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Security and Liberty - Striking a Balance

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Security and Liberty - Striking a Balance

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Abstract

"The State of Israel is undergoing a difficult period… 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."

The question remains, however, what is the right balance between security and liberty?

It is no secret that an effective war on terror compromises the human rights and liberties that our society deserves, just as any attempt to preserve liberties that true democracies are accustomed to, will jeopardize effective counter terrorism. So where do security and liberty intersect? Where is the point of equilibrium that secures the wellbeing of our citizens without applying draconian measures against entire communities, suspects and even convicted villains?

In a number of key decisions given by the High Court of Justice in Israel (HCJ), it seems that the scale may be tilted in one direction on the account of the other. In this paper we will briefly review four different decisions given by the HCJ and analyze their ramifications on the war on terror and the rule of law.

Keywords: Law, Terrorism, Occupied Territories, Security, Liberty

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1 Chief Justice Aharon Barak, HCJ 7019/02 Ajuri vs. IDF Commander para. 41

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1. The Public Committee against Torture in Israel vs. The Government of Israel (HCJ 5100/94) - The use of measured physical pressure in interrogations - (Decision given: 6.9.99)

In its investigations, the Israeli Security Agency (ISA)[2] made use of methods that included subjecting suspects to physical pressure/force, methods considered by some to be torture. The means were employed under the authority of official directives. These directives allowed for the use of moderate physical pressure if such pressure was immediately necessary to save human life. In this controversial case, the High Court of Justice was asked to rule if the interrogation methods used by the ISA, including the use of physical force under extreme circumstances, were legal.

These methods included the authority to "shake" a man, hold him in the "Shabak" position (which includes the combination of various methods), force him into a "frog crouch" position, and deprive him of sleep.

The HCJ, lead by its President A. Barak, held that the ISA did not have the authority to employ certain methods challenged by the petitioners. President Barak concluded that "according to the existing state of the law, neither the government nor the heads of the security services have the authority to establish directives regarding the use of physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general rules which can be inferred from the very concept of an interrogation itself."[3]

The Court was fully aware of the fact that many attacks-including suicide bombings, attempts to detonate car bombs, kidnappings of citizens and soldiers, attempts to highjack buses, murders, and the placing of explosives - were prevented due to daily measures taken by authorities, especially the ISA, responsible for thwarting terrorist activities.[4] However, it concluded, that physical force must not be used in these interrogations. Specifically, the

2 The ISA's duties are to protect ministers and high public officials, to prevent violent insurrection, to gather intelligence, and to pinpoint terrorist cells and prevent them from causing damage.

3 H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. The Government of Israel

4 Ibid.

persons being interrogated must not be tortured.[5]

The position held by the HCJ can best be summarized by the words of President Barak:

> "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 arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen its spirit and this strength allows it to overcome difficulties."[6]

Ramifications on the War on Terror and the Rule of Law

This ruling was widely commended by the international legal community for its liberalism and perceived enhancement of the rule of law and human rights. However, in the context of the war on terror, Israel's ability to gather intelligence and prevent acts of terror were hampered, at least in the short run.

The Court's decision did not negate the possibility that the "necessity defense" would be available, post factum, to ISA investigators - either in the choice made by the Attorney-General in deciding whether to prosecute, or according to the discretion of the court if criminal charges were brought against them. However, as a direct result of this HCJ ruling, terrorists under interrogation today are fully aware of the boundaries and constraints their interrogators are under, in terms of means of information gathering. This clearly places added onus on the ISA to gather intelligence and prevent terrorism.

Subsequent to this ruling abolishing the use of physical means in the context of interrogations, Palestinian terrorists have murdered more than 1000 Israeli civilians. This is not to imply that had the HCJ squashed the petition, 1000 Israeli lives would have been spared. However, it is not far-fetched to assert that a few souls might have been saved if Israel would have had better intelligence at its disposal. This leads one to an old Jewish proverb that states: "One who saves a single soul in Israel; it is as if he has saved an entire universe".[7]

Without derogating from the above - it should be clarified that the use of torture in interrogation is unacceptable, not only because of its cruelty, but also, and perhaps more importantly, because of if its lack of effectiveness. A tortured individual will occasionally say whatever he/she thinks will satisfy the interrogators so as to stop his/her immediate suffering. This may lead to faulty and counter-productive intelligence. We are of the opinion that the methods applied by the ISA were not torture, but rather proportional physical pressure that effectively garnered life-saving intelligence.

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5 H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. The Government of Israel 53(4) P.D. 817, 835.

6 H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. The Government of Israel 53(4) P.D. 817, 845.

7 Tractate Sanhadrin, Chapter 4.

2. Ajouri vs. IDF Commander (HCJ 7019/02) - Expulsion of terrorist's family - (Decision given: 3.9.02)

In a landmark decision, the Israel Supreme Court unanimously approved (by nine Supreme Court Justices) the expulsions of Intissar and Kifah Ajouri, sister and brother of Ali Ajouri, accused of ordering several suicide bombings. This was the first time the court upheld a decision to expel relatives of terror suspects rather than limiting the expulsion to the perpetrators themselves.[8]

In this case, the Court evaluated the merits of expelling three different family members that were directly involved in, or had knowledge of, a planned suicide attack. It was decided, as stated, that the IDF commander has the authority, in principle, to assign residence under international law. Therefore, the Court decided not to intervene in the decision of the IDF Commander to assign the residence of two of the petitioners. Amtassar Muhammed Ahmed Ajuri (Amtassar), was held to have directly assisted her terrorist brother Ahmed Ajuri, by sewing explosive belts, and Kipah Mahmad Ahmed Ajuri (Kipah), was held to have helped his brother, by facilitating a hideout apartment and by acting as a lookout when his brother and members of his group transferred two explosive charges from one place to another. The two were expelled.

The Court was convinced that Amtassar and Kipah were extensively involved in the terrorist act and that they presented a danger, which would be averted if they were removed from their place of residence. However, the Court also decided that with regard to the petitioner Abed Alnasser Mustafa Ahmed Asida - the brother of the terrorist Nasser A-Din Asida - the measure of assigned residence could not be adopted. The reason for this was that even though this petitioner knew of the deeds of his terrorist brother, his involvement amounted merely to lending his brother a car and giving him clean clothes and food at his home and no connection had been established between the petitioner's acts and the terrorist activity of his brother. It was, therefore, held that there was an inadequate basis to deem the petitioner as sufficiently dangerous for his residence to be assigned.[9]

The Court also clarified that if a real risk is evident it is permissible to move Palestinians to the Gaza Strip from the Judea and Samaria. However, it is not permissible to do so as a deterrent. That is, even if assigning the relative's residence, even temporarily, may deter others from carrying out terrorist acts in general and suicide attacks in particular.

The Supreme Court, led by President A. Barak and with the agreement of all the members of the panel, clarified that the basic framework for examining the legality of the IDF Commander's actions are found in the provisions of international law and the laws that apply to belligerent occupation. Within this framework, the Court said, the circumstances of the case should not be regarded as a deportation or a forcible transfer (within the meaning of article 49 of the Fourth Geneva Convention[10]) but as an assigned residence, which is permitted under article 78 of that Convention.[11]

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8 www.us-israel.org/jsource/Terrorism/sctdec.html

9 Ibid.

10 This article relates to the status of treatment of protected persons in occupied territories.

11 www.us-israel.org/jsource/Terrorism/sctdec.html

The court went on to clarify that every person has a basic right to retain his place of residence and to prevent a change of that place. However, International law recognizes - in article 78 of the Fourth Geneva Convention - that there are circumstances in which this right may be overridden by other interests, namely 'imperative reasons of security'.

Article 78 of the Fourth Geneva Convention begins:

> 'If the Occupying Power considers it necessary, for imperative reasons of security, to take security measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.(Underlined O.F.)

The court held that in the circumstances of the case, the preconditions set out in article 78 of the Fourth Geneva Convention allowing someone's place of residence to be assigned, were indeed fulfilled.[12]

When the condition of a person presenting a danger exists, it was held that it is justified to take into account, when deciding whether to assign his place of residence, the impact of this measure in deterring others from carrying out terrorist acts and helping those carrying out terrorist acts. This consideration could also be taken into account, for example, when choosing between internment and assigned residence. This result, the court said, 'is required by the harsh reality in which the State of Israel and the territory are situated, in that they are exposed to an inhuman phenomenon of "human bombs" that is engulfing the area'. In this respect, the court accepted the position of the IDF Commander that assigned residence is an effective measure in the struggle against the scourge of suicide bombers.[13]

The result was that, in accordance with the level of involvement and the risk posed, two petitions against the assigned residence orders were denied, and the petition of one petitioner was granted.

Ramifications on the War on Terror and the Rule of Law

As far as the rule of law is concerned, international and domestic law were upheld in full compliance with the Geneva Conventions, the universal right to self-defense allotted to all nation states under the UN charter and under the Basic Laws of the State of Israel. However, in terms of the war on terror, it is questionable whether anything substantial was achieved.

Terrorists and those who harbor them in areas under the judicial jurisdiction of Israel can now draw the boundaries of collaboration with terrorists by means of the guidelines set in Ajouri vs. IDF Commander (HCJ 7019/02).

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12 Ibid.

13 Ibid.

The court made it clear that by sewing explosive belts or by helping terrorists subsist in hideouts, and by acting as a lookout for terrorists, one has crossed the boundaries and may be temporarily "assigned residence" if one continues to pose an imminent threat. However, if one "merely" has knowledge of a person (in this case a relative) being a terrorist and comforts him with food, means of transportation and shelter, then such a collaborator cannot be "assigned residence".

Such a verdict does not serve as a deterrence factor to potential suicide bombers who want, inter alia, to provide their family with pride, public standing within their community and funds from sources that finance terror, not necessarily in that order. In the event that all potential suicide bombers were to be fully aware that their family would pay the price for their actions - a price that includes deportation - perhaps "assigned residence" would serve as a deterrent to some of the potential suicide terrorists.

3. Beit Sourik Village Council vs. The Government of Israel (HCJ 2056/04) - Security Fence (Decision given: 30.6.04)

Pursuant to an unprecedented wave of terror against Israeli civilians, the Commander of the Israeli Defense Forces (IDF) in Judea and Samaria, based on government directives, issued orders to take possession of plots of land in Judea and Samaria. The stated purpose of the seizure was to erect a section of the separation fence across the seized land, in an effort to hinder the access of potential perpetrators, including suicide bombers, into Israel's population centers. The question presented before the High Court of Justice was whether the orders and the fence were legal.

In this decision, President Barak clarified that "only a Separation Fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law will lead the state to the security so yearned for."[14]

In this paramount decision by the HCJ, it was held that the placement of a security fence in an effort to save lives is legal, based on international law. In accordance with articles 23(g) and 52 of the Hague Convention and article 53 of the Fourth Geneva Convention, the military commander is authorized to take possession of land under belligerent occupation, if this is deemed necessary for the needs of the army.[15]

The HCJ also clarified that the fence does not necessarily have to be erected on what is referred to as the "green line" - the armistice line between Israel and Jordan, set after Israel's War of Independence in 1949. It can therefore be inferred that the HCJ was convinced that a security fence built on the "green line" could not address Israel's security needs.

Nevertheless, the HCJ stated that the separation fence must be built with consideration of the local "inhabitants" rights to freedom of movement. As such, it was decided that the route set by the IDF Commander in Judea and Samaria was not proportional and needed to be revised,

14 Beit Sourik Village Council v. The Government of Israel (HCJ 2056/04)

15 Ibid, paragraph 32.

even if the said revision may jeopardize, to a certain degree, the lives of innocents.

Ramifications on the War on Terror and the Rule of Law

The importance of this decision is that the HCJ affirmed that the state has the right to protect its citizens by means of erecting a security fence, even if the said fence is placed on occupied land.

Nevertheless, the immediate result of this decision, given on June 30, 2004, was that the route set by the Commander of the IDF Forces in Judea and Samaria had to be revised and the actual placement of the fence delayed. Consequently, the border into Israel's population centers remained porous, which in turn enabled infiltration by Palestinian perpetrators, including suicide bombers, into Israeli city centers. These infiltrations included suicide attacks in Jerusalem by Palestinian terrorists arriving unhindered from villages near Hebron, and suicide attacks in Netanya by Palestinian terrorists arriving unhindered from villages near Jenin.

Without derogating from the above, we are not stating that had a security fence been in place, the said attacks would have been prevented. Yet, it is reasonable to believe, based on experience before as well as after the aforementioned decision, that a security fence would have served as an obstacle for attackers and thus mitigated, at least partly, the vulnerability of Jerusalem and Netanya to such attacks.

In addition, this decision served as a floodgate for petitioners to contend the route of all future segments of the security fence. By doing so, the petitioners are delaying the erection of this life-saving fence.

4. Adaala vs. The Minister of Defense HCJ 3799/02 - The use of civilians as means of early warning (Decision given: 15.9.04)

As part of its ongoing struggle against terrorism, the IDF set an 'Early Warning' procedure that permitted IDF soldiers attempting to arrest Palestinian terrorist suspects to use the assistance of local Palestinians, in an effort to receive and provide early warning. This 'Early warning' would alert the Suspect of harm that may be inflicted upon him and upon those who may be harboring him, in the event that the Suspect does not surrender peacefully.

A petition was filed in May 2002 by seven different human rights organizations, based on reports that the IDF had forced Palestinians to search houses that were thought to be booby-trapped and to enter houses where wanted men were thought to be hiding, in advance of the soldiers who sought to arrest them.16 This case came to examine whether the said procedure is legal.

The High Court of Justice ruled on 6.10.2005 that the IDF's use of Palestinians to deliver warnings to wanted men on impending arrest operations is illegal, as it violates the principles

16 Haaretz 7.10.2005

of international law.[17]

Ramifications on the War on Terror and the Rule of Law

Subsequent to the ruling, IDF Chief of Staff Dan Halutz ordered the army to immediately implement the High Court decision and disallow the 'Early Warning' procedure in the IDF. By disallowing the 'Early Warning' procedure, the IDF was forced to either put its soldiers at greater risk by directly exposing them to the suspected terrorists, or apply greater use of unselective force.

As a result of the ruling, senior IDF officers said that until a "creative solution" was found, the army would have to employ more force and might demolish more homes during arrests, since it was no longer permitted to use Palestinians as human shields.[18] Shields aimed to protect the lives of IDF soldiers as well as the lives of Palestinians.

Final Note

From the cases reviewed herein, it is clear that the Israeli High Court of Justice is being asked to rule, on many different occasions, as to the correct balancing between security and liberty. The High Court of Justice in Israel, lead by its President, Aharon Barak, appears to view itself an expert in the framework of "humanitarian considerations", or more specifically, in "the question of proportionality between military consideration and humanitarian consideration".[19]

This controversial position is not held by all. There are those who believe that the Courts should limit themselves to the interpretation of the law and that their expertise does not necessarily provide them with better tools than others, to find the correct balancing point between security and liberty. We are of the opinion that, when possible, such balancing points should be set by the elected representatives of the people. Elected representatives of the public that receive a clear mandate to decide upon such constitutional matters. These issues should not be narrowed to the legal interpretation.

International Comparison and Cooperation

In the distant past, and more specifically before September 11, 2001, it was internationally perceived by many that Israel was the only state vulnerable to terror. At the time, the term 'terrorism' was not completely recognized by most of the international community, but was rather referred to as 'violence' or 'militant activity' or, in extreme cases, depicted as 'severe use of violence'. However, times have changed and today, almost every corner of the world is vulnerable to terrorism to a certain degree, and most states are aware of their predicament.

This relatively new reality dictates the need for a comparison of the different legal doctrines

17 HCJ 3799/02

18 Haaretz 7.10.2005

19 Beit Sourik Village Council v. The Government of Israel (HCJ 2056/04), paragraph 48.

applied to counter-terrorism among different states, in an effort to find the most humane and effective policies. Once these are recognized, global cooperation must be established to successfully implement the best policy.

In terms of the legal confrontation with terror and the need to preserve human rights, a comparison of the human rights doctrine applied by Israel's neighbors would be ambivalent, since there are no real democracies in Israel's geographic milieu, leaving it as the only nation in the Middle East operating under the rule of law.[20] In contrast to Israel, the Egyptians, Jordanians and Palestinians, routinely torture suspects and do not limit their torture to non-lethal techniques.[21]

A more valuable assessment would be to compare Israel's policy to other democracies in general, and democracies that are currently in a state of war or belligerent occupation, in particular - similar to Israel. Countries like France, Great Britain, Australia and the United States are four countries of interest that have longstanding judicial systems and are currently confronting the challenges of terror.

With the right cooperation between peace-loving yet terror-riddled states, the right balance between security and liberty may be found.

20 Alan Dershowitz, The Case for Israel, 183.

21 Dershowitz, The Case for Israel, 186.