LIONEL COHEN LECTURE

Patricia Janet Scotland[*]

INTRODUCTION

First let me say that I regard it as a great honour and a privilege to be asked to give this year's Lionel Cohen Lecture. I am very grateful to Professor Menahem Ben-Sasson as President and Professor Barak Medina as Dean of the Faculty for hosting this event here at the Hebrew University. It is a pleasure to be giving this lecture in a city of such central importance to three great religions; a city steeped in historical significance; but also a city which—through institutions such as the Hebrew University—is preparing today's youth for a bright future. Whilst I recognize and celebrate the University's distinguished heritage, it is particularly gratifying to find an institution not resting on the past but actively preparing for the future through its outreach projects such as those of the Clinical Legal Education Center for Human Rights and Social Responsibility. I am very interested in the work being done through the clinics on domestic violence and on youth justice through initiatives such as the "Street Law" program. This work chimes with many of my own priorities and concerns, and I was therefore very grateful to learn more about this work from Sharon Sionov Arad. I confess that I will steal every good idea I heard, but I also promise that I will give every credit where it is due for those that I do!

The lecture is a sign of the close relations between our respective legal professions and the shared common law tradition of our two countries. It is named in honor of a most distinguished judge. And indeed I am humbled to be following such a distinguished list of academics, advocates, and jurists who have given this lecture in the past. From the first lecture by Arthur—later Lord—Goodheart through to lectures by Lords Bingham, Hope, Woolf, and Pannick, Baronesses Deech, and Hale in more recent years, and the President of the Family Division last year, this lecture has always brought the best of the British legal talent here to the Hebrew University. As much as anything though, and distinct from the personalities involved, the lectures are a

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continuing testament to the strength of the bond between our legal communities and our appreciation and affection for a great university. The British Friends of Hebrew University are committed to supporting and promoting the work of the university and I pay tribute to them—and to the University—here tonight.

I was particularly interested to see that last year's lecture—given by Sir Mark Potter—was the first on family law, a subject upon which I first cut my teeth as a lawyer and about which I still take a close interest today. In many respects it is family ties that bring nations together. In today's world we marry across different nationalities, different races, and different faiths. Globalization shrinks the world. It makes people who were strangers into neighbors. How those new neighbors get on will depend on the understanding and respect they can show each other. Fear and misunderstanding are fertile ground for hostility and conflict. Barack Obama said it last year in his speech in Cairo: we have to end the cycle of suspicion and discord.[1] He hasn't put on rose-tinted spectacles—but the need is urgent and practical and real. My parents taught me that you should always look at what you have in common with others, not at what separates you. Our family lived next door to a synagogue and actually I was one of the very few non-Orthodox members of the Jewish youth club. I was also the "Shabbat Goy." We have much in common. With understanding we can celebrate our differences and welcome our neighbors as family, just as I was made welcome. It is therefore no surprise to me that many of the tools of resolving disputes within families—negotiation, mediation, arbitration—are the same tools used at the international level to resolve disputes within the family of nations.

I. "LAWFARE"

As ever the challenge in a lecture such as this is to be thought provoking enough to be interesting, without being so provocative as to cause offense. It is a delicate balancing act, particularly for a serving Government Minister. But I am fortunate in that regard in that the office of the Attorney General is uniquely a series of balancing acts between separate and distinct roles—as a criminal justice minister with superintendence of independent prosecuting authorities; as chief legal adviser to the government; and as guardian of the public interest. I am well used to juggling these responsibilities and interests and also well used to the fact that inevitably one cannot please all people at all times.

[1] Barack Obama, A New Beginning (June 4, 2009), *available at* http://www.whitehouse.gov/the_press_office/remarks-by-the-president-at-cairo-university-6-04-09.

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When first considering the subject matter and title for this lecture last spring I little realized the prospect of its having such added topicality in light of recent events, as regards private applications for arrest warrants. I shall not tonight be talking about the rights and wrongs of any individual case. But you will know that the Foreign Secretary has stated clearly that the Government is looking urgently at ways in which the UK system might be changed to avoid this situation arising again and is determined that Israel's leaders should always be able to travel freely to the UK.

When thinking about the theme of the lecture I wanted to focus on challenges which our two countries face and indeed, which to an extent all countries now face. Increasingly, every aspect of the work of government, of its agencies and of its military are the subject of legal challenge—both domestically and internationally—often in areas where traditionally courts have hesitated from rushing in, preferring to leave matters within the prerogative of the executive. It is right and proper that the executive should be held to account; where wrongs are done they are put right; and where damage is done it is compensated. But we also need to be alert to misuse and abuse of recourse to law where legal action may be taken not just to secure a legal response, but also as a tactic in what is essentially a political campaign where any tool may be engaged as the ends are considered to justify the means. It is that which I have termed "Lawfare" for the purpose of this lecture.

I wanted to set out at the outset what I would be referring to by the term "lawfare" this evening as with any new or emerging term there can be some debate over exactly what is in issue. Others have used it in a different sense. Writing in the Wall Street Journal, David B Rivkin Jr and Lee A Casey referred to the term "lawfare" as describing "the growing use of international law claims, usually factually or legally meritless, as a tool of war. The goal is to gain a moral advantage over your enemy in the court of world opinion, and potentially a legal advantage in national and international tribunals."[2] Major General Charles J. Dunlap Jr., wrote:

> I now define "lawfare" as the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective. As such I view law in this context much the same as a weapon. It is a means that can be used for good and bad purposes."[3]

I recognize this specific application to the military context—and shall be returning to that. But I will be discussing lawfare in a broader sense to cover the range of

[2] David B. Rivkin, Jr. & Lee A. Casey, *Lawfare,* WALL ST. J., Feb. 23, 2007, at A11.

[3] Charles J. Dunlap, Commentary, *Lawfare Today: A Perspective*, YALE J. INT'L AFFAIRS 146, 146 (Winter 2008) (commenting on "Lawfare Today").

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challenges recourse to law can present both to individuals and governments, and the respective roles and responsibilities of lawyers involved—including my own role as Attorney General. The issue can manifest itself in a variety of ways; it is not just a question of seeking a military objective or politicising of arrest warrants. It is also the impact of a low threshold for the bringing of applications for judicial review; the litigating of the battlefield; the bringing of actions in the UK for the alleged wrongdoing of other states; the application of a disclosure regime to national security information collated for a different purpose; and the diversion of increasingly scarce government resources from frontline tasks to meet the relentless pace of litigation. It would be all too easy to throw ones hands up in horror at the consequences of all this. An allegation can take a moment to make and a lifetime to disprove, but I defend absolutely an individual's right to make it. Ultimately, whatever challenges we face, we are duty bound to uphold the Rule of Law and all lawyers have a role in achieving this.

II. WARFARE: RULES OF ENGAGEMENT

Regardless of the justification or legality of the decision to use force, it is well understood that armed forces must act in accordance with the Law of Armed Conflict. This detailed set of rules governing the conduct of hostilities aims to protect combatants and non-combatants from unnecessary suffering and to safeguard the fundamental human rights of persons who are not, or are no longer, taking part in the conflict. By preventing the degeneration of conflicts into brutality and savagery, the Law of Armed Conflict aids the restoration of peace and the resumption of friendly relations between the belligerents.

Although it was not always so, the conduct of armed conflict today has law at its heart—indeed Article 82 of the First Protocol to the Geneva Conventions[4] specifically requires that legal advisers are made available to military commanders to advise on the application of the Conventions and on the appropriate instruction to be given to members of the armed forces.

I do not aim tonight to cover the Law of Armed Conflict in detail, but rather to consider if any the fundamental principles underpinning the rules of engagement in warfare may have any parallel to a set of rules of engagement for "lawfare."

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 82, June 8, 1977, 1125 U.N.T.S. 3.

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There are four fundamental principles which run through the whole of the Law of Armed Conflict:

A. MILITARY NECESSITY

This principle requires a State engaged in armed conflict to use only that degree and kind of force, not otherwise prohibited by the Law of Armed Conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.

B. HUMANITY

This forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes. It confirms the immunity of civilians and civilian objects from attack. This does not mean that unavoidable incidental civilian casualties and damage resulting from legitimate attacks upon military objectives are unlawful—provided such casualties and damage are not excessive in relation to the concrete and direct military advantage contemplated.

C. PROPORTIONALITY

The principle of proportionality is set out specifically in Additional Protocol I to the Geneva Convention. It is a link between the principles of military necessity and humanity. The application of the principle can be far from straightforward. The method of attack that minimises the risk to civilians may mean an increased risk to the armed forces. The principle does not require that the attacker accept the increased risk. The obligation, however, is to refrain from attacks that would cause excessive collateral damage.

D. DISTINCTION

There must be a clear distinction between the armed forces and civilians. Only combatants are permitted to take direct part in hostilities and, for so long as they refrain from doing so, civilians are protected from attack. Equally a distinction has to be made between military targets and civilian objects.

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III. LAWFARE: RULES OF ENGAGEMENT?

One can see scope for parallels between the principles governing the laws of warfare and a nascent set of principles that might be applicable for "lawfare." For "military necessity" one might consider a "principle of necessity." That you go to law as a last resort, not a first one, and that you genuinely engage with alternatives. That if your disagreement is one of policy, you engage in political debate not play out your disagreements through the courts. That the main purpose of recourse to law is to seek legal redress, whilst recognizing that a legal ruling may strengthen the case for a particular course of action.

For "humanity" one might speak of "a principle of integrity" in the sense which we as professional lawyers understand from the letter and spirit of the Bar Council Code of Conduct or that for the Law Society. That we are honest with each other and that we treat each other, the clients and the courts, with respect. That we approach cases acutely conscious of the duty of candour, and that cases are not brought where there is no realist foundation for success.

For "proportionality" we might have—again—a "principle of proportionality." Not just in the sense that the bringing a case should a proportionate response to the perceived wrong. But also in the sense that in dealing with cases we as lawyers, and the courts too are focused on the issue in question and are alert to the dangers of unintended consequences flowing from any particular approach or decision.

And for "distinction" we perhaps need to reverse the principle and have a "principle of non-discrimination." That all are equal before the law. But also that those that uphold the law are reflective of the diversity of the society in which they work.

But I believe to continue down this road would be a flawed approach. There may be parallels between rules for warfare and rules for "lawfare," but I do not think that treating recourse to law as if it were tantamount to taking up arms is the right approach. If the charge is that those who would wage war on us through terror are now seeking to achieve similar ends through use and misuse of law, I am conscious that those who might do so are no more likely to respect rules of engagement for "lawfare" than they do rules of engagement for warfare. What is not needed is a new set of principles to deal with a new threat, but rather a reaffirmation of existing principles underpinning our legal system. And there you do not need a pocket card to remind you of the rules of engagement on the battlefield. For there is only one rule of engagement and that is the Rule of Law.

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IV. THE RULE OF LAW

But what is this "rule of law" we so often talk about? In the narrow sense, it is those ideas expressed by Dicey. It is the idea that the exercise of power needs to be authorized in particular and consistent ways and that it must not be arbitrary. But it's essentially a procedural demand—a Rule of Recognition—as the theorists call it. It says little about the substance of the law; it just says there's got to be a law. But there is more to it than that. Access to the law and to justice should not be impeded. In the ancient words of the Magna Carta, "to no-one will we deny or delay right or justice." But there's more still. The rule of law means striking a fair balance between individual and public interest. This is the language of the European Convention of Human Rights[5] (ECHR) and the Human Rights Act[6]. But it's pervasive—the protection of private rights and the protection of community rights, and how to accommodate them. And it means the proper observance of constitutional boundaries between judge, Parliamentarian and Minister.

So I think there are four important principles. They are:

1. Rule of recognition
2. Access to the law
3. Striking a fair balance
4. Constitutional boundaries

Primo Levi, the Italian chemist and writer who survived Auschwitz, told a chilling story of the time when he asked one of the camp guards the question "why?." It was the one thing he needed to know. The guard pushed him aside and said simply, "there's no 'why' here." So I also see the rule of law as being the right to ask the question "why?" and the right to receive a proper answer.

We have always separated power between different bodies, the Executive, the Legislature, the Judiciary. I firmly believe these bodies exist in a type of "creative tension" with each other. They will not always agree. Very often they will not. It is not always comfortable for Parliament, the Government and the judges to work together. The press will not always support the Government, as you may have noticed. NGOs will intervene. People will protest. They will all want their say. They may be right. And they may be wrong. The Attorney's roles—my roles—are all about promoting

[5] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

[6] *See* The Human Rights Act, 1998 (Eng.).

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and protecting these principles. So you will hopefully forgive me for telling you how I see myself as Attorney doing that, by mentioning and discussing just some of the roles I perform, as an activist for the rule of law.

As Attorney General I have a role in the superintendence and the provision of accountability for the work of Crown Prosecution Service and other prosecutorial bodies. But as Attorney I am also a member of the Government I advise. For my part, I have long considered that my position in Government does not weaken my role protecting the rule of law. My work as legal adviser to the Government strengthens it in the following ways.

As to the rule of recognition, it is my role to test and challenge the practical effectiveness and necessity of legislation.

Access to the law. The Attorney demands propriety and transparency in law-making, and guards the right of individuals to go to court to seek redress.

Fair balance. The Attorney demands law and policy are fair and compatible with the Convention rights.

Constitutional boundaries. The Attorney considers questions of devolved competence, European Union issues, the proper allocation of power.

Being in Government, the Attorney is able to advise and counsel with sympathy and creativity, to be entirely objective, to speak frankly and freely. To decline when declining is called for. Protecting the rule of law is to promote the interests of the Government, and it is to protect the public interest. We are not called to see these as irreconcilable.

In speaking about the Attorney's different roles I inevitably speak about myself. But of course it's not just me who does this work. Nor just the lawyers who work in my office. As Attorney, I am the Minister with responsibility for the Government Legal Service and for the panels of counsel who work for the Government. It is vital that we, who work for Government, imbue it with these principles. Rule of recognition, access to the law, fair balance, constitutional boundaries. Whatever the perception of "lawfare" many rules are made nowadays which are never challenged in the courts. In many cases Government lawyers are the rule of law. It will be they who test, challenge and if necessary correct flaws which would otherwise inaccurately express policy, in a way which is inconsistent with these principles.

If we are to promote access to the law we must not stop at the gate. I could not stand here and say, not without risk of hypocrisy, that 'to no-one will we deny or delay justice' unless I encourage others, those with legal expertise, to help those who need help. We have done great work on a Pro Bono Toolkit. The aspiration is that, with shared best practices from other Commonwealth countries, it will help provide guidance

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or a blueprint for how best to undertake pro bono work. With our shared common law tradition there is no reason to think that Israel could not share in that too. With my fellow Attorneys from Australia, Canada, New Zealand and the USA meeting last autumn as a Quintet and affirming their commitment to pro bono, this is clearly not the preserve of the Commonwealth alone. We are deeply involved in using pro bono to encourage access to the law. No-one now suggests that pro bono could or should ever be viewed as a substitute for legal aid, but it is an additional resource which can be invaluable in delivering justice to those who would otherwise have little access to it.

And it is the same principle which gives the Attorney a role in encouraging young people to join the profession. We must endue young people with a belief in the law's importance—in the hope of their contribution to it. To this end I have established a Youth Network, designed to coordinate initiatives aimed at encouraging understanding of and respect for the rule of law, de-mystifying the legal profession and building pathways into it. It will help children understand they will one day own the law, and they should feel empowered by this.

The Attorney's functions are varied and miscellaneous. But the fundamental coherent principle governing and directing them is the rule of law. Rule of recognition, access to the law, fair balance, constitutional boundaries. And there is a kind of positive feedback at work here, for the fact that they are all performed by the Attorney, who is supremely concerned with the rule of law, is the thing which gives them a coherent shape and color. Keeping people safe is a fundamental part of the rule of law, and it follows that delivering justice to those who would threaten our society is a necessity if we are to protect that society.

V. THE ROLES OF THE JUDICIARY AND THE EXECUTIVE

What though are the proper respective roles of the executive and the courts in responding to the challenges society faces today, particularly the threat from terrorism? Administrative law is fundamentally about the relationship between the executive and judicial arms of the state: between "the government" and the courts. The relationship is not a static one. It is shifting all the time in response to social, economic, cultural and of course legislative changes. I am clear that the primary function of a state must be to protect its citizens. I am equally clear that, in responding to the terrorist threat, it is more, not less, important that we maintain scrupulously our respect for the rule of law and for the values which underlie it.

Working out how to protect society within the rule of law is not the exclusive responsibility of any one branch of the state. It is a task which all the branches

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share: the legislature, the executive and the courts. Getting the right balance between ensuring the collective security of society, whilst protecting the fundamental rights of individuals, is far from straightforward. Nor is it straightforward to work out precisely what the roles of the executive and the courts should be in getting that balance right.

In the UK the relationship between the executive and the courts was given a particular focus by the Human Rights Act. The Act was the method by which the ECHR was "incorporated" into UK law. It gave our domestic courts a new and very particular role. On the one hand, the Act preserved the sovereignty of Parliamentary, so that the courts cannot strike down an Act of Parliament on the ground that it offends the Convention rights. On the other hand, the courts can, if they take the view that an Act of Parliament is incompatible, make a declaration to that effect. Other provisions allow the courts to strike down secondary legislation, such as rules and regulations made by Ministers. In addition, the Act provides that legislation must, as far as possible, be read and given effect in a way which is compatible with the Convention rights. The role of the courts under the Human Rights Act is of particular importance because so many of the rights under the ECHR contain within themselves an element of balance—balance between the rights of individuals and the collective interests of society

One concept which has been used to define the boundary between the courts and the executive is that of judicial "deference." The idea is essentially that some issues are so fundamentally within the province or expertise of the executive that the courts should "defer" to the executive on those issues. In other words the courts should respect the judgment of the executive in those areas and not interfere.

The classic example is national security. But it would be too simplistic to conclude that national security is simply a "no-go area" for the courts. When the government acts to protect national security, it must still do so within the rule of law. And ultimately it is still answerable to the courts for the action it takes. Indeed, deciding how to respond to protect their citizens from the modern terrorist threat has presented democratic governments around the world with legal and jurisprudential problems of the most acute difficulty, on which they have repeatedly been held to account by the courts.

Sometimes I believe governments have gone too far. I believe the former U.S. administration went too far with Guantanamo Bay. In that case, the search for a pragmatic solution to the terror threat failed to demonstrate respect for the rule of law and consequently lacked legitimacy. In the UK we have sought to find solutions within the rule of law, not outside it. That means our solutions have been subject to the close scrutiny of the courts. Sometimes the courts have told us that we have got it wrong.

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However, traditionally the courts have nonetheless been prepared to accept that the executive has a special responsibility and a special expertise in the field of national security. That does not equate to immunity from review, or anything like it. What it means is that, where the executive reaches specific judgments on national security issues, and those judgments can be shown to be carefully reasoned and based on sound evidence, the judges should be slow to substitute their own views. The courts will still perform their review function. But in performing that function they should respect the expert judgments of the executive on matters of fact and policy in the national security field. That balance may continue to be subject to challenge and review, but I still think that it is the right one.

It is my view that the judiciary and the government have a shared responsibility to ensure that responses to the very real terrorist threat we face is both principled and pragmatic. Without question adherence to the rule of law means that the Courts should and must, when asked, inquire into the actions of the executive. It is their duty to uphold the law. The Courts play the vital role of telling us so. But, it is clear from recent judgements that the Courts do not find these matters easy. The Courts have asked themselves some searching question as to their role when matters of national security are at stake. The Courts should not and must not defer from their responsibility to rigorously inquire when they are requested to do so. It is a different question though when the Courts legitimately decide that another arm of government is best placed to make a subjective decision that has resulted in the challenged course of action.

I expect that jurists will continue to grapple with these questions just as governments will have to in devising strategies to keep their citizens safe from harm. Adopting pragmatic approaches to protecting ourselves from the terrorist threat whilst observing the principles of the rule of law, is a shared endeavour of all three arms of government. Bearing our respective burdens in this regard and recognising where those burdens lie are crucial to ensuring that the rule of law remains at the centre of any solutions we may devise. We would all do well to remember Mark Twain's advice: "Always do right. This will gratify some people and astonish the rest."

CONCLUSION

The rule of law forms the principled framework that enables us to take a pragmatic approach in dealing with national security issues in today's world. It does not bind us to using the mechanisms that have traditionally been utilised. But it does ensure that our core values are not disregarded. If we are pragmatic without principle we risk

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rejecting the rule of law as a core foundation of our society. We lose our legitimacy. Whatever the challenges of litigation, "lawfare" style or otherwise it is important to stay true to the rule of law and that is the only rule of engagement with which we need be truly concerned: because at the end of the day "See you in Court" is always better than "See you outside."

But I shall leave the last word to Aharon Barak—who I had the pleasure of meeting earlier—from his opinion written for a September 6, 1999 decision of the Supreme Court of Israel:

> This is the destiny of democracy, as not all means are acceptable to it and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day they strengthen its spirit and allow it to overcome its difficulties.[7]

I could not agree more.

[7] HCJ 5100/94 The Public Committee against Torture in Israel v. The State of Israel [1999] IsrSC 53(4) 817, para. 39, English translation *available at* http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.htm.

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