

TAB 10

**SOME BASIC OBSERVATIONS ABOUT HOW
A DEMOCRACY SHOULD CONDUCT WAR
ON TERRORISM**

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What is the role of the law in fighting terrorism? To answer this question we should understand the role of law in general, in a civilized society. Law as a code of normative order exists in every type of society, but my attention here is focused on a liberal-democratic regime¹. In a democracy, law might have different roles: first, it reflects the basic norms, the bedrock foundation of the society, an agreement between all members of the society on how to live together. A second role for the law in a democracy is the promotion of the principle of the rule of law. The rule of law is the fountain of democracy. Its true concept must be judged in exceptional times, in times of tension and emergency.

What does the “rule of law” mean in times of emergency? Exceptional times may require exceptional responses. In times of exigency, the government – in order to protect its citizens and ensure the regular supply of the essential services – needs some additional legal tools, such as sending the National Guard or the Army, or spending more money out of the regular budget. One prominent example to this is the case of terrorism. Terrorism

¹ Hereinafter – democracy.

by its nature is the use of force in order to intimidate innocent people.² Terrorism is used by individuals or groups in order to spread their ideas and achieving a political goal of a nationalist, religious, social, or economic nature.³ Targeting people indiscriminately may demoralize and terrify parts of the population; life might veer from its normal course. Thus, dealing with the phenomenon of terrorism may require the government to use special tools which it generally lacks in normal times. Those special legal tools entail a potential risk to our civil liberties, and therefore they could conflict with our constitutional rights.

When we come to delineate the appropriate way for a democracy to conduct its war against terrorism, we first need to determine the applicable law that governs the dispute. The primary difficulty in determining the applicable law is the lack of positive regulation of the status of terrorists in international law.

The international laws of war positively regulate the status of *civilians* and *lawful combatants* during times of hostilities.⁴ However, they do not regulate the status of a third category – *unlawful combatants* – which comprises of people who are not members of the armed forces of the state, but nonetheless take active part in the fighting without distinguishing themselves from the innocent civilian population and without maintaining the international laws of war. Hence, we currently do not have an explicit international

² For a comprehensive discussion regarding the legal definitions and common characteristics of the terrorist act see EMANUEL GROSS, *THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM – LESSONS FROM THE UNITED STATES, THE UNITED KINGDOM, AND ISRAEL* 11-25 (2006).

³ PAUL WILKINSON, *POLITICAL TERRORISM* 12-13 (1974).

⁴ Art. 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) (Aug. 12, 1949), 75 U.N.T.S. 135; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) (Aug. 12, 1949), 75 U.N.T.S. 287.

regulation for the manner in which violent disputes between sovereign states and private terrorist organizations ought to be conducted.

The Israeli Supreme Court – when confronted with that problem – was unwilling to acknowledge this third category of 'unlawful combatants'.⁵ In the court's opinion, this category has not been recognized, at the present time, both in international treaty law and customary international law.⁶ Thus, the court concluded that under the current international law, 'unlawful combatants' are to be recognized as *civilians taking a direct part in hostilities*. In essence, this classification means that as long as they are taking a direct part in hostilities, they do not enjoy the protection granted to a civilian.

I do not agree with the court's opinion. In view of the special nature of the war waged by terrorists, as opposed to the other "classic" participants within the international arena, I believe that they cannot be regarded either as civilians, lawful combatants, or even as freedom fighters.⁷ Terrorists, by the nature of their definition, are principally people who do not regard themselves as subject to legal constraints. They do not balk at any measures that they believe will further their cause. Is it conceivable to classify them as "civilians" or grant them the protections awarded to "combatants", while their declared objective is to take active part in hostilities while breaching the laws of war? So long as these people do not respect the restraining rules imposed by international law in times of

⁵ H.C. 769/02 *Public Committee against Torture in Israel et al. v. Government of Israel et al.* (as yet unpublished, judgment dated 14.12.2006), paras. 27-40. English translation of the judgment may be found at: http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.HTM.

⁶ *Ibid*, para. 28.

⁷ For a similar view, see YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 29 (2004).

war, there is no reason for international law to respect them, protect them, and acknowledge them as lawful combatants.⁸

However, the lack of positive regulation regarding the status of terrorists is only the starting point. We then encounter additional serious questions, such as what are those exceptional legal powers that are needed in times of emergency in order to thwart terrorism? How should we reconcile those unusual powers when they clash with our civil liberties? What is the role of the constitution in those exceptional times – Should we have a separate constitution for times of emergency, as some scholars have suggested recently?⁹

An emergency regime involves seemingly two conflicting interests: a need for security – both personal and national – and a need for preserving civil liberties.¹⁰ A more careful examination will prove that there is no real conflict between these interests, but that they are in fact complementary. One cannot have and enjoy basic human rights without the benefit of security. Security is an important brick in the temple of civil liberties.¹¹ But does it mean that at times of emergency people should forego their basic rights in the name of security? No, the answer should be negative. An emergency regime does not propel a complete halt to civil liberties. A regime that gives preference to security needs while disregarding completely civil liberties is not a real democracy.

⁸ GROSS, *supra* note 2, at p. 50.

⁹ See Bruce Ackerman, "The Emergency Constitution" 113 YALE L. J. 1029 (2004); Bruce Ackerman, "This Is Not a War" 113 YALE L.J. 1871 (2004). For criticism of Ackerman's thesis, see David Cole, "The Priority of Morality: The Emergency Constitution's Blind Spot" 113 YALE L.J. 1753 (2004); Laurence H. Tribe & Patrick O. Gudridge, "The Anti-Emergency Constitution" 113 YALE L.J. 1801 (2004).

¹⁰ Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" 116 HARV. L. REV. 16, 153 (2002).

¹¹ ASA KASHER, *MILITARY ETHICS* 38-39 (3rd ed., 1998). [Hebrew]

Indeed when a threat overshadows our ability to run normal life, common sense dictates a preference to security needs. But with the same logic we should remember that the real need and ultimate test of our constitution as our great protector of human rights, is in time of emergencies. We should be aware that in those exceptional times, there is a normal inclination to let our government do whatever it thinks fits and needed in order to protect us, including suspending our liberties.¹²

Preference to security needs in the name of combating terrorism does not justify the disregarding of basic rights. There is a need for a just and proper balance. Human rights and freedoms in a democracy are not absolute. The state not only *may* limit them in order to allow the fulfillment of competing interests, but sometimes it even *must* do so. The limitation of human rights and freedoms in a democracy is not coincidental or arbitrary. It is rather the product of a careful balance between the competing interests. The balance between clashing interests is one of the main characteristics of a democracy. It raises many complicated dilemmas in ordinary times; but its ultimate challenge is found in times of exigency.

The war on terrorism challenges us to confront hard cases which we never encountered before. If in the past civilians were protected by all sides to the conflict, now only one side is committed to protect them. The other side not only neglects this duty but instead, knowing the moral obligations of democracies, terrorist organizations try to use them to their advantages.

¹² Alexander Hamilton eloquently expressed this public feeling as follows:

"Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civilian and political rights. To be safer, they at length become willing to run the risk of being less free."

Federalist No. 84 (Alexander Hamilton), THE FEDERALIST PAPERS 512 (1961).

But to what extent should a democratic state take on these restrictions? Sometimes we in Israel are accused of depriving those who are suspected of engaging in terrorism from having their day in court by the targeting policy which we apply, or as it is sometimes put, 'extra-judicial killing'.¹³ This argument, though very powerful on its face, fails to hold water. A terrorist is a warrior, a combatant, though an illegal combatant. Now let's turn to the classic warfare rules. According to the customary rules regarding war on the land, any party to a conflict is allowed to kill its enemies based on the doctrine of self-defense, unless the enemy is willing to surrender or is unable to continue fighting for some other reason.¹⁴ Does anyone raise the legality of those killings? Does anybody call them assassinations? Does anybody seriously think that by killing the enemy we deprive him of due process of law, from having his day in court? Why inject due process claims in those situations? Does an enemy – who acts to kill innocent human beings – is entitled to ask not to be killed while he is reluctant to surrender?

If we can agree that in the case of a lawful combatant we are entitled to neutralize him, unless he asks to surrender, then it should certainly not be any different in the case of an illegal combatant, by way of analogy. What moral tenet can demand the refraining of killing a suicide bomber? Or what could be the moral value which would dictate that we sacrifice our soldiers in order to save the lives of the would-be terrorists? The only duty that we should have is to make sure that we are not mistaken about the identity of

¹³ GROSS, *supra* note 2, at 222-223; Jonathan Ulrich, "The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism" 45 VA. J. INT'L L. 1029, 1056 (2005).

¹⁴ See the four Geneva Conventions of 1949 for the Protection of War Victims (Aug. 12, 1949), 75 U.N.T.S. 3. See also YORAM DINSTEIN, *THE LAWS OF WAR* 95 (1983) [Hebrew].

the wanted terrorist.¹⁵ On this point we should demand that the military use procedures and oversight which would increase the accuracy of our intelligence.

Until recently, no judicial tribunal – international or domestic – has ever ruled on this matter. The first precedent regarding the legality of this preventive practice was determined by the Israeli Supreme Court, a few months ago.¹⁶ After examining the normative framework regulating the conduct of the armed conflict between Israel and the terrorist organizations active in Judea, Samaria, and the Gaza Strip, the court has found this practice to be legitimate, so long as two conditions are being fulfilled:

- 1) there is no other less harmful means – i.e., the preemptive strike ought to be used as a last resort; *and*
- 2) the harm to innocent civilians caused by collateral damage during the preemptive strike is proportionate – i.e., the benefit stemming from the attainment of the proper military objective ought to be proportionate to the damage caused to innocent civilians harmed by it.

Another phase of the self-defense doctrine flows from the cruel reality that Israel has faced for the last six years. As we all know, Israel has been engulfed repeatedly by acts of suicide bombers. Those terrorists had arrived within Israel from the West Bank. At that time, there was no separation or a fence between the old armistice line of 1949 and the West Bank. Israel has tried all possible ways to stop these suicide bombers from entering into its territories. Our repeated requests to the Palestinian Authority to stop them were ignored. Consequently, hundreds of innocent Israelis were killed. As a last

¹⁵ GROSS, *supra* note 2, at 236.

¹⁶ H.C. 769/02 *Public Committee against Torture in Israel et al. v. Government of Israel et al.* (as yet unpublished, judgment dated 14.12.2006), *supra* note 5.

resort, the government adopted the advice of the army to erect a separation barrier to prevent, or at least make it more difficult for insurgents to infiltrate Israel.

The separation barrier has been designed to meet the security needs along the Green Line, but in some parts it had entered Palestinian lands. The owners of these lands have petitioned the High Court of Justice, challenging the legality of the confiscation of their property.¹⁷ The Supreme Court overruled their contention that the barrier was erected for political reasons and as a pretext for the real scheme to annex their lands to the State of Israel.¹⁸ On this point, the court adopted the attorney general's argument that the sole reason for erecting the barrier was security needs. Nonetheless, the court accepted the Palestinians' contention that when the barrier had been designed not enough weight was given to the humanitarian needs of the civilians under occupation.¹⁹ The court stressed the importance that the duty of the military commander, who is responsible for this project, is to use a just balance between the needs of security and the need to preserve the basic humanitarian interests of the people who are adversely affected by the barrier. The military commander must be mindful of the consequences of his actions.

The Israeli ruling was issued just a week before the advisory opinion of the International Court of Justice. The opinion of the International Court of Justice found that the security barrier, or the "wall" as it described it, cannot be justified as an act of self-defense, and alternatively that the fence should have been erected along the old armistice border of 1949.²⁰ The advisory opinion of the ICJ totally disregarded the acts of terrorism

¹⁷ H.C. 2056/04 *Beit Surik Village Council v. Government of Israel*, 43 ILM 1099 (2004).

¹⁸ *Beit Surik Judgment*, *ibid.*, paras. 27-31.

¹⁹ *Beit Surik Judgment*, *ibid.*, paras. 49-85.

²⁰ Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ 131 (July 9, 2004), 43 ILM 1009, paras. 121-122.

that preceded Israel's decision to erect the barrier. It made no mention of the murderous acts of the suicide bombers.²¹ It also failed to address the legal responsibility of the Palestinian Authority to stop those acts.²²

The different conclusions reached by the Supreme Court and the ICJ can be explained on the basis of the facts that were presented before each tribunal.²³ While the Supreme Court gathered and assessed the relevant evidence by using an adversarial process, which means that both sides to the dispute submitted relevant evidence, the ICJ based its finding on a file which the Secretary General of the UN provided to the court. We know that this file lacks many important facts, for example, the reasons for the Israeli Government decision to erect the fence. Had the ICJ rendered its decision with the evidence which was brought before the Israeli Supreme Court, the outcome might have been different.

The last subject which concerns a democracy that conducts a war on terrorism is the problem of judicial review. As we have seen, acts of terrorism may disturb the ability of a society to conduct normal life and necessitate a state of emergency. Some scholars hold the view that in those unusual times, the courts should stay away and not interfere with the decisions of the executive branch on how to conduct such a war.²⁴ The old

²¹ Emanuel Gross, "Combating Terrorism: Does Self-Defense Include the Security Barrier? – The Answer Depends on Who You Ask" 38 CORNELL INT'L L.J. 569, 572 (2005).

²² Ibid.

²³ See H.C. 7957/04 *Merabe et al. v. The Prime Minister of Israel et al.* (as yet unpublished), paras. 58-60. English translation of the judgment may be found at:

http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.htm.

²⁴ See primarily Ackerman, "The Emergency Constitution", supra note 9.

saying attributed to Cicero that when the canons roar the muses should be silent²⁵ is neither correct nor should it be followed.

I have started my presentation by pointing to the inevitable tension which exists at times of emergency between the needs of security and the need to preserve civil liberties. The constitution is put on trial especially in those times. It is during such extra-ordinary periods that its power and vitality as the bedrock of our liberties are severely challenged.

This has always been the guiding principle of the Israeli Supreme Court. Even during times of actual combat, the court has been willing to examine the legality of various aspects associated with it. In a long list of judgments, the court has examined the powers of the army, the security services and the legislature during times of combat and the limitations placed upon them by international humanitarian law and domestic law.²⁶ Only recently, the court has examined the constitutionality of an amendment to the Civilian Damages Act which granted the state of Israel immunity from civilian lawsuits demanding compensation for damages caused by the security forces in 'areas of conflict'.²⁷ The primary purpose of the amendment was to prevent lawsuits by the

²⁵ CICERO, PRO MILONE 16 (5th ed., 1972).

²⁶ See, for example: H.C. 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, 58(5) P.D. 385 (judicial examination of the rights of the local population to food, medicine, and similar needs of the population during combat operations); H.C. 3799/02 *Adalah – The Legal Center for Arab Minority Rights in Israel v. Commander of the Central Command, IDF* (as yet unpublished) (judicial examination of the rights of the local population during the arrest of terrorists); H.C. 5591/02 *Yasin v. The Commander of the Ktzi'ot Military Camp*, 57(1) P.D. 403, H.C. 3278/02 *Hamoked: Center for Defense of the Individual v. The Commander of IDF Forces in the West Bank Area*, 57(1) P.D. 385, H.C. 5100/94 *The Public Committee against Torture in Israel et al. v. Government of Israel et al.*, 53(4) P.D. 817 (judicial examination of the rights of the local population during detention and interrogation).

²⁷ The Civilian Damages Act (State Responsibility) (Amend. No. 7), 2005 [Hebrew]; H.C. 8276/05 *Adalla – The Legal Center for Arab Minority Rights in Israel et al. v. The Minister of Defense* (not yet published, judgment dated: 12.12.2006).

Palestinian population for damages caused during the activities of the Israeli security forces in the territories. However, the law intentionally made no distinction between damages caused due to warfare activities and damages caused due to regular law-enforcement activities; and negated state responsibility in both cases. The court determined that the negation of state responsibility to pay civilian damages not only injures the constitutional right to property but also weakens the constitutional rights of the injured person to life, liberty and privacy.²⁸ Such an injury is proportionate when the damage was caused during warfare activity, since the ordinary tort law was not designed to deal with such incidents. However, this injury is not proportionate when the damage was not caused during warfare activity but during regular law-enforcement operations. Hence, the court determined the amendment to be unconstitutional and therefore void.²⁹

This, and the other judgments of the Israeli Supreme Court over the years, have all been guided by the same reason: that there is no other way for a democratic society to preserve its values and the rule of law but by enabling access via an open door to the courts.³⁰ Unfortunately, the response of the U.S. government to the threat posed by terrorism has not been guided by the same reason. In the past years, the government has initiated several statutory reforms that significantly eroded the court's power to conduct an effective judicial review on the measures used by the Executive to fight terrorism.³¹

²⁸ Ibid, at paras. 24-25.

²⁹ Ibid, at para. 42.

³⁰ See, for example, H.C. 769/02 *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, supra note 5, at para. 50: "[t]here is a clear trend in the caselaw of the Supreme Court, according to which there is no application of the institutional non-justiciability doctrine where recognition of it might prevent the examination of impingement upon human rights."

³¹ See, for example, *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272;

Only five months ago, on last October, Congress has passed the Military Commissions Act³², which severely restricts the powers of judicial review of the courts by negating the U.S. courts of jurisdiction to hear or consider *habeas corpus* appeals challenging the lawfulness or conditions of detention of anyone held in U.S. custody as an "enemy combatant". The law applies retroactively, and thus might affect not only future appeals but also the ones already pending before the courts.³³

The erosion of the courts power to conduct meaningful judicial review must not be adopted as a tool to fight terrorism; on the contrary. Closing down the doors of the courts will bring an end to our regime as a liberal democracy. If there is a law, there should be a court to review it. No one is above the law and the courts were designed to make sure that our government is a government that operates within the law; a government of law and not a government of men.

Military Order – Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 16, 2001).

³² Military Commissions Act of 2006, 109 P.L. 366; 120 Stat. 2600 (Oct. 17, 2006).

³³ See Sec. 7 of the Military Commissions Act (Habeas Corpus Matters):

"(a) ... (e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

"(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

(b) Effective Date. – The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."