International Policy Institute For Counter Terrorism

Interdisciplinary Center - Herzlia

Counter Terror Warfare: The Judicial Front

Confronting the 'Democratic Dilemma' of Counter Terror Warfare the Evolution of the ***'Probable Scope'***

Preface: Dr. Boaz Ganor

Author: Jonathan Adiri*

July 2005

* Jonathan Adiri is an International Legacy Heritage Fund fellow. His MA research focuses on the interaction between law, society and politics. Jonathan served as a lieutenant in the IDF Foreign Relations Division, as a liaison officer to the Red Cross.
jonadiri@gmail.com

Abstract:

On January 20th, in a ruling seen as a sharp blow to coordinated counterterrorism efforts in Europe, Germany's highest court has refused to turn over to Spain a Mamoun Darkazanli, a 46-year-old German of Syrian origin suspected in Spain and by many independent experts on terrorism of having provided logistical and financial support to Al Qaeda. The court argued that a recent European agreement to streamline extradition procedures violated the rights of German citizens*.

The following article argues that the global legislative revision that followed the 9/11 terror attacks, aimed at improving global counter terror capabilities, is futile, unless followed by a parallel process in terms of judicial review.

The article presents the reader with a global comparative data of the legislative response to 9/11, setting the basis for a theoretical discussion of the court's position in the political counter terror sphere. The author then continues to unfold the Israeli case of the High Court of Justice, arguing it to set a proper example for a legal system which is resilient enough to ease the 'democratic dilemma' of counter terror, faced by decision makers. The analysis of the Israeli case study is based on a quantitative research, including all counter terror related pleas presented to the HCJ. The article concludes with several 'ground rules' for the evolution of such interaction between the legal and the counter terror (political) spheres.

* *"Court lets German linked to terror go"* **International Herald Tribune**, July 20, 2005.

Contents:

Preface: The 'Democratic Dilemma' of Counter Terror Warfare

Dr. Boaz Ganor

The escalating nature and scope of international terror presents a concrete threat to an ever-growing number of states and areas worldwide. Countries that until recently perceived themselves as immune to the threat of terror, as they are removed from the cycle of terror and far from its core, are slowly grasping that the world has become a 'global village' and terror is ever closer. This also applies to countries that have reached a 'silent understanding' with the terror organizations. For example, in the event that a biological terror attack involving the smallpox virus was to be deployed in London, the effect would spread rapidly to Paris, and even to Johannesburg.

The world is awakening from the terror attacks of September 11th 2001, and has undergone a phase of reckoning in its bitter aftermath. At present, nations of the globe are gradually realizing that in order to increase the efficacy of counter-terror efforts, they must understand that terror poses a serious threat to global peace. Current paradigms and perceptions must be readdressed and altered in order to construct a new, effective counter-terror effort. This process requires the establishment of proper 'checks and balances' in order to ensure that counter-terror policies, from legislation to military measures, will not exceed the bounds of the liberal-democratic framework.

The *'democratic dilemma'* of counter-terror is emerging as a concrete issue for many democratic countries seeking to reform their internal institutions and legislative systems, to enhance their capabilities in challenges global terror. There is an inevitable tension or even contradiction between the goal of maximum counter-terror efficacy, and the will to maintain the liberal-democratic institutions and values.

Under the democratic regime, based on (among others) the principle of *separation of powers*, the judicial system is a prominent institution safeguarding checks and balances, restraining the executive authority from promoting policies that infringe upon human rights, counterterror-related or not. At the same time, the court is the safe haven of all who feel that an administrative, military or other exertion of government power is injurious and infringes upon their basic rights.

Following the six day war, the right of individuals to appeal to the Supreme Court was acknowledged by the Israeli High Court of Justice (henceforth HCJ) – as applicable to non-citizens, namely the non-Israeli residents of the West Bank and Gaza Strip. This entered the Israeli HCJ into the realm of 'Jus in Bellum'.

The process of identifying the point of equilibrium in the 'democratic dilemma' is still evolving, and is often 'rolled into the judicial court'. Hence, the democratic judicial actor holds a pivotal role in defining this balance.

Under these circumstances, a country attacked by a terror organization immediately seeks a preventive and deterrent response that will minimize the chances of reoccurrence of terror. Decision makers trying to formulate the response, are faced with immense pressure from the general public and from the government's constituencies. Some will demand retaliatory measures, regardless of their implications for liberal-democratic values. In this situation, democratic leaders and governments must find a 'golden path' between those who advocate a harsh reaction, and the democratic constraints of a government with a fundamental obligation towards the liberal-democratic system.

Decision makers faced with this dilemma may also find that their public legitimacy eroded in the face of high emotions surrounding the debate. In the process of seeking solutions, a series of singular cases is often brought to the judicial arena, for the court to examine the legitimacy of the decision maker's policies. Israel is an interesting case, in that anyone who feels that the Israeli government's counter-terrorism measures are injurious to human rights may appeal to the proper judicial authorities – in this case, the HCJ.

As the sole administrative instance of the Israeli judicial system, the HCJ has the capacity to annul various government decisions, including those in the field of counterterrorism policy.

The litigation process of the public’s review of government counterterror measures yields an ***evolutionary process***, in which the court sets the criteria of legitimate actions designed to thwart terror. This is remarkably illustrated in Israel, as the evolution process has greatly facilitated the regime's ability to maintain its liberal-democratic values, while developing a comprehensive counterterror effort.

The rule of law, forcing the Israeli security apparatus to adhere to the HCJ's ***balance formulations***, was key to the evolution of the agreed 'rules of the CT game', successfully tackling the democratic dilemma. This evolution seems to be the optimal way to devise such balance, compared with other radical and revolutionary solutions.

A state that faces the threat of terror is often inclined, mainly due to public pressure, to replace a zealous liberal approach that favors human rights at all costs, with counter terror rules and somewhat draconian legislation aimed against the terror organizations and their support. This revolutionary paradigm shift is an inevitable turning point, reflecting the beginning of an evolution. The said process is the key to understanding the many petitions brought before the court and is reflected by the courts’ continuous formation of a '***balanced formula***', that seek a better balance between CT efficacy and the infringement of human rights.

The Israeli model, as illustrated by the HCJ, serves as a unique historical exemplum of a democratic state successfully handling terror, while walking a ***'golden path'*** set forward by its judicial system. The following article by Jonathan Adiri examines the pivotal role of the HCJ and the unique formulas that evolved under its judicial review, easing the 'democratic dilemma' for the Israeli decision makers trying to face the challenge of terror.

Chapter 1:

Locating Law in the Political Counter Terror Sphere

On October 23rd, 1983, the Lebanese resistance movement (comprised of terror elements of the Hezbollah and Amal movements) set a dreadful precedent in human and terror history, as they carried out the world's first suicide bombing, targeting the Marine Barracks in Beirut and killing 241 American soldiers[1]. Within days, American President Ronald Reagan decided on the immediate withdrawal of American forces from Lebanon.

With historical perspective, it appears that that Reagan's seemingly logical step of redeployment had critical implications for the terror organizations' strategic assessment of their 'new tool'- the suicide bombing.

The rationale behind the 'new tool' lays in the Prussian general Carl Von Klausewitz's well-known insight that:"war is nothing but the continuation of policy with other means"[2]. President Reagan and his French counterpart's hasty withdrawal from Lebanon helped establish a new equation, which can be summarized by stating that: "in a non-symmetric confrontation, terror is the continuation of policy by other means".

Although the timing of Reagan's decision to withdraw the troops spoke for itself, he felt obliged in his memoires to address the redeployment, reaffirming the causal link between the bombing and his decision to change his government policy of intervening in Lebanon. Reagan wrote the following: 'the price we had to pay in Beirut was so great, the tragedy at the barracks was so enormous [..] we had to pull out [..] ***we couldn't stay there and run the risk of another suicide attack on the Marines***'[3].

The Lebanese resistance succeeded in its goal of expelling foreign armies from its region. The suicide bombing immediately prompted the Americans, as well as the French, to pull out of Lebanon. The causal link established in Lebanon led to the

[1] According to the American Department of Defense Commission report: http://www.beirut-memorial.org/history/dod.html

[2] Karl Von Klausewitz, On War (Vom Kriege), *(J.J. Graham translation published in London in 1873*), page 69-70

[3] Reagan, Ronald. 1990. *An American Life.* New York: Simon and Schuster.

global proliferation of the suicide-bomb strategy, as a tool of coercion aimed at decision makers to alter their policies in accordance with the terrorists' agenda[4].

Albeit, it must be said that in many a-symmetric conflicts worldwide, the suicide terror strategy does not enjoy such an immediate impact. In some areas of the world, this tactic is an integral part of a weaker side's strategy of coercing a prolonged "mutually hurting stalemate"[5] on the stronger side in the conflict. This is done in order to bring about a much-desired "ripeness"[6], that provides the weaker side with improved cards around the negotiation table, compared with the initial a-symmetry that lies at the heart of the conflict.[7]

A more germane and up-to-date example is the use of terror in order to coerce governments into policy change in the Madrid bombing of March 2004. (191 killed[8]). Though not a suicide bombing, it relies on the logic and knowledge arising from suicide bombings according to which large-scale civilian death resulting from terror can shift social and political opinion.

The Madrid terror attack was perfectly timed during the heat of the election period, aimed at forcing a regime change from the pro-Iraq war camp led by the Conservative party ('Partido Popular', PP) and headed by sitting Prime Minister Jose Maria Aznar to the 'Anti-Iraq war' camp led by the socialist party ('Partido Socialista Obrero Espanol', PSOE). The PSOE was headed by Jose Luis Rodriguez Zapatero, who had pledged, prior to the bombing, to pullback 1,300 troops from Iraq[9].

The timing, as well as the *modus operandi* and the grand scale of the bombing, resulted in a political change. This change paved the way for the instant retreat of the

---

[4] See elaborate details in a comprehensive analysis in: Pape, Robert A. **The Universe of Suicide Terrorist Attacks worldwide, 1980-2001**, University of Chicago Magazine, December 2002, volume 95 2nd issue.

[5] As presented by: Zartman, William I, *The Time of Peace Initiatives: Hurting Stalemates and Ripe moments*, **The Global Review of Ethnopolitics** Vol. 1, no. 1, September 2001, 8-18
Greig, Michael J., *Moments of Opportunity. Recognizing Conditions for Ripeness for International Mediation Between Enduring Rivals,* ***Journal of Conflict Resolution,*** Vol. 45, No. 6 (December 2001) Page 714

[6] Zartman, William, Chapter 6:*" Ripeness: The Hurting Stalemate and Beyond", in Paul C. Stern and Daniel Druckman (eds.)* ***International Conflict Resolution After the Cold War*** (National Academy Pres, 2000).
Haas, Richard, *Ripeness, De-escalation and Arms Control, in Louis Kriesberg and Stuart J. Thorson (eds.),* **Timing the De-Escalation of International Conflicts.** Syracuse, NY. Pages 93-96.

[7] see the case of the Tamils in Sri Lanka and, according to several researchers, Israel's withdrawal from Lebanon

[8] Analysis and media summary at: http://edition.cnn.com/SPECIALS/2004/madrid.bombing/

[9] See analysis by Amando Doronilla in the **Philippine Daily inquirer**, 17.03.04. The analysis is especially interesting considering the fact that the Philippines also withdrew from Iraq following terror coercion. http://www.inq7.net/opi/2004/mar/17/opi_amdoronila-1.htm

Spanish force in Iraq, three months after the elections. This is yet another example of the immediate and coercive effect terror bears on politics, this time in a liberal system.

The liberal democratic social system raises the banner of the people's sovereignty and civil rights. From this basic value, and the establishment of the civil society, derives a unique characteristic of democracy – the people's ability, through different social institutions, ***to force a desired change on the government***, either by elections or by different ex-parliamentary bodies.

The susceptibility of the masses to psychological manipulation, combined with their ability to force a regime change without resorting to violent revolution, is an *asset to the terror organizations*. It enables them to manipulate public opinion and coerce their own policy through a proxy – the civilians of the democratic regime.

Robert Pape describes how terror organizations manipulate the power of civil society to achieve their goals: "Suicide terrorism is more likely to be employed against states with a democratic political system [..] Democracies are often thought to be especially vulnerable to coercive punishment [..] Terrorists often view democracies as 'soft', usually on the grounds that their publics have ***low thresholds of cost tolerance and high ability to affect state policy***"[10].

Pape's thesis will serve as the premise of this article, arguing is that *Democratic systems are more prone to the terror's strategic affect as a tool to coerce specific policies on a society.* This premise illustrates the linkage of the terror and the political sphere, through which terror strategies operate to achieve their goals.

I will now try to present evidence of the connection between law and this bi-dimensional field of terror and politics, creating a three-dimensional field of terror, law and politics.

The question of law and legislation arises when, eventually, democratic decision makers facing terror are confronted with the **'Democratic Dilemma'**: the tension between effective counterterror measures and the narrowing of civil liberties. Different answers to this dilemma have arisen in recent years from all sides of the spectrum. From Vladimir Putin's reaction to the 'Baslan Massacre'[11] – an unapologetic narrowing of democratic civil liberties in the name of counter terror efficacy, to the

[10] Pape, Robert, *The Strategic Logic Of Suicide Terrorism*, **American Political Science Review**, Vol. 97, No. 3 August 2003. Page 349.

[11] Putin's Tragic Gaffes of 2004: Constatine Pleshakov **The Japan Times**, 4 January 2005 http://yaleglobal.yale.edu/display.article?id=5108

English case, in which the government has been unable to issue a counter terror act, due to the zeal of English civil rights movements demanding that civil rights be top priority. This zeal might result in an ill-prepared counterterror apparatus.

This article will claim that the legal sphere, through its interaction with the political one, assists decision makers (henceforth called intermittently 'politicians'), by evolving '***balance formulas***' easing the tension at the heart of the democratic dilemma and abating the difficulties arising along the process of counter terror decision making.

The need to accommodate legislation into an effective CT effort
A short comparative study:

Different countries are arduously trying to figure out the ideal formula to mitigate the contradiction at the heart of the 'democratic dilemma'. The extensive intelligence failure precipitating the September 11 attacks (detailed in different national fact-finding committees in the US, Germany, UK and more) brought about increased global awareness of the need to reformulate national, as well as international, legislation to meet the demands of the counter terror era. I will try to define the contours of this effort, as it is reflected in different state legislation cases:

(a) **The American Case:** Within eight days of the World Trade Center bombings, the Bush Administration presented Congress with the **'Patriot Act'**[12]**,** a comprehensive legislation revision widening the federal administration's capacity to take counter terror measures, while permitting intrusions into the civil rights of citizens (and non-citizens). The act was not exactly embraced by the American legislative institutions, as the Democrats, headed by Chairman of the Senate Judiciary Committee Patrick Leahy, demanded the minimization of encroachment of civil liberties provided by the act.

Various opinions were voiced with regards to the act. Some favored it as an imperative step in the United States' war against terrorism. Others, however, criticized the broad scope of the act, which bears negative influence on many

[12] House of Representatives, Committee on the Judiciary: http://judiciary.house.gov/Printshop.aspx?Section=44

law-abiding companies that were likely to be the first to feel its impact[13]. An unsigned Boston Globe editorial maintained that the Patriot Act, signed into law on Oct. 26, gave the government a vast arsenal of surveillance tools, easier access to personal information, and increased authority to detain and deport noncitizens, thus inevitably narrowing civil rights[14].

Public controversy continued, while supporters claimed that "the legislation will greatly improve federal authorities' ability to investigate and prevent terrorism. Attorney General Ashcroft had already put this new law to use, arresting and detaining terror suspects, freezing assets of terrorist organizations and employing new surveillance authority to detect and disrupt future terrorist attacks. The new law is an important step, one element of the broad cooperation across our society - between federal officials, state and local police, private citizens and our men and women in the armed forces - that is needed to keep America safe and secure".[15]

Notwithstanding the vibrant discourse and controversy in the American public, media and political spheres, President Bush ultimately signed the Act just six weeks following the attack. President's Bush's resolve in promoting the act raised liberal doubts claiming that the administration merely took advantage of the post-9/11 atmosphere of fear to issue an agglomeration of draconian regulations.

Disregarding the political and bureaucratic critique of the act, there is no question that the Bush Administration chose a different strategy for handling terror, than the one chosen by his predecessors. Instead of complying with terrorist coercion, within six weeks after the bombing, the United States created a precedent for the world by enacting a comprehensive counter terror legislative amendment, facilitating its ability to pursue the perpetrators both locally and globally[16].

---

[13] The Daily Record (Baltimore, MD.) **November** 18, 2001, Sunday

[14] The Boston Globe **November** 18, 2001, Sunday ,THIRD EDITION

[15] The Pantograph (Bloomington, IL) **November** 18, 2001.

[16] Other voices concerning the Patriot act:
NY Law Journal November 26*USA PATRIOT Act of 2001: The Impact on Immigration,*
The Daily Record (Baltimore, MD.) November 19, 2001; "*The USA Patriot Act extends law enforcement powers* well beyond investigations of terrorist acts and will critically subvert our personal right to privacy".
Legal Times November 19, 2001.

This approach was later on cemented by the US 'war on terror', initially in Afghanistan (following the UN resolution 1368[17]) and later, amidst international controversy, in Iraq. The Bush administration introduced a new approach for the legitimacy of the use of force under international law. 'The Bush Doctrine' maintains, after Sept. 11th, that after suffering a terror attack, the US has the right to exercise preemptive force in accordance with the 'self defense' clause of article 51 to the UN charter[18]. This doctrine, though under scrutiny and critique by international law experts, reflects the stark contradiction between President Bush's offensive response to terror and the defensive one preferred by his predecessors Reagan in Lebanon and Clinton in Somalia.

(b) **The British Case[19]:**

"What we now have to face is the fact that there are irresponsible states that either have, or are actively seeking, biological, chemical and nuclear weapons. This is the threat which President Bush rightly highlighted in his State of the Union Speech. And if we continue to allow these states to obtain and develop these weapons, we may find out too late their potential for destruction.[20]

British Prime Minister Blair is an avid supporter of the American war on terror. His support extends far beyond mere rhetoric, and is demonstrated by the magnitude of Britain's physical support of the cause: for example, fully *one quarter of the British Army was sent to fight in Iraq*, and remains there to this day[21]. Nevertheless, however, the proposed '**Prevention of Terrorism Bill**'[22] aimed at formulizing the counter terror tools available to the British government, is yet to pass.

[17] See: http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement
[18] "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"
[19] Cartoon by Zapiro at: http://www.brandonhamber.com/photos/cartoon-minime.htm
[20] A coalition Update, The White House 'Iraqi Freedom' site: http://www.whitehouse.gov/march11/coalition/introduction.html
[21] On January 20th, the British Defence Secretary Geoff Hoon reported to the parliament that 30,000 troops and air, sea and land vessels will be deployed in Iraq as part of the American Coalition:
The Independent (London), January 21, 2003.
Suday Telegraph (London), January 26, 2003.
The Daily Telegraph (London), January 21, 2003.
[22] Final Draft of the proposed bill is found in the **British Ministry of Interior Affairs**: http://www.publications.parliament.uk/pa/cm200405/cmbills/061/05061.i-iii.html

Two months prior to the elections, on March 13th, 2005, Prime Minister Blair refused to pass a less invasive version of the bill (earning the Tory nickname: 'petulant schoolboy[23]'). The salient opposition to the bill tended to focus on the "control orders" section, which would allow the Home Secretary to lock suspects in their homes. Prime Minister Blair lashed out against the opposition to the bill, by delivering a blistering attack on the Tories: *'If what they are actually doing is watering down the legislation in the interests of playing daft games with the nation's security, then this will flush it out'*[24]**.** Political implications and accusations aside, the British failed to incorporate the CT dimension into the national legislation. This failure might be proven deadly, in case of failure to prevent an impending attack.

(c) **The German Case:**

Germany's failure to handle the 'Hamburg Cell', a core element in the 9/11 planning and execution infrastructure, led to the incorporation of CT legislation, which was formally accepted on September 1st, 2002[25]. The law is the culmination of a gradual legislative process commencing immediately after the 9/11 attacks, and reflects the German willingness to allow potential breaches of civil rights in order to improve CT efficacy[26].

On the third anniversary of the 9/11 attacks, German Minister of Interior Affairs Otto Schily addressed the provisions of the act, and the fact that it facilitates state CT efforts while abating the 'democratic dilemma':

> "Military means should be used in accordance with the accepted conventions of war and international law. But **are these rules simply applicable in the framework of the asymmetric confrontation in the war against terrorism?** […] **The classic tools of law enforcement are not enough for this task**. For a comprehensive approach to fighting terrorism, we must take coordinated action in a wide variety of areas, including the funding of terror. The importance

[23] **Daily Express, Friday**, March 03, 2005.
[24] **The Observer**, March 13, 2005.
[25] See Associated Press Worldstream at: http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2002/09/01/financial1452EDT0008.DTL#sections
[26] See U.S Attorney General praise for the German efforts at: http://www.cbsnews.com/stories/2001/12/14/attack/main321361.shtml (December, 2001).

of this last point in particular can hardly be overestimated. International terrorism depends on a significant flow of money, which we have to cut off permanently.

For this reason, on August 5th, 2002, **I banned the Al-Aqsa registered society;** among other things, in Germany it conducted fund-raising for Hamas"[27].

(d) **The European Union:**

On December 12, 2001, a set of counter-terror measures and regulations were introduced within the framework of the European Union[28]. These legislative efforts, however, *did not materialize into a comprehensive CT law* comparable to the ones passed by Germany, the US and other countries. One can only speculate that the lack of coherent action in the form of a formal anti-terror policy and legislation derives from the 'subsidiarity principle[29]' and the fact that the 25 sovereign states included in the EU have each taken certain individual actions in this field.

Though the EU is increasingly responsible for monetary, social, political and humanitarian fields (subsequent to the conventions of Rome, Nice, Maastricht and the SEA), it seems that CT is still perceived to be a part of (individual) national security.

Other European CT mechanisms are operating while trying to establish a framework that will produce a comprehensive plan with regards to counter terror and WMD trafficking. Two bodies have been established to develop cooperation in counter terror efforts, both under the rubric of the OSCE. Even though their work is somewhat inchoate, some achievements are already apparent, such as the Anti Terrorism Task Force (ATTF), and the Southeast European Cooperative initiative[30].

[27] German Ministry of Interior Affairs http://www.bmi.bund.de/cln_007/nn_148716/Internet/Content/Themen/EuropaInternationales/DatenundFakten/4th__International__Conference__the__global__impact__of__terrorism.html

[28] See, International Counter Terror Institute website at: http://www.ict.org.il/spotlight/det.cfm?id=723

[29] Article E of the Maastricht Treaty (1993); See also (Hebrew): Shahor-Landau Chava, 'Evaluating the Subsidiarity Principle in the European Union, Bar Ilan Law Studies 13, 1997, pages 301-328.

[30] Details found at the OSCE report: http://www.osce.org/documents/sg/2004/03/2211_en.pdf

(e) **The United Nations (Security Council Resolution 1373[31]):**

Shortly after the September 11 attacks on the World Trade Center, the United Nations Security Council issued Resolution 1373, establishing the Counter Terror Committee (28.09.01), and laying the groundwork for an international counter terror policy, which included specific goals and objectives. Ostensibly, the written word lent the impression that the establishment of the CTC reflects a profound change of UN perception of global security efforts; yet reality proved otherwise.

On January 26th, 2004, the CTC presented the Security Council with a detailed report concerning the status of implementation of its mandate, as directed by resolution 1373. The presentation revealed that throughout the period of the committee's activity, its efforts to establish a global CT policy and foster international CT cooperation, were relatively futile; and international counter-terror efforts remained as amorphous as they were prior to the committee's establishment.

Committee Chairman Inocenio Arias, also the Spanish Ambassador to the UN, emphasized the need for extensive revision of the mandate and the composition of the committee, in order to achieve the desired results. His report focused on the enervative gap between the determined wording of the mandate and the actual toothless nature of the committee. The result has been an impotent committee, unable to take even incipient steps in forging a global CT policy.

The Security Council members concurred with the critique expressed by Arias' report:

> "From all the above issues it is clear that **the implementation of Resolution 1373 is encountering serious problems**, both at the States and at the Counter Terrorism Committee levels. These should be tackled in a comprehensive way due to the intimate interaction between them and the urgency of the task[32].

[31] UN site, The Counter Terror Committee:
http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement
http://www.un.org/Docs/sc/committees/1373/revitalization.html

[32] The detailed report of the CTC and the proposed changes are found at:
http://www.un.org/News/Press/docs/2004/sc8020.doc.htm

> "Members of the United Nations anti-terrorism committee today agreed on the need to "revitalize" its work in order to adapt to the evolving nature of its mission and voiced support for a plan that aims to enhance the Security Council's ability to help countries implement a resolution. During today's meeting, Council members, who also serve on the CTC, voiced support for the proposed changes…[33].

Ultimately, the UN also *failed to make the international community understand the necessity of an* ***overall paradigm shift*** in perceptions of the global threats to security. It was therefore unable to initiate a corresponding overhaul of perceptions regarding the measures needed to face these new challenges.

All the examples mentioned above illustrate a process of modifying existing legal system seeking to bridge the tension of the 'democratic dilemma' of counterterror warfare. One might argue, and with certain validity, that the American legislative response to the September 11th attack is exceptional in comparison to other examples presented, in the sense that it holds greater injurious capacity towards human rights.

Even the American case, however, is merely sufficient for facilitation of counterterror measures and the mitigation of the democratic dilemma. This article argues that even if comprehensive legislative change, designed to accommodate the legal system and provide for efficient state counter terror efforts has been accepted, ***in the absence of proper judicial review, the 'democratic dilemma' remains unsolved***.

Conclusions methodological contours of the research

The Supreme Court and the judicial review process can potentially play a key complementary role in counter terror policymaking in the political arena. Jurisprudence under terror-related scenarios faces a critical challenge of not lapsing into formalistic discussions and bogging down the efficacy of the counter terror effort, which relies mainly on swift, intelligence-based, action.

On the other hand, it is obliged to oversee that the state's reaction to terror does not exceed the limits of the liberal-democratic framework. Hence, the power of the court in terror-related cases relies on its ability to create a **'probable scope'** between

[33] UN press release: http://www.un.org/apps/news/storyAr.asp?NewsID=9970&Cr=terror&Cr1=

the violence of the terror perpetrator and the response of organized society[34]**.** This scope evolves as different government counter terror measures arrive at the court for its judicial review.

The article will focus on the Israeli case, which I argue is unique in terms of the intensity of the judicial challenges characterizing it. This intensity appears to originate from three main factors: the lack of a constitution, the social differences and splits in Israeli society, and the protracted situation of terror, in reality rather than theory. As described by Israeli legal scholar, Dr. Barak Erez: "The Israeli example is interesting for several reasons – first and foremost the constant threats posed to Israel's security by terrorism, coupled with the prolonged military occupation…create a laboratory for the intensive application of international law… second, Israel's Supreme Court has a policy of hearing almost every petition that raises human rights issues"[35].

In this environment, the Israeli High Court of Justice (henceforth HCJ) is constantly called upon to review government counter terror efforts. Given the three exacerbating factors listed above, the HCJ has a tough challenge of creating the **probable scope** of state counter terror measures. In providing judicial review of state counterterror policies, the HCJ often finds itself in the position of legitimizing the state's infringement on human rights (both foreign and Israeli), but it also assists the decision makers in facing the 'democratic dilemma'.

[34] Bilski, Leora, The Court's Function in Counter Terror realities, **Hamishpat**, Tet (9) 1994, page 209. (Original in Hebrew, translated by author)

[35] Barak Erez, Daphne, *"The international Law of Human rights and Constitutional Law"* **I-CON**, Volume 2, Number 4 2004. Oxford University Press, Page 612.

Three further by-products of this judicial review are addressed here: **First**, the judicial review, by casting the cloak of legitimacy on state CT warfare measures, tends to bolster public support for the government's policies. This makes the society less susceptible for terror organizations' psychological warfare, aimed at striking fear and confusion in the public, coercing it to exert its critique over the government and make it change its policies. This is reflected in the Spanish case presented above, as well as the French-American withdrawal from Lebanon.

Second, the HCJ, by exercising judicial review which is considered within the probable scope, is perceived as 'fair' by the society from which the terror evolves (in this case the Palestinian society). This makes it harder for terrorist organs to present themselves as 'the only organ through which justice is served', an essential factor behind the prevalence of terror as a tool in the Israeli-Palestinian conflict.

The third is referred to by the, Terrorism scholar Martha Krenshaw and is based on the premise that terror is the outgrowth of a strategic process[36]. She draws attention to a recurring pattern in which terror organizations attempt to be increasingly provocative, using tactics such as suicide bombings of civilian busses designed to 'lure' the state into an exaggerated response that would be far beyond reasonable. Should the state succumb by retaliating with a military operation that causes innocent civilian deaths among the enemy, the hope of the terrorists is that the Government will have to deal with a corresponding decline of public support for the retaliation, both internally and internationally.

When a terror organization succeeds in carrying out attacks (see also the Tamil use of child terrorists and Hezbollah's direct AAA shelling of houses in the Galilee instead of aiming at IAF planes violating Lebanese sovereignty) but fails to provoke the desired state response, ***public trust and support of the parliament rapidly mounts***. State retaliations within what the public perceives to be legitimate, makes the public less susceptible for terror psychological pressure.

I shall argue that judicial review, by establishing a probable scope of action to the government, may weaken the ability of terror organizations to intimidate the public and coercing it to 'play by its rules'.

[36] Krenshaw, Martha, "The Logic of Terrorism: Terrorist Behaviour as a product of Strategic Choice", in Walter Reich (ed.)**Origins of Terrorism**, Woodrow Wilson Inernational Center and Cambridge University Press, Cambridge 1990.

The legitimizing effect of government judicial review by the courts has been discussed at length both in general[37] and with regards to Israel in particular. Professor Ronen Shamir's research of the HCJ 'Landmark Cases'[38], aside from questioning the Court's ability to lead an actual positive change in the field of human rights, presents the reader with fascinating illustrations of the legitimization effect of the HCJ both on the Israeli public and among the international community.

During four years of terror confrontation in Israel between September 2000 and January 2005, 265 pleas were presented to the HCJ. The pleas requested the Court's judicial review of measures taken by state and military officials such as administrative arrests, house demolitions, prevention of humanitarian aid and more. The Israeli case, especially because of its unique intensity, presents us with an example of the evolution of '**probable scope of action**' through judicial review, facilitating the creation of an efficient counter terror effort on behalf of the government.

This article will demonstrate the process required for the establishment of the 'probable scope' alluded to earlier. I shall attempt to adduce several arguments from the Israeli case study, leading to the conclusion of essential pre-requisites for the achievement of "probable scope". This will be done following four steps:

(a) Short theoretical discussion of **the location of law in the political sphere and the significance of 'judicial legislation'**.

(b) Presentation of **the causal relation between the extent of the counter terror efforts and the extent of HCJ pleas**, making the HCJ a regulator of state sponsored violence through judicial review.

(c) Discussion of **HCJ's perception of its role as a regulator of state sponsored violence**, creating a dynamic evolution of the 'probable scope'. This will be done based on court rulings as well as an analysis of the judicial theory put forward by the HCJ Chief Justice Barak, which, to a great extent, reflects the opinion and policies of the court itself[39].

[37] Nonet, Philippe and Selznick Law and Society in Transition. New York: Octagon Books (1978). Dahl, Robert A., *Decision Making in a Democracy: The Supreme Court as a national Policy Maker*; **Journal of Public Law**, No. 6 (1957).

[38] Shamir, Ronen, *Landmark Cases and the Reproduction of Legitimacy, The Case of Israel's HCJ*, **Law and Society Review**, Vol. 24, No. 3, 1990. Pages 781-806.

[39] Barzilai, Gad, Judicial Hegemony, Parliamentary Polarization and Social Change, **Politics** (2), 1998. Pages 32, 33. (In Hebrew).

(d) Analysis of Court rulings and assessments of the 'probability scope' as it evolves through a 'trial and error' process.

Chapter 2:

The Court as an Actor in the Political Sphere: Theory and Practice

> "Charles Louis De Montesquieu saw the judge as a mere 'mouthpiece' of the legislator. He was wrong. Indeed, the judge is a 'mouthpiece' of the legislator in many cases, yet not in all of them. There are some tough cases in which the judge must activate judicial discretion…this requires certain pre-requisites for the fulfillment of the judicial vocation: objectivity, ***working within the social consensus and the people's trust of the court***"
>
> Israeli Supreme Court President, Chief Justice Aharon Barak[40]

It is generally accepted that Chief Justice Barak's judicial school of thought reflects the jurisprudence of the HCJ, as demonstrated by its policies and decisions[41]. The judicial theory of Chief Justice Barak cited above lies at the heart of the discussion regarding the role of the judiciary in counter terror efforts.

Barak's statement describes two contradictory perceptions (he, of course, favors one over the other). If one were to accept the 'Montesquieu School' of thought, then the court must not take part in the political and CT spheres. The HCJ, however, as proven in its history of rulings and its chief Justice's approach, renounces the 'Montesquieu School' in cases related to judicial review of state violence in the form of counter terror efforts, never hesitating to state its opinion juris and take an active part in designing the public agenda.

Barak's perception of the role of the judge far exceeds the boundaries of the judicial norm and formalistic legislation. According to this perception, given a lacuna in the formal law, the judge is entitled (not to mention obliged) to interpret the law actively and purposely, thus creating **Judicial Legislation[42]**. Through the mechanism of judicial legislation, the court locates itself, *de-facto*, within the socio-political sphere. Hence, the court abides by the modus operandi of the legislator, and by that

[40] Barak, Aharon, **The Judge in a Democratic Society(Hebrew)**, Haifa University Press, 2004. pages 27,40.

[41] Amit, Roei, *Justice Barak's Approach as an evolving Judicial Canon*, **Iunei Mishpat**, 21, 1998 Pages 81-137. (Hebrew)

[42] **Ibid.** (note 40). Page 26: The function of the judge is to operate existing laws and for that purpose, he must, off course, interpret them. In cases he feels the law is inappropriate, he has the power to deviate from it. In cases where the law lacks a stand, he must create them through judicial legislation. See also: Barak, Aharon, **Judicial Legislation** in Cohen, Haim and Zamir, Isaac, **various legal writings(Hebrew)**, volume A, 2000. Page 821.

characterizes himself as a 'socio-political animal' operating in a political environment[43].

The HCJ, in its role as the primary administrative State body to which any person is entitled to lodge an initial appeal, highlights the intertwined nature of the political and judicial sphere. This dual political and judicial identity role is bluntly illustrated in Chief Justice Barak's self-evident citation (aforementioned) in which the ***public consensus and trust of the court are described as key factors of judicial discretion***. Yet these two factors are not typically considered part of the 'pure' judicial sphere.

Although Barak refutes the 'Montesquieu' approach that the two spheres of politics and the judiciary are separate, the nature of this interaction must be ascertained as well. The most suitable theoretical model of analysis for the interaction between the two spheres is the institutional theory of the '**Bargaining Power Model'** presented by Lee Epstein and Jack Knight[44], and adapted to the Israeli arena by Professor Gad Barzilai[45] and Omri Yadlin[46].

According to the adapted model, the HCJ is an institution that strives to acquire a powerful position in the political sphere, which is characterized by a zero sum game of political powers. *The court, according to this model, is a strategic actor in the political sphere that attempts to optimize its powers of influencing society* and the hegemonic narrative. This perception of the court is remarkably illustrated by Barak's words that judgments are made in accordance with public consensus and the public support of the court.

Barzilai claims that Israeli society reflects a tendency toward litigation of political issues, which he sees as a direct result of the political power split and the decline of public support for the parliament. The trust that was lost by the political institution was inherited by the court.

Accepting the theory put forward by Knight and Epstein, one must reckon that both the political and the judicial actors are involved in an ongoing dynamic competition for scarce 'bargaining powers' in the arena. "Given that democratization is an ongoing, dynamic process, what explains the emergence and maintenance of

[43] Segal, Zeev, *The HCJ – A Court and a Social Designer (Hebrew)*, in Hanna Herzog (ed.) **A Mirror for Society,** Ramot Publishing, 200. Page 297.
[44] Knight, Jack, Epstein, Lee, *On The Struggle for Judicial Supremacy*, **Law & Society Review**, Vol. 30, No.1 (1996), pages 87-120.
[45] **Ibid**, note 33.
[46] Yadlin, Omri, *Judicial Discretion and Judicial Activism as a Strategic Game (Hebrew)*, **Bar-Ilan Law Studies**, Volume 19, 2003. Pages 665-720.

some types of political institutions and the decline of others? The answer, we argue, lies not in the intentional design of long run constitutional principles but rather in the **short run strategies of political actors… we claim this is equally applicable to courts**"[47].

In conclusion, this chapter demonstrates the intertwined nature of the judicial and political spheres in Israel, both on a theoretical level and a practical one. The illustrations here are mainly based on Chief Justice Barak's perception of the judicial role, which has had a decisive influence on the Israeli judiciary over the last two decades. This seemingly simple fact of judicial and political interconnectedness will provide the groundwork the analysis presented in chapter 4. Here, the Court's perception of its role in counter terror pleas will be discussed in greater length, through various specific cases

[47] **Ibid**, see note 44, page 87.

Chapter 3:

The Evolution of the 'Scope of Probable Action'

HCJ Quantitative Research

Israel's unique characteristics regarding counterterror activity, as shown earlier, make it a worthy case study for the matter at hand. The data presented here is drawn from the period of the 'second intifada', beginning October 2000, and ending (the quantitative research) on January 2005. While I am aware of other landmark cases concerning the HCJ's Judicial review prior the year 2000, and the research focusing on them,[48] the presented research focuses on the current confrontation. Focusing on concurrent times is aimed both at increasing the comparative capabilities of the research, as well as an attempt to discover new grounds and conclude in re-visiting paradigms concerning the first intifada and earlier periods..

The quantitative database begins on September 29th, following Prime Minister (then MK) Ariel Sharon's walk on the Temple Mount, and concludes on January 1st, 2005. The database includes all pleas that were presented to the HCJ, in which the government (and proxies such as the IDF, GSS etc.) was the respondent, questioning state policy with regards to the occupied territories[49]. It is important to mention that *the cases presented before the HCJ, represent only a part of the judicial process concerning the Israeli counter terror policies. Over the years, an informal path of 'pre-HCJ' has evolved,* through which petitioners have obtained justice[50]. For methodological reasons, I have chosen to focus on the formal HCJ ruling of the aforementioned period.

In order to examine the thesis that the court has CT potential, one has to first take a closer look into quantitative trends of terror and counter terror of the discussed period:

[48] Analyzing (among others) the following legal precedence:
HCJ 337/71 The Christian Society for the Holy Places v. Ministry of Defence
HCJ 606/78 Ayub v. Minister of Defense
HCJ 390/79 Duikat v. Government of Israel
HCJ 785/87 Afu v. IDF commander of the West Bank
HCJ 5973/92 Association for Civil Rights in Israel v. Minister of Defence
HCJ 5100/94 The Public Committee Against Torture in Israel v The Government of Israel et al.

[49] Cases were collected based on the following respondents: Defense Minister, Government and Military Commander. All relevant cases appear the following databases:
Http://www.court.gov.il
Http://www.Takdinet.co.il
Http://www.Nevo.co.il

[50] See detailed discussion of the 'Pre-HCJ' process in (Hebrew): Dotan, Yoav, 'Pre HCJ Process and Constitutional dilemmas over the role of the State Advocacy in HCJ discourse', Mishpat Umimshal (Law and Government), Haifa University, No. 7, 2004.

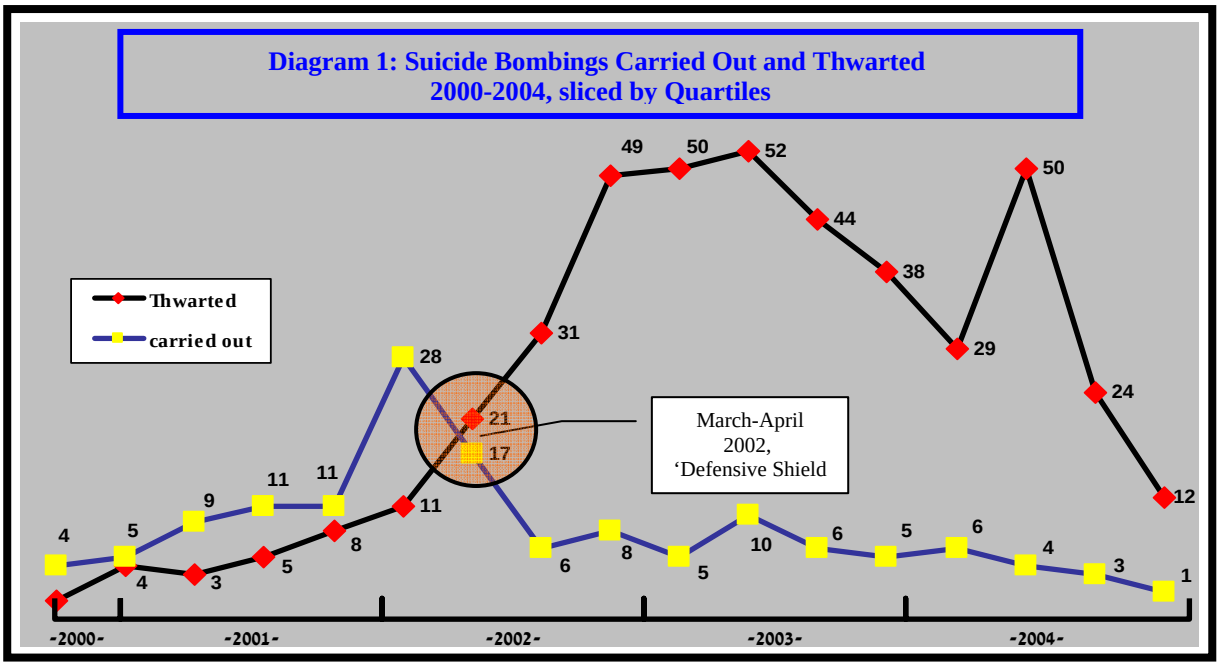
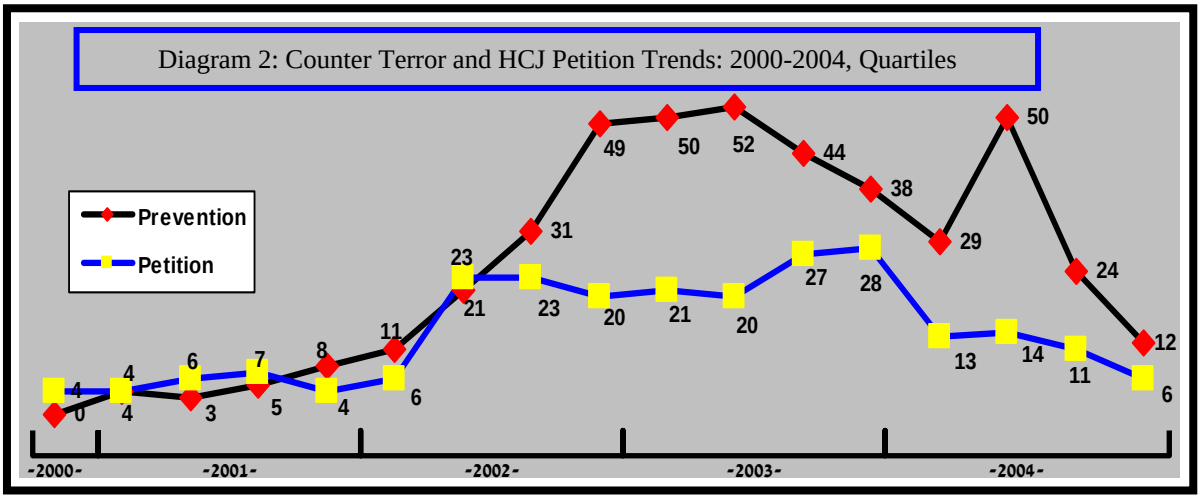


Diagram 1 presents a clear picture of **two contradictory trends**: the prevention versus success of suicide bombings. The reader's attention should be drawn to two main points, circled on the diagram.

For over a year, the Palestinian terror organizations succeeded in executing 40 suicide bombings aimed at civilian targets inside the 'green line'. The terrorists hardly met any counter terror efforts on behalf of the Israeli government. During the first quarter of 2002, the terror organizations tripled their yearly rate of suicide bombings, executing 28 and culminating with the 'Park Hotel' Passover holiday bombing, which killed 29 Israelis. It was only after this deadly attack that the Israeli Government began a comprehensive counter terror effort, commencing with the 'Defensive Shield' operation. "Defensive Shield" marked the beginning of the decline in executions (or the rate of success) and the increasing success of prevention. The trend of ***HCJ petitions is aligned with the trend of CT efforts of the Israeli government***:

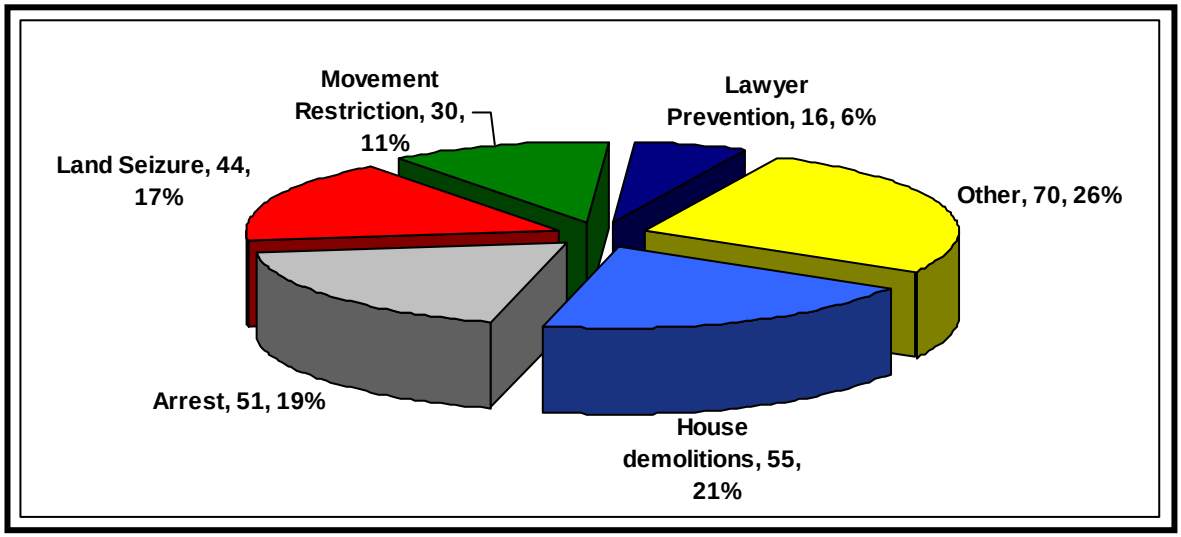


A Monthly based crosstabulation, based on the data presented in **diagram 2** yields a rather strong and significant parameter of 0.685 (r=0.685), which further bolsters the argument that there is a linear connection between the counter terror measures deployed by the state and the number of petitions presented to its court. **As CT increases, the HCJ is 'called into action'** of reviewing the state's actions and drawing the 'probable scope'. This proof will be revisited further along the article.

Two more relevant quantitative analyses are called for:

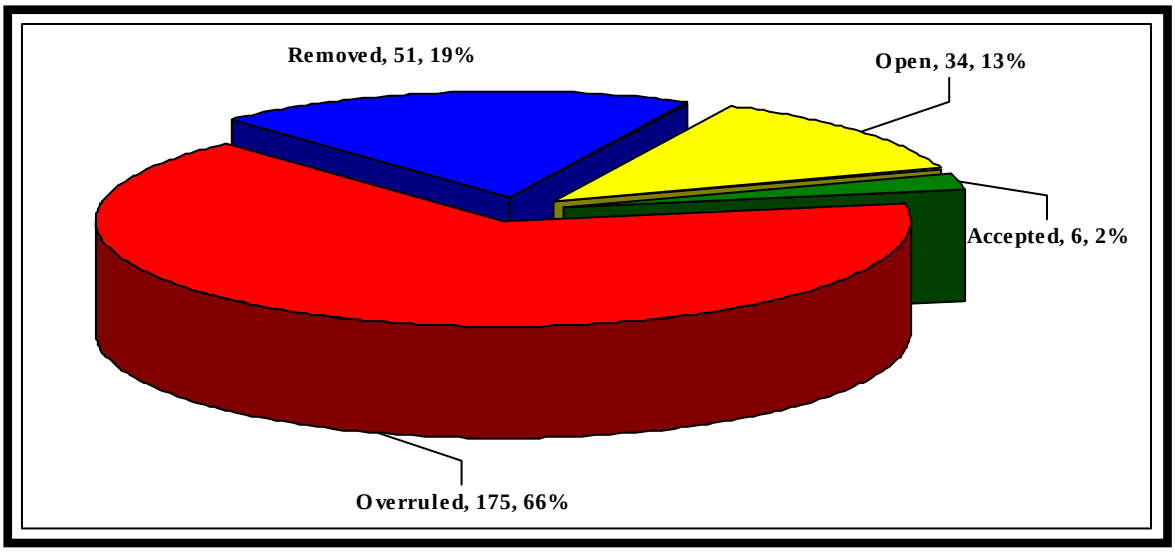
1. **Petition subject review (Diagram 3):** Out of 266 petitions discussed in the HCJ, 55 (21%) discussed the reasonability and proportion of terrorist's houses; 51 revolved around arrest matters (mainly administrative); 44 dealt with land seizure (roadblocks, security fence); 30 on movement restriction and curfew; 15 on the right to see a lawyer and further 70 (26%) that focused on an array of counter terror measures such as family reunions, deportation etc.

Diagram 3: HCJ Petition Subjects:



2. **Court ruling review (diagram 4):** out of 266 petitions dealing with the subjects aforementioned, 175 were overruled, 51 removed, 34 left open and 6 accepted. In Chapter 5 I shall further discuss this finding, which reflects unbalanced rulings on behalf of the HCJ, which seemingly contradict the HCJ's capacity to review government's CT measures and create a legitimate 'probable scope'. One might argue that an institution that refuses to legally aid 98% of the petitions brought to it, will never attain proper legitimacy from the public, a legitimacy which is imperative for the creation of the 'agreeable rules' of state violence in the form of counter terror activity.

Diagram 4: HCJ Ruling on CT related petitions



Quantitative analysis conclusions:

The quantitative analysis presents us with several factual premises. The main one seems to be the fact that only 2% of the CT related petitions were accepted by the court. Allegedly, this poses a big question mark over the thesis presented in this article, according to which the court is an actor in the CT sphere, one that generates a 'probable scope', and confines state measures against terror into 'legitimate' boundaries. This question mark will be dealt with in the next chapter.

Another relevant fact is the correlation between the intensity of the pleas and the intensity of the CT measures taken by the state. The database analysis reveals a positive, significant and linear linkage between the two. This supports one of the premises of the article's argument, according to which there is a connection between the CT sphere and the legal one.

As counter terror activity intensifies, so does the potential for civil rights infringements, pursuant to CT tactics such as administrative arrests, punitive measures and more. As these tactics are increasingly deployed, the HCJ is correspondingly called upon to review their legitimacy and face the challenge of creating the 'probable scope' for the state's response, a dynamic scope which is in turn constantly challenged both by the Palestinian petitioners and the state.

The quantitative data reveals that the theory of creation of the probable scope might lack credence, since the court has not produced a dynamic judicial approach, but rather a strict, seemingly arbitrary approach, accepting only 2% of the pleas.

The following chapters shall further examine the HCJ's rulings and prove that their effect far exceeds the formalistic criteria of accepting/overruling a petition. I will argue that the court's ruling presents a picture of 'hidden arrangements' in which legal justice is done far from the formal decision. I shall try to point to the evolution of the 'probable scope' as a dynamic process, influenced both by legal precedents such as 'Ajouri[51]', 'Mar'ab[52]', 'Beit Surik[53]', and by the 'long shadow of the court' – coercing a non-formal settlement of the dispute favoring the petitioner.

Ultimately, I'd attempt to prove that in creating the probable scope, whether by formal rulings or through its 'shadow' as reflected in non-formal arrangements, ***the court facilitates the ground rules of the counter terror efforts***, while providing a non-violent mechanism through which both sides may attempt to obtain justice and widen their range of action.

[51] HCJ 7015/02 Ajouri v. IDF commander of the West Bank
[52] HCJ 3239/02 Mar'ab v. IDF commander of the West Bank.
[53] HCJ 2056/04 Beit Surik Village Council v. Government of Israel et al.

Chapter 4:

HCJ perception of its Social-Political Role

The positive and significant linear connection between the extent of deployed counter terror measures and the petitions to the HCJ reflect an ongoing dynamic challenge, which the court is forced to confront. The challenge is how to create the scope of probable counter terror measures while safeguarding the democratic framework. One might ask, to what extent is the court willing to accept this challenge? What tools does it possess, that enable it to promote the discourse it believes in and maintain its public legitimacy?

This chapter provides two levels of analysis. The first is the **circumstantial level**, in which I shall try to outline the circumstances under which the HCJ is working to resolve the challenge described above; the second is the **judicial theory level**, based on Chief Justice Barak's judicial theory and his perception of the judge's role in a democratic society, from which I will try to construct the core of the normative credo of the HCJ with regard to counter terror petitions. To conclude this analysis, several examples will be presented reflecting the court's awareness of this challenge, and its proposed 'balance formula'.

The circumstantial level: Israeli public perceptions affecting the HCJ

Having departed from the classic notion that judicial and political spheres are separate, in order to understand a court ruling, one must also research the public's perception of the court, as well as its perception of other institutes and government measures.

The Israeli public shows two consistently predominant perceptions of the HCJ, which are characterized as 'consensus patterns' and 'dissent patterns'[54]. These patterns were identified through perennial analysis of ongoing public opinion survey research. According to the authors, the survey data reveals that with regards to several issues related to the HCJ, over 65% of the Israeli public share similar views, which are considered 'consensus patterns.' On other issues regarding the Court, the public is divided, creating a 'dissent' pattern.

[54] Barzilai Gad, Effi Yaar, Zeev Segal, **'The Supreme Court in the Public Eye'** (Hebrew), Papyrus publishing, 1994. pages 113-120

For example, 85.5% of the Israeli public in 1994, perceived the HCJ to be politically neutral (neither right-wing left-wing oriented) This is a classic consensus pattern – it means that in political petitions, the HCJ enjoys wide public support, enabling it to rule almost without fear of public recriminations (the same goes for the HCJ's perception as a democratic institution - 72% of the public agree; and its ability to defend civil rights, 79% agree, among other aspects).

However, in response to the question: *'to what extent do you support a Palestinian right to petition the HCJ'* – a clear cut dissent pattern appears: 54.4 per cent of the public supports this right, and 44.6 percent oppose it. This dissent trend signifies great constraints for the HCJ, as it casts into doubt the very basis of the discussion in counter terror measures, regardless of specific cases. This trend, coupled with Chief Justice Barak's approach that public opinion is an integral part of the judicial process, narrows the HCJ's ability to produce counter consensus rulings, which constrains its ability to facilitate the probable scope.

The judicial theory level:

HCJ's normative credo: a social engineer concerning the territories

Presumably, Barzilai, Ya'ar and Yochtman's research should conclude that the Court has only limited space for 'avant-garde' rulings on behalf of the HCJ (in the sense of paving the way for the consolidation of civil rights at the expense of CT efficacy). And yet the contrary is true. From the writings of Chief Justice Barak, one learns that the court is well-aware that it does not rule in a vacuum, and therefore, its normative judicial approach must incorporate circumstances and limitations.

The main judicial tool enabling the HCJ to maintain its resilience in light of powerful dissent trends is the '***Dynamic Objective Interpretation***'. The essence of this interpretive approach is that it exceeds the limits of the 'subjective interpretation', which adheres to the constraints of reality and the original intent of the legislator.

The Objective interpretation relies on the probable action of the 'reasonable person in a normative atmosphere'. This approach has led to several precedents of avant-garde rulings, repealing government laws and restraining counter terror

activities[55]. For that, the court was subject to ongoing criticism, mainly on behalf of the legislative bodies.

Chief Justice Barak explained the concept of dynamic objective interpretation as follows: "Law is, as Judge Zussman put it, 'a living entity in its own environment'. As such, it blends into its normative environment, affecting it and affected by it. This normative environment includes basic accepted principles, core objectives and moral criteria… *Hence, we interpret the law based on the perception that it was created to realize human rights, uphold the rule of law and the separation of powers*, [and that it is] aimed at promising justice and protecting the existence and well-being of the state."[56]

A closer look into the definition Barak proposes for the 'objective interpretation' reveals that it is comprised of sets of contradictory principles (protecting the existence of the state; realizing human rights). This enables the judge to locate the case on a continuum, rather than viewing it within a dichotomy between the two concepts, forcing him to decide which of the principles will prevail in his judgment.

Does the judge include public opinion as a parameter in his interpretation? Justice Barak addressed this subject in his latest book: "I am frequently asked, 'is a judge 'truly' objective'? [..] Judges think they work objectively, though in action they demonstrate their subjective preferences [..] in order to fulfill their role, while acting with judicial discretion, ***the judge must consider also the social consensus***. The judge must consider the values and aspire to incorporate them into the balances that are aligned with the consensus… generally speaking, the judge should not be the bearer of new social ideals".[57]

To summarize, the HCJ clearly works within a normative rationale, far exceeding the Montesquieu school of jurisprudence. This normative foundation of the judicial discretion served as basis for its counter terror related rulings.

[55] Kerzmer, David, **The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories**, University of New York Press.
Shelef, Leon, The limits of Judicial Activism is the Green Line, Iunei Mishpat, 17, 757-809 (Hebrew)
HCJ 4267/92 AMITI Citizens for Proper Administration v. Prime Minister of Israel
HCJ 212/03 Herut the National Movement v. Chairman of the Central Elections Committee
HCJ 680/88 Schnitzer v. Chief Military Censor

[56] Barak, Aharon, Judicial Discretion (Hebrew), Papyrus, 1987. page 211.

[57] Ibid. (see note 40), page 47.

The *de-facto* judicial discourse in actual cases went even further than the normative perception, far exceeding the formalistic view. The court has reaffirmed its main interpretive analytical construct: "the reasonability and proportion tests", which is derived from the principles underlining the objective interpretation. This test is called upon repeatedly, to review the actions of government officials and proxies.

The reasonability and proportion tests were widely turned to in the petitions of 2000-2004, and one can find it in almost every case, notwithstanding the final ruling. In the opinion of the court in the Ajouri Case, Chief Justice Barak discusses the environmental circumstances leading to the court's opinion, ascertaining the grounds on which he later bases his ruling:

> "Israel's fighting is complex. The Palestinian side is using, among other techniques, 'human guided bombs'. These suicide bombers are deployed everywhere you find Israeli citizens, sowing the seeds of killing and bloodshed in cities and in settlements.
>
> Indeed, the forces fighting Israel are terrorists; they are not part of a regular army; they hide within the civilian population, including sacred places, and do not wear uniforms; A new reality, a harsh one, is facing the State of Israel, fighting for the security of itself and its citizens [..] In this battle, the State of Israel – as part of its right for self defense – takes unique counter terror measures ('Defensive Shield' and 'Resolved Path'), which are aimed at suppressing the terror infrastructure and preventing the recurrence of suicide bombings[..] these measures proved partial and insufficient.
>
> The Ministerial Committee for National Security has authorized the use of various other steps aimed at preventing further terror and deterring potential bombers. The Government's legal advisor has stated the boundaries of such activity"…[58]

The comprehensive discussion presented above, which aims to put the judicial discourse within proper context, is merely one example of the discourse characterizing the HCJ's rulings on counter terror petitions, reflecting its concise deliberation of the circumstances at hand and the tensions built in the counter terror

[58] Ibid. See note 51, page 47. (Hebrew).

warfare. One may find similar logic in the cases of Mar'ab[59], Beit Surik[60] (security fence), Kinana[61] (family reunification), Physicians for Human Rights[62] (house demolition, humanitarian aid, Rafah), Faraj[63] (house demolition), Halal Yassin[64] (administrative arrest) and more. All these rulings reflect the court's deliberation on its way to facilitating the 'probable scope' for the state.

To conclude, this chapter dealt with ***the specific tools through which the HCJ deals with the complex challenge*** of facilitating the evolution of realities easing the 'democratic dilemma' – a dilemma that gradually intensifies while facing dissent trends and international pressure.

[59] Ibid. See note 52.
[60] Ibid. See note 53.
[61] **HCJ 6788/02**, Muhammad Mahmoud Kinana V. IDF commander of the west bank.
[62] **HCJ 4764/04**, Doctors for Human Rights V. IDF commander of Gaza Strip.
[63] **HCJ 893/04** Tayeb Ali Faraj et al. V. IDF commander of the West Bank.
[64] **HCJ 5591/02** Hillal Yassin V. Colonel Yoni Ben David.

Chapter 5:

Where did the Balance Go?

Revisiting the Quantitative Data

When confronted with the court's rulings (a mere 2 percent of the petitions accepted) one may question the validity of the argument that the HCJ presents the decision-makers with a 'balance formula' defining the probable scope. How can a court which rules consistently for the respondent still enjoy the public legitimacy which is imperative for its work as a driving force of social values? Moreover, how can the court maintain its legitimacy in the international judicial community, facing such un-balanced rulings[65]?

In order to produce such formulas, the HCJ must be considered a neutral institution by both the Israeli as well as the Palestinian public. That is to say, that both sides must see it as a body seeking to reduce state violence to the bare minimum required for efficient counter terror efforts on the one hand, while seeking to reduce human rights violations on the other. In light of the reality that 98% of the pleas are overruled, how can the court maintain such images?

A deeper analysis of the quantitative data that looks beyond the formal division of acceptance or rejection reveals a key element, which eludes the formalistic discourse: ***'the hidden arrangement'***.

In a large number of the undecided cases (i.e removed and open petitions) both sides have agreed upon a solution, mainly because the state feared to continue the deliberation under the HCJ and risk a formal loss. The hidden arrangement enables the state to avoid formal loss, in which the court would rule against it (with all the potential implications as discussed under dissent trends) and the petitioner could thereby obtain judicial aid from the court. Such an outcome could conceivably prevent the state from being able to use an intrusive, but possibly effective, counter terror technique.

Diagrams 5-8 illustrate the picture, according to which 68 of the 80 informally decided cases ended in a 'hidden arrangement'. This completely changes the HCJ's ability to facilitate the probable scope.

[65] Extended research on the power of the international judicial community and the Supreme Court's international legitimacy effect is found in **Shamir** (Ibid, see note 38; **Slaughter** (Ibid, see note 71); Koh, Harold Hongju, *International Law as Par of Our Law,* **American Journal of International Law** Vol. 98, No. 1 (Jan. 2004) 43-57;

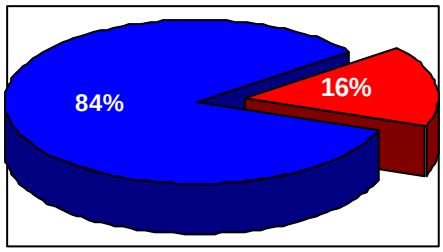
In the year 2002, out of 78 petitions presented before the Court, 25 petitions were removed and left open (32%). Out of these 25, four (16%) were closed without an arrangement and the remaining 21 (84%) concluded in hidden arrangement.

In the year 2003, out of 102 petitions presented before the Court, 26 petitions were removed and left open (25%). Out of these 26, two (8%) were cancelled without an arrangement and the remaining 24 (92%) concluded in hidden arrangement.

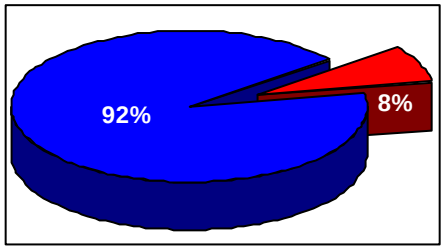
In the year 2004, out of 53 petitions presented before the Court, 28 petitions were removed and left open (53%). Out of these 28, five (18%) were cancelled without an arrangements and the remaining 23 (82%) concluded in hidden arrangement.

This approach reveals that alongside the objective interpretation, which reflects a direct approach, ***there is an informal route***. In this route, the court manages to 'escape' the counter-consensus predicament, but succeeds in forcing an arrangement which satisfies all sides and consolidates the 'rules of the counter terror game' as a result of the probable scope.

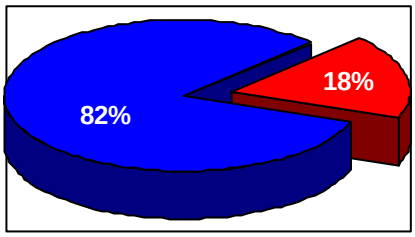
Diagrams 5-8: Annual ratio of informally decided petitions: 'hidden arrangement'/none



2002

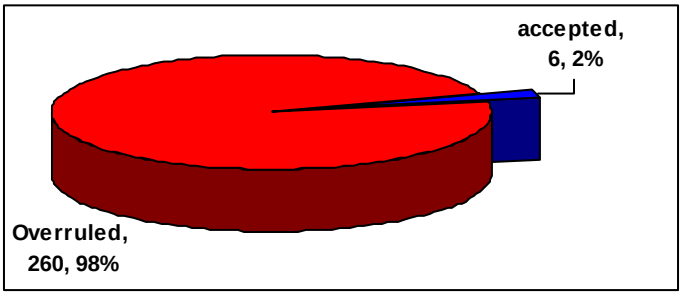


2003



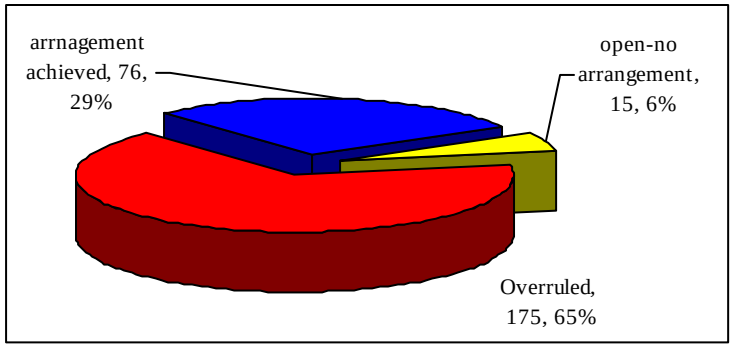
2004

Diagram 9: 'Formal Division' of the HCJ Ruling



The integrated ruling picture represents a more resilient HCJ, which did not accept 98% of the petitions presented to it, yet certainly did not overrule 98%. A formal examination illustrates that 175 of the petitions were overruled (66%), 51 removed (19%), 34 remained open (13%) and a mere six (2%) were accepted.

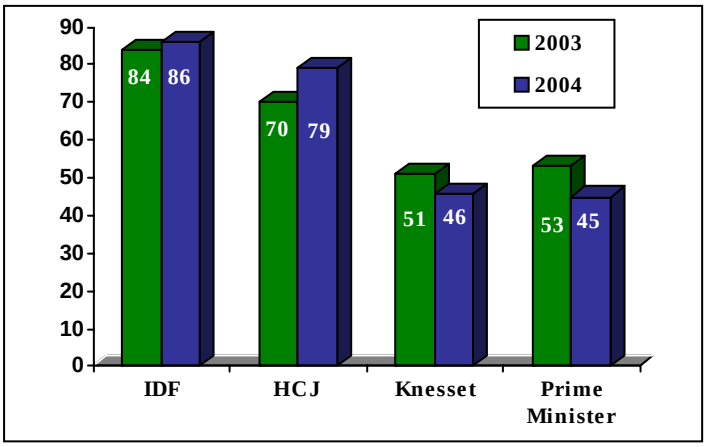
Diagram 10: 'De Facto' HCJ Rulings



The actual ratio (de-facto) is a lot more resilient: 175 overruled, 76 ended in an arrangement agreed by sides (either by accepting or by 'hidden arrangement') and 15 were left unresolved. The 'big picture' is one of a balanced HCJ, which supported the Palestinian plea for justice in 30% of the petitions, and in 65% supports the state's argument.

This picture provides a strong factual basis in support of the argument made here, that the HCJ, through the dynamic process of plea discourse, facilitates a clear probable scope, limiting state counter terror efforts. Different balance formulas were presented over the past four years relying on this effort: The security fence formula (Beit Surik[66]), the 'Neighbor procedure' formula[67], Mar'ab arrest formula[68], the Amer house demolition formula[69] and more.

Diagram 11: Public Institutional Support



One last quantitative aspect to be addressed is the ***institutional public support of the HCJ***. Claims of anti-activism rely on the fear that judicial activism and the 'hegemony of litigation' risks causing an erosion of public support for the court. And yet, the data reveals a completely different picture. It seems that despite dissent trends in the public that indicate increasing unwillingness to accept rulings on counter terror matters, the HCJ maintains its high public reputation among the Israeli public as the second most credible institution after the IDF.

Throughout the years, the IDF and the HCJ have maintained their status as the leading institutions in terms of public support[70]. The HCJ maintained a 20% support gap in its

[66] Ibid. See note 53.
[67] **HCJ 3799/02**, Addallah V. Yizhak Eitan.
[68] Ibid. See note 53.
[69] **HCJ 6696/02**, Nahil Aadu Sahel Amer V. IDF commander in the West Bank.

favor, compared with the Parliament and the Prime Minister. At the end of 2004, in spite of all the challenges discussed above, the HCJ was not deterred from reviewing the counter terror efforts, and it maintained a high public support of 29 per cent. this is yet another reflection of the potential the Court holds in abating the 'Democratic Dilemma' of CT warfare

[70] Arian, Asher, Nachmias David, Navot Doron, Shani Daniel, **Israeli Democracy: a Report for 2003, the 'Democracy Index Project**, the Israeli Democracy Institute. Pages 185-187, 2004 data was taken from the current edition.

Chapter 6:

Conclusions, recommendations

Groundwork for the facilitation of the 'probable scope'

The discussion here has addressed the potential of the High Court for facilitating counter terror activities in an open, democratic society. The Court's facilitation of the '***Probable Scope***' serves to elucidate the legitimate responses to terror, thus abating the ability of terrorists to sow the seeds of doubt in democratic society, and easing the 'democratic dilemma' faced by decision-makers.

The quantitative research, as well as the judicial content analysis, proves that While maintaining public trust on both the Palestinian and the Israeli side (through a balanced ruling history) the court also served as a non-violent mechanism for Palestinians to seek justice, thus ameliorating feelings of despair, which are manipulated by the terror organizations for their own use.

Hence, several conditions for this facilitation are to be concluded:

1. **Standing rights for the terror-producing population:** in order to ascertain the scope of probable CT actions, the court must allow the terror-producing population a channel through which they can forward claims for justice and ease pressure. Nullifying this standing right enables the terror organizations to advance their claim that 'terror is the only means to obtain justice.
2. **Public support for the court:** Judicial review of government decisions is always a complex issue, originating in the basic elements of the democratic political 'bargaining power' game. These tensions intensify when it comes to the review of counter terror measures, which are often characterized by lack of public consensus. In order for the courts to define the boundaries of legitimate counter terror efforts in the form of judicial legislation, the court must enjoy broad and solid (in this case, 70%) public support.
3. **Broad interpretive tools employed by the court:** Indeed, international human rights law, along with international human rights conventions (Geneva, Hague) offers the courts quite an array of interpretive tools, though the context of counter terror legislation is yet to have been accommodated. This situation requires state courts to produce a judicial approach that is flexible and resilient enough to exceed the limits of formal civil rights protection, which might

endanger the efficacy of counter terror efforts. The court must be willing to review counter terror efforts of the state from a broad, context-sensitive, point of view, that sometimes allows violations on human rights for the sake of the greater cause.

4. **Court willingness:** The price the courts may pay in the form of institutional powers is quite heavy. Therefore, one cannot take for granted the court's willingness to discuss government activities in the field of counter terror. The Israeli case is an example of a willing court, which found various ways to tackle these challenges, whether in a formal or informal way, creating acceptable rules for both parties. It should be said, however, that the court has refrained from addressing questions such as the 'targeted killing' policy, although this issue has been presented to it several times over the past four years.

To conclude, I would like to point out to the theory of ***'International Judicial Dialogues'*** forwarded by Anne Marie Slaughter[71]. This trend presents the 'diffusion' of legal theories through an ongoing global legal discourse. Within this process, judges tend to cite their peers from other countries and legal systems, in their internal decisions. This mechanism also creates international judicial pressure on internal courts.

The diffusion of international legal values through comparative law and international development of human rights law, is reflected in many cases worldwide and reflects a growing trend of an international judicial community.

This teaches us that the process of global counter terror moderation must not stop at the level of formal law and human rights law. Courts, worldwide, should turn to their peers, such as the HCJ, and try to learn their decisions and formulas with regards to the judicial review of counter terror measures. In the same manner that September 11th led to a global understanding of a need for legislation changes, a learning process of the judicial review methods should follow as well.

[71] Slaughter, Anne Marie, **A New World Order**, Princeton University Press, 2004;
Slaughter, Anne Marie, *A Typology of Transjudicial Communication*, **University of Richmond Law Review**, Vol. 99, (1994).

The Patriot Act, if not accompanied by the right of prisoners to stand before the US courts, will not accomplish its goals and objectives, and its public support will dwindle, due to the tactics it allows the government to employ.

Furthermore, an international community that enjoys comparative standards on human rights, legislation, intelligence and military relations, must strive for an increasingly unified judicial approach, minimizing the chances of 'judicial safe havens' for terror, and increasing the efficacy of global counter terror efforts, as well as the concern for human rights. *A network threat requires a network solution, and within the network, alongside proper legislation and military strength lays* also the Supreme Court and judicial discretion.