

The Law of Betrayal in the Wild West Bank

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The response by Israel's Foreign Minister to the International Court of Justice's advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹ has struck a chord that echoes with history. As Silvan Shalom put it,² in condemning his state's defences the Court has condemned its own set of legal norms, in the process becoming 'equally guilty of betrayal.'³ Other commentators, pointing to the failure of the Court to address the catalogue of violence presented in the Israeli submissions,⁴ have accused the United Nations of 'a betrayal of its Charter commitment to peace and security.'⁵ It is as if in denying Israel's claim to self-defence with respect to the barrier that snakes along the Green Line and through the West Bank,⁶ the Court has both sentenced the country to death and sealed its own fate as a normative authority.⁷

Historians, journalists, and other observers of the scene have noted the centrality of betrayal—whether by the British in administering

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¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), Advisory Opinion, [2004] I.C.J. Rep. 131 [*Legal Consequences*].

² Shalom, Silvan, 'A Fence built for peace' *The Guardian* (3 February 2004), online: *Guardian Unlimited* <<http://www.guardian.co.uk/israel/comment/0,10551,1137685,00.html>>.

³ *Ibid.*, quoting Harry S. Truman ('... if we seek to use it [the United Nations] selfishly—for the advantage of one nation or any small group of nations—we shall be equally guilty of ... betrayal').

⁴ See *Written Statement of the Government of Israel on Jurisdiction and Propriety* (30 January 2004), online: <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>> 40-54 ('The Palestinian Terror Threat to Israel').

⁵ 'UN's Twin Betrayal' *The Telegraph* (22 July 2004), online: <<http://www.opinion.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2004/07/22/dl2202.xml&sSheet=/opinion/2004/07/22/ixopinion.html>>.

⁶ *Legal Consequences*, *supra* note 1 at para. 139 ('Consequently, the Court concludes that Article 51 of the [United Nations] Charter has no relevance in this case'). The Court describes the route (or planned route) of the barrier at paras. 80-1.

⁷ For the Israeli view that the ICJ has undermined the Security Council Resolution 1515 (19 November 2003) and its endorsement of the 'roadmap' formula for a negotiated settlement of the conflict, see Government of Israel, *Written Statement on Jurisdiction and Propriety*, Request for an Advisory Opinion from the 10th Emergency Session of the General Assembly on the 'legal consequences arising from the construction of a wall being built by Israel' (30 January 2004), online: <<http://www.jewishvirtuallibrary.org/jsource/Peace/israelbrief.pdf>>.

the League of Nations Palestine Mandate,⁸ by the Allies in failing to confront the Nazi regime's anti-Jewish policies,⁹ or by the United Nations in fostering rhetorical attacks on the Jewish state¹⁰—as a formative theme for the State of Israel.¹¹ Accordingly, just as the International Court of Justice ruling against Israel was in keeping with prevailing attitudes in international institutions,¹² so the Israeli perception of the judgment has been in keeping with tradition. The purpose of this essay is to delve into the question of betrayal and history, with a view to discerning how the most dramatic forms of self-denial and treachery equally reflect the most dramatic assertions of self-determination and national identity.¹³ The same theme may hold for the Court as holds for the nation, since international law's propensity to undermine itself may turn out to be part of what makes it work.

Turning from international betrayals to the domestic front,

⁸ On British policy limiting Jewish immigration to Palestine as a 'betrayal', see 'British Mandate: McDonald White Paper', online: Palestine Facts <http://www.palestinefacts.org/pf_mandate_whitepaper_1939.php> ('The Jews of Palestine and the rest of the Jewish world were outraged at this British betrayal').

⁹ On the betrayal of the allies during the Nazi period, see Michael Neufeld & Michael Berenbaum, eds., *The Bombing of Auschwitz: Should the Allies have Attempted it?* (Lawrence, KS: University of Kansas Press, 2003).

¹⁰ See 'Betrayal at the U.N.' *Jerusalem Post* (10 October 2000), online: Christian Action for Israel <<http://christianactionforisrael.org/un/betrayal.html>>.

¹¹ See 'A History of Betrayal: The Zionist Establishment of Israel' *The Orthodox Presbyterian* (18 January 2002), online: Free Republic <<http://www.freerepublic.com/focus/news/611272/posts>>.

¹² For a description of the ICJ judgment as in keeping with the history of UN motions, resolutions, and pronouncements condemning Israeli actions, see Anne Bayefsky, 'Had Enough?' *National Review* (17 July 2004), online: National Review <<http://www.nationalreview.com/comment/bayefsky200407171024.asp>>.

¹³ This article explores incidents of actual treason or betrayals of the Israeli national cause, not rhetorical uses of the betrayal image. See, for example, the accusations by the right wing of the Likud Party that Prime Minister Ariel Sharon's disengagement plan for Gaza represents a form of 'betrayal' (Lonnie C. Mings, 'PM Sharon: We Will Not Wait Indefinitely' *Israel News Digest* (January 2004), online: Christian Friends of Israel <<http://www.cfjerusalem.org/article.asp?id=17&publication=monthly&category=IND&cat=1>>). It may also be noted that Palestinian political rhetoric has followed a similar pattern. See, for example, reports of Palestinians labeling Arab cement contractors working on the security wall a 'betrayal' of the nationalist cause ('Betrayed in Palestine' *Radio Netherlands* (3 August 2004), online: Radio Netherlands <<http://www2.rnw.nl/rnw/en/currentaffairs/region/middleeast/isr040803.html>>).

Israel's most recent case of treason made for a news story that was shocking even in a region that seems to specialize in shocking news.¹⁴ In the summer of 2002 several Jewish residents of Adora—a West Bank settlement encircled by the security wall impugned by the International Court of Justice¹⁵—were detained by Israeli police for selling guns and ammunition to activists of the Fatah-affiliated Tanzim movement. Doubly astonishing is that the town of Adora had only three months previously, in April 2002, been the site of a terrorist attack in which four

¹⁴ 'Arms scandal shocks settlers' *BBC News* (19 July 2002), online: Phase III <<http://news.phaseiii.org/article1793.html>>. See also, 'Jewish settlers suspected of selling ammunition to Palestinians' *Associated Press Worldstream* (19 July 2002), online: eI-media <<http://groups.yahoo.com/group/eI-media/message/149>> ('Not just we on the settlement but the whole Israeli people, I think, is struck with disbelief'). It should also be noted that the more recent case of Elhanan Tenenbaum, a high ranking Israeli reserve officer who went to Lebanon for mysterious reasons and was held there as a hostage for several years, has also been discussed in the Israeli media in terms of treachery and betrayal. See Mathew Gutman, Margot Dudkevitch & David Rudge, 'Prisoner Swap Includes Killers' *The Jerusalem Post* (27 January 2004), online: Jerusalem Post Online Edition <<http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/Printer&cid=1075114462121>>. The list of analogous cases might also include that of Tali Fahima, who in 2004 set up camp in the home of Zakariya Zubeidi, the commander of the Al-Aqsa Martyrs' Brigades in Jenin, in order to act as a 'human shield' against his assassination; in the Israeli press, however, the Minister of Defense's labelling of her as a threat to public safety and the administrative detention in which she has been held has been portrayed more as a potential miscarriage of justice than as a case of actual treason. See Orit Shohat, 'Throwing the Book at Tali Fahima' *Ha'aretz* (31 December 2004), online: [haaretz.com](http://www.haaretz.com) <<http://www.haaretzdaily.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=521424>>. Perhaps a closer parallel would be the saga of Udi Adiv, who in 1973 was imprisoned for espionage resulting from his visit to Damascus, Syria in his capacity as a representative of Matzpen, a radical Israeli anti-zionist activist group. The perception of this group remains divided until today. For the differing views, see Uri Davis, 'Citizenship Legislation in the Syrian Arab Republic' (1996) 18 *Arab Studies Quarterly*, online: Find Articles <http://www.findarticles.com/p/articles/mi_m2501/is_n1_v18/ai_18413376> ('[Matzpen] aimed to form a common anti-Zionist military resistance underground for Arabs and Jews inside Israel ...'); and Stephen Plaut, 'The Israeli Analogues to Taliban John' *FrontPage Magazine* (27 May 2003), online: [frontpagemag.com](http://www.frontpagemag.com) <<http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=8017>> ('The Matzpen of the 1960s and 1970s was little more than a lunatic fringe circus curiosity...').

¹⁵ For a map of the security fence, or separation wall, see online: PASSIA <http://www.passia.org/images/pal_facts_MAPS/WallWeb/pages/FSps_tateorPS14.htm>.

residents, including a five-year-old child, were killed in a gunfight.¹⁶

In the ongoing prosecution the suspects face treason charges and, some have even suggested, the death penalty,¹⁷ for having crossed from the ultra-nationalist edge of society to the opposite, anti-nationalist side. Certainly one can say that the loyalties of the settler/soldiers were at best ephemeral. Having stolen the weapons from the Israel Defense Forces base on which they served reserve duty, the suspects changed direction again upon arrest and began cooperating with the police investigating the rest of their group.¹⁸ The multiple betrayals seem as complete as could be.

This article proceeds on the assumption that complex political and social events are understood in the contemporary imagination through the narratives and metaphors of popular media.¹⁹ And indeed, the twisted saga of civilians turned frontier settlers, then turned soldiers, then turned thieves, then turned traitors, then turned mercenaries, then turning on the enemy for whom they betrayed their own, speaks of a lawlessness seen more on movie screens than in newspapers. In point of fact, it is a close parallel to the story line of one of the most famous, and most shockingly violent Westerns ever made, Sam Peckinpah's *The Wild Bunch* (1969).²⁰ In the West Bank town of Adora and in the Wild West settings of Peckinpah, characters seem to compete to break the rules of

¹⁶ Israel Ministry of Foreign Affairs, '2000-2005 Major Terror Attacks' (14 January 2004), online: Israel Ministry of Foreign Affairs <<http://www.mfa.gov.il/MFA/Facts+About+Israel/Israel+in+Maps/2000-2004-+Major+Terror+Attacks.htm>>; Moshe Fox, 'The Killing of Innocents in Adora' Embassy of Israel Briefing, Washington, DC, (29 April 2002), online: Embassy of Israel <<http://www.embassyofisrael.org/articles/embassy-briefing/2002042900.html>>.

¹⁷ Margot Dudkevitch, 'Israelis Suspected of Selling Arms to Tanzim may face Treason Charges' *The Jerusalem Post* (19 July 2002), online: <<http://goldwater.mideastreality.com/israelisuspect.html>>.

¹⁸ Nadev Shragai, Jonathan Lis & Amos Harel, 'Four soldier-settlers are prime suspects in arms sales case' *Ha'aretz* (20 July 2002), online: <http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=188421&contrassID=2&subContrassID=1&sbSubContrassID=0&listSrc=Y>>.

¹⁹ The point is stated in reverse in a comment by film scholars written in the immediate aftermath of the attacks of 9/11/01: David Sterritt & Mikita Brottman, 'Hollywood's Metaphors' *The Chronicle of Higher Education: The Chronicle Review* 48:5, (28 September 2001) B15 ('Perhaps ... the ungraspable enormity of the tragedy, will now compel us to look beyond Hollywood for our narratives and metaphors').

²⁰ For a review of *The Wild Bunch* and a description of the provocatively graphic violence of the film, see Tim Dirks, 'The Wild Bunch (1969)', Film Review, online: The Greatest Films <<http://www.filmsite.org/wilddb.html>>.

the society around them.²¹

Whereas the International Court of Justice ruling was received with an attitude of resignation, news of the Adora arrests was greeted with an overwhelming sense of incredulity at the turns that life can take. As one settler asked rhetorically, '[h]ow can such a thing happen, the thought that some of the weapons could be used to murder our own residents ...'²² All of this occurred at a time of general political confusion. Certainly, with the start of construction on the security fence in 2002,²³ it had become increasingly difficult for many Israelis to take refuge in the usual paradigms of humanism and nationalism, or to recapture the boundary between order and chaos, 'home' and the 'territories', the 'self' and the 'other.'²⁴ The political right vied with the political left in both supporting and opposing the wall between themselves and the Palestinians in the most confusing possible way.²⁵ With the Adora arrests added to the overall strain of the prolonged occupation and the renewed *intifada*, the society appeared to have lost its normative bearings altogether. The entire country, it seems, began yearning for a simpler time.

Likewise, *The Wild Bunch* starts off with confusion. The film relates the tale of a group of aging men first seen as Texas Rangers helping old ladies cross the street in a frontier town, who then are

²¹ 'Film Masterclasses: Sam Peckinpah', online: [channel4.com <http://www.channel4.com/film/reviews/feature.jsp?id=31292>](http://www.channel4.com/film/reviews/feature.jsp?id=31292) at 1.

²² Dudkevitch, *supra* note 17.

²³ See Adam Keller, 'The Israeli fence is not going to deliver' *The Guardian* (19 June 2002), online: Communist Party of Australia <<http://www.cpa.org.au/garchve5/1096fence1.html>>. Construction of the security fence around the bloc of settlements where Adora is located was commenced in June 2002. See Palestinian Society for the Study of International Affairs, *PASSIA Annual Report 2002*, online: PASSIA <http://www.passia.org/publications/annual_seminar_reports/annual2002n.htm>.

²⁴ Meron Benvenisti, 'The Fence May Blend in with the Olive Trees', Opinion and Comment, *Ha'aretz* (7 June 2002) 1; Ephraim Ya'ar & Tamar Hermann, 'A Fence, yes—But not in Jerusalem', online: Colorado Campaign for Middle East Peace <<http://www.ccmeop.org/hotnews2/fence060702html.htm>>.

²⁵ On the early support of the left and opposition of the right to the security fence, see Moshe Feiglin, 'Fences Against Wisdom—A Tragic-Comedy in Five Acts', online: Israel Universe <<http://www.israeluniverse.com/post-search.php3?RowID=411&x=49&y=7>>. On the later support of the right and opposition of the left to the security fence, see Chemi Shalev 'Sharon Faces Ire As he Eyes Hamas Prisoner Release' *Forward* (18 July 2003), online: *Forward* <<http://www.forward.com/issues/2003/03.07.18/news7.html>>.

revealed as bank robbers and fugitives. The Bunch flees across the Rio Grande and sides with local villagers against a Mexican general before signing on as mercenaries with the same general, who hires them to re-cross the border and steal weapons and ammunition from the United States cavalry. Adding final injury to their tendency to insult the loyalties of virtually everyone, they ultimately face a death penalty on all sides by selling arms to rebels fighting the Mexican army for whom they had, in turn, betrayed their own country.²⁶

The response of the townsfolk caught in the initial shootout, like that of the United States cavalymen surprised by the bandits and the Mexican soldiers betrayed in the final scene, is one of incredulity.²⁷ Even the Bunch themselves are surprised by the complexity of the times and the twists and turns of life, as they relate their own stories of betrayal and nostalgia for an era of more honour among men and thieves. The movie is set in 1913, thirty years later than the classic Western setting, and the first automobiles, automatic weapons, and even world politics in the form of Germany's pre-World War I alliance with one of the Mexican factions, have invaded the cowboy world.²⁸ In this atmosphere of aging bandits and an aging West, everyone seems to have lost the normative compass by which they previously measured their lives. The entire society, it seems, yearns for a simpler time

The last Israeli death penalty case—that of Holocaust master planner, Adolf Eichmann—does hark back to a morally more straightforward era. Despite the standard condemnation of capital punishment, including Eichmann's, by international human rights groups,²⁹ Israeli law reflects a collective consciousness of the case as one in which a redemptive death sentence vanquished oppressive violence. There may have been an element of frontier justice in the abduction of the Nazi fugitive from his South American sanctuary, but the dramatic action captured virtually everyone's sense of right.³⁰

²⁶ For a more detailed account of the film's narrative, see James Mulay, 'The Wild Bunch' *Cinemania* (1994), online: <<http://members.aol.com/tonywestok/private/wildbunc.htm>>.

²⁷ Lawrence Russell, 'The Wild Bunch', Film Court Review, online: Culture Court <<http://www.culturecourt.com/F/Westerns/WildBunch.htm>>.

²⁸ 'The Wild Bunch', online: Films on Disc <<http://www.filmsondisc.com/DVDPages/WildBunch.htm>> ('Sam Peckinpah's paean to the changing world').

²⁹ See Israel Ministry of Foreign Affairs, 'Justice Ministry Reply to Amnesty International Report' (5 July 1995), online: Israel Ministry of Foreign Affairs <<http://www.mfa.gov.il/mfa/go.asp?MFAH0c0u0>>.

³⁰ The UN Security Council condemned the self-help capture of Eichmann, prompting Israel to express regret over its method of arrest and urge Argentina to accept Israel's apology as an end to any international law

The Supreme Court's assessment that Eichmann's 'crimes against the Jewish people'³¹ correspond with the most heinous crimes under the United Nations' *Genocide Convention*³² lives on in the Israeli imagination as the moment in which national and international ethics coincided. Thus, the state could assert universal jurisdiction and reflect the humanistic *raison d'être* of all legal systems; and, at the same time, it could fulfill its legal role as territorial sovereign and reflect a nationalist view of itself as the truly final solution to the historic 'Jewish problem.'³³ The society lived by and, indeed, embodied an all-encompassing normative code.

Living life by a code is also, of course, what the classic Western movie is all about. Good conquered evil from John Ford's *Stagecoach* (1939), where civilization first headed west bringing noble traits to even the drunken doctor and the barroom whore,³⁴ to *Red River* (1948), where an epic cattle drive evaded Indians and traversed a bleak landscape taking John Wayne to the promised land.³⁵ The gunfights, whether at the OK Corral or over Clementine,³⁶ came at the climax of the films and, as in *High Noon* (1952), where a lone lawman stood his ground against marauding outlaws,³⁷ were meant to redeem civilized society

claim. See UN SC Res. 138, UN SCOR, 15th Sess. 865th Mtg., UN Doc. S/4349 (1960).

³¹ *Nazi and Nazi Collaborators (Punishment) Law*, 1950, section I(a)(1). Passed by the Knesset on the 18th Av, 5710 (1 August 1950) and published in Sefer Ha-Chukim No. 57 of the 26th Av, 5711 (August 9, 1950) at 281; the Bill and an Explanatory Note were published in Hatza'ot Chok No. 36 of the 11th Adar, 5710, (28 February 1950) at 350.

³² *Attorney-General of Israel v. Adolph Eichmann*, 36 I.L.R. 5 (1968) (Isr. Dist. Ct., Jerusalem 1961), aff'd 36 I.L.R. 277 (1968) (Isr. S. Ct. 1962) [*Eichmann*].

³³ *Ibid.*, 304 at para. 20. ('The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant').

³⁴ For a description of *Stagecoach* as the film that initiated the classic Western, see 'Stagecoach', online: RaveCentral.com <<http://www.ravecentral.com/stagecoach.html>>.

³⁵ For a summary of the plot of *Red River* and an explanation of the title, which echoes the Biblical crossing of the Red Sea, see Tim Dirks, 'Red River (1948)', Film Review, online: The Greatest Films <<http://www.filmsite.org/redr.html>>.

³⁶ The seminal film about the showdown between US Marshal Wyatt Earp and his brothers on one side, and the evil Clanton gang on the other, was *My Darling Clementine* (1946), but the story was made most famous in *Gunfight at the OK Corral* (1956) with the appearance of Burt Lancaster as Earp and Kirk Douglas as his gambler friend, Doc Holliday.

³⁷ For a summary of the plot of *High Noon* and a review of the 1950s era of McCarthyite, good vs. evil politics against which it was set, see Tim Dirks,

from oppression.

Students of the genre have noted that it was the Western's ability to engage with the morality of violence,³⁸ as well as its capacity to instil positive civic ideals and unambiguous gender roles,³⁹ that accounted for its enduring effect on the popular imagination. The pedagogical message was one in which the specific socio-political ethic of 1940's and 1950's America coincided with the universal need for civilization to defeat savagery. To do this, cinematographic society lived by and, in its white hats and black hats, embodied an all-encompassing normative code.

In *The Wild Bunch*, director Sam Peckinpah set out to demonstrate that codes, even sacred ones like those of the Western, are made to be broken. The gunfight, which unlike the sterile versions in classical Westerns graphically depicts arterial blood spurting with every wound, comes right at the beginning of the film. The leader of the Bunch is dapper, articulate and talkative instead of rough, strong and silent, but, as one critic has noted, civility is 'an ill-fitting suit for an animal that has lived by a more violent nature.'⁴⁰ Thus, he speaks about camaraderie even as he kills an injured gang member in order not to slow the Bunch down, and speaks of honor even as he leads his gang into a futile showdown where the Mexicans butcher them. The law enforcement agents chasing the anti-heroic Bunch are even worse, acting like vultures that descend to take the boots off townspeople shot in the crossfire and lying dead on main street.

The characters' roles constantly reverse with the twists of *The Wild Bunch's* plot, conveying the message that even the strongest codes are breached when pressed.⁴¹ It is as if this 1969 movie, made nearly fifteen years after Hollywood's high point for the Western,⁴² cannot recapture the morality of the 1940s and 1950s any more than twentieth century characters can replicate nineteenth century heroes. The nostalgia for a time before codes and roles were betrayed is destined to be unfulfilled.

'*High Noon* (1952)', Film Review, online: The Greatest Films <<http://www.filmsite.org/high.html>>.

³⁸ Robert Warshow, 'Movie Chronicle: The Westerner' in *The Immediate Experience: Movies, Comics, Theatre, and Other Aspects of Popular Culture* (Garden City, N.J.: Doubleday, 1962) 151.

³⁹ Lee Clark Mitchell, *Westerns: Making the Man in Fiction and Film* (Chicago: University of Chicago Press, 1996) at 191.

⁴⁰ Craig Winter, 'Shoot to immortalize: Sam Peckinpah shoots from the tragically hip' *Movias's* (1 July 2000), online: *Movias's* <<http://www.geocities.com/movias/on8.html>>.

⁴¹ Mulay, *supra* note 26.

⁴² Mitchell, *supra* note 39 at 241.

Back on the Israeli front, the role reversals that come with Jewish betrayal of the Jewish cause also challenge preconceived notions of morality and civic duty. In a series of reports curiously similar to the opening scene of Peckinpah's film, the principal suspects in the arms sales to the Tanzim were alternatively misdescribed in the press as civilians who were soldiers and soldiers who were civilians.⁴³ Further, the principal players may have been streetwise characters who knew precisely where to acquire and unload their wares, or, alternately, they may have been greedy dupes of underworld middlemen—criminals who mis-stepped or traitors by mistake. In this, the reports share something with the International Court of Justice, whose ruling on the West Bank security wall has taken politics for law,⁴⁴ leaving the reader wondering whether the judges are excessively shrewd or remarkably naïve about the relationship between the two.

Indeed, in the area of legal investigation mistakes may be more the norm than the exception. In one infamous Israeli case, a field military court in 1948 tried, and convicted, Meir Tubiansky of treasonous collaboration with the British in the last days of Britain's Mandate for Palestine.⁴⁵ A posthumous inquiry, commissioned by Prime Minister David Ben-Gurion after what appeared to be Tubiansky's excessively hurried execution, revealed the charges to have been fabricated and the penalty imposed by a 'show trial'.⁴⁶ The episode almost caricatures notions of honor and dishonor, individual and community, rule and law, military and intelligence, all of which were able to reverse themselves on command.

Perhaps even more notorious a case of betrayal was the so-called 'Lavon Affair' of 1954. In a plot with surprises worthy of Hollywood, Minister of Defence Pinhas Lavon was found guilty, then

⁴³ Jonathan Lis, 'More arrests expected soon in soldiers Tanzim arms scandal' *Ha'aretz* (21 July 2002), online: <http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=188830&contrassID=2&subContrassID=1&sbSubContrassID=0&listSrc=Y>.

⁴⁴ *Legal Consequences*, *supra* note 1 at para. 41 ('As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects, "as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question'"), citing *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, [1973] Advisory Opinion, I.C.J. Rep. 172 at para. 14.

⁴⁵ For a detailed account, see Shabtai Teveth, *Ben-Gurion's Spy: The Story of the Political Scandal that Shaped Modern Israel* (New York: Columbia University Press, 1996).

⁴⁶ 'Operation Suzannah' *Wikipedia: The Free Encyclopedia*, online: http://en.wikipedia.org/wiki/Lavon_Affair.

exonerated, then forced to resign, over a rogue intelligence operation designed to damage British and American installations in Egypt. Without the knowledge of the political echelons at the Ministry of Defense, military intelligence chief and Ben-Gurion protégé Benjamin Givly (parenthetically, the same agent who as field officer had condemned Meir Tubiansky),⁴⁷ established a sabotage ring whose aim was to alienate western opinion from the regime of Gamal Abdul Nasser that had recently overthrown King Faruk.⁴⁸ The operation, in effect, turned Israel on its friends in order to turn its friends on its enemies. Perhaps befitting an operation permeated by double-cross, the plan turned disastrous for Israel when one of the saboteurs turned informant and later revealed himself as an Egyptian double agent.⁴⁹

What made the plan even more controversial than the notion of damaging Nasser by damaging western interests in Cairo was the idea of using Egyptian Jews as saboteurs.⁵⁰ The involvement of a diaspora Jewish community has been a sensitive area for Israeli policy. Indeed, it represents a publicly espoused taboo from the earliest days of statehood that has been chronicled by no less an authority on the subject than the convicted American Jewish spy for Israel, Jonathan Pollard.⁵¹ One could be forgiven for concluding that, on the odd occasion, the interests of the State of Israel seem to conflict with, and override, those of its dispersed people.⁵² With an extra dose of cynicism, one might also say that, in the mid-1950s, the presence of a rather well educated and affluent community in a hostile Arab country provided fertile grounds for the government to accomplish multiple tasks with a single strategy. As one understated scholar put it, '[t]he welfare of Oriental Jewry in their various homelands was ... Israel's last concern.'⁵³

⁴⁷ *Ibid.*

⁴⁸ Jewish University in Cyberspace, 'The Lavon Affair', online: The Jewish Agency for Israel <<http://www.jajz-ed.org.il/juice/service/week2.html>>.

⁴⁹ Ami Isseroff, 'The Lavon Affair: Israel and Terror in Egypt', online: MidEastWeb <<http://www.mideastweb.org/lavon.htm>>.

⁵⁰ See Alfred M. Lilienthal, 'The Lavon Affair' in *The Zionist Connection II: What Price Peace?* (New Brunswick, N.J.: North American, 1982).

⁵¹ Jonathan Pollard, 'Who's Afraid of Jonathan Pollard?' *New Jersey Jewish News* (14 August 1997), online: Temple of the Screaming Electron <http://www.totse.com/en/conspiracy/institutional_analysis/pollfrad.html>.

⁵² 'Israel Honors Terrorists' (1 April 2005), online: The Arabist Network <<http://arabist.net/archives/2005/04/01/>> ('The legacy of the Lavon Affair was especially unpleasant for Egyptian Jews and for Jews living in other Arab countries').

⁵³ David Hirst, *The Gun and the Olive Branch: The Roots of Violence in the Middle East* (London: Futura, 1984), online: <http://www.geocities.com/CapitolHill/Senate/7891/lavon_hirst.html>.

In the result, the Israeli democracy accused the Egyptian military regime of staging a show trial,⁵⁴ while the authoritarian Egyptian court made what later were conceded to be accurate findings and spared most of its conspiring Jewish citizens the Meir Tubiansky fate.⁵⁵ The recruited Jewish loyalists were eventually repatriated from Egypt only to complain bitterly about their treatment, while Ben-Gurion, whose handpicked intelligence chief was revealed as the ultimately culpable party, never quite shook the political stigma of the affair.⁵⁶ Taken in its entirety, the Lavon saga rivals King David's many infidelities and the tale of betrayal by his son, Avshalom, who seized the throne in revenge for David's siding with his other son, Amnon, who had in turn raped their sister, Tamar.⁵⁷ If nations live by a code, this one was breached in so many directions that it seemed rent beyond recapture or repair.

How, one might ask, can roles get so reversed and things go so wrong? In *The Wild Bunch*, the clue lies in the fact that the reversals take place not only in the present, but in the past. Thus, for example, the Bunch is chased by a posse that turns out to be headed by a former partner of the Bunch itself, whom their current leader had betrayed years before. In an immediately telltale scene, the opening credits of the film show small children torturing a scorpion by pushing it into a nest of killer ants, and then dousing the ants in kerosene and setting them on fire. The shots get frozen into black-and-white stills resembling old newspapers, as if today's action is frozen into history as it unfolds.⁵⁸ Just as the past inevitably intrudes into the present, so the present is shown to be inseparable from the past.

The history captured by this technique, of course, is one of non-innocent children. The message of the film is that the Bunch cannot recapture an idealized past, where civilized codes and an ethic of loyalty restrained the impulse to violence and betrayal, because there was no such idealized past. The old West (and the old Western movie), now almost gone, was a non-innocent child. Today's chaos—the 'ballet of violence' with which the gruesome film ends⁵⁹—is but a reenactment of

⁵⁴ 'Egypt Show Trial Arouses Israel, Sharrett tells House. Sees Inquisition Practices Revived' *The Jerusalem Post* (14 December 1954) 1.

⁵⁵ Doron Geller, 'The Lavon Affair' in *Jewish Virtual Library*, online: <<http://www.us-israel.org/jsource/History/lavon.html>>.

⁵⁶ *Ibid.*

⁵⁷ 2 Samuel 13:1-22 to 18:1-18.

⁵⁸ On the place of children within the theme of *The Wild Bunch*, see James Berardinelli, 'The Wild Bunch: A Film Review' (1995), online: Reelviews <http://movie-reviews.colossus.net/movies/w/wild_bunch.html>.

⁵⁹ Peckinpah's slow-motion technique for portraying mass shootings has been

yesterday's chaos. The characters yearn for a simpler time, but that time is nothing but a mirage in the desert.

But can the same be said of Israel and its struggles? It is one thing for the internal complexities of politics, loyalty and identity to have infiltrated the sovereign state in the Lavon Affair and other such episodes; indeed, this is almost a badge of Zionism's success, as if the structural normalization of Jewish society has by osmosis produced the same level of disorder within the state as without.⁶⁰ The pre-state era, however, with its massive external threats to existence, should be contemplated as a time of normative simplicity. As the *Eichmann* case seems to demonstrate, the darkness of Nazism was followed, as it were, by a time of light, when an idealized code of universal conduct actually walked the earth, straddling the courthouses in Nuremberg⁶¹ and Jerusalem.⁶² Indeed, at Israel's birth the International Court of Justice could recognize the prospect of Israeli sovereignty and defence in a way that became impossible by the time the West Bank security wall came into legal view.⁶³

Although the *Eichmann* judgment exhibits a veneer of fidelity to nation and to international ideals,⁶⁴ press further into the history of Israel's legal engagement with the Nazi era and one finds the conflicted story of Rudolph (Israel) Kasztner. In 1953, the government launched a

dubbed the 'ballet of violence', and is credited as the originator for the extended violent episodes that have become commonplace in action films. See David A. Cook, 'Ballistic Balletics: Styles of Violent Representation in *The Wild Bunch* and After' in Stephen Prince, ed., *Sam Peckinpah's The Wild Bunch* (Cambridge: Cambridge University Press, 1999) 130.

⁶⁰ Labor Zionism generally sought to normalize the Jewish situation so that Jews could participate in world events as one more nation, while Revisionist Zionism generally sought to accentuate the special situation of the Jews making them a *sui generis* nation. For a summary of this debate, see Real Jean Isaac, 'What Went Wrong?' *Outpost* (April 1999) 3, online: Outpost <<http://www.afsi.org/OUTPOST/96APR/apr3.htm>>.

⁶¹ See the seminal legal instrument on crimes against humanity, *Charter of the Nuremberg International Military Tribunal*, Annexed to the London Agreement, 8 August 1945; 82 U.N.T.S. 279; 59 Stat. 1544, 8AS No. 472, reprinted in (1945) 39 Am. J. Int'l L. 257.

⁶² The *Eichmann* case was heard initially by the District Court for Jerusalem and, on appeal, by the Israel Supreme Court. *Eichmann*, *supra* note 32.

⁶³ *Reparations Case*, [1949] Advisory Opinion, I.C.J. Rep. 174 (Israel responsible for death of UN diplomat in Jewish-held part of Jerusalem).

⁶⁴ Editors of international law casebooks have tended to stress one or the other, but rarely both, of the *Eichmann* case themes. For the stress on universal jurisdiction, see Jordan J. Paust *et al.*, *International Criminal Law* (Durham, NC: Carolina Academic Press, 1996) at 1038-44. For the stress on Israeli national sovereignty, see D.J. Harris, *Cases and Materials on International Law*, 5th ed. (London: Sweet & Maxwell, 1998) at 280-8.

prosecution for criminal libel against an elderly writer, Malchiel Gruenwald, for having named Kasztner as a Nazi collaborator. According to Gruenwald, Kasztner arranged for the cooperation of Hungarian Jews facing deportation in 1944, at a time when the fate of Polish and Slovakian deportees was already known to the Jewish leadership.⁶⁵ The state's siding with Kasztner instead of against him in this tale of collaboration signals that fidelity can turn to betrayal with relative ease.

Kasztner was the head of the Labor Zionist movement in Hungary. In return for the cooperation of the Jewish masses, he had arranged with the Nazis to send 600 Jews, most of whom were from his home town of Kluj, to Palestine instead of Auschwitz.⁶⁶ Kasztner negotiated the deal with none other than Adolf Eichmann. In interviews taped by Dutch Nazi journalist Willem Sassen, who met with Eichmann in Argentina in 1955 and published his interviews in *Life Magazine* in 1960 after the capture of the genocidal grandmaster, Eichmann described the tenor of his wartime meetings with Kasztner: 'While we talked he would smoke one aromatic cigarette after another, taking them from a silver case and lighting them with a little silver lighter. With his great polish and reserve he would have made an ideal Gestapo officer himself.'⁶⁷

Other European survivors have accused the Zionist movement, including such notables as Israel's first foreign minister, Moshe Sharett, and its first president, Chaim Weizmann, of selling out Hungarian Jewry for the sake of an elite emigration to Palestine.⁶⁸ In yet another wrinkle, Gruenwald was represented at the *Kasztner* trial by Revisionist lawyer and later Likud minister of justice, Shmuel Tamir. The lawyer's primary aim was to expose the moral bankruptcy of Labor policies in sacrificing the many for the few.⁶⁹ Hungarian Jewish Laborites testifying at the trial described the several hundred headed for Palestine amidst the multitude headed for death camps as 'Kasztner's pride—the

⁶⁵ See Leora Bilsky, 'Judging Evil in the Trial of Kastner' (2001) 19 L.H.R. 117 (2001) at 120.

⁶⁶ For an assessment of whether the Hungarian Zionist leaders were self-interested collaborators or realistic activists, see Randolph Braham, 'The Role of the Jewish Council in Hungary: A Tentative Assessment' 10 *Yad Vashem Studies* 78.

⁶⁷ Adolf Eichmann, 'I Transported Them to the Butcher' *Life Magazine* (5 December, 1960) 146.

⁶⁸ See Alex Weissberg, *Desperate Mission: Joel Brand's Story* (New York: Criterion Books, 1958) at esp. 208-10.

⁶⁹ For transcripts of Tamir's cross-examinations of witnesses and of Kasztner himself, along with a general history of the *Kasztner* matter, see Ben Hecht, *Perfidy* (New London, NH: Milah Press, 1961).

Zionist youth.⁷⁰

In addition, Tamir set out to provide a not-so-subtle parallel between Kasztner and the pre-state Socialist Workers' Party (Mapai), demonstrating that Mapai, unlike the right-wing Revisionists, had corrupted itself in its relations with the British much as Kasztner had done with the Germans.⁷¹ The *Kasztner* trial, in other words, became a show trial about betrayal, and like all show trials it came to itself betray the legal principles on which it purported to stand.⁷² The government turned on the Jews in favor of the collaborator, while the hardened Zionist lawyer turned on the national movement in favor of the uncommitted masses of European Jews. For its part, the Court lost control of the process, eventually refusing to hear from any *Kasztner*-related witnesses at the much higher profile *Eichmann* trial seven years later.⁷³

Ironically, for a leader in a workers' movement supposedly devoted to national rebirth through socialism and labor, Kasztner engineered a story that has the flavor of a commercial transaction. He dealt in the coinage of live Jews, a valuable currency in Europe by the time of the destruction of Hungarian Jewry late in the war.⁷⁴ In ruling against Kasztner the Israeli court seemed to betray Labor Zionism, while Kasztner showed that the wartime Labor Zionists seemed to betray the Jews. Superficially, at least, the nascent state paralleled Peckenpah's theme of a non-innocent childhood, with each betrayal piled on top of the previous one, forming no more order than a wild bunch of betrayals. In this light, the circle from Kasztner back to the soldiers and settlers, the traders and traitors of the West Bank town of Adora, seems complete. Indeed, the links go as far as the International Court of Justice's consideration of the West Bank fence. The law sacrificed the sovereignty rights of Israel for the self-determination rights of the Palestinians, as if it were longing for the non-existent simpler time when the two legal principles could exist in mutual harmony.⁷⁵ In

⁷⁰ Lenni Brenner, 'Hungary: The Crime Within a Crime' in *Zionism in the Age of the Dictators* (London: Croom Helm, 1983), excerpted online: REDS—Die Roten <<http://www.marxists.de/middleeast/brenner/ch25.htm>>, citing André Biss, *A Million Jews to Save: Check to the Final Solution* (London: Hutchinson, 1973) at 92-4.

⁷¹ On the use of *Kasztner* as a show trial against the Labor Zionist movement, see Bilsky, *supra* note 65, and Leora Bilsky, ed., 'Judgment in the Shadow of the Holocaust' (2000) 1 Theor. Inq. L. at 237-43.

⁷² *Ibid.*

⁷³ Brenner, *supra* note 70.

⁷⁴ Yehuda Bauer, *Jews for Sale? Jewish Negotiations, 1933-1945* (New Haven: Yale University Press, 1994).

⁷⁵ On the contradiction between sovereignty and self-determination, see

similar fashion, the betrayed families and neighbours in Adora may yearn nostalgically for an ethic, or a time, that exists only in the imagination.

A closer look at *Kasztner*, however, shows that the West Bank analogy may be imperfect. The trial judge went out of his way to state that Kasztner was motivated by misguided idealism rather than selfish gain.⁷⁶ On appeal, the Supreme Court majority determined that although Kasztner was guilty of collaboration, one could sympathize with his plight. 'He didn't warn Hungarian Jewry of the danger facing it because he didn't think it would be useful...', the Court opined.⁷⁷ In this respect, Eichmann's *Life Magazine* interview is also revealing. The old Nazi perceived the betrayal of Hungary's Jews by its Laborite leadership as yet one more *selectzia*, this time in the name of building a nation rather than eliminating one. 'I believe that Kasztner would have sacrificed a thousand or a hundred thousand of his blood to achieve his political goal,' said the accomplished mass murderer. "'You can have the others" he would say, "but let me have this group here."'"⁷⁸

Much as international institutions attacking a state in the name of misguided liberation is not the same as attacking it out of sheer prejudice,⁷⁹ selling humanity for ideology, however twisted under the circumstances, is not the same as selling it for cash. One more story from the town of Adora illustrates the point. There was a crime wave in the settlement in 2001 in which almost every house was burglarized during the course of one night. Apparently, all of the settlement's children, and most of its adults, had already surmised that one of the teenagers arrested in the Tanzim affair was in all likelihood implicated

Reference Re Secession of Quebec, [1998] 2 S.C.R. 217 at para. 111 (establishing a contest between two propositions: '... international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state', and '...the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of 'a people' to self-determination').

⁷⁶ The trial before Tel Aviv District Court Judge Halevi is described in Yitzhak Heimowitz, 'On the Kastner Case' *Middle East and the West* (31 January 1958) 3.

⁷⁷ Biss, *supra* note 70 at 231.

⁷⁸ Eichmann, *supra* note 67.

⁷⁹ For the suggestion that the United Nations frequent condemnations of Israel result not from a misguided concern for the Palestinian cause but rather from anti-Semitism, see Anne Bayefsky, 'One Small Step: Is the U.N. finally ready to get serious about anti-Semitism?' *Wall Street Journal* (21 June 2004), online: Opinion Journal <<http://www.opinionjournal.com/extra/?id=110005245>>.

in the thefts, but due to the lack of absolute certainty no one in the closely knit community informed the police.⁸⁰ They could not bring themselves to betray their own betrayer, so they instead betrayed the state authorities out to protect the very lifestyle that brought them together in the first place.

Betrayal appears built into the genetic code of loyalty, as if it is the corrosive potential that gives the community and the nation its bonds. Without the possibility of betrayal there is no possibility of loyalty. The International Court of Justice defended nascent (Palestinian) nationhood and territory by undermining (Israeli) sovereign rights;⁸¹ it brought the rule of law to bear on the conflict by ignoring the domestic courts and the judicial process actually at work in the West Bank and Israel.⁸² It sold out its own themes of sovereignty and self-defence to build a new sovereignty and self-determination. It is very much like pre-state Israeli history, where Jewish lives were sold to purchase a few more residents of the inchoate Jewish nation.

In the West Bank settlement, when Israeli ammunition is sold to Palestinians the neighbors hope that it was likewise for twisted ideology, or for something other than the gratuitous desire for status and money.⁸³ Otherwise, the oppressive news of the moment would be more than merely a crude re-enactment of the oppressions of the past. Much as the *Kasztner* case acknowledged that the Hungarian Jewish masses were sold to feed a starving Jewish nation, one hopes that the International Court of Justice's betrayal of the Israelis protected by the separation wall is in the cause of a new Partition and a rebirth of the law.⁸⁴ As with the Adora settlers/soldiers, the motive—greed or

⁸⁰ Vered Levy-Barzilai, 'Salt in their Wounds' *Ha'aretz* (26 July 2002), online: <http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=190463&contrassID=2&subContrassID=5&sbSubContrassID=0&listSrc=Y>.

⁸¹ *Legal Consequences*, *supra* note 1 at para. 88 ('The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV)...').

⁸² *Ibid.* at para. 100 (briefly mentioning, then ignoring, the Israel Supreme Court ruling on the separation barrier). See, *Beit Sourik Village Council v. Government of Israel*, H.C.J. 2056/04, English version online: http://www.mfa.gov.il/NR/rdonlyres/75671100-3248-4196-888B-362D6425D3AA/0/HCI_Fence_ruling_300604.doc.

⁸³ Shragai, *supra* note 18.

⁸⁴ In international law terms, Israel's establishment as a state resulted from the United Nation's partitioning of the territory of Palestinian into a Jewish and Arab state upon the termination of Britain's Mandate. See *Future Government of Palestine*, GA Res. 181(II), UNGAOR, 2nd Sess., (29 November 1947), online: United Nations <http://www.un.org/>

ideology, prejudice or normativity—remains indeterminate. Either there is a productive seed buried in the rotten fruit, or the International Court of Justice and Adora episodes are, like a Peckinpah film, so nihilistic that the only point of its telling would be in the action of its telling.⁸⁵

Whatever the specific motives, the message of history is that the idealized past is unattainable because it was always just a phantom. In international law, the principle of self-determination could always be betrayed for sovereignty reasons,⁸⁶ or statehood and self-defence could be betrayed for the cause of liberation.⁸⁷ In Jewish history, the nation could always be betrayed for humanitarian reasons, or human lives could be betrayed for nationalist reasons. The self betrayed by the other, or the other betrayed for the self. In this sense, international lawyers and Israeli society alike may be yearning for a simpler time that never did exist.

The ultimate betrayal, of course, would be the abandonment of both sets of ideals altogether. As with international law, it is society's complexities that give it momentum. Norms and states can either be reborn from the process in which they are undermined, or the act of undermining can be the death of all states and their norms. If the competition between nation and people gives way to a tale of simple greed in the West Bank, or if the elaboration of principles of sovereignty and human rights gives way to outright bias in the International Court of Justice,⁸⁸ the last of the societies' bonds will have been sold.

documents/ga/res/2/ares2.htm>.

⁸⁵ Michael Biss, "'Back Off to What?' Enclosure, Violence, and Capitalism in Sam Peckinpah's *The Wild Bunch*" in Prince, *supra* note 59 at 127 (describing the Bunch as '[b]itter, unloved, wanted only for the money that their "pelts" will bring...').

⁸⁶ *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)*, [1986] I.C.J. Rep. 15 at para 20 (defining the principle of *uti possidetis* and identifying its purpose as preventing 'fratricidal struggles provoked by the challenging of frontiers').

⁸⁷ E.g. *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine*, UNCHROR, 58th Sess., 39th Mtg., UN Doc. E/CN.4/RES/2002/8 (2002), online: <http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2002-8.doc> ('Affirms the legitimate right of the Palestinian people to resist the Israeli occupation' by any available means).

⁸⁸ There is an accusation of actual and perceived bias in Israel's motion to preclude one of the ICJ judges from sitting on the case (*Legal Consequences*, *supra* note 1). See ICJ, Press Release 2004/4 'Composition of the Court' (3 February 2004) ('Israel contended that [Egyptian] Judge Elaraby, both in his previous professional capacity and in an interview given by him in August 2001 to an Egyptian newspaper, had been "actively engaged in opposition to Israel including on matters which go directly to aspects of the

This is the bleak future foreshadowed in *The Wild Bunch* when the Bunch's leader takes to dressing in a black suit and shoulder holster rather than in cowboy denim and guns at the hip. It is as if the era of the gangster movie, with its gratuitous action and amoral violence, has already arrived to displace the Western.⁸⁹ A world that pretends at idealism and normativity, even if corrupted by circumstances and living in fantasy of an uncorrupted time, is still better than a world that lacks this aspiration altogether. To abandon that pretense would be to lose the self-perpetuating momentum that allows a contradictory legal system and a contradictory nation to move along.

question now before the Court”')

⁸⁹ On the moral distinctions between gangster movies and westerns, see Robert Warshow, 'Movie Chronicler: The Western' in *The Immediate Experience: Movies, Comics, Theater and Other Aspects of Popular Culture* (Garden City, NY: Doubleday, 1962) 151.