SOME BASIC OBSERVATIONS ABOUT HOW A DEMOCRACY SHOULD CONDUCT WAR ON TERRORISM

Address by Professor Emanuel Gross

What is the role of the law in fighting terrorism? To answer this question we should understand the role of law in general, in a civilized society. Law as a code of normative order exists in every type of society, but my attention is focused on a liberal democracy regime[1]. In a democracy, law might have different roles: first, law reflects the basic norms, the bedrock foundation of the society, an agreement between all members of the society on how to live together. A second role for the law in a democracy is the promotion of the principle of the rule of law. The rule of law is the fountain of democracy. Its true concept must be judged in exceptional times, in times of tension and emergency.

What does the "rule of law" mean in times of emergency? In order to be able to answer this question we should first define the legal notion of "emergency". Emergency can be described as an unusual state of affairs or times that pose a threat to a democracy and its ability to conduct normal life. At this point it should be stressed that an emergency regime is not necessarily connected to existential problems. The character and the magnitude of the event should not necessarily pose a risk to the existence of a society. It is enough that the event or events prevent some parts of the society from being able to pursue their normal life. For example, such events can exist when a strong earthquake

[1] Hereinafter-democracy

causes devastating casualties, or a dangerous epidemic spreads and risks many lives. Those events are characterized by a complete halt to normal life. In response to those events the government in order to provide help needs some additional legal tools, such as sending the National Guard or the Army, or spending more money out of the regular budget. In a federal system, emergency regime can be confined to those places that were affected by the events.

Another event which corresponds and may constitute a need for an emergency regime is an act or acts of terrorism. Terrorism by its nature uses force and creates fear against innocent people. Terrorism is used by individuals or groups in order to spread their ideas and achieving a political goal. Targeting people indiscriminately may demoralize and terrify parts of the population; life might veer from its normal course. Thus, dealing with the phenomenon of terrorism may require the government to use special tools which it generally lacks in normal times. Those special legal tools entail a potential risk to our liberties, and therefore they could conflict with our constitutional rights.

Emergency, we may conclude, is a state of being that prevents many people from having their normal life. It also means that the government might need more powers to effectively overcome the thereat and to restore the normal course of life.

What are those exceptional legal powers that are needed in times of emergency in order to thwart terrorism? How should we reconcile those unusual powers when they conflict with our civil liberties? What is the role of the constitution in those exceptional

times? Should we have a separate constitution for times of emergency, as some scholars have suggested recently?[2]

An emergency regime involves seemingly two conflicting interests: a need for security- personal and national -and preserving civil liberties. A more careful examination will prove that there is no real conflict between those interests, in fact they are complementary. One cannot have and enjoy basic human rights without the benefit of security. Security is an important brick in the temple of civil liberties. But does it mean that at times of emergency people should forego their basic rights in the name of security? No, the answer should be negative. An emergency regime does not propel a complete halt to civil liberties. A regime that prefers security needs while disregarding completely civil liberties is not a real democracy.

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

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[2] Curtis A. Bradley* and Jack L. Goldsmith CONGRESSIONAL AUTHORIZATION AND THE WAR ON TERRORISM 118 Harv. L. Rev. 2047 (2005), Bruce Ackerman, The **Emergency Constitution**, 113 YALE L. J. 1029, 1040 (2004); ... Cole,The Priority of Morality: The **Emergency Constitution's** Blind Spot, 113 Yale. L.J. 1753, 1754 (2004

Are we not contradicting ourselves when we demand that security should respect human rights? Have we not mentioned before that there is no real liberty without having security?

No, we are not contradicting ourselves. Preference to security needs in the name of combating terrorism does not justify the disregarding of basic rights. There is a need for a just and proper balance.

Thus, balance is the benchmark, the key to resolving a potential conflict between advancing security needs and protecting civil liberties. How should we balance those interests and by which formula should we do it?

The legal formula that should be used consists of three subtests: 1) The suitability test: here we should ask the following - does the security measure which we want to apply bring the expected results? 2) The less harmful means test: here we should ask - is there a less harmful tool to bring about the same results? 3) The proportionality test in the strict sense: here we should ask - is the benefit outcome significantly greater than the harm inflicted? This formula should be applied in a sensitive way, particularly in those cases involving civilians who are under military occupation.

This formula balances the needs of security with the needs of civilians of every kind: civilians who are inhabitants of the state fighting the terrorists, and civilians who are under belligerent occupation. Of course when we deal with civilians of the second type their basic needs might be different. Thus, when we ask through the second subtest: is there a lesser invasive way to achieve the security goal, our answer should not be a negative one just because the choice made by the military commander could bring about optimal results to the security needs. Sometimes a compromise must be struck. When one

realizes that there might be two ways to satisfy the security needs, the first is the optimum and the second is less effective to security needs but is more considerate of humanitarian needs, one should prefer the second option.

We could have reached this conclusion also by using carefully the proportionality test. If we came to a conclusion that the additional advantage to one's security comes from adopting the first option is not significant in comparison to the second option, but on the other hand the damage to humanitarian needs by doing so is very significant, the conclusion should be to prefer the second option even if it is less beneficial to the security needs. Humanitarian needs should always be kept and respected consistent with the relevant international law; they should be regarded as the Magna Carta for civilians under occupation. Security needs and military operations should always be mindful of the state's humanitarian law obligations. Civilians should be spared, whenever possible, the suffering and agony of military operation. But suffering cannot be avoided at all times. War is a deplorable way of resolving conflicts but sometimes it is inevitable. The problem is magnified when a democracy deals with hostilities and the consequences of acts of terror.

Terrorism by definition aims to target civilians, and terrorists usually operate or find safe haven among the civil population. Sometimes they impose their will on innocent civilians even if they consider themselves to be part of them. They might impose themselves by taking civilians as hostages or using them as human shields. In those cases a democratic state will be confronted with heavy moral and legal dilemmas.

As I have already mentioned, humanitarian law should be respected, but sometimes terrorists make it very difficult for a democracy to realize this objective. Take

for example the holding of civilians as human shields. No one will dispute the right of those hostages to be protected in their person. What should a democracy do in case terrorists pose demands for their release? Should it defer to this claim even if it means incurring high risk to its security for instance by releasing many dangerous terrorists? Should the state refrain from using any type of force against such kidnappers just because the life of hostages might be impaired? Should our answer be different if we know that the hostages had agreed to become human shields?

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

War on terrorism is different from the other wars that we have known in the past, due to the different nature of the participants. In the past we have been accustomed to wars among states. Now we have a new phenomenon: war between a state and a non state organization. What should the rules of engagement be? The old customary rules of engagement were based on the assumption that all the parties to a conflict had agreed in a mutual way to restrain their use of power. Now only one side sees itself committed to those rules: the democratic state. The other side, the terrorist organization, not only does not consider itself bound by the law, on the contrary, it defies and despises those laws. Professor Barak has reflected on this point: terrorists act against the law, and the state acts according to the law. He reasoned that the war on terrorism is therefore the war of the law against those who contravene the law. Barak also observed that conducting a war on terrorism according to the rule of law means that this is the fate of democracy. It means that the state cannot always use the means which terrorists use; sometimes it must conduct its war with one hand tied behind its back. Do these restrictions which apply to a

democracy invite its inevitable defeat? No, on the contrary. Sticking to the rule of law and adhering to our moral values will increase the strength of the state and ultimately cause it to prevail in this war.

As I have mentioned before, the war on terrorism challenges us to confront hard cases which we never encountered before. If before civilians were protected by all sides to the conflict, now only one side is committed to protect them. The other side not only neglects this duty but instead, knowing the moral obligations of democracies, terrorist organizations will try to use them to their advantages.

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

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

Sometimes we in Israel are accused of depriving those who are suspected of engaging in terrorism from having their day in court by the targeting policy which we apply, or as it is sometimes put, extrajudicial killing. This argument , though very powerful on its face fails to hold water. A terrorist is warrior, a combatant, though an illegal combatant. Now let's turn to the classic warfare rules. According to the customary rules regarding war on the land, any party to a conflict is allowed to kill its enemies based on the doctrine of self defense, unless the enemy is ready to surrender. Does anyone raise the legality of those killings? Does anybody call them assassinations? Does anybody seriously think that by killing the enemy we deprive him of due process of law, from having his day in court? Why inject due process claims in those situations? Is the enemy entitled to ask not to be killed while he is reluctant to surrender?

If we can agree that in the case of a lawful combatant we are entitled to neutralize him, unless he asks to surrender, then it should not be any different in the case of an illegal combatant, by way of analogy. What moral tenet can demand the refraining of killing a suicide bomber? Or what could be the moral value which would dictate that we sacrifice our soldiers in order to save the life of the would be terrorists? The only duty that we should have is to make sure that we are not mistaken about the identity of the terrorist. On this point we should demand that the military use procedures and oversight which would increase the accuracy of our intelligence. At this point I should point out that our Supreme Court has ruled on the legality of the said practices. It said that by principle this practice correspond the international law provided we are following some safe guards.

Another phase of the self defense doctrine flows from the cruel reality that Israel has faced for the last four years. As we all know, Israel has been engulfed repeatedly by acts of suicide bombers. Those terrorists had arrived within Israel from the West Bank. At that time, there was no separation or a fence between the old armistice line of 1949 and the West Bank. Israel has tried all possible ways to stop these suicide bombers from entering our land. Our repeated requests to the Palestinian Authority to stop them were ignored. Consequently, hundreds of innocent Israelis were killed. As a last resort, the government adopted the advice of the army to erect a separation barrier to prevent, or at least make it more difficult for insurgents to infiltrate Israel. The barrier is a composition of several means: fence, electronic sensors, physical barriers and a patrol way.

The separation barrier has been designed to meet the security needs along the Green Line, but in some parts it had entered Palestinian lands. The owners of these lands have petitioned the High Court of Justice, challenging the legality of the confiscation of their property. The Supreme Court overruled their contention that the barrier was erected for political reasons and a pretext for the real scheme to annex their land to the State of Israel. On this point, the court adopted the attorney general's argument that the sole reason for erecting the barrier was security needs. Nonetheless, the court accepted the Palestinians' contention that when the barrier had been designed not enough weight was given to the humanitarian needs of the civilians under occupation. The court stressed the importance that the duty of the military commander, who is responsible for this project, is to use a just balance between the needs of security and the need to preserve the basic humanitarian interests of the people who are adversely affected by the barrier. The military commander must be mindful of the consequences of his actions.

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

When I finished writing this paper the other day, our supreme court issued its new ruling on the security fence in the case of Alfi Menashe. The court observed that on the legal dimensions, namely the legal sources relevant to analyzing the dispute, both courts were identical. Then how did the two courts arrive at different conclusions? The Supreme Court explained the difference on the basis of the facts that they used. While the Supreme Court gathered and assessed the relevant evidence by using an adversarial process, which means that both sides to the dispute submitted relevant evidence, the ICJ based its finding on a file which the Secretary General of the UN provided to the court. We know that this file lacks many important facts, for example, the minutes of the Israeli Government decisions to erect the fence. Had the ICJ rendered its decision with the evidence which was brought before the Israel Supreme Court, the outcome might have been different. In the latest case, again the Supreme Court ruled against our government and in favor of the Palestinian petitioners, five Arab villages which complained that the route of the fence detached them from their lands and from social services. The Supreme Court ruled that

the Government should reroute the barrier in order to exclude those Arab villages from the Israeli side of the fence.

The last subject which concerns a democracy that conducts a war on terrorism is the problem of judicial review. As we have seen, acts of terrorism may disturb the ability of a society to perform normal life and necessitate a state of emergency. Some scholars hold the view that in those unusual times, the courts should stay away and not interfere with the decisions of the executive branch on how to conduct such a war. The old saying attributed to Cicero that when the canons roar the muses should be silent is neither correct nor should it be followed.

I have started my presentation by pointing to the inevitable tension which exists at times of emergency between the needs of security and the need to preserve civil liberties. The constitution is put on trial in those times. Its power and vitality as the bedrock of our liberties are severely challenged.

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