garbage as they usually did. There is the pervasive feeling that the Palestinians are equally intent on slaughtering Jews when, in fact, many would probably be very grateful just to clean our houses and collect our garbage. If Israelis can no longer lay claim to underdog status, they have not ceased to think they can. This myopia, fueled by a constant preoccupation with survival and an incessant fear of another pogrom, makes it impossible to come to grips with Palestinian national aspirations.

Unlike blacks, Palestinians have done a lot to feed these fears. The abominable acts of terror against civilians tar their entire cause and it’s outrageous that more Palestinian intellectuals have not repudiated them. Not every Palestinian under arms is a terrorist, not every attack is a terrorist attack, but instead of seizing on this distinction

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*Without just war,  
there will be no  
just peace.*

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and condemning attacks on civilians, Palestinians too often have followed the Israeli lead of trying to justify abhorrent practices by redefining the terms. Just as assassination is for an Israeli “preemption” and torture is “moderate physical pressure”, so terror is for a Palestinian “national liberation,” and Jewish civilians are but “potential combatants.” But the argument does not wash and very few people buy it.

These two factors, Jewish fear of extermination and Palestinian terror, make it easy to ignore the humanitarian rules of war. But if this recognition makes it easy to turn around and seize the moral high ground, we must avoid getting trapped up there, unable to confront reality. Israelis are experiencing a level of personal insecurity unmatched since the founding of the state. Israeli officials, by the same token, are almost helpless. This helplessness breeds the final resort to pariah warfare and the subsequent spiral of reprisal and violence. And, it leaves us in a quandary:

“Suppose a bomb explodes in Tel Aviv,” asked one Israeli official earlier this year, “and I knew who was planning it. I could not arrest him because he is in the PA [Palestinian Authority] and cannot eliminate him because it’s not ‘nice.’ What shall I say to the families of the people who are ripped to pieces by that bomb?”

Following the suicide attack that killed more than twenty youngsters at a Tel Aviv night club in June 2001, opposition leader Yossi Sarid declared that we should gauge our response by a very simple criteria that might be called “Jewish utilitarianism”: any action that saves more Israeli lives than it takes is good; any action that costs more Israeli lives than it saves is bad. In this sense, responding to terror with torture, assassination, blackmail, and collective punishment is bad. But it is important to understand why. More Jewish lives are lost because the means used to preserve them are morally odious from our perspective, from the Palestinian perspective and, indeed, from any perspective. Ultimately, we are fighting a war in order to make peace, and the peace we make must be able to survive the way we practice war. Without just war, there will be no just peace.

Periodically we hear that the rules of just war are but a relic of European history, wholly inapplicable to local conflicts rooted in fierce ethnic enmities. But, if true, what remains of any humanitarian law between nations? Is humanitarian law only an issue when the West is involved? If not, then those locked in regional rivalries face an abiding challenge to police themselves. Israel has an opportunity to show how a Jewish war might be just—how humanitarian law might apply in the kind of wars now in vogue, not international armed conflict but local hostilities confounded by an asymmetry of arms, terrorism, incongruent cultures, and the general indifference of most of the world. The tragedies of Jewish history were instrumental in bringing humanitarian law to the fore; it would be ironic if the Jews were the agents of its demise. □