We have just marked 60 years to the end of the Europe chapter of WW2. International law, human rights law, and the law of war, were all developed as a response to the atrocities and the devastations of that war. Their aim is to declare an alliance against what made that war possible. Americans and Jews were central in designing those parts of law and in insisting on their importance. The need for protecting human rights and the rule of law have not lessened. WW2 taught us that we need to constrain the power of states to wage war and to violate rights under the guise of war. This rationale of international law and human rights is as valid today as it was 60 years ago. We do not want a world based only on power. We want power to serve the causes of justice and human rights. International law and human rights law were developed as important ways of doing just that. They aimed at taking the decision about what was required by law and universal human rights away from the exclusive jurisdiction of interested parties and into the hands of neutral and authoritative interpreters of these norms accepted as binding by all.

Yet in recent times Israel (and the US) is often presented as the arch enemy of international law, peace and human rights. So much so that many Israelis feel that the application of international law to its activity is so politicized that international law and decisions by the international community should simply be ignored. I am very pleased that official Israel has not taken this position. International law and human rights are indeed values that all states should adhere to. We should not let the fact that there are some serious problems in the enforcement and use of these standards make us forget that the need to guide our conduct by these norms is indeed a crucial part of being a member of the family of nations. However, understanding the nature of these problems may help us find a way to be bound by the rationale of international and HR law and avoid those features that make their application less credible. Finding such a
way may help Israel meet its moral and legal obligations and may also enhance the credibility and effectiveness of international and HR law.

I will therefore start with a skeletal discussion of some problems in the current interpretation and implementation of international and HR laws. I will then argue that Israel has been making an impressive attempt to guide its behavior by these norms, and that - for the benefit of international law itself - its conduct should be evaluated in a way much more balanced and appreciative than the blanket condemnation of some international bodies.

II

I will concentrate on three related elements in international law: (1) Its inability to resolve conflicts and to protect, on its own, the life and security of states and individuals; (2) the fact that its norms relating to war are not fully responsive to many complex realities; and (3) the expansion of international and HR laws to ‘compensate’ for the first two limitations of its power.

International and HR laws are based on an immanent tension. They seek to protect us against genocide, aggressive war, torture and discrimination, but the norms and the institutions in themselves are not powerful enough to provide protection against someone with military or other power intent to harm. They are useful only so long as they are accepted. There is today more power to these norms than they had in WW2, but not quite enough. It follows that individuals and states under threat must have the power to defend themselves against violations of their rights. They cannot just wait for international law to help them. They must use their force to defend themselves. The key question that norms of international law seek to answer is how to distinguish justified use of force from unjustified use. When the answer to this question is clear, the international community should seek to enforce the law by endorsing justified force and condemning and seeking to punish, or at least not encourage, the unjustified use of force. Often, however, the answer to the question of just force is unclear. Then the main question becomes who decides. Inevitably, international law will be invoked by those who do not have the power to protect their rights themselves. The institutions that decide these issues need to avoid bias against either side. This is precisely what
makes them more suited to the task better than the internal institutions of the parties themselves. It is not clear that international bodies can and have always been constructed to meet this standard.

The UN created Israel, but could not defend it. There would be no Israel had Arabs won the 1947-49 war. Similarly, the international community did not rush to defend Israel in 1967. But while most think these two wars were just, opinions differ on the legitimacy of what Israel has been doing to deal with the war that started in October 2000. In fact, it is not even clear that this is treated as a war.

III

Ambiguity and inapplicability of international norms may thus be a critical feature of difficulties in implementation and interpretation. The international laws concerning use of force are vulnerable because they do not provide adequate answers to many of the questions often raised in contemporary conflicts.

International laws of war respond to the paradigm of WW2. They presuppose a war with identifiable frontlines, a war led by states, a war that erupts and then ends. WW2 was also a war in which there was a clear aggressor, fighting a war of expansion, and clear victims, fighting to survive and to protect freedom and dignity. The rules that developed were enacted by the victors, who – fortunately for all of us - were the ‘good guys’.

Many of the problems of the ME are connected to the very different nature of the war and to the fact that the 1947-49 war never ‘really’ ended in the legal sense. Take the ‘occupation’ as an example. IL assumed that occupation is a short term state during war or pending an agreement after it. It has no answer for the situation created by a very prolonged occupation. Some respond by saying the occupation is illegal and must end. But there is no obligation on the victor of a war to end an occupation without an agreement. Assuming the occupier cannot settle its civilians in OT, should this fact make IL demand an end to the occupation? But maybe it should only demand an end to settlements? Clearly, we then get into the controversial political question of who is responsible for the fact that this particular occupation has not ended. We are
back at the immanent tensions between norms and power to implement them that we had mentioned.

Here are just some of the many questions that do not have clear answers under IL. Is Israel at war with some of its neighbors? Is it at war with the Palestinians, despite the fact they are not yet a state? If so, are there implications to this in terms of movement of Palestinians across the lines? What is the regime during the uprisings, especially the armed one? How does one deal with acts of violence targeting individuals within Israel coming from the OT? Are settlers in the OT soldiers? If so, why is their presence there a violation of IL? If they are civilians – why are people not protesting when they are targeted and murdered? What is the legal status of those who plan, mastermind and legitimate terrorist acts against Israelis? When Israel is fighting suicide bombers, is it engaging in war or in law enforcement? Is it a war against terror or an unjustified attempt to suppress a legitimate resistance to occupation? Are the shahids terrorists or are they freedom fighters? Israel was criticized for re-entering the West Bank. On the other hand, it is also criticized for treating the areas controlled by the PA as a foreign territory, in a state of war when it does not control terrorists coming out of it.

Clearly, there are many ambiguities in what international law requires here. Many of them stem from the fact that the laws do not suit the complex reality of a persistent, never ending dispute, where wars are just a continuation of politics and vice versa.

(Some of these aspects now exist very clearly in other international contexts. September 11 was an act by non-state agents. The UN rightly found a way to permit the US to act against the perpetrators under the doctrine of self defense. The court in Hague was not willing to apply the same reasoning to the building of the fence. As many have observed, we need a consistent response, one way or the other. IL needs to respond to all new realities. Similarly, the law enforcement model cannot apply either against el Qaeda in TalibanAfghanistan or to the situation in the ME at the moment. Illegal combatants, people who are neither soldiers nor civilians, are a new reality, and the law must develop to deal with them. They cannot be regarded ‘protected civilians’ until they can in fact be charged with a crime. At the same time, they should not be denied all their rights of due process simply because there is no legal regime applicable to them).
IV

The problems with IL and HR grow when their limits are forgotten.

We have seen above that a key source of the problem in the ME is the fact that the parties never reached an agreement involving mutual recognition and resolution of the main issues among them, such small matters like borders, security and refugees. This resulted from the fact that the parties themselves were either unwilling or unable to reach an agreement, and no one imposed a resolution on them. This is not surprising. It is very hard for IL to impose an agreement on parties in a long a persistent conflict, because the imposed agreement is not likely to carry legitimacy with the parties, and the UN cannot itself enforce it without serious support on the ground from important parts of the local populations.

The absence of an agreement, plus the asymmetry between Israel and the Palestinians in military and economic strength, have fed the impression that Israel is acting like a hooligan, and international sanctions and force need to be used to make her do what is legal and right. In fact, many feel that it is only US veto power, itself unjustified, which stands between Israel and these necessary international sanctions. In this picture, many of Israel’s actions are dubbed not only unwise, imprudent, undesirable, but are described as clearly illegal and as violations of human rights. This legal talk in turn paves the way for both condemnation and demonizing of Israel and for persistent moves to impose international sanctions.

In most instances, these UN decisions do not concern any particular deed or practice deemed a violation of HR or IL. They often concern questions such as the ROR, the building of the fence, or a particular military operation. The clearest instance of this is the decision by the Hague ICJ to take jurisdiction over the question of the fence (I am not addressing here the interpretation of IL in the opinion).

V
Based on what I had said above, I believe the tendency to present central political aspects of the conflict as if they are matters of law and rights is itself a dangerous trend. The international community should indeed seek ways to break the deadlock, and put pressure on the parties to negotiate and not let them continue to resist an agreement. Palestinians should be encouraged to build effective government. Israel should at the very minimum stop allowing what even it has concluded are illegal outposts. Both should recognize the right of the other people to SD and independence. The currency of such efforts, however, is not international law and HR but international politics. If a party thinks that important aspects of its claims are underwritten by law, why should it compromise? And if what one party thinks is required by its very existence is dubbed by others a violation of human rights, it will not feel free to accept UN solutions.

One example will suffice. The refugees and their alleged RoR are a key element in any solution. Most concede that SD for both Jews and Palestinians is inconsistent with recognition of the right of Palestinians to choose to implement RoR in Israel. Yet many IL NGOs agree with the Palestinians that they do have such a RoR. In turn, many Palestinian spokesmen say that since this is an individual right of every refugee, even an agreement by a P leadership will not undermine this claim. At the same time, they claim that Israel MUST, as a matter of law, end the occupation and return to the 1967 borders. The two claims together mean that each of the elements is independent and a matter of law. Israel can be made to return to the 1967 borders AND Palestinian refugees and their descendants have the right to return to Israel. Moreover, Israel can be made to return to the 1967 borders even if there is no agreement on the issue of the RoR.

If this is indeed the case, Israel will have to choose between obeying the law and its identity and existence. It will, as it must, prefer the latter.

This could be avoided if the international community would draw a distinction between constraints imposed by IL and HR and those that are a matter of international politics. The Palestinians do have a right to SD. Israel does have an obligation not to transfer its civilian population into OT. But not every claim the parties make is theirs by a right or IL. True, in politics parties which are weak may get less than what they think is their right. But politics should not seek to give them all they think is their
right but only what is indeed theirs as a matter of right, plus whatever else may be arrived at by agreement. If IL supports their claim of right and justice to the full, it will not allow the necessary space for the necessary concessions they, too, have to make. ‘Compensating’ for the military weakness of one party can well be done within alternative frameworks. And relative weakness and relative strength should anyway be seen in a wider regional and temporal perspective.

In short, I argue that IL should provide the framework and the constraints for the parties to negotiate. It should not seek to dictate as a matter of law the contours of the agreement.

VI

This was the necessary background for me to discuss the ‘war against terror’. This way of framing the issue suggests that the war itself is just, and the only questions pertain to balances between the needs of effective war and human rights under conditions of a struggle that is neither classic war nor regular national law enforcement. Israel has been facing these issues for a long time, and the balances it strikes are informative and on the whole both effective and impressive. But before I elaborate on this, Israel has to face an additional challenge I want to relate to explicitly. There are people within and abroad argue that its war is not a war against terror but a war to perpetuate the occupation. In their reasoning, since the latter is an unjust war, the question of justice in war does not arise.

I agree that the justness of war is preliminary to that of the justice in war, and that is a serious issue for Israel. I hope we are on our way to a political agreement that will make this question mute. We need the help of the international community to get there. It may be a long process but it is critical. I have argued that the justness of Israel’s war is a matter of IL politics, not of IL law. I cannot go into this crucial question in detail here. However, if I am right that this is in essence a contested political question, it must be resolved by a serious political discussion. Before we can conclude that the war, in its entirety, is not just, we cannot take this assumption as the basis for demonizing Israel and singling it out.
If this is done, Israel’s record in balancing the fight against terror with IL law and human might be evaluated in a more charitable light. I do not know any country that has been so careful to guide its behavior by IL as Israel. In this effort Israel has been aided by the fact that whatever it does is under a magnifying glass and there is very little that it might do that does not become public. Within Israel, even within the IDF, there is a robust ongoing debate about how to meet standards of international law and of morality. Internal reservations from senior officers and the knowledge of the possibility of refusal to serve coming from the very best are more effective guarantees than the ICC and external pressure that these processes are real.

In addition, Israel's official actions are all put under judicial review in real time and with high publicity, in a way unprecedented in any country. Israel’s high court of Justice (bagatz) has effectively eliminated the requirements of standing and has seriously limited the applicability of the doctrine of non-justiciability. It sits on such matter as the first and usually the last instance. It took three years for the USSC to pronounce doubts as to the legality of extended imprisonment of illegal combatants in Guantanamo, and return the question for further legal resolution. In Israel bagatz stopped in real time an attempt by the IDF to remove and bury corpses in Jenin, forced the IDF to provide food (later seen to not be necessary) to the nativity church that was under siege, and asked the commander of the air force (now the elected CS) to explain statements he made in the press concerning the legality and the morality of targeted killings lest a petition asking to stop his promotion be allowed! I am not saying this to support the practice. I happen to be among those who think that in a healthy democracy these are not matters that courts are most competent to decide in real time. I am saying this to emphasize the variety of levels on which the internal debate in Israel concerning these questions is conducted.

Moreover, because for Israel the struggle against terror is not a one time affair, there is a lot of learning that is being done. Both about the effectiveness of ways of dealing with the threat and on the suitability. Thus, after a 1 ton bomb killed many innocent civilians when an arch hammas commander was targeted, Israel has decided not to use those bombs again despite the fact that this meant that other legitimate targets escaped.
I am not suggesting that because there are these processes of learning and self-criticism Israel's record is perfect and that it should not be criticized from the outside. But it does seem that the allegations that Israel is the villain of the world in terms of violations of HR is grossly exaggerated. Israel itself should not contribute to this tendency by describing all criticism as anti-semitism. This in turn may help to demonstrate that at least some of the demonizing cannot be explained as anything but anti-Semitism. There is no other explanation, and no justification, for the fact that Israel is the only state as to which the allegation that it has violated human rights sheds doubts about the legitimacy of its very existence. Those who care about the legitimacy and effectiveness of international law and human rights discourse should themselves beware of the most blatant examples of double standard and singling out of Israel of the kind we have seen in Durban 2001 and in all meetings of the Human Rights Commission.

Israel was established by the international community against the background of the holocaust. The idea was to give Jews, who had perished in Europe because they had no power to defend themselves, a place where they could defend themselves as individuals and as a collective. Israel does not ask any other state to fight for its freedom or existence. It does not ask for immunity from criticism when it is due. It should not deny to others what it seeks for itself. It should not rule over another people. But its right to exist should not be doubted because it has not yet reached an agreement permitting it to found an independent state in a part of its historic homeland.