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JUDICIAL REVIEW OF COUNTER-TERRORISM MEASURES: THE ISRAELI MODEL FOR THE ROLE OF THE JUDICIARY DURING THE TERROR ERA*

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Terrorism has become a global phenomenon. It no longer affects just conflict-torn regions and fragile, hypercleavaged societies. Democracies, old and new, face a real challenge in the twenty-first century: how to maintain their democratic structure and principles, on the one hand, while decisively and effectively responding to the terror threat, on the other. As such, democracies have a constant need to balance democratic values and security. The main responsibility for confronting the danger of terrorism falls to the executive branch, and, to a lesser extent, the legislative branch. Both are accountable to voters and directly responsible for guaran-

^{*} This paper was written during my stay at NYU Law School 2003-2004, as Hauser Global Researcher, Fulbright Scholar and Emile Noel Fellow at the Jean Monnet Center. It was presented at a lecture given at NYU Center on Law and Security on February 2004, as well as at a lecture given at NYU Law School in the 9th Annual Herbert Rubin and Judge Rose Luttan Rubin International Law Symposium—"Foreign Relations Jurisprudence in the Post 9/11 Era" (February 2005).

Please note that this paper was completed and processed for printing before the Supreme Court of Israel decided the case regarding the eligibility of West Bank inhabitants to citizenship (see HCJ 7052/03 [2006] Adalha v. Minister of Interior (Unpublished, available at http://elyon1.court.gov.il/ files/03/520/070/a47/03070520.a47.HTM) (Isr.)). For this reason, the paper will not refer to that important decision. That recent decision is worth by itself a separate analysis.

I wish to thank Joseph Weiler, Stephan Schulhofer, Eyal Benvenisti, Richard Pildes, Roger Zakheim, Roy Sheindorf, Yaron Gotleib, Karen Greenberg, Elizabeth Oliner Justin Florence, and Yoni Rosenzweig, as well as the editors of New York University Journal of International Law and POLITICS, for their most helpful comments and assistance.

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^{1.} For an elaboration on the special role of the legislature via the executive in times of crises, and the role of the judiciary as enforcer of the legislature sovereignty, see Samuel Issacharoff & Richard H. Pildes, Between Civil

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teeing both public safety and democracy. These branches are in charge of identifying the country's needs and hazards, framing a clear policy in response to these threats, and enforcing that policy. At the end of the day, counter-terrorism activity is mostly a combined effort of the executive and the legislature.

The role of the judiciary in the challenge of fighting terrorism, however, is not so obvious, as manifested recently in a number of dramatic decisions of the U.S. Supreme Court.² Indeed, judicial review of the measures and means used by other branches—be it counter-terrorism legislation like the Patriot Act³ or executive counter-terrorism actions and policies like detentions and interrogations—raises many questions: Are these state actions subject to judicial review at all? Are they within the law or should they be considered as an extra-legal domain?⁴ Can the courts decide the proper way to fight terrorism, and even if they can, should they? Do courts have the tools to adjudicate such delicate issues? Will judicial interference burden the fight against terrorism? Should these issues be left to the expert and accountable entities of the state, namely the legislature and the executive? If, after considering these questions, one concludes that courts should adjudicate counter-terrorism activities just as they adjudicate any other state action, there still nevertheless remain questions specific to the war against terror: Which law is applicable to these counter-terrorist activities? Is it the law of war? Or perhaps criminal law? And finally, what is the plausible balance between human rights and public safety in the era of terrorism?

This Article focuses on one case study to address most of these questions—the adjudication of counter-terrorism activities by the Israeli Supreme Court in recent years. It proposes a

Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 Theoretical Inquiries L. 1 (2004).

^{2.} See Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

^{3.} Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

^{4.} See Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 112 YALE L.J. 1011, 1023 (2003) (arguing that war against terrorism can be conducted outside the law and that the executive's actions will be analyzed after the emergency ends); Diane P. Wood, *The Rule* of Law in Times of Stress, 70 U. CHI. L. REV. 455, 459 (2003) (arguing that the war against terror must be within the rule of law).

model for counter-terrorism adjudication, taking into account the special features of the terror problem within the legal context. This Article will show what possible role a Supreme Court can have in times of terror and what theoretical and practical developments in both substantive and procedural law may be adopted in order to preserve the rule of law and national security. I primarily argue that despite the unique characteristics of the "Terror Era," courts are still a crucial element in maintaining democracy and a proper separation of powers within government. The judiciary must not be left aside, for it has an important role in these matters, especially in times of crises. Using the right judicial doctrines and understanding the nature of crisis periods, as well as the limits of the courts, can result in a model of judicial review which, at the end of the day, will reinforce democracy and strengthen its ability to combat its enemies. A possible model of this kind is the jurisprudence of the Israeli Supreme Court in recent years.

The Supreme Court of Israel has dealt many times with questions regarding the role of the Court in the era of terrorism. The State of Israel, since its establishment, has been involved in wars and constant threats to domestic security. Counter-terrorism has become a part of daily reality in Israel. The last years, however, have been particularly severe, even in the abnormal context of Israeli reality.⁵ Since September 2000, Israel has experienced frequent terror attacks, involving suicide bombings of buses, malls, and other public facilities, and deadly ambushes on cars.⁶ Many Israeli citizens have been murdered in these attacks. Thousands more have been wounded.⁷ Israel's economy and the rhythms of daily life have been severely damaged. Without opening discussion on the many dimensions of the Israeli-Palestinian conflict, it seems widely accepted that activities aimed solely at killing innocent

^{5.} See Yuval Shany, Israeli Counter-terrorism Measures: Are They "Kosher" Under International Law?, in Terrorism And International Law: Challenges and Responses 96, 101-02 (Michael N. Schmitt & Gian Luca Beruto eds., 2003), available at http://web.iihl.org/iihl/Album/terrorism-law.pdf.

^{6.} For a detailed description of this background, see Shany, supra note 5, at 100-02.

^{7.} See the description given by the court itself in HCJ 2056/04 [2004], Beit Sourik Village Council v. Gov't of Israel, 58(5) P.D. 807, ¶ 1 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

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civilians should be considered terrorism.⁸ This is the kind of frequent exposure to terrorism that other Western countries dread.

Under this terrorist assault, Israeli security forces—the Israeli Defense Force and other agencies—have taken numerous steps, ranging from border closings to "targeted killings." Many of these counter-terrorism measures were challenged before the Israeli Supreme Court.9 Some of them were declared unlawful; others were ruled permissible.¹⁰ Some decisions were heavily criticized by public officials and public opinion. Others were accepted calmly. All of these cases involved the basic question raised above: what is the proper role of the court in counter-terrorism adjudication? This Article analyzes the answer of the Israeli Supreme Court to this question. I argue that there is a distinct model for the role of the judiciary in a democracy during times of national crisis and the Terror Era. The approach of the Israeli judiciary is unique in comparison with the judges and courts in other democracies¹¹ and is especially remarkable when taking into account the context of the troubling reality in Israel. The Article analyzes this Is-

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^{8.} See Emanuel Gross, Democracy in the War Against Terrorism—The Israeli Experience, 35 Loy. L.A. L. Rev. 1161, 1164-66 (2002) [hereinafter Gross, Democracy in War]; Emanuel Gross, Democracy's Struggle Against Terrorism: The Powers of Military Commanders to Decide Upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and the Declaration of an Area as a Closed Military Area, 30 Ga. J. Int'l & Comp. L. 165, 179 (2002) [hereinafter Gross, Democracy's Struggle] ("There is no doubt that the activities carried out in Israel at present are violent activities carried out by terrorist organizations."); Desmond K. Derrington, The Terrorist Threat: Australia's Response, 13 Ind. Int'l & Comp. L. Rev. 699, 699 (2003) ("Terrorism . . . may be described as an attack on innocent civilian targets for the propose of furthering a political cause"); Shany, supra note 5, at 102. For a wider definition—and its critics—see Kent Roach, The New Terrorism Offences and the Criminal Law, in The Security of Freedom—Essays On Canadian Anti-Terrorism Bill 151, 154-160 (Ronald J. Daniels et al. eds., 2001).

^{9.} See infra Part I.

^{10.} See infra Part I.

^{11.} I do not analyze the broader comparison between the powers and jurisprudence of the Israeli Supreme Court to other courts in various democracies. For an example of such an analysis comparing the Israeli Supreme Court with the United States Supreme Court, see Marcia Gelpe, Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space, 13 Emory Int'l L. Rev. 493 (1999); John T. Parry, Judicial Restraints on Illegal State Violence: Israel and the United States, 35 Vand. J. Transant'l L. 73 (2002).

raeli jurisprudence as a possible model for the role of courts in times of terrorism and heightened counter-terrorism activity. I will not seek to justify these specific decisions or to comment on the larger and more complex aspects of the Israeli-Palestinian conflict; 12 rather, the Article highlights the philosophy of the judicial review in these cases. One might question the relevance of the Israeli experience due to the special Israeli circumstances. Indeed, the Israeli reality is a special one. Other countries might have different views regarding the role of courts in counter-terrorism matters.¹³ These varying stances arise from the constitutional traditions and democratic legacies of those nations and are linked to national histories and previous experiences in times of war or crisis. As a result of these diverging legacies, comparing different countries in this context is not always easy, but it is still essential. As terrorism has become a global phenomenon, the problems it raises are similar from one country to another. All democracies seek the proper balance between human rights and security, all democracies seek a clear definition of the role of courts in times of national emergency, and all democracies can learn from one another. Despite historical differences between countries, comparative law might provide new insights regarding the role courts can play in times of national crisis.¹⁴ In this context, the Israeli model regarding the role of the courts in adjudicating counter-terrorism can offer an interesting and useful comparison, despite the obvious differences between nations.

Part I outlines some of the major cases where the Israeli Supreme Court has reviewed counter-terrorism measures. This

^{12.} For more elaborated research on the different opinions of the Israeli Supreme Court and the administrated territories, see generally David Kretzmer, The Occupation of Justice (2002). I rely heavily on this seminal work, as many of the cases of counter-terrorism were also connected to the administrated territories. There are, however, cases and counter-terrorism activities that are not connected to the administrated territories; these justify a distinct overview. For a further analysis of the legal aspects of Israeli-Palestinian conflict, see also Shany, *supra* note 5, at 97-103.

^{13.} See, e.g., Stephan J. Schulhofer, Checks and Balances in Wartime: American, British and Israeli Experiences, 102 Mich. L. Rev. 1906 (2004); Mary Arden, Human Rights in the Age of Terrorism, 121 L. Q. Rev. 604, 619 (2005).

^{14.} For a discussion on the importance and relevance of comparative law, see Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 110-14 (2002) [hereinafter Barak, *A Judge on Judging*].

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outline will provide a basic knowledge about the different issues brought before the Court and the wide range of cases it has handled, revealing the willingness of the Court to consider almost any case on its merits, regardless of its "operational" or "wartime" character. Part II connects the legal dots among the cases to reveal underlying theories of counter-terrorism adjudication that the Court is advancing. I argue that the Court is willing to review a broad range of counter-terrorism activities and has special legal mechanisms for balancing human rights and public safety. Part III argues that the Israeli Supreme Court's practice is a model for other democracies. I also present parameters for evaluating the Israeli practice and suggest that other democracies might consider the adoption of that model in equivalent circumstances.

I. Legal Challenges to Counter-Terrorism Measures

Analysis of cases is the most effective way to examine the Israeli Supreme Court's perspective in regard to its role in counter-terrorism. Since judges seldom opine on these issues ex-officio, 15 they mostly do so either explicitly in their written opinions or, more subtly, through the outcome of their judgments. Thus, I refer mostly to the cases themselves. 16 I outline some of the main counter-terrorism decisions, especially those since 2000, and I refer to categories of cases based on the specific counter-terrorism measure challenged before the Court. This presentation will enable us not only to get a fair impression of the variety of cases that the Court was willing to address but also of the difficult reality that Israeli society and courts face. It will also show how far-ranging the adjudication of counter-terrorism measures has become. It is important to note that the following discussion does not comprehensively cover all of the hundreds of opinions that constitute the Israeli

^{15.} See id. at 148-60; Dorit Beinisch, The Role of the Supreme Court in the Fight Against Terrorism, 37 Isr. L. Rev. 281, 298 (2004); Aharon Barak, The Role of a Supreme Court in a Democracy and the Fight Against Terrorism, 58 U. MIAMI. L. Rev. 125 (2003).

^{16.} For historical reasons, the Israeli Supreme Court traditionally has been the only court that heard cases against the state in constitutional and administrative matters. Today, some of these cases are heard before District courts, but the more important ones, including most of the counter-terrorism-cases, are still heard by the Supreme Court in the first and last instance. For a further description, see Kretzmer, *supra* note 12, at 10-11.

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court's jurisprudence on these issues. My aim is not to report on all of these cases and the specific developments of the case law, but rather to use some of the cases to highlight the main philosophy of the Court in adjudicating counter-terrorism.

This section is divided according to the different forms of counter-terrorism measures reviewed by the Court: preventive measures such as detention and arrest, assigned residence of inhabitants, house demolitions, and the "separation fence;" interrogation methods; the course of actual combatant activity; provisions for civil liability of the armed forces; and electoral laws banning candidates who support terror activities.

A. Preventative Measures

Perhaps the most obvious counter-terrorism tactic is prevention. Thus, Israeli security forces have exerted a great deal of effort tracing potential terrorists and thwarting their activities. Most of these counter-terrorism methods have been challenged in the Israeli Supreme Court, examples of which I discuss below.¹⁷

1. Detention and Arrest

One of the basic counter-terrorism measures often used by the security services is detention and arrest, mostly in order to prevent future terrorist acts. Israeli legislation provides a specific framework for this activity: administrative detention, which differs from regular criminal detention. Administrative detention is exercised by the executive branch, does not require a prior judicial order, and can be used only for preventing danger rather than as a sanction. Is legality has

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^{17.} I do not address all of the practices challenged in the Supreme Court—such as curfews, blockades or deportations—as it is my goal only to create a baseline for the characteristics of the court's jurisprudence. For other challenges to the court, see Gross, *Democracy in War, supra* note 8, at 1209-14; Gross, *Democracy's Struggle, supra* note 8, at 212-28. For a discussion on deportations, see Kretzmer, *supra* note 12, at 165-86.

^{18.} See Emergency Powers (Detention) Law, 5739-1979, 33 L.S.I. 89-92 (Isr.) (outlining procedure for detention).

^{19.} See, e.g., ADA 10/80 [1980], Kahana v. Minister of Defense, 35(2) P.D. 253, 257-60 (Isr); ADA 4/94 [1994], Ben-Horin v. State of Israel, 48(5) P.D. 329, 333-37 (Isr).

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subsequently been reviewed by the courts.²⁰ In the early 1990s, a group of Lebanese, including some suspected terrorists, were arrested through this administrative detention procedure.21 After some time, however, it became clear that the sole justification for their arrest was the fact that terror organizations were allegedly holding Israeli soldiers as hostages; the Lebanese were detained as "bargaining chips" to use in future negotiations for the release of the Israeli hostages.²² A panel for the Court first held in a 2-1 decision that the administrative detention law authorized detention for reasons of state security and that the possible release of Israeli soldiers satisfied this requirement.²³ This decision was, however, overturned by a 6-3 decision in 2000.24 The Court held that the scope of the term "state security" should be interpreted by balancing human dignity and state security.²⁵ After applying this balancing test, the court ruled that a person cannot be held in detention solely to be employed as a "bargaining chip," nor can he be held responsible for the wrongs of others despite the fact that his detention might be crucial to state security and the return of the Israeli soldiers.²⁶ As a result of this decision, most of the Lebanese detainees were released, although two were kept in administrative detention after it was proven that their release might endanger state security.²⁷

In an ancillary case, the court considered the legality of the state's refusal to allow these Lebanese prisoners visits from the Red Cross.²⁸ Israel refused this access for security reasons,

^{20.} The Emergency Powers (Detention) Law sets a mechanism according to which a detainee must be brought in front of the president of a district court within 48 hours of his arrest, for a judicial review of the detention. A further review of the detention is done every three months by the court. Id. art. 4-5.

^{21.} ADA 10/94 [1997], Anonymous Persons v. Minister of Defense, 53(1) P.D. 97 (Isr.).

^{22.} See id. at 111 (Dorner, J., dissenting).

^{23.} See id. at 109-10.

^{24.} See CrimA 7048/97 [2000], Anonymous Persons v. Minister of Defense, 54(1) P.D. 721 (Isr.).

^{25.} Id. at 740-41.

^{26.} *Id.* at 741-42.

^{27.} See CrimA 5652/00 [2000], Ubeid v. Minister of Defense, 55(4) P.D. 913 (Isr.).

^{28.} HCJ 794/98 [2001], Ubeid. v. Minister of Defense, 55(5) P.D. 769 (Isr.).

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namely because Israel was not given any information about the condition of the Israeli POWs.²⁹ The Lebanese detainees petitioned the court, arguing that they were entitled to these visits.³⁰ The court ruled that the petitioners were indeed entitled to Red Cross visits by balancing state security on the one hand and humanitarian consideration on the other.³¹ As time goes on, the court noted, the weight of the humanitarian interest increases while the weight of the security concern decreases.³² Since the detainees were held for many years, and in light of the humanitarian concern, the Court decided that they were entitled to Red Cross visits despite the lack of reciprocity.³³

In a more recent decision, the court dealt with detentions exercised during the military operation known as "Protective Wall" (or "Defensive Shield").³⁴ This operation, undertaken by the Israel Defense Force (IDF) as a reaction to the bombing of a Passover dinner in an Israeli hotel that killed dozens,³⁵ included searches and arrests of terrorists in the West Bank.³⁶ Throughout the course of the operation, thousands of people were arrested. The prevailing law on which these arrests were based enabled the military to hold detainees without judicial review of their arrest for twelve days.³⁷ Due to the massive numbers of detainees, the law also allowed the military to postpone the initial questioning of the detainees for up to four days after their arrest.³⁸ The court struck down these two pro-

^{29.} Id. at 772-73.

^{30.} Id. at 771-72.

^{31.} Id. at 773-75.

^{32.} Id. at 774.

^{33.} Id.

^{34.} See HCJ 3278/02 [2002], Ctr. for the Def. of the Individual v. IDF Commander, 57(1) P.D. \P 1-2 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{35.} For a more detailed description of the operation and its legal aspects, see Shany, *supra* note 5, at 110-13.

^{36.} The legal basis for these detentions is not the Israeli law, which is not directly applicable to the administrated territories, but rather local law dating back to the British Mandate. *See* Defense (Emergency) Regulations, 1945, Palestine Gazette 1083, art. 111 (Isr.); *see also* Kretzmer, *supra* note 12, at 129-30.

^{37.} Israel Defense Force, Order Number 1505: Detentions in Time of Warfare (Temporary Order), Amend. 2 (June 4, 2002).

^{38.} See HCJ 3239/02 [2002], Marab v. IDF Commander in the West Bank, 57(2) P.D. 349, ¶ 6 (Isr.), available at http://elyonl.court.gov.il/eng/verdict/framesetSrch.html.

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visions. It ruled that prompt judicial review of detention is an inherent part of the legality of the detention measures, especially while the detainee is still presumed innocent, as is the case in most administrative detentions.³⁹ On this basis, the practice of allowing twelve days before judicial review of the detention was declared illegal under international law and Israeli administrative law principles. 40 The court also found the practice of holding detainees for four days with no actual questioning to be illegal on the same grounds, finding this period to be too long a delay for a simple questioning that might show immediately whether there was justification for the detention.41

Following these massive arrests, the detainees were placed in detention camps in the West Bank and in Israeli territory. 42 Petitions were brought to the court by detainees in both camps arguing that the detention conditions were inhumane and in violation of international law.⁴³ They claimed they were held in overcrowded tents, and were exposed to harsh weather conditions with inadequate bedding, a shortage of food, a deprivation of personal belongings, and insufficient medical treatment.44 The court reviewed the factual and legal issues behind each of their claims and found that, although most of the claims were eventually satisfactorily resolved by the detaining authorities, some specific improvement had to be made in order to respect the detainees' human dignity and to meet the standards of international law.45 The Court declared that

^{39.} *Id.* ¶¶ 26-27, 36.

^{40.} See id. ¶¶ 32-36.

^{41.} See id. $\P\P$ 48-49.

^{42.} For the facts of the cases, see HCJ 5591/02 [2002], Yassin v. Commander of Kziot Military Camp, 57(1) P.D. 403, ¶¶ 1-2 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html; HCJ 3278/02 [2002]; Ctr. for the Def. of the Individual v. IDF Commander, 57(1) P.D. 385, ¶ 2 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/frameset Srch.html.

^{43.} See Yassin, 57(1) P.D. ¶¶ 3, 6; HCJ 3278/02 [2002], Ctr. for the Def. of the Individual v. IDF Commander, 57(1) P.D. ¶¶ 3-5 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{44.} See HCJ 5591/02, Yassin v. Commander of Kziot Military Camp, 57(1) P.D. 403, ¶¶ 3, 6 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/ framesetSrch.html; Ctr. for the Def. of the Individual, 57(1) P.D. ¶¶ 3-5.

^{45.} See Yassin, 57(1) P.D. ¶¶ 14-20; Ctr. for the Def. of the Individual, 57(1) P.D. ¶ 28.

some aspects of the detention conditions in the early stages of the camps' operation were therefore illegal.⁴⁶

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Assigned Residence

One of the means used by the IDF in order to prevent suicide bombings was an order of assigned residence. This order, issued under the authority of Article 78 of the Fourth Geneva Convention,⁴⁷ authorized the transfer of an individual from one area within the administrated territories to another.⁴⁸ It was used against family members of suicide bombers, who had allegedly cooperated with and assisted the bombers.⁴⁹ Three petitions were submitted to the Supreme Court, challenging the legality and the factual basis of the orders.⁵⁰

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power. Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

48. The assignment was from the West Bank to the Gaza Strip. One of the points the Court had to address was whether these two territories could be perceived as one territorial unit, rather than as two distinct ones. The later possibility would face the argument that the assignment was actually a deportation and legally problematic under Article 49 of the Geneva Convention. For a critical review of the Court's decision in this aspect, see Eyal Benvenisti, Case Review: Ajuri et al. v. IDF Commander in the West Bank et al. (unpublished manuscript), available at http://www.tau.ac.il/law/members/benvenisti/articals/Ajuri%20et%20al-1.pdf; Shany, supra note 5, at

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^{46.} See Yassin, 57(1) P.D. ¶ 14; Ctr. for the Def. of the Individual, 57(1) P.D. ¶ 26.

^{47.} The article states:

^{49.} See HCJ 7015/02 [2002], Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352, ¶¶ 5, 9, 31-39 (Isr.), available at http://elyon1.court.gov.il/ eng/verdict/framesetSrch.html.

^{50.} See id.

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The Court ruled that Article 78 does enable the military commander to assign the residence of an inhabitant for security reasons. However, this power cannot be used against an innocent person only in order to deter others. It can only be used against a person who himself poses a danger.⁵¹ It is a preventative measure and not a sanction. Furthermore, this action should be used proportionally to the present danger, and only after pursuing less rights-infringing means such as normal criminal proceedings.⁵² Finally, the Court emphasized that the authority needed to have a firm evidentiary basis before moving an individual, and needed to show at least a reasonable possibility that the assignee presented a real threat of danger.⁵³ Following this reasoning, the Court upheld two of the decisions to assign residence.⁵⁴ The Court cancelled another order, finding insufficient evidence of the person's direct involvement in aiding terrorist activity.55

3. House Demolitions

In many cases following a terrorist attack, the IDF demolishes the house of the terrorist.⁵⁶ It does this mainly to deter

^{51.} See id. ¶ 24. A different question was whether the decision could take into consideration whether the outcome would deter others in addition to the individual in question. The court answered this question in the affirmative, holding that the deterrence of other terrorists could be considered along with the deterrence of the individual assignee. See id. \P 27.

^{52.} See id. ¶¶ 24-26. In a later case, for example, the Court noted that the principle of proportionality was properly respected as the length of the assigned residence was proportional to the specific danger of each individual. Furthermore, it held that the assigned residence is less of an infringement upon human liberty than detention and thus its usage is preferred if it achieves the required goal of deterrence. See HCJ 9586/03 [2003], Sulama v. IDF Commander in the West Bank, 58(2) P.D. 342, 346-47 (Isr.).

^{53.} See Ajuri, 56(6) P.D. ¶ 25.

^{54.} Id. ¶¶ 32, 36.

^{55.} Id. ¶ 39. For further consideration of this decision, see Detlev F. Vagts, Ajuri v. Idf Commander in West Bank. Case No. HCJ 7015/02. [2002] Isr.L.Rep 1. Supreme Court of Israel, September 3, 2002, 97 Am. J. Int'l L. 173 (2003). The author notes that "[o]ne wonders whether, if security problems in the United States were to reach the same level of intensity, American courts would do as well." Id. at 175.

^{56.} For the origins of this power in Israeli domestic law and in the administrated territories, see Gross, Democracy in War, supra note 8, at 1204-06.

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terrorists.⁵⁷ This measure is administrative rather than part of any criminal procedure, and is considered severe because it often results in the loss of housing for an entire family, even though the family was not involved in the terrorist activity.⁵⁸ As a matter of practice, the IDF has also used this tactic in cases where the terrorist died or escaped from the country.⁵⁹ In numerous cases, petitioners have requested that the Court cancel these demolition orders.⁶⁰ Upon review, the Court ruled that this counter-terrorism method can be used to deter terrorists but not to punish them, and that no international or domestic law renders the practice illegal.⁶¹ The fact that other people, namely the families of the terrorists, were affected by this action was not found to make the action itself illegal under international law.⁶² However, there are some restraints on the use of this power. For instance, the Court decided that generally there should be a hearing before the execution of the order. 63 Furthermore, this action should be carried out according to principles of proportionality. If it is possible to accomplish the same goal by demolishing only a part of the house or one room, or by sealing the house, then it should not be destroyed.⁶⁴

The "Separation Fence"

The most recent decisions handed down by the Court regarding counter-terrorism measures ruled on the legality of

^{57.} For a general overview of the house demolition practice, including the policy arguments underlying it, and statistical data on its usage, see Brian Farrell, Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119, 28 Brook. J. Int'l L. 871, 884-99 (2003).

^{58.} See, e.g., HCJ 4772 [1992], Hizran v. IDF Commander in Judea and Samaria, 46(2) P.D. 150, 154 (Isr.).

^{59.} See Kretzmer, supra note 12, at 152.

^{60.} See, e.g., HCJ 8575/03 [2004], Azazdin v. IDF Commander in the West Bank, 58(1) P.D. 210 (Isr.); HCJ 8262/03 [2003] Ab-Salim v. IDF Commander in the West Bank, 57(6) P.D. 569 (Isr.); HCJ 8084/02 [2003], Abasi v. Commander of the Homefront, 57(2) P.D. 55 (Isr.).

^{61.} HCJ 6288/03 [2003], Saada v. Commander of the Homefront, 58(2) P.D. 289 (Isr.).

^{62.} HCJ 2977/91 [1992], Muhammed v. Minister of Def., 46(5) P.D. 467, 473 (Isr.).

^{63.} See Kretzmer, supra note 12, at 155-157.

^{64.} See HCJ 5510/92 [1993], Turkeman v. Minister of Def., 48(1) P.D. 217, 219 (Isr.); see also Gross, Democracy in War, supra note 8, at 1206-07.

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the "Separation Fence."65 The Israeli government had decided to build an obstacle to improve and strengthen operational capability in the framework of fighting terror and to prevent the penetration of terrorists from the West Bank, Judea, and Samaria, into Israel.⁶⁶ The purpose of the fence was to prevent the uncontrolled passage of residents of the area into Israel and into Israeli towns located nearby.⁶⁷ The separation fence was also intended to prevent the smuggling of arms, the infiltration of terror cells into Israel, and new recruits from joining existing cells.⁶⁸ In order to build the fence, the Israeli authorities seized large areas of land, mostly Palestinian.⁶⁹

Petitioners argued before the Israeli Supreme Court that the fence was illegal, primarily because it would infringe upon the petitioners' most basic liberties and make access to these agricultural lands difficult if not impossible.⁷⁰ Petitioners' ability to go from place to place would depend on a complex and burdensome bureaucratic permit regime. Use of local water wells would not be possible. Shepherding, which depends on access to these wells, would be made difficult. Tens of thousands of olive and fruit trees would be uprooted. The livelihood of many hundreds of Palestinian families, based on agriculture, would be critically injured.⁷¹ Moreover, the petitioners argued that the separation fence would injure not only landowners to whom the orders of seizure apply but also the lives of 35,000 village residents which would be disrupted.⁷² Access to medical and other services in East Jerusalem and in other places would become impossible.⁷³ Children's access to schools in the urban centers and students' access to universi-

^{65.} HCJ 2056/04 [2004], Beit Sourik Village Council v. Gov't of Israel, 58(5) P.D. 807, ¶ 12 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html; HCJ 7957/04 [2005], Mara'abe et al. v. The Prime Minister, ¶¶ 73-74 (unpublished decision) (Isr.), available at http://elyon1. court.gov.il/eng/verdict/framesetSrch.html.

^{66.} Beit Sourik Village Council, 58(5) P.D. ¶ 12.

^{67.} Id. ¶ 12.

^{68.} Id.

^{69.} Id. ¶ 8.

^{70.} *Id.* ¶ 9.

^{71.} *Id*.

^{72.} Id.

^{73.} Id.

ties would be impaired.⁷⁴ The petitioners argued, thus, that these injuries could not be justified.⁷⁵

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In a detailed decision the court ruled per curium that the petitions should be partly accepted.⁷⁶ The Court pointed out that the commander in charge cannot take into account any political considerations but must ground his decision solely on the balance between the needs of the army on the one hand and the needs of the local inhabitants on the other.⁷⁷ This balance should be done according to the principle of proportionality.⁷⁸ The military decision can be justified therefore only if it meets three conditions. First, the means used must rationally lead to the realization of the objective. Second, the means used must injure the individual to the least extent. Third, the damage caused to the individual by the means used by the army must be of proper proportion to the gain brought about by that means.⁷⁹ In applying this three-part test, the court reached the conclusion that some of the seizure actions were unjustified. The Court rationalized that even if it can be assumed that building the fence would achieve and promote national security, and even if there is no alternative means that is less restrictive, some of the seizure actions were illegal under principals of international law and Israeli administrative law because the damage they caused to the individual was not proportional to the gain brought about.80

The legality of the separation fence was brought again to the Israeli Supreme Court, following the publication of the advisory opinion of the International Court of Justice which declared the fence to be a violation of international law.⁸¹ The Israeli Supreme Court, in a very detailed decision, did not decide to declare the mere building of the fence a violation of

^{74.} Id.

^{75.} Id.

^{76.} *Id.* ¶ 86.

^{77.} *Id.* ¶ 27.

^{78.} See Id. ¶¶ 36-39.

^{79.} See Id. ¶¶ 41-42.

^{80.} See Id. ¶¶ 57-59. For a detailed review of the usage of the proportionality test in this case and its analytical critique, see Moshe Cohen-Eliya, The Formal and the Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence, 38 Isr. L. Rev. 262 (2005).

^{81.} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 43 I.L.M. 1009 (July 9, 2004), *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.

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international law, mainly due to some crucial deficiencies it had found in the advisory opinion of the ICJ.82 However, while reviewing the legality of specific segments of the fence, the Court ruled that one specific segment violated the principle of proportionality and was therefore illegal. The Court opined that the executive could place the fence in a different location that would achieve the same goal of protecting security while infringing upon the Palestinian inhabitants in a less intrusive manner.83

Methods of Interrogation

Often, the most effective way to prevent and fight terrorism is through information from human resources, generally those held in custody. As important as this source of information may be, it also raises questions about the limits on interrogation techniques and methods.

In 1994, a group of petitioners challenged specific methods of interrogation employed by the Israeli General Security Services (GSS).84 These methods included, among others, sleep deprivation and handcuffing for long periods of time. The petitioners argued that these practices constituted torture and were thus impermissible.85 In 1999, in an 8-1 decision, the

^{82.} Though the Israeli Supreme Court did recognize the normative value of the advisory opinion in terms of the current interpretation of international law, it did not follow the ICJ conclusion that the fence was illegal since it found that the ICJ opinion was not based on the same factual basis as the Israeli Court had seen it, both in terms of the necessity of building the fence as well as the amount of harm caused to the Palestinians inhabitants as a result of its construction. See HCJ 7957/04, Mara'abe et al. v. The Prime Minister, ¶¶ 73-74 (unpublished decision) (Isr.), available at http://elyon1. court.gov.il/eng/verdict/framesetSrch.html. For a further critique of the ICJ decision, both in terms of fact finding as well as its legal reasoning, see Emanuel Gross, Combating Terrorism: Does Self Defence Include the Security Barrier? The Answer Depends on Who You Ask, 38 Cornell Int'l L.J. 569 (2005).

^{83.} See id. $\P\P$ 112-114.

^{84.} See HCJ 5100/94 [1999], Pub. Comm. Against Torture in Israel v. State of Israel, 53(4) P.D. 817, ¶ 33 (Isr.), available at http://elyon1.court. gov.il/eng/verdict/framesetSrch.html.

^{85.} As a matter of fact, there were also other petitions of this kind, but in adjudicating those, the Court did not address the core question of the legality of interrogation methods. See Kretzmer, supra note 12, at 135-140. For a general background to the Israeli practice and the legal efforts to challenge it, see Torture—Human Rights, Medical Ethics and the Case of Israel 73-95 (Neve Gordon & Ruchama Marton eds., 1995).

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court declared these practices to be unlawful.86 Without explicitly stating whether these practices amounted to torture,87 the Court held that any infringement of human dignity, and especially of the physical integrity of a detainee, must be proscribed by law. The GSS had failed to point to any legal provision authorizing the use of such methods, and they were therefore declared illegal according to Israeli constitutional and criminal law.88 The Court added, however, that there might be circumstances where an interrogator would act illegally using such methods but would nevertheless have the opportunity to employ a "necessity" defense which, if successful, would excuse his or her actions and avoid the imposition of criminal liability.89

In another case, the Court considered whether the right to a hearing applied during war.⁹⁰ The IDF sometimes demolishes houses of terrorists for immediate security reasons, commonly granting a hearing immediately before the execution of the decree.⁹¹ The Court heard the question of whether this right should also be protected during warfare.⁹² The Court answered that the right to be heard is elementary and basic and therefore also applicable during times of war. 93 However, this right is not absolute and might be overcome by operational needs if the hearing might jeopardize the mission or risk the lives of soldiers.⁹⁴ If there is an operational possibility

^{86.} See Pub. Comm. Against Torture in Israel, 53(4) P.D. ¶ 33.

^{87.} The official Israeli position was that these techniques did not amount to torture. For a critique of this position see Barak Cohen, Democracy and the Mis-Rule of Law: The Israeli Legal System's Failure to Prevent Torture in the Occupied Territories, 12 Ind. Int'l & Comp. L. Rev. 75 (2001).

^{88.} See Pub. Comm. Against Torture in Israel, 53(4) P.D. ¶ 33. An open question is whether the court would uphold or strike down a law which specifically enables the usage of such interrogation techniques. For different opinions in this regard, see Amnon Reichman & Zvi Kahana, Israel and the Recognition of Torture: Domestic and International Aspects, in Torture as Tort: Comparative Perspectives on the Development of Transnational Human RIGHTS LITIGATION 631, 633-43 (C. Scott ed., 2001).

^{89.} See Pub. Comm. Against Torture in Israel, 53(4) P.D. ¶¶ 33-38.

^{90.} See HCI 6696/02 [2002], Amar v. IDF Commander in the West Bank, 56(6) P.D. 110 (Isr.).

^{91.} See supra note 57 and accompanying text.

^{92.} See Amar, 56(6) P.D. at 114.

^{93.} Id. at 114-16.

^{94.} Id.

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to provide a hearing, however, the commander in the field must grant it.95

C. Combatant Activity

Perhaps the most significant cases of counter-terrorism adjudication by the Israeli Supreme Court are those that deal with direct combat activity. In a few decisions, the Supreme Court was asked to rule on the legality of certain fighting strategies and troop movements in real time. These cases demonstrate, again, the intensive involvement of the Court in adjudicating counter-terrorism measures.

In one case, petitioners challenged the usage of flechette shells by the IDF. 96 These shells contain a cluster of steel darts that are dispersed over an area of several hundred square meters upon detonation at a certain altitude.⁹⁷ The petitioners argued that the usage of these shells was forbidden under international law since this kind of weapon does not differentiate between combatants and non-combatants.98 The Court rejected the petition, ruling that this weapon was not banned by any of the conventions that Israel had signed and was not forbidden under international law.⁹⁹

Another challenged provision was a military order that gave the commanding officer the authority to prevent a detainee from meeting with a lawyer for up to thirty-four days. 100 The officer could exercise this authority if he believed that such a meeting would hamper the effectiveness of the interrogation.¹⁰¹ The Israeli Supreme Court upheld this provision, finding that despite the importance of the basic right to an attorney, it is not an absolute one and could be abridged by a significant security consideration, including the risk of damage

^{95.} Id.

^{96.} HCJ 8990/02 [2003], Physicians for Human Rights v. O.C Southern Command, 57(4) P.D. 193, ¶ 1 (Isr.), available at http://elyon1.court.gov.il/ eng/verdict/framesetSrch.html [hereinafter Physicians III].

^{97.} *Id*.

^{98.} See Physicians III, 57(4) P.D. ¶ 2.

^{99.} Physicians III, 57(4) P.D. 193.

^{100.} See HCJ 3239/02, Marab v. IDF Commander in the West Bank, 57(2) P.D. 349, ¶¶ 39, 45 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{101.} See id. ¶ 39.

to an investigation.¹⁰² In the specific circumstances, the Court found the length of the detention to be reasonable.¹⁰³

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In another case, the petitioners challenged the practice of the IDF to ask local Palestinian inhabitants to warn a suspect that he is about to be arrested and that there is a potential harm to him and people surrounding him.¹⁰⁴ The Court decided that this practice was forbidden under international law, noting that there is a rule against the compulsory involvement of civilians in combatant activity of the occupying power.¹⁰⁵ This rule also applies in circumstances where the inhabitant agrees to warn the suspect person. 106 The Court pointed out that there is clear tendency of international law to distinguish civilians from combatants. 107 Furthermore, there is an inherent inequality between the occupying force and the local residents and therefore there is a real risk that the inhabitant's consent will not be real. 108 Finally, the risk imposed upon an inhabitant who will be asked to cooperate is greater than one could expect.109 For these reasons, the Court declared the IDF policy in this regard as unlawful.¹¹⁰

^{102.} See id. ¶ 45.

^{103.} See id. ¶ 46.

^{104.} See HCJ 3799/02 [2005], Adalah v. GOC Cent. Commander IDF (unpublished decision) (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html (search by case number).

^{105.} See id. ¶¶ 21-22.

^{106.} See id. ¶¶ 23-24.

^{107.} See id. ¶ 24.

^{108.} See id.

^{109.} See id.

^{110.} See id. It is interesting to note that the Justices presiding in this case had seen it as a very hard case. Justice M. Chesin had opined in this context that "The subject is a difficult one. Most difficult. So difficult that a judge might ask himself why he chose the calling of the judiciary, and not of another profession, to fill his time." Id. (remarks of Vice President M. Cheshin). For a discussion of the moral and practical problems in the treatment of civilians during counter-terrorism activities, see generally Emanuel Gross, Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?, 16 Emory Int'l L.Rev. 445 (2002) (concluding that inflicting injuries upon innocents is prohibited, however the duty to avoid such harm is not absolute). The author specifically notes that if civilians were forced to march in front of soldiers during military operations in the area, "[s]uch a phenomenon should be condemned and cannot be justified." Id. at 506-07.

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It should be also mentioned that, at the present, there is a pending petition at the Supreme Court questioning the Israeli practice of targeted killing of terrorists. The petitioners argue that this practice is no different from an administrative assassination or an extra-judicial execution and is thus impermissible under international law.

Other cases challenged before the Court involved not tactics and techniques, but rather specific actions taken by the IDF. In one case, for instance, petitioners argued that IDF soldiers opened fire on ambulances which were evacuating injured Palestinians.¹¹³ The Court did not reach a conclusive result on this matter due to factual deficiencies.¹¹⁴ It ruled,

111. In a short decision on this matter, given by a three judge panel, the court decided not to intervene in this policy since the decision about which method should be used for counter-terrorism is a matter for the other branches. See HCJ 5872/01 [2002], Barakeh v. Prime Minister, 56(3) P.D. 1 (Isr.). However, the issue of targeted killing is again being reviewed by the Court, in an enlarged panel of judges. This time, the Court had explicitly asked the parties to submit written arguments on the applicable law and the legality of this method. See HCJ 769/02 [2002], Pub. Comm. Against Torture v. Gov't of Israel (unreported decision) (Isr.), available at http://elyon1.court.gov.il/files/02/690/007/a04/02007690.a04.htm.

112. Much had been written on this issue, both for and against. See, e.g., Gross, Democracy in War, supra note 8, at 1194-1204; Emanuel Gross, Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the States Duty to Protect its Citizens, 15 Temp. Int'l. & COMP. L. J. 195 (2001) (arguing that the Israeli practice can be seen under certain condition as self defense); J. Nicholas Kendall, Israeli Counter-Terrorism: "Targeted Killings" Under International Law, 80 N.C. L. Rev. 1069, 1070 (2002) (Israeli practice should not be considered as impermissible assassinations but rather as legitimate self-defense); Orna Ben-Naftali & Keren R. Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings, 36 Cornell Int'l L.J. 233, 290-91 (2003) (concluding that targeted killings of combatants is permissible under exceptional circumstances, while targeted killings of non-combatants is impermissible); George Nolte, Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order, 5 Theoretical Inquiries L. 111 (2004) (discussing whether modern law should define differently the concept of "immediacy," and hence the legality of preventive attacks or targeted killings).

113. See HCJ 2117/02 [2002], Physicians for Human Rights v. Commander of the IDF Forces in the West Bank, 56(3) P.D. 26, ¶ 1 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html [hereinafter Physicians I]; see also HCJ 8990/02 [2003], Physicians for Human Rights v. O.C. Southern Command, 57(4) P.D. 193 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

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^{114.} See id. ¶ 4.

however, that this kind of practice, if it existed, would be impermissible under international law unless it were shown that the ambulances were a camouflage for terrorist activity. 115

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A few cases were brought before the court about the curfew around the Church of Nativity in Bethlehem. During fights in that city, a group of Palestinian terrorists had entered the Church of Nativity, which was populated by many church clergy and Palestinian civilians.¹¹⁶ In the first case, the petitioners argued that there was a shortage of water and food in the church.¹¹⁷ The Court ruled that there was no shortage.¹¹⁸ In the second case, the petitioners argued that the curfew was illegal since innocent people were being held in the church as well.¹¹⁹ The court rejected the petition because there was no evidence that any civilian in the church was not allowed to leave the area on his free will. 120 The Court noted again that there was no shortage of food or water in the church. 121 Eventually, an international compromise brought the curfew to an end, and the civilians were released and the terrorists were deported to European countries.¹²² At that point, an additional petition was submitted to the court, this time by an Israeli civilian whose relatives were killed and injured by one of the terrorists who was released from the church, asking the Court to order the Israeli Minister of Justice to request the extradition of these terrorists from the European countries that hosted them.¹²³ The Court rejected the request because the interna-

^{115.} See id. ¶ 9. In a previous case on the same matter, the court noted the duty of the IDF to issue sufficient guidelines for its soldiers regarding the special international law status of medical units. See HC[2936/02 [2002], Ass'n of Physicians for Human Rights v. Commander of IDF Forces in the West Bank, 56(3) P.D. 3, 5 (Isr.) [hereinafter Physicians II].

^{116.} See HCJ 3436/02 [2002], La Custodia Internazionale di Terra Santa v. Gov't of Israel, 56(3) P.D. 22, 24 (Isr.); HCJ 3451/02 [2002], Almandi v. Minister of Def., 56(3) P.D. 30, ¶ 11 (Isr.), available at http://elyon1.court. gov.il/eng/verdict/framesetSrch.html.

^{117.} La Custodia Internazionale di Terra Santa, 56(3) P.D. at 23.

^{118.} Id. at 24.

^{119.} See Almandi, 56(3) P.D. ¶ 11.

^{120.} See id. ¶ 11.

^{121.} See id.

^{122.} HCJ 10223/02 [2003], Fish-Lifschitz v. Attorney-General, 57(3) P.D. 517, ¶ 52 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/frameset Srch.html.

^{123.} See id. ¶ 3.

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tional agreement was a matter of Israeli foreign policy in which the Court had no basis for intervening. 124

D. Civil Liability

It is important to note that the legal influence on counterterrorism activities does not always concern cases of actual fighting or combating.

For instance, a different set of cases confronted by the Supreme Court involved the civil liability of the state for counterterrorism measures taken by Israeli security forces. Many Palestinians were killed and injured by the activities of Israeli forces in the West Bank between 1987 and 1993. In some cases, it was argued that the shootings were not justified and were, in fact, negligent because the victims were innocent civilians. 125 The state claimed sovereign immunity from some of these suits and others arising from "actions of war." 126 The Court first ruled that the term "war" can include counter-terrorism activities with the exact scope of the term to be decided on a case-by-case basis. 127 However, counter-terrorism actions are not inherently immune from civil liability, the Court decided.¹²⁸ In that specific case the Court held that the shooting of a Palestinian was not done in a battle situation presenting actual danger to the Israeli force. 129 Therefore the Court found no justification to grant the state immunity. 130

In other important decisions, the Court ruled on the required burden of proof for tort litigation of counter-terrorism activity.¹³¹ The Court declined to adopt a rule holding that

^{124.} See id. ¶ 5.

^{125.} See, e.g., CA 1071/96 [2004] El-Abed v. State of Israel (unpublished decision) (Isr), available at http://elyon1.court.gov.il/files/96/710/010/ p04/96010710.p04.pdf; CA 6521/98 [2000] Buatna v. State of Israel (unpublished decision) (Isr), available at http://elyon1.court.gov.il/files/98/210/ 065/a11/98065210.a11.pdf.

^{126.} See, e.g., El-Abed $\hat{\mathbb{I}}$ 11; CA 1354/97 [1997] Mahmud v. State of Israel (unpublished decision) (Isr.), available at http://elyon1.court.gov.il/files/ 97/540/013/a07/97013540.a07.pdf; CA 5964/92 [2002], Uda v. State of Israel, 56(4) P.D. 1, 9 (Isr.).

^{127.} *Uda*, 56(4) P.D. at 8-9.

^{128.} Id.

^{129.} Id. at 9.

^{131.} CA 2176/94 [2003], State of Israel v. Tabanja, 57(3) P.D. 693 (Isr.); El-Abed.

the state always bears the burden to prove that the shooting was justified.¹³² In a more recent case the Court ruled on the relevant standard of care that must be taken in a negligence case during counter-terror and war activity.¹³³ The main question was whether the standard of care varies between wartime and peacetime.¹³⁴ The Court ruled that the mere existence of an emergency does not necessarily change the standard of care.¹³⁵ Nevertheless, circumstances of stress, danger, and risk are relevant in assessing liability.¹³⁶ In that specific case, the Court ruled that injuries sustained while security forces were breaking apart a violent demonstration constituted negligence. The soldiers were not in danger, and they were firing harmful ammunition in the dark without sufficient warning even though more proportional and less hazardous ammunition and methods were available.¹³⁷

E. Electoral Laws

A more remote issue involving counter-terrorism adjudication in the courts was the decision of the Elections Committee to ban the participation of a list of candidates as well as a few individual candidates from the 2003 Knesset elections. The Elections Committee took this action based on a finding that these candidates supported the combat activities of terrorist organizations. The Court ruled that although the Israeli Basic Law allows such a ban, 140 it should be exercised only in

^{132.} CA 2176/94 [2003], State of Israel v. Tabanja, 57(3) P.D. 693, 700 (Isr.); *El-Abed* § 17.

^{133.} CA 5604/94 [2004], Hamed v. State of Israel, 58(2) P.D. 498 (Isr).

^{134.} Id. at 508.

^{135.} Id. at 508-09.

^{136.} Id. at 508.

^{137.} Id. at 513-14.

^{138.} The Elections Committee held three days of hearings regarding this issue in December 2002. *See Protokolim shel Diyune Vaadat HaB'chirot [Minutes of the Deliberations of the Central Elections Committee]* (Dec. 29-31, 2003), available at http://www.knesset.gov.il/elections16/heb/protocols/menu.htm.

^{139.} See id.; see also CA 11280/02 [2003], Cent. Election Comm. v. Tibi, 57(4) P.D. 1, 32-33, 43-46 (Isr.).

^{140.} Basic Law: The Knesset, art. 7A, amend. 35, 5762-2002, 1845 S.H. 440 (Isr.), available at http://www.mfa.gov.il/mfa/go.asp?MFAH00h80 (Isr.) ("A candidates list shall not participate in elections to the Knesset, and a person shall not be a candidate for election to the Knesset, if the goals or actions of the list or the actions of the person, expressly or by implication, include one

extreme situations where the candidates' support for terrorists was decisively proven.¹⁴¹ The Court found insufficient evidence in all cases and hence allowed these candidates to participate in the elections. 142

THE UNDERLYING THEORY: WAR WITHIN THE LAW

What do these cases, collectively, reveal? They show a clear tendency by the Court to adjudicate almost any aspect of counter-terrorism, as well as a willingness to nullify important executive actions. The Israeli court not only hears cases concerning ex post activities, but also considers policies on an ex

of the following: (1) negation of the existence of the State of Israel as a Jewish and democratic state; (2) incitement to racism; (3) support for armed struggle by a hostile state or a terrorist organization against the State of Israel."). For previous usages of this constitutional provision, in cases where the political party was considered as an-democratic or racial, see Raphael Cohen-Almagor, Disqualification of Lists in 1988 and 1992: A Comparative Analysis, in Law Justice and the State II 88, 88-103 (Michel Troper & Mikael M. Karlsson eds., 1995); Raphael Cohen-Almagor, Disqualification of Political Parties in Israel: 1988-1996, 11 Emory Int'l. L. R. 67 (1997).

141. See Tibi, 57(4) P.D. at 27. It should be noted that the possibility to disqualify a list of electoral candidates within a democracy is not an obvious one. See generally Yigal Mersel, The Dissolution of Political Parties: The Problem of Internal Democracy, 4 Int'l. J. Const. L. 84, 84-87 (2006). Some countries -Germany for instance – grant the Constitutional Court the power to dissolve a non-democratic political party. See Donald P. Kommers, The Constitu-TIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 217-24 (2d ed. 1997). A similar authority exists in Spain. See Katherine A. Sawyer, Rejection of Weimarian Politics or Betrayal of Democracy?: Spain's Proscription of Batasuna Under the European Convention on Human Rights, 52 Am. U. L. Rev. 1531, 1534-35 (2003); see also Leslie Turano, Spain: Banning Political Parties as a Response to Basque Terrorism, 1 Int'l. J. Con. L. 730, 730-31 (2003). However, England and the United States are examples of countries which lack this authority. For a comparative analysis of this phenomenon, see Dan Gordon, Limits on Extremist Political Parties: A Comparison of Israeli Jurisprudence with That of the United States and Germany, 10 Hastings Int. & Comp. L. Rev. 347 (1987).

142. See Tibi, 57(4) P.D. at 43-45, 50-51. It should be noted that the decision in that case was not unanimous, and some Justices joined a minority opinion finding that there was sufficient evidence to ban Azmi Bishara and the Balad Party due to their support of terror activity or the negation of the Jewish-democratic character of the state of Israel. See id. at 69-73 (Sternberg-Cohen, J., dissenting with respect to Bishara and Balad Party), 81-82 (Levine, I., dissenting with respect to Bishara and Balad Party), 100-04 (Terkel, I., dissenting with respect to Bishara and Balad Party), 109-13 (Levy, J., dissenting with respect to Bishara and Balad Party).

ante basis. 143 It does not limit the scope of its review to procedural aspects; instead, it rules on delicate issues of combatant activities and interrogation conditions. These decisions and this spectrum of cases, however, do not by themselves make this Israeli jurisprudence a coherent model. Further analysis is needed in order to better understand these rulings and their reasoning. Hence this Part focuses on the main features of Israel's model of counter-terrorism adjudication.

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A. The Starting Point: Rule of Law

Perhaps the most basic question that the Israeli Court has addressed is the normative framework of counter-terrorism. On numerous occasions the court has ruled, and clearly so, that the war against terror must be fought within the rule of law and not outside of it:

This combat is not taking place in a normative void. It is being carried out according to the rules of international law, which provide principles and rules for combat activity. The saying, "when the cannons roar, the muses are silent," is incorrect. Cicero's aphorism that laws are silent during war does not reflect modern reality.¹⁴⁴

The Court used this language despite the fact that the terrorists aim to destabilize the democratic social order of freedom, liberty, and human rights. The idea behind the concept of "war within the law" is that since terrorism is an attempt to break the law and disrupt the public order, the fight against terrorism must be a war fought by the law itself against the forces threatening it.145 Furthermore, this fight can be conducted only according to the rule of law because "[t]he power of society to stand against its enemies is based on its recognition that it is fighting for values that deserve protection. The

^{143.} See H.C.J. 4764/04 [2004], Physicians for Human Rights et al. v. Commander of the IDF Forces in the Gaza Strip, 58(5) P.D. 385, ¶ 15 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html [hereinafter Physicians IV] (Barak, J.).

^{144.} H.C.J. 3451/02 [2002], Almandi v. The Minister of Def., 56(3) P.D. 30, ¶ 9 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/frameset Srch.html.

^{145.} *Id.* ¶ 9.

rule of law is one of these values."146 The Court maintains that its proper role in a democracy is to protect the formal and substantive rule of law. It should enforce the law against all state actors, be they legislative or executive, and it should maintain the proper protection of human rights.¹⁴⁷ The Court should, at the same time, balance these principles, rights, and values with the interests of state security and public safety. Judges have a duty to balance national security and human rights, in times of peace and of war.148 Terrorist actions and counter-terrorism activity are not exceptions to the rule, but rather a more difficult case, as the terrorists do not respects the laws of war. Difficult as it is, the essence of the Court's role may be greater in dire times, when long-term values and principles tend to be pushed aside, not always justifiably, for short-term measures supported by public opinion. The Court is aware that its decisions might not be popular, but this concern does not dilute its duty to protect democratic values and the rule of law. In the court's words:

[E]ven when the cannons speak, the military must uphold the law. The power of society to stand against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values . . . [T]he position of the State of Israel is a difficult one. Our role as judges is also not easy. We are doing all we can to balance properly between human rights and the security of the area. In this balance, human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle. Our work, as

^{146.} See HCJ 7015/02 [2002], Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352, ¶ 41 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html (quoting HCJ 168/91, Morcos v. Minister of Def., 45(1) P.D. 467, 470).

^{147.} See, e.g., Ajuri, 56(6) P.D. \P 41; Almandi, 56(3) P.D. \P 9.

^{148.} HCJ 3239/02 [2002], Marab v. IDF Commander in the West Bank, 57(2) P.D. 349, \P 19 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

judges, is hard. But we cannot escape this difficulty, nor do we wish to do so.149

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В. Terrorism and Counter-terrorism: A Holistic Approach

Another feature of Israeli jurisprudence in these matters is the understanding that terrorism is a complex phenomenon that involves more than just an actual physical threat. Similarly, counter-terrorism involves not only the detention or interrogation of a potential terrorist. It also includes dealing with political support for terror activities, such as that by a political party;¹⁵⁰ it includes issues of free speech, such as the ability to restrict or ban the broadcasting of a movie that describes counter-terrorism activity as war crimes;¹⁵¹ and further, it includes problems of civil liability in cases of "collateral damage" or injuries to innocent civilians during counter-terrorism operations. 152

All of these cases, and others, confront the same questions: how should a democracy fight terrorism, and what is the proper balance between human rights and national security? The Court's answer in one case will influence how it decides others. If the Court decides, for instance, that soldiers have a duty of care in torts for injuries to bystanders during operational counter-terrorism activity, that ruling may directly affect how the army functions in future operations. As a result, the Court must adopt a coherent jurisprudence regarding the dif-

^{149.} See Ajuri, 56(6) P.D. ¶ 41.

^{150.} See CA 11280/02 [2003], Cent. Election Comm. v. Tibi, 57(4) P.D. 1 Isr.).

^{151.} In a recent case, the court reversed a decision of the film review board to ban the projection of a film named "Jenin-Jenin." This movie depicted in details the Palestinian argument that the activities of the IDF in the Jenin refugee camp on April 2002, were crimes of war and a massacre. The court held that this decision to ban the movie cannot stand. Despite the fact that the allegations in the movie were proven to be false and despite the emotional stress it caused to Israeli society and to the families of soldiers who died during the activities, a free and democratic society must tolerate this kind of speech and not ban it, especially as there is a more proportional means to cope with it. This is true, said the court, also in times of national crisis although it might be that public safety will be given more importance during these times than in times of peace. See HCJ 316/03, Mohamad Bakri v. Israel Film council, 58(1) P.D. 249, ¶¶ 17 (Isr.), available at http://elyon1. court.gov.il/eng/verdict/framesetSrch.html.

^{152.} See supra notes 126-36132 and accompanying text.

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ferent aspects of counter-terrorism. Following the assumption that terrorism and counter-terrorism have many different ramifications, the Court must develop a holistic approach to all of these problems.

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C. Adjudicating Counter terrorism—Procedural Aspects

One of the immediate questions that arises from the wide perspective adopted by the Court is as follows: what *procedures* are used by the court to implement its basic view regarding the adjudication of counter-terrorism?

1. The Jurisdiction and Standing Requirement: The Open Court

An almost directly derivative conclusion of the court's starting viewpoint, according to which counter-terrorism must be within the law and not outside it, is the wide interpretation of its jurisdiction. It has been decided that the Court has jurisdiction over these matters because they involve actions of the executive branch, which are as a matter of principle under the jurisdiction if the Court.¹⁵³ Israeli security forces, the army, and other agencies all operate as part of the executive branch and are thus subject to judicial review.¹⁵⁴ Under this approach, there is no activity conducted by the executive that is precluded from the Court's jurisdiction, despite the fact that it might be manifested even during war.¹⁵⁵ Such an approach literally opens the doors of the court to many cases.

A further openness can be found in the standing requirement as adopted—or neglected—by the Court. As the Court sees itself as an essential part of the "democratic triangle" (Legislature-Executive-Judiciary), and as it understands its role as the main guardian of the rule of law, there is almost no standing requirement for the Israeli Supreme Court—not in

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^{153.} Kretzmer, *supra* note 12, at 21. *See also* Israel, The "Intifada" and the Rule of Law 61-70 (David Yahav et al. eds., 1993).

^{154.} See, e.g., HCJ 2056/04 [2004], Beit Sourik Village Council v. Gov't of Israel, 58(5) P.D. 807, ¶ 45 (Isr.), available at http://elyonl.court.gov.il/eng/verdict/framesetSrch.html; HCJ 393/82 [1983], Iscan v. Commander of the IDF, 37(4) P.D. 785, 810 (Isr.).

^{155.} See HCJ 4764/04 [2004], Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip, 58(5) P.D. 385, ¶ 15 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html; see also HCJ 910/86 [1988], Ressler v. Minister of Def., 42(2) P.D. 441, 478.

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times of peace and certainly not in time of war. 156 Almost any person directly affected by a state action can come to Court claiming that the action was unlawful.¹⁵⁷ Thus, detainees in Israeli territory were able to challenge their own interrogation methods. The Court is willing to hear cases from inhabitants of the West Bank, despite the fact that Israeli law as such is not directly applicable to these territories.¹⁵⁸ If a petitioner argues that the Israeli military is acting unlawfully, the petition will normally not be rejected on the grounds that the petitioner is not an Israeli citizen or inhabitant.¹⁵⁹ The Court heard, for instance, cases on conditions in detention camps in the West Bank¹⁶⁰ and a petition brought by the family of a person killed in the West Bank in a target killing operation.¹⁶¹ Furthermore, the Court usually does not require a petitioner to show that a direct interest or right of his was infringed. It is sufficient that a public interest in lawful governance was allegedly at play. Thus, many of the Israeli counter-terrorist activities are challenged in the court by NGO's like the Civil Rights Association, the Public Committee Against Torture, 162 the Center for the Defense of the Individual, 163 and Physicians for Human Rights.¹⁶⁴

2. *Justiciability*

Traditionally, since the mid-1980s, the Israeli Supreme Court has rarely rejected a case on the basis of nonjusticiabil-

156	See Kretzmer,	subra note	19	at 94-95
100.	See KRETZMER.	suvia note	14.	at 2 4- 23.

^{157.} See Barak, supra note 14, at 106-09.

^{158.} See, e.g., HCJ 3278/02 [2002], Ctr. for the Def. of the Individual v. IDF Commander, 57(1) P.D. 385, ¶¶ 1-2 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{159.} See Kretzmer, supra note 12, at 19-21.

^{160.} See supra notes 38, 44.

^{161.} See HCJ 5872/01 [2002], Barakeh v. Prime Minister, 56(3) P.D. 1 (Isr.).

^{162.} See HCJ 5100/94 [1999], Pub. Comm. Against Torture in Israel v. The State of Israel, 53(4) P.D. 817, \P 2 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{163.} HCJ 3239/02 [2002], Marab v. IDF Commander in the West Bank, 57(2) P.D. 349, ¶ 19 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{164.} See supra note 99. For an analysis of the role of NGO's and transnational organizations in times of national crises, especially as enforcers of international law, see Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism"*, 5 THEORETICAL INQUIRIES L. 47 (2004).

ity. 165 Institutionally, it usually does not find that another institution-either the Legislature or the Executive-is better equipped to rule on the issue at hand. This idea also applies to counter-terrorism—the Court does not see itself as institutionally unfit to adjudicate issues of counter-terrorism. Furthermore, it almost always finds a normative framework on which it can base its adjudication. Thus, rarely does it reject a case because there is no normative standard for evaluating the legality of the state action. 166 The decision to go to war is thus an administrative decision that can be adjudicated on the basis of the reasonableness doctrine of administrative law; 167 the usage of a certain weapon could be legal or not according to international law, 168 or the legality of interrogation methods can be analyzed according to Israeli constitutional law. 169 There are areas in which the court is more modest than others about intervening in the executive's discretion, but these are mostly cases of foreign relations and international negotiations.¹⁷⁰ Even then, the Court will usually not rule that the issue is nonjusticiable per se, but rather that there is no basis for the Court's interference in the executive's discretion.¹⁷¹ The number of cases decided on the merits, reported earlier in this Article, shows that almost all counter-terrorism activities have been held, up to this point, justiciable. The reason for rejecting a petition that challenges counter-terrorism activity will result from a declaration that the activity was legal, or reasonable, or that the petition lacked factual basis, but the Court usually does not reject a case on the basis of nonjusticiability.

165. See Kretzmer, supra note 12, at 21-24.

166. See Barak, A Judge on Judging, supra note 14, at 97-101.

167. See id. at 98.

168. Physicians III, supra note 99.

169. HCJ 5100/94 [1999], Pub. Comm. Against Torture in Israel v. The State of Israel, 53(4) P.D. 817, ¶ 18 (Isr.), available at http://elyon1.court. gov.il/eng/verdict/framesetSrch.html.

170. HCJ 10223/02 [2003], Fish-Lifschitz v. The Attorney General, 57(3) P.D. 517, ¶ 5 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/frame setSrch.html.

171. See Barak, A Judge on Judging, supra note 14, at 97-101.

172. There are, however, rare exceptions. See HCJ 5872/01 [2002], Barakeh v. Prime Minister, 56(3) P.D. 1, 16 (Isr.).

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3. Remedies

Lastly, even when a counter-terrorism case is adjudicated by the Court, there is often a problem with the remedy that might be granted. In many of the cases, the Court is asked to issue an injunction until the hearing itself. For instance, the Court might order officials to refrain from interrogating a person or employing a certain method of counter-terrorism until its legality is analyzed. The decision to issue such an order is a very sensitive one, since issuing an injunction might make the counter-terrorism action ineffective, but refraining from doing so might make the hearing itself ineffective. The Court's practice in this regard is not definitive. In some cases—like some of the interrogation cases¹⁷³—an injunction was issued; in others—like the targeted killings—it was denied.¹⁷⁴

The problem of remedies becomes even more significant in the final judgment. Even if the Court concludes that a certain administrative activity is illegal, it might not necessarily issue an immediate remedy. For instance, the court might find that the detention of a suspected terrorist was illegal since a certain procedure was omitted. In such a case, the immediate release of the individual might cause a significant risk to public safety. Hence, the court might postpone or suspend the execution of its own judgment for some time, thereby enabling the administration to use an alternative means that is legal. For example, when the Court decided that the detention of a person for twelve days with no judicial review of the arrest was illegal and that the detention of a person for four days without even preliminary questioning of him was also illegal, it did not order the immediate execution of the judgment.¹⁷⁵ Doing so could have had direct consequences on the detention of many suspected terrorists.¹⁷⁶ Hence, the Court ruled

^{173.} Kretzmer, *supra* note 12, at 138-140.

^{174.} See Pub. Comm. Against Torture, 53(4) P.D. 817.

^{175.} HCJ 3239/02 [2002], Marab v. IDF Commander in the West Bank, 57(2) P.D. 349, ¶ 49 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{176.} This is due to the fact that most of the detainees were detained on the basis of these decrees, which were found eventually as illegal. The immediate execution of the judgment could have raised the argument that all detainees should be released immediately. According to the court in *Marab*, 7,000 people were detained on the basis of these decrees, and during the hearing at the court, 1,600 of them were still in custody. *Id.* \P 1.

that its judgment would come into force six months later.¹⁷⁷ This suspension period enables the executive to devise and implement a legal regime of detention and arrest. Thus, by suspending and postponing the execution of its judgment, the Court balances preserving the rule of law on the one hand and promoting public safety on the other. It had also recognized, by this suspension, the primary role of the other branches in effectively combating terror.¹⁷⁸

D. Adjudicating Counter-Terrorism – Substantive Aspects

Which Law? A Three-Step Doctrine

The most critical question to ask is which standards and legal criteria the court employs in its counter-terrorism jurisprudence. Indeed, the Israeli counter-terrorism adjudication model is characterized not only by procedural features, such as standing and justiciability, but also by substantive ones. In most of the counter-terrorism cases, the Court applies a threestep analysis reviewing the challenged state activity under three different normative frameworks.

The first is international law. In cases involving the administrated territories the court will almost always review the

^{177.} HCJ 3239/02 [2002], Marab v. IDF Commander in the West Bank, 57(2) P.D. 349, \P 49 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{178.} The Israeli remedial doctrine of suspending the declaration of invalidity - originally formed in Canadian law - has been deployed in different other cases, not necessarily of counter-terrorism. It had been used, for instance, in two cases in which the court stroked-down unconstitutional provisions of laws and as a matter of fact, the court uses this remedy more and more often, sometimes in order to avoid a massive public hazard and normative vacuum; sometimes in order to protect the reliance of third parties; and sometimes in order to enable the other agencies to come up with their own solution to the problem. Yet, it is obviously not a simple remedy and it has its deficiencies, mainly in terms of civil liberties effective protection as well as the rule of law. For an overview of this remedial doctrine in Israeli law and criticisms of it, see generally Yigal Mersel, Suspending the Declaration of Invalidity, 9 Mishpat U'Mimshal 39 (2006) (Isr.). For some examples of the usage of the same doctrine in Canadian law, see Kent Roach, Constitutional Remedies in Canada ¶¶ 14.1480-14.1790 (1994); Peter. W. Hogg, Constitu-TIONAL LAW OF CANADA 922-26 (4th ed. 1997); Kent Roach, Remedial Consensus and Dialogue Under the Charter: General Declarations and Delayed Declarations of Invalidity, 35 U. B.C. L. Rev. 211 (2002).

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action under the Fourth Geneva Convention, 179 as well as customary and conventional international law. 180 For instance, when the court established the proper timing for judicial review of detentions, it referred to the European Court of Human Rights' jurisprudence on Article 5 of the European Convention on Human Rights.¹⁸¹ The Court's perspective is that "Israel is not an isolated island. She is a member of an international system," and, therefore, international standards are applicable to counter-terrorism adjudication. 182

179. See, e.g., H.C.J. 3451/02 [2002], Almandi v. The Minister of Def., 56(3) P.D. 30, ¶ 11 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html. It should be noted that Israel's official position is that the Fourth Geneva convention does not apply to the administrative territories. However, the Israeli government has traditionally accorded its activities with the humanitarian provisions of that convention. See Farrell, supra note 57, at 913-15. The court, therefore, usually does not rule on the direct applicability of the Fourth Geneva Convention but rather relies on the state's declaration of its acceptance of judicial review of its activities under the humanitarian provisions. See, e.g., HCJ 7015/02 [2002], Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352, ¶ 13 (Isr.), available at http:// elyon1.court.gov.il/eng/verdict/framesetSrch.html; HCJ 3278/02 [2002], Ctr. for the Def. of the Individual v. IDF Commander, 57(1) P.D. 385, ¶ 23 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html; HCJ 2056/04 [2004], Beit Sourik Village Council v. Gov't of Israel, 58(5) P.D. 807, ¶ 23 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/ framesetSrch.html; see also Kretzmer, supra note 12, at 31-42. For a critical view of the Israeli position regarding the applicability if the Fourth Geneva Convention, see Shany, supra note 5, at 98-99. A different question—which will not be discussed here—is whether terrorists are entitled at all to the protection of the Geneva Convention, an issue which the Israeli Court did not yet profoundly address. See generally Marco Sassoli, "Unlawful Combatants": The Law and Whether It Needs To Be Revised, 97 Am. Soc'y Int'l Proc.

180. See Justice Englard's opinion in Almandi, 56(3) P.D. 30.

181. See Marab, 57(2) P.D. ¶ 27. For further examples, see, e.g., HCJ 8990/02 [2003], Physicians for Human Rights v. O.C Southern Command, 57(4) P.D. 193, ¶ 1 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html (referring to the 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects).

182. See HCJ 5591/02 [2002], Yassin v. Commander of Kziot Military Camp, 57(1) P.D. 403, ¶ 11 (Isr.), available at http://elyon1.court.gov.il/ eng/verdict/framesetSrch.html; see also Physicians IV, supra note 143, ¶¶ 19-22. It should be noted that this international law analysis has special resonance. Even though Israel is a dualistic state, in which conventional international law only applies if incorporated into Israeli legislation, the Israeli

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Second, the Court looks to Israeli administrative common law. The court conceives of any Israeli military action—both within state boundaries or outside them—as an administrative action of Israeli officials. 183 In other words, the Israeli soldier carries with him in his backpack, wherever he goes, not only international law but also the Israeli law.¹⁸⁴ Any counter-terrorism action should therefore be analyzed not only under international law but also under Israeli administrative common law. This body of law may include procedural rights like the right to be heard and also substantive rights like human dignity and liberty, which are codified in Israel's Basic Law. 185 Israeli soldiers have the statutorily-imposed duty to "act with integrity (both [in] substan[ce] and procedur[e]), with reasonableness and proportionality, and [to] appropriately balance individual liberty and the public interest." ¹⁸⁶

Third, the Court enforces military laws and domestic Israeli laws that are applicable to the specific dispute.¹⁸⁷ For example, the Court analyzes the specific provisions of the Israeli detention laws¹⁸⁸ or the laws issued by the military commander, in cases that involve the administrated territories. 189

Indeed, examining the different bodies of laws applied by the Israeli Supreme Court suggests a few interesting character-

Supreme Court does refer occasionally to international law that is not enforceable in that court. See, e.g., Physicians III, supra note 99.

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^{183.} See, e.g., Beit Sourik Village Council, 58(5) P.D. ¶ 24; HCJ 393/82 [1983], Iscan v. Commander of the IDF, 37(4) P.D. 785, 810 (Isr.).

^{184.} Ajuri, 56(6) P.D. ¶ 13 ("Alongside the rules of international law that apply in our case, the fundamental principles of Israeli administrative law, such as the rules of natural justice, also apply. Indeed, every Israeli soldier carries in his pack both the rules of international law and also the basic principles of Israeli administrative law that are relevant to the issue."); Kretzmer, *supra* note 12, at 25-27.

^{185.} Basic Law: Human Dignity and Liberty, 5752-1992, 1391 S.H. 150 (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic3_eng. htm. See, e.g., Marab, 57(2) P.D. ¶¶ 20-21; Yassin, 57(1) P.D. ¶ 8.

^{186.} See Physicians IV, supra note 143, ¶ 19. Sometimes the Court treats cases of administrated territories according to Israeli Constitutional law and balancing between competing rights. See, e.g., H.C.J. 1890/03 [2005], Bethlehem Municipality v. The State of Israel, ¶¶ 11-16 (unpublished decision) (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{187.} See Kretzmer, supra note 12, at 27-29.

^{188.} See Yassin, 57(1) P.D. ¶¶ 7-10.

^{189.} Ajuri, 56(6) P.D. ¶ 6; Marab, 57(2) P.D. ¶ 21.

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istics of Israeli counter-terrorism adjudication.¹⁹⁰ First, the Court envisions the terrorist threat as an international—rather than a solely domestic—problem. Accordingly, the standards for adjudicating counter-terrorism cases, as well those involving human rights and national security, are international standards.¹⁹¹ Second, the war against terrorism is an exceptional circumstance but has not been treated with exceptional law. The Court usually refers to existing international law of war and human rights conventions. 192 It has not ruled that terror presents a unique situation outside the force of international law. Third, this three-tiered analysis actually reinforces human rights. In order to justify certain counter-terrorism measures, the state must prove that the operation or action taken is in accordance not only with the relevant direct law (be it detention law, military order or other regulation) but also with the Israeli common law and international law. Legality under one set of laws does not imply per se legality under another set of laws.

2. Interpreting the Law: Terrorism as New Circumstances

As noted earlier, the Court has not ruled that counterterrorism measures are outside the law. It does not assert that international law is inapplicable because it does not fit the reality of terrorism. In a few cases, however, the Court has noted that current international law should be interpreted as taking

^{190.} For further examples of this three-step analysis, see *Yassin*, 57(1) P.D. $\P\P$ 7-13

^{191.} Some argue that this Court's trend is influenced by the importance of international jurisdiction and the risk of criminal and civil liability being imposed upon Israeli officials, including the court itself. See Amnon Reichman, "When We Sit To Judge We Are Being Judged" The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation, 9 Cardozo J. Int'l & Comp. L. 41, 46-47 (2001); see also Shany, supra note 5, at 102-03.

^{192.} These sources include usually the Convention Respecting the Laws and Customs of War on Land, Annex to the Convention: Regulations respecting the laws and customs of war on land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 6 U.S.T. 3516, 75 U.N.T.S. 287; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

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into account the modern reality of terror.¹⁹³ In a case about the legality of assigned residence, the court opined:

We have interpreted to the best of our ability the provisions of Art. 78 of the Fourth Geneva Convention. According to all the accepted interpretive approaches, we have sought to give them a meaning that can contend with the new reality that the State of Israel is facing. We doubt whether the drafters of the provisions of Art. 78 of the Fourth Geneva Convention anticipated protected persons who collaborated with terrorists and "living bombs." This new reality requires a dynamic interpretive approach to the provisions of Art. 78 of the Fourth Geneva Convention, so that it can deal with the new reality. 194

The Court's recent decisions provide further examples. In a case challenging detention conditions, detainees were lodged in tents that did not provide sufficient protection from the weather.¹⁹⁵ Accordingly, the Court referred to Article 85 of the Fourth Geneva Convention, which specifies that detainees should "[b]e accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigors of the climate and the effects of war." Citing the official commentator of the convention,¹⁹⁶ the Court suggested that civilian detainees should, in certain circumstances, depending on the length of the detention, be detained in structures of a permanent character.¹⁹⁷ However, the Court noted that this interpretation is contestable under certain circumstances:¹⁹⁸

It depends upon the nature of the tents on the one hand, and the conditions of the location on the other. Additionally, a significant factor is whether

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^{193.} Kretzmer argues that, at least in the context of the Fourth Geneva Convention, the interpretation adopted would usually be the one that least restricts the sovereignty of the state parties, rather than the one that promotes human rights. Kretzmer, *supra* note 12, at 55-56.

^{194.} Ajuri, 56(6) P.D. ¶ 40.

^{195.} See Yassin, 57(1) P.D. ¶ 17.

^{196.} Int'l Comm. Of the Red Cross, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 386 (Jean S. Pictet ed., Ronald Griffn & C.W. Dumbleton trans., 1958).

^{197.} See Yassin, 57(1) P.D. ¶ 17.

^{198.} See id.

the detention is short-term or long-term, whether it lasts months or even years. Ultimately, the test is one of reasonableness and proportionality. 199

Perhaps the Court's conclusion is better understood in light of the fact that, in this case, the IDF had administratively detained a large number of detainees, all arrested in one major counter-terrorism operation in response to a terror attack.

A similar approach, adapting standard rules to the new circumstances of warfare and counterterrorism, all the while balancing security and human rights, is evidenced in the Court's analysis of the legality of the IDF practice of detention without judicial review for twelve days. In that case, the Court noted:

The special circumstances of the detention must be taken into account. 'Regular' police detention is not the same as detention carried out 'during warfare in the area'... or 'during anti-terrorism operations' It should not be demanded that the initial investigation be performed under conditions of warfare, nor should it be demanded that a judge accompany the fighting forces. We accept that there is room to postpone the beginning of the investigation, and naturally also the judicial intervention. These may be postponed until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly.²⁰⁰

Democratic Struggle Against the Non-Democratic Terrorists

In numerous decisions, the Court has taken note of the challenge terrorism poses to democracy.²⁰¹ Terrorism is characterized not only by its cruelty and damage to innocent civil-

^{199.} See id.

^{200.} HCJ 3239/02 [2002], Marab v. IDF Commander in the West Bank, 57(2) P.D. 349, ¶ 30 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{201.} See, e.g., HCJ 7015/02 [2002], Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352, ¶ 41 (Isr.), available at http://elyon1.court.gov.il/eng/ verdict/framesetSrch.html; HCJ 5100/94 [2002], Pub. Comm. Against Torture in Israel v. State of Israel, 53(4) P.D. 817, ¶ 39 (Isr.), available at http:// elyon1.court.gov.il/eng/verdict/framesetSrch.html.

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ians, but also by the way it threatens the democratic order. Indeed, "[i]t is difficult to fight against persons who are prepared to turn themselves into living bombs."²⁰² The Court has ruled that democracy must tackle terrorism in democratic ways, i.e., in manners respecting human rights. It is an unfair game, notes the Court, but this is the only game a true democracy can play. In the case where the Court banned the use of certain interrogation techniques, it noted:

This decision opened with a description of the difficult reality in which Israel finds herself. We conclude this judgment by revisiting that harsh reality. We are aware that this decision does make it easier to deal with that reality. This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.²⁰³

Clearly, the Court is aware of the effect its rulings might have on the effectiveness of counter-terrorism measures. Nevertheless, it prefers to pay this price in order to achieve and preserve more important values—the rule of law and democracy.

4. Terrorists and the Presumption of Innocence

Some of the Court's cases raise the question of whether the presumption of innocence should apply under the special circumstances of counter- terrorism efforts.²⁰⁴ In a way, most of the Israeli counter-terrorism activities, as well as the activities challenged in court, were aimed at minimizing the risks of

^{202.} Ajuri, 56(6) P.D. ¶ 41.

^{203.} Pub. Comm. Against Torture, 53(4) P.D. ¶ 39.

^{204.} A more general, theoretical question remains whether there should be a difference in procedural rules and court jurisdiction between cases of terrorism and ordinary criminal offenses. See, e.g., Emanuel Gross, Trying Terrorists—Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights, 13 Ind. Int'l & Comp. L. Rev. 1, 3, 96-97 (2002) (finding that terrorist acts should be tried according to the same procedural and evidence rules as any other criminal offence).

terrorism, not at punishing the terrorists themselves. They included mostly preventative measures.²⁰⁵ These measures, almost by definition, concern people who had not yet been convicted in criminal proceedings. When presented with the question of whether these detainees should be treated as innocent, the Court's answer was clear: as long as they are not convicted, they should enjoy the presumption of innocence.²⁰⁶ When analyzing the proper standard for conditions in the detention camps, the Court noted that:

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[There is a] possible claim that since the detainees being held in Kziot Camp are terrorists who have harmed innocent people, their detention conditions should not be looked after. This argument is fundamentally incorrect. Those being detained in the Kziot Camp have not been tried; needless to say, they have not been convicted. They still enjoy the presumption of innocence.207

Therefore, the Court reasoned, "Not only should we not allow the detention conditions of administrative detainees to fall short of those of convicted prisoners, we should also strive to ensure that the conditions of detainees surpass those provided to prisoners."208 This standard applies despite horrific terrorist activities allegedly attributed to some of the detainees:

Prisoners should not be crammed like animals into inadequate spaces. Even those suspected of terrorist activity of the worst kind are entitled to conditions of detention which satisfy minimal standards of humane treatment and ensure basic human necessities. How could we consider ourselves civilized if we did not guarantee civilized standards to those in our custody? Such is the duty of the commander of the area under international law, and such is his duty under our administrative law. Such is the duty of the Israeli gov-

^{205.} See cases cited supra Part I.A.

^{206.} See HCJ 5591/02 [2002], Yassin v. Commander of Kziot Military Camp, 57(1) P.D. 403, ¶ 7 (Isr.), available at http://elyon1.court.gov.il/eng/ verdict/framesetSrch.html.

^{207.} See id.

^{208.} See id.

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ernment, in accord with its fundamental character: Jewish, democratic and humane.²⁰⁹

The Court adopted the same rationale when evaluating the legality of detention itself. When it ruled on detaining a person for twelve days without judicial review of the detention order, the Court held that the right of judicial review becomes even more crucial in cases of preventive detention of people who still enjoy the presumption of innocence. Arbitrary detention must be avoided, the Court reasoned, in order to preserve the individual's right of liberty:

Thus, a person should not be detained merely because he has been detained during warfare; a person should not be detained merely because he is located in a house or village wherein other detainees are located. The circumstances of his detention must be such that they raise the suspicion that he—he individually and no one else—presents a danger to security. "Such a suspicion may be raised because he was detained in an area of warfare while he was actively fighting or carrying out terrorist activities, or because he is suspect of being involved in warfare or terrorism.²¹¹

5. Operational Margin of Deference

Although there are not procedural hurdles, like standing or justiciability, to its adjudicating terrorism cases, the Court will rarely intervene in actual, operational decisions made by the executive. The Court has noted repeatedly that it will not substitute its own discretion for the executive's decisions about the way to conduct counter-terrorism activities. It intervenes only in cases of extreme unreasonableness or clear illegality.²¹² In most of these cases, the court has left a wide margin of deference (what is called the margin of appreciation) to the exec-

^{209.} See HCJ 3278/02 [2002], Ctr. for the Def. of the Individual v. IDF Commander, 57(1) P.D. 385, ¶ 24 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{210.} HCJ 3239/02 [2002], Marab v. IDF Commander in the West Bank, 57(2) P.D. 349, ¶ 19 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{211.} See id. ¶ 23.

^{212.} See Barak, A Judge on Judging, supra note 14, at 157-60.

utive to decide which counter-terrorism measures to employ, when to use them, and to what extent.²¹³ The underlying rationale for deference is the basic notion that the executive and legislative branches—not the Court—must deal with the terrorism problem. Furthermore, especially in cases involving politics and intelligence analysis, the other branches have the expertise regarding the most efficient way to guarantee public safety. The Court's role is, therefore, not to decide how to combat terrorism but rather to review the legality of the method chosen by other powers.²¹⁴ The Court focuses, therefore, on the legal and humanitarian aspects of the executive's activities and does not concern itself with operational field decisions.²¹⁵ Thus, the Court's jurisprudence sets the borderlines of legality, while leaving broad discretion to the executive within those lines. In short, the Court does not consider itself to be the appropriate decisionmaker in the counter-terrorism effort.:

In exercising this judicial review, we do not appoint ourselves as experts in security matters. We do not replace the security considerations of the military commander with our own security considerations. We do not adopt any position with regard to the manner in which security matters are conducted . . . our role is to ensure that boundaries are not crossed and that the conditions that restrict the discretion of the military commander are upheld.²¹⁶

Overall, the court hears almost every case concerning counter-terrorism but defiantly refuses to grant remedies in

^{213.} In Ajuri v. IDF Commander in the West Bank, the court referred to this idea as the "zone of reasonabless." HCJ 7015/02 [2002], Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352, ¶ 29 (Isr.), available at http:// elyon1.court.gov.il/eng/verdict/framesetSrch.html ("The discretion of the military commander to order assigned residence is broad. But it is not absolute discretion. The military commander must exercise his discretion within the framework of the conditions that we have established in this judgment and as prescribed in Art. 78 of the Fourth Geneva Convention and the Amending Order. . . . These parameters create a 'zone' of situations – a kind of 'zone of reasonableness' - within which the military commander may act. He may not deviate from them."); see also Barak, A Judge on Judging, supra note 14, at 157-60.

^{214.} *Id.* at 159-60.

^{215.} See Physicians IV, supra note 143, ¶ 16.

^{216.} Ajuri, 56(6) P.D. ¶ 30.

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many of these matters.217 If the executive's method, by itself, is legal, the court will usually not intervene in the decision to use this specific method for counter-terrorism needs.²¹⁸ Most of the petitions fall within this margin of deference to the executive and are thereby rejected.²¹⁹ Furthermore, most of the cases are heard ex post and not ex ante; the counter-terrorist activity has already occurred. This characteristic narrows, by definition, the actual scope of judicial review.²²⁰

217. See, e.g., the rejections of petitions in HCJ 10467/03 [2004], Sharabati v. Commander of the IDF, 58(1) P.D. 810 (Isr.); HCJ 893/04 [2004], Faraj v. Commander of the IDF, 58(4) P.D. 1 (Isr.); HCJ 4694/04 [2004] Abu-Atara v. IDF Commander in Gaza (unpublished decision) (Isr), available at http:// elyon1.court.gov.il/files/04/940/046/f02/04046940.f02.pdf; HCJ 8124/04 [2004] Al-Jabari v. IDF Commander in the West Bank (unpublished decision) (Isr.), available at http://elyon1.court.gov.il/files/04/240/081/n04/04 081240.n04.pdf; HCJ 9586/03 [2004], Salach v. Commander of the IDF, 58(2) P.D. 342 (Isr); HCJ 9535/03 [2004], Dayuk v. Commander of the IDF, 58(2) P.D. 102 (Isr.).

218. In the case of Physicians for Human Rights v. O.C Southern Command, after ruling that the use of flechette shells, by itself, is not forbidden under international law, the court noted that "[p]etitioners request that we prohibit the military from using flechette shells. As the use of such artillery is not prohibited by international conventions, we cannot grant their petition. Our decisions have stated that 'this Court will not intervene in the choice of military weapons, which the respondents use in order to prevent vicious terrorist attacks.'" HCJ 8990/02 [2003], Physicians for Human Rights v. O.C Southern Command, 57(4) P.D. 193 (Isr.), available at http:// elyon1.court.gov.il/eng/verdict/framesetSrch.html. It should be recalled that this international law analysis has special resonance, even though Israel is a dualistic state, in which conventional international law only applies if incorporated into Israeli legislation. The Israeli Court does refer occasionally to international law that is not enforceable in that court. Id.

219. The statistics of the court might not show the whole picture in this context. Hence, it had been found that in many of the rejected cases, the petitioners actually succeeded in their petition. This had happened due to a high rate of out-of-court settlements in these matters. The court's rulings have thus an important effect on out-of-court settlements. See Yoav Dotan, Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice During the Intifada, 33 LAW & Soc'y Rev. 319 (1999).

220. One example of an ex ante petition concerned methods of interrogations, in which the court ruled on the legality of certain practices without a specific case. See HCJ 5100/94 [2002], Pub. Comm. Against Torture in Israel v. The State of Israel, 53(4) P.D. 817, ¶¶ 8-14 (Isr.), available at http:// elyon1.court.gov.il/eng/verdict/framesetSrch.html. Another example is Physicians for Human Rights et al. v. Commander of the IDF Forces in the Gaza Strip, in which the court had ruled on the legality of the future actions of the IDF in Gaza Strip. Physicians IV, supra note 143, ¶ 15.

6. The Cost of Human Rights: Planning the War Properly

In more than one case, the Israeli government has argued that the infringement upon human rights occurred, not on account of security concerns, but rather as a result of inadequate resources or unexpected circumstances. For instance, the government argued that it held detainees for eight days (most of the twelve-day period) without even a preliminary questioning because the army did not have enough professional interrogators.²²¹ Moreover, the executive has argued that it did not have the ability to meet the minimum detention conditions, since the number of detainees arrested during the counter-terrorism activity was overwhelming.²²² The Court has rejected these arguments. It pointed out that almost any counter-terrorism activity is pre-meditated and often with a significant amount of time before execution. Planning for counter-terrorism should include, said the Court, not only operational provisions but also humanitarian ones.²²³ The executive branch must take into account humanitarian considerations as well as cost.²²⁴ In rejecting the state's argument about its lack of interrogators:

^{221.} HCJ 3239/02 [2002], Marab v. IDF Commander in the West Bank, 57(2) P.D. 349, ¶ 48 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{292.} See HCJ 3278/02 [2002], Ctr. for the Def. of the Individual v. IDF Commander, 57(1) P.D. 385, \P 6 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{223.} See Yassin, 57(1) P.D. ¶ 14 ("Soon after the reopening of Kziot Camp, conditions of detention there underwent changes. This reopening was done hastily and without preparation. The detention conditions encountered by the first detainees, whose affidavits are attached to this petition, did not meet the necessary minimum standards. There was no justification for this. Operation Defensive Wall was planned in advance. Its main goal was 'to prevail over the Palestinian terror infrastructure, and to prevent the recurrence of the terror attacks which have plagued Israel.' . . . It was obvious to all – or at least should have been obvious—that one of the consequences of the operation would be a large number of detainees. As such, it was necessary to prepare detention facilities in advance, which would satisfy minimum standards. This was not done."); see also Ctr. for the Def. of the Individual, 57(1) P.D. ¶ 96

^{224.} See, for instance, *Marab*, where the court noted that its ruling according to which there has to be a prompt judicial review of the detention will result in a need of more judges. *See Marab*, 57(2) P.D. ¶ 35. In Physicians for Human Rights et al. v. Commander of the IDF Forces in the Gaza Strip, the court held that it is the duty of the commander to ensure that there is

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A society which desires both security and individual liberty must pay the price. The mere lack of investigators cannot justify neglecting to investigate. Everything possible should be done to increase the number of investigators. This will guarantee both security and individual liberty.²²⁵

III. A Model of Counter-Terrorism Adjudication?

Now that the main characteristics of the Israeli jurisprudence have been discerned, there remains a question: can this jurisprudence and its features be described as a model? I argue that the answer is yes.

The basic philosophy of the Court in these counter-terrorism cases is consistent both in terms of its procedural and substantive holdings and the rhetoric it uses to explain them. Because these features are coherent, repetitive, and based on the same foundation, they are a model. The Court's rulings demonstrate a clear stance regarding the rule of law in times of terror and the applicability of legal analysis to counter-terrorism efforts. This legal analysis is based on the recognition of national security as a crucial interest, but not a paramount one. Human rights must be balanced against the nation's security. Despite the fact that terrorists do not respect the law and try to destroy democratic liberties, democracies must apply a different standard by fighting back in a democratic manner. For instance, suspected terrorists must still be presumed innocent. The approach of the Court is to balance human rights and national security on a case-by-case basis; this approach manifests itself in an almost total willingness to hear any case challenging any counter-terrorism activity, without reservations about justiciability or standing. Yet the margin of deference affords a substantial area in which the executive and legislature can employ their unique functional and institutional capabilities. The specific procedures and remedies the Court employs support a general position that counter-terrorism should be adjudicated in a manner that preserves the role and respects the capabilities of the political branches on one

enough medical equipment in the combat zone. This issue must be an integral part of the preparation framework of any military operation. *Physicians* IV, supra note 143, ¶ 35; see Marab, 57(2) P.D. ¶ 35. 225. *Id.* ¶ 48.

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hand, and creates a coherent framework to protect human rights on the other hand. The Court's use of substantive standards—applying international law, common law, and military law to almost any counter-terrorism activity—is the centerpiece of the framework to protect human rights. In striking this balance, when the government's only claim invokes a non-security interest such as a financial burden or poor planning, the Court is more rigorous in its intervention.

Without judging the value of this jurisprudence, one can still conclude that the Israeli court's approach towards the issue of counter-terrorism is distinctive. This distinctiveness also provides a ground for Israeli jurisprudence to be considered as a model.

The last question to be asked, then, is whether the Israeli model of counter-terrorism adjudication should be followed by other courts in different democracies facing the same problems? Since this paper takes a mostly descriptive viewpoint, I will not attempt to answer this complicated question, which has many dimensions and possible answers. I do, however, suggest some guidelines which might serve as criteria for evaluating the Israeli practices and comparing them against the practices of other courts. My suggestion is to evaluate counter-terrorism adjudication on the basis of three parameters:

First, evaluate the potential harm of judicial review to the effectiveness of the counter-terrorism activity at stake. An over-active court in times of crises, one might argue, places national security in danger and breaches the core idea of separation of powers. Any model of counter-terrorism adjudication must be evaluated therefore by taking into account this possible critique.

Second, note the influence of public confidence in the judiciary. It is important to consider not only what courts do, but also what they are seen to be doing.

Third and finally, the effectiveness of any model of counter-terrorism adjudication should be measured not only in terms of national security but also in terms of civil liberties protection. If it is accepted that courts must balance national security with the protection of civil liberties, then any model of counter-terrorism adjudication should be evaluated also in terms of the balance it achieves, not only in terms of effective

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counter-terrorism, but also in terms of an effective protection of civil liberties.

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A. The Effectiveness of the Counter-Terrorism Activity at Stake

We all agree that terrorism must be handled rigorously and definitively. It is therefore important to ask whether the Israeli Supreme Court has adjudicated counter-terrorism cases in a way that hinders the war on terror. There is arguably a danger that the Court will get in the way of effective counterterrorism because it is under-qualified in assessing risks and methods. It might possibly lack the experience or the knowledge to prescribe how to achieve the desired outcome. These shortcomings, as an argument might run, become crucial in times of crisis. The court may have good intentions in balancing this right with another interest, but the risk of mistake is arguably too high, especially given the horrors that might result. Similarly, even if the Court rules correctly, the procedure of judicial review might impede counter-terrorism efforts. Lengthy proceedings might delay important preventative steps. Classified information might be revealed. Furthermore, officials might become hesitant—too hesitant—to act because they foresee possible review by the Court.

Are these doubts justified? If they are, should we narrow the scope of judicial review in these terrorism cases? I say no. Indeed, the Court cannot see the big picture in any case it adjudicates. It also lacks the experience that the executive has in managing security matters. This division of expertise does not mean, however, that the Court should always step out of these conflicts. As mentioned earlier, under the Israeli model, the Court usually does not uproot the executive's discretion. It does not set the goals. It does not choose the means. The only thing it does, in only some cases at that, is set the borders of illegality. In the vast majority of cases, activities are never questioned before the Court at all or are upheld by it.

What about the hard cases: when the Court sets the barrier of illegality, do those rulings actually obstruct counter-terrorism? My answer is again negative. There is always a possibility of a wrong decision or a faulty balancing determination. Courts might have miscalculated the danger of certain circumstances or their probability. But this threat is not unique to the Court. Legislatures and executives are not immune to this

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risk. Really, which danger is more ominous—an executive power without check in a time of crisis or a potentially erroneous court ruling in one of the rare cases that reaches a court?

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Furthermore, courts and judges are asked on a daily basis to balance interests and rights, and to assess dangers and probabilities. If they can do so in criminal law, environmental law, malpractice, or in cases of financial wrongdoing, why should they avoid such practices in times of national crisis?²²⁶ Two factors make this argument even more poignant. First, we should keep in mind that the government tends to overreact in times of crisis and overestimates the danger at hand.²²⁷ Executive overreaching often goes beyond a matter of "being on the safe side" and results in a needless deprivation of human rights, as well as a needless use of resources. We have no reason to say that the Court's rulings—even with many mistakes and opportunities for mistakes—will not lead to a more efficient result. Second, the war against terrorism is indeed a war, but it is a different kind of war. It is a long war, and its end is not easily defined, neither analytically nor practically.²²⁸ The executive's counter-terrorism measures will be in effect for very long periods. Most of these decisions do not involve "ticking bomb" circumstances. Not all of the arrests, deportations and interrogations of individuals are cases involving immediate threats to national security.²²⁹ Accordingly,

^{226.} For an elaboration of this argument, and its application to the post September 11 cases in the U.S., see Peter Margulies, Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11, 84 B.U.L. Rev. 383 (2004).

^{227.} See Ronald Dworkin, Rights and Terror (Oct. 1, 2003) (unpublished manuscript), available at http://www.law.nyu.edu/clppt/program2003/readings/dworkin.pdf. For a detailed analysis of the reasons for executive overreaction in times of national crisis, see Gross, supra note 4, at 1022-42. But see Eric A. Posner & Adrian Vermeule, Accommodating Emergencies (Chi. Pub. Law & Legal Theory, Working Paper No. 48, 2003), available at http://ssrn. comqabstract_id=441343 (presenting opposite approach, arguing that there is no basis to assumption that people and officials tend to overreact and exaggerate in times of crises).

^{228.} Terrorists are not a defined territorial unit or group that can be abolished or can lose de jure. It is also doubtful if the war against terror can even be won de facto, and what would such a win mean exactly.

^{229.} For instance, house demolition practice is conducted in order to deter terrorist. However, the cases show that the deterrence is not of an actual and immediate "ticking bomb" situation but rather a general one. See, e.g., HCJ 10467/03 [2004], Sharabati v. Commander of the IDF, 58(1) P.D. 810

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most of the cases heard in the Israeli Court did not involve the "ticking bomb" either. The Court's decisions might have affected counter-terrorism efforts, but these effects are barely a ripple in the ocean of counter-terrorist activities. Especially in this time of the war against terrorism, the fear of an incorrect judicial decision should not be as substantial as in other, more dire circumstances. Even if it occasionally gets in the way, judicial review might be preferable over an uncontrolled executive.

That being said, the Court needs to make sure that its efforts minimize the risk of obstructing essential counter-terrorist measures. Its decisions must be based on firm evidence and a clear understanding of the matter at stake. It may ask the parties—especially the state—to provide the Court with information regarding the importance of the challenged counterterrorist method and the scope of its usage. It may also ask the state to justify how it selected the specific method it employed. The Israeli case briefings, by both parties, tend to contain this kind of information. For instance, in the assigned residence case, the Court had to rule on the legality of assigned residence of terrorists' relatives who were involved in terror activity.²³⁰ The state specifically argued that this method was perceived by the Palestinian population as an extreme deterrent and was necessary at that time to stop the phenomenon of suicide bombers.²³¹ Along the same lines, the petitioners in the interrogation techniques case submitted several affidavits of people who were interrogated while being allegedly tortured and were later released with no indictment of any kind.²³² The petitioners argued that these interrogation techniques were used not only in cases of ticking bombs but as a regular method of "fishing" for information.²³³ Detailed evidence of

⁽Isr.); HCJ 893/04 [2004], Faraj v. Commander of the IDF, 58(4) P.D. 1 (Isr.).

^{230.} HCJ 7015/02 [2002], Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352, ¶ 5 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{231.} Id. ¶ 5

^{232.} HCJ 5100/94 [2002], Pub. Comm. Against Torture in Israel v. The State of Israel, 53(4) P.D. 817, \P 3 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{233.} See id. \P 14.

this kind is crucial for an effective judicial review of counterterrorism.

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Procedural rules and trial management can also possibly hinder counter-terrorism efforts. Cases involving counter-terrorism measures should be heard as soon as possible. Immediate action is necessary in certain cases for security reasons, and in others, to prevent severe human right violations. Courts should also be sensitive to confidential information and the need for some cases to be closed to the public. Even in terms of remedies, courts should make sure that the ruling will not pose an obstacle to counter-terrorist initiatives. With this concern in mind, the Israeli Supreme Court has more than once suspended enforcement of its judgments in order to enable the legislature or the executive to tailor their activities to make them legal.²³⁴ Even when suspected terrorists were found to be held in illegal detention conditions, the result was not their immediate release but a six-month period to adapt these conditions to the requirements of international and domestic law.235

Effectiveness is quite clearly an important parameter in any evaluation of counter-terrorism adjudication. However, any argument accusing the Court of hampering the counterterrorism effort must be analyzed carefully, taking into account the nature of cases heard by the Court, its specific rulings and remedies, and the benefits of an effective judicial review.

B. Public Confidence and Court's Legitimacy

A second factor in counter-terrorism adjudication is public confidence in the Court. The public sentiment can be quite sensitive and volatile in times of national crisis,²³⁶ and it is usually the case that the public cares primarily about its own personal safety. Long-range implications for democratic val-

^{234.} HCJ 3239/02 [2002], Marab v. IDF Commander in the West Bank, 57(2) P.D. 349, \P 49 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html. For a further example, not within the counter-terrorism context, see HCJ 6055/95 Sagi Tzemach v. Minister of Defense et al., P.D. 53(5) 241, \P 44 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{235.} Marab, 57(2) P.D. ¶ 49.

^{236.} See Lee Epstein et al., The Supreme Court During Crisis: How War Effects Only Non-War Cases, 80 N.Y.U. L. Rev. 1 (2005).

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ues seem less important. One might argue that adjudicating counter-terrorism might decrease public confidence in courts, as they are not politically accountable. This is especially foreseeable in cases where the Court actually intervenes in the executive's enforcement actions, the way the Israeli court has done in several cases, discussed above. Furthermore, even if the Court does not actually impede counter-terrorist programs, the public might expect that only the accountable branches—the legislature and the executive—will handle counter-terrorism effectively. Indeed, adjudicating counterterrorism has a possible price-tag: people might blame the Court for handling nonjusticiable issues and interfering with issues that should be handled by other branches. In Israel, this rhetoric had even found its way to a private bill by some Knesset members, who wanted to restrict by law the power of the Supreme Court to adjudicate certain matters, including issues of state security.²³⁷ The Court itself is aware of the problem with public opinion:

Part of the public will be happy with our decision; another part will oppose it. It is possible that neither the former nor the latter will read the reasoning. But we shall do our work. 'This is our duty and this is our obligation as judges.'238

In another case, the author of the opinion wrote:

I am forced to rule in accordance with the law, in complete awareness that the public at large will not be interested in the legal reasoning behind our decision, but rather in the final result. Conceivably, the status of the Court as an institution that stands above the arguments that divide the public will be damaged. But what can we do, for this is our role and our obligation as judges?239

^{237.} See Draft bill amending Basic Law: The Judiciary (no. 3726), 5762-2002 H.H. 5581 (Isr.), available at http://www.knesset.gov.il/privatelaw/ data/15/3726.rtf.

^{238.} HCJ 7015/02 [2002], Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352, ¶ 41 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

^{239.} HCJ 5100/94 [2002], Pub. Comm. Against Torture in Israel v. The State of Israel, 53(4) P.D. 817, ¶ 40 (Isr.), available at http://elyon1.court. gov.il/eng/verdict/framesetSrch.html (citing HCI 390/79, Dawikat v. Gov't of Israel, 34(1) P.D. 1, 4).

The Court acknowledges that it is not disconnected from the Israeli reality, both in terms of public opinion and the daily concerns of average citizens:

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Deciding these petitions weighed heavily on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The possibility that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us. We are, however, judges. We must decide according to the law.²⁴⁰

Indeed, the Court is aware that, in the short term, its broad scope of judicial review might result in sinking public confidence in the Court.²⁴¹ Yet it is willing to accept this partial disapproval because it believes its democratic duty is to rule for certain outcomes.²⁴² Displeasing some people is a natural result of adjudicating any conflict. It seems as if the court assumes that, in the long term, these rulings will reinforce the public confidence in the Court as a stabilizing institution in times of crisis.²⁴³

Is the Court right to take this approach? The Israeli experience shows that throughout the years, the Supreme Court enjoys almost the highest confidence rate among Israeli institutions.²⁴⁴ Even taking into account the general tendency of distrust towards Israeli institutions in recent years, the Court has maintained its relatively high degree of public confi-

^{240.} Pub. Comm. Against Torture in Israel, 53(4) P.D. ¶ 40; see also HCJ 2056/04 [2004], Beit Sourik Village Council v. Gov't of Israel, 58(5) P.D. 807, ¶ 86 (Isr.), available at http://elyon1.court.gov.il/eng/verdict/frameset Srch.html.

^{241.} Id.

^{242.} *Id*.

^{243.} Id.

^{244.} For recent surveys of the Israeli public opinion trust in the Supreme Court, see Asher Arian, Shlomit Barnea & Pazit Ben-Nun, The 2004 Israeli Democracy Index 32-34, 41-42 (2004), available at http://www.idi.org.il/english/catalog.asp?pdid=340&tmp=1&did=50; Asher Arian, David Nachmias, Doron Navot & Danielle Shani, The 2003 Democracy Index 21-22 (2003), available at http://www.idi.org.il/hebrew/article.asp?id=1461.

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dence.²⁴⁵ It should be mentioned, also, that the public's confidence in the Israeli court is often influenced by other factors, mostly the Court's rulings on the religious-secular divide. To this point, it seems as if the court's counter-terrorism jurisprudence has not resulted in a deepening distrust among Israelis.²⁴⁶ Furthermore, the proposal to restrict the Court's powers in these matters by law has not garnered substantial support.

The Israeli Court is aware of the immediate reputational cost of its rulings, as well as its long-term gain. It is willing to adjudicate almost any counter-terrorism case by defining legal boundaries. The Court is not acting in a vacuum, however, by trying to conduct the war against terror by itself or by upending the executive's strategy. Most of the cases it hears on these matters are dismissed.²⁴⁷ Those orders it does grant are not always immediately executed but are sometimes suspended or delayed. Thus, public confidence is a factor taken into account, but it does not completely bar the Court from ruling on these delicate issues. The court certainly, as discussed above, is not reluctant to adjudicate hard cases and even rule against the state in delicate situations.

Public confidence in the Court is an important criterion to use in evaluating counter-terrorism adjudication. Courts can not ignore it totally, but it should not be the sole or even prevailing factor in determining the Court's approach.

C. Protection of Human Rights

Third, a court's practice in counter-terrorism cases should take into account human rights. Is the Israeli model granting

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^{245.} Kretzmer, *supra* note 12, at 12-13.

^{246.} A similar result was indicated during the first uprising in the West Bank territories of Judea and Samaria, during the late 1980's where most Israelis were willing to give heavy weight to considerations of democracy and civil rights, and not only to national security. See generally Asher Arian, Vox Populi: Public Opinion and National Security, in NATIONAL SECURITY AND DEMOCRACY IN ISRAEL 129, 134-37 (Avner Yaniv ed., 1993).

^{247.} See Dotan, supra note 219, at 332. It should also be noted that the general statistics of the Israeli Supreme Court show a clear tendency to reject petitions and appeals. In 2004, for instance, the total rate of success in Supreme Court proceedings was 16.5%. The Judicial Authority of the State of Israel, The Judicial Authority of the State of Israel, Din v'Heshbon 'Shnati 2004 [The 2004 Annual Report on the Judiciary] 11.

sufficient weight to civil liberties? My view is that the Israeli practice takes rights seriously. The willingness to review almost any governmental action, as well as various cases in which the court had found violations of human rights, prove the adequacy of the Israeli model in terms of human rights protection.

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It is true that some of the court rulings were criticized over the years. Some have pointed out that most of the cases are rejected, especially the important ones dealing with basic human rights.²⁴⁸ The court was blamed, sometimes, for being too loyal to the state.²⁴⁹ However, these critics focus on the ways in which the Court balances human rights and state security.²⁵⁰ Usually, they do not argue that the Court should avoid these issues as nonjusticiable or leave them to be shaped through political discourse and public debate.²⁵¹

The Israeli Supreme Court's model of counter-terrorism adjudication should therefore be seen, in my view, as one of the major guarantees for human rights. It is a useful and pow-

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^{248.} See, e.g., Ralph Ruebner, Judicial Review and the Rule of Law in the Age of Terrorism: the Experience of Israel – a Comparative Perspective, 31 GA. J. Int'l. & COMP. L. 493, 506-11 (2003) (describing the court's practice as avoiding the hard cases and as silent in times of war); see also Dotan, supra note 219. As mentioned earlier, Dotan shows that as a result of the court's activist reputation, many cases are resolved outside the court for the benefit of the petitioners. Hence, the rejection rate in the court does not paint the whole picture. Kretzmer seems to accept this image of the court as a restraint and even argues that this "shadow" of the court is the most effective consequence of its activism, rather than the decisions themselves, which generally tend to legitimate governmental activities. Kretzmer, supra note 12, at 190-198.

^{249.} See Cohen, supra note 87, at 105 ("[t]he Israeli legal regime is largely subject to the powerful grip of the country's national security narrative and the influence of the Israeli government's occupation policies").

^{250.} See, e.g., Yoram Dinstein, The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing Off of Houses, 29 ISR. Y.B. Hum. Rts. 285, 295-96, 304 (1999); Orna Ben-Naftali & Keren Michaeli, Ajuri 'The Call of Abraham: Between Man and Makom (Place, God), 9 Hamishpat 107 (2004) (Isr.) (discussing HCJ 7105/02 Ajuri v. IDF Commander in the West Bank); David Kretzmer, The Supreme Court and the Fourth Geneva Convention Domestic Enforcement and Interpretation, 26 Mishpatim 49 (1995) (Isr.).

^{251.} Kretzmer raises, in his survey, a contrasting argument. He argues, that perhaps the final outcome would have been better if the Supreme Court did not impose it's jurisdiction over the administrated territories. In such circumstances, the Elites would have been better aware of the gap between the mother-country and the administrated territories, and perhaps changing the reality of occupation. See Kretzmer, supra note 12, at 198.

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erful tool for properly balancing state security and human rights. The fine tuning of the model might be criticized like any other ruling; it is only natural that not everyone is in accordance with every judgment. Nevertheless, it can generally be argued that taken as a whole, this model provides a firm framework for human right protection.

Thus, evaluating a given model of counter-terrorism adjudication should involve considering the protection it grants to human rights. This evaluation may include the ability to access the Court and the Court's willingness to hear cases on the merits; the length of proceeding and the procedure used; the applicable norms—domestic, comparative and international law; the remedies granted; and the margin of appreciation given to the government. The Israeli model, as elaborated above, displays a pattern of adjudication in each of these areas. Evaluating its performance in protecting human rights can be part of the comparison between the Israel Court and other courts in various democracies.

IV. CONCLUSION

The modern threat of terror poses new challenges to democracies. These challenges are not only operational but also legal. We ask how to fight terrorism while preserving democracy and more specifically, what is the role of the judiciary in this regard. This Article presents the Israeli Supreme Court as a model for courts during states of emergency and counterterrorism activity. The balance between the three major considerations—maintaining effective counter-terrorism policies, upholding public confidence in the courts, and protecting human rights—can lead to different models of judicial review; however, one must compare the different models and consider their advantages and disadvantages in the short and long term. Terror is becoming a global problem. It should be therefore faced—legally and from a global perspective. The Israeli model—built upon many cases, over many years, in the context of an unfortunate and tragic reality—is a worthwhile starting point for such analysis.