Reichman University
International Institute for Counter-Terrorism (ICT)
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Judicial Overhaul is Undermining Israeli Counterterrorism Posture

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Introduction

On July 26, Qatar announced its intention to submit a memorandum to the International Court of Justice (ICJ) in The Hague to discuss the "legal consequences" of Israel's West Bank policy, following "changes in the Israeli legal system".1 The sharp-eyed will notice that this is not just another routine condemnation of Israel's policy in the West Bank, but rather a first step that creates a link between the current changes of the judicial system in Israel and the potential damage for Israel's national security. Additional signals regarding the possible negative impacts posed by judicial possible overhaul are also being observed in other circles, from Washington to Brussels, as well as in international institutions such as the UN High Commissioner for Human Rights.

The authors of this commentary have spent more than 25 years designing, developing and implementing the counterterrorism (CT) doctrines of the IDF, and beyond. And we wish to point out the dramatic consequences inherent in the emerging legislation (and at this stage, the legal elimination of the "reasonableness" as it subjects to court discretion) to Israel's national security posture, including the CT crucial posture and long-standing operational practices. In other words, the omission of the "cause of reasonableness" from any judicial tribunal in Israel holds severe blow to the CT practices that have been built and formulated over decades, as a fascinating outcome of intergenerational technological, operational, and cultural changes (including on the enemy's side), and is expected to erode to the point of endangering vital components of the national security of Israel and its allies in the region and around the world, especially the US.

From our professional perspective, the expected violation of the basic principles of constitutional and administrative law in Israel, which dates back to the days of the British Mandate, in a manner that reflects prevailing perceptions in Western democracies – from the US to France – will significantly increase the risks facing Israel's freedom of action in the field of CT and the use of military force. In fact, the international context is the most significant indicator regarding the potential risk involved in the legislative processes ahead, since, as President Biden has repeatedly pointed out in recent months, the basis of the special relationship between Israel and the US rests on a shared moral values. Part of the expected erosion will also affect the world of the CT on several levels:

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1 In memo to ICJ, Qatar condemns Israeli occupation of Palestine | The Peninsula Qatar

The IDF's Freedom of Action

Eliminating the "grounds of reasonableness" may erode the Israeli claim of "complementarity" while investigating IDF actions, and in fact undermine the "legal Iron Dome" deployed over IDF combatants and commanders in their operational activities. This vacuum may lead to increased international judicial review, including before the International Criminal Court (ICC), but also other state tribunals (for the most part, state proceedings against IDF officers were blocked due to the same "claim of complementarity" originating in international law). Both are likely to challenge the IDF's freedom of action today, particularly in a complex arena such as the West Bank and Gaza urban warfare that leads to complicated and congested battlefield scene. For example, the concept of targeted killings, which is based on the historic High Course of Justice ruling (2006), and which constitutes the cornerstone of Israel's operational concept for targeted killings, is likely to face upheaval, with the omission of the reasonableness cause, which is a fundamental component (alongside the principles of international law and the law of war, such as the principle of proportionality) in the use of force, and increase the future legal risk given similar actions up the road. This may have a dramatic impact on the Israeli CT doctrine, particularly in the Palestinian arena, including for house demolitions (which relies on both the principles of the laws of war and the elements of reasonableness in administrative law). This approach joins a broader argument, which goes beyond the scope of this discussion, which seeks to argue that the legislative elements led by the current coalition are sufficient to limit the IDF's operational freedom of action. In other words, there is a kind of "overlap" between the principles of Israeli administrative law and the principles of international law and the law of war, which may create legal difficulties for Israel and serve as an opening for clashes in international forums.

Judicial Review

Elimination of the "grounds of reasonableness" is expected to make it difficult for Israeli courts to conduct judicial review of CT activities, which primarily rely on examining the reasonableness of the government's decision. In addition to house demolition, this reflects changing prison conditions for terror prisoners (affiliated to Hamas, PIJ, ISIL and other terror organizations) in light of changing security realities and need; and it also applies to Missing-in-Action (MIA) exchange deals. The courts, which generally refrain from interfering with political decision, will hold limited tools for discussing issues related to Missing-In-Action (MIAs) negotiations, such as the deportation of terrorists on one hand, and the release of prisoners, on the other. These will not only harm the Israel's ability to defend itself, both in the local arena and certainly in the international arena but will hold profound impact to the families of terror victims, who are entitled to present their position to the Supreme Court before releasing terrorists, based on domestic law.

In the international Arena

The longstanding but changing US posture vis-à-vis international tribunals, particularly the ICC, entails, inter alia, the united front that the US and its Western allies present before these forums. This front rests not only on a shared, rooted, and well-established world of values, but also on a similar domestic legal experience, and the adoption of almost identical international

and standards. Eliminating the "cause of reasonableness" can be a dramatic catalyst to differentiate Israel from the Western legal posture, which allows freedom of military and operational action, particularly in the field of CT: from the war in Afghanistan following 9/11, through the French CT campaign in West Africa, to the international sanctions' regime against terrorist organizations, including via the UN Security Council. In other words, regime change in Israel may lead to the erosion of State's status as a central and influential CT key-player in decision-making processes among Western opinion makers, with regard to the customary legal need required for continued war against terror.

Conclusion

The bottom line: Regime change as currently being promoted by the government poses a genuine threat to the Israeli CT ConOps (concepts of operation), which is considered esteemed, leading and has a powerful standing among its allies around the globe.

Given the continued intensification to limit the justice system and law enforcement in Israel, along with the elimination of the "grounds of reasonableness," one can expect a series of challenges – which are not a necessity but the product of political, sectoral, and personal whims – that are expected to negatively impact Israel's National Security, restrict freedom of military action, while providing ammunitions to those seeking evil (from terrorist organizations through state sponsors of terrorism to delegitimization organizations and international tribunals).

On the deeper level, this discussion reflects another significant dimension of a series of dangers to Israel's national security and that of its allies in light of government initiatives, in a manner that could generate far-reaching geopolitical, security, and strategic projections in the Middle East and beyond.