Fighting Terrorism with One Hand Tied Behind the Back: Delineating the Normative Framework for Conducting the Struggle against Terrorism within a Democratic Paradigm

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The 21st Century poses many new challenges to the free world. One of its most ominous and peril challenges is the phenomenon of terrorism. Terrorism is different from all other traditional armed conflicts we used to face and have in the past, by the fact of its different nature and character of its participants. Not anymore the classic wars or armed conflicts between states, but rather states against non state actors – individuals or private terrorist organizations, who does not necessarily belong or endorsed by a sovereign state, and who are acting independently from countless possible places on the globe.

In this note, I would like to suggest a legal paradigm by which a democracy should conduct itself when it struggles with terrorism. The note provides an elevated point of view of international law. It does not presume to handle and analyze every aspect of it to the last detail. Instead, this note refers to the cornerstones of international law, and emphasizes the parts, elements, and interpretations of it, in which when applied, international law is simply incompatible.

The first chapter will discuss the meaning of emergency regime as legal answer for combating terrorism. The second chapter will try to answer the legal dimension and the choice of law in fighting terrorism. The third chapter will discuss the relevance of the legal framework applicable to an armed conflict between a state and non state actors, in the international aspect. The fourth chapter is devoted to the question how to balance in a
just way the interests of human rights against the needs of security. The fifth subject deals
with the meaning of self defense in connection with the phenomenon of terrorism. The
last chapter poses the question of role of the judiciary during times of emergency when
the executive branch struggle with terrorists.

I.

A democratic regime is a government of law, not of men.¹ The corner stone of
every democracy is the principle of rule of law. Therefore, the struggle of a democracy
against terrorism should be solved within our understanding of the rule of law.

What is the role of the law in fighting terrorism? To answer this question we
should understand the role of law in general, in a civilized society. In a democracy, law
might have different roles: first, it reflects the basic norms, the bedrock foundation of the
society, an agreement between all members of the society on how to live together.² A
second role for the law in a democracy is the promotion of the principle of the rule of
law.³ The rule of law is the fountain of democracy.⁴ Its true value and its ability to be our
protector must be judged in exceptional times, in times of tension and emergency.⁵

¹ See HCJ 4764/04 Physicians for Human Rights v. Commander of IDF Forces in Gaza Strip, 58(5) P.D. 385, para. 7. English translation of the judgment may be found at: http://elyon1.court.gov.il/Files_Eng/04/640/047/a03/04047640.a03.htm. See also: F.H.C. 2161/96 Sharif v. C.O. Home-front Command, 50(4) P.D. 485, 491 [in Hebrew]: “The branches of government hold a high place, but the law is higher than all of us.”
What does the “rule of law” mean in times of emergency? In order to be able to answer this question we should first define the legal notion of “emergency”. Emergency can be described as an unusual state of affairs or times that pose a threat to a democracy and its ability to conduct normal life. At this point it should be stressed that an emergency regime is not exclusively connected to existential problems. The character and the magnitude of the event should not necessarily pose a risk to the existence of a society. It is sufficient that the event or events gravely undermine public order and prevent from significant parts of society the ability to pursue their normal life. For example, such events can exist when a strong earthquake or a powerful hurricane cause devastating casualties, or a dangerous epidemic spreads and risks many lives. Those events are characterized by a complete or at least grave and exceptional halt to normal life. In response to those events the government – in order to protect its citizens and ensure the regular supply of the essential services – may need to employ some exceptional normative powers, such as sending the National Guard or the Army, or

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6 Although we lack one analytical definition that clearly defines the concept of "emergency", it is commonly accepted to characterize it as an exceptional real or imminent threat. See, for example, the definition offered by the European Commission of Human Rights to the term "public emergency threatening the life of the nation" in the Convention for the Protection of Human Rights and Fundamental Freedoms: “a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organized life of the community which composes the state in question.” 1 EUR. CT. OF H.R., Report of the Eur. Commission of Human Rights, “Lawless” Case, (ser. B) 82, at 90 (1960).


9 In Canada, for example, the Emergencies Act distinguishes between four types of emergencies: public welfare emergency, public order emergency, international emergency and war emergency. See Emergencies Act, R.S. 1985, c. 22 (4th Supp.), ss. 5, 16, 27, 37.
spending more money out of the regular budget.\textsuperscript{10} In a federal system, emergency regime can be confined only to those places that have been affected by the events.\textsuperscript{11}

Another event which corresponds and may constitute a need for an emergency regime is an act or acts of terrorism.\textsuperscript{12} Terrorism by its nature is the use of force in order to intimidate innocent people.\textsuperscript{13} Terrorism is used by individuals or groups in order to spread their ideas and achieve a political goal of a nationalist, religious, social, or economic nature.\textsuperscript{14} Targeting people indiscriminately may demoralize and terrify parts of the population; life might veer from its normal course.\textsuperscript{15} Thus, dealing with the phenomenon of terrorism may require the government to use special tools which it generally lacks in normal times.\textsuperscript{16} Those special legal tools entail a potential risk to our liberties, and therefore they could conflict with our constitutional rights.\textsuperscript{17}

Emergency, we may conclude, is a real and imminent crisis which gravely and exceptionally endangers the sovereignty of the state.\textsuperscript{18} Thus, it also means that the

\textsuperscript{10} William L. Waugh Jr., The Political Costs of Failure in the Katrina and Rita Disasters, 604 ANNALS 10 (2006)
\textsuperscript{11} Id.
\textsuperscript{12} Emanuel Gross, How to Justify an Emergency Regime and Preserve Civil Liberties in Times of Terrorism?, 5 SOUTH CAROLINA J. INT'L L. & BUSINESS 1(2008).
\textsuperscript{13} For a comprehensive discussion regarding the legal definitions and common characteristics of the terrorist act see Emanuel Gross, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM – LESSONS FROM THE UNITED STATES, THE UNITED KINGDOM, AND ISRAEL 11-25 (2006).
\textsuperscript{14} Paul Wilkinson, POLITICAL TERRORISM 12-13 (1974).
\textsuperscript{16} Gross, 12, p 11.
\textsuperscript{17} Id.
\textsuperscript{18} It should be noted that the concept of "emergency" has never received a descriptive definition that clearly expresses its scope of application. The reason for this is that states of emergency may occur due to infinite variety of circumstances and in various levels of severity. Furthermore, because of the fact that states vary from one another in the size of their territory, their culture, the constitutional structure of their governments, etc., every attempt to define in advance the parameters that characterize the "emergency" is inherently flawed because it ignores the need to examine each event according to its unique context and circumstances. (See the International Law Association Paris Report 59 (1984), quoted in Jaime Oraa, HUMAN RIGHTS AND STATES OF EMERGENCY IN INTERNATIONAL LAW 31 (1992))
government might need to restrict the constitutional liberties of its citizens in order to effectively overcome the threat and restore the normal course of life as soon as possible.\textsuperscript{19}

In our next chapter we shall try to describe the kind of law that should regulate the struggle of a democracy against terrorism.

\section*{II.}

The response of a democratic government to terrorism-related states of emergency ought to be derived from two sets of norms: the international law regarding the conduct of hostilities and the domestic laws which govern the use of force in times of emergency. We shall first turn to discuss the former.

Wars were the fate of human nature from the beginning of history. Since the formation of nations, the civilized world tried to regulate the norms by which wars will be justified and ways it should be conducted. The 19\textsuperscript{th} and 20\textsuperscript{th} centuries provided us with the international laws of armed conflicts.\textsuperscript{20} The common denominator of those rules, is

\begin{itemize}
  \item i.e., when the government is unable to ensure national and personal security, or the ordinary supply of essential services, such as law-enforcement, medical services, public transportation, etc. Second, a state of emergency exists only in light of grave and exceptional threats. Third, the crisis must be of a temporary nature. Fourth, the crisis must be real or imminent. (for a comprehensive examination of these elements see: Gross, supra note 12, p. 3)
\end{itemize}


that they were based on a general understanding and consent that albeit the desire to win a war, not all available means and techniques are to be permissible.\textsuperscript{21}

The war on terrorism is different from all other traditional wars we have known in the past, due to the different nature of its participants. In the past we have been accustomed to wars among sovereign states.\textsuperscript{22} Now we have a new phenomenon: armed struggles between a state and non state actors. Thus, while the old customary rules of engagement were based on the assumption that all the parties to a conflict had agreed in a mutual way to restrain their use of power; now only one side sees itself committed to those rules: the democratic state. The other side, the terrorist organization, not only does not consider itself bound by the laws of war, on the contrary, it defies and despises those laws.\textsuperscript{23}

Under these circumstances, the first question that arises concerns the status of terrorists under international law. Under the existing body of international law there are only two kinds of players in connection with an armed conflict of an international character. There are the \textit{combatants} who are persons who conduct the war and there are \textit{civilians}, those who find themselves involved in a war but do not take part in the hostilities\textsuperscript{24}. How should we regard the status of a terrorist: is he a warrior, a combatant, or is he a civilian?

In view of the special nature of the war waged by terrorists, as opposed to the other "classic" participants within the international arena, I believe that a terrorist cannot

\begin{itemize}
  \item \textsuperscript{22} PAUL GILBERT, \textit{NEW TERROR, NEW WARS} 7-8 (2003).
  \item \textsuperscript{23} Meisels, supra note 21, at p. 33.
  \item \textsuperscript{24} See Regulation 1, Annexed to the Hague Convention Respecting the Laws and Customs of War on Land (Hague IV) (Oct. 18, 1907); Article 13 of The First and Second Geneva Conventions, supra note 20; article 4 of The Third Geneva Convention, supra note 20.
\end{itemize}
be regarded as a lawful combatant, or even as a freedom fighter.\textsuperscript{25} The international laws of war positively regulate the status of civilians and lawful combatants during times of hostilities. However, they do not regulate the status of unlawful combatants, such as terrorists. Hence, we currently do not have an explicit international regulation for the manner in which an armed conflict between sovereign states and private terrorist organizations ought to be conducted. Article 2 common to the four Geneva Conventions of 1949 provides that the norms anchored in the conventions are intended to apply to \textit{international armed conflicts}, i.e., to conflicts between two or more entities possessing an international legal personality.\textsuperscript{26} Article 1(4) of the First Additional Protocol to the Geneva Conventions expands the definition of an armed conflict to situations where peoples fight against a colonial regime, foreign occupation or racial regimes within the framework of their struggle for self-determination.\textsuperscript{27} International law also enables the attribution of the activities of non-state actors to a state sponsoring their acts if that state has effective control over them, i.e., if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that state in carrying out the conduct.\textsuperscript{28}

However, in the existing reality, even though the vast majority of terrorist organizations are indeed being supported by sovereign states, it is very difficult to adduce

\footnotesize{\textsuperscript{25} For a similar view, see Yoram Dinstein, \textit{The Conduct of Hostilities under the Law of International Armed Conflict} 29 (2004).}

\footnotesize{\textsuperscript{26} Art. 2 common to the four Geneva Conventions of 1949 for the Protection of War Victims, Aug. 12, 1949, 75 U.N.T.S. 3.}

\footnotesize{\textsuperscript{27} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 1(4), 1125 U.N.T.S. 3.}

\footnotesize{\textsuperscript{28} Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. 14, 65; see also Draft Articles on Responsibility of States for internationally wrongful acts, International Law Commission, 53\textsuperscript{rd} Sess., art. 8 (2001), at http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf.}
sufficient proof for the existence of such support.\textsuperscript{29} Thus, only in a few cases, is it possible to render the doctrine of effective control and attribute to the sponsoring state responsibility for the terrorist acts carried out in the territory of another state. If the terrorists are inhabitants of the state and operating against it from inside we should regard it as an armed conflict not of an international character, and the domestic law should provide the legal norms of how to conduct this struggle. Article 3 common to the four Geneva Conventions refers to armed conflicts of non international character. If this article applies in our scenario, it could provide minimum humanitarian norms which bind all the parties to the dispute.\textsuperscript{30} It follows that the central question is whether this article is applicable to terrorist attacks against a sovereign state, where such attacks are perpetrated by a terrorist organization operating from outside the country it attacks and assuming those terrorists are not sponsored by a state or where it is impossible to prove such support.

Article 3 sets out two cumulative conditions for its application; first, the existence of an armed conflict; and second, that the dispute is not of an international character.

Even if we assume that the second condition is directed to apply to every armed conflict which is not governed by Article 2 common to all the conventions, i.e., a conflict in which only one of the parties is a sovereign state and the other is a non state actor, we still need to determine whether it is possible to regard terrorist attacks as armed conflicts, and not merely as internal uprisings or riots. Although terrorist acts are not armed conflicts in the traditional sense, due to their special nature and attributes, they

\textsuperscript{29} See GROSS, supra note 13, at p. 52.
nonetheless meet some of the basic characteristics of the classic armed conflict.\textsuperscript{31} A terrorist organization is an organization possessing a hierarchical structure, which consists of a political wing and a military wing. Terrorist acts are not spontaneous but are preceded by careful planning and often by intelligence gathering in order to increase the chance of success. Additionally, they are capable of causing great damage to life and property.

Thus, even if it is not possible to clearly define the exact application's scope of the term "armed conflict", it will be safe to agree that it should apply to hostilities which pose grave breach of international humanitarian law. Thus, while not all terrorist attacks may amount to an armed conflict according to the classic definition, at least attacks that were planned and launched by terrorist organization against civilians, and threatening or causing serious damages to person or property, should be regarded as armed conflicts.\textsuperscript{32}

One thing for sure, you cannot conceive those attacks just as riots or insurgencies.\textsuperscript{33}

But there are different scenarios. Let's take the response of the United States after the attacks of Sep. 11, 2001, when it decided that there is a military need to send the army to Afghanistan in order to fight those who sent the assailers of the attack on America, Al Quida.\textsuperscript{34} What should be the law govern this situation? Al Quida is not a state but rather a network of global terrorism.\textsuperscript{35} Because it is not a state we could say that Article 2 mentioned before is not applicable. So if the international law of armed conflicts is not applicable, should we consider it as a problem of domestic law enforcement, as one

\textsuperscript{31} GROSS, supra note 13, at p. 52; Taft, supra note 21.
\textsuperscript{32} GROSS, id, at pp. 51-54.
\textsuperscript{33} See also: Derek Jinks, \textit{September 11 and the Laws of War}, 28 \textit{Yale J. Int'l L.} 1, 47 (2003).
\textsuperscript{34} See the joint resolution which was issued by the two Houses of Congress shortly after the attacks: Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
prominent scholar suggested recently? I do not think that the domestic law should regulate those situations when the army operates out of its borders. I agree with Prof. Corn that between domestic law and international law of armed conflict, the latter is preferable and makes much more sense.

The answer should be found in article 3 mentioned before. Because terrorists organizations are not states thus fighting them cannot be regarded as armed conflict of international character according to the article 2, the residual article, thus article 3 should be applicable. As we have seen this article covers all armed conflicts that are not of international character. It is important to apply this article because it sets the minimum standards of humanity even if the terrorists are not respecting those norms.

Yet, there is another scenario of armed conflict between a state and a non state organization - this time the latter operates from a political entity which is not a state, for example, in the context of the Israeli-Palestinian conflict. The Palestinian Authority has not been recognized by international law as a sovereign state. For this reason, it is not clear whether the Israeli-Palestinian conflict ought to be regarded as an armed conflict of an international character according to article 2 common to the four Geneva conventions. However, the long-lasting ruling of the Israeli supreme court was that Israel holds Judea, Samaria, and the Gaza Strip by virtue of belligerent occupation, and consequently, the military commander's power stems from two normative sources: first, the rules of international law concerning belligerent occupation (including the customary

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38 See, for example: Ariel Zemach, Taking War Seriously: Applying the Law of War to Hostilities within an Occupied Territory, 38 GEO. WASH. INT'L L. REV. 645 (2006); Mehir Shamgar, The Observance of International Law in the Administered Territories, 1 ISR. YEARBOOK HUM. RTS. 262 (1971).
39 Dinstein, supra note 36, at p. 887.
Hague Regulations and the Fourth Geneva Convention), which are part of the laws of war. Second, the basic principles of Israeli administrative law, which demand that the military commander – as a public official – will implement the powers conferred to him in a reasonable, proportional and fair manner and will appropriately balance individual liberties against the public interest.40

In our next chapter we shall confront with the broader question of whether the international law as a corpus, its configuration, principles and premises, truly are successful in promoting its humanitarian goals or hinder them, in relevance to the situation of an armed conflict between a state and a non-state actor.

III.

As it been held, international law, per se, regulates solely the status of civilians and combatants. International law is not adjusted to the phenomena of terrorism. In order to view international law through the lens of today's reality, I would like to use the example of operation "Cast lead" and particularly the following United Nations fact-finding mission on the war in Gaza led by Judge Richard Goldstone41 as a case study.

Since the year 2000, approximately 12,000 rockets, fired by Palestinian militants, have struck Israel. These ongoing attacks on Israel's civilian population has taken many casualties and generated the need of an action, in order to re-establish security and order into place. Thus, operation "Cast lead" was launched. A sovereign state, i.e. Israel, has the right to self defense and the obligation to protect its citizens.

41 Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf (Hereinafter - "the Goldstone report" or "the report").
As a result of operation Cast lead, now more familiar as the "Gaza war", the United Nations Human Rights Council assigned the aforementioned mission with the mandate "to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after". 42

The Goldstone report is an ideal example to use and apply when we try to answer the question mentioned at the beginning of this chapter.

First, the legal framework of the report is the general international law, in particular international human rights law and international humanitarian law. 43 Second, the "armed conflict" in subject is of the kind of a state and a terrorism organization – a non state actor, and therefore appropriate also on the factual basis.

But most of all, the report is an extraordinary example because of the outcome of it. It seems that the Goldstone report can teach us a lot more about international law, than about Israel’s misconduct (if at all occurred - an issue that, as explained below, this is not the place to address) during the Gaza War.

A lot has been said about the Goldstone report, about it being biased, opinionated and discriminatory against Israel. 44 My intention is not to revive all these arguments, but rather to use the report, with all its controversiality, ad hoc, as an instrument to show that current international laws covering the conduct of war do not properly take into account

42 The Goldstone report, supra note 41, para. 1.
43 Supra note 20; see also the Goldstone report, supra note 41, paras. 294-310.
44 See, for example, Israel’s "INITIAL RESPONSE TO REPORT OF THE FACT FINDING MISSION ON GAZA ESTABLISHED PURSUANT TO RESOLUTION S-9/1 OF THE HUMAN RIGHTS COUNCIL. Available at: http://www.mfa.gov.il/NR/rdonlyres/FC985702-61C4-41C9-8B72-E3876FEF0ACA/0/GoldstoneReportInitialResponse240909.pdf.
the needs of states forced to defend themselves against terrorism. Hence, in these forward
words there will not be a consideration to the conclusions of the report, in so far as they
are based on judgment of the mission's members. The major partiality of the report, is in
fact the thing that demonstrates and teaches us, more than all, to what extent the
international law is not applicable to situations of armed conflict between state and non-
state entities, in particular terror organizations. In other words, the more the Goldstone
report is excessive against Israel, the more it reveals and emphasizes that appliance of
international law, per se, in this case is, saying the least, misguided, and more intensely
when a probable outcome of that appliance is individual criminal responsibility under
international criminal law. It should be noted, already at this preliminary point, that the
very relevance of International law to a state and a non-state actor kind of armed conflict
is not free of doubts.

The difficulty arises when we ask ourselves, what was the primary and
fundamental humanitarian goal that international law wished to accomplish, and has it
been accomplished, when we try to answer this question nowadays. The historical and
worldwide background leaves no place to doubt, that the initial target by establishing
international law was to prevent incidents like human rights violation and harming

45 For a similar opinion see Liesbeth Zegveld, THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN
INTERNATIONAL LAW (2002), stating that international humanitarian and human rights law as a corpusjuris
developed with a state centric approach. Hence application of international humanitarian law protecting the
rights of victims in conflict situations involving non-state actors is an area of debate.
46 The international criminal law (ICL) is in fact the set of rules which provides the way to enforce the
international humanitarian law on the states compelled to it, where its norms have been breached and
severely violated by persons of the state in matter. In other words, ICL makes grave breaches of
International law indictable and punishable as war crimes. See the Goldstone report, supra note 41, paras.
46, 291-293.
47 See Duncan B. Hollis, "Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing
"protected persons" (civilians mostly) from occur. Hence, the objective of international law is minimizing human suffering and damage to civilian objects during the conduct of hostilities.

When we overview the Goldstone report, grounded upon international law, and considering its acute repercussion, it seems that international law manages to damage the very cause it attempts to address. The report is utilized here merely as a means to an end, whereas the end is international law.

To begin with, international law does not recognize the *sui generis* circumstances of the Israeli-Palestinian conflict: according international law, there are two kinds of armed conflict: the international kind and the non-international kind. The Gaza strip is either a state, nor a territory – occupied or controlled by Israel, thus the confrontation in the area is between a sovereign state and a non-state terrorist armed group operating from a separate territory. It is not settled yet which regime applies on this kind of unique situation. Although the basic guidelines between the two regimes are relatively similar and thus classification of the armed conflict between Hamas and Israel as international or non-international is, for now, abstract, it does show that the current rules of international law are not set to that kind of circumstances.

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48 Under the Fourth Geneva Convention, protected persons are those who, at a given moment and in any manner whatsoever, find themselves in the hands of a party to the conflict or occupying Power of which they are not nationals.


50 See HCJ 9132/07 *Jaber Al-Bassiouni v. The Prime Minister of Israel*, at p. 12 (2008), where the Israeli High Court of Justice recognized that “since September 2005 Israel no longer has effective control over what happens in the Gaza Strip, and thus no longer can be considered an “occupying power” under international law”. Available at: http://elyon1.court.gov.il/verdictsSearch/EnglishStaticVerdicts.html. For a different stance, see SECURITY COUNCIL RESOLUTION 1860 (2009) AND HUMAN RIGHTS COUNCIL RESOLUTION S-9/1; The Goldstone report, supra note 41, paras. 276-277.

Secondly, Most of the rules governing the use of force in armed conflicts\(^{52}\), served as legal framework to the Goldstone report\(^ {53}\), have been accepted by Israel, who considers them binding under both international and Israeli law.\(^ {54}\) The Palestinian side is also bound by International Humanitarian law,\(^ {55}\) and substantially, also by international human rights law.\(^ {56}\) “Most” and not all of the rules because Israel is not a party to the Additional Protocol I,\(^ {57}\) though accepts that some of its provisions accurately reflect customary international law, and thus are applicable.\(^ {58}\) It should be noted, in this context, that as oppose to the Hague Regulations Respecting the Laws and Customs of War on Land,\(^ {59}\) recognized as customary international law, the 1949 Geneva Conventions has yet made such transition.\(^ {60}\)

A special consideration should be given to the reason why Israel is not a signatory to a significant part of international law, i.e., Protocol I. But before providing the explanation, and without yet referring to the circumstances surrounding the initiation of the protocol, as well as to its content, it should be stressed that the very fact that provisions for regulating the status of irregular combatants did not become part of the IV

\(^{52}\) Supra note 20.

\(^{53}\) See the Goldstone report, supra note 41, paras. 158, 268.

\(^{54}\) HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel (as yet unpublished, judgment dated 14.12.2006), para. 19. English translation of the judgment may be found at: http://elyon1.court.gov.il/Files_Eng/02/690/007/a34/02007690.a34.HTM.

\(^{55}\) Prosecutor v. Sam Hinga Norman, case SCSL-2004-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment) (31 May 2004), para. 22: “It is well settled that all parties to an armed conflict, whether States or non-State actors, are bound by international humanitarian law, even though only States may become parties to international treaties”.

\(^{56}\) The Goldstone report, supra note 41, paras. 305-307.

\(^{57}\) Supra note 27 (Hereinafter – “Protocol I”).

\(^{58}\) Id, para. 20.

\(^{59}\) See supra note 20.

\(^{60}\) Yoram Dinstein, Application of Customary International Law, in Michael Bote, ed., National Implementation of International Humanitarian Law: Proceedings of an International Colloquium Held at Bad Homburg, June 17-19, 1988 (Leiden: Brill Academic Publishers, 1991), p. 31; See also Geneva Convention III, art. 2, sec. 3, where its explicitly stated that parties need not apply it to all conflicts, especially when the foes are not parties, and when enemies do not abide by its terms.
Geneva convention – premeditated a priori to protect civilian population – arises somewhat of concerning questions.

It should also be noted at this point, that the International Committee of the Red Cross published, at May 2009, an interpretative guidance clarifying what international humanitarian law says concerning civilians directly participating in hostilities.61 The aim of this document was to help distinguish between civilians who must be protected against attack and those who, in very exceptional circumstances, lose protection against direct attack. According to this document, the Interpretive Guidance document does not intend to change existing rules and principles of International Humanitarian Laws, but facilitates their coherent interpretation. The initial assumption of the document is that civilians are entitled to protection against direct attack, unless and for such time as they directly participate in hostilities. It aims to answer the questions of who is a civilian; what conduct amounts to direct participation in hostilities (and therefore leads to the loss of the civilian's protection); and, what modalities govern the loss of protection against direct attack.

Though the document attempts to simplify the interpretation, it creates a rather confusing, ambiguous and problematic classification: A civilian that supports insurgencies, even by directly participating in hostilities, does not necessarily lose its "civilian protection". For example, according to the document, if the direct participation in hostilities occurred in a spontaneous, sporadic or unorganized way, rather than "continuous combat function", the participant is still considered a civilian under International Humanitarian Law, and therefore – protected against attack. While acts which directly inflicts death, injury or destruction, or directly harms the enemy's military

61 Available at: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.pdf.
operations or capacity are considered "direct participation in hostilities", acts like production and shipment of weapons, or financial, administrative and political support, does not directly cause harm and, therefore, are considered "indirect".

The difference between "direct" and "indirect" participation is difficult, and the interpretation the Red Cross suggests makes it even more difficult. For example, the delivery by a civilian truck driver of ammunition to a shooting position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and would therefore constitute direct participation in hostilities. However, transporting ammunition from a factory to a port far from a conflict zone is too incidental to the use of that ammunition in specific military operations to be considered as "directly" causing harm. Although the ammunition truck remains a military objective subject to attack, driving it would not amount to direct participation in hostilities and, therefore, the civilian driver could not be targeted separately from the truck.\footnote{See the official website of the ICRC, Direct participation in hostilities: questions & answers, which notes the exact same example. Available at: http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-faq-020609,} It is hard enough to distinguish between these two scenarios. Add the pressure of decision making and the uncertainty of real time situation, and the outcome is acute. Of course, in case of doubt, the document concludes, the person in question must be presumed to be protected against direct attack. It should be reminded, in this context, that International Humanitarian Law does not privilege civilian direct participation in hostilities, but at the same time does not prohibit it. Therefore, such participation does not constitute a war crime. The defensive act taken by the other side, in order to response to that participation in hostilities, does, on the other hand, constitute a war crime.
To conclude, the Interpretive Guidance document of the International Committee of the Red Cross attempts to clarify certain uncertainties in applying International Humanitarian Law when it comes to civilians taking part in hostilities. As we have tried to show, the need of such clarification is indeed essential, but the document misses its aim, and maybe even drifts apart from it.

To the issue in subject, the final text of Protocol I incorporated highly controversial changes to the types of conflicts that could legally be characterized as interstate wars, with the attendant consequence of conveying combatant immunity to a far broader class of persons. Accordingly, Protocol I have been described as "law in the service of terror", served to legitimize international terror, and to protect terrorists from punishment as criminals. These reasons, amongst the political circumstances surrounded the drafters of Protocol I, had a crucial impact on its final version, and eventually brought the United States to reject the treaty. Israel, followed the path first laid by the United States, and decided also not to be a side to the treaty, for the same reasons.

One of the main difficulties laid by Protocol I is the ability to distinct between a lawful combatant and an unlawful one. Article 51 of the Protocol sets out provisions

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63 Protocol I, supra note 27, article 44, sec. 2, which bestows automatic "Prisoners Of War" status on all combatants, including so-called freedom fighters, even if they violate the laws of war.
64 Douglas J. Feith, Law in the Service of Terror, 1 Nat’l Int. 36, 36-41.
65 Protocol I was drafted at the height of the Cold war. Many third world nations, the Soviet bloc and its allies, sought recognition for those who fight against colonial domination and alien occupation and against racist regimes. Supported by the negotiating muscle of socialist states, these nations hijacked the Protocol to achieve explicitly political objectives. See also Tedd Lapkin, "Does Human Rights Law Apply to Terrorists?" The Middle East Quarterly, Vol. XI, No.4 (2004). Available at: http://www.meforum.org/651/does-human-rights-law-apply-to-terrorists#_ftnref34.
regarding to the protection of civilian population in which sides to the conflict are obligated. The primary purpose of the article is, of course, to protect the civilians engaged in warfare. Civilians can be considered military objectives – thus, can be attacked – only while they are taking a direct part in hostilities, not before and not after. This constitutes a great privilege to terrorists. Instead of a title – once a terrorist, always a terrorist – the article grants those unlawful combatants with a double-value status, which makes it very difficult and even impossible for the other side to effectively protect itself without being accused of breaches of international law and particularly the principle of distinction. Israel does not accept the qualifying phrase "and for such time" as reflective of customary law. Should we consider a person who is bearing arms (openly or concealed) and is on his way to the place where he will use them against the army, at such place, or on his way back from it, as a civilian? Isn't a person, who transports unlawful combatants to or from the place where the hostilities are taking place, taking a direct part in hostilities? According to the Goldstone report, in line with the implication of article 51, that person is a civilian. The words of article 51 thwart the ability of the army to defend itself and its country's citizens, and enables the terrorists to be under the cloak of civilians, who are naturally immune from attack.

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67 Protocol I, supra note 27, article 51.
69 Protocol I, supra note 27, article 51(3): "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities"; Yoram Dinstein, "The ICRC customary international humanitarian law study", ISRAEL YEARBOOK ON HUMAN RIGHTS, vol. 36 (2006), p. 11.
70 Supra note 54, para 34-35.
71 See Fenrick, supra note 66, p. 120.
72 The Goldstone report, supra note 41, see for example paras. 812, 841, 862-863.
Like the principle of distinction, *proportionality* is also one of the core tenets of international law.\(^7^3\) These two fundamental principles are linked by underlying combat activity.\(^7^4\) In a situation of an armed conflict, proportionality refers to the balance between the achievement of a military goal and the cost in terms of casualties. The proportionality principle fits the narrative of the classic war, and indeed it exists for centuries.\(^7^5\) Still, international law – in the aspect of proportionality – hasn’t been accommodated since then to the modern era and to the phenomena of terrorism. And again, there isn’t more suitable example to demonstrate this, than the Gaza war. The main characteristic of combat in the Gaza war was that of *fighting in built-up area*. This delicate situation, clashes with the principle of proportionality, and evidently also with the principle of distinction. The conclusion is that an army action taken against unlawful combatants, would forever be considered as disproportionate in terms of international law, when the military objective, not by mistake, is located in the middle of civilian population. Furthermore, when unlawful combatants are considered as civilians (according to Protocol I\(^7^6\)), and with regard to the principle of distinction, it seems that the above conclusion is inevitable.

The Goldstone report refers to the fulfillment of the principle of distinction and proportionality in the Gaza war and veritably proves that point. It concludes that "weighing the military advantage to be gained against the risk of killing civilians, will

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\(^7^4\) E.g. article 51 sec. 5(b) of Protocol I mentioned above: "Among others, the following types of attacks are to be considered as indiscriminate: an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive in relation to* the concrete and direct military advantage anticipated".

\(^7^5\) See Gardam, supre note 71, p. 397.

\(^7^6\) See supra notes 65-70 and accompanying text.
present very genuine dilemmas in certain cases". The report continues and addresses to a specific incident of firing mortar shells towards an exact target, in a setting where there was a large numbers of civilians nearby. The report does not addresses the issue of why that military target was a priory located in the middle of civilian territory, but rather concludes that "The Mission does not consider this to be such a case [which presents very genuine dilemmas]". The acute outcome of the report indicates the need of significant modification in the principle of distinction and proportionality, at least when it is being applied on combat conditions like fighting in built-up areas.

International law, via Protocol I, acknowledges the right of so called freedom-fighters and resistance movements, under a colonial regime, to self determination. The acts of such movements against the sovereign state are regarded as international armed conflicts. The Goldstone report refers to the cause of self determination as "a fundamental element in the legal framework" it applies, stating that "the right to self-determination has an erga omnes character whereby all States have the duty to promote its realization". Even if we grant Hamas with the title of such freedom-fighters or liberation movement, it cannot mean, and does not mean, that Israel, or any other sovereign state, would permit or endure continues terrorist acts against its citizens. The United Nations maintained an institutional commitment to self-determination that

77 The Goldstone report, supra note 41, para. 42.
78 Id. See also para. 362: "There are circumstances under international humanitarian law in which military actions resulting in the loss of civilian life would not be unlawful… The reportedly exceedingly high percentage of civilians among those killed raises concerns about the precautions taken by Israel in launching attacks as well as the legality of many of the attacks".
79 Protocol I, supra note 27, article 1 sec. 4.
80 The Goldstone report, supra note 41, para. 269.
81 Id. Later on, at paras. 308, 1842 its stated and reiterated that any action of resistance pursuant to the right to self-determination should be exercised with full respect of other human rights and international humanitarian law, though (as oppose to countless references to the Israeli side), there is no further implementation of this rule towards the Palestinian side.
clouded its vision relating to terrorism. The right to self determination is not the privilege to terrorize a whole nation over almost a decade. There shouldn’t be any congruence between the pursuit of self-determination and terrorism.

For conclusion of this chapter, as been already stressed, the Goldstone report is the ultimate proof that terror organizations had succeeded in paralyzing democracy in its struggle against terrorism. We are now facing the paradoxical situation of terrorists being protected and sheltered by the patronage of international law – the same set of rules that they dismiss and despise to. At the same time the report finds Israel as a consistent human rights violator, committing grave breaches of international law, considered as war crimes and may amount to crimes against humanity. Among various kinds of effects the Goldstone report had, the one that is most relevant here is that it highlighted the need for a new international legal framework.

In our next chapter we shall try to find out the legal formula by which we should balance the needs of the individual to preserve his human rights against the needs of the state to give priority to security needs.

IV.

However, the choice of law which regulates the state's war against terrorism is only one phase of the problem. Let’s assume that an armed conflict between a state and a

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84 According to article 147 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, (12 August 1949) 75 U.N.T.S. 287.
85 The Goldstone report, supra note 41, see for example, paras. 32; 46; 50; 60; 75; 108; 287-293; 931; 937; 1171-1172; 1332; 1335; 1502; 1842 and so on.
86 Gabriella Blum, "The Laws of War and the “Lesser Evil”", 35 YALE J. INT’L L. 1 (2010): "[International law] takes an absolutist stance, rejecting any justification that might exculpate states or individuals from liability for violating its rules. The claim that certain war crimes might actually lead to the saving of innocent lives - even many thousands of innocent lives - is categorically rejected by the laws of war. Put bluntly, in many cases, the laws of war demand an excessive sacrifice of lives".
non state actor should be regulated by the international law. But this is only one phase of the subject. It answers us what are the norms by which the security forces should conduct its fighting with terrorist. The other phase refers to the legal norms that should regulate the conduct of the security forces in relation with the civilians. The first dimension points outside while the second phase points to the inside relation. No one disputes the fact that in order to be able to fight terrorism, the state might need to provide its security organs with extra legal powers they do not need in normal times of peace.\textsuperscript{87} However, those powers might clash with our civil liberties. How should we reconcile them when they compromise our civil liberties? What is the role of the constitution in those exceptional times – should we have a separate constitution for times of emergency, as some scholars have suggested recently?\textsuperscript{88}

An emergency regime involves seemingly two conflicting interests: a need for security – personal and national – and a need for preserving civil liberties.\textsuperscript{89} But a more careful examination will prove us that there is no real conflict between these interests, but rather that they are complementary. One cannot have and enjoy basic human rights without the benefit of security. Security is an important brick in the temple of civil liberties.\textsuperscript{90} But what does it mean to have security - does it mean that at times of emergency people should forego their basic rights in the name of security? The answer is almost self evident. An emergency regime does not propel a complete halt to civil

\textsuperscript{87} RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).


\textsuperscript{89} Aharon Barak, A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 HARV. L. REV. 16, 153 (2002).

A regime that prefers security needs while disregarding completely civil liberties is not a real democracy.

A regime that suppresses or suspends completely civil liberties, especially in times of exigency, cannot be regarded as reflecting the true ideals of a liberal democracy. Indeed when a threat overshadows our ability to run normal life, common sense dictates a preference to security needs. But with the same logic we should remember that the real need and ultimate test of our constitution as our great protector of human rights, is in times of emergency. We should be aware that in those exceptional times, there is a normal inclination to let our government do whatever it thinks fits and needed in order to protect us, including suspending our liberties.

Thus if we admit that in order to thwart terrorism we need to prefer the needs of security and yet we also demand to save our civil liberties how can we achieve those two goals?

Preference to security needs in the name of combating terrorism does not justify the disregarding of basic rights. There is a need for a just and proper balance.

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93 United States v. Rahmani, 209 F. Supp. 2d 1045 (D. Cal. 2002): "The moral strength, vitality and commitment proudly enunciated in the Constitution is best tested at a time when forceful, emotionally moving arguments to ignore or trivialize its provisions seek a subordination of time honored constitutional protections."
94 Alexander Hamilton eloquently expressed this public feeling as follows: "Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civilian and political rights. To be safer, they at length become willing to run the risk of being less free."
Constitutional balance is the benchmark, the key to resolving a potential conflict between advancing security needs and protecting civil liberties. How should we balance those interests and by which formula should we do so?

The legal formula that should be used consists of three subtests:

1) The rational connection test: here we should ask the following - does the security measure which we want to apply may produce the expected results?

2) The less restrictive means test: here we should ask - is there a less harmful tool to bring about the same results?

3) The proportionality test in the strict sense: here we should ask - is the benefit outcome significantly greater than the harm inflicted?

This formula should be applied in a sensitive manner, in particular when it comes to scenarios involving civilians who are already under belligerent occupation.

After applied in relation to the determination whether the situation at hand should be regarded as emergency, and if the conclusion is- Yes, the formula should be applied also on the latter phase – that of the proper operational means taken in emergency times.

This formula balances the needs of security with the needs of the civilians: both kinds of civilians: those who are inhabitants of the state fighting the terrorists, and civilians who are under belligerent occupation. Of course when we deal with civilians of the second type their basic needs might be different. If we move one step further and apply the second subtest our question should be: is there a lesser invasive way to achieve the security goal, our answer should not be a negative one just because the choice made

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96 See generally, AHARON BARAK, INTERPRETATION IN LAW 536 (vol. 3: Constitutional Interpretation, 1994). [in Hebrew]
97 HCJ 7957/04 Marabe v. The Prime Minister of Israel (as yet unpublished), paras. 24-30; Lassa Oppenheim, The Legal Relations Between an Occupying Power and the Inhabitants, 33 L. Q. REV. 363 (1917).
by the military commander could bring about optimal results to the security needs\(^98\). Sometimes a compromise must be struck. When military commander faces two possible ways to satisfy the security needs, the first is the optimum and the second is less effective to security needs but is more considerate of humanitarian needs, he should prefer the second option\(^99\).

We could have reached this conclusion also by using carefully the third subtest of proportionality. Thus, if we reach a conclusion that the additional advantage to one’s security, out of the first option is not significant in comparison to the second option, but on the other hand the damage to humanitarian needs by doing so is very significant, our conclusion should be to prefer the second option even if it is less beneficial to the security needs. Humanitarian needs should always be kept and be part of the international law of armed conflict\(^100\); they should be regarded as the *Magna Carta* for civilians under occupation. Security needs should always heed the state’s humanitarian law obligations.

Civilians should be spared, whenever possible, the suffering and agony of military operations. But suffering cannot be avoided at all times. War is a deplorable way of resolving conflicts but sometimes it is inevitable.\(^101\) The problem is magnified when a democracy deals with hostilities and the horrors of terror.

Terrorism by definition aims to target civilians, and terrorists usually operate or find safe haven among the civil population. Sometimes they impose their will on innocent civilians even if they consider themselves to be part of them. They might impose

\(^{98}\) HCJ 7957/04 *Marabe*, Id, paras. 28-29.
\(^{99}\) HCJ 7957/04 *Marabe*, Id, para. 114.
\(^{100}\) HCJ 7957/04 *Marabe*, Id, para. 28; JEAN S. PICTET, DEVELOPMENTS AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 62 (1985).
themselves by taking civilians as hostages or using them as human shields.\textsuperscript{102} In those cases a democratic state will be confronted with heavy moral and legal dilemmas.

As I have already mentioned, humanitarian law should be respected, but sometimes terrorists make it very difficult for a democracy to realize this objective. Take, for example, the case of holding civilians as human shields. No one disputes the right of those hostages to be protected in their person.\textsuperscript{103} What should a democracy do in case terrorists pose demands for their release? Should it defer to this claim even if it means incurring high risk to its security for instance by releasing many dangerous terrorists? Should the state refrain from using any type of force against such kidnappers just because the lives of the hostages might be compromised? Should our answer be different if we know that the hostages had willingly agreed to become human shields?\textsuperscript{104}

These are only a few examples of the kinds of dilemmas we might face when we apply our formula.

Indeed our next chapter shall try to reflect on the meaning of self defense in connection with combating terrorism.

\textsuperscript{102} For a comprehensive discussion of the use of civilians as human shields see: Gross, supra note 13, at pp. 194-219.


\textsuperscript{104} See Gross, supra note 13, at pp. 205-207 and Elizabeth Anscombe, \textit{War and Murder, in War}, \textit{Morality and the Military Profession} 285, 288 (1979), for elaboration regarding the legal and moral difference between innocent and guilty civilians – i.e., between civilians who are forced to accommodate or assist the terrorists in any way and civilians who willingly volunteer to provide shelter to terrorists and allow them to operate from their living areas.
Professor Barak, the Retired President of the Israeli Supreme Court, has rightly observed that conducting a war on terrorism according to the rule of law is the inevitable fate of democracy. It means that the state cannot always use the means which terrorists use; sometimes it must conduct its war "with one hand tied behind its back". Indeed, the concept of "restraint" has seemed to become by now the identifying mark of every democratic nation which is confronted with terrorism.

While this has been the guiding notion, the question then remains to what extent democratic states do take on these restrictions? In particular, this dilemma intensifies whenever there is a conflict between two commitments, even two kinds of loyalties: protecting one’s own civilians or the enemy’s civilians? This might happen when we know that suicide bombers hide themselves among friendly civilians, and if we do not stop them they most probably will arrive at our doorsteps and blow themselves up. Hence, whose life should we prefer? If we are committed to respect the lives of those civilians who are under belligerent occupation but who willingly harbor terrorists, it means that we might risk the lives of our own people. Why should we have to do so?

Another dilemma which is not typical only to the war on terrorism, but here it emerges more bluntly, is how far should we risk the safety of our soldiers in order to minimize the risk of harm to civilians? Let us assume that using ground forces will always be considered less risky to the safety of civilians than using aerial raids. Therefore, does it necessarily follow that we should always prefer ground operations, knowing that this will increase the number of casualties among our military forces?

One of the means to stop a suicide bomber is to target him before he starts his moving as an act of self defense. Such a practice is used by states engaged in war with terrorism, Israel is one of them. Sometimes Israel is accused of depriving those who are suspected of engaging in terrorism from having their day in court by the targeting policy which it applies, or as it is sometimes put, extra-judicial killing. Is this policy flawed and illegal? Let's find out. A terrorist is a warrior, a combatant, though an illegal combatant. Now let’s turn to the classic warfare rules. According to the customary rules regarding war on the land, any party to a conflict is allowed to kill its enemies based on the doctrine of self-defense, unless the enemy is willing to surrender or is unable to continue fighting for some other reason. When dealing with an enemy we are allowed to target him a terrorist is warrior and an enemy and he should be treated the same way. Killing your enemy is an act of self defense and a step forward toward winning the war. Why should it be different when we deal with terrorists? Even if we regard them as civilians taking part in the hostilities and as long they take part they become enemy and should risk the possibility of being targeted. Thus, there is no deference between combatants and terrorists both are legitimate objects to be targeted as long they are not laying down their arms. Therefore there is no room for all kinds of arguments about depriving the terrorist’s right to due process of law or committing extrajudicial execution.

107 It should be noted that the Israeli Supreme Court has not acknowledge terrorists as unlawful combatants since in the court’s opinion, this classification has not been recognized at the present time both in international treaty law and customary international law. Thus, the court concluded that under the current international law, unlawful combatants are to be classified as civilians taking a direct part in hostilities. In essence, this classification means that as long as they are taking a direct part in hostilities, they do not enjoy the protection granted to a civilian. See: H.C.J. 769/02 Public Committee against Torture in Israel v. Government of Israel (as yet unpublished, judgment dated 14.12.2006), paras. 27-40. English translation of the judgment may be found at: http://elyon1.court.gov.il/Files_Eng/02/690/007/a34/02007690.a34.HTM.
A terrorist while not laying down his arms is not entitled to demand not being targeted and "having his day in court", the same way a combatant cannot demand it.\textsuperscript{109}

If we are right in our assumption that in the case of a lawful combatant we are entitled to neutralize him, unless he asks to surrender, then it should certainly not be any different in the case of an illegal combatant, by way of analogy. What moral tenet can demand the refraining of killing a suicide bomber? Or what could be the moral value which would dictate that we sacrifice our soldiers in order to save the lives of the would-be terrorists? The only duty that we should have is to make sure that we are not mistaken about the identity of the terrorist.\textsuperscript{110} On this point we should demand that the military use procedures and oversight which would increase the accuracy of our intelligence. Recently the Israeli Supreme Court issued a landmark ruling on the legality of this practice.\textsuperscript{111} The court observed that a terrorist is in fact a civilian who participates in the hostilities,\textsuperscript{112} hence he loses his immunities as a civilian and as long as he participates in the fighting he becomes a legitimate target and the state has a complete right to target him.\textsuperscript{113}

Another phase of the self-defense doctrine flows from the cruel reality that Israel has faced for the past years, such a reality may occur to any democratic country who holds territories by belligerent occupation and fights terror infiltrating its land. As we all know, Israel has been engulfed repeatedly by acts of suicide bombers. Those terrorists had arrived into Israel from the West Bank. At that time, there was no separation or a

\textsuperscript{110} GROSS, supra note 13; Alberto R. Coll, \textit{The Legal and Moral Adequacy of Military Responses to Terrorism}, 81 AM. SOC’Y INT’L L. PROC. 297, 305 (1987).
\textsuperscript{111} HCJ 769/02 \textit{Public Committee against Torture in Israel v. Government of Israel} (as yet unpublished, judgment dated 14.12.2006). English translation of the judgment may be found at: \url{http://elyon1.court.gov.il/Files_Eng/02/690/007/a34/02007690.a34.HTM}.
\textsuperscript{112} Id, paras.
\textsuperscript{113} Id.
fence between the old armistice line of 1949 and the West Bank. Israel has tried all possible ways to stop these suicide bombers from entering into its territories. Our repeated requests from the Palestinian Authority to stop them were ignored. Consequently, hundreds of innocent Israelis were killed. As a last resort, the government adopted the advice of the army to erect a separation barrier to prevent, or at least make it more difficult for those insurgents to infiltrate Israel.\textsuperscript{114} The barrier is a composition of several means: fence, electronic sensors, physical barriers and a patrol way.\textsuperscript{115}

The separation barrier has been designed to meet the security needs along the "Green Line",\textsuperscript{116} but in some parts it had entered Palestinian lands. The owners of these lands have petitioned the Israeli High Court of Justice, challenging the legality of the confiscation of their property.\textsuperscript{117} The Supreme Court overruled their contention that the barrier was erected for political reasons and as a pretext for the real scheme to annex their lands to the State of Israel.\textsuperscript{118} On this point, the court adopted the attorney general’s argument that the sole reason for erecting the barrier was security needs. Nonetheless, the court accepted the Palestinians’ contention that when the barrier had been designed not enough weight was given to the humanitarian needs of the civilians under occupation.\textsuperscript{119} The court stressed the duty of the military commander, who is responsible for this project, to use a just balance between the needs of security and the need to preserve the

\textsuperscript{114} For a survey regarding the reasons which led to the decision to build the separation barrier see: Emanuel Gross, Combating Terrorism: Does Self-Defense Include the Security Barrier?- The Answer Depends on Who You Ask, 38 CORNELL INT'L L.J. 569 (2005).
\textsuperscript{116} The "Green Line" represents the 1949 armistice line between Israel and Jordan after the War of Independence.
\textsuperscript{117} Beit Surik Judgment, supra note 69.
\textsuperscript{118} Beit Surik Judgment, Id, paras. 27-31.
\textsuperscript{119} Beit Surik Judgment, Id, paras. 49-85.
basic humanitarian interests of the people who are adversely affected by the barrier.\textsuperscript{120} The military commander should be sensitive and mindful of the consequences of his actions.

The Israeli ruling was issued just a week before the advisory opinion of the International Court of Justice.\textsuperscript{121} The opinion of the International Court of Justice found that the security barrier, or the "wall" as it described it, cannot be justified as an act of self-defense, and alternatively that the fence should have been erected along the old armistice border of 1949.\textsuperscript{122} The advisory opinion of the ICJ totally disregarded the acts of terrorism that preceded Israel’s decision to erect the barrier. It made no mention of the murderous acts of the suicide bombers.\textsuperscript{123} It also failed to address the legal responsibility of the Palestinian Authority to stop those acts.\textsuperscript{124}

A year after the Supreme Court rendered this judgment; it issued another ruling regarding the legitimacy of additional parts of the fence.\textsuperscript{125} The court observed that on the legal dimensions, namely the legal sources relevant to analyzing the dispute, both courts were identical.\textsuperscript{126} Then how did the two prominent courts arrive at different conclusions? The Israeli Supreme Court explained the difference on the basis of the facts that were presented before each tribunal.\textsuperscript{127} While the Supreme Court gathered and assessed the relevant evidence by using an adversarial process, which means that both sides to the dispute submitted relevant evidence, the ICJ based its findings on a file which the

\begin{footnotesize}
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\item \textsuperscript{120} Beit Surik Judgment, Id, paras. 33-44.
\item \textsuperscript{121} Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ 131 (July 9, 2004), 43 ILM 1009.
\item \textsuperscript{122} Id, paras. 121-122.
\item \textsuperscript{123} Gross, supra note 68, at p. 572.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} HCJ 7957/04 Marabe, supra note 51.
\item \textsuperscript{126} Id, para. 57.
\item \textsuperscript{127} Id, paras. 58-60.
\end{itemize}
\end{footnotesize}
Secretary General of the UN provided to the court.\textsuperscript{128} We know that this file lacks many important facts, for example, the reasons for the Israeli Government decision to erect the fence. Had the ICJ rendered its decision with the evidence which was brought before the Israeli Supreme Court, the outcome might have been different.\textsuperscript{129} In this second petition, again the Supreme Court ruled against our government and in favor of the Palestinian petitioners, five Arab villages which argued that the route of the fence detached them from their lands and from social and welfare services. The Supreme Court ruled that the Government should reroute the barrier in order to exclude those Arab villages from the Israeli side of the fence.\textsuperscript{130}

We cannot conclude our discourse without pose the important question whether the courts should remain open during the emergency times while the state is fighting terrorists or should stay out and being involved in the way the executive branch is conducting this struggle.

VI.

The last subject I would like to discuss before concluding, concerns the role of the courts in times of terrorism. As we have seen, acts of terrorism may disturb the ability of a society to conduct normal life and necessitate a state of emergency.\textsuperscript{131} Some scholars hold the view that in those unusual times, the courts should stay away and not interfere with the decisions of the executive branch on how to conduct such a war.\textsuperscript{132} However, I

\begin{itemize}
\item \textsuperscript{128} Id, paras. 69-70.
\item \textsuperscript{129} Id, paras. 59-72.
\item \textsuperscript{130} Id, paras. 110-116.
\item \textsuperscript{131} See supra notes 12-17 and accompanying text.
\item \textsuperscript{132} Bruce Ackerman, \textit{The Emergency Constitution}, 113 YALE L.J. 1029 (2004).
\end{itemize}
strongly believe that the old saying attributed to Cicero that when the canons roar the
muses should be silent is neither correct nor should it be followed.

We have already pointed to the inevitable tension which exists at times of
emergency between the needs of security and the need to preserve civil liberties. The
constitution is put on trial especially in those times, when its power and vitality as the
bedrock of our liberties are severely challenged.

There is no other way for a democratic society to preserve its values and the rule
of law but by enabling access via an open door to the courts. Closing down the doors
of the courts will bring an end to our regime as a liberal democracy. If there is a law,
there should be a court to review it. No one is above the law and the courts were designed
to make sure that our government is a government that operates within the law; a
government of law and not a government of men.

134 Barak, supra note 43, p. 150.
136 See, for example, the following opinions of the Israeli Supreme Court: H.C. 7015/02 Ajar et al. v. Commander of I.D.F. Forces in Judea and Samaria et al. [in Hebrew], 56(6) P.D. 352, 375; H.C. 3114/02 MK Muhammed Barake v. Minister of Defense [in Hebrew], 56(3) P.D. 11, 16.