[A Jurisprudential Framework for Defending Israel](http://www.algemeiner.com/2015/07/01/dershowitz-a-jurisprudential-framework-for-defending-israel/" \o "Permanent Link to Dershowitz: A Jurisprudential Framework for Defending Israel)

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Another recent United Nations report once again condemned Israel for defending its civilians against rockets fired by Hamas from densely populated civilian areas. Once again Israel responded by releasing information compiled by independents experts. This article attempts to put these issues in a broader jurisprudential context.

The aspiration of every legal system is to be governed by the objective rule of law rather than the ad hoc decisions of biased human beings. What then is the rule of law, as distinguished from the rule of men and women, since all law must, in practice, be administered by fallible humans. The essence of the rule of law — from the Bible, the Codes of Hammurabi and Lipit-Ishtar, to the Magna Carta, to the United States Constitution, to the Geneva Accords — is advanced codification: that is a series of written rules that are designed to be applied equally to all, without knowing in advance who will be perpetrators, who victims and who bystanders.

The great legal philosopher John Rawles made the principle an important part of the legal cannon, where he coined the phrase “veil of ignorance.” In his abstract conception, rules must be written in a nether-world by those veiled in ignorance in what their status will be in the real world to be governed by the rules.

In other words, the writers cannot know whether they will be male or female, gay or straight, white or black, handicapped or fully able, Jew or gentile, handsome or ugly, strong or weak, smart or not so smart, poor or rich, healthy or unhealthy, etc. etc, when they draft the rules that will govern their future conduct.

In this way, they will be incentivized to enact laws that will be fair to all.

This idea was not original with Rawles, though he deserves credit for formulating it in a clever and accessible manner. The idea underlying Rawles’ conception is an ancient as codification, and finds expression in such Biblical concepts as “be kind to strangers, for you were once strangers in the land of Egypt,” with the implication that you may be strangers once again in other lands.

In the United States Constitution, this idea is manifested in the prohibition against Bills of Attainder, which preclude Congress from enacting laws punishing named individuals. All criminal laws must be a general nature, equally applicable to all who come within its prohibitory language. No one is above the law, as courts have repeatedly stated. The principle is also reflected in the prohibition against “common law crimes,” applied retroactively to conduct that was not specifically codified in advance.

How then do these general principles, about which there is universal agreement in theory, apply to the subject of our discussion today? Directly!

The way Israel is being judged today is a dramatic exception to the rule of law and the principles articulated above. Under the current approach, the international community first considers Israel’s actions, in isolation from the actions of other nations; it judges them to be imperfect, when evaluated against abstract rules; it then creates specific rules applicable only to the nation-state of the Jewish people, and to no other nation.

This has clearly been the case with the Goldstone Report, the more recent report by Mary McGowan Davis, the decisions of the International Court of Justice, the resolutions of numerous United Nations bodies, especially the misnamed Human Rights Council, and even the reports of Israeli NGOs such as B’tselem and Breaking the Silence.

These so called applications of the rules of international law all share a common modus operandi: they begin with Israel’s actions rather than with neutral principles of law designed to govern the actions of all nations and groups. They then judge Israel’s actions against unrealistic, anachronistic and abstract principles that could not be, and have never been, applied to other nations or groups. They then condemn Israel, without articulating rules of general applicability.

Consider the following relevant examples: What is the international law governing nations whose civilians are being targeted by rockets being deliberately fired from densely populated civilian areas? One can search the various codes of law without finding a definitive answer to this question. Must the victim nation simply accept the casualties and fear that accompany such rocket fire? May it try to stop the launch of future rockets, even if its preventive actions will inevitably kill some civilians? How many potential civilian deaths are permissible to prevent how many rockets, under the rules of “proportionality?”

What about the risk from terror tunnels dug under its territory with intended exits near civilian areas? Can the known entrances to these terror tunnels that are built in or near civilian homes, mosques, schools, hospitals, or United Nations facilities, be destroyed preventatively? Or must the victim nation wait until the terrorists exit the tunnels at unknown locations?

May a nation that is repeatedly threatened with non-negotiable demands for its complete destruction take preemptive or preventive military action to destroy nuclear facilities that may soon give the threatening nation the ability to carry out its threats with nuclear weapons? Or must they depend on negotiations from which they are excluded.

The international community refuses to address these general issues of great and immediate relevance. They refuse to apply the Rawlsian test veiled in ignorance of whether they will be the aggressor nation or the victim nation. They prefer instead to enact Bills of Attainder against only one specifically named country: the nation-state of the Jewish people.

I’m reminded of an infamous exchange between the great American jurist Learned Hand and Harvard’s bigoted former president A. Lawrence Lowell, who enacted anti-Jewish admission quota because, as he put it, “Jews cheat.” When Learned Hand wrote him, insisting that non-Jews cheat as well, Lowell wrote back: “You’re changing the subject.  We’re talking about the Jews now.”

Well you can’t just talk about Jews, or any other specific groups, when you apply the rule of law. Nor can you talk only about the nation-state of the Jewish people. You must talk about all groups, all nations, and all people when you enact or apply rules of law.

The same analysis is applicable to the BDS movement. As far as I’m aware, none of the advocates of BDS, nor any of the institution that have adopted it, have asked what general criteria should have to be met before BDS is directed against any country. The principle of the “worst first,” is never applied by BDSers. Instead they apply the President Lawrence approach: “We’re talking only about the Jews now.” If general principles were applied to the worst first no boycott movement would reach Israel until the very end of the list.

I suggest therefore the following approach to the BDS movement: whenever and wherever BDS is proposed, an effort ought to be made to apply BDS to the worst first. A document should be provided to the institution, listing the human rights violators in order of the seriousness of their violation and of the inability of its victims to achieve redress from institutions within the state, especially an independent judiciary and media. Topping this list would be nations such as China, Cuba, Iran, Russia, Turkey, Venezuela, Saudi Arabia, Egypt, Pakistan, Belarus, Syria, Lebanon, and Libya.  The list goes on and on, well before it would reach Israel. The idea of singling out Israel for BDS is as incompatible with the rule of law as is the focus of the international community on Israel’s alleged war crimes.

Those who support Israel should not be defending every Israeli action but merely demanding that Israel’s imperfections be assessed in a comparative context, as Learned Hand demanded that President Lawrence do of Harvard students, and as the Bill of Attainder clause and the prohibition against common law crimes demands in the context of the rule of law. Justice must not only be done, but it must be seen to be done and treating Israel differently from other similarly situationed nations undercuts both the rule of law and the quest for justice.