

JUDICIAL INDEPENDENCE IN TIMES OF WAR:
PROLONGED ARMED CONFLICT AND JUDICIAL REVIEW
OF MILITARY ACTIONS IN ISRAEL

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I. INTRODUCTION

Emergencies, and especially wars, challenge our intuitive approach to judicial independence in two important ways. One relates to the tension between judicial independence as a feature of separation of powers and the need to consolidate powers in times of crisis. The other relates to the tension faced by an (independent) judiciary when the state (of which the judiciary is a part) is threatened by an external enemy. Part II of this Article will present these two challenges and briefly sketch their theoretical roots and possible practical implications. Part III will then examine the issue of judicial independence in times of war in Israel, a state embattled in an armed conflict since its establishment and, as of 1967, faced with administering territories inhabited by over one million residents held under a regime of belligerent occupation. The Article will demonstrate the ability of the Israeli Supreme Court (the Court) to maintain its independence when exercising judicial review over the acts of the military commander in the occupied territories, as revealed by the Court's reasoning and decisions. Part IV will then outline the limits of such independence, when particularly hard cases are presented for judicial consideration. In conclusion, Part V will address the transnational dimension of judicial independence in times of war. It will suggest that the presence of the international and transnational community places the Israeli judiciary in a state best described as "bounded" independence, in which the Court must navigate between its internal audiences (and constituencies) and the international and transnational legal communities. The latter two may be seen as exercising a kind of peer review over the decisions of the Israeli Court.

II. WHAT IS UNIQUE ABOUT JUDICIAL INDEPENDENCE IN TIMES OF WAR?

A. Judicial Independence: Separation vs. Consolidation of Powers

Judicial independence is central to maintaining separation of powers, a cornerstone of modern democracy. Yet an emergency, by definition, is a time when consolidation of powers is crucial for the survival of the polity. In ordinary times, the exercise of power by one branch of government is checked by the others in order to achieve a balance designed to minimize the risk of dictatorship. But, in times of acute crises the need to coordinate action between the various branches

may prevent the state from fulfilling its core function: to protect its citizens.¹ A unified, hierarchical structure of government, rather than a cluster of independent agencies, is apparently crucial to deal effectively with the impending catastrophe. The principle of limited government, central to which is the presence of independent judges empowered to ensure that no agency oversteps its *vires*, is therefore difficult to reconcile with the need for effective government.

In that context, the independence of the judiciary may prove especially thorny: during emergencies, independent judges, exercising powers of review (constitutional or administrative), are in a position to curtail collective efforts to effectively combat the threat. Judges see only a segment of the picture. The judicial process is deliberately designed to address concrete cases by relying on special evidentiary rules, which may exclude facts pertaining to the “big picture.” Furthermore, the legal process requires evidence, fair hearings, and other elements of due process, all of which take time. The emergency at hand may not wait for the courts to conduct their business.

Nevertheless, it is precisely in times of war that the danger posed by the state to the fundamental rights of those under its control is at its peak. Therefore, to the extent that we view judicial review by unelected judges as a check against the abuse of state power and the violation of rights, the call for judicial review is ever more insistent in times of emergency. This conclusion flows from each of the three conventional justifications for judicial review: the liberty justification, the minority protection justification, and the “bounded rationality” justification.

Judicial review is needed, according to the liberty justification, in order to secure the liberty of the individual, which may be sacrificed when state agencies act to promote the public interest.² Put in institutional terminology, if a state agency was created in order to promote a certain important public interest, it is

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⁺ In writing this piece, Professor Reichman relied on various sources written in Hebrew. These sources were not available for review by the *Utah Law Review*. Sources only available in Hebrew are designated with a (Heb.) in their citation. Readers interested in the Hebrew sources may contact the author directly at reichman@research.haifa.ac.il.

¹ Recall that the origin of the term “dictator” is directly related to the consolidation of powers in the Roman republic. ANDREW LINTOTT, *THE CONSTITUTION OF THE ROMAN REPUBLIC* 109–10 (1999).

² The liberty justification dates back to James Bradley Thayer. James Bradley Thayer, *The Origin and Scope of American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893–94) (arguing that the Court should limit its review only to cases when basic rights have been violated). The emphasis on liberty has recently been developed by Stephen G. Breyer. See STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 31–34 (2005); see also Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 541–42 (1998).

likely to overvalue the importance of protecting this public interest and undervalue the harm to individual liberties which may occur in the course of achieving this end. Similarly, the state agency will tend to overvalue the urgency of deploying certain means of protecting the public interest even if such means seriously infringe on some individual rights. Such an institutional bias stems not from some ill will on the part of the agency or its office holders, but from the basic institutional incentive to avoid failures. For example, no intelligence officer would like to have an attack occur on her shift if the attack could have been foiled by using available, if drastic, means. The officer's incentives are especially strong when the means are employed against "others," who are not a part of the polity and whose needs and interests are less directly accessible to the executive.

Unelected judges are neither in charge of achieving any particular social goal nor expected to deliver a certain public good beyond upholding basic rights. Therefore, it is incumbent upon judges to ensure that the executive and the legislature harm individual liberty only if it is absolutely necessary for achieving the public interest and the interest at stake is sufficiently important. In times of war, state agencies are even more likely to sacrifice the liberty of the individual to protect the public and, in so doing, err on the side of security rather than liberty. Judicial review is therefore crucial to balance this tendency and protect the liberty of the individual.

The same applies to the second justification for judicial review—minority protection. As articulated by John Hart Ely, on the basis of the famous footnote 4 in the *Carolene Products* case,³ the unelected judiciary, secured from electoral pressures, must ensure open channels of political participation for discrete and insular minorities who otherwise would constantly be marginalized.⁴ If left unchecked, majorities may use their power to accord minorities less than a fair allocation of resources, deny minorities the equal protection of rights, bar them from seeking their share of public goods, or otherwise prevent minorities from coalescing with others in order to advance their cause. Further expounding of this approach would suggest that protecting the rights of minorities, and especially the rights of discrete and insular minorities, is of special importance in times of armed struggle. During war, minorities, particularly discrete (i.e., less integrated) minorities, are more likely to be seen as a threat (e.g., as siding with the enemy) because stereotyping and majority biases surface and may take hold of policy-forming and enforcement processes. Unelected judges are better positioned (precisely because they are unelected and therefore somewhat insulated from the political process) to counter political biases by requiring a higher burden of proof when the government uses suspect classifications.

Lastly, judicial review could be seen as a precommitment for more sober policy-formation and enforcement processes.⁵ Policy formation and enforcement

³ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 75–101 (1980).

⁵ JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 90 (1979) (referring to the creation of a central bank as a check against

processes are subject to short-term (but nonetheless considerable) pressures by heated emotional reactions to threats and provocations. Moreover, policy formation and enforcement processes tend to prefer short-term gains over long-term considerations in part because politicians stand for election (and bureaucrats stand for promotion) in relatively short time cycles and therefore are usually evaluated by gains (or losses) they were able to achieve (or prevent) during their term of office. This tilt calls for a mechanism designed to compensate. Such a compensating mechanism is especially needed in times of emergency. Constructing an institutional buffer between the processes of policy formation and enforcement and the emotional gales of emergencies is sensible because as emotions run high, poorly considered and less legitimate decisions are more likely to be made. Judicial review under this rationale serves a cooling-off function, designed to provide state agencies with the necessary space and time to reevaluate their policies, and avoid rushed and overbroad decisions adopted under pressure. War is a prime example of a heated moment when passion flares and judgment may be clouded. If ever an institutional space shielded from the thunder of explosions is necessary, it is during times of war.

In conclusion, emergency times, and war in particular, present a dilemma. During such times, judicial independence is a liability as well as an asset because it is both a possible impediment to the war effort and a possible cure to the war's collateral damage.

*B. Judicial Independence: An Organ of a State at War
or of the International Community?*

The second reason war challenges our thinking about judicial independence stems from the unique nature of war, which posits the state against an enemy. The judiciary, while independent, is still an agency of the state. The three branches of government, albeit separate, are branches of the same tree and “the enemy” attacks the whole tree. In ordinary times, the judiciary strives to place itself “outside” or “above” the dispute it is set to adjudicate by acting as the “independent neutral umpire.”⁶ This posture of independent neutrality is difficult to maintain in times of war when the judiciary itself is part of the threatened state.

Moreover, in ordinary times judges act in the name of both parties to the dispute—whether it is a criminal or a civil case—because both parties in one way or another are taken to have accepted the sovereignty of state over them. This is not the case in times of war, however, because parties before the judiciary cannot be understood to have accepted the legitimacy of the forum state to judge them. In fact, they may view the trial as an extension of warfare. While any judiciary would

hasty pressures by the public); Jon Elster, *Intertemporal Choice and Political Thought*, in CHOICE OVER TIME 35–45 (George Loewenstein & Jon Elster eds., 1992).

⁶ Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CALIF. L. REV. 1619, 1620 n.6 (2007). For a classical account, see MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 5–17 (1986).

be expected to adhere to accepted standards of due process and fairness when adjudging foreigners, should a judiciary try to see the point of view of the enemy when it comes to substantial claims? It would be odd to expect judges to distance themselves from the entity in the name of which they exercise power and independently consider whether to accept the narrative and justifications of the enemy. This could prove particularly difficult when the enemies that are brought before a court in a democracy openly reject the core moral precepts of the democracy.⁷ To the extent that applying the law entails discretion—with respect to facts and meaning of the law—can judges truly remove themselves to be fully neutral and independent?

The latter conceptual quandary is usually accompanied with real-life political consequences. When the stakes are high, the tolerance of the executive and the legislature to judicial “interventions”—even in the form of providing detailed procedural due process, which entails possible delays and the production of specific evidence—may be severely tested. Moreover, when the guns fire, public sentiment, as shaped by the media and other factors, often solidifies strongly around patriotic values and care for “our own” in the fight with the “other.”⁸ This is especially so when national security clashes with the rights of those accused of siding with the enemy. In Western democracies, it is unlikely that judges will receive a phone call from a member of the executive asking them to rule one way. But political pressure is nonetheless quite palpable, and the media and politicians are more than likely to blame the judiciary if a position of the court is perceived to be “over-independent” and contrary to the national struggle. This is especially true when the struggle is against those who reject the values underlying the system of rights the judiciary is in place to protect. As many have noted, the judiciary’s ability to perform its role rests on public confidence.⁹ Issuing judicial decisions

⁷ Even under the U.S. Supreme Court’s approach to impartiality, which is pretty strict, a judge may harbor a predisposition against the Nazis and their values, but this would not disqualify him or her from sitting in judgment, including, presumably, of a Nazi accused of war crimes. As stated by Justice Scalia in *Liteky v. United States*, 510 U.S. 540, 550 (1994), in the context of judicial predisposition (i.e., prejudice or bias), “[o]ne would not say, for example, that world opinion is biased or prejudiced against Adolf Hitler.” For a discussion on judicial predispositions, see *Republican Party of Minn. v. White*, 536 U.S. 765, 777–78 (2002).

⁸ For a discussion of the role of the media in shaping public perception about courts, see Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985, 1017–23 (1990). For the possible effect the media might have on courts, see Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1543–44 (2010) (further expounding on the “Greenhouse effect,” or in other words, the possible desire of judges to avoid clashes with the “media and academic elites”). See also James Zagel & Adam Winkler, *The Independence Of Judges*, 46 MERCER L. REV. 795, 829–30 (1995).

⁹ *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by

that run against public opinion for an extended period of time (and specifically against public opinion regarding the role of the court in securing the life, liberty, and the pursuit of happiness of the citizens) while the state is fighting for its survival is, politically speaking, a strategy most courts would avoid, notwithstanding their institutional independence.

Two main responses to the above tensions come to mind. One is to devise techniques, which would limit de jure or de facto jurisdiction of the court (and perhaps even go as far as looking for venues to operate “outside” the ambit of the law). Such techniques may include, inter alia, exercising state power in foreign lands,¹⁰ extraordinary renditions,¹¹ or devising secrecy arrangements that effectively curtail information about the activity from reaching the judiciary.¹² The idea of operating outside the law is not new: recall that Carl Schmitt accused liberal democracies of hypocrisy precisely because he argued that liberal democracies, as all states, would begin acting outside the law in extreme situations.¹³ This technique, of course, is hardly seen as legitimate in modern times, and rightly so. But, it would seem naïve to assume that some illegal actions are not taken by agencies dealing with security threats.¹⁴

The second response is to operate “above” the table, but devise doctrines that would limit the friction between the court and other branches of government. Judiciaries in times of war apply a myriad of “avoidance techniques” to preserve

abstention from injecting itself into the clash of political forces in political settlements.”); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, 238–239 (Yale Univ. Press 1986) (1962). For a conceptual analysis of the idea of public confidence, see Reichman, *supra* note 6, at 1623.

¹⁰ See *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) (noting the U.S. Government’s argument that “noncitizens designated as enemy combatants and detained in territory located outside our Nation’s borders have no constitutional rights and no privilege of habeas corpus”). For cases dealing with solutions for the tension between individual rights and national security adopted by the United States, see *infra* note 20.

¹¹ See, e.g., MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32890, *RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE* 3 (2009), available at <http://www.fas.org/sgp/crs/natsec/RL32890.pdf> (defining the term and analyzing its legal status); *Fact Sheet: Extraordinary Rendition*, ACLU (Dec. 6, 2005), <http://www.aclu.org/national-security/fact-sheet-extraordinary-rendition>.

¹² See, e.g., Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.’s Covert Drone Program?*, *NEW YORKER*, Oct. 26, 2009, at 36 (discussing how the U.S. Government has operated the C.I.A.’s covert drone program without judicial oversight), available at http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

¹³ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 13 (George Schwab trans., Univ. of Chi. Press 2005) (1922); see also William E. Scheuerman, *Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt*, 17 *HIST. OF POL. THOUGHT* 571–72, 585–86 (1996). For the contemporary relevance of the debate, see DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 35 (2006).

¹⁴ For a discussion of the notion that some state agencies take part in “black holes” or “grey holes,” see Dyzenhaus, *supra* note 13, at 123.

their institutional capital. The political question doctrine, standing, ripeness, justiciability, and deference provide courts with ways of distancing themselves from direct review over military actions in times of war. Responses to the same effect may be developed with respect to the application of international norms.¹⁵

Additionally, doctrines governing procedural or substantive law may be modified in order to account for the emergency by giving greater weight to pressing and paramount governmental interests.¹⁶ While this judicial strategy seeks to ensure legal coherency by avoiding a break between law in ordinary times and law in emergency times, its risks are clear. Modifying doctrines to encompass both ordinary and emergency times may result in an overly lax application during emergencies, causing the judiciary to rubber stamp executive decisions. This is of particular concern when the court is unable or unwilling to independently examine the evidence and alternative courses of action available to the executive or the legislature. Judicial approval of state action under such circumstances may end up hurting the institutional capital of the court by associating it with practices over which it had little control. Moreover, expanding the doctrinal blanket to cover emergencies requires a different calibration of the weights assigned to the various rights and interests. This recalibration may dilute the ability of the judiciary to protect against rights violations in ordinary times because the distinction between emergencies and ordinary times may prove elusive.¹⁷

As a practical matter, experience reveals that adjudication may last long enough for the emergency to become less acute, thereby decreasing the aforementioned tensions. In other cases, by the time the matter reaches the highest court, the relevant remedy available to the bench may take some of the sting out of the dilemma.¹⁸ Usually, judiciaries prefer ex post remedies because they carry a different set of real and symbolic consequences than ex ante remedies.¹⁹

¹⁵ Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 169–173 (1993).

¹⁶ Aharon Barak, *The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U. MIAMI L. REV. 125, 132–36 (2003); Aharon Barak, *Human Rights in Times of Terror—A Judicial Point of View*, 28 LEGAL STUD. 493, 497–98 (2008).

¹⁷ This was strongly put by Justice Jackson in his dissent in *Korematsu v. United States*, 323 U.S. 214, 244–246 (1944) (Jackson, J., dissenting). The blurring of the line between emergency times and ordinary times is perhaps most acute with respect to the rise of terrorism: it may be that international terrorism is not a passing phenomenon, but is here to stay, much like crime. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004). The British House of Lords, for example, has noted how “emergency procedures” have become a commonly used tool of law enforcement. See *Sec’y of State for the Home Dep’t v. MB*, [2007] UKHL 46, [17], [32]–[35] (appeal taken from [2006] EWCA (Civ) 1140, [2007] EWCH 651 (Admin.)), available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071031/home-1.htm> (discussing the employment of the “Special Advocate Procedure” in proceedings against terror suspects).

¹⁸ For example, a number of interested persons petitioned the Israeli Supreme Court to force the Israeli Defense Force (IDF) to open a criminal investigation following the death of two Hamas activists as well as fourteen civilians in the targeted preemptive bombing of a building in Gaza City. See H CJ 8794/03 Hass v. Judge Advocate Gen., slip op. at 1–2

III. THE ISRAELI EXAMPLE

Having briefly sketched the challenges posed to judicial independence by emergencies in general and wars in particular, this Article now turns to a closer examination of the issue in Israel. While the clash between rights and national security has been on the agenda of courts in several Western democracies,²⁰ the Israeli legal system has been laboring on the matter almost since its creation. This Part will start by outlining the development of judicial review over military actions and advance the proposition that the Israeli judiciary has been able, on the whole, to maintain a degree of independence from the pressure of the military establishment. Following this discussion, this Part will go on to examine the limits of this independence. In some particularly difficult cases, the Israeli Supreme Court reached its institutional limits and, as revealed by the reasoning of its decisions, had to back-track from established doctrine by upholding highly problematic military actions.

A. *The Israeli Courts, Human Rights, and the Security Establishment*

Israel has enjoyed a relatively independent judiciary since its inception. While it took some years to establish institutional independence in terms of salaries, security of tenure, selection to the bench, and promotion or demotion, Israeli judges, on the whole, have been able to assert their independence since the state was established.²¹

In one of its earliest cases, as the state was emerging from its war of independence, the Israeli Supreme Court released a suspect because the military police failed to comply with the required procedure, thereby establishing the

(Isr. Sup. Ct. Dec. 23, 2008), available at http://www.adh-geneva.ch/RULAC/pdf_state/HCJ-decision-8794-03-1-.pdf. The petition was filed on September 9, 2002 and decided on December 14, 2006. *Id.* slip op. at 1–3. But by that time, the IDF had already reformulated many of its policies, pursuant to another petition. *See id.* slip op. at 2.

¹⁹ In dealing with the legality of targeted killings, the Israeli Supreme Court insisted that a legal check must be conducted before a target is hit, but was careful to state that the judicial review of the legal decision would take place post facto. *See* HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel [2006](2) PD 459, 511 (Barak, C.J.).

²⁰ The tension between constitutional rights and national security is not unique to Israel, as is revealed by rich U.S. jurisprudence on point. The following cases are among those generated by the recent “war on terror.” *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007); *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005). The issues are relevant in the United Kingdom as well. *See, e.g., Al Jedda v. Sec’y of State for Def.*, [2010] EWCA (Civ) 758 (Eng.); *Al-Saadoon v. United Kingdom*, 2010 Eur. Ct. H.R. 9; *R v. Prime Minister*, [2008] UKHL 27 (appeal taken from [2006] EWCA (Civ) 1689).

²¹ For further analysis of the Israeli judiciary, see Shimon Shetreet, *Judicial Independence and Accountability in Israel*, 33 INT’L & COMP. L.Q. 979, 990 (1984).

principle of legality, according to which state power can only be used by an agency pursuant to authorization by law.²² In another famous case, the Court considered a petition by a teacher who was fired because of his political opinions; he was associated with the right-wing forces that were considered terrorists by the mainstream Zionist movement.²³ The Court reinstated the teacher despite the fact that the powerful David Ben-Gurion, who served as prime minister and defense minister, specifically asked for his removal.²⁴ The security establishment was concerned that rehabilitating the public standing of the right-wing forces would pose a security threat, but the Court saw the dismissal as violating the freedom of vocation of the teacher without explicit authorization by law, and thus motivated by considerations irrelevant to the empowering law.²⁵

As early as the 1950's, the court withstood harsh political criticism of its alleged "pro-accused" approach, turning the tables on the accusing justice minister by framing the issue as one of judicial independence.²⁶ In 1953, in another famous case, the Court struck down the order of the interior minister to shut down a communist paper in Hebrew and Arabic.²⁷ The Court concluded that the order violated freedom of expression, despite the minister's claim that the publication might undermine national security.²⁸ The Court required that the state demonstrate that it was nearly certain that such publication would cause substantial harm to national security before the minister could use the power to order the newspaper to cease publication.²⁹ In a similar manner, the Court developed a relatively robust bill of rights, applicable to the executive, under the premise that any empowering statute should be interpreted as granting the executive the power to infringe upon a basic right no more than was absolutely necessary.³⁰

This is not to portray the Court as beyond politics. The Court refused, by deploying various legal arguments, to limit the seizure of Palestinian lands after the War of Independence.³¹ Also, the Court was careful not to question the necessity of placing Arab villages captured in the War of Independence under military rule.³² Furthermore, the Court upheld the power of the state to curtail the

²² HCJ 7/48 Alkharbutli v. Minister of Defense 2 PD 5, 15 [1948] (Isr.) (Heb.).

²³ HCJ 144/50 Scheib v. Minister of Defense 5 PD 399, slip op. at 3 [1951] (Isr.).

²⁴ *Id.* slip op. at 5.

²⁵ *Id.* slip op. at 29 (Witkon, J., concurring).

²⁶ YITZHAK OLSHAN, DIN UDVARIM [COLLECTION OF ARTICLES IN LAW] 242–245 (1978) (Heb.).

²⁷ HCJ 73/53 "Kol Ha'am" Co. Ltd. v. Minister of Interior 7 PD 871, slip op. at 1 [1953] (Isr.).

²⁸ *Id.* slip op. at 30.

²⁹ *Id.* slip op. at 21–22.

³⁰ *See, e.g.*, HCJ 337/81 Mitrani v. Minister of Transp. 37(3) PD 337, 356–57 [1983] (Isr.) (Heb.).

³¹ *See, e.g.*, HCJ 30/55 Comm. for Defending Confiscated Arab Land in Nazareth v. Ministry of Fin. 9 PD 1261, 1264–67 [1955] (Isr.) (Heb.).

³² The occupied Arab villages remained under military regime until November 1966. *See* 47 Divrei Haknesset 228 (Protocols of the Knesset, Nov. 8, 1966) (Isr.) (Heb.).

activities of an Arab political movement that sought the dissolution of the state of Israel.³³ For the Court, it seems, these were issues fundamental to the security of the state, although it is not clear that these state actions (and the attitude of the Court) can be reconciled with the robust bill of rights the Court has developed in other areas. At the same time, the Court was diligent in protecting the individual rights of Israel's citizens—Jews and Arabs alike—in other areas.³⁴ The presence of uncompromising judicial review over governmental action when basic human rights, including equality, were at stake, was one of the main reasons Israel was able to develop a democratic culture.

In 1967 Israel had captured the West Bank, the Golan Heights, Sinai, and the Gaza Strip. Whereas most residents of the Golan Heights left the area, and Sinai was sparsely inhabited, occupying the West Bank and Gaza brought nearly one million Palestinians under military control. Israel had the legal apparatus for the occupation almost ready—it relied on its experience with the military rule it established over Arab villages between 1949 and 1966, and adapted it pursuant to the lessons it learned from the Sinai War of 1956, when it captured the Sinai Peninsula and instituted military rule over that area for six months (until withdrawal). But the occupation of the territories presented some new challenges: arrangements had to be made to maintain the civil systems in place in Gaza and in the West Bank, as required by international humanitarian law;³⁵ Israeli military courts had to be set up to supplement the civil systems, as stipulated by

³³ EA1/65 *Yardor v. Chair of the Electoral Comm. of the 6th Knesset* 19(3) PD 365 [1965] (Isr.) (Heb.) (finding that the Election Committee is empowered—notwithstanding the lack of explicit authorization in law—to reject an application by a party to run in the general election if the committee is convinced that the said party would act towards the dissolution of the state of Israel as the national home of the Jewish people); H CJ 241/60 *Cardosh v. Registrar of Companies* 15 PD 1151 [1961] (Isr.) (Heb.); H CJ 16/61 *Registrar of Companies v. Cardosh* 16 PD 1209 [1962] (Isr.) (Heb.) (rehearing) (finding, that the registrar of companies may deny an application by a firm to incorporate if the registrar is convinced that upon incorporation the company would act towards undermining the existence of the state of Israel).

³⁴ H CJ 7/48 *Alkharbutli v. Minister of Def.* 2 PD 5, 15 [1948] (Isr.) (Heb.) (insisting on explicit legal authorization empowering the executive to place a person under custody); H CJ 1/49 *Bejerano v. Minister of Police*, 2 PD 80, 82–83 [1949] (Isr.) (Heb.) (stating that individuals have basic rights the state may not infringe without explicit authorization in Knesset legislation). The petitioner in the former case was an Arab Israeli and in the latter case, a Jew.

³⁵ See Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, 36 Stat. 2277 (1910), available at <http://www.unhcr.org/refworld/docid/4374cae64.html>; see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 64, Aug. 12, 1949, 6 U.S.T 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

international law;³⁶ and judicial review of military actions and military courts had to be addressed.³⁷

Examining the independence of the civil courts and military courts operating under a regime of belligerent occupation raises interesting questions. While under the Fourth Geneva Convention, the occupying power may not alter the status of judges appointed to civil courts by the previous ruler, appointment of new judges to the civil system—as any other appointment to official positions—requires the approval of the occupying power.³⁸ In the case of Israel's occupation of Gaza and the West Bank, the power of approval is vested in the Israeli Defense Force's military commander. Such power allows the military commander to ensure that over time (and upon retirement of the judges that presided in the territories prior to the occupation), only judges he finds favorable will sit on the bench. As for military courts, empowered to adjudicate offenses against decrees issued by the occupying power under international law, such institutions by definition operate as part of the armed forces of the occupying power.³⁹

However, it would be hasty to conclude from these characteristics that the civil or the military courts are merely pawns of the military government. The military government in the West Bank and Gaza would collapse if it attempted to control the criminal and civil adjudication of the Palestinians because it lacks the administrative resources to supervise each and every decision. As for the military courts, the ethics of military lawyers and judges and their professional structure of command are too solid to succumb to the wishes of the military commander. Nonetheless, it is clear that military governance, almost by definition, is not premised on separation of powers as it is understood in a democratic regime. Therefore, the contours of judicial independence in the context of military governance differ from the minimal standards of judicial independence within a

³⁶ See Geneva Convention IV, *supra* note 35, art. 66.

³⁷ See *Criminal Proceedings: Jurisdiction*, IDF MAG CORPS, <http://www.law.idf.il/603-3077-en/Patar.aspx> (last visited Feb. 13, 2011). The concerned power (Israel) is under the obligation, set by common article 1 of the Geneva Conventions and customary law to respect and ensure respect to the applicable norms of international humanitarian law. Geneva Convention IV, *supra* note 35, art. 1; see JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES, 495–98 (2005) (discussing customary legal obligations to respect international humanitarian law under Rule 139). According to the IDF MAG Corps, Israel saw this obligation as generating an obligation to establish judicial review of its actions in the “administered territories.” *Criminal Proceedings: Jurisdiction*, *supra*.

³⁸ See Geneva Convention IV, *supra* note 35, art. 54. Local judges appointed by Jordan, which annexed the West Bank, or Egypt, which kept the Gaza Strip under military control, initially resigned when Israel captured the territories, but eventually many resumed their activities.

³⁹ Although it is important to note that article 66 of the Geneva Convention IV requires that these courts be apolitical, the conduct and jurisdiction of these courts are regulated by Geneva Convention IV, articles 64–75, 146–47. Geneva Convention IV, *supra* note 35, art. 64–75, 146–47.

democratic regime.⁴⁰ Put more bluntly, few citizens of a democratic regime would opt to be governed by civil courts whose judges are appointed by a military regime or by military courts who implement rules over which the local population has little control.

This design emphasizes the dilemma put before the Israeli Supreme Court: should it open its gates and exercise judicial review over military actions (including the actions of military judges) in the territories held under a regime of belligerent occupation?⁴¹ The Israeli Court decided in the affirmative: it agreed to hear cases regarding the legal competence of the military commander, the due process accorded to local residents, the weight accorded to human rights, and the proportionality of the military commander's action.⁴² The Court applied public international law, as it saw it.⁴³ But, the Court also applied Israeli public law, theorizing that each Israeli soldier carries not only the Israeli uniform, but also Israeli public law, and therefore is subject to public law norms when exercising official powers, regardless of the location where the power is exercised.⁴⁴

The decision of the Court to open its gates is understandable and some say laudable.⁴⁵ When the military exercises control over civilian population, it seems some venue is necessary to check the exercise of the military commander's authority and discretion. The Court would fail its mission to uphold the rule of law and protect basic rights if it refused to hear cases about the military commander's actions as the ruler of the territories. After all, no other effective judicial venue to adjudicate grievances of individual residents of these territories exists. Moreover, the Israeli Supreme Court has traditionally taken the view that national courts are also agents of the "community of nations," and do not operate solely as an organ of the nation state.⁴⁶ One way to understand this approach is to view the national

⁴⁰ EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION 197–98* (1993).

⁴¹ It was initially the military advocate general and the attorney general's lawyers who decided the Court should hear cases from the territories by demurring on the question of the jurisdiction of the Court.

⁴² The question whether the Israeli Supreme Court has jurisdiction to review the actions of the commander in the territories was first addressed by the Court in H CJ 302/72 *Abu-Hilu v. Gov't of Israel* 27(2) PD 169, 176 [1973] (Isr.) (Heb.). For analysis of the various modes of judicial review in the occupied territories, see DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 1–16* (2002).

⁴³ See H CJ 337/71 *Aljamayah Almasychiya Lilarachi Almakdasa v. Minister of Def.* 26(1) PD 574, 580 [1972] (Isr.) (Heb.); Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B.H.R. 262, 266 (1971) (Heb.).

⁴⁴ H CJ 393/82 *Jamayat Iskan Alma'almoun Altauniya Almachduda Almasulia v. IDF Commander in Judea & Samaria* 37(4) PD 785, 809 [1983] (Isr.) (Heb.).

⁴⁵ See, e.g., Amos Giuora, *Not "By All Means Necessary": A Comparative Framework for Post-9/11 Approaches to Counterterrorism*, 42 CASE W. RES. J. INT'L L. 273, 282 (2009); Amos Guiora, *Transnational Comparative Analysis of Balancing Competing Interests in Counterterrorism*, 20 TEMP. INT'L & COMP. L.J. 363, 393 (2006).

⁴⁶ This was most clear in CrimA 336/61 *Eichmann v. Attorney Gen.* 17 PD 2033, 2062 [1962] (Isr.) (Heb.).

court as a segment of a supranational judiciary that is expected to perform a global role vis-à-vis supranational executives.⁴⁷ Under such an approach, the Israeli Supreme Court would be acting on behalf of the law of nations when hearing petitions from the residents of the occupied territories.⁴⁸

However, it is hard to ignore the other side of the coin. The Israeli Supreme Court is still part of the Israeli system, applying Israeli law and its understanding of public international law, which may vary considerably from the interpretation of other organs of the international community.⁴⁹ Furthermore, establishing the jurisdiction of the Israeli Supreme Court over the activities of the military commander could be seen as a step towards the annexation of the territories.⁵⁰

Moreover, some scholars have argued that by opening its gates to hear petitions from the occupied territories, the Court would be legitimizing the occupation in the eyes of the Israeli public and, to an extent, the international community.⁵¹ In reviewing the activities of the government, the Court generates

⁴⁷ Eyal Benvenisti & George Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59, 59 (2009); Amnon Reichman, *Universal Jurisdiction in National Courts – Undermining Sovereignty or a New World Order?*, 17 I.D.F. L. REV. 49, 57, 93 (2004) (Heb.); Amnon Reichman, “*When We Sit to Judge We Are Being Judged*” the Israeli G.S.S. Case, Ex Parte Pinochet and Domestic/Global Deliberation, 9 CARDOZO J. INT'L & COMP. L. 41, 45–50 (2001) [hereinafter Reichman, *When We Sit to Judge*]; Yuval Shany, *National Courts as International Actors: Jurisdictional Implications*, FEDERALISM.LIT, 6–7, 31 (July 29, 2009), <http://www.effective-intl-adjudication.org/admin/Reports/2af9ed4d4a026e581437876dd1b73b87Yuval.pdf>.

⁴⁸ Yuval Shany, *Dédoublement Fonctionnel and the Mixed Loyalties of National and International Judges*, in SHAPING RULE OF LAW THROUGH DIALOGUE: INTERNATIONAL AND SUPRANATIONAL EXPERIENCES 34, 41 (Filippo Fontanelli et al. eds., 2009).

⁴⁹ See, e.g., *infra* notes 145–153 and accompanying text regarding the debate about the legality of the security barrier and *infra* notes 92–98 and accompanying text regarding the legality of deportations from territories under belligerent occupation.

⁵⁰ But see Yoram Dinstein, *Legislative Power in Occupied Territories*, 2 TEL AVIV U. L. REV. 508, 511 (1972) (Heb.) (“The Israeli Supreme Court is under the obligation to review the actions of the military commander, who is a part of the executive branch of the state.”). Because it is ultimately the duty of Israel to ensure that its military observes the relevant segments of public international law, it is hard to see how Israel could have consistently refused to review the actions of its military commander. See Geneva Convention IV, *supra* note 35, art. 1; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 80, June 8, 1977, 1125 U.N.T.S. 3. Nevertheless, it is unclear that the Court was the only available legal venue and that the Court was authorized to apply Israeli law in reviewing the actions of Israeli soldiers in the territories.

⁵¹ KRETZMER, *supra* note 42, at 2–3; Ronen Shamir, “*Landmark Cases*” and the *Reproduction of Legitimacy: The Case of Israel’s High Court of Justice*, 24 LAW & SOC’Y REV. 781, 786, 795, 799 (1990). This is not to suggest that the exercise of judicial review necessarily portrays the occupation as legally legitimate or lawful. As stated by the Nuremberg Court:

some legitimacy for the government's actions by the mere fact that petitioners may challenge the legality of the actions. To the extent that the Court is perceived as an independent, serious institution, an action that may be challenged in the Court enjoys greater legitimacy than an action immune from review. Furthermore, actions that were upheld by the Court are given, in public discourse, a seal of legality, which may be translated by the media to a seal of approval by the Court. It should be recalled that the majority of the petitions against the state—not to mention the majority of the petitions against the military commander—are denied.⁵² Therefore, the effect of judicial review over the activities of the military commander in the territories is complex. In some cases the human rights of petitioners are protected by the court. But, the net effect may well be the prolongation of the occupation. Without judicial review, a Marxist might say, it would have been easier to mobilize political forces and seek an end to the occupation sooner.

B. Controversial Cases: Judicial Independence and Its Limits

Was the Israeli Supreme Court able to withstand the pressure associated with exercising review over the security forces in relation to the occupation? Yes, but within limits. The two following cases may be the clearest illustration of the Court's independence and ability to perform its role despite substantial pressures from the political and security establishments. The first case deals with the legality of the confiscation of private land to build a Jewish settlement in the West Bank.⁵³ The second case deals with the legality of the use of force by General Security Service investigators in the course of investigating suspects of terrorism.⁵⁴

In the first case, known as the *Elon Moreh* case, the Court was confronted with an order of the military commander in the West Bank to seize private land in

At the outset, we desire to point out that International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.

VIII UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 59 (1949), available at http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf. The claim here is that the presence of national judicial review provides an aura of legality, which translates to political legitimacy.

⁵² Guy Davidov & Amnon Reichman, "Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel," 35 LAW & SOC. INQUIRY 919, 935–36 (2010).

⁵³ H CJ 390/79 Dawikat v. Gov't of Israel 34(1) PD 1, slip op. at 3–4 [1980] (Isr.).

⁵⁴ H CJ 5100/94 Pub. Comm. against Torture v. Gov't of Israel 53(4) PD 817, slip op. at 5 [1999] (Isr.) (Barak, C.J.).

the vicinity of Nablus.⁵⁵ Prime Minister Menachem Begin, of the Likud Party, saw the West Bank as an area with which the Jewish people had a special historical connection because it is the area where the Jewish Kingdom of biblical times had thrived. Yet under public international law, an occupying power may confiscate land only for security reasons.⁵⁶ Previous Jewish settlements in the West Bank and Gaza were built in the early 1970s pursuant to the military commander's claim that these settlements were outposts necessary to create a security belt against possible attacks from the East. In previous cases the Court was willing to accept that theory, especially because the land in some of the cases was not privately owned.⁵⁷

However, in *Elon Moreh* it was difficult for the Court to be convinced that indeed security reasons were behind the confiscation of the particular private land. While the military commander stated that the settlement was necessary for the security of Israel, the settlers themselves attested that the reason behind the settlement was the fulfillment of the "right of return" of Jews to their historic homeland.⁵⁸ It was difficult to support the position of the military commander because other segments of the Israeli Defense Forces stated that there was no real security reason in the particular spot chosen for the settlement. The Court therefore concluded that the order was *ultra vires* and void.⁵⁹ The Court took pains to extricate itself from the highly contentious political debate surrounding the issue of Jewish settlements in the West Bank and their implication for Israel's security.⁶⁰ It was clear that some would see the Court as taking a political side, and some would even see the decision not to allow the settlement as undermining Israel's security. The reaction of Prime Minister Menachem Begin, however, diffused the tension: "[t]here are judges in Jerusalem" he stated, and by that he meant that the security establishment would abide by the order of the Court.⁶¹

In that context it would be an overreach to suggest that the Court was able (or willing) to play a more active role in the issue of the Jewish settlements. The Court refused to deal with the question of the overall legality of the settlement project under international law,⁶² or with the legality of the occupation itself.⁶³ The Court

⁵⁵ HCJ 390/79 *Dawikat v. Gov't of Israel* 34(1) PD 1, slip op. at 3–4 [1979] (Isr.).

⁵⁶ See Geneva Convention IV, *supra* note 35, art. 146–147. The Geneva Convention specifically states that the occupying power shall not transfer parts of its population to the occupied territories. Geneva Convention IV, *supra* note 35, art. 49.

⁵⁷ HCJ 606/78 *Ouyeb v. Minister of Def.* 33(2) PD 113, 120 [1979] (Isr.) (Heb.); HCJ 258/79 *Amira v. Minister of Def.*, 34(1) PD 90, 94 [1979] (Isr.) (Heb.).

⁵⁸ HCJ 390/79 *Dawikat v. Gov't of Israel* 34(1) PD 1, slip op. at 10–11 [1979] (Isr.).

⁵⁹ *Id.* slip op. at 31 (Witkon, J., concurring).

⁶⁰ See *id.* slip op. at 3–4.

⁶¹ Aharon Barak, *Begin and the Rule of Law*, ISR. STUD., Fall 2005, at 1, 1, available at http://muse.jhu.edu/journals/israel_studies/toc/is10.3.html. For a more complete description of the case, see Amnon Reichman *Judicial Non-dependence: Operational Closure, Cognitive Openness and the Underlying Rationale of The Provincial Judges Reference – The Israeli Perspective*, in *THE JUDICIAL INDEPENDENCE IN CONTEXT* 448–49 (Adam Dodek & Lorne Sossin eds., 2010).

⁶² HCJ 4481/91 *Bargil v. Gov't of Israel* 47(4) PD 210, slip op. at 6–9 [1993] (Isr.).

was unwilling to contest the position of the military regarding the necessity of building civilian settlements as a security measure. At first, the military, on the advice of the aides to the prime minister and to the defense minister, was careful to plan the settlements in areas where a claim for strategic importance for the defense of Israel could be made. Later on, it has been assumed without discussion that such importance exists. Israel has not officially annexed the land occupied by the Jewish settlements in the West Bank,⁶⁴ because such a move is, it would seem, contrary to international law. According to international law, and as stated by the Israeli Court, the Israeli settlements, as outposts necessary for the security of the occupying power, are only temporary and may be subject to evacuation.⁶⁵ This position is difficult to reconcile with the reality on the ground, as allowed to develop by the judicial approach of the Court. Some 300,000 settlers live in the West Bank. Evacuation and resettlement in Israel for the entire group appears possible on paper only. It could therefore be argued that *Elon Moreh* should be read in conjunction with previous cases in which the Court decided not to intervene. Thus, *Elon Moreh* is not only about the independence of the Court, but also about its limits: in striking down egregious conduct by the military commander, and only that conduct, the Court has de facto allowed the settlement project to proceed.

The second illustration of the Court's assertion of its independence from the security establishment is known as the *Torture Case*.⁶⁶ The case emerged from a realization by the Israeli legal system that the General Security Service (GSS), the Israeli equivalent of the Federal Bureau of Investigation (FBI), is conducting some of its investigations "outside" the law.⁶⁷ This finding was part of a report submitted by a commission of inquiry led by Chief Justice Landau (the Landau Report).⁶⁸ The commission was appointed after Israeli Defense Forces (IDF) officer Izaat Nafsu, of the Circassian denomination, was coerced to admit to spying for the enemy.⁶⁹ This was an offense Nafsu did not commit, and only admitted to

⁶³ Orna Ben-Naftali et al., *Illegal Occupation: Framing the Occupied Palestinian Territories*, 23 BERKELEY J. INT'L L. 551, 551–52 & 552 n.2 (2005).

⁶⁴ Israel has officially annexed East Jerusalem. See Basic Law: Jerusalem the Capitol of Israel, 5740-1980, SH No. 980 p. 186, art. 1 (Isr.).

⁶⁵ HCJ 606/78 Ouyeb v. Minister of Def. 33(2) PD 113, 131–32 [1979] (Isr.) (Heb.); HCJ 390/79 Dawikat v. Gov't of Israel 34(1) PD 1, slip op. at 33–34 [1979] (Isr.) (Bechor, J. concurring).

⁶⁶ HCJ 5100/94 Pub. Comm. against Torture v. Gov't of Israel 53(4) PD 817 [1999] (Isr.).

⁶⁷ David Dyzenhaus refers to actions "outside" the law as "black holes." Dyzenhaus, *supra* note 13, at 30.

⁶⁸ REPORT OF THE COMM'N OF INQUIRY REGARDING THE GSS' INTERROGATION PRACTICES WITH RESPECT TO HOSTILE TERRORIST ACTIVITIES (1987) (Heb.) [hereinafter LANDAU REPORT]. The public part of the Landau Report was published in LANDAU BOOK (1995) (Heb.). For critical analysis, see M. Kremnitzer, *National Security and the Rule of Law: A Critique of the Landau Commission's Report*, in NATIONAL SECURITY AND DEMOCRACY IN ISRAEL (Avner Yaniv ed., 1993).

⁶⁹ For the history of the Nafsu affair, see IAN BLACK & BENNY MORIS, ISRAEL'S SECRET WARS: A HISTORY OF ISRAEL'S INTELLIGENCE SERVICES 409–12 (1991).

following mental and physical abuse by the GSS.⁷⁰ This disgrace came on the heels of a previous scandal, known as the Line 300 Affair,⁷¹ which had seriously strained the relationship between the security service and the judiciary. The commission found that the GSS was using force in its investigations, without any authorization in law. The commission suggested that the matter should be regulated by empowering the GSS to apply “moderate physical force” only in extreme situations where such force is the only way to conduct an investigation necessary to dismantle a “ticking bomb,” namely a terror operation already under way.⁷²

Petitions were filed to the Court challenging the Landau Report, suggesting that there is no legal basis for allowing any kind of physical force.⁷³ But the Court was unwilling to entertain the matter, stating that such petitions were theoretical: should the GSS use force, charges would be filed by the state and only then could the authority of the GSS investigators to use such force be litigated.⁷⁴ While in a couple of cases such charges were brought,⁷⁵ the cases were sealed for security reasons, and in any event, it was up to the prosecution to decide whether to file criminal charges in the first place. The Court’s expectation that the matter would be dealt with by other agencies (such as the Knesset’s Security Services Subcommittee or the State Comptroller) in their reviews of the activities of the GSS was overly optimistic. Evidence began to accumulate regarding the systemic use of force by GSS investigators, relying, at least in part, on the Landau Report.⁷⁶ At that time, the GSS was operating without comprehensive statutory authorization: GSS investigators received a personal letter of appointment by the justice minister, granting them the power to use any legal means available to police officers.⁷⁷ Groups and individuals filed a petition challenging the authorization to deploy such methods of investigation.⁷⁸ The petition included careful documentation of the methods of investigation based on interviews with detainees.⁷⁹ It also identified that at least one detainee died as a result of an investigation method known as “shaking.”⁸⁰ In response, the Court finally took the case. In a strong opinion, Chief Justice Barak stated that without explicit

⁷⁰ *See id.*

⁷¹ The Line 300 Affair is discussed below *infra* at notes 99–107 and accompanying text.

⁷² LANDAU REPORT, *supra* note 68, at 312, 328.

⁷³ HCJ 5100/94 Pub. Comm. against Torture in Israel v. Israel 53(4) PD 817, slip op. at 5–6 [1999] (Isr.) (Barak, C.J.).

⁷⁴ Justice Shlomo Levin, writing for the Court in HCJ 2581/91 *Salhat et. al v. Gov’t of Israel* 47(4) PD 837, 841–43 [1993] (Isr.) (Heb.).

⁷⁵ *Id.* at 841.

⁷⁶ LANDAU REPORT, *supra* note 68, at 328.

⁷⁷ HCJ 5100/94 Pub. Comm. against Torture in Israel v. Israel 53(4) PD 817, slip op. at 15–20 [1999] (Isr.) (Barak, C.J.).

⁷⁸ *Id.* slip op. at 19–29.

⁷⁹ *Id.*

⁸⁰ *Id.* slip op. at 9.

authorization by law, the GSS is not legally empowered to use any force in its investigation.⁸¹

The Court resolved the issue of the “ticking bomb” by stating that, should GSS investigators nonetheless resort to the use of force, they would be doing so at their own risk.⁸² The Court would grant investigators the criminal defense of necessity only if they could prove that the use of force was the only way to prevent serious harm to the lives of Israeli citizens and that the force used did not amount to torture, which is forbidden *per se*.⁸³ By the time the *Torture Case* was decided, the Court had also developed, albeit in a different context, a cause of action in public law against the attorney general for *not* filing charges.⁸⁴ Consequently, should information about the use of force in an investigation become publically available and should the attorney general decide not to press charges, the attorney general’s decision would be subject to judicial review.

Many in the security establishment complained that the decision would place GSS investigators in a bind, because investigators would hesitate in critical times, undermining national security.⁸⁵ From the other side, the Court has been blamed for opening up the necessity defense as a “backdoor” which, while not authorizing the GSS investigators to use force as agents of the state, would nonetheless exempt investigators from personal liability for their actions as individuals.⁸⁶ Students of the Court feared that the next time a suicide bomber succeeded in slipping through the security measures, a finger would be pointed directly at the Court, but this has not happened.

Within the legal community, the judgment was taken as an indication that the Court realized that “[w]hen [it] sit[s] to judge, [it is also being] judged.”⁸⁷ This sentence, appearing in the opinion of the Court, indicates that professional accountability vis-à-vis the local and the transnational community of jurists must have played a role in the Court’s decision.⁸⁸ As judicial bodies—national and international—are being empowered to examine the legality of Israeli state action as part of exercising their universal jurisdiction, the Israeli Supreme Court would

⁸¹ *Id.* slip op. at 19–29.

⁸² *Id.* slip op. at 30–31.

⁸³ *Id.*

⁸⁴ HCJ 935/89 Ganor v. Attorney-General 44(2) PD 485, 528 [1990] (Isr.) (Heb.).

⁸⁵ See Serge Schmemmann, *When Israel Confronted and Rejected Torture*, N.Y. TIMES, May 1, 2009, at A22.

⁸⁶ Mordecai Kremnitzer & Re’em Segev, *The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?*, 34 ISR. L. REV. 509, 540 (2000).

⁸⁷ HCJ 5100/94 Pub. Comm. against Torture v. Gov’t of Israel 53(4) PD 817, slip op. at 37 [1999] (Isr.). For analysis, see Reichman, *When We Sit to Judge*, *supra* note 47, at 41 (arguing that this case can be understood as part of an emerging dialogue between national judiciaries empowered to effectively review the decisions of one another).

⁸⁸ Daphna Golan-Agnon suggests that the presence of foreign judges in the hearings of the Court has ensured that the Israeli judges were aware that their audience included international spectators. DAPHNA GOLAN-AGNON, NEXT YEAR IN JERUSALEM 82–97 (2005).

be hard pressed to ignore the possible impact of appearing unwilling or unable to apply basic principles of public international law. The decision has been translated to English, and was thus offered de facto for the review of the international community of jurists—a form of peer review.⁸⁹ As revealed by the *Torture Case*, such transnational review may be harnessed by the Court to assert its independence from heavy pressures emanating from the security establishment.

Yet the Court has not always been able to reach decisions it can defend as a matter of doctrine or that are consistent with the Court's role in checking the powers of the military commander in charge of the occupied territories. On three famous occasions the Court has reached its institutional limits, as indicated by the difficulty of reconciling the Court's reasoning with precedent or with the rationale undergirding past cases.

The clearest of the three cases dealt with the deportation of 415 Hamas members from the Gaza Strip after the kidnapping and brutal murder of an Israeli soldier within the borders of Israel.⁹⁰ The clear language of article 49 of the Geneva Convention bars the deportation of protected persons from occupied territories.⁹¹ Despite this, deportations of individuals were previously deemed permissible by the Court, provided the deportee posed a clear threat.⁹² Yet in the past, the Court insisted that due process must be maintained and specifically that a fair hearing prior to deportation must be granted.⁹³ In this case, the Court was

⁸⁹ Reichman, *When We Sit to Judge*, *supra* note 47, at 47.

⁹⁰ H CJ 5973/92 Ass'n for Civil Rights in Israel v. Minister of Def. 47 PD 267, slip op. at 8 [1993] (Isr.).

⁹¹ Geneva Convention IV, *supra* note 35, art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The state agreed to respect article 49 as a matter of humanitarian norms, without foregoing its argument that the Convention does not apply to the territories and/or is inapplicable in Israeli courts because it is not a customary convention.

⁹² This conclusion rests on a rather contrived interpretation of the term "protected person." Recall that article 49 forbids the deportations of individuals or groups, regardless of the motive of the state. Geneva Convention IV, *supra* note 35, art. 49. The Court found that if article 49 completely bans the deportations of individuals, it would be impossible to deport individuals who illegally crossed the border into the territories. H CJ 845/87 Affu v. IDF Commander in Judea & Samaria 42(2) PD 4, 24–33, 68–69 [1988] (Isr.) (Heb.). Because that conclusion is absurd, and under Public International Law absurd conclusions should be avoided through interpretation, the Court examined the historical context underlying the Convention, namely World War II, where mass deportations were the problem. Therefore, the Convention, according to the Court, should not be read as forbidding deportations of individuals under all circumstances. If such deportations are necessary for maintaining the security of the state, they are permissible. As scholars have noted, the problem with this line of reasoning, beyond the clear conflict with the expressed text, is that the absurdity the Court pointed to can be easily avoided by interpreting the term "protected persons" as excluding illegal trespassers. KRETZMER, *supra* note 42, at 181–82. Once this absurdity is removed—as there is no ban on deporting the infiltrators—there is no reason to circumvent the clear and obvious meaning of the text.

⁹³ See, e.g., H CJ 320/80 Kawasma v. Minister of Def. 35(3) PD 113, 120 [1981] (Isr.) (Heb.).

faced with the deportation of not one or two, but 415 “individuals,” and the right to a hearing had been denied.⁹⁴ The GSS argued that it was imperative to react swiftly and deport the Hamas members that very night. The Court issued an interim injunction and heard the parties’ arguments in the early hours of the morning, with the Hamas members waiting in buses near the border crossing to Lebanon. But, the political and military pressure appears to have been too strong for the Court: the judges found that the right to a hearing can also be granted after the deportation to Lebanon.⁹⁵ Needless to say, the legal community met this decision with disbelief. It is difficult to reconcile with previous decisions and, more importantly, with the underlying rationale for judicial review over the security forces. The Court took the highly unusual step of not disclosing the authorship of the decision: each of the seven justices appears as the co-author.⁹⁶ It was later revealed that Justice Barak wrote a strong dissenting opinion, which he agreed to withdraw if Chief Justice Shamgar would refrain from addressing the legality of the deportation itself and restrict the issue to the matter of the right to a fair hearing.⁹⁷ Since this case, the Court has not approved any deportations under article 49.⁹⁸

Another illustration of the limit of the judicial power in security matters during times of conflict is known as the *GSS Pardon Case*.⁹⁹ At issue was the decision of the Israeli President to pardon the head of the GSS and other high level officers before their trial for involvement in the Line 300 Affair.¹⁰⁰ According to the charges, the GSS officers had deliberately obstructed justice in the

⁹⁴ HCJ 5973/92 Ass’n for Civil Rights in Israel v. Minister of Def. 47 PD 267, 279 [1993] (Heb.).

⁹⁵ *Id.* at 284.

⁹⁶ *Id.*

⁹⁷ NOMI LEVITSKY, *YOUR HONOR: A BIOGRAPHY* 185–87 (2007) (Heb.).

⁹⁸ In HCJ 7015/02 *Ajouri v. Military Commander in the West Bank* 56(6) PD 352, slip op. at 8–9 [2002] (Isr.), the Court dealt with the decision of the military commander to order three West Bank residents to move to the Gaza strip. Rather than addressing the matter as a deportation from the West Bank to Gaza, the Court analyzed the issue under article 78 of the Fourth Geneva Convention. *Id.* slip op. at 14. Article 78 empowers the occupying power to assign residency of protected persons if paramount security reasons necessitate such an assignment. *Id.* slip op. at 14. The Court stated that, because the West Bank and Gaza are part of the same territorial unit, article 78 applies rather than article 49, even though the rationale behind the commander’s action was to remove the three individuals from their home towns. *Id.* slip op. at 17–18. Substantively, the Court found that the commander must base his decisions on evidence demonstrating the risk posed by the person whose residence he seeks to assign. *Id.* slip op. at 19–22. With respect to one of the three, no such evidence existed, and the decree was declared void by the Court with respect to that individual. *Id.* slip op. at 31–32. It should be noted that the Court did not insist that the commander consider alternatives to residency assignment, such as confinement, under the hypothesis that confinement is a harsher measure. *See id.* slip op. at 27. This is the first case where the Court used public international law as the main source for its analysis.

⁹⁹ HCJ 428/86 *Barzilai v. Gov’t of Israel* 40(3) PD 505, slip op. at 8–9 [1986] (Isr.).

¹⁰⁰ *Id.* slip op. at 8.

investigation of the killing of terrorists. The terrorists were taken alive when Special Forces stormed Bus Line 300 from Tel Aviv to Ashkelon, which was full of passengers the terrorists held captive. The security forces first claimed all terrorists were killed during combat, but a photo taken by a journalist revealed otherwise.¹⁰¹

When a commission was appointed to investigate, the head of the GSS ordered the GSS representative on the commission and other GSS officers to fabricate evidence, lie to the commission, and otherwise obstruct the investigation.¹⁰² Attorney General Yitzhak Zamir learned of this conduct from GSS officers who refused to take part in the obstruction and decided, despite severe political pressure, to press charges. The GSS turned to the president, who pardoned the officers before their trial began, and without revealing their names, stated that conducting legal proceedings in this case would severely undermine national security.¹⁰³ The attorney general who strongly disagreed, resigned. When a petition was filed with the Court, the majority of the justices, over a strong dissent by Justice Barak, found that the president was legally empowered to act as he did, despite the fact that the basic law only allowed the president to pardon “criminals.”¹⁰⁴ The majority concluded that, in asking for the pardon, the GSS officers admitted to the charged crimes, albeit without specifying the exact deeds committed.¹⁰⁵ As a result, there was no need for a formal conviction before the president was authorized to exercise his pardon power.¹⁰⁶ Justice Barak saw the matter differently, stating that the decision of the Court amounts to an acceptance of the power of the president to act outside the law.¹⁰⁷

More recently, the Court was faced with the constitutionality of a measure adopted by the Knesset designed to block family unifications in Israel of Israeli Palestinians married to residents of the occupied territories.¹⁰⁸ The measure stripped the interior minister of discretion to grant a visa permit for residents of the territories who married Israeli citizens, except for those who actively aided the Israeli armed forces, those who are in dire medical need, or if the request is made

¹⁰¹ Ze'ev Segal, *End of the Line for Bus 300*, HAARETZ.COM (June 14, 2010, 2:04 AM), <http://www.haaretz.com/print-edition/opinion/end-of-the-line-for-bus-300-1.296002>.

¹⁰² Efrat Weiss, *Line 300 Affair: Yatom Admitted Killing and then Denied*, YNET (Dec. 27, 2001), <http://www.ynet.co.il/articles/1,7340,L-1470789,FF.html> (Heb.).

¹⁰³ HCJ 428/86 Barzilai v. Gov't of Israel 40(3) PD 505, slip op. at 8 [1986] (Isr.).

¹⁰⁴ *Id.* slip op. at 24–26 [1986]; see also Basic Law: The President of the State, 5724-1964, S.H. No. 428 p.118 (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic12_eng.htm.

¹⁰⁵ HCJ 428/86 Barzilai v. Gov't of Israel 40(3) PD 505, slip op. at 56 [1986] (Isr.).

¹⁰⁶ *Id.* slip op. at 24.

¹⁰⁷ *Id.* slip op. at 120 (Barak, J., dissenting).

¹⁰⁸ HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Israel v. Minister of Interior (2) Takdin-Elion 1754, slip op. at 14 [2006] (Isr.).

by a child under the age of fourteen.¹⁰⁹ In the latter case, only the child may join his or her parent in Israel— not the spouse.¹¹⁰

The measure was adopted in 2003, immediately following a wave of suicide attacks in Israel, under the theory that family unifications may provide terrorists with human infrastructure in Israel.¹¹¹ The GSS was unable to demonstrate clearly whether terrorists were in fact aided by family members originally from the West Bank or Gaza beyond a general claim, supported with no concrete evidence, that in some twenty-six cases such involvement existed.¹¹² Petitioners disputed this claim.¹¹³ The security establishment stated that only a complete ban on such unifications could reduce terrorism because there was no efficient way to keep track of all unifications, and if a ban was not instituted, casualties were imminent.¹¹⁴ The majority of the justices found that the statute disproportionately violated the right to human dignity.¹¹⁵ But, the swing vote, cast by Justice Edmond Levi, decided not to issue a remedy because the measure was temporary and it was clear, he stated, that the Knesset would not renew it.¹¹⁶ Because the Knesset has renewed it with only minor or cosmetic modifications, the matter is now before the Court again and has been awaiting a decision for several years.¹¹⁷

If the impression from the above cases is that the Court has totally succumbed to the overpowering force of security considerations, this is not the case. Since the 1990s, the Court, under Chief Justice Barak, was not shy in reviewing the most contentious issues, such as the demolition of houses where suicide bombers used to

¹⁰⁹ *Id.* slip op. at 15–16, 18–22.

¹¹⁰ *Id.* slip op. at 19–20.

¹¹¹ *Id.* slip op. at 16.

¹¹² *Id.*

¹¹³ *Id.* slip op. at 22–23.

¹¹⁴ *Id.* slip op. at 26.

¹¹⁵ *Id.* slip op. at 232.

¹¹⁶ *Id.* slip op. at 325–26 (Levi, J., concurring).

¹¹⁷ HCJ 466/07 Knesset Member Zahava Galon v. Legal Advisor to the Gov't (pending); HCJ 544/07 Ass'n for Civil Rights in Israel v. Minister of Interior (pending); HCJ 830/07 Ranin Tabila v. Minister of Interior (pending); HCJ 5030/07 Ctr. for the Def. of the Individual v. Minister of Interior (pending). It should be noted that because the application of the measure was immediate, some five thousand couples have been blocked since 2003 from proceeding with the intricate family unification procedures as they stood prior to the measure. These procedures included a vetting by the GSS.

reside,¹¹⁸ targeted killings,¹¹⁹ the use of human shields,¹²⁰ the construction of the separation barrier,¹²¹ and military detentions.¹²²

First, the Court found that the demolition of houses is authorized under British Mandatory law still applicable in the West Bank.¹²³ But, in utilizing such measures, the military commander must consider whether there are alternatives which would minimize harm to the uninvolved members of the family who also reside in the house, such as sealing the house, or parts thereof.¹²⁴

Second, for targeted killings, the Court completed an extensive analysis of public international law, including international humanitarian law.¹²⁵ The Court found that such killings may be authorized only if the target qualifies as a military target and if the killing, including the potential harm to neighboring civilian population, is proportional to the risk posed by the combatant.¹²⁶ The practical consequence of the decision was that the IDF had to design a process by which operations are approved not only by security experts, but also by legal experts for conformity with international and domestic law.

Third, considering the use of human shields, the Court found that soldiers may not ask protected persons, namely civilians in the territories, to knock on the doors of their neighbors when the IDF is looking for suspects in terror activities,

¹¹⁸ HCJ 9353/08 Abu-Dheim v. GOC Home Front Command, slip op. at 7 (Isr. Sup. Ct. Dec. 17, 2008); HCJ 2161/96 Sharif v. Home Front Commander 50(4) PD 485, 486 [1996] (Isr.) (Heb.); HCJ 6026/94 Nazal v. IDF Commander of Judea & Samaria Area 48(5) PD 338, 341 [1994] (Isr.) (Heb.).

¹¹⁹ HCJ 769/02 Pub. Comm. against Torture in Israel v. Gov't of Israel [2006](2) IsrLR 459, 464 (Barak, C.J.).

¹²⁰ HCJ 3799/02 Adalah Legal Ctr. for Arab Minority Rights in Israel v. GOC Cent. Command, IDF 60(3) PD 67, slip op. at 1–2 [2005].

¹²¹ HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Israel 58(5) PD 807, slip op. at 3 [2004].

¹²² See, e.g., CrimFH 7048/97 A. v. Minister of Def. 44(1) PD 721, 731 [2000] (Isr.) (Heb.) (discussing detention of “bargaining chips”). For scholarly work evaluating the reasoning of the Court in matters of detention, see Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. L. 721, 721–22 (2001).

¹²³ For scholarly work examining the reasoning of the Court on demolitions, see Ariel Zemach, *The Limits of International Criminal Law: House Demolitions in an Occupied Territory*, 20 CONN. J. INT'L L. 65, 67 (2005).

¹²⁴ *Id.* at 69, 106 n.229.

¹²⁵ HCJ 769/02 Pub. Comm. against Torture in Israel v. Gov't of Israel [2006](2) IsrLR 459, 465 (Barak, C.J.).

¹²⁶ *Id.* at 515–16. For scholarly work examining the reasoning of the Court on targeted killings, see Orna Ben-Naftali & Keren Michaeli, Public Committee against Torture in Israel v. Government of Israel, *Case No. HCJ 769/02*, 101 AM. J. INT'L L. 459, 461 (2007); Amichai Cohen & Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 J. INT'L CRIM. JUST. 310, 310 (2007); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 205 (2005).

open suspected bags, or perform other acts at the request of the soldiers.¹²⁷ The Court reasoned that such actions amount to the conscription of protected persons to a military operation and may endanger their lives.¹²⁸ The Court rejected the IDF's argument that civilians are free to refuse such a request, and it recognized that its decision may place Israeli soldiers at a greater risk by exposing them to hostile enemy fire.¹²⁹ But, the Court was firm in drawing a distinction between armed forces, which may face such risks, and civilians, which are protected under the laws of armed conflicts.¹³⁰

Lastly, the Court found that the barrier Israel built largely within occupied territory is permitted under public international law as a security measure, provided the harm caused to the Palestinian population is proportionate.¹³¹ Some sections of the barriers were found to be disproportionate and had to be dismantled by the IDF.¹³² In order to avoid a similar legal fate for other sections, the IDF, on its own initiative, redrew much of the barrier's path.¹³³

It has been shown that overall, the deference expressed by the Court towards the armed forces has declined in the 1990s, perhaps as a result of the prolongation of the conflict, or in tandem with the globalization of human rights (and the culture of justification, according to which rights' violations have to be justified as necessary for the protection of other rights and narrowly tailored to protect compelling public interests).¹³⁴ The Court was clear to indicate in its rulings that it did not exercise judicial review, a judicial institution outside Israel, less familiar

¹²⁷ HCJ 3799/02 Adalah Legal Ctr. for Arab Minority Rights in Israel v. Military Commander of the West Bank 60(3) PD 67, slip op. at 12 [2005].

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ For scholarly work examining the reasoning of the Court on human shields, see Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292, 311–316 (2009). See also Gabriella Blum, *The Laws of War and the "Lesser Evil,"* 35 YALE J. INT'L L. 1, 15–19 (2010).

¹³¹ HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Israel 58(5) PD 807, slip op. at 13 [2004].

¹³² For scholarly work examining the Court's reasoning on the separation barrier case, see Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law and Domestic Judicial Review*, 4 INT'L J. CONST. L. 540 (2006); Ariel L. Bendor, *Justiciability of the Israeli Fight Against Terrorism*, 39 GEO. WASH. INT'L L. REV. 149, 159–63 (2007); Aeyal M. Gross, *The Construction of a Wall Between the Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, 19 LEIDEN J. INT'L L. 393 (2006); 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).

¹³³ Tovah Lazaroff & Dan Izenberg, *IDF Moving 1,700 Meters of the Security Fence in Bil'in*, JERUSALEM POST, Feb. 11, 2010, at 4, available at <http://www.jpost.com/Israel/Article.aspx?id=168424>.

¹³⁴ Davidov & Reichman, *supra* note 52, at 948–49.

with the details of the case, would.¹³⁵ Nonetheless, some segments of Israeli society view the Court as overly sensitive to the rights of the Palestinians and there are forces within the security establishment that seek to forestall or otherwise dilute the rulings of the Court. To the extent that there are now orders of the Court that the state security agencies do not carry out speedily, it appears the Court is paying a price for its independence.¹³⁶

IV. THE MUNICIPAL COURT, THE INTERNATIONAL COMMUNITY AND THE NOTION OF INDEPENDENCE: PROXIMITY AND REMOTENESS

As the brief outline of the Israeli cases reveals, the Israeli Supreme Court has demonstrated its awareness, since the 1990s, of its transnational audience.¹³⁷ Does this awareness amount to a loss of independence? Have the Israeli judges succumbed to pressure, not from domestic forces, but generated by external forces, such as other courts equipped with the power to exercise universal jurisdiction¹³⁸ or prominent international jurists who may mobilize the opinion of the transnational legal community?¹³⁹ At first glance, it appears that only a truly conservative court, captured by old concepts of nationalism would be hostile to dialogue with comparative and international sources in the context of *jus in bellum* and *jus ad bellum*. After all, it would appear that relying on norms developed by courts neutral (and thus “objective”) to the dispute at hand is not only defensible, but also commendable. By definition, an armed conflict with characteristics and implications that transcend a mere domestic dispute engages the powers of the state under international law. Therefore, what the international legal community may have to say about the use of such powers must be relevant when municipal courts (i.e., local courts) exercise their jurisdiction. Even if municipal courts view their function as mere agents of the state, not the international community, it would be odd to ignore an accepted interpretation of an applicable international norm developed by courts in other jurisdictions or by an international tribunal.

Moreover, viewed from the perspective of the international community, efforts to change the venue of a legal proceeding pertaining to the conflict between

¹³⁵ HCJ 769/02 Pub. Comm. against Torture in Israel v. Gov’t of Israel [2006](2) IsrLR 459, 512 (Isr.) (Barak, C.J.).

¹³⁶ See, e.g., INTERIM REPORT ON THE SUBJECT OF UNAUTHORIZED OUTPOSTS 45–46, 262–264 (2005) (Heb.), available at <http://www.pmo.gov.il/NR/rdonlyres/0A0FBE3C-C741-46A6-8CB5-F6CDC042465D/0/sason2.pdf> (known as the “Sasson Report”).

¹³⁷ See, e.g., HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Israel 58(5) PD 807, slip op. at 20–22 [2004] (Isr.).

¹³⁸ See, e.g., Geneva Conventions Act, 1957, 5 & 6 Eliz. 2, c. 52 (Eng.) (British legislation discussing universal jurisdiction).

¹³⁹ For a discussion of the transnational legal community, see, for example Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 192–194 (2003); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1103–04 (2000); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 101, 136–37 (1994).

the national security of a state and the human rights of those under the state's belligerent occupation to an international forum, or at least to a neutral forum, should be supported.¹⁴⁰ If we care about providing an independent tribunal, removing the adjudication from the jurisdiction of a state embattled in such a conflict to another forum seems like a good idea. Are not judges that are removed from the vicissitudes of conflict—and thus independent from the pressures of the local security establishment—better situated to weigh dispassionately the evidence and assess in a neutral demeanor the necessity and the proportionality of the use of force?

Yet, closer examination reveals the limit of the concept of independence, understood as insulation from pressure. A key component of the rule of law is that institutions that develop and apply the law, including courts, are subject to the same laws they develop and apply. This is not merely a theoretical requirement, but an element that informs the exercise of actual judicial discretion. A judicial institution removed from a conflict, while more independent from local pressures, nonetheless lacks a crucial element necessary for its decisions to be considered legitimate. In other words, having no stakes in a decision is a guarantee for neutrality—and independence serves neutrality—but at the same time, it is precisely the stakes that judges have in the consequences of their decisions that provides a crucial element for their rulings to demand obedience.

The proximity between the judge and the consequences of her decision is of particular importance in human right cases. The protection of any human right entails a degree of risk.¹⁴¹ In protecting human rights pursuant to their constitutional mandate, justices, their family members, or their friends must be subject to the risks imposed by the judicial decision for the judicial decree to carry with it the demand for obedience by all state agencies. If judges situated in other jurisdictions are so removed from conflict that it is unlikely they will ever be subject to the real world risks of their decisions, the equal protection of the laws is no longer maintained—there is a law for the judges and another law for those subject to their decisions. Such a disconnection undercuts the foundation upon which the judicial authority rests. If a right is protected by a judiciary that will not be subjected to the increased risk resulting from the decision, a key ingredient of self-governance is missing. Conversely, if a right is *not* protected, it should be a municipal court that makes this determination and bears the responsibility for criticism by both the international community and local residents for the manner in which it is performing its role as guardian of the rule of law. This argument is

¹⁴⁰ Chief Justice Landau, in analyzing confiscation of private property for the purpose of building a settlement in Dawikat, was careful to stress that, in his opinion, the Geneva Convention, and its application to the West Bank and Gaza, should be adjudicated by an international forum, not the Israeli Supreme Court. HCJ 390/79 *Dawikat v. Gov't of Israel* 34(1) PD 1, slip op. at 31 [1980] (Isr.).

¹⁴¹ By protecting a right we make it more difficult for the state to pursue an important public interest, and thus incur a risk. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 96–97 (2002) (discussing “vertical balancing” between human rights and state interests such as public security).

particularly relevant in times of war, given the nature of the risk involved when national security clashes with human rights.

According to the principle of complementarity, a legal system with closer jurisdictional ties to a dispute takes precedence over other systems in resolving disputes.¹⁴² Complementarity is justified, not only because courts with closer jurisdictional ties are better equipped to gather evidence or to ascertain the operational meaning of the evidence. Closer ties also entail closer proximity to the risks of the decision, and therefore the court with the closer ties also has a stronger claim to assert sovereignty over the case. We cannot ignore the notion that the dependence of the judiciary, rather than its independence, has an impact on public acceptance of its authority to rule on the case, in part derived from the fact that judges do not operate independently from the real life implications of the case.

But, if this reasoning holds, it provides a strong reason for the Palestinians under belligerent Israeli occupation to be suspicious of the Israeli Supreme Court. It is unlikely that Israeli judges will live in the occupied territories, let alone experience life in the occupied territories from the Palestinian perspective in the foreseeable future. Therefore, they cannot claim that they will be subject to the full implications of their decision. After all, the Israeli court, as neutral and empathic as it attempts to be, will experience the implications of its decision only vis-à-vis the Israeli side.

So a deeper dilemma emerges with respect to the independence of judiciaries in times of war. On one hand, municipal courts are more legitimate because they are better connected to the case. On the other hand, they are less legitimate because, by definition, they are connected to one side of a conflict and thus may be biased.¹⁴³ Or, viewed differently, municipal courts could be seen as losing their independence if, by relying on international precedents as authoritative, they become mere pawns of removed supranational courts. At the same time, they may be perceived as not independent from local forces if they are not a part of a globalized judicial system.

¹⁴² See, e.g., United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Rome Statute of the International Criminal Court*, art. 1, U.N. Doc. A/Conf.183/9 (July 17, 1998), available at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf (establishing the International Criminal Court). The principle is also recognized in the First, Second, Third, and Fourth Geneva Conventions, which impose a duty on parties to the conventions to prosecute those who commit grievous violations of the conventions, unless the case is transferred to a party with closer ties to the offense. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3315, 75 U.N.T.S. 970; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 971; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 972; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 973.

¹⁴³ For more on the tendency of national courts to protect governmental interests, see Benvenisti, *supra* note 15, at 161.

The legal challenges to the separation barrier Israel constructed in the West Bank provides an example of this tension. Was the Israeli Supreme Court sufficiently independent from the pressures of local Israeli groups to address the legality of the construction under international law? If not, we would prefer the ruling of an international tribunal. We would have to ensure that the international tribunal was sufficiently insulated from pressures from any group and that the panel adjudicating the case was balanced and free from conflicts of interest or other biases. Such a preliminary requirement may prove difficult, especially given that judges on international tribunals are appointed according to criteria sensitive to nationality, a process which can lead to overrepresentation of some nations and underrepresentation of others.¹⁴⁴ Moreover, because of the politics of appointments, Israel, for example, stands little chance of having its jurists appointed to the International Court of Justice (ICJ), a hurdle jurists from the Arab League do not face.¹⁴⁵

But, even if we design a mechanism that ensures fair panels and that the culture on the international tribunal is professional,¹⁴⁶ we still face the above-mentioned difficulty of remoteness. While the Israeli Supreme Court is, by definition, more susceptible to express or implied pressure by the Israeli security establishment, it has better access to the evidence and is positioned to issue judgments whose implications will be borne by the judges themselves—at least as far as such implications pertain to the Israeli public. The ICJ, as an international tribunal, could theoretically claim a more independent and neutral stance, but at the same time, it would lack the benefits of closer jurisdictional links to the question at hand.

The unfolding of the adjudication on the separation barrier lends support to the thesis advanced here. The ICJ, acting on referral from the United Nations General Assembly, issued an advisory opinion finding that the barrier (the “wall” in the Court’s terminology) is illegal in its entirety because an occupying power may not erect such a structure in an occupied territory.¹⁴⁷ The ICJ also found that the occupying power may not invoke its right to self-defense with respect to attacks emanating from the occupied territory and refused to address the terror

¹⁴⁴ See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 3, 12, 26 (2005).

¹⁴⁵ Appointments to tribunals are often an exercise of bargaining among voting blocs. Because Israel is technically not part of Europe and its neighbors in the Middle East are not keen to promote Israeli interests, Israel has traditionally not fared well in placing prominent jurists on international tribunals. Even after a rapprochement with the European group, Israel still cannot count on having adequate representation on international tribunals.

¹⁴⁶ Here, professionalism is used to mean that jurists do not see their role as representing the position of their government, but rather seek the best interpretation of the law.

¹⁴⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 162 (July 9). Several scholars have criticized the court on the adoption of the terminology used by the General Assembly of the U.N. See, e.g., Daphne Barak-Erez, *supra* note 132, at 541.

offensive which led to the construction of the barrier.¹⁴⁸ In that respect, the ICJ ruling, as noted by the dissenting opinion,¹⁴⁹ was far from convincing. The lack of sensitivity to the harm caused by terror and the treatment of the barrier as an immovable object left leading scholars wondering whether the ICJ judgment meets professional standards.¹⁵⁰ For example, the notion that building a removable barrier in the territories is *ultra vires* for the occupying power is curious, because it would seem that the alternative—placing tanks in the occupied territories to seal off infiltration—is even more harmful to the protected residents. In the terminology of the argument put forward here, the ICJ was overly independent from the actual implications of its ruling based. Any nation facing the type of threats Israel faced would find the ICJ’s reasoning and interpretation of international norms difficult to accept in light of the casual disregard to the duty of the state to protect its security from threats emanating from occupied territories.

This is not to suggest that the international community, including the Israeli community, would have been better off if the matter was left solely at the hands of the Israeli Court. The ICJ was able to critically examine whether the initial route of the barrier was motivated by security concerns or by the desire to annex land to Israel.¹⁵¹ The ICJ found the latter explanation more convincing.¹⁵² Also, the ICJ was able to consider the legality of Jewish settlements as a project, instead of on a piecemeal basis.¹⁵³ These are two issues the Israeli Supreme Court has consistently

¹⁴⁸ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Occupied Palestinian Territory v. Isr., Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9). The ICJ reached this dubious conclusion, reasoning that because Palestine is not a state, Israel does not have a right of self-defense. *Id.* The Court also assessed the harm caused to the civilian population and their property by the construction of the separation barrier. *Id.* at ¶¶ 132–134. Then, the ICJ stated that it was “not convinced that the destructions . . . were rendered absolutely necessary by military operations,” without any serious discussion of the military necessity of the separation barrier. *Id.* at ¶ 135.

¹⁴⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 240, ¶ 7 (July 9) (separate declaration of Judge Buergenthal) (“Lacking is an examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that it ‘is not convinced’ but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.”).

¹⁵⁰ See, e.g., David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT’L L. 88, 100 (2005). Israel, fearing the politicization of the question, refused to participate in the case because it saw the deck was stacked against its position a priori. See Yuval Shany, *Capacities and Inadequacies: A Look at the Two Separation Barrier Cases*, 38 ISR. L. REV. 230, 234–36 (2005).

¹⁵¹ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 116, 121 (Jul. 9).

¹⁵² *Id.* ¶ 121.

¹⁵³ *Id.* ¶ 120.

avoided. In that respect, the ICJ revealed the advantages of independence offered by a removed, supranational court.¹⁵⁴

Unlike the broad-brush approach of the ICJ with regard to specifics of the situation on the ground, the Israeli Supreme Court took special care in examining in detail the proportionality of the various sections of the separation barrier.¹⁵⁵ In doing so, the Court was mindful of both its national and international audiences. Additionally, the Court was very careful in analyzing the rights of Palestinian residents and the security concerns of the state of Israel.¹⁵⁶ As a result the IDF has modified the route of large sections of the barrier—either as a result of the direct Court order¹⁵⁷ or because the IDF realized the barrier’s original alignment would be overturned in Court. As far as analyzing the proportionality of the infringements, the Court was able to generate an approach more coherent than the ICJ’s.¹⁵⁸ But, as mentioned, the Court was unable to examine the broader pieces of the legal puzzle, like the legality of Jewish settlements in the occupied territories. Similarly, the Court was willing, without much hesitation, to accept the position of the state regarding the motivation behind the specific line drawn for the barrier as purely based on security concerns.

It appears, then, that the ICJ performed a necessary check on the Israeli Supreme Court in matters that fell outside the institutional limits of the Court as a municipal organ. Moreover, the presence of the ICJ was important in informing the Israeli Court that it must provide reasons that courts, independent of parties, would find convincing. Ultimately, when it came to the actual analysis of the question at hand—the legality of the specific path of the barrier—the Israeli Court was better positioned to decide the matter. It was able to situate itself as if it was adjudicating the matter as an organ of the international community, not only as a court in a nation embattled in an armed conflict. Because its members stood to bear the security risk entailed by rerouting the barrier in order to minimize the violations to Palestinian rights, and because its members stood to bear the brunt of criticism by the international community had the judicial analysis been perceived as biased against the Palestinians, the Israeli Court was facing a balanced audience. Consequently, it appears its decision was able to garner the support of both the international and the domestic community (even if both the Israeli security establishment and the Palestinian official representatives have reservations about the final outcome).

¹⁵⁴ It should be noted that even the ICJ did not address the issue of the legality of the occupation as such. *See* Orna Ben-Naftali et al., *supra* note 63, at 551.

¹⁵⁵ HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Israel 58(5) PD 807, slip op. at 30 [2004] (Isr.) (Barak, C.J.).

¹⁵⁶ *Id.* slip op. at 28–29.

¹⁵⁷ *Id.* slip op. at 43–45.

¹⁵⁸ Geoffrey R. Watson, *The “Wall” Decisions in Legal and Political Context*, 99 AM. J. INT’L L. 6, 24–25 (2005); *see also* Daphne Barak-Erez, *supra* note 147, at 552; Kretzmer, *supra* note 150, at 99–100; Yuval Shany, *supra* note 150, at 233–38. For further scholarly examination of the ICJ’s advisory opinion, see the symposium published in 38 ISR. L. REV. 6 (2005).

V. CONCLUSION: “BOUNDED INDEPENDENCE”

The Israeli Court is perhaps one of the only courts in a jurisdiction endeavoring to be democratic that had to face the ongoing review of the actions of security forces during a prolonged armed conflict. It is rather unusual for a national court to hear petitions relating to acts of the military in occupied territories; then again, the situation in the West Bank and, until recently Gaza, is unique itself because the territories, and the Palestinian population therein, have been held under belligerent occupation for over forty years. The purpose of this short Article has not been to examine the performance of the Court—a question that has attracted considerable scholarly attention;¹⁵⁹ but rather, its point is to briefly illustrate the Court’s ability to establish its independence vis-à-vis the security establishment and at the same time to demonstrate the limits to such independence.

We are still left with the theoretical questions: According to what standards should we measure the effectiveness of a national judiciary in times of armed conflict? Is the Israeli Supreme Court an example of an independent court taking into consideration the importance of the national security interest as it balances rights and interests? Or, are we faced with a Court taking into account its institutional limits and the limits of adjudication in times of strife, and thus, the independence of the Court itself is affected by the ebbs and flows of the crisis? Because it is unlikely to find a “smoking gun”—an admission by the judges that the Court is under severe pressure or disclosure by the security establishment or even the political branches that such pressure has been directly applied¹⁶⁰—we are left with circumstantial evidence.

This Article suggests that when the Court departs from previous doctrine or applies the governing doctrine in a manner that leaves the professional community puzzled, there is a prima facie indication that external considerations influenced the Court’s decision. For example, stating that there is no legal problem with being

¹⁵⁹ See, e.g., KRETZMER, *supra* note 42, at 1–3; Yoav Dotan, *Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice During the Intifada*, 33 LAW & SOC’Y REV. 319, 319–22 (1999); Yigal Mersel, *Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era*, 38 N.Y.U. J. INT’L L. & POL. 67, 68 (2005–2006); Shamir, *supra* note 51, at 781–784.

¹⁶⁰ The former Justice Minister, Daniel Friedmann, has suggested that the Court should be stripped of its jurisdiction to hear cases pertaining to national security and the Ministry has drafted a bill to amend the “Basic Law: The Judiciary” to that effect. See Dan Izenberg, *Friedmann Preparing Bill to Restrict High Court’s Powers*, JERUSALEM POST, Aug. 23, 2007, at 4, available at <http://www.jpost.com/Israel/Article.aspx?id=73108>. Because the jurisdiction of the Court can be amended by a simple majority, it could be argued that such a bill is hanging over the head of the Court in a manner that comes close to threatening its independence.

required to wait to exercise one's right to a hearing until *after* one is deported to Lebanon is difficult to reconcile with the Court's rationale for this right.¹⁶¹

Furthermore, the Israeli example suggests that two factors may be worth considering in assessing the Court's response to pressure generated by an emergency situation. The first is the duration of the conflict and its acuteness. The second is the structure of the communication between the municipal court and the international and transnational legal community.

Regarding the first factor, to the extent that the Court is faced with a prolonged armed conflict that entails control over civilian population lacking recourse to meaningful alternative judicial venues, the Court faces not only pressure to accommodate the military, but also a countervailing pressure to provide the civilian population under occupation access to legal process. Under such circumstances it has become increasingly difficult for the Court to maintain threshold barriers (such as justiciability or a deferential attitude towards the discretion of the security establishment), when such doctrinal hurdles were already relaxed in other areas of the law applicable in Israel.¹⁶² The longer the armed conflict lasts, the more routine it becomes and the more difficult it is for the Court to treat it with a set of legal tools designed to distance the Court from contentious cases.¹⁶³ As the discussion in this Article reveals, the Israeli Court has, slowly but surely, established itself over the occupied territories as a court with powers and doctrines similar to those it holds with respect to Israel's sovereign territory, and thus was able to accord some protection to the rights of the Palestinians living under a regime of belligerent occupation. This dynamic, in turn, carried with it an institutional price the Court had to pay. In Israel, the institutional capital of the Court, measured by its diffuse public confidence,¹⁶⁴ has suffered in part because of the heightened friction with the security establishment.¹⁶⁵

¹⁶¹ See *supra* notes 98–107 and accompanying text.

¹⁶² See Davidov & Reichman, *supra* note 52, at 926.

¹⁶³ Distancing the Court from addressing some petitions on their merits is meant to protect the Court from a possible loss of institutional capital which may ensue if the Court were nonetheless pushed to apply the governing doctrine to highly contentious cases involving the clash between human rights and national security. Such loss of institutional capital is likely because in some such cases the Court is caught between a rock and a hard place: if it takes the governing doctrine to its logical conclusion it may generate a backlash from the security establishment (and ultimately other systems, such as the media), but if it “bends” the doctrine to “take into account” the possible outcomes of its decision, the Court may lose the respect of the professional legal community. This Gordian knot, associated with contentious cases in emergency times, may ultimately lead to loss of judicial independence.

¹⁶⁴ See generally WALTER F. MURPHY ET AL., PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS: ALTERNATIVE EXPLANATIONS 9–10 (1973) (discussing the concept of diffuse public confidence versus agreement with a particular judicial decision). See also Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992).

¹⁶⁵ Arie Rattner, *Legal Culture: Law and the Legal System in the Eyes of the Israeli Public* 66, 68, 71 (The Shasha Ctr. for Strategic Res., Hebrew Univ., 2009) (Heb.).

Regarding the second factor—the structure of the communication between the municipal court and other courts and tribunals—this Article suggests that a tension exists between two notions of judicial independence. According to one, an international tribunal or a municipal court in a jurisdiction with no ties to the armed conflict may be more independent from local pressures (as well as more neutral, provided the appointment mechanism to such tribunal ensures against biases or conflict of interests). But, such independence is perhaps not the right kind of independence, because it threatens the legitimacy of the decision in the eyes of those subject to the actual implications of the judicial decision. According to the second notion of independence, municipal courts should insist on being independent not only from local pressures, but also from pressures emanating from the international community, including the international legal community. But, this notion is also not free of difficulties because municipal courts are expected to apply international norms governing an armed conflict because these norms provide the source of authority for the occupying power. Consequently, it would be odd if a municipal court ignored the body of law developed by other courts.

It is because of this tension between two opposing views regarding the concept of judicial independence that the Israeli example is interesting. When the issue is the application of international norms amidst an armed conflict, there is no easy solution to this tension. The Court has realized—at least since the 1990s—that the transnational community is a necessary check on its discretion when adjudicating cases pertaining to the military commander's use of his occupying power under international law. By providing reasons addressed at the international community of jurists, the Court can be seen as seeking to alleviate some of the concerns that might otherwise be associated with its judgments (e.g. judgments reflecting the perspective of only one side of the conflict). Courts fully removed from the case may notice whether the decision of the Israeli Court is overly tilted to the Israeli side, and thus serve as a useful audience.

At the same time, the Court harnessed the presence of the international audience in order to address its domestic audience. It has insisted that in a globalized world, ignoring the international community may lead to greater interventions and loss of independence.¹⁶⁶ In so doing, the dependence of the Court on the presence of the international community—but not on its actual intervention—serves as a buffer between the Court and the pressure generated by the security establishment. But, dependence on the international community does not sacrifice the position of the Court as an independent municipal court worthy of the confidence of the citizens of the forum state. Perhaps, following the debate regarding international tribunals, this position can be termed as “bounded

¹⁶⁶ As Chief Justice Barak insinuated in H CJ 769/02 *Public Committee against Torture in Israel v. Government of Israel* 2006(2) IsrLR 459, 511, if the Israeli Court would not rule on the matter, the court in the Hague will. For a discussion of this proposition, see Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 248 (2008).

nondependence” or “restricted independence.”¹⁶⁷ Time will tell to what extent the Israeli Supreme Court will be able to continue walking on this tightrope and whether the emergence of hierarchical international courts, such as the ICJ, will disrupt this balance.

¹⁶⁷ Treating national courts as possessing “bounded” or “restricted” independence when exercising review over state actions under international law during armed conflicts may be seen as the mirror image of the recent academic debate regarding the dependence or nondependence of *international* tribunals. While some view effective international tribunals as less independent, *see, e.g.*, Posner & Yoo, *supra* note 144, at 72, others view the independence of such tribunals as “restricted” but nonetheless effective, *see, e.g.*, Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 3, 3–4 (2005). This Article suggests that, in applying international law in times of armed conflict, national courts similarly enjoy restricted or bounded independence.