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Bridging Between Law, Life and Assassinations

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Overtime without Penalty Kicks

The Israeli Supreme Court's ruling delivered in December 2006 on Israel's policy of assassinations in the Palestinian territories occupied in 1967 has a strange outcome. Former Chief Justice of the Supreme Court, Aharon Barak, who wrote the main judgment, ruled that the legality of the "targeted killing" policy as such could not be determined. In Barak's words: "Thus it is decided that it cannot be determined in advance that every targeted killing is prohibited according to customary international law, just as it cannot be determined in advance that every targeted killing is permissible according to customary international law."[2]

After nearly five years of hearings, deferrals and the postponement of the ruling in the case, Barak declared it a draw, like a soccer referee after the completion of overtime who was unable to decide the game with penalty kicks. This declaration is not without problems. In this short article, I will try to point some of them out.

Between Facts and Law

Barak's ruling is written as an opinion by a jurist in "the civil service," in this case in the service of the occupying power. Barak's vanishing decisiveness is no coincidence in light of the absence of facts in the convoluted judgment, facts which would appear and be applied in a regular decision of the court. The only facts noted by the court pertained to the broad terror offensive against the State of Israel, and the need for Israel to defend itself in the framework of the paradigm of a "militant democracy" or a "defensive democracy." No operation of an assassination is mentioned in the ruling, with the exception of the famous case of the dropping of a one-ton bomb on a crowded neighborhood in the Gaza Strip to liquidate Salah Shehadeh, which is mentioned in one line without any critical comments. Barak wrote that:

> According to the data relayed by the petitioners, since the commencement of these acts, and up until the end of 2005, close to three hundred members of terrorist organizations have been killed by them [the Israeli military]. More than thirty targeted killing attempts have failed. Approximately 150 civilians who were proximate to the location of the targeted persons have been killed during those acts. Hundreds of others have been wounded.[3]

In the absence of concrete facts that should have led to a decision by the Supreme Court, Barak's ruling looks like a pendulum that swings tirelessly between theoretical endpoints. Between these endpoints, the ruling seeks a middle way, which, as always, is actually found in the center. But this center, like the endpoints, is completely theoretical. It is a center located outside of "the area",[4] the territories occupied in 1967, which lacks

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[2] H.C. 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (delivered 14 December 2006), para. 64.
[3] Para. 2 of the judgment.
[4] The abstract term "the area" ("Ha-Ezor" in Hebrew), which by definition lacks any borders and substance, refers to the 1967 Palestinian Occupied Territories, excluding East Jerusalem which is considered Israeli territory, in the official Israeli legal discourse.

any power relations and their actual manifestation in reality, between the occupying power and the occupied, with the law biased in favor of the former. Even the Palestinian civilian who was liquidated because his name was similar to the original target of liquidation is not accorded any mention in the ruling except as someone who was struck by the hand of fate and not by the occupying power. He "was put to death" [*humat* in Hebrew] as opposed to being killed or even murdered, so that Barak's ruling could not be used by attorneys seeking to bring to justice the killers of the person who "was put to death." Barak's ruling, therefore, was written at the most abstract level, which renders it void of any legal significance.

The Revolving Door of the Occupation at the Supreme Court
The official position of the State of Israel is that the Geneva Conventions of 1949 do not apply, and in any case are not in force, in the Palestinian territories it conquered in 1967. This is the stance that Israel declares to the entire world at the UN, and most importantly, it is the position that it presents to the Palestinians living in these territories. Indeed, there is not a single military decree by any of the Israeli military commanders who have ruled in these territories for nearly 40 years that establishes this authority based on the Geneva Conventions. Thus, there is not a single decree by any of these military commanders in which you can find, for example, the following sentence: "In accordance with my authority under the Geneva Conventions, I determine as follows …" Not only is the pastoral quality of the city of Geneva missing from the occupied Palestinian territories, with the generous assistance of the occupying power, but the combination of words "Geneva Conventions" is absent, together with all of the legal significance it entails with regard to the conduct of the occupying power in these territories.

This is undoubtedly a black hole, a kingdom with no clear law. Even the unilateral commitment by the occupying power, solely before its own court, to the "humanitarian provisions" of the Fourth Geneva Convention, without specifying what these provisions are and without basing this on a single human experience, cannot illuminate the black hole that has encompassed the Occupied Territories that have been under the effective control of this occupying power for some 40 years. Even a discussion before the court in light of several of the rules of customary international law or treaty law, conducted after the fact, cannot illuminate this black hole – certainly not when the judicial review, which itself is grounded in the bizarre legal fiction that Israel created in the Occupied Territories, usually ends up concurring with the position of the occupying power. These are the foundations of a strange legal regime that establishes a firm basis for impunity for the various agents of the occupation.

It is possible to understand the absurdity of the legal regime that Israel created in the Occupied Territories if we apply it in the framework of contract law. Israel (Side A in the example) claims that it makes a contract with itself. This contract does not obligate Israel in its relations with Side B (the Palestinians), nor does it obligate Israel in the framework of its relations with Side C (the world). In other words, for this contract to hold in any framework, including a legal one, at least one primary condition must exist: Sides B and C are convinced that the moral character of Side A is so high that there is no need to make a contract with it; and that it is possible to suffice with Side A's unilateral commitment. But the only side in this system of relations that is convinced of Side A's high moral character (which is sufficient to enable Side A to make a contract with itself) is the one which benefits from the non-fulfillment of the unilateral contract – which is none other than Side A.

With regard to the policy of assassinations, Israel even undermined the traditional arguments raised before the Supreme Court: Israel usually argued, with the Supreme Court's concurrence, that it is bound by customary law, but not by treaty law. The state included the Geneva Conventions in the framework of treaty law. Concerning the policy of targeted assassinations, Israel argued that the rule anchored in Article 51(3) of Protocol 1 of the Geneva Conventions, which stipulates that no civilian may be harmed "unless and for such time as they take a direct part in hostilities," is not customary, despite the fact that this rule is clearly accepted as customary law by the international legal community. Even worse, Israel sought to join those who wish to fundamentally revamp international humanitarian law by creating a new category of “civilian combatants” – that is, combatants whom the state can attack without according them any rights.

The Supreme Court rejected the state's two arguments. It did not accept the state's position over the non-customary nature of Article 51(3) and also it did not accept the state's desire to create a new category in international humanitarian law beyond the existing categories of “civilians” and “combatants”. Thus, the court tried to affiliate itself with the "good guys" in the international legal community and to distinguish itself from the "creative" interpreters of international law, such as those who have worked in the service of the current immoderate administration in the United States before becoming international law professors, namely, John Yoo of the University of California, Berkeley or Jack Goldsmith of Harvard University.

Gerry Adams and George Bush, Beware

However, the court failed in this dubiously sophisticated attempt. The court accepted the state's expansive interpretation of the conditions under which civilians take "a direct part in hostilities" and "for such time." So it is no surprise that the Israeli military expressed satisfaction after the publication of the ruling and stated that it acts precisely in the manner described by the court. According to this interpretation, it would be very doubtful whether Gerry Adams would still be among us today if the British had decided to act according to the Israeli policy of assassinations, when it had effective military control over Northern Ireland.

The Supreme Court's ruling endangers the US President, George Bush, as well, who is defined by Article 2(2) of the US Constitution as the Commander in Chief of the armed forces in the US, and, in any case, takes a direct part in an armed conflict for as long as such a conflict exists. According to the Supreme Court's interpretation, President Bush takes a part in the conflict as long as the conflict exists, regardless of whether he is in the Pentagon with those under his command, or eating dinner with his wife Laura, and his dog by his feet.

The Palestinian collaborator is also in danger of being killed at home without a trial. According to the Supreme Court's ruling, the collaborator can be regarded as a civilian who takes a direct part in hostilities and can be targeted, even within his home, before or after his joint action with the occupying power. But it seems that the decisive danger which the court poses is actually faced by Israeli army soldiers, their commanders and political-level dispatchers, who under the ruling are not accorded protection when they are not fighting in the battlefield. These implications derive directly from the ruling and, of course, are contrary to the rules of international humanitarian law. They are a source of

anarchy and undermine the foundations of this law, its objective and purpose: to protect civilians and set binding rules of warfare.

About Schmitt and Collateral Damage

As noted above, the Supreme Court was presented with the fact that more than 30 of the targeted assassination operations conducted by Israel in the Occupied Territories failed. The ruling did not dispute this. Moreover, 150 civilians were killed and hundreds of others injured, in addition to the 300 who were killed after being defined as targets according to the court's expansive and problematic interpretation (to put it mildly). That is, in a rough calculation based on the data presented to the Supreme Court, one-half of a civilian was killed for every legitimate killing, and many others were injured, most of them severely it appears, as a result of the policy of assassinations practiced by Israel. This is the collateral damage of legitimate military action. Of all of the cases presented to the court by the petitioners, not a single one was determined to be illegal or at least problematic. Therefore, it is not an exaggeration to say, and it must be said, that the court granted legitimacy to these lethal actions.

Throughout his ruling, Barak referenced scholars, experts in international humanitarian law, more often than any others: Michael Schmitt (at least six references) and Antonio Cassese (at least 12 references). The first is more identified with the military outlook of international humanitarian law. Schmitt, an American citizen, teaches international law at the European Center for Security Studies in Germany. Cassese, on the other hand, regards international law in general and international humanitarian law in particular as based on human rights. He is considered one of the founders of this school, including in the framework of international criminal law, as the first president of the International Criminal Tribunal for the Former Yugoslavia.

Hence, there is an indiscernible optical illusion in the ruling. The scholar most often cited in Barak's ruling (which was translated into English) provided an expert opinion to the court on behalf of the petitioners. He is a human rights advocate, who has declared that the concrete policy of assassinations that Israel has adopted is illegal. Nonetheless, on the decisive questions that determined the legality of the assassinations policy, such as the meaning of "direct participation in hostilities," the expansive stance of Schmitt[5] was preferred over the clear and explicit position of Cassese, who had come out against Israel's policy.

I met Professor Schmitt during the summer of 2005 while taking an advanced course in international humanitarian law at Harvard University. Participants in the course included military prosecutors from the US and Canadian armies, humanitarian activists from the Red Cross and the UN, and senior representatives of human rights organizations such as Amnesty International and Human Rights Watch. Professor Schmitt was one of the participants and instructors of the discussion. One of the purposes of these discussions

[5] No less severe is Barak's reliance, at critical junctures in the ruling, on the moral arguments of two Israeli academics and an Israeli army officer, who justify Israel's policy of assassinations. This occurs when he adopts the expansive interpretation of the concept of "direct participation in hostilities" (Para. 39; Daniel Statman, a graduate of Bar-Ilan University who teaches at Haifa University), and when he discusses the question of the appropriate balance between damage and benefit in the framework of the discussion on the concept of the proportionality of the policy (Para. 46; a joint article by Asa Kasher of Tel Aviv University, the army's regular advisor on ethical issues, and Amos Yadlin, the Head of Military Intelligence).

was to raise difficult issues and to examine how international humanitarian law deals with them. One of the exercises, led by Professor Schmitt, involved examining the legality of military attacks against the city of Baghdad. The exercise was designed to examine which targets are legitimate to attack, as opposed to targets that cannot be attacked under international humanitarian law. We were provided intelligence information about each target prior to deciding on whether or not it was legal to attack it.

One of the targets was a room located on the roof of a school. According to the intelligence we received, the top echelon of the opposing army's military intelligence was convening in this room. We were also told that it was not known whether or not there were students in the school. A heated discussion developed between Professor Schmitt and me. He argued that it was possible and appropriate to attack the room and those in it. His main argument was that striking at these people would likely bring an end to the war. I argued that this target should not be hit because there is no intelligence indicating that there are no students in the vicinity and that a school, as such, has the right not to be attacked. In his view, the question of the injury of students and damage to the school would be resolved within the framework of the question of "legitimate collateral damage."[6]

The ruling on the Israeli policy of assassinations provides support for one of the most dangerous policies that Israel has carried out as an occupying power in the Occupied Territories during the past 40 years: untargeted acts of killing with substantial and foreseeable "collateral damage." This backing is liable to lead to additional blatant violations of the basic human rights of the population living under Israel's occupation. These flagrant violations carried out by the Israeli military and its political-level dispatchers have enjoyed a stable regime of impunity under the leadership of the Chief Military Prosecutor, the Attorney General and the Supreme Court for generations. There is no alternative, therefore, but to fundamentally challenge this regime of impunity. Indeed, Professor David Kennedy, who teaches international law at Harvard Law School, is precise in describing the difficulty of assessing legitimate injury to civilians, the consequences of which always go beyond the legal rules that allowed them to be injured, leading toward criminal responsibility for the injury:

> "[It] is extremely difficult to see how one might, in fact, weigh and balance civilian deaths against military objectives. The idea of proportionality – or necessity – encourages a kind of strategy, and ethic, by metaphor: the metaphor of weighing and balancing … Indeed, at least so far as I have been able to ascertain, there is no background exchange rate for civilian life. What you find instead are rules kicking the decision up the chain of command as the number of civilians increase, until the decision moves offstage from military professionals to politicians. Rules transforming weighing and balancing effects into attributions of responsibility."[7]

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[6] It seems that Article 30(3) of the Rome Statute of the International Criminal Court (which expands the concept of "knowledge" to include both the circumstances and consequences "that occur in the ordinary course of events") reduces, to the point of nullifying, reliance on the doctrine of "legitimate collateral damage" to conduct barbaric military actions.

[7] David Kennedy, *Of War and Law* (Princeton University Press, 2006) pp. 143-144.