The Role of the Court in Reaching Judicial Decisions that Concern the State of Israel's National Security

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Since its establishment, the State of Israel has committed itself to the principles of the rule of law and the protection of human rights, both in times of combat and in times of calm. Israel's battle against threats to its national security must be waged within the framework of the law, and in accordance with the legal norms practiced among the family of democratic nations. One of the supervisory and control mechanisms to ensure that these legal norms are indeed followed is judicial review conducted by the Israeli Supreme Court in relation to matters of national security. The judicial review, which is not intended to replace, and cannot replace, the operational decision making process of IDF commanders, is not only a key element of national security; in many respects it is the source of Israel's strength and reflects the State's commitment to the rule of law. The Supreme Court, not a distant and detached critic, is familiar with Israel's security needs and the unique reality the State confronts. This familiarity enables the Court to apply the law in a way that is most applicable to the facts at hand.

Keywords: Supreme Court, judicial review, national security

"In times of war, the laws fall mute." This statement ("*silent enim leges inter arma*") is attributed to Cicero, a Roman philosopher and orator from the 1st century BCE.[1] Countries that chose to establish a democratic-liberal regime, however, did not adopt this principle. For example, British Judge

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Lord James Atkin noted in a World War II-era judgment discussing the legality of security measures:

> In England, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which...we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.[2]

Israel, a young democracy, advocates that same view. In essence, one could posit that had Israel adopted Cicero's statement, it would have been sentenced to life without law and justice, because it appears that even after seventy years of independence, Israel is still under constant existential threat.

However, since the day of its establishment, the State of Israel has committed itself to the principles of the rule of law and the protection of human rights, both in times of combat and in times of calm. Moreover, by adopting this principle, Israel did not need to memorize Lord Atkin's doctrine, cited above. It was sufficient to refer to our Biblical origins to understand the root of this idea. In Deuteronomy it is written that when the Israelites reach their land and the king "is seated on his royal throne, he shall have a copy of this Teaching [the Torah] written for him...Let it remain with him, and let him read in it all his life."[3] The Midrash [an ancient commentary] adds that "based on this, they said that the king went off to war and it was with him"; in other words, the king is commanded to remember that even when waging war, the book of laws is not left behind but is always with him.

One of Israel's most illustrious judges, Justice Haim Cohen, who was as knowledgeable in Jewish sources as he was in the law, gave expression to this idea in an opinion he wrote nearly 40 years ago, in the *Kawasma* case:

> What distinguishes the war of the State from the war of its enemies is that the State fights while upholding the law, whereas its enemies fight while violating the law. The moral strength and objective justness of the Government's war depend entirely on upholding the laws of the State: by conceding this strength and this justness, the Government serves the purposes of the enemy. Moral weapons are no less important than any other weapon, and perhaps more important. There is no weapon more moral than the rule of law. Everyone who ought to know should be

> aware that the rule of law in Israel will never succumb to the state's enemies.[4]

This statement by Justice Cohen delineates the difference between the State of Israel as a law-abiding state, and the terrorist organizations that are among its bitterest enemies and do not see themselves as obligated to any rules of law or morality and believe that all means are justified.

Indeed, the challenges facing the State of Israel in maintaining the rule of law in times of combat, and not only during times of calm, have become more complex over the years. The region's changing strategic environment, in addition to other concerns, is characterized by a weakening of the state framework. These changes, coupled with the advantages they offer when the focus of the fighting in some countries in the region is internal, also entail disadvantages. With the weakening of the state framework, Israel faces many more threatening elements that do not consider themselves obligated to uphold international law or even any internal state laws. This is undoubtedly an extremely complex challenge in terms of maintaining the rule of law during times of combat.

Anyone perusing "The IDF Strategy" document, which was published in April 2018, will recognize that despite the nature of these threatening elements, the State of Israel and the forces defending it adhere to the fundamental tenet that the rule of law must be maintained both in times of combat and times of calm, along with the democratic norms concerning human rights – this, of course, while ensuring the appropriate balances.

"The IDF Strategy" states: "The State of Israel acts as a Jewish and democratic state according to rules of combat ethics and according to international law, and is judged by the international community in light of these laws and ethics, while the enemy does not conduct itself in like manner."[5] This is the ethos that has accompanied the IDF since it was formed. It appears in the ordinance establishing the IDF, which David Ben-Gurion signed approximately two weeks after the Declaration of the Establishment of the State of Israel,[6] and every soldier inducted into the IDF since then takes an oath, pledges allegiance to the State of Israel, and affirms the commitment to uphold its laws and respect its authorized governing institutions.[7]

Guided by this ethos, Israel is proud that as a Jewish and democratic state its soldiers are continuously guided by the principles of the rule of law and human rights. A clear and important expression of this may also

be found in recent statements by the outgoing Chief of Staff, Lt. Gen. Gadi Eisenkot. In referring to criticism regarding possible over-legalization in military operations, Eisenkot emphasized that "the Military Advocate General's corps is part of the IDF's strength and stands shoulder to shoulder with the commanders and combatants, to help the IDF fulfill its operational mission and be victorious in war."[8]

These important statements point to the linchpin designed to shape Israel's battle against threats to its national security, specifically, that this battle must be waged within the framework of the law and not outside it, and in accordance with the legal norms practiced among the family of democratic nations. In order to ensure that these legal norms are indeed followed, supervisory and control mechanisms are needed. One of these mechanisms is judicial review conducted by the Israeli Supreme Court in relation to matters of national security as part of the decades-long tradition of judicial review of executive authority activities, including security forces. Indeed, the Court is charged with ensuring that security activities are conducted lawfully.

However, it is important to emphasize that the judicial review performed by the Court is not intended to replace, and cannot replace, the operational decision making process of IDF commanders. It is not the Court's role to choose between operational alternatives or to debate considerations requiring purely professional expertise. The role of the Court within this context focuses on the question of whether a particular security activity meets the national and international criteria defining its legality.

Accordingly, many petitions have been denied over the years when it became evident that they overstepped the aforesaid judicial question and sought the Court's intervention in the operational discretion that is the sphere of expertise of the security agencies. For example, a petition seeking an order that would prohibit the IDF from employing tanks armed with flechette shells during its activities in the Gaza Strip region filed by Physicians for Human Rights was dismissed in 2003.[9] A flechette shell contains a cluster of steel darts; when it detonates, these darts are dispersed over an area of several hundred square meters and are intended to be used against field targets, as opposed to pinpoint, individual targets.

In dismissing the petition, the Court stated that it had conducted an examination and found that the use of this ammunition is not prohibited by international warfare conventions, and held that it would not intervene in the choice of combat measures used by security forces. The Court further

emphasized in its judgment that the State clarified that this ammunition's scope of use is regulated by the IDF, which issues directives defining the conditions under which commanders of the forces operating in the field are authorized to use it. The question of whether the prevailing circumstances in the combat arena in each individual case justify the use of flechette shells is subject to the decision of the authorized commander.

A similar decision was handed down in 2011 following another petition by Physicians for Human Rights alleging that the safety buffer distances of artillery shelling toward the Gaza Strip defined by the IDF are illegal. In denying the petition, the Court ruled:

> The petition at hand is directly linked to clearly professional-operational aspects of the planning of the IDF's combative and defensive activity against the Qassam rockets that are launched toward Israeli territory with the aim of harming its residents, since a remedy was requested in the petition to order the IDF to refrain from taking action in a particular operational manner while preferring a different one. This demand is problematic, since it involves clearly military operational aspects and, as is known, the military authorities responsible for such matters possess the expertise in this regard. Therefore, the Court will be inclined to back away from intervening in them.[10]

It is important to emphasize that the Court's restraint in these issues is reasoned restraint, in the sense that it is accompanied by scrutiny of the rules and provisions under which the security agencies exercise their operational discretion.

A recent judgment that illustrates this policy of the Court is a decision handed down in May 2018 that dealt with petitions filed to protest Israel security forces' rules of engagement and the way in which they are applied in the area of the security barrier between Israel and the Gaza Strip.[11] The context preceding the petitions was the violent and large scale incidents that attracted tens of thousands of Palestinian residents of the Gaza Strip, and that were organized and funded by the Hamas organization, among other terrorist groups. The organizers' goal for these incidents was to breach the border fence, infiltrate Israeli territory, and commit terrorist attacks against the Israeli security forces and Israeli residents who live on the other side of the fence, i.e., within Israel.

And indeed, under the guise of the demonstrations, various actions were taken to create a smokescreen, like burning tires, hurling grenades

and Molotov cocktails, planting and hurling explosive charges, firing at the Israeli forces, and launching incendiary kites, causing widespread fires and destroying fields and considerable property in Israeli communities adjacent to the fence. During one of the incidents, the Kerem Shalom Crossing, used for the transfer of goods, fuel, and gas from Israel to the Gaza Strip, was set ablaze and largely destroyed.

These incidents well demonstrate the complexity previously discussed. Indeed, during these incidents, the security forces faced – and continue to face – one of their greatest challenges, derived from the need to contend with the deliberate intentions of the organizers of these incidents to conceal the terrorists among the civilian population. This concealment serves to blur and create difficulty in identifying the terrorists among the masses of people participating in the incidents, to enable the terrorists to commit the terrorist attacks described while taking shelter among the civilian population.

It is customary in international law to refer to two paradigms that regulate legally the operational actions of security forces. The first is a paradigm for handling acts of hostility that generally relates to combat situations, while the second is a paradigm for law enforcement that regulates the forces' conduct in situations of law enforcement and maintaining public order and safety. Each of the two paradigms delineates different rules for authorizing the use of force.

However, during the war against terrorist activities and terrorist organizations, Israel – and in recent years, additional countries – faces complicated challenges contending with complex scenarios that do not clearly fall under one of the two aforesaid categories: combat operations or law enforcement operations. Consequently, as stated in the judgment, Courts are often required to characterize the operational activity in concrete cases and to define criteria that will ascertain, for example, if at issue is an incident of "warfare" that is sheltered under the exemption from the tort liability pursuant to Section 5 of the Civil Wrongs (Liability of the State) Law, 1952.[12]

With respect to the incidents at the border fence, it became clear that the issue essentially was that the incidents combined characteristics of both paradigms, and therefore, the Israeli security forces face an extremely complex mission: they must alternate and conduct themselves differently, during the same incident, according to the different rules dictated by each paradigm.

The petitioners sought to invalidate the IDF's rules of engagement and their method of application against unarmed civilian residents of the Gaza Strip during these incidents. The State asked to present explanations and clarifications to the Court *ex parte* with regard to the rules of engagement, including presenting confidential intelligence material and classified rules of engagement under which the IDF operates during the incidents in question. The petitioners objected to an *ex parte* hearing, and therefore, the Court limited the examination of the rules of engagement to the unclassified description presented by the respondents in their brief.

We found that the rules of engagement prescribe criteria for use of graduated means to contend with the dangers deriving from the incidents, and that these criteria maintain a direct correlation to the gravity of the danger and the certainty of its materialization. We further found that according to the prescribed rules, the use of potentially lethal force in a concrete instance is subject to the strict principles of "necessity" and "proportionality" prescribed in international law in each of the paradigms relevant to that instance.

The petitioners claimed that based on the outcome and considering the number of fatalities and wounded among the Palestinians, even if the rules of engagement are legal, the use of live ammunition contravened international and Israeli law. We rejected this argument and, according to the rule referenced above, stated in the judgment that within this context,

> As opposed to the examination of the legality of the Rules of Engagement, with which the Court is entrusted, there is doubt whether the Court possesses the tools to perform the examination of the manner in which these Rules are implemented, as it relates to professional aspects – particularly when the events are still taking place.[13]

We also referred to the various mechanisms that the IDF has in place for assessing operational conclusions. For example, while the incidents are underway, the IDF conducts an orderly process for the purpose of drawing conclusions and subsequently issues emphases and clarifications to the forces on the ground, and particular cases are referred for examination by an independent General Staff mechanism that investigates aberrant incidents.

At the same time, and in addition to the non-intervention policy that the Court applies in appropriate instances, some of which are outlined above, the Court does not hesitate to conduct a judicial review when

fundamental legal questions are submitted to it that justify intervention. Within this framework, at least three important judgments may be cited. The first concerns the question of whether the General Security Service may employ physical measures during its interrogations.[14] The second concerns targeted killings,[15] and the third concerns the "early warning procedure."[16]

In each of these cases, the Supreme Court delineated what is permitted and what is prohibited in terms of the law, and that is why these cases are so important. Indeed, these judgments engaged in sensitive and complex issues, and the very nature of these issues arouses public debate.

A question that usually arises within this context is whether judicial involvement, by way of a review of the legality of the war against terrorism, is warranted. There are those who claim that it would be advisable for the Court not to engage in these matters.

In an article about judgment, democracy, and terrorism, President Aharon Barak (ret.) wrote that "these arguments are heard from both ends of the political spectrum. On one side, critics argue that judicial review undermines security. On the other side, critics argue that judicial review gives legitimacy to actions of the government authorities in their battle against terrorism."[17] In the same article, basing himself on an age-old tradition, Barak emphasized: "Judicial review of the legality of the battle against terrorism may make the battle against terrorism harder in the short term. Judicial review, however, fortifies and strengthens the people in the long term." He closed by saying that in his view, "the rule of law is a key element in national security."

This is a precise and correct insight, also reflected by President Shamgar in the *Barzilai* case, when he said that:

> The rule of law is not an artificial creation. It is to be observed in a concrete day-to day manner in the maintenance of binding normative arrangements and their actual application to one and all...The rule of law, the public welfare and the approach of the State to problems are not opposing conceptions but complement and sustain each other. The court is specially charged with the practical realisation of these expectations, but all of the State organs are committed to the attainment of the stated objectives... National security also leaned on the rule of law, both in protecting internal policy measures, and in aiding the creation of means to combat hostile elements. There can be no organized activity of any body of persons, or any discipline, without norms based on binding legal provisions.[18]

Furthermore, the judicial review conducted by the Supreme Court is not only a key element of national security but in many respects is the source of the State of Israel's strength. First and foremost, it reflects the State's commitment to the rule of law and the State's meticulous care to maintain a set of checks and balances between the executive authority, the judicial authority, and civil society. Second, Israel's Supreme Court is familiar with Israel's security needs and the unique reality the State confronts. It is not a distant and detached critic. This familiarity enables the Court to apply the law in a way that is most applicable to the facts at hand, reflected both in its identification of the relevant normative framework and in its interpretation.

For example, in the *Mara'abe* case,[19] the Court referred to the advisory opinion of the International Court of Justice (ICJ) in the Hague, which reached the conclusion that Israel was in violation of international law when it built the security fence in the West Bank, while the Israeli Supreme Court reached the opposite conclusion and ruled that the construction of the fence is consistent with the law. President Barak noted that the primary reason for the differing conclusions is the different factual foundation that the Israeli Supreme Court possessed, giving it a deeper understanding of the security needs.

In addition, even though this is not a purpose of judicial review, one of its important byproducts is its contribution to Israel's international legitimacy. Conducting judicial review underscores the State of Israel's commitment to act lawfully, whether the Court affirms the legality of the security activity, or whether it invalidates it. This also contributes to national security.

Within this context, considering that the Court is objective and possesses many years of experience deliberating complex questions about counterterrorism efforts, the judgments issued by the Court also resonate loudly outside of Israel. They are read by foreign and international courts, and by universities and government ministries, and they affect the way the players in the international community understand and interpret international law. A well known example of this is the judgment in the "targeted killings" case, which had a considerable impact on the judicial discourse concerning injuries to civilians involved in the fighting. Another recent example is the judgment previously mentioned concerning the legality of the IDF's rules of engagement when contending with violent incidents in the area of the security barrier between Israel and the Gaza Strip.

An additional and important byproduct of the Court's judicial review of issues pertaining to national security, chiefly in the context of decisions pertaining to criminal enforcement, is that they support the State of Israel's claim of "complementarity" when it comes to dealing with criminal proceedings before foreign courts in the international arena or in other countries.

It is known that foreign courts have no jurisdiction to exercise their authority in relation to incidents under the jurisdiction of the Israeli judicial system when that system conducts independent and sincere inquiries, investigations, trials, and judicial proceedings.

In conclusion, the uniqueness of Israeli democracy is derived from the fact that the State of Israel has been under a constant existential threat from the day it was established to this very day, and in this reality, it is particularly challenging and complex to maintain fundamental constitutional principles and human rights.

In 1987, one of the illustrious justices of the United States Supreme Court, Justice William J. Brennan, presented a lecture at the Hebrew University in Jerusalem and spoke about this uniqueness of the Israeli democracy and the considerable appreciation that its judicial system has earned, due to the way it contends with these complex challenges when employing judicial review:

> It may well be Israel, not the United States, that provides the best hope for building a jurisprudence that can protect civil liberties against the demands of national security...The nations of the world, faced with sudden threats to their own security, will look to Israel's experience in handling its continuing security crises, and may well find in that experience the expertise to reject the security claims that Israel has exposed as baseless and the courage to preserve the civil liberties that Israel has preserved without detriment to its security.[20]

Considering the threats of terrorism and other strategic threats faced today, unfortunately, many countries in the free world have turned Justice Brennan's statements, voiced more than thirty years ago, into a self-fulfilling prophecy.

Indeed, the judgments of the Israeli Supreme Court, and particularly those addressing the clash between the State's security needs and the rule of law and the need to protect human rights, are studied and cited throughout the world and viewed with considerable respect and admiration.

Notes

1 Cicero, Pro Milone 11.
2 *Liversidge vs. Anderson* [1941], All E.R. 338, 361 [HL] [dissenting opinion on the outcome].
3 Deuteronomy 17:18-19, translated by the Jewish Publication Society of America, 1962.
4 HCJ 320/80 – *Kawasma vs. Minister of Defense,* PD 35(3), 113, 132 (1980) [dissenting opinion on the outcome]. Translation taken from the Ministry of Foreign Affairs website, "Judgments of the Israel Supreme Court: Fighting Terrorism within the Law," January 2, 2005, https://bit.ly/2UvrRch.
5 "The IDF Strategy," April 2018.
6 Defense Army of Israel Ordinance, *5708* – 1948.
7 General Staff Ordinance 33.0915, "Pledging Allegiance to the IDF and Distribution of Weapons to Recruits," July 20, 1982.
8 Press release by the outgoing Chief of Staff, Gadi Eisenkot, November 13, 2018.
9 HCJ 8990/02 – *Physicians for Human Rights – Israel Organization vs. GOC Southern Command*, PD 57(4), 193 (2003).
10 HCJ 3261/06 – *Physicians for Human Rights – Israel Organization vs the Minister of Defense*, clause 10 of President D. Beinisch's judgment, January 31, 2011.
11 HCJ 3003/18 – *Yesh Din – Human Rights Volunteers vs. the IDF Chief of General Staff*, May 24, 2018 (hereinafter: the matter of the rules of engagement).
12 Civil Wrongs (Liability of the State) Law, *5712* – 1952.
13 The matter of the rules of engagement, paragraph 13.
14 HCJ 5100/94 – *The Public Committee against Torture in Israel vs the Israeli Government*, PD 53(4), 817 (1999).
15 HCJ 769/02 – *The Public Committee against Torture in Israel vs the Israeli Government* (14.12.2006).
16 HCJ 3799/02 – *Adalah – The Legal Center for Arab Minority Rights in Israel vs. IDF GOC Central Command*, PD 60(3), 67 (2005).
17 Aharon Barak, "Human Rights and National Security," *Selected Essays – Volume III: Constitutional Inquiries* 339 (2017).
18 HCJ 428/86 – *Barzilai vs. the Government of Israel*, PD 40(3), 505, 554-555 (1986).
19 HCJ 7957/04 – *Mara'abe vs. the Prime Minister of Israel*, PD 60(2), 477 (2005).
20 William J. Brennan, "The American Experience: Free Speech and National Security," in *Free Speech and National Security*, ed. Shimon Shetreet (*International Studies and Human Rights*, vol. 16), pp. 10, 18-19.