

## Israel's Democracy and Security

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In Leonard Weinberg and Elizabeth Francis (Editors), *Routledge Handbook of Democracy and Security* (London and New York: Routledge, 2020): chap. 11.

### Introduction

Israel is a small country. Its size is roughly 21,200 square kilometers, more or less the size of the State of Massachusetts (21,456 sq km) which is ranked 45th among the 50 states of the United States.<sup>2</sup> The above-mentioned size does not include the West Bank (5,607 sq km),<sup>3</sup> which is not officially part of Israel. Israeli law does not apply in the West Bank, where the majority of the population consists of Palestinians, about 2.5 million, and 360,000 Jewish settlers (Dror 2011, p. 102; BBC News 12 March 2012).<sup>4</sup> On the eve of Rosh Hashana (Jewish New Year of 2014), its population was 8,904,373 people; of them about 75 percent were Jews (Gravé-Lazi 2014).

Israel's national security environment is volatile, extreme in the breadth and frequency of change in its level of uncertainty (Freilich 2012, p. 13). Israel has four Arab neighbour states: Egypt, Syria, Lebanon and Jordan. With two of its neighbours, Egypt and Jordan, Israel signed

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<sup>1</sup> We thank Chuck Freilich for his constructive comments.

<sup>2</sup> Massachusetts - Location, size, and extent, <http://www.city-data.com/states/Massachusetts-Location-size-and-extent.html>

<sup>3</sup> 5,900 sq km with East Jerusalem. See American Heritage Dictionary: *West Bank*, <http://www.answers.com/topic/west-bank>

<sup>4</sup> In East Jerusalem there are roughly 150,000 Jews.

peace treaties. Permanent hostility defines Israel's relationships with Syria, Lebanon, Hamas in Gaza and the Palestinian Authority in the West Bank. In recent years, we witnessed new non-state actors in Syria that might interfere with the integrity of the State of Israel and pose threats. Israel is different from its neighbours in many crucial respects: religion, culture, language, and regime. For many years, its neighbours refused to accept it, perceiving Israel as a bone in their throats. Many Palestinians and Arabs in the neighbouring states still perceive Israel as a foreign element that needs to be removed. As the Arab states are collectively many times stronger and larger than Israel in means, size and in population, every threat is taken most seriously. Israel's history is thus the history of survival.

Since its establishment, Israel has had to fight. From 1948 until 2010, some 23,000 Israelis were killed in wars and terror attacks (Dror 2011, p. 16). This loss is felt in every home in Israel. Israel's objectives were to continue its existence, to provide a home for the Jewish people, and to uphold the political prerogatives of nationality. Facing an unequal balance of power, unfavourable geo-strategic conditions, and constant threats of physical annihilation, Israel was forced to develop a strong army that could withstand the siege. Since until the 1970s, none of its neighbours was willing even to recognize Israel's existence, not to mention some form of reconciliation, violence had to be expected. Israeli security policy was dictated by an Arab strategy that aimed to undermine Israel's existence (Gissin 1982). Thus, until the 1970s wars were perceived as an inevitable eruption and expansion of the constant violence. The periods between wars were perceived as latent wars. Given its lack of economic resources, its limited geo-strategic depth, and the psychological effects of a nation recovering from the trauma of the Holocaust, Israel developed a defensive strategy that relied first and foremost on its strong army (Dror 2011).

The reasoning was: the world did not rush to save European Jewry. There was no reason to think that anything significant had changed. The outside world still will not feel compelled to come to Israel's rescue in case of need. Thus, the development of a strong military power was the most important priority.

All Zionist political parties, from the far left to the far right, recognize security needs and the necessity to maintain a strong army in order to sustain Israel's sovereignty. Security is a basic necessity, sine qua non to the promotion of other ends, including peace. The country unites in the face of security challenges.

### **Israel's security policy**

The Israeli security policy began to formulate in the early 1950s by its first leader, David Ben-Gurion. The three pillars of the defence doctrine were deterrence of possible threats; detection of impending attacks, and decisive military defeat of the enemy when the deterrence had failed (Freilich 2015). Up until the 1990s, the major perceived threat was an Arab military invasion into Israel and a war between states. In the early 1990s, Israel started to formulate a new security concept according to which the main threat might not emanate from states but from sub-state organizations such as Hamas and the Hezbollah (Ben-Israel 2013). Israel is surrounded by non-state actors: Hamas, Hezbollah, rebel organizations in Syria, jihadist elements in the Golan Heights, Sinai and in Gaza, and the Palestinian Authority. Since the mid-2000s, a lot of attention is given to the Iranian nuclear threat and to rocket and missile attacks from Gaza, Lebanon and potentially other hostile areas. The security policy has the following characteristics:

- a. It is aimed to secure ability to overcome single-handedly challenges posed by neighbouring states.
- b. There is an inherent asymmetry between Israel and the Muslim and Arab countries around it. Thus a significant part of Israel's annual budget is dedicated to security issues.
- c. At the same time, Israel always sought the support of influential international players and aspired to develop security relationships with many countries across the globe (Dror 2011; Kalb 2013). Since the 1973 Yom Kippur War, Israel has developed special relationships with the United States.
- d. There is no clear borderline between times of war and times of relative peace (Horowitz 1984, p. 107).
- e. Peace is a desired end, a value in itself. But important as undoubtedly peace is, security is the prime consideration; nothing should undermine Israel's security.
- f. A zero sum game exists between Israel and its enemies, where gains for the one necessarily mean loss for the other.
- g. Thus, violations of the status-quo by Israel's enemies are unacceptable. Such violations are met by active steps to restore the status quo ante.
- h. Nearly 80% of Israel's population reside along the Mediterranean Sea and much of its essential infrastructure facilities are built along the coastal line. Thus protecting the shores from attack is crucial. Furthermore, the discovery of large gas resources in the sea has a huge potential for the economy, and 97% of Israel's export and import is conducted via the sea. Freedom of navigation is crucial. For

many years, the sea was the only gateway which did not pass through hostile territory. The sea needs to remain open in accordance with international laws (Alon 1959, p. 347; Minz and Shai 2014).

- i. Threats and intimidation are necessary for deterrence. Threats, of course, need to correspond to the stakes at any given point. They need to be credible and sufficient to overcome the challenge posed by the aggressor (Craig and George 1983; Shalev 2006).
- j. Deterrence is more an act of hostility rather than an act motivated by fear. Such a behavioural model is based on the stick rather than the carrot. Schelling explained (1963, p. 9): “Deterrence is concerned with the exploitation of potential force. It is concerned with persuading a potential enemy that he should in his own interest avoid certain courses of activity”.
- k. Thus Israel wishes to be perceived as a resolute and determined actor, willing to protect its interests, building an image of insistence and will to apply sanctions, including force when it deems necessary (Yaniv 1985). As Claude explained (1967, p. 57): “Deterrence is a psychological phenomenon, deriving from the belief that the power situation does not favor aggressive action”.<sup>5</sup>
- l. When measures of deterrence failed, military force on varying scales was used to secure the integrity of the State and its sovereignty.
- m. Israeli leaders are well aware of its geo-strategic vulnerability and its inferiority compared to the Arab world, parts of which wish to destroy it. Israeli leaders know

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<sup>5</sup> See also Maniv (1987, p. 185).

that Israel cannot match Arab quantitative abilities. There is no comparison between Israel's size and population and the Arab countries' size and population. Israel lacks strategic depth, is surrounded by Arab countries, and it lacks natural resources which are in abundance in Arab lands (Alon 1959, pp. 55-60; Sharon 15 December 1981).<sup>6</sup>

- n. Israel has thus developed and produced both defensive and attacking capabilities (Alon 1959, p. 342) and sophisticated weaponry in order to maintain "a permanent qualitative advantage over Arab confrontation states". Israel aspires to have clear qualitative and technological superiority (Sharon 15 December 1981; Cordesman 2010). In recent years, Israel has developed enhanced cyber capabilities to protect its infrastructure: water, energy, communication, transportation, economy, technology and security. Israel's cyber defence includes attacks on the opponents' cyber systems in order to undermine their offensive capabilities (Minz and Shai 2014).
- o. Israel would try to disrupt potential war coalitions by damaging the core of its offensive capability (Sharon 15 December 1981). It would launch military attacks against targets that might undermine its security.
- p. Israel's existential imperative leads to ruthless conduct if it is attacked or threatened (Dror 2011, p. 25).

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<sup>6</sup> In his comments, Freilich commented that this is a false comparison. Israeli military capabilities should not be compared to the combined power of the entire Arab world. We need to compare the Israeli might to specific Arab countries. Vis-à-vis each and every such country, Israel has qualitative and quantitative superiority.

- q. Israel wishes to have regional monopoly on the possession of nuclear capabilities. It attacked Iraq under Saddam Hussein in 1981, and Syria under Bashar Assad in 2007 and in 2013 to maintain this monopoly. It threatens to attack Iran if the Ayatollah's regime continues to develop its nuclear program.
- r. The "Worst Case Scenario" is always in the minds of the decision-makers as they always believe that the State is under siege. Consequently, the aim is to secure the widest possible security margins.
- s. The perception is one of a "Power Politics" orientation, rejecting juridical and moral codes of behaviour when those seem contradictory to the above characteristics (Horowitz 1984, p. 107).

The radical Arab stand against Israel of neither peace nor reconciliation or even mere recognition of its right to exist brought about a high level of sensitivity to each declaration and action against Israel. Understanding the "crazy" and irrational characteristics of the Arab nations was crucial for Israeli strategy (Dror 1973), leading its leaders to think that the only language the Arabs understand was force. The virulent, unabashed hostility towards Israel undermined common features of deterrence policy that customarily assume that rivals act rationally: they calculate risks and benefits; they avoid taking high risks and are repelled by strong sanctions. Israeli leaders thought in the past and still think today that Arab and Muslim leaders are willing to take very high risks to destroy Israel. The assumption is that Muslim extremists have different norms of rationality than the ones that guide western leaders. The combination of insecurity and lack of trust in the other's ability to act rationally lead to the frequent collapse of deterrence in the Middle East, and bring about sporadic eruptions of violence.

While Israeli leaders believe that Israel should remain capable of withstanding any challenge against its sovereignty and basic rights, they always sought powerful allies that might come to its help. During the 1950s, France was the sought-after major power. Indeed, the close relationship between Israel and France led to the 1956 Sinai War. Until the June 1967 War, France was the main supplier of Israel's weapons but on 3 June, two days before the beginning of the Six Day War, President Charles de Gaulle decreed an arms embargo on Israel and the supportive relationship came to an end. From then on Israel allied itself first and foremost with the United States. The bond and strategic alliance between the two sides has deepened since then, and although the relationship has had ups and downs, the bond is still said to be unshakeable. On 22 May 2011, President Obama remarked that "the bonds between the United States and Israel are unbreakable, and the commitment of the United States to the security of Israel is ironclad" (Obama 22 May 2011).

In crisis times, Israel had usually taken three steps which constituted the basis of its deterrence policy (Bar-Joseph 2001; Yaniv 1985, p. 43): verbal threats by its leaders; mobilization of reserve soldiers; and negotiations with allies in order to receive their support and approval (public or discreet) to use force against the enemy. As mentioned above, Israeli leaders understand that they are not able to compete equally with the Arabs on resources as the Arabs enjoy capabilities that Israel does not have, primarily land, population, and oil. Thus Israel relies on developed military skills, enhanced technology and superior weapons, supplied by the Americans, to withstand aggression.



The centrality of Israel's attitude toward defence leads to the formation of many ties and links between the military and the civilian sectors (Lasswell 1941). The tendency of the military elite to gather and keep power makes the army an important player in the economy and politics of Israel (Levy 2012). Retired generals enjoy high esteem and are well positioned to start a second successful career in business or politics. Indeed, some generals try both (Peri 1985). At the same time, up until now the army has always supported Israel's democratic institutions and has always subordinated itself to the elected governments. As Horowitz (1977, p. 75) explained, although Israel is a "Fortress Nation", it is much closer to the Athenian model of governance than to the Spartan model as the prominence of security issues does not lead to limitations on society's openness and does not threaten to resolve civil conflicts via military force.

## **Occupation**

The occupation is a black mark in Israeli and Jewish history (Bregman 2014). The occupation undermines Israeli democracy and its security. It put soldiers in tenuous position vis-à-vis the Palestinians and the Jewish settlers, and it is an obstacle for constructing trust between Israel and the Palestinians. Trust is essential for reaching peace which should be seen as a significant factor in bolstering Israel's security. Indeed, one may argue that peace is the key for Israel's security. The occupation is immoral and increasingly leads to Israel's isolation among the community of nations. In 2012, Human Rights Watch (HRW) released a report that exposes the ways in which Israel controls immigration and nationality in the occupied Palestinian territory (OPT) through the population registry, which it established in September 1967. The first census conducted upon its

establishment resulted in the exclusion of at least 270,000 people. In another wave, Israel excluded a further 130,000 West Bank Palestinians who stayed abroad for long periods of time, between 1967 and 1994. In 2000, Israel effectively 'froze' the registry's functions altogether and prevented the Palestinian authorities from issuing identity and travel documents or updating information for residents of the OPT.

The report details Israel's policies and practices since the beginning of its occupation of Palestinian territory with respect to the control of population and movement in and outside of the occupied territory – including removal of individuals from the population registry, denial of child registration and denial of residency in the West Bank for Palestinians from the Gaza Strip. The implementation of these policies has resulted in the depopulation of large groups of Palestinians.

The report holds that Israel's policies violate the rights to freedom of movement, including the right to choose one's place of residence, and the right to family life (or family unity as stated in the report). It further states that these policies violate the rights to a nationality and the prohibition of collective punishment, due to their sweeping character and indiscriminate effects. In its final section, the report briefly discusses Israel's authority under the law of occupation, recalling the limits placed by the international law of belligerent occupation on an Occupying Power's ability to administer and implement changes in the daily life of the occupied territory. The law strictly prohibits an occupier from undertaking adjustments in the life of the occupied territory that would outlive the occupation. Premised on a conservational purpose, the law of belligerent occupation is there to ensure that an occupier does not transcend its administrator-

type mandate and does not use the slogan of ‘the benefit of the local population’ as a pretext for a hidden agenda. Controlling the population in the occupied territory by regulating immigration and nationality, and granting or revoking citizenship and permanent residency, not only resembles the powers of sovereign governments, but most pressingly has the effect of changing the demographic composition in the territory, which is also perpetuated through the continuous expansion of Jewish settlements in the Palestinian territory.

Sarah Leah Whitson, Middle East director at Human Rights Watch (6 February 2012), stated that “Israel had not put forth any concrete security rationale for blanket policies.” It can be added that however serious the security rationale may be, there is no rationale that would allow Israel to legally implement blanket policies of the kind it does by controlling the registry and effectively rendering it defunct. In all cases, such measures cannot include expulsions from the occupied territory, which are absolutely prohibited. At most, it could use security measures when a real necessity for this can be shown on the basis of the specific merits of the case, particularly in order to prevent measures taken under the guise of security, which actually result in the suppression and punishment of the local population.<sup>7</sup>

It is impossible to maintain the occupation without adversely impacting democracy. The occupation dehumanizes the Palestinians and desensitizes the Israelis of the harms inflicted on

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<sup>7</sup> In his comments, Chuck Freilich wrote (10 October 2014) that there are “real security concerns – ‘eastern threat’, terrorism”, irredentist Palestinian state, threat to Jordan, the fact that the Palestinians “have rejected every offer – and Israel made dramatic ones” in 2000 (Camp David and Clinton Parameter), Olmert in 2008, and Netanyahu in 2014. We have offered almost 100% of territory, division of Jerusalem, Palestinian state “and they have refused repeatedly. Only area where we didn’t make dramatic proposals was on refugees and that won’t happen. So not all Israel’s fault, occupation, actually most of the fault is the pal’s, as much as I wish to see the ‘occupation’ end.”

the occupied. The occupiers are mostly young Israeli soldiers who implement the policies of the occupation. It is impossible to maintain a duality of Dr Jekyll and Mr Hyde, being an occupier who denies basic human rights to others and, in turn, a democratic citizen who understands and promotes human rights. There is a zero sum game between the occupation and democracy. One comes at the expense of the other. Because the occupation has been continued to be part of Israeli life for almost fifty years, Israelis have grown used to it. They accept it, legitimize it, and at the same time deny it. Many Israelis do not speak about the occupation, do not acknowledge it, and rebuff its existence. The Supreme Court considers petitions protesting against the harms of the occupation, and sometimes decides that security considerations do not trump basic human rights, but the occupation should not exist in the first place. The Supreme Court cannot fix something that is inherently wrong.

The Israeli Democracy Index 2013 shows that the greatest share of respondents identified the tension between Jews and Arabs as the most serious area of friction in Israeli society (Hermann et al 2013, pp. 13, 150). The tensions relate both to the Palestinians in the West Bank and Gaza as well as to the Palestinians inside the Green (1967) Line. The Jewish public is divided as to whether Jewish citizens should be given more rights than non-Jewish citizens. The fact that roughly half of the respondents consider the latter to be an acceptable policy is extremely problematic since the essence of democracy is the principle of equal rights for all citizens (Hermann et al 2013, p. 14). A large proportion of the Jewish sample believes that Arabs should not take part in a referendum to approve a peace treaty with the Palestinians, if and when such

a referendum is held (Hermann et al 2013, p. 14).<sup>8</sup> 27.5% of the Jews in the sample “Agree totally” and further 16.3% “Agree somewhat” with the statement “The government should encourage Arabs to emigrate from Israel” (Hermann 2013, p. 148). The survey also reveals that a majority of the Jewish public considers the Jews to be the “chosen people” (50.1% believe this “Very strongly” and a further 14.2% believe this “Quite strongly”, Hermann 2013, p. 152) and that there is a direct correlation between this view and support for excluding Arabs from a possible peace referendum. This sense of “chosenness” entails the exclusion of others. Unsurprisingly, only a minority of the Israeli-Arabs, less than one third of the sample, feel part of Israel (Hermann et al 2013, p. 78).

Human rights organizations that stand to protect the rights of Palestinians are under increased pressure and are often portrayed as enemies of Israel (Hermann et al 2013, p. 105).<sup>9</sup> Their activities are closely monitored. After the last round of violence during the summer of 2014, Israeli parliamentarians have warned civil-rights groups that they could be branded as delegitimisers if they insist on promoting rights for Israel’s Arab minority and oppose the definition of Israel as the nation-state of the Jews (The Economist 2014)

## The Fence

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<sup>8</sup> 47% “Agree totally” that “Decisions crucial to the state on issues of peace and security should be made by a Jewish majority”. Further 19.7% “Agree somewhat”. Hermann 2013, p. 148.

<sup>9</sup> 31.8% of the sample “Agree totally” that “Human rights and civil rights organizations, such as the Association for Civil Rights in Israel and B’Tselem, cause damage to the state”. 18.4% “Agree somewhat”. 37.1% of the sample “Agree totally” that “Speakers should be prohibited from harshly criticizing the State of Israel in public”. 15.3% “Agree somewhat”. Hermann 2013, p. 142.

On 27 March 2002, on the eve of Pesach, when Jews all around the world celebrate the Seder, a Palestinian Hamas suicide bomber murdered thirty people and injured 140 others, 20 of them seriously in a brutal attack at Hotel Park in Netanya. This attack shook the nation. The Israeli leadership decided to stop working with the Palestinians on security matters. Israel began construction of a barrier that would separate most of the West Bank from areas inside Israel. The fence (as Israel terms it; others call it wall) was deemed necessary to block terrorists from entering Israel. Israel argued that the fence is consistent with the right of the State to self-defence, as enshrined in Article 51 of the UN Charter (UN General Assembly 2003).<sup>10</sup> Indeed, the fence/wall has proved a security success story. The facts are conclusive: before the fence/wall was erected, the average number of terrorist attacks was 26 per year. Since its partial construction, the number dropped to three-to-zero per year as Israel was able to foil every suicide bombing originating from the northern West Bank and specifically from the cities of Nablus and Jenin, areas that had previously been infamous for exporting suicide bombers. However, 85% of the entire fence/wall passes inside Palestinian territory. If the fence is completed as planned, some 25,000 Palestinians are expected to live between the barrier and the Green Line (United Nations 2011).

Because of the route of the barrier, which passes through Palestinian living space, 47 gates have been established that are supposed to enable daily movement of farmers to their lands,

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<sup>10</sup> Article 51 of the UN Charter holds: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

students and teachers to their schools, businessmen and merchants to their places of work, and more. As a practical matter, freedom of movement for Palestinians is drastically restricted and their lives are now run against their will on both sides of the barrier.

On 9 July 2004, the International Court of Justice (ICJ) (2004) dismissed the applicability of the law of self-defence which Israel claimed in constructing the fence. In its Advisory Opinion, the Court ruled that the destruction of enemy property is permitted only if it is absolutely necessary by military operations, which was not the case here. The Court argued that the West Bank separation barrier contravenes international law, that it must be dismantled, and that compensation must be paid to the Palestinian owners of property confiscated for its construction. Fourteen justices supported the decision and the sole opponent was the American judge, Thomas Buergenthal.

In building the Wall, the court opined, Israel violated international humanitarian law by infringing on Palestinians' freedom of movement, freedom to seek employment, education and health. It also found Israel in violation of international treaties it had signed, noting, "The construction of such a wall accordingly constitutes breaches by Israel of its various obligations under the applicable international humanitarian law and human rights instruments" (International Court of Justice 2004).

The judges rightly questioned the route of the wall determined by Israel, saying they were "not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives" (International Court of Justice 2004).

The ruling says: "The wall, along the route chosen, and its associated regime, gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order" (International Court of Justice 2004).

On the issue of compensating Palestinians harmed by construction of the wall, the court rules that, "Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem" (International Court of Justice 2004; see also Okimoto 2011).

The Hague decision is not binding. As expected, Israel immediately reacted by saying that it would not honour the ICJ advisory opinion.

The separation barrier should have been built along the 1967 Green Line, with some accommodations necessary to include large settlement in the Jerusalem area and Ariel inside the fence/wall, and compensating the Palestinians in other areas. The idea of using the barrier to create geographic facts that in effect make Israel greater and Palestine smaller was unfair, discriminatory, unwise and unjust. The fence/wall should be moved, and international pressure is expected to be exerted to ensure that it will be moved.

### **Israeli Security: Through the Lens of the Supreme Court**

Israeli security concerns significantly changed in the aftermath of the 1967 Six Day War; in addition to threats from neighbouring countries, decision-makers increasingly had to develop



counterterrorism measures relevant to Palestinian terrorism in the West Bank and also in the Gaza Strip up until Israel evacuated the settlers and withdrew its army in 2005 (Sharon's Disengagement Plan, known also as Gaza First). This section focuses on Palestinian terrorism, Israeli counterterrorism and the balancing of national security and individual rights.

The Israel Supreme Court, sitting as the High Court of Justice (HCJ) is the primary Israeli institution that balances national security and individual rights. The HCJ hears cases initiated by petitions claiming government action injures individuals and their interests. The Court may issue temporary restraining orders thereby halting, at least temporarily, the planned government action; in addition, given the acuity of some measures, the Court may convene a hearing immediately upon submission of the petition. With respect to Palestinian's living in the West Bank the HJC hears petitions filed by Palestinian's or by human rights organizations on behalf of aggrieved Palestinian's.

To date, Israel has not annexed the West Bank (conquered in the 1967 Six Day War). The areas under Israeli control are subject to military rule. The legislation is drafted by the officers of the Judge Advocate General Corps and signed into being by the Commander of the Central Command or by the Commander of the Southern Command, both are Major Generals. Their decisions may be scrutinized by the Supreme Court which applies Israeli and international law in its decisions. The Court seeks to ensure that the decision-making reflects respect for international law and conduct in accordance with international treaties to which Israel is signatory. Israel's decades-long controversial "State of Emergency" -- subject to extension by vote of the Knesset (Parliament) -- reflects the primacy of security concerns for decision-makers.

Under President (akin to Chief Justice) Aharon Barak, the Supreme Court significantly minimized the standing requirement and greatly expanded justiciability. In April 2002, during Operation “Ebb and Flow” when the Israel Defense Forces (IDF) was involved in intensive fighting in the West Bank, over 40 petitions were filed against the IDF in the HCJ regarding military action in the West Bank city of Jenin.

Issues raised in petitions include potential demolition of a suspected terrorist’s home; alleged firing by IDF soldiers on ambulances transporting wounded and sick Palestinian’s; the need to enable the local population to have a normal water supply and burial of terrorists. The Court’s decisions are rooted in both Israeli law and international humanitarian law. Generally, the Court notes military matters are not within its area of expertise, whereas issues of humanitarian law are, and the Court will intervene if it determines the IDF has violated domestic or international law.

The principle of judicial activism in Israel is examined by analysing five petitions that highlight balancing of national security and individual rights.

## I. Detainees

Marab v. IDF Commander in the West Bank

According to Military Order 378, as amended in 1997, a Palestinian may be held for eight days before seeing a judge.<sup>11</sup> Upon initiation of Operation “Ebb and Flow” (April 2002) IDF, the detention period before the initial judicial review was extended to 18 days. Iad Ashak Mahmud Marab, a Palestinian detainee, filed a petition before the HCJ against this Order (Marab v. IDF Commander in the West Bank 2002). Marab’s counsel argued the Order results in collective detention without judicial review and prolonged mass detention rather than individual review. Counsel argued the Order was neither preventive nor administrative and violated the principles of proportionality and due process (Ibid, ¶¶8-10).

The State argued standard detention law was unsuitable for combat situations; screening of detainees is a time-consuming process; keeping detainees from meeting with counsel prevents passing of messages that endanger soldiers; detentions were individualized rather than collective; unique circumstances of armed conflict dictated unusual measures and detention standards were proportional and reasonable (Ibid, ¶¶11-14).

The HCJ held the Order illegal, arguing that detaining individuals for twelve or eighteen days without bringing them before a judge conflicted with “fundamentals of both international and Israeli law” (Ibid, ¶32). The Court also held judicial review is not separate from detention but rather is “an integral part of the detention process” and as such cannot legally be separated (Ibid).

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<sup>11</sup> In Israel, according to section 9.3.3 of the Penal Code, a detainee must be brought before a judge within 24 hours. See Sebba *et al.* (2003).

## II. Timeliness of the Court's Action with respect to humanitarian obligations

### Physicians for Human Rights et al. v. Commander of the IDF Forces in the Gaza Strip

In response to widespread smuggling of arms and ammunition through an intricate series of tunnels dug between Egypt and the city of Rafah (located in the southern part of the Gaza Strip), the IDF conducted a military operation intended to locate and destroy the tunnels and to weaken the terrorist infrastructure in Rafah. During the course of the fighting, civilians were injured and the water supply was affected. Complaints were lodged that the IDF was not allowing basic supplies, such as medication, to enter the city.

A petition was filed by Physicians for Human Rights, Association for Civil Rights in Israel, the Center for the Defense of the Individual, and B'Tselem, asking the Court to order the IDF to enable critical humanitarian supplies to be received by the local population and to ensure that the water supply was adequate (Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip 2004, ¶17). As in *Marab*, the Court heard the case during the course of the armed conflict. A senior IDF Commander was present in the courtroom to respond directly to the Court's questions. The petition was filed on a Thursday and the hearing was held the following day. The State argued the Court should exercise judicial restraint given the Operation's twin goals: preventing additional arms smuggling and destroying up terrorist infrastructure (*Ibid*, ¶19). The State also argued that humanitarian measures were occurring within the confines of a military operation and efforts were made to minimize danger to innocent civilians while Palestinian terrorists were using civilians as "human shields" (*Ibid*, ¶22).

The Court wrote it would not rule on the manner in which combat is conducted, as that is the responsibility of military commanders when “soldiers’ lives are in danger” (Ibid, ¶16). The decision whether or not to take military action is not a judicial question. Rather, the question before the Court is whether the operation meets international humanitarian legal obligations. The Court assumed the Operation was a military necessity (Ibid, ¶17).

In granting a majority of the petitioners’ requests, the Court held rules of conduct must be taught to and internalized by all combat soldiers, regardless of their rank (Ibid, ¶66). The Court also required “procedures be drawn up that allow implementation of these rules, and which allow them to be put into practice during combat” (Ibid, ¶66). The Court ruled that the military commander had an obligation to prevent his troops from “harming lives and dignity of the local residents” (Ibid).

### III. House Demolition

In an effort to quell the Palestinian Intifada (1987-1993), the Israeli Government instituted a number of counterterrorism measures including a policy of demolishing houses in which suspected terrorists resided, predicated on deterring other Palestinian’s from committing similar acts of terrorism. Israel viewed the policy as an administrative sanction distinct from criminal law process, whereby suspected terrorists are tried either in a civilian or military court. In response to a terrorist attack, the Israel Security Agency (ISA) recommends to the commanding general of the West Bank that the suspected terrorists home be demolished.

Section 119 of the Emergency Defense Regulations 1945 authorizes house demolitions:

(1) A Military Commander may by order direct the forfeiture to the Government of Palestine of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offence against these Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything on growing on the land.

(2) Members of His Majesty's forces or of the Police Force, acting under the authority of the Military Commander may seize and occupy, without compensation, any property in any such area, town, village, quarter or street as is referred to in subregulation (1), after eviction without compensation, of the previous occupiers, if any (Dinstein 1996).

When the IDF conquered the West Bank and the Gaza Strip in June 1967, the British Mandatory 1945 Defense Emergency Regulations were in effect; accordingly, commanders were authorized, according to section 119, to order the forfeiture, sealing, and demolition of houses.

From 1967 to 1989, IDF commanders would order the demolition of homes without granting prior notice to the homeowner or tenants.

In *Association for Civil Rights in Israel and Others v. Central District Commander* (1989), the HCJ ordered the Israel Defense Forces to establish a mechanism whereby written notice would be given to the family regarding the intent to demolish the home. The family was granted the right to appeal to the Commanding Officer prior to the actual demolition; in those cases when the appeal was denied, the family could petition the HCJ.

A number of criteria were established in order to determine application of the measure in response to a specific act of terrorism. If the suspected terrorist committed an act resulting in the death of innocent civilians, the home would be immediately sealed and the family would be simultaneously notified of the Commanding Officer's intent to demolish the house. The purpose of immediately sealing the house was to deter others in the terrorist's community from committing a similar act of terrorism. Simultaneous to the sealing, the relevant authorities gathered information—classified and unclassified—regarding the following issues: (1) did the terrorist actually live in the house; (2) how many family members resided in the dwelling; (3) who owned the house; (4) did the terrorist receive assistance—active or passive—from family members; (5) would demolition of the house cause structural damage to neighboring homes; (6) how severe were the terrorist acts committed. After the decision was made to seal or demolish the house, the authorities would determine the extent of the sanction imposed. An Arabic-speaking officer serving in the Civil Administration would give written notice of the Commander's decision to the family.

The 1989 High Court's ruling ordering prior due notice fundamentally changed the process, substantively and procedurally. The Court decision ensured both a process and a more balanced approach to implementation of the sanction. Decision-makers were forced to articulate a house demolitions policy; once the policy was in place, the HCJ largely gave the IDF a free hand in implementing the house demolition sanction. Therefore, the issue was not the legality of the policy; the HCJ had decided that. Rather, the relevant concern was the policy's effectiveness.

A high level IDF commission recommended to the Minister of Defense that the policy be frozen. The commission concluded house demolitions had not acted as a deterrent and did not meet its stated purpose. Prime Minister Sharon accepted the recommendation, though he indicated the policy could be reactivated if an extreme change in circumstances warranted such a decision (Guiora 2013).

#### IV. The Security Fence

According to the government, the security fence was constructed for strategic and topographical reasons rather than as a border demarcating boundaries between Israel and a future Palestinian state (*The Association for Civil Rights in Israel and Others v. The Central District Commander and Another* 1989, ¶¶ 12-15).

In the petition filed to the HCJ, petitioners from the West Bank village of Beit Sourik argued the fence prevents access to their land; impacts their ability to move freely without excessive bureaucracy; makes use of local water wells almost impossible; greatly hinders access to water



for crops; uproots olive trees; injures the livelihood of farmers; does not benefit the local population; and the real purpose of the fence is annexation of the land exclusively benefitting the IDF and the Jewish population living in the West Bank. Furthermore, petitioners argued due process had been violated since military orders regarding the construction of the fence had not been published, denying those injured the right to appeal the decision (*Beit Sourik Village Council v. The Government of Israel* 2004, ¶13).

The state, in its response to the petition, argued that affected landowners were both offered compensation and entitled to appeal to the West Bank military commander against the order to use their land for the fence. Additionally, the state argued the primary purpose of the fence was self-defense, intended to protect Israeli citizens against Palestinian terrorists who could easily infiltrate Israel proper.<sup>12</sup> The state argued commanders balanced national security and individual rights, concluding Palestinian terrorism justified the measure in the context of self-defense (*Ibid*, ¶13). The state did not deny injury had been incurred by Palestinians, but argued an effort had been made to minimize the damage and rejected claims the decision was intended to annex Palestinian lands for political purposes.

The HCJ developed a three-pronged proportionality test for determining legality of state action. According to the Court, the objective must be related to the means (a rational means test); the means used must injure the individual to the least extent possible (least injurious test); and the means used must be of proper proportion to the benefit gained (proportionality test).

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<sup>12</sup> Israel proper refers to lands not captured in the 1967 six-day war (the West Bank, Gaza Strip, Golan Heights, Sinai Peninsula and East Jerusalem including the Old City of Jerusalem).

According to the Court, the state failed to meet this test. Therefore, while upholding the legality of the fence's construction the Court ordered the government to re-contour the fence's route in order to minimize impact on Palestinian's.

A second petition was filed to the HCJ regarding the fence's effect on the residents of the town of Bil'in (Yassin v. Israel and Military Commander in the West Bank 2005). The petitioners argued the fence directly impacts construction of housing projects, access to agricultural lands and therefore villagers' livelihoods; in addition, the petitioners argued construction of the security fence on Palestinian lands violates public international law. The military commander (respondent) argued the fence, as contoured, is necessary from a security perspective for the purpose of protecting Israeli citizens. The Court held security considerations were within the purview of the military commander; however, in applying a proportionality test, the Court concluded the military commander did not sufficiently examine alternatives that would have enabled meeting legitimate security requirements while minimizing harm to village residents.

## V. Targeted Killing

In the original petition filed against the policy of targeted killings, the Court determined that the issue was not justiciable thereby dismissing the case. Upon filing a second petition, the Court decided to hear the parties' arguments (Public Committee Against Torture in Israel, Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel and Others 2005).

The State argued that, first, the conflict between the State of Israel and Palestinian terror organizations is defined as "Armed Conflict" (this definition had been previously accepted and adopted by the Israel Supreme Court in a number of decisions). Second, according to the law of armed conflict, terrorists taking part in attacks against civilian or public targets are illegal combatants, not civilians, and are therefore legitimate targets. Third, the principle of proportionality must be respected when implementing targeted killing. Fourth, targeted killing is used only when the targeted terrorist cannot be arrested using reasonable means, in accordance with international principles requiring exhaustion of all reasonable alternatives. The HCJ held:

The approach of customary international law applying to armed conflicts of an international nature is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians "for such time as they take a direct part in hostilities" (§ 51(3) of The First Protocol). Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not (Ibid, ¶40).

The opinion, written by President Aharon Barak, articulates the limits of operational counterterrorism by holding that the targeted killing of known terrorists is legal if done in accordance with international law. This means that the decision and order for a terrorist's targeted killing must be rooted in the principles of proportionality, collateral damage and alternatives. The decision, the last in Barak's corpus of rulings on fighting terrorism, is the final piece in a puzzle of judicially mandated rules for how an army should conduct operational counterterrorism. Rather than engaging in broad, academic discourse, the ruling establishes clear criteria; a checklist of how the state is to make operational considerations. Harming civilians that "take direct part in hostilities," as defined in the decision, "even if the result is death, is permitted, on the condition that there is no other means which harms them less, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportional. That proportionality is determined according to a values-based test, intended to balance between the military advantage and the civilian damage."

## **Iran**

In recent years, Israeli leaders portray Iran as the greatest threat to Israel; threat not only to its security but to its very existence. This is because from time to time, Iranian leaders uttered their commitment to destroy Israel and, at the same time, their commitment to develop nuclear capabilities. Iranian leaders also voiced their desire for hegemony in the Middle East and the Muslim world at large. To achieve this hegemony, Iran has been developing nuclear policy which poses an existential threat for Israel. Its leaders have a long history of uttering explicit threats

against “the Zionist entity”, a history which makes the Iranian nuclear aspirations extremely dangerous for Israel, and for the Middle East at large.

The threat is threefold. First, terrorist organization supported by Iran may enjoy a larger scope for violent activity against Israel and against Jewish targets in the world as they feel more secure by the Iranian capabilities. Second, via its proxies in Lebanon, Syria, Gaza and other places, Iran might challenge the Israeli Defence Forces. Third, and most significantly, Iran has a large stock of nuclear reactor fuel that is enriched to 3.5 percent fissionable uranium as a fraction of total uranium content. "Fissionable" means the individual atomic nuclei can be split, yielding useable energy. Iran also has a smaller stock of 20 percent enriched uranium, which it claims to need for medicine and research. Iran has installed 12,000 centrifuges in its large Natanz enrichment plant and its smaller underground and heavily fortified Fordow plant (Hobson 1 December 2013).<sup>13</sup> Iran also has Uranium conversion facility in Esfahan, Uranium mine in Gachin, Uranium enrichment plant in Qom, a heavy water production plant in Arak, and nuclear power plants in Bushehr, Darkhovin and Parchin.

Iran's enrichment capability is much greater than required for its announced peaceful purposes. Its leaders wish to exert pressure on Israel whose nuclear capacity is known, although Israeli leaders never admitted this capability in explicit terms. They maintain opaque policy on this matter. Reports have claimed that Israel developed its 100 to 200 nuclear weapons during the 1960s, and today has a secure "triad" (land missiles, bombers, submarines) of delivery

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<sup>13</sup> See also Norman and Mitnick (29 September 2014); *Haaretz* (7 September 2014); Ploughshares Fund (28 August 2014).

systems. Israel's plutonium-producing reactor at Dimona is similar to Iran's partially built Arak reactor, except that Israel also has a reprocessing facility to convert plutonium to bomb-usable form. Like Iran, Israel also has an uranium enrichment facility (Hobson 22 December 2013; Cohen 2010).

On 13 July 2015, an historic agreement was signed between Iran and a group of six nations: Britain, China, France, Germany, Russia and the United States. The agreement would limit Tehran's nuclear ability for more than a decade in return for lifting international oil and financial sanctions against Iran. The agreement outlines how much nuclear fuel Iran can keep in the country for the next 15 years; what kind of research and development it can perform on centrifuges and other nuclear equipment; and the redesign of both a nuclear reactor and a deep-underground enrichment site. Most of Iran's nuclear infrastructure will remain intact, although much of it would be disassembled and put in storage. Some restrictions limiting Iran's program will begin to be phased out after 10 years. Then, after 15 years, Iran would be free to produce as much enriched uranium as it wanted (Friedman 2015; Sanger and Gordon 2015; Sanger 2015).

A nuclear Iran poses a problem first and foremost for Israel but it is not only a concern for Israel alone. A nuclear Iran might lead to nuclear proliferation as more countries (Saudi Arabia, Turkey, Egypt) might opt to develop their own nuclear programs to offset the Iranian capabilities. Meanwhile Iran should be encouraged to adhere to the Convention on Nuclear Safety that was adopted on 17 June 1994 by a Diplomatic Conference convened by the International Atomic Energy Agency, and to engage with its Gulf neighbours over nuclear safety concerns about reactors in seismic zones. Iran should also be invited to Nuclear Security Summits,

be encouraged to ratify the Comprehensive Test Ban Treaty, and play a part in pursuing a weapon of mass destruction (WMD) free zone in the Middle East (Jenkins and Dalton 2014).

## **Conclusion**

Zionism is aimed to secure a Jewish home for all Jews in Israel. The Zionist idea has remained contested. Hamas does not recognize the Zionist venture. It wishes to eradicate Israel from the map and to establish Palestine at its expense. Leaders of a major Islamic nation, Iran, voice the same desires. Two of Israel's neighbours, Syria and Lebanon, remain in a state of war with the Jewish state and contest its borders. For more than sixty years since its establishment, Israel has withstood many challenges and overcome sturdy opposition. To be successful, Zionism must find a way to integrate into the Middle East and to garner acceptance especially among the nations surrounding Israel.

At present, many Israelis are quite content with satisfying security needs and see no urgency or need to establish peace with Israel's neighbours. They believe that the status quo is good for Israel. However, in reality there is no status quo, as Israel continues to build the settlements, hampering the possibility of striking a deal with the Palestinians in the future. The situation on the ground keeps changing, supposedly in favour of Israel. The Palestinians observe as their future state is shrinking in front of their eyes and there is very little that they can do about it. Furthermore, the occupation remains a reality and is undermining the vital ingredients needed for peace talks: good faith and trust. Under occupation, Palestinians lack freedom and control over their lives. Their economic activities, the allocation and management of their natural

resources, their health and well-being, their ability to move are in the hands of Israel (Cohen-Almagor 1991 and 2012).

The situation is becoming more and more complicated as countries are developing long-range ballistic missiles and nuclear capabilities. The potential for attack might come not only from Israel's neighbours but also from remote countries like Iran. Israel has dominated the balance of power with its neighbours in terms of modern conventional systems, recapitalization and foreign military support (Cordesman 2010, p. 44) but dramatic regional geo-political changes, the Arab Spring turmoil and techno-military advances introduce further weighty challenges to Israel's deterrence and defensive capabilities. Israel's ability to overcome those fateful tests and challenges alone is questionable. Powerful allies do not rush to involve themselves in conflicts with significant regional powers such as Iran. The worst case scenario includes total nuclear annihilation against which wide security margins are difficult to ascertain. Other scenarios involve conventional threats emanating from Israel's neighbours and/or terror organizations wishing to plant chaos, undermine Israel's security and/or escalate the situation into a regional war.

Achieving democratic and secure Israel requires bold steps. Israeli leaders need to define its borders. They should abolish the ever-present "State of Emergency" that has been in place since the establishment of the State (Sucharov 2013). The continued renewal of the Emergency Laws enable the government and its security forces to put security considerations above human rights and the democratic principle of upholding civil liberties. Israel should end the occupation and make a sincere and audacious effort to sign a peace treaty with the Palestinians, attempting to address their rights and needs, and making the necessary compromises in order to achieve just



and lasting peace (Cohen-Almagor 2014). Peace should be Israel's security strategy. Finding ways to integrate into the Middle East and to bring to a halt the continued cycle of violence and war are essential. Without resolving the Palestinian problem, Israel's existence will continue to be threatened.

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