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BLACK FLAG AT A CROSSROADS: THE KAFR QASIM POLITICAL TRIAL (1957–58)

Abstract
A political trial, according to Steven E. Barkan, is a trial revolving around highly publicized legal controversies. In some cases, such a trial may determine fundamental political questions, exceeding the legal realm, which are in debate inside a given polity. The 1957–58 trial related to the 1956 massacre in Kafr Qasim, Israel certainly belongs to this category. The trial established the doctrine of a "manifestly unlawful order" in Israeli military law, contributed considerably to the reshaping of civil–military relations, and influenced the civic status of the Arab minority in Israel. In this article, using hitherto underexamined primary sources, I argue that the most important contribution of the trial, the doctrine of a "manifestly unlawful order," was not only a creation of the bench but also a result of a complicated interaction between the actors present in the courtroom: the defendants, their defense lawyers, the prosecutors, and the judges. Above all, the article shows how the bitter struggle between the two main attorneys helped shape the doctrine of a "manifestly unlawful order," that is, an order that is illegal for a soldier to obey.

> The two main defendants: deputy, commandant
> It was clear at the end of this serious trial
> Were engaged in pitch battle, did not cease to fight
> to find every excuse that their doing was right . . .
>
> All was argued and tried, no stone left unturned . . .
> but still your heart chills, from that thought in your head
> that the weeping of mothers and daughters
> in front of the muzzles, beholden by dread
> failed to evoke even one out of ten,
> of a hundred, of a thousand, of ten thousand parts
> out of (how shall we put it?) the way they embraced
> the extenuating circumstances—incredible wealth
> so defiantly claimed for themselves.
>
> —Nathan Alterman, "After the Verdict," August 1958

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A political trial, according to Steven E. Barkan, is a trial revolving around "hotly contested adversarial actions."[1] Such a trial can retrospectively judge a defeated political system, such as in Nuremberg, or be directed against politically dangerous individuals, "when the state feels itself in jeopardy."[2] In other cases, it may determine fundamental political questions, exceeding the legal realm, which are in debate *inside* a given polity. The trial held in 1957 and 1958 on the previous year's massacre in Kafr Qasim, Israel—in which forty-nine Israeli Arab civilians were killed by border policemen, allegedly because they violated a curfew order—belongs to the third category. The policemen were accused of murder, and their trial, a special court martial, would have considerable ramifications on the development of Israeli judicial history. The Kafr Qasim ruling established the doctrine of a "manifestly unlawful order" in Israeli military law, defining a category of military orders that are illegal for a soldier to obey. The word "manifestly" was key to this doctrine, because soldiers are not usually expected to verify the legality of orders before carrying them out; on the contrary, they are often required to obey all orders, and if one is later determined to be illegal only the commander who gave it is liable for punishment. According to this doctrine, however, if an order is "manifestly" illegal, that is, if its illegality is absolutely clear, soldiers must disobey it or be liable for punishment along with the commander. In addition to playing a central role in defining the category of the "manifestly unlawful order," the verdict of the Kafr Qasim trial contributed to the reshaping of civil–military relations and even influenced the civic status of the Arab minority in Israel.

Surprisingly, the massacre and the seminal trial that ensued have received scant scholarly attention, although a handful of high-quality studies exist. Shortly after the trial, the jurist Moshe Kordov published a rich journalistic account of the proceedings, with lengthy citations from the protocol and verdict.[3] In 1990, after decades of historiographical silence (occasionally broken by brief references to the massacre in general history books), historian Yigal Elam devoted a chapter of his study on the execution of atrocious orders to the Kafr Qasim affair, focusing primarily on the massacre itself.[4] More recently, journalist and linguist Ruvik Rosenthal published an edited volume of interviews and articles related to the affair, including his own in-depth historical study of the massacre, its background, and the court proceedings. Other articles in the collection examine the legal aspects of the doctrine of a "manifestly unlawful order" and the reception of the massacre in Arab, Israeli-Palestinian, and Israeli-Jewish historiography and memory.[5]

Most of these studies focus on the impact of the verdict and its subsequent exegesis rather than on the influence of the courtroom dynamics on this verdict and on the discourse it subsequently generated. In this article, using unpublished sources (including a less censored version of the trial protocol hidden in the personal papers of one of the defense attorneys), I argue that the most important contribution of the trial, the doctrine of a "manifestly unlawful order," was not only a creation of the bench but also a result of a complicated interaction between the actors present in the courtroom: the defendants, their defense lawyers, the prosecutors, and the judges. Above all, we shall see how the arguments of the defense lawyers differed significantly from those of their clients and how the bitter struggle between the two main attorneys helped shape the doctrine of a "manifestly unlawful order."

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THE MASSACRE

The morning of 29 October 1956 began as a normal day in Kafr Qasim, a small Israeli Arab community in the "Triangle," a sensitive zone near the Jordanian border. ʿAli Salim Sarsur, who only one month earlier had begun his studies at elementary school, asked his mother to buy him a notebook on her way back from work. She agreed.[6] ʿAli, however, never received his notebook. His mother, along with forty-eight other Arab villagers, was killed by Israeli border policemen on her way home that evening.

It was the first day of the Suez War, pitting Israel, Britain, and France against Egypt in an armed confrontation over the Suez Canal. The Israeli government was considering a preemptive strike against the Hashimite Kingdom of Jordan, fearing that it might join the war on Egypt's side. The Triangle was home to a significant population of Israeli Arabs, who unlike many had not been forced to leave during the 1948 war and subsequently received Israeli citizenship. Formally defined as citizens, they were perceived by the government, and most of the Jewish population, as a security risk. Placed under military regime, they were subject, among other restrictions, to frequent curfews and strict limitations on their movements. The government feared that they might join forces with Israel's enemies or at least give shelter and other assistance to "infiltrators" from Jordan, often young Palestinian refugees who crossed the border to commit terrorist attacks inside Israel. The Triangle was guarded by the Border Police (Mishmar ha-Gevul), a hybrid force subordinated to the police but often "loaned" to the army for various tasks. One if its major duties was to prevent infiltrators from entering Israel; Arabs who crossed, or were suspected of having crossed, the border from Jordan were often shot on sight by these policemen.[7]

In 1956, Israeli army regulations included the concept of a "manifestly unlawful order" that is illegal for a soldier to obey, but hardly anyone in the military was aware of this fact. It certainly did not prevent the formation of a violent culture of war, reprisals, and counter-reprisals, in which civilians were often killed. Formed during the 1948 war, this culture was slow to fade even after ceasefire agreements were reached in 1949. In August of that year, for example, a southern platoon kidnapped a Bedouin girl in the desert. The platoon commander, known to us only by his first name, Moshe, asked the soldiers to vote on "what to do with her." After a quick deliberation, it was decided to make her the platoon's sex slave. The young girl was brutally raped by many of the soldiers, and then shot by Moshe and his troops to cover the crime. "She was washed," writes Aviv Lavie in *Ha'aretz,* "her hair was cut and she was raped, no one knows how many times. Then she was executed and buried near the military outpost."[8] Moshe was sentenced to fifteen years in prison, though he actually served much less time. Its severity notwithstanding, this affair did not come to the attention of the public.[9]

The prevailing military culture of the time was chaotic and showed little regard for abstract concepts such as the rule of law. The Israeli army was a relatively new force, lacking the rich legal traditions of armies in western Europe and the United States. The structure of authority and the scope of operational freedom given to local commanders were unclear. The Border Police, in particular, was located in a twilight zone of authority between the police and the army. Among the troops, brotherhood in arms was important, Arab lives had little worth, and the feeling of existential danger seemed to justify brutal

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behavior. Arab villagers were subject to the arbitrary whims of military officers, with few rules and regulations to limit their authority over the local Arab population.

On the morning of 29 October, regiment commander Colonel Yissachar (Yischa) Shadmi decided to impose a curfew on the Arab villages near the Jordanian border, to prevent them from "abetting the enemy" as well as to "protect them from the army reservists." As Shadmi did not follow due procedure, the curfew was, formally speaking, illegal. It was, however, related to a top-secret plan named "Operation Mole," which had been drafted two or three months earlier by the army. According to the plan, after hostilities began with Jordan the Israeli Arab villages near the Jordanian border were to be "rapidly occupied by the army, neutralized, isolated from one another and cut off from the Jordanians."[10] In a second scenario detailed in the plan, the Arabs of the Triangle were to be evacuated to enclosures in central Israel until the end of the war. Distant rumors about the plan reached the officers of the Border Police, some of whom erroneously understood it as a scheme to expel the Triangle Arabs to Jordan.[11]

Operation Mole documents remain classified and thus unavailable to scholars, but Ruvik Rosenthal was able to reconstruct the general lines of the plan based on the protocol of Shadmi's trial and some interviews, in addition to other snippets of information.[12] However, the link between Operation Mole and the massacre is still debated. Writers on the Israeli left, such as Gadi Algazi, have argued that the massacre was in fact the first stage of Operation Mole.[13] Algazi based this argument on later claims by some of the defendants that they followed state-sanctioned orders only to be thrown to the wolves by an ungrateful establishment.[14] These arguments can be rejected; Operation Mole did not sanction an expulsion to Jordan, certainly not a massacre, and it was in any case canceled by Major-General Zvi Tsur, chief of the central command, on 28 October.[15]

The influence of Operation Mole on the atmosphere in the Border Police is harder to dismiss. In fact, it was acknowledged by the Border Police itself in a post facto report that "this situation [Mole] had considerable influence on the Kafr-Qasim [affair]."[16] The Border Police's main task, as ordered by Shadmi, was to impose a curfew on the Arab villagers of the Triangle. Had Operation Mole been in force, this would have been the first stage before their expulsion to "enclosures" in central Israel. Following Tsur's command to cancel Operation Mole, however, Shadmi had to cancel the plan to expel the villagers of the Triangle. He did so through orders to his direct subordinate, Major Shmuel Malinki, the Border Police battalion commander whose task was to impose the curfew.[17]

Malinki, however, complicated things. In a highly confusing briefing to the platoon and squad commanders of his battalion, he stated that Mole was canceled until further notice. The task of the battalion was now limited to imposing the curfew as ordered by Shadmi. However, using "double speak," Malinki insinuated that "Mole" was not completely off the stage: Arabs will not be expelled to enclosures in central Israel, but "Mole" would still serve as an organizational blueprint for the imposition of the curfew. The summary minutes of the meeting, taken by Malinki's adjutant a few hours before the massacre, stated that the "division of the [operational] sectors [covered by the troops is] according to 'Operation Mole' . . . The boundaries of the sectors will be established according to 'Mole'. . . road blocks and patrols according to 'Mole'. All other existing tasks are no longer valid, unless ordered otherwise by the battalion." Lt. Gabriel Dahan, the platoon commander who played a major role in the massacre, testified that one of his

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tasks was to "prevent [the] infiltration" of Arabs into Jordan. In other words, he knew that expulsion was no longer part of the plan.[18] Still, Operation Mole engendered an atmosphere of tension and of dehumanization of Arabs in Malinki's battalion.[19]

In any case, with or without "Mole," it was determined that the imposition of the curfew had to be especially strict. Malinki ordered his subordinate officers to shoot any Arab who dared to violate the curfew. His deputy and some of the platoon and company commanders, shocked by his cruelty, were silenced when they tried to challenge the order. The original source of the command, however, was not Major Malinki but his commander, Colonel Shadmi. When Malinki asked him what to do with workers returning late from their fields who were oblivious to the curfew, Shadmi answered with the colloquial Arab phrase: *Allāh yarḥamu* (may God have mercy on their souls).[20] According to virtually all testimonies, Malinki passed the order verbatim to his company and platoon commanders, and even added that women and children must be shot as well. The wounded, he hinted, should be finished off. However, he ended his remarks with a warning that he "does not want any murders, and that the honor of the corps [Border Police] must be upheld."[21]

The curfew began at 17:00. As expected, many farmers, oblivious to the order, came back later from their fields. In most sectors, Malinki's officers circumvented his orders. One of the company commanders, Captain Yehuda Frankental, explicitly contradicted them, telling his subordinates not to shoot anyone without his permission and to instead "escort the Arabs to their homes."[22] Frankental checked that his subordinate officers were actually not shooting the villagers, and in some cases personally saved citizens' lives.[23] Another company commander, Captain Haim Levi, did not dare challenge the order in front of his officers, as Frankental did (i.e., he did not instruct his subordinates not to shoot), but he did prevent the shooting of civilians in practice wherever he was present. He explicitly told a platoon commander, Lt. Benjamin Cole, not to shoot returnees and ordered another, Lt. Aryeh Menashes, "to act flexibly, according to your own discretion," when it was clear that the latter did not want to shoot.[24] A third platoon commander, Lt. Nimrod Lampert, was apparently overcome by his own humane feelings and could not permit his soldiers to shoot Arab civilians they encountered.[25]

Kafr Qasim was under the authority of Captain Levi's company, and here the platoon commander in charge was Lieutenant Gabriel Dahan, an office who openly admitted his hatred of Arabs. Lance Corporal Shalom Ofer, one of his squad commanders, combined similar hatred with an unusual degree of bloodthirstiness.[26] Captain Levi was not present in Kafr Qasim, nor was he consulted by radio.[27] Soon after 17:00, Ofer encountered the first group of returning Arab workers. "Are you happy?," he asked them, and after they answered in the affirmative, he and his soldiers began to mow them down.[28] Ruvik Rosenthal writes of one of the incidents, based on the testimonies of survivors at the trial:

> The policemen forced the driver and workers out of the truck and told them they were about to be killed. The women cried and implored them to let the workers go. The policemen yelled: "We will kill you too." They killed the driver, Mahmud Masarawa from Taybeh, and the three men, Muhammad Diab Sarsur, ʿAbd Allah Sarsur and Muhammad Salim Sarsur. For a time they hesitated over what to do with the women, and one of the soldiers proposed letting them go unharmed. Ofer, however, ordered them all to be shot. The policemen slaughtered them without

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exception, including pregnant women, old ladies and little girls. After the shooting, Ofer said: “Bang them all in the head,” and the policemen shot again the wounded and the slain.[29]

During the massacre, a major named Kotler passed by. Shocked by the scene, he ordered the platoon commander, Lt. Dahan, to stop shooting immediately, yet Dahan refused, quoting his orders.[30] News of the mass slaughter soon reached Major Malinki. The battalion commander, panicked by the magnitude of the massacre, ordered Dahan to stop shooting. When the sun rose over Kafr Qasim, forty-nine of the villagers were dead.[31]

THE TRIAL

The Israeli public is familiar with the Kafr Qasim massacre, mainly because of the pivotal ruling of the special court martial. The proceedings took place from January to September 1957, and the verdict was handed down in August 1958. The three judges, prominent civilian jurists given officer ranks for the occasion, were Colonel Benjamin Halevy (president of the court, later famous as a judge in the Eichmann trial), Lieutenant-Colonel Yitzhak Divon, and Major Yehuda Cohen. The defendants were the battalion commander, Major Shmuel Malinki; the platoon commander, Lt. Gabriel Dahan; Lance Corporal Shalom Ofer, the commander on the ground; and nine rank and file perpetrators: Gabriel Uliel, Albert Fahima, Edmund Nahmani, Avraham Eliyahu, ʿAbd al-Rahman Ismail, Mahluf Harush, Saʿid Zakaria Shaʿban, and Daniel Semnitz. Colonel Shadmi was not a defendant in the trial, but was later judged in a separate proceeding. The defense lawyers for Malinki and Dahan were, respectively, Asher Levitski and Yitzhak Oren, two of the most prominent and experienced criminal jurists in the country. The struggle between these two, as we shall see, largely dictated the courtroom dynamics of the trial. The prosecutors were the attorney general of the State of Israel, Lieutenant Colonel Colin Gillon, and Brigadier General Moshe David, chief prosecutor of the army.

The presiding judges, Halevy, Divon, and Cohen, rejected almost all of the arguments for the defense and condemned the defendants to prison sentences, the severity of which was determined according to rank. Major Malinki was sentenced to seventeen years, and Lt. Dahan and Lance Corporal Ofer each received prison terms of fifteen years; all three were demoted to the rank of private. Six of the rank and file perpetrators were condemned to seven to twelve years, while three others were acquitted.

THE DOCTRINE OF A “MANIFESTLY UNLAWFUL ORDER”

The verdict has become famous in Israeli history due to the doctrine of a “manifestly unlawful order,” according to which some orders should never be followed and that a soldier who follows them is liable to punishment. This doctrine, which first appeared in British common law during the 18th century, had a basis in Israeli law at the time of the massacre.[32] According to Penal Code 34 13 (2), in force at the time, a person shall not be criminally liable for an act “following an order of a qualified authority to which he is bound to obey, unless the order is manifestly unlawful.” The military penal code (1955 edition, article 15) also established that “a person shall not be criminally liable

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according to articles 122 (disobeying an order), 123 (failure to follow an order) and 124 (negligence to follow an order), if it is manifest that the order given to him is unlawful."

But how could a soldier know that an order was manifestly unlawful? In the Kafr Qasim ruling, Justice Halevy established a legal construct, retrospectively called the "black flag test." According to this test, a manifestly unlawful order is one that every reasonable soldier would recognize as such:

> The distinguishing mark of a "manifestly unlawful order" should fly like a black flag above the order given ... Not formal unlawfulness, hidden or half hidden, nor unlawfulness discernible only to the eyes of legal experts.... Unlawfulness appearing on the face of the order itself ... Unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart stony and corrupt, that is the measure of "manifest unlawfulness" required to release a soldier from the duty of obedience.[33]

Because the term "manifestly unlawful order," as interpreted by the judges in the Kafr Qasim trial, has since been incorporated into both military and civil law in Israel, it is easy to forget that in 1956 it was not merely unaccepted but almost unknown among the involved soldiers and officers. If there was a consensus among the defendants, and many of the witnesses, it was that all military commands are legal by definition from the perspective of subordinates. The testimony of Private Shay Amiram, a soldier uninvolved in the massacre, was typical in that regard. When asked by two of the defense lawyers about the legality of the orders, he had the following exchange with them:

> David Rot-Levi [Ofer's attorney]: Considering the orders you received, what did you think you would have to do when encountering these people [the Arabs]?
> Amiram: I believe that the order given to me was very clear on that point. I would have had to kill each and every one of them.
> Rot-Levi: Why?
> Amiram: Because it is an order. I was trained to follow orders ... I was trained to believe that the one who appoints me to a certain post is not the person who told me, "You are placed here!," but his authority is in the name of the state. His authority is as if the state had given [the order]. And if the state decided to give me such an order, is there anything to consider? Maybe because I do not have much information, it is hard for me to understand. I was told to do it, and I did it.
> Levitski [Malinki's attorney]: Say that they told you to shoot in a Kibbutz after five p.m., would you shoot? Let us assume that the Kibbutz does not belong to your political party.
> Amiram: We understood the state of affairs according to the orders given to us. If they had explained to me that shooting into a Kibbutz would help the state, I would have done it.[34]

Thus, Amiram, according to his testimony, would follow even a command to shoot into a Jewish kibbutz, not for fear of punishment, but because the commander, in his view, represents the authority of the state (note also the astounding insinuation by Levitski that it is easier to shoot into a community not associated with your own political party). An even more radical view was expressed by one of the defendants, Private Gabriel Uliel. "Given an order," he confessed to a fellow soldier, "I would have shot my father and family members, because I follow orders."[35]

The extent to which this point of view—that subordinates are required to follow the orders of their superiors in all circumstances—was shared by the higher echelons involved in the massacre is illustrated by the testimonies of Colonel Shadmi and Major Malinki. Shadmi admitted in his cross-examination by Levitski that "until this trial

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I did not know anything about the notion of a reasonable or an unreasonable command. I knew only that there are dictates of conscience."[36] Malinki's point of view, as expressed in his testimony, was similar:

> I saw my order as an order. Not a conventional one, given in normal time and circumstances, but a severe order. The order made sense at that specific time and was far from being a murderous one. There are no murderers in uniform . . . I see him [Shadmi] entirely responsible for the order I received. However, I do not take responsibility for the killing of innocents, if the people who killed them knew they were innocent. I gave the order I had received . . . My conscience was completely clean, because the order I received was clear.[37]

According to Malinki, an order cannot be unlawful from the point of view of military subordinates: "there are no murderers in uniform." If an order is illegal, then the issuing commander (in this case, Shadmi) is responsible. However, in the case of Kafr Qasim, he asserted, the order was neither murderous nor illegal. Rather, it was a severe order directed only against people who were not innocent, who were a security threat. The soldiers should have understood that the people returning from the fields were not a security threat; but the battalion commander refused to take responsibility for the "killing of innocents." Shooting returnees who were oblivious to the curfew was, according to Malinki, a distortion of his order.

Malinki's belief that orders are always legal from the point of view of subordinates was also shared by the officers and soldiers who did not shoot. In a recent interview, most of them argued that they refused the order because it was illegal, but that was many years after the verdict was given and the doctrine of a "manifestly unlawful order" established.[38] During the trial, their testimonies disclosed a very different understanding. Private Shalom Ben Pordo, who did shoot Arabs who tried to run away from the village, spared three women because of humane feelings though he knew that he was violating an expressed, "legal" order. Lt. Aryeh Menashes, who saved the lives of many villagers by ordering his troops not to shoot without an explicit order from himself, "went around the village and shot in the air, once in this street, once in that street, so people would believe that I killed someone." The notion that every order has to be followed, even one involving the killing of innocent civilians, was so rooted that Lt. Menashes had to "cheat" the system in order to avoid it.[39] Another platoon commander, Lt. Benjamin Cole, declared in court that he would have killed as many Arabs as possible if not stopped by his company commander, Captain Levi.[40] Lt. Nimrod Lampert, who refrained from shooting, confessed in the trial that he was "a little bit ashamed to go back to the unit, as in his village no one was killed."[41] The next morning, Ofer boasted about the massacre over breakfast. "You behaved like murderers," Lt. Menashes reproached him, and a row began. Menashes indeed believed that the killing of civilians was tantamount to "murder," but he did not go so far as to claim that the order itself was illegal from the point of view of subordinates.[42]

Even Yehuda Frankental, the only officer who explicitly contradicted Malinki's command, did not have a notion of a manifestly unlawful order. In his recent work, Rosenthal argued that Frankental understood the concept,[43] but the latter's testimony suggests that that was not the case. "There is the order of the commander, but there is also the dictates of one's conscience. I understood the command, but chose to behave according to the dictates of my conscience," he said.[44] For Frankental, it seems, even illegal orders were

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legally binding from the point of view of subordinates. He, however, chose to violate his legal duty in order to obey the "dictates of conscience."

The legal discourse in the courtroom itself contributed considerably to the concept that following an order such as the one given by Malinki is illegal. This discourse originated in large part from the interplay between the defense lawyers. From the outset, Levitski's strategy was to draw a line between his client Malinki and the other defendants. Malinki, according to Levitski, had merely passed along Shadmi's command, which was severe but perfectly legal. It was not a command to murder, and a massacre was never intended. "The order was far from being a murderous one," Malinki said, and "there are no murderers in uniform."[45] True, Malinki admitted that his order was to shoot curfew violators, but this was only the "maximal authority" he gave to his subordinate commanders. They should have restricted the use of this "maximal authority" to curfew violators who were "undermining [state] security" (*pegiʿah ba-biṭaḥon*), for example by helping infiltrators, and not used it against innocent returnees.[46] Building on his client's testimony, Levitski argued that the illegal order was actually issued by Malinki's subordinate Dahan, who "distorted" the command. Levitski did not deny that an order to massacre innocent civilians is a criminal one; rather, he attempted to push the guilt downward from his client to Dahan and the latter's subordinates.[47] "Levitski's strategy to defend Malinki," noted Kordov, "had moved the guilt along to his ten subordinates. Their attorneys strived, in their own turn, to push the burden of guilt back to the commanding officer, Malinki."[48] Indeed, Gideon Hasid, the attorney of three rank and file perpetrators, confidentially wrote to Dahan's attorney Yitzhak Oren that "Asher [Levitski] will not only decline to help us. He will evidently harm our cause."[49]

The case for the junior defendants was most aptly made by Oren, who engaged in an unrelenting struggle against Levitski and Malinki. An astute jurist, Oren immediately noticed the contradiction in Malinki's (i.e., Levitski's) line of defense. On the one hand, Malinki would not change, soften, or reinterpret the command he received from Shadmi; on the other hand, he expected his subordinates to do just that.

> You issued a murderous order, which left no doubt even with your deputy. A murderous order, I say, without limits . . . and now you tell me that you expected others to do the exact opposite? Is that the military doctrine you have learned? . . . You are a man with a Jewish heart, and pretend of having a human heart, as well. Why did you not take it upon yourself, under your own initiative, to change Shadmi's command? You demanded that from Dahan, but you did not do it yourself . . . You expected Dahan, who is much lower than you in rank, authority and understanding, to have more discretion than yourself.[50]

The dispute between Oren and Levitski was over who had the duty to recognize the illegality of the command and who should bear the blame. Oren did not challenge the fact that the "murderous" (*ratsḥanit*) order was, in a sense, unlawful. He simply argued that Dahan (and, by extension, his subordinates) did not have the authority or the knowledge to recognize this illegality and thus that they should not be held accountable. Malinki, who had given the unlawful order, was a senior commander, with a better understanding of the situation. He should have recognized the illegality of the command, and was therefore responsible. Thus, Levitski and Oren, the two prominent defense attorneys, agreed in a sense that a command to murder innocent civilians is unlawful. In that, they greatly differed from their defendants.

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Oren argued that as a result of the wartime conditions and the "disloyalty" of the Arabs, the illegality of the order was so mild as to excuse even the senior commanders who issued it. Left alone, there is no reason to believe he would have emphasized the illegality of the order at all. In the pretrial stages, in fact, he directed his client "neither to work for Malinki, nor against him." He even attempted to visit Malinki in jail in order to plan "a common defense strategy."[51] However, Levitski's strategy to shift the guilt downward from his client Malinki to Oren's client Dahan forced Oren to try to bounce the guilt back to Malinki and therefore to concede, almost reluctantly, that an order to kill innocent civilians is illegal. Indeed, Malinki's defense strategy, dictated by Levitski, infuriated Oren and turned him into a bitter enemy of the battalion commander. "To excuse himself and escape punishment, Malinki is piling lies upon lies," Oren wrote in a personal note after Malinki's testimony. "He is distorting the simple, logical meaning of his own words . . . all beautified interpretations in his testimony are a blatant lie, intended to avoid punishment and throw all guilt on his subordinates."[52]

The "agreement" between Oren and Levitski on this issue, born out of their confrontation, established this illegality as a consensus, one that was also shared by another defense attorney, Gideon Hasid. As the champion for the rank and file perpetrators, he conceded that Dahan's order was illegal, because Dahan (along with Shadmi and Malinki) knew the returning villagers were oblivious to the curfew. The soldiers, however, were helpless and had to obey. Thus, along with Levitski and Oren, Hasid underlined the illegality of the order.[53] The "consensus" that emerged from this confrontation helped to establish that an order to kill innocent civilians is illegal in principle. Only with this presumption was it possible for the court to argue that such orders are unlawful not only from the point of view of the responsible commanders but also from the point of view of their subordinates.

The prosecutor, Colin Gillon, also played a central role in the formation of this consensus. Gillon represented the interests of the political (and, by extension, the military) establishment, and thus one of his main goals was to protect Colonel Shadmi, the originator of the order that led to the Kafr Qasim massacre.[54] In fact, Shadmi, a scion of a prominent military family and a man with strong political ties to the prime minister's office and the Mapam Party, a crucial partner in the coalition, was well protected by Ben-Gurion himself.[55] Gillon, in that sense, functioned as Shadmi's attorney.

Just as Levitski tried to push the burden of guilt downward from Malinki to Dahan, Gillon tried to push it down from Shadmi to Malinki:

> Gillon [to Malinki]: I would like to inform you of the position of the military prosecution. We will ask the court to accept Shadmi's version in its entirety . . . but not yours. And we will argue that Shadmi's order was not dangerous . . . but yours was.
> Malinki: Why only me? Why am I on [trial] and the rest are outside? . . . The fact that they [those in the government] spared Shadmi but not me, it annoyed me and still annoys me, and I will not be silent on that point.
> Gillon: Is it true that you distorted Shadmi's order, that you passed it onto your subordinates in a distorted way?
> Malinki: I believe that the orders I received from Shadmi are exactly the orders I passed on.[56]

Therefore, Gillon also did not dispute the existence of an unlawful order. In fact, as expected, he emphasized this point both in his opening speech and during the trial. For

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the prosecutor, who desperately tried to protect Shadmi during his concluding speech, condemning Malinki and his subordinates was the best way to protect the integrity of the army command and the government as well.

Four key actors in the trial—Oren, Levitski, Hasid, and Gillon—with all their differences, had almost taken for granted that an order to kill innocent civilians is an illegal command. Just as important, the implicit agreement between them was that the army is bound to civilian law.

CIVIL–MILITARY RELATIONS

Is the army bound to civilian law? That seems to have been far from self-evident in 1957. After the war of 1948, the army enjoyed immense prestige, and disregarding civilian law was the norm rather than the exception. Thus, a commander such as Shadmi could say, in his testimony from the witness stand, that as a district commander in wartime he was "responsible" for the lives of the citizens in "his" sector, presumably Jews and Arabs alike. His authority to impose a curfew without legal authority or to order subordinates to shoot curfew violators was self-evident for him. He was the commander, and authority in "his" sector belonged to him.[57]

However, the discourse shared by all jurists in the trial, defense and prosecution alike, was different. The long debate, for example, over whether Shadmi was authorized to impose the curfew or not was held under the basic assumption that such an action has to be carried out according to legal authority as ascribed by civil and military law, not according to the whims of the military commander.[58] As the verdict stated: "There is no Israeli law endowing a wartime commander with authority upon citizens exceeding the aforementioned defense regulations [relevant civil and military regulations about the imposition of a legal curfew]. The dangerous notion that the lives of citizens in wartime are bound to the regional commander must be rejected as illegal."[59]

Addressing the limits of the military commander's authority over human lives, the court was just as unequivocal:

> No one, soldiers and policemen included, is authorized to kill or to order the killing of another person, except in exceptional cases specifically proscribed by law (written and unwritten). No law in the world permits killing "curfew violators" for no particular reason, let alone returnees who happen to enter the curfew zone with no intention to violate it. The law permits the enforcers of a legally imposed curfew, and law enforcement personnel in general, to use the force required to prevent the violation of the law, namely a legally imposed curfew . . . It is clear that intentionally opening fire on human beings can only be a "last resort" . . . A generalized order to fatally shoot every person found outside his/her home during a curfew turns this last resort, which can be legally applied only in exceptional cases and extremely rare circumstances, into a general way to impose a curfew. Such an order demonstrates utter indifference to the principle of "minimal necessary force" and is therefore unlawful.[60]

This paragraph, unlike the famous "black flag" metaphor, used legalistic rather than moral arguments. A command to shoot curfew violators is not only an immoral order with a "black flag" flying over it; it is also unlawful, as its imposition exceeds the authority of the military commander. A commander, regardless of rank, cannot do whatever he or she wishes but remains liable to the civilian law and legal principles

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("minimal necessary force") determined by the judicial system. The Kafr Qasim trial also helped to firmly bind the army to the civilian sphere.

ARE ARABS CITIZENS?

In his 1959 account of the Kafr Qasim trial, Moshe Kordov argued that the marginal status of the Arab minority in Israel must be taken into account when considering the roots of the massacre.

> In Israel, there is an ambiguous and unarticulated attitude towards the Arab minority. No one attempts to define the current attitude.... The disaster of Kafr Qasim, as far as it contains the element of a "misunderstanding", "broken telephone" in the hierarchy, or an attempt of one of the commanders to excel in his duty, could not have come into being but in this atmosphere.[61]

Kordov's arguments were later elaborated by scholars such as Yigal Elam and Ruvik Rosenthal.[62] While by 1956 Israeli Arabs were legally defined as citizens of Israel, in practice they were liable to arbitrary military rule and isolated from the rest of Israeli society. The war of 1948 was not that far in the past, and the feeling that the villagers of the Triangle were enemies rather than citizens was widespread in the army, the Border Police, and the general Jewish population. In Shadmi's trial, Malinki testified that "if he [Shadmi] had shared with me the directions of the higher echelons [in the government] that the Arabs should not be hurt, and treated as Israeli citizens, I would have canceled the order outright. But he said no such thing."[63] In the absence of an order to the contrary, Arabs were enemies, not citizens. In many cases, the very humanity of Arab citizens was questioned. In a conversation the morning before the massacre, Shadmi told Malinki, according to the latter, that it "is even preferable that during the first night some will die" (*she-yelkhu kamah kakhah*, literally "so that some will go like that," a colloquial term denoting carelessness and indifference to human life).[64]

"The protocol of the trial," notes Rosenthal, "alarmingly discloses the atmosphere prevalent among the young policemen towards the Arabs.... The testimonies of the defendants show the hatred and deep suspicion towards Arabs in the Border Police."[65] Shalom Ofer, for example, stated in his affidavit to the court:

> Every Arab I saw while on duty, there was an order to liquidate. It was always explained that Arabs are fifth columnists and enemies of the state ... during conversations in our platoon, operations against the Arab population from 1948 were often mentioned. It was explained that the government's policy was to expel the Arabs from their villages, so the state will not suffer from an enemy within its borders.[66]

Another soldier, David Goldfeld, told the court that "there were rumors [*hitlaḥashuyot*] that there was an intention [on the Israeli army's part] to occupy the Triangle," adding later that the locals were "doubtlessly" enemies and fifth-columnists, no different from the Arabs outside Israel.[67] Rosenthal argues that by using the term "occupy" (*likhbosh),* Goldfeld insinuated that the Triangle, in spite of being formally part of Israel, was enemy territory.[68] A similar attitude was expressed in the first radio update by Lt. Dahan to Captain Levi when the killing began: "One less."[69] Both Malinki and Shadmi, who evidently did not want a large-scale massacre (Malinki stopped it immediately after learning about it), were ready and even willing to witness the death of only a "few"

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(*kamah kachah*) Arabs. "I expected a few [dead Arabs]," testified Malinki, "But fifteen? That's a number."[70]

In Shadmi's second briefing to his platoon and company commanders, one of the officers asked the battalion commander again about the fate of Arabs who were oblivious to the curfew. According to Malinki, the other officers reacted angrily. "Let it be," they said, "Why are you asking nitpicking questions [Yiddish: *klots kashes*]. Now this situation, then that situation. So there will be one [Arab] less."[71] The only exception, again, was Captain Yehuda Frankental, the company commander who changed Malinki's orders and tried to safeguard returnees in the villages under his control. "It is known," he testified, "that not every Arab is an enemy. One must think twice about shooting an Arab, who is a citizen of the state." Still, even Frankental noted that, "We do not believe that the Arabs are 100% loyal."[72]

On the question of illegal orders and that of civil–military relations, as we have seen, the defense, the prosecution, and the bench shared the same basic principles (an order to kill innocent civilians is illegal, and the army has to obey the law of the state) even as they differed on the interpretation and implementation of the principles. However, there was no such agreement on the civil status of Israeli Arabs. While the judges and the prosecutors agreed that they should be treated as Israeli citizens, the defense councils shared the presumption of the defendants that Arabs were enemies of the state. Levitski asked one witness whether the command was to shoot Arabs (*ʿaravim*) or human beings (*anashim*), practically dehumanizing the former.[73] Moshe Schweig, the attorney of five rank and file defendants (Harush, Uliel, Nahmani, Fahima, and Avraham), defined Kafr Qasim as enemy territory. His colleague Oren, the attorney of Lt. Dahan, compared the Kafr Qasim affair to acts of a Jewish holy war (*milḥemet metzṿah*), alluding to biblical stories of the conquest of Canaan (and, implicitly, the killing of locals) and to medieval Jewish laws of war. The inhabitants of Kafr Qasim, he stressed, were not Amalekites (a mythical enemy that Jews are commanded to liquidate), but they were nevertheless part of the so-called "Arab problem"—enemies and not citizens.[74] Echoing the sentiment prevailing in the Border Police, he maintained:

> Suspicion towards Arabs still exists. Saving our lives [*piḳuaḥ nefesh*] permits many things. Arabs are still suspected of being in league with our enemies and are still held in enclosed areas. Therefore, if something like that [the command to kill] was given to them [the defendants] just before a war, it seemed to them reasonable.[75]

Of all the jurists in the trial, Oren was doubtlessly the most well versed in Jewish legal sources. In a personal note, he was even more explicit than in his trial statements with his use of biblical and midrashic references:

> The court asked one of the defendants whether he is familiar with the Ten Commandments. True, he could not forget the prohibition of "Thou shalt not kill," but it is not as simple when he is ordered by the authorities, to which he is bound to obey, when confronted by a border village in which soldiers from beyond the border can hide with fake IDs. Maybe these soldiers are about to start or to reinforce a hostile attack. He must know that in the Torah it is written, as far as the seven nations are concerned, "You shall let nothing that breathes remain alive" (Deuteronomy 20:16) . . . Saul was explicitly ordered by Samuel: "Now go and attack Amalek, and utterly destroy all that they have, and do not spare them. But kill both man and woman, infant and nursing child, ox and sheep, camel and donkey." (1 Samuel 15:3). And Saul began to wonder in his heart if the

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order is just . . . "if the grown men had sinned, what about the little children?" And then a divine voice came and exclaimed: "Do not be too righteous!" (Midrash Yoma 22:72). Because of these musings, Saul was destined to lose his crown.[76]

If that were not strong enough, in a hand-written version of the same note, Oren quoted another biblical verse: "And cursed is he who keeps back his sword from blood" (Jeremiah 48:10).[77]

As we have seen, Oren admitted that the order was illegal, and even called it "murderous" (*ratsḥanit*) in his confrontation with Malinki. Still, he reminded the court that Israel was in a holy war, that its enemies (including the Israeli Arabs) were dangerous, and that in such cases even innocent children may have to be killed, as Saul and Moses were ordered to do. Biblical references endowed these arguments for the acquittal of the soldiers with an air of respectability and even sanctity. According to Oren, the commanders, who issued an illegal order, had to be punished, but only "symbolically." The Arab enemy was entitled only to a weak, ineffective legal protection.[78]

These arguments are more complex than they may seem. In tandem with Oren's strategy to push the guilt upward, his speech against the Arabs had a hidden blade pushed against the government and the ruling elites. "I was not told that the Arabs were tolerable foreigners [*gerim*]," Oren quotes an anonymous soldier, pointing out the hypocrisy of the government. In other words, if you, the leaders of Israel, treat the Arabs as enemies and imprison them in enclosures under military administration, how can you blame a young officer like Dahan who is merely a product of this atmosphere?[79]

This position was confronted head-on by the prosecution. In his opening speech, Gillon argued that the defendants did not shoot enemies nor did they merely massacre defenseless human beings, which would be bad enough. Their victims were "citizens returning home from work, and not dangerous people who could compromise the tasks of the army." They had the right to safely return home "after their daily toil, just like any other resident of the state."[80] In a sense, Gillon echoed the view of the higher echelons. David Ben-Gurion, the man responsible both for granting voting rights to Arabs and for their discrimination under the military administration, declared in the Knesset:

In our Torah it is written that "the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt." (Leveticus 19: 34) . . . However, Israeli-Arabs are not strangers, but citizens with equal rights. As far as human lives are concerned, the civic status of the person makes no difference whatsoever. Every human life is sacred. These two sacred principles were horrendously compromised in this terrible atrocity, and I am certain that the Knesset in its entirety will join my feelings which I tried to express here, and such a thing will never be done in Israel again.[81]

Although Ben-Gurion maintained in this speech that Arabs were citizens with equal rights, their marginal status was implied by the reference to the biblical protection of foreigners. Nevertheless, the concept that Arabs were equal citizens, though certainly not implemented in government policy, existed as an idea, one that was reinforced by Gillon in his concluding speech. Not immune to the anti-Arab notions of the time, he referred to the Arabs as "primitive people," but never as enemies and always as citizens; he even referred to the residents of Kafr Qasim as "everyman from Israel" (*Kol Adam me-Yisraʾel*), a term usually reserved exclusively for Jews:

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The defendants faced citizens of the state, who could not harm the state, innocent people returning to their homes. Whatever we shall argue, anyone encountering such people has to know that it is forbidden to harm them. Article 19 of the [penal] code stipulates that one shall not obey a manifestly unlawful order, and to harm a citizen of the state in such circumstances is manifestly unlawful.[82]

The judges adopted the discourse of civil equality, but not unequivocally. In an exchange with Oren during the trial, President Halevy insisted that "Arabs" must be referred to as "citizens."[83] The term *ezraḥim*, which appears about thirty times in the verdict, has a double meaning: either citizens of a state or civilians (in contrast to soldiers). In almost all of their uses of the term, the judges insisted that even during a war *ezraḥim* must never be harmed intentionally. It is usually unclear whether the meaning was citizens or civilians. This ambiguity was not by chance. The judges were more interested in solidifying basic morality in wartime than in upholding the civic status of Israeli Arabs; unarmed people who posed no threat should not be killed regardless of whether they were citizens of the state of Israel: "Human lives are not fair game, and article 214 of the penal code protects them, whether they are citizens of the state or merely subject to its rule, and even in an occupied territory outside its borders."[84] At one point, though, the court specifically referred to the civic status of Israeli Arabs:

That order was illegal even in wartime. The killing of every person found outside his or her home during a curfew was not necessary for any military purpose . . . "Killing some to frighten others" is not a justified military method. This is a "strong hand" strategy that costs the lives of innocent civilians, in accord with the illegal view of Colonel Shadmi that "the lives of citizens in wartime in a certain region are bound to the regional commander." The lives of citizens during war, let alone in a region without any hostilities, are not bound to the regional commander, and they are certainly not his private property. War has laws that every IDF commander has to respect and follow, and one of them forbids the killing of citizens who take no part in hostilities (see ruling M 1/52 of the specially established court martial). True, this ruling is concerned with enemy citizens in an occupied territory, but it is even more valid for Israeli citizens in Israeli territory.[85]

The civic status of Arabs was not a central issue for the court, which was more concerned with human than with civil rights, yet the explicit reference to Arabs as citizens was clear and meaningful. The Kafr Qasim ruling contributed its share to the reinforcement of a discourse of civil equality.

CONSEQUENCES AND IMPORTANCE

Recently, several scholars and jurists have downplayed the importance of the Kafr Qasim ruling in general and of the "black flag" test in particular. Emmanuel Gross, a military judge and leading legal scholar, wrote in one of his rulings that the Kafr Qasim verdict "is a motley collection of colorful phrases more than a definition of the term 'manifestly unlawful order.'"[86] Ziv Borer noted that there are at least four contradictory juridical doctrines of the "black flag" test and that many orders might be in the gray zone between unlawful and manifestly unlawful.[87]

A more in-depth legal criticism has been offered by Adi Parush. In an argument later echoed by Yigal Elam, Parush maintained that the "black flag" test is problematic because it confuses manifest illegality with manifest immorality. What would have happened,

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for example, if the Knesset had legislated, just before the Kafr Qasim massacre, a law according to which curfew breakers would have to be indiscriminately shot? In that case, black flag or not, this order to kill would be legal.[88] According to Elam, it was a mistake on the part of the court to assume that disobeying a "manifestly unlawful order" should presuppose soldiers who are not "blind" and whose heart is not "stony and corrupt."[89]

This criticism, it seems to me, is too general and theoretical, and it ignores the specific historical context of the "black flag" test in the Kafr Qasim case. It may be true, as Parush writes, that some "black flag" commands may not be unlawful, while some "manifestly unlawful orders" (e.g., stealing fruit for one's commander) do not have a black flag flying over them. Still, the ruling specifically declared the killing of innocent civilians under security pretexts as unlawful from the perspective of superior commands and subordinates alike and, in a way, granted the Arab minority the protection of the law. In this light, it is interesting to consult the verdict again:

> Malinki restricted the term "murder" to the killing of people inside their own dwellings, and by excluding the curfew breakers deprived it of one of its important components. One may add that by using the term "murder" in such a distorted way . . . he did not reinforce the humane restraints among the enforcers of the curfew, but rather weakened them by distorting the term "murder" and permitting the killing of peaceful civilians. Malinki's order created the arbitrary dichotomy between "murder" [*retsaḥ*] of home dwellers and "killing" [*harigah*], allegedly legal, of people found outside their homes. This false doctrine, best expressed in Dahan's order to his soldiers, made them oblivious to good and evil and hardened their hearts to commit abominable murders under the pretext of "keeping law and order."[90]

If anything was clear after the trial, it was that the killing of civilians under the pretext of "keeping law and order" is unlawful, and that criminal liability should be borne by both commanders and executioners. The trial made clear that Arab lives are not fair game and that the army is fully bound to civilian law. The ruling also established, though in a weaker way, that Israel Arabs should be treated as citizens not only de jure but also de facto.

Clearly, neither of these principles was a consensus outside or inside the Israeli army before 1956. Merav Schnitzer-Maimon's study of the Israeli reception of the ruling, the protocol of the trial, and even the academic responses to it unequivocally show that the court's ruling went against the grain. Public opinion did not accept that an order to kill Arabs who violated a curfew is illegal, certainly not "manifestly illegal" in the sense of making subordinate soldiers and officers liable for punishment. In addition, Arabs were almost universally viewed as a security threat rather than as citizens deserving equal treatment.[91] The response of the press to the verdict was thus generally hostile, most military commentators were furious, and at least one legal scholar, Professor Paltiel Daykan, dean of Tel Aviv University Faculty of Law, argued that "Jewish morality" dictates that in a holy war one has to be very lenient toward executors who act in good faith.[92] So rooted was the notion that Arab lives are cheap that the poet Nathan Alterman, one of the most consistent denouncers of the massacre, was moved to write not only that the perpetrators should be imprisoned but also that the "public mood" that made their crime possible had to be eliminated.[93]

Indeed, it would have been easy for the court to reach an altogether different verdict and the ruling was not unanimous even within the tribunal. The minority opinion of

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Justice Major Yehuda Cohen concurred with the verdict convicting the perpetrators and with their sentence, but disagreed with the doctrine of a "manifestly unlawful order." He maintained that owing to the utmost importance of military discipline in an enemy-surrounded country such as Israel, a soldier should not be expected to have the knowledge, nor the authority, to decide whether an order is "manifestly unlawful." As for Kafr Qasim, had military discipline been kept in the first place, an order to kill civilians would not have been even issued, let alone executed. He concedes that in the exceptional case of Kafr Qasim, the perpetrators could not be excused, but he was wary lest this case be used as a precedent to undermine military discipline.[94] Had his opinion been accepted by the majority, it is hard to imagine that the doctrine of a manifestly unlawful order, the most important heritage of the trial, would have as much binding influence on Israeli military culture as it does.

Alternately, the judges could have accepted the arguments of Levitski and excused Malinki because "his order was distorted by his subordinates." In fact, another court, in a subsequent trial, did just that by practically exonerating Colonel Shadmi, the original issuer of the command to kill curfew violators, "punishing" him only with a fine of one Israeli pound.[95] Or they could have accepted Oren's argument, acquitting the subordinates who received a command whose lawfulness they knew nothing about. It would have even been possible to excuse the commanders and subordinates at once, as advocated by both Oren (in his appeal) and Daykan. Numerous arguments were made for such an acquittal by the defense lawyers and other critics of the ruling: the country was at war and in existential danger; "excesses" in wartime are natural and should be tolerated; Israeli Arabs are not real citizens, but an untrustworthy fifth column. After all, as noted by both Oren and Malinki, even boys, girls, and pregnant women could be infiltrators, saboteurs, spies, and terrorists, and therefore it might be necessary, justified, and even mandatory to shoot them. Notwithstanding the condemnations of the massacre by Ben-Gurion and selected journalists, the public atmosphere was so hostile to Arabs and so lenient to the perpetrators that the judges' ruling was truly exceptional.

The ruling became influential, though, because of the cooperation of the military establishment. Indeed, considering the hostile atmosphere in the country, only such cooperation could have turned the verdict into a binding doctrine. After it was approved by the military court of appeals, the IDF Chief of Staff, Lieutenant General Haim Laskov, publically endorsed the new doctrine and formally incorporated it into the army:

> Based on my authority according to the military code of criminal procedure [*hok ha-shiput ha-tseva'i*], I have recently approved the verdict of the military court of appeals that convicted a battalion commander, a platoon commander and a squad commander of the Border Police of murder, and five other privates of attempted murder . . . of 43 innocent, helpless Arab villagers, including seven boys and girls aged 8–14, and nine women, one of them 66 years old. The Kafr Qasim affair atrociously undermined the sublime, humane principles of the sanctity of life and purity of arms, and seriously violated the legislation of the state of Israel. The following letter aims to explain to commanders, and through them to every soldier in the IDF, the implications of the Kafr Qasim affair on the question of military discipline.[96]

In the letter, clearly based on the summary of the ruling, Lieutenant-General Laskov explicitly referred to the doctrine of a "manifestly unlawful order." After several paragraphs on the utmost importance of military discipline, he writes:

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A soldier has to follow every order given by his commander. Upon doing so he is exempted from criminal responsibility for the consequences of his actions. This rule has one exception: a manifestly unlawful order, which the soldier does not have to obey. And if he does nevertheless, he is criminally responsible for the consequences . . . Manifestly unlawful is an order that, clearly to everyone, including a private, stands in contradiction to humane, moral or military values shared by every soldier, regardless of his knowledge of the law or the commands of the General Staff [Pekudot Matkal]. Only if it is clear at first glance that the execution of an order is a crime, causing irreversible damage, is it justified, and mandatory, to disobey a military superior. Such an order is naturally revolting to the conscience and the heart of anyone required to follow it, and its recognition requires no inquiry.[97]

The second principle put forth by the court, the subordination of military commanders to civilian law, was also clearly expressed in the letter. Commanders should obey military law, but the regulations of the army are based on civilian legislation approved by the parliament:

Just like any democratic state with free citizenship, Israel must ensure that the physical power of the state, concentrated in the army, will only be used for the benefit of the nation, and according to the will of the people, as expressed in the laws legislated by its elected representatives, and in the orders of the government and the minister of defense to the chief of the general staff.[98]

The third principle advocated by the court, the civic status of Israeli Arabs, was not expressed in Laskov's letter. The victims were referred to as "helpless, innocent Arab villagers," but not as Israeli citizens.

Although, as Merav Schnitzer-Maimon argues, the Kafr Qasim trial is far from dominant in Israeli memory, its influence on Israeli military culture was dramatic.[99] In May 1959, the chief education officer of the army (*ḳatsin ḥinuch rashi*), Colonel Aharon Ze'ev, ordered army units to explain Laskov's letter to all soldiers as soon as possible. In particular, it was emphasized that a command to intentionally shoot innocent civilians is a manifestly unlawful order.[100] By 1974 (and probably earlier), the Kafr Qasim ruling had been incorporated into the basic training of all Israeli policemen. The notion of a "manifestly illegal order" was emphasized in the curriculum of the basic course in the police academy. By contrast, all mitigating arguments for the perpetrators, so dominant and influential during the trial, had no trace in the curriculum.[101]

The military interpretation of the verdict, as reflected in Lieutenant-General Laskov's letter, maintained that orders to kill Arabs, just like other human beings, are illegal and should never be obeyed. True, there was much hypocrisy here. The military administration of Arab border villages was abolished only eight years later (in 1966), and Arabs continued to face discrimination. In addition, the perpetrators of the Kafr Qasim massacre were quietly released from jail with amnesties, in which both Ben-Gurion and Laskov played a role. However, the notion of a "manifestly unlawful order" became ingrained in military law and the military education system. Brutalities and atrocities against Arabs continued to occur long after 1956, especially during the First Lebanon War and two intifadas. In 1982, for example, the Israeli army failed to prevent a large-scale massacre committed by its Lebanese allies in the refugee camps of Sabra and Shatila. Still, a massacre like Kafr Qasim, in which Israeli soldiers or policemen have shot innocent civilians intentionally and en masse without any threat or military purpose,

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never took place again. That fact is intimately related to the Kafr Qasim trial and its legacy.

NOTES

Author's note: The author is grateful to Mr. Ruvik Rosenthal for access to his private archive, and to Colonel (ret.) Misha Shauli for his information on the police academy curriculum in 1974. The protocol of the Kafr Qasim trial, one of the most important sources for this article, is located in two different archives. The official version is kept in the IDF archives, but an additional, partial copy is held in Tel Aviv University Archives, as part of the Oren Papers. In both places, the protocol is not always well ordered, and some parts are still classified. Some of the classified parts are preserved in the Oren Papers but not in the IDF archives, and others are absent in both places. As a rule, I have used the official version in the IDF archives. For some passages I could not find there, the Oren Papers are quoted instead.

[1] Steven E. Barkan, "Political Trials and the 'Pro Se' Defendant in the Adversary System," *Social Problems* 24 (1977): 324.

[2] Ronald P. Sokol, "The Political Trial: Courtroom as Stage, History as Critic," *New Literary History* 2, no. 3, Performances in Drama, the Arts, and Society (Spring 1971): 497.

[3] Moshe Kordov, *Ahat ʿEśreh Kumtot yerukot ba-Din: Parashat Kefar-Kasem* (Tel Aviv: A. Narkis, 1959).

[4] Yigal Elam, *Memalʾe ha-Pekudot* (Jerusalem: Keter, 1990), 53–71.

[5] Ruvik Rosenthal, ed., *Kefar Kasem: Eruʿim u-Mitos* (Tel Aviv: ha-Kibbutz ha-Meuhad, 2000).

[6] Ibrahim Sarsur, "Ben ha-Sulha ve-ha-Andarta," in Rosenthal, *Kefar Kasem*, 196.

[7] Benny Morris, *Israel's Border Wars, 1949–1956: Arab Infiltration, Israeli Retaliation, and the Countdown to the Suez War* (Oxford: Oxford University Press, 1993), 128–30.

[8] Aviv Lavie, "Uhlat ve-Kuyam," *Haaretz*, 28 October 2005.

[9] Ibid. For an English summary of the research see http://www.guardian.co.uk/world/2003/nov/04/israel1.

[10] Captain Tavor, Batallion Operation Officer, 12 November 1958, "Mivtsa Kadesh," 79/2006–143, IDF Archives, Tel ha-Shomer, Israel (hereafter IDFA).

[11] Col. Shadmi's testimony to Maj. Holder, Military Police, 1 November 1956, Justice (ret.) Yitzhak Oren, Private Papers (hereafter Oren Papers) box 46.27, file 22, Tel Aviv University Archives (hereafter TAUA); Avraham Tamir to Ruvik Rosenthal, Ruvik Rosenthal Private Archive (hereafter RRPA); "Military Prosecutor vs. Major Malinki and others—Protocol of the trial" (hereafter Protocol), session 22, 9 May 1957, IDFA 165/1992–21, p. 16.

[12] Rosenthal, *Kefar Kasem*, 14–16.

[13] Gadi Elgazi, "Me-Yomano shel Tevustan," http://www.defeatist-diary.com/index.asp?p=memories_new10003&period=20/7/2009–30/3/2010.

[14] Ibid; Dalia Kerpel, "Anahnu me-Oto ha-*Kefar*," in Rosenthal, *Kefar Kasem*, 184–85; Rot-Levi to Rosenthal, RRPA.

[15] Shadmi to Holder, 1 November 1956, Oren Papers 46.27/22.

[16] Captain Tavor, Batallion Operation Officer, 12 November 1958, "Mivtsa Kadesh," IDFA 79/2006–143.

[17] Shadmi to Holder, 1 November 1956, Oren Papers 46.27/22.

[18] Rosenthal, *Kefar Kasem,* 25.

[19] Ibid, 39.

[20] Col. Shaham's testimony to Col. Bar-Yosef, 2 December 1956, Oren Papers 46.27/22; Protocol, session 43, 26.6.1957, pp. 7–8, Oren Papers 46.21. Shadmi testified later that he ordered subordinates to "treat courteously law abiding Arabs," and that Malinki did not understand and distorted his orders. That, however, should be seen as post facto apologetics. If it was indeed Shadmi's intention, he clearly did not pass it on correctly. See Shadmi's testimony to Holder, in Oren Papers 46.25/20.

[21] "Military Prosecutor vs. Major Malinki and others—Verdict," 57/3 מר 90 י"ז פ"מ (hereafter Verdict), 140–50, 154–6; Lt. Menashes' testimony to Sergeant Gross, 9 July 1957, Oren Papers 46.27/22; Protocol, session 18, 1 May 1957, p. 7, Oren Papers 46.21.

[22] Protocol, session 18, 1 May 1957, p. 8, Oren Papers 46.21.

[23] Verdict, 167–70.

[24] Ibid, 7. Lt. Cole's testimony to Danai, 17 January 1957, Oren Papers 46.27/22; Protocol, session 43, 26 June 1957, pp. 23, 29, 46.

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[25]Verdict, 170–73.

[26]Rosenthal, *Kefar Kasem*, 46–47. In a handwritten report for his attorney, Dahan wrote that he hated Arabs not because they were Arabs, but because they were enemies. In Morocco, his country of origin, he had "no problems" with them. See "Sipur Dahan," Oren Papers 46.27/22.

[27]Verdict, 173–74.

[28]Rosenthal, *Kefar Kasem*, 28.

[29]Ibid., 31.

[30]Verdict, 120.

[31]Protocol, session 43, 26 June 1957, p. 33, Oren Papers 46.21; Rosenthal, *Kefar Kasem*, 32.

[32]Keighly v. Bell (1896) 176 E.R. 781, 793.

[33]Verdict, 213–14. English translation from Gary D. Solis, *The Law of Armed Conflict* (Cambridge: Cambridge University Press, 2010), 360.

[34]Protocol, session 55, 18 July 1957, pp. 12, 26, IDFA 165/1992–12.

[35]Protocol, session 15, 25 April 1957, IDFA 165/1992:1.

[36]Protocol, session 11, 9 April 1957, p. 41, Oren Papers 46.21/1.

[37]Protocol, session 44, 27 June 1957, p. 21, IDFA 165/1992–23; session 45, 1 July 1957, p. 72 and session 47, 3 July 1957, p. 52, Oren Papers 46.21.

[38]Dalia Kerpel, "ha-Tevah be-*Kefar Kasem*: Anahnu lo Yarinu," *Haaretz*, 5 October 2008, http://www.haaretz.co.il/misc/1.1353519.

[39]Protocol, session 15, 25 April 1957, pp. 87–92 and session 18, 1 May 1957, p. 6, IDFA 165/1992:1.

[40]Verdict, 173–74.

[41]Protocol, session 60, 28 July 1957, p. 33, IDFA 165/1992:25.

[42]Protocol, session 59, 25 July 1957, pp. 17–18, IDFA 165/1992:25.

[43]Rosenthal, *Kefar Kasem*, 26.

[44]Protocol, session 18, 1 May 1957, p. 66, IDFA 165/1992–2.

[45]Protocol, session 44, 27 June 1957, p. 21, IDFA 165/1992–23; session 45, 1 July 1957, p. 72, session 47, 3 July 1957, p. 52, Oren Papers 46.21.

[46]Verdict, 153.

[47]Protocol, session 83, 1 December 1957, pp. 6–9, IDFA 165/1992–15; compare with session 55, 18 July 1957, pp. 12–26, 165/1992–12.

[48]Kordov, *Kumtot*, 101.

[49]Hasid to Oren, 12 June 1957, Oren Papers 46.25/20.

[50]Protocol, session 44, 27 June 1957, pp. 21, 77, IDFA 165/1992–23.

[51]Protocol, session 45, 1 July 1957, p. 72, IDFA 165/1992–23; "Personal Note—Questions to Shadmi," 8 April 1957, Oren Papers 46.27/22.

[52]"Contradictions in Malinki's testimony and confessions," Oren Papers 46.27/22. See also Protocol, session 44, 27 June 1957, pp. 1–11, IDFA 165/1992–23.

[53]Protocol, session 99, 5 January 1958, p. 2, IDFA 165/1992–17.

[54]Protocol, session 2, 25 March 1957, IDFA 165/1992–18, p. 28; session 48, 4 July 1957, IDFA, 165/1992–24.

[55]Rosenthal, *Kefar Kasem*, 43–46; Shadmi to Bar-Yehuda, 26 February 1961, Yad Tavenkin Archive, Ramat Efʿal, Israel (hereafter YTA).

[56]Protocol, session 48, 4 July 1957, pp. 62, 64–70, IDFA 165/1992–24.

[57]Verdict, 184.

[58]Ibid., 185.

[59]Verdict, 91.

[60]Ibid., 90.

[61]Kordov, *Kumtot,* 252.

[62]Elam, *Memalʾe*, 60–61; Rosenthal, *Kefar Kasem*, 50.

[63]"Special Court Martial: Colonel Yissachar Shadmi" (hereafter Shadmi Trial Protocol), vol. 8, p. 71, IDFA 317/1960–11.

[64]Shadmi Trial Protocol, 134–6, 54, IDFA 317/1960–11.

[65]Rosenthal, *Kefar Kasem*, 13.

[66]Protocol, session 56, 22 July 1957, IDFA 165/1992–12, p. 2.

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[67]Protocol, session 22, 9 May 1957, IDFA 165/1992–21, pp. 16, 26, 30–31. Goldfeld also said that "no one told us whether these are citizens or Arabs," expressing the exclusion of the Arabs from the general community of Israeli citizens. See Protocol, IDFA 165/1992–21, p. 9.

[68]Rosenthal, *Kefar Kasem*, 17–18.

[69]Verdict, 106.

[70]Ibid., 156–59.

[71]Ibid.; Protocol, session 43, 26 June 1957, pp. 7–8, 26, IDFA 165/1992–23.

[72]Protocol, session 18, 1 May 1957, pp. 12, 48, IDFA 165/1992–2.

[73]Protocol, session 22, 9 May 1957, p. 7, IDFA 165/1992–21.

[74]Protocol, session 22, 9 May 1957, p. 12, IDFA 165/1992–21.

[75]Oren Papers 46.25/16, pp. 254(12)–257(15).

[76]"What a soldier must think about during hostilities?," Oren Papers 46.25/16.

[77]Ibid.

[78]Oren Papers 46.25/16, 254–5 (12–13), 265–6 (3–4). Oren made a similar argument in his appeal to the Military Court of Appeals. See 46.25/20, 94.

[79]Ibid., 46.25/16, 254–5 (12–13).

[80]Protocol, session 2, 25 March 1957, IDFA 165/1992–18, pp. 21–22.

[81]*Yedioth Ahronot*, 13.12.1956.

[82]Protocol, session 66, 28 October 1957, p. 3, session 82, 28 December 1957, p. 8, Oren Papers 46.25/17; see also Oren Papers 46.35/20, 3–7, 184(3).

[83]Protocol, session 22, 9 May 1957, p. 101, IDFA 165/1992–21.

[84]Verdict, 186.

[85]Ibid., 221.

[86]Ilan Schiff, "be-Zehut Mivhan ha-Degel ha-Shahor," in Rosenthal, *Kefar Kasm*, 124.

[87]Ziv Borer, "Barur ve-galui? Ketsad yezahe Hayal Pekuda bilti-hukit be-ʿalil," *Mishpat ve-Tsava* 17, nos. 1–2 (1994), http://www.law.idf.il/SIP_STORAGE/files/0/310.pdf.

[88]Adi Parush, "Bikoret Mivhan ha-Degel ha-Shahor," in Rosenthal, *Kefar Kasem*, 131–47.

[89]Elam, *Memalʾe*, 59–61.

[90]Verdict, 162. To see how Malinki's and Dahan's interpretations of "murder" influenced the troops, compare with Ben Pordo's testimony, in Protocol, session 15, 25 April 1957, p. 79, IDFA 165/1992:1.

[91]Merav Schnitzer-Maimon, "Ben Zaʿzuʿah le-Shikhehah," in Rosenthal, *Kefar Kasem,* 58–65.

[92]Paltiel Daykan, "Parashat Kefar Kasem be-Aspaklariah historit," *Gesher* 4, no. 21 (1959): 39–45, YTA.

[93]Natan Alterman, "Im Pesak ha-Din," in Rosenthal, *Kefar Kasem*, 230–31.

[94]Verdict, 248–52.

[95]Summary of the verdict in "Military Prosecutor vs. Colonel Shadmi," BDM 5/58, p. 877, attached to Shadmi to Bar-Yehuda, 26 February 1961, YTA. In fact, even the prosecutor, Brig. Gen. Moshe David, did not hold Shadmi responsible for the murders in Kafr Qasim, accusing him of only minor procedural offences. See Shadmi Trial Protocol, p. 11, IDFA 317/1960–11.

[96]Lt. Gen. Haim Laskov, "Igeret le-Mefakdim be-Tsahal," YTA.

[97]Ibid.

[98]Ibid.

[99]Schnitzer-Maimon, "Ben," in Rosenthal, *Kefar Kasem*, 80–81.

[100]Chief education officer (Katsin Hinuch Rashi), information branch, "Rashe Perakim" (May 1959), IDFA 853/1960–57, 704/1960–150.

[101]Police Colonel (ret.) Misha Shauli, discussion with the author, 25 May 2012.

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