

# Suicidal Terror, Radical Evil, and the Distortion of Politics and Law

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*One of the main characteristics of this phase of the Israeli-Palestinian conflict is the resort by Palestinian groups to suicidal terror. This paper focuses on the unique nature of suicidal terror, since, I believe, it is this kind of terror that presents the most immanent threat to the foundations of politics and law in the free world. The article begins with a phenomenological exploration of the effect of suicidal terror on politics in Israel, inspired by the work of Hannah Arendt. It presents the various manifestations of the suicidal terror as a new Paradigm of Violence. This new paradigm poses a great threat on politics: as the terrorists waive their effort to stay alive, deterrence becomes useless; the Israeli politics, in response, redraws the boundaries of the collective according to demographic lines; the feelings of helplessness reduces politics to personal tragedies giving up on normative arguments and long term policies. Compassion replaces persuasion. The attempt of an organized army to respond effectively to suicidal terror is ridden by the dilemma of effectiveness-legitimacy, that is, the more the response is effective, the more difficult it becomes to retain the distinction between the actions of the army and the actions of the terrorist. Moreover, during the attempt to bring the actions of the army to the review of the court, the legal system itself is infected by the same dilemma. The*

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*article examines the response of the Israeli Supreme Court to several petitions that questioned the legality of the means employed by the IDF in its fight against terror. These cases provide a unique opportunity to examine the way in which terror infiltrates into the very legal system that is called upon to respond to it, mainly by changing the legal language. The question that guides my discussion is what effect terror exerts on politics and law, and can law provide a way to resist the destructive influence of terror on the political system.*

## INTRODUCTION

We live in dark times. For the last three years, Israelis and Palestinians have been engaged in a bloody and murderous conflict that seems to undermine any possibility for a political solution of the kind sought by the Oslo agreements. One of the main characteristics of this phase of the struggle is the resort by Palestinian groups to "suicidal terror." Terror as a means of political struggle is not new to this area of the world, and it has been the constant companion of the conflict from its inception. In this paper, it is not my intention to enter into the lengthy debate over the legitimacy of different means of resistance to occupation and the difference between a war of liberation and terrorist attacks.<sup>1</sup> Rather, I will focus on the unique nature of the latest wave of terror attacks known as suicidal terror, since, I believe, it is this kind of terror that presents the most immanent threat to the foundations of politics and law in the free world as we have come to know them.

I will conduct this phenomenological investigation in the spirit of Hannah Arendt's work. Arendt, who wrote about the French and American revolutions, about totalitarianism in the wake of the Second World War, and about the banality of evil in reporting on the Eichmann trial in Jerusalem in 1961, has taught us that the political sphere is ever-changing and, in order to understand it, one must be willing to explore its newness, without rushing to misleading analogies. The tendency to paint the new as something familiar is rooted in our fear of the new as an unknown, and in our need to feel secure and in control of our surroundings. However, this tendency might blind us from noticing the new and, consequently, prevent us from

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<sup>1</sup> For elaboration, see Shanon E. French, *Murderers, Not Warriors: The Moral Distinction Between Terrorists and Legitimate Fighters in Asymmetric Conflicts*, in *Terrorism and International Justice* 31, 31-46 (James P. Sterba ed., 2003); *see also* Amnesty International, *Without Distinction — Attacks on Civilians by Palestinian Armed Groups* (July 2002), available at <http://www.amnesty.org>.

designing institutional and legal responses adequate to deal with it. Such was the danger following World War II, when, in the Nuremberg trials of Nazi war criminals, jurists were too eager to apply known legal norms and precedents to Nazi crimes and thus overlooked the most novel (and horrifying) aspect of these crimes: their nature as crimes against humanity. In the introduction to the *Origins of Totalitarianism*, Arendt explains,

Comprehension ... does not mean denying the outrageous, deducing the unprecedented from precedents, or explaining phenomena by such analogies and generalities that the impact of reality and the shock of experience are no longer felt. It means, rather, examining and bearing consciously the burden that events have placed upon us — neither denying their existence nor submitting meekly to their weight as though everything that in fact happened could not have happened otherwise. Comprehension, in short, means the unpremeditated, attentive facing up to, and resisting of, reality — whatever it may be or might have been.<sup>2</sup>

I believe that today the world is facing a similar crossroads in its fight against suicidal terror. Many of the international laws of war that have been developed over the years are governed by state-centric terms that presuppose a state-actor and the state's monopoly over the legitimate use of the means of violence that assures the effectivity of different means of deterrence. This situation has changed globally since September 11th, 2001.<sup>3</sup> The Israeli-Palestinian conflict, too, has undergone important transformations since October 2000, with the Islamic element gaining prominence (movements such as the *Hammas* and *Islamic Jihad* entering the cycle of terror) and with the introduction of new means of struggle: suicidal terror. Unlike international terror that confronts us with a new paradigm of violence (decentralized violence, weapons of mass destruction in the hands of non-state actors, the lack of defined actors and contrasted territory), the Palestinian-Israeli conflict represents a hybrid case, combining some of the traditional characteristics of military conflict (a national liberation struggle over a certain territory conducted by organs of a "state" in embryo) and some very new elements (suicidal terror). Recently, Jurgen Habermas suggested that we see the

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2 Hannah Arendt, *Preface to Part One: Antisemitism*, in *The Origins of Totalitarianism* 14 (1951).

3 Seyla Benhabib, *Political Geographies in a Global World: Arendtian Reflections*, 69 Soc. Res. 539 (2002). For a critique of the "statist" response of the U.S. to the attack, see Daniele Archibugi & Iris Marion Young, *Envisioning a Global Rule of Law*, in *Terrorism and International Justice*, *supra* note 1, at 158.

novelty in the post September 11 terror not in its being decentralized (since this is common to guerilla war in general) but rather according to its lack of an affirmative political goal.<sup>4</sup> I do not agree that a clear distinction can be made between the old paradigm of terror (Palestinian) and the new paradigm of terror (*Al-Qaida*). Habermas explains that the latter lacks a 'political' cause since it does not try to affirm a new political order but only to destabilize and distract an existing political order. I argue, in contrast, that the new means of Palestinian terror — suicidal terror — undermines the possibility of conducting a political struggle, since it undermines the very foundations of politics. In other words, the "means-ends" distinction collapses under the weight of the means chosen (suicidal terror), and hence the very nature of Palestinian terror is changed and begins to resemble international terror. This paper will analyze the phenomenon of suicidal terror since it is this aspect of the conflict that presents new dangers and requires a rethinking of our assumptions about politics and law.

## I. MANIFESTATIONS OF THE NEW PARADIGM OF VIOLENCE

### A. The Body Is the Message

People strapping explosives to themselves, targeting civilians, and dying during the attack — is this something radically new? One can imagine many ways of inflicting terror. In the past, this was achieved rather effectively with bombs planted by terrorists. Today, terrorists insist on involving their own deaths in the attacks. This cannot be wholly explained in terms of utility since the same objective can sometimes be accomplished by more "traditional" means of violence. Rather, in such attacks, *the body is the message*. Suicidal terror requires that the perpetrator turn his or her body into the weapon of death.

### B. Natality and Mortality

During a search of a Palestinian home, Israeli soldiers found a photograph of a baby dressed up as a suicide bomber. The *Jerusalem Post* captioned the photograph "Born to Kill." Apart from the sensational effect of this picture, the caption implies a reversal in the categories of birth and death,

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4 Giovanna Borradori, Jacques Derrida, Jurgen Habermas, *Philosophy in a Time of Terror: Dialogues with Jurgen Habermas and Jacques Derrida* 29 (2003).

the beginning of life touching its end, natality and mortality mixed together. This reversal is also evident in the role of women in recent suicidal attacks. Women join the ranks of suicide bombers and are thereby iconized as national symbols of heroism and sacrifice.<sup>5</sup> For example, a woman disguised the explosives strapped to her belly by pretending to be pregnant.<sup>6</sup> The terror engendered by this act was captured in the poem *Shahida*, written by Israeli poet Agi Mishol:

You are just twenty years old  
 And your first pregnancy is a bomb  
 Underneath your wide dress you are pregnant with explosives,  
 Splinters of metal, and thus you pass by in the market  
 Ticking amongst the people, andalib ktataka ...<sup>7</sup>

The collapse of natality and mortality as distinct categories can also be seen in the way these acts of violence are memorialized. The suicide attack reverses the traditional order between words and deeds, for the words of the suicide bomber are videotaped before his or her death and are broadcasted after death has occurred. These taped words are an attempt to take over the traditional role of the poet and the historian (the spectators) who give meaning to the actions of the hero only *after* death has occurred, by recounting them and showing their significance for the community. By contrast, the videotaped wills of suicide bombers try to fix the meaning of their death in advance. Interestingly, the goal of the taped suicide is not to

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- 5 Thus, for example, on October 4, 2003, 29 year-old Palestinian woman exploded in a Haifa restaurant, killing twenty and injuring dozens. The radical group Islamic Jihad claimed responsibility for the attack in statements issued to television networks identifying the bomber as Hanadi Tayseer Jaradat, from Jenin who recently graduated from law school in Jordan. The statement said Jaradat watched as Israeli troops shot and killed her brother, Salah, and a cousin, both Islamic Jihad supporters, at the family home in June. Associates of Jaradat's said that since the killings, she had become increasingly religious. For elaboration see Vered Levi-Barzilai "A Ticking Bomb" *Musaf Haaretz* 17.10.03. For a discussion of the phenomenon of women suicide bombers see, Dorit Naaman, *In The Name of the Nation: Images of Palestinian and Israeli Women Fighters, in Killing Women* (Susan Lord & Annette Burfoot eds., forthcoming 2004).
- 6 Note that this use of women's gender specific attributes to conceal weapons is not unique to Palestinian fighters. One of the fictitious mythic icons of the Jewish woman fighter prior to the 1948 War of Independence is that of the *Palmach* girl hiding grenades in her bra. Naaman, *supra* note 5.
- 7 Agi Mishol, Selection and New Poems 284 (2003) (Hebrew) (author's translation).

distinguish the individual story, but to cast it as just one of many similar others, whose power resides in its mass quantity.

What is the meaning of this inversion? The two poles of natality and mortality have long been at the center of philosophical inquiry and were given special attention by Martin Heidegger and Hannah Arendt. Heidegger's philosophy is anchored in the experience of "Being toward death," of living one's life authentically by anticipating one's mortality.<sup>8</sup> For Arendt, by contrast, human beings are first and foremost creatures of natality, that is, creatures capable of new beginnings as manifested in the experience of giving birth and of creating new artifacts. Human beings often turn to political action as a means of overcoming their earthly death, seeking to achieve immortality through great deeds in the political realm.<sup>9</sup> These two philosophical approaches to the meaning of human existence seem to have found an unexpected meeting point in the suicide bomber attack.

### C. The Hero and the Suicide Bomber

One of the central ways throughout human history to achieve immortality has been by acts of heroism on the battlefield. In the great religions, sacrificing one's life on the altar of a sacred cause is considered to be a heroic act, worthy of memorializing and imitating. Does suicidal terror fit this category of heroism? Suicide bombers seek to gain immortality with the single act of sacrificing their lives for a collective cause. This single act serves as their entrance card into the political sphere, into the web of stories by which a community memorializes its heroes. Philosophers and writers throughout the ages have glorified the heroism of the one who is willing to sacrifice his or her life for a just cause. The Palestinian and Islamic media have depicted the suicide bombers in similar terms as *shahids* — holy men and women who sacrifice their lives for the good of the community.

The immortality glorified by philosophers and poets was always the result of a life story that was meaningful to the given community. This quality of sacrifice was captured in the story of Achilles, as pointed out by Arendt:

[T]he essence of who somebody is — can come into being only when life departs, leaving behind nothing but a story. Therefore whoever consciously aims at being "essential," at leaving behind a story and an identity which will win "immortal fame," must not only risk his

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8 Martin Heidegger, *Being and Time* (Joan Stambaugh trans., 1996) (1953).

9 Hannah Arendt, *The Human Condition* (1959).

life but expressly choose, as Achilles did, a short life and premature death.<sup>10</sup>

Can we not say that the suicide bomber, too, like Achilles, chooses the "short life and premature death"? Does this choice fulfill the ideal of summing up all of one's life in a single deed, or does he or she in fact betray this ideal and in what ways?

The difference between suicide bombers and the self-sacrificing hero becomes apparent when we consider the relation between the categories of natality and mortality. One important distinction between the hero Achilles represents, and the suicide bomber lies in the fact that the act of suicide by the suicide bomber is not the peak of a life of heroic acts. Rather, it collapses the beginning and the ending of life into one indistinguishable point. For the suicide bomber death is both the beginning and the end, there is no life story or words preceding the death that carry significance for the community. Put differently, the suicide bomber fulfills his mission in life by returning to the point of beginning — it is a cyclical death, not a linear life story culminating in heroic death. As a result, the power of this death is connected to its anonymity, not to the individual story of the actor. We see that the very means of suicidal bombing changes the meaning of the act, since to create the terror effect, the individual actor has to be deprived of a unique life story and be presented as one of a mass of suicide bombers.

#### **D. The Soldier and the Suicide Bomber**

The suicide-bomber's death may be different from the deaths of historic and mythological heroes, but it is more difficult to distinguish it from the acts of heroism of soldiers in the battlefields of the Twentieth century.<sup>11</sup> Here we must point to another factor. Unlike the soldier, who is willing to fight while assuming the risk of dying, the suicide bomber knows that his or her death is certain, it is a condition of the success of the attack. In other words, the

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<sup>10</sup> *Id.* at 193.

<sup>11</sup> See, for example, a speech given by Prime Minister P.S. Keating on November 11, 1993, at the service for the unknown Australian soldier, *available at* <http://members.Ozemail.com.au>:

We do not know this Australian's name and we never will. We do not know his rank or his battalion. We do not know where he was born, or precisely how and when he died ... . We know that he was one of the 45,000 Australians who died on the Western Front. One of the 416,000 Australians who volunteered for service in the First World War ...

element of risk is almost completely obliterated. If there is a 'risk' it is that the suicide-bomber will remain alive.

Suicide-bombing is a combination of a violent attack and suicide. Let us take these two components apart for a moment. Trying to account for the immorality of suicide, Immanuel Kant took up to investigate its different manifestations.<sup>12</sup> According to Kant the fragility of the human body, its destructibility is what gives a human being the ultimate power over his life — the power to take his life. But when using this power against one's own body in an act of suicide — one is transforming oneself into something less than human. This transformation, from a human being into a thing, Kant argues, is also most dangerous to a human society because "being ready to sacrifice his life at any and every time rather than be captured, he could perpetrate every conceivable crime and vice."<sup>13</sup>

These old observations shed more light on the current phenomenon of suicide bombers. We are confronted with a 'human bomb', a person who turns his own body into a bomb. The suicide bomber is the ultimate incarnation of human beings as instruments, since the act of rendering oneself a tool is an act that leaves nothing beyond it and nothing escapes it, since it is the act that defines his life and death. It is also this reduction of human beings into tools of death that creates the greatest danger, not only to the society under attack, but also to the society that breeds these attacks. The late public critic Edward Said raised this point saying that suicide bombing have "disfigured and debased the Palestinian struggle. All liberation movements in history have affirmed that their struggle is about life not about death. Why should ours be an exception?"<sup>14</sup>

The suicide bomber takes his or her life as an act of sacrifice of one's life for what he or she sees as the good of the community. How is this different from the soldier who knows his fate is to die, and nevertheless continues to fight to the end in order to save the others? Kant explains: "A man who shortens his life by intemperance is guilty of imprudence and indirectly of his own death; but his guilt is not direct; he did not intend to kill himself; his death was not premeditated ... what constitutes suicide is the intention to destroy oneself."<sup>15</sup> For the suicide bomber death is intended and this casts his death in questionable

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12 Immanuel Kant, *Lectures on Ethics* 147-57 (Louis Infield trans., White Beck ed., 1963) (1930).

13 *Id.* at 151.

14 Stated in May 2002, *cited in* Amnesty International, *Without Distinction — Attacks on Civilians by Palestinian Armed Groups* (Jul. 2002), *available at* <http://www.amnesty.org>.

15 Kant, *supra* note 12, at 150.



colors. The only exception in which Kant is willing to accept the morality of suicide is the example set by old Cato. Cato knew that the entire Roman nation relied upon him in their resistance to Caesar, but he found that he could not prevent himself from falling into Caesar's hands. He did not want to set a bad example, and he decided to commit suicide. Kant explains "He thought that if he could not go on living as Cato, he could not go on living at all" — this is why his death is considered virtuous, according to Kant, because he maintains his highest ideals and sacrifices his life for the better of his followers. Can old Cato be considered an example for the new terrorists?

We should first listen to the way the young terrorists explain their motivation for taking upon themselves the suicide attack. In an interview with three suicide bombers who were captured before committing the terrorist act, appears a rare and genuine effort to understand the young terrorist's motives and thoughts. The three were all residents of the Gaza Strip, between eighteen to twenty years old. *M*, one of the three, described how his cousin easily convinced him within days to commit the horrifying act.

Q: "You're going towards death ... so easily?"

*M*: "Right, I'm going to die. And is there something better than death? No. ... Life is a headache ... the sights we see on TV... something repulsive makes us lose the will to live. If I had the opportunity to kill myself in prison, I would have done so."

Q: "Did the promise of going to Heaven ease your choice?"

*M*: "Of course, Heaven is the first thing, but the pictures on TV are what influenced me to make such a decision."

*A.*, a resident of a refugee camp, graduated high school and worked several times in Israel. He started praying five years ago; his family is traditional "like everyone else" and not very religious. A month before trying to commit the suicide attack, he looked for the Islamic Jihad branch in his region, to volunteer for the mission. He was rejected time and time again, until one day, when he came straight from work, he was asked to do it right away. *A* said yes, took a shower, prepared himself, and returned for his mission, without saying goodbye to anyone.

Q: "Why did you want to commit an 'Estash'had act'?"

*A*: "The truth is that the reason is ... a religious motive. And on the other hand, a national motive. The death, which is now everywhere, instead of coming to me, I wanted to go to him, and to Heaven."<sup>16</sup>

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16 Amira Hess, *Flying to Heaven*, Ha'aretz, Apr. 4, 2003, at 26-32 (Hebrew) (author's translation).

These interviews reveal that the suicide bombers are no longer concerned with their individual life. Rather, the culture of death and the desperate life conditions have made them devalue the value of life to such an extent that suicide does not look like a sacrifice of something important any more. Thus, the erasure of the individuality of the suicide bomber becomes the condition for the success of this kind of terror. Moreover, these people seek death not to protect the dignity of their lives, but rather because their lives lost all value to them. This is the exact opposite of the example set by Old Cato. Although their act appear as an act of taking responsibility for their community, in fact, suicidal terror provides them an 'easy way out' of dealing with the responsibilities of life.

The combination of an intended death and the use of one's death as means of destruction is the basis for condemning the morality of the act of the suicide bomber, and for distinguishing it from what was hailed in the past as the heroism of soldiers. This reversal is threatening to humanity. It masquerades as something familiar — the hero sacrificing his life for a collective goal, a goal larger than his own well-being. It seems to produce new "Achilleses". But it can only be achieved by changing the meaning of political action itself, by erasing the unique life story of the actor and by turning him or her into a small part of a mass-production of suicide bombers. For terror to be effective, the unique life-story of each person involved, has to be ignored, and mortality has to replace natality, that is, to overcome the life instinct itself.

## II. THE EFFECTS ON POLITICS

### A. Counter-Rationality

The Cold War was a confrontation between military giants, a 'balance of terror' was created between states, thus maintaining some sort of stability. As the cold war ended, the sovereign state gradually lost its priority over other political actors. The Balance of terror is shaken today by transnational Islamic terrorism undertaken by non-state actors, which undermines the possibility of deterrence. This is still not the case with the Israeli-Palestinian conflict, since the struggle is a national struggle over specific land, and the actors can be located on this territory. However, here too, deterrence was weakened considerably by the turn to suicidal-terror. When the terrorists waive their effort to stay alive, deterrence becomes useless. Suicide attacks frustrate utilitarian calculations of deterrence and of cost-benefit. This is so, because one can no longer assume that the will to live is stronger than the

fear of death. A society that tries to fight back these attacks is caught up in this counter-rationality that defies both calculability, and the very foundation of 'common sense.' Suicidal terror collapses the distinction between means and ends, since the 'end' itself is deprived of that element of utilitarian calculation.

The culture of death that has developed in the occupied territories demonstrates how quickly the life-instinct can be reversed, and how widespread the phenomenon can become. It therefore poses the greatest challenge to any state that is trying to effectively respond to the threat while remaining within the constraints of democracy. As one observer phrased the dilemma: "To protect rights is to limit the state. But transnational terrorism is a product of state weakness, not of state strength. Protecting human rights against abusive *state* authority contributes very little to protecting our cities against threats emanating from nonstate actors."<sup>17</sup>

## **B. Politics as Demography**

Suicide bombing is aimed at destroying human life. However, unlike wars, the number of people injured and killed in the process does not pose an existential threat. The threat lies elsewhere, in the change from ordinary politics to what I call "body politics", that is, politics focused on demography.

Politics, as Michel Foucault explains, has used demography ever since the 18th century as a way of gaining control over the population. The turn to demography has changed the very definition of the sovereign, from the one who has the power to take life to the one who controls and disciplines life.<sup>18</sup> The revival of demographic arguments in Israel in the last few years is different, however, because instead of using demography to advance the objectives of the state, state policies gradually become controlled by the logic of demography.

Demography has long been part and parcel of political discourse in Israel. However, due to the basic commitment (stated in the 'Declaration of Independence') to make Israel a state based on the principle of equal citizenship, demography could not become a legitimate criteria of distinguishing between citizens on the basis of their ethnicity. Suicidal terror has contributed to the important changes we are witnessing today in this respect. Instead of treating people as citizens we become accustomed to

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17 Stephen Holmes, *Why International Justice Limp*s, 69 Soc. Res. 1055, 1056 (2002).

18 Michel Foucault, *The History of Sexuality* 133-60 (Robert Hurley trans. Penguin books 1<sup>st</sup> ed. 1988) (1978).

treating them in terms of their national/ethnic/religious affiliation — Jews and Arabs. Israeli politics lost faith in the concept of citizenship as defining the boundaries of the political community. It is true that also in the past Israel discriminated between people in their ability to enter the political community ('law of return' — applying only to Jews). But once admitted as a member, the laws could not discriminate a person according to his or her ethnicity.<sup>19</sup> The new law "family unification law" seems to adopt this distinction, since it is directed against those who want to join the political community through marriage. However, its effect is to discriminate Arab citizens who cannot extend citizenship rights to those whom they choose to marry.<sup>20</sup> Thus, Israel's commitment to the principle of equality (even if only *de-jure*) has given way to demographic considerations.

Demography controls the politics of the conflict. Every political solution to the current conflict has to be shown first as demographically stable. It has to guarantee that a substantial Jewish majority will be kept within the borders of Israel. However, achieving stability in this way is an illusion. Any demographic solution points to a sphere beyond the political realm, a sphere in which the determining factors are the rate of child birth, the rate of inter-group marriages etc. When a state abandons the concept of citizenship as the main criteria for deciding who belongs to the collective, it also loses its ability to decide these questions in political terms and is left with 'external' criteria such as biology, ethnicity and religion for setting its boundaries. Politicians have to delegate their power of decision-making to 'experts'. Counter to the widespread assumption that only 'demography' can guarantee stability, I would argue that stable political solutions can only be achieved

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19 Chaim Gans, *The Law of Return and Affirmative Action*, 19 Tel Aviv L. Rev. 69 (1995) (Hebrew); Na'ama Carmi, *Immigration and the Law of Return* (Tel Aviv University Press, 2003).

20 The new law, adopted on July 31, 2003, entitled: Nationality and Entry into Israel Law (Temporary Order) — 2003 (*Sefer Ha-hukim* 1901 2003 (6.8.03) 5448). The purpose of the new law is to prohibit Palestinians from the Occupied Territories from obtaining citizenship, permanent residency, and/or temporary residency status in Israel by marriage to an Israeli citizen ("family unification"). The new law solely targets "residents of the region," defined by the law as a person who lives in "Judea and Samaria and the Gaza Strip," but "is not registered in the region's Population Registry, excluding a resident of an Israeli community in the region." It will therefore primarily impact the rights of Palestinian citizens of Israel who marry Palestinians from the Occupied Territories. For elaboration, see <http://www.adalah.org/eng/index.php>. On August 3, 2003 *Adalah*, the Legal Center for Arab Minority Rights in Israel, submitted a petition to the Supreme Court of Israel challenging the constitutionality of the new law.

by abandoning 'body talk' (biology, nature etc.,) in favor of 'artificial' concepts, such as citizenship, because these are determined according to explicit political considerations. 'Nature' cannot provide neutral criteria for those advocating it. However, when the determining factor is biology the political considerations driving the decision are hidden from the public. The question is no longer subject to political discussion. The decision is taken from the hands of politicians only to be given to 'experts' who are not accountable.

Demography overcomes the political distinction between citizen and foreigner and replaces it with a more primordial distinction based on blood ties. This change has been manifest in the political treatment of Arab-Israelis in the last few years. From equal citizens (*de-jure*) they have gradually become perceived by many in Israel as 'suspect' people and as a 'security threat'.<sup>21</sup> And like a prophecy that tends to fulfill itself, some individuals from this group, gradually begin to collaborate with some terrorists.<sup>22</sup> This change seems to point to a deeper process that the Israeli society is undergoing, one of redrawing the boundaries of the political collective according to ethnic lines instead of political ones. Under this new constellation of the political field Arab-Israelis are perceived as a destabilizing force, instead of being perceived as a bridging force between the nations.

Demography reduces people into numbers. Their life stories, aspirations, convictions are of no relevance anymore. Their humanity becomes superfluous. From here a link can be noticed between the threat of suicide

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21 Recent Surveys taken for the *Knesset* (the Israeli Parliament) reveal that the majority of the Jewish population (63.3%) estimate that the Arab citizens of Israel will be more loyal to a Palestinian State, than to Israel. On the other hand, the Arab Interviewers were not as certain (25.4%) that they will be more loyal to a Palestinian state. This substantial gap between the two populations about the question of loyalty, as other findings in these surveys, indicate a high level of distrust among the Jewish population towards the Arab Citizens of Israel. See *The Identity and Loyalty of The Arabs, Citizens of Israel — An Analysis of Surveys for the Research and Information Center of the Knesset* 1/10/02, at 7.

22 Ada Ushpiz, *If You Go to Jenin — I'll Tell Mother*, Ha'aretz, May 24, 2002 (Hebrew) (The story of two young Palestinian women who were accused of collaborating with the terrorists). Aviv Lavie, *Despite the Betrayal*, Ha'aretz, Mar. 28, 2003 (Hebrew) (a meeting between a Jewish Israeli and a Palestinian Israeli who once had better relations before the cousin of the latter was charged with collaborating with Palestinian terrorists).

Note, however, a recent reporting on the drop in the involvement of Arab Israelis in terrorist activity in 2003 (in contrast to a steep rise in their involvement in the last four consecutive years.) Yair Etinger, *Shin Bet Finds a Sharp Drop in Israeli Arabs Involvement in Terrorism* Ha'aretz, Dec. 18, 2003 (English) at 4.

bombers and the turn to demography — both activities count human bodies, both ignore the person behind the body. Since the struggle is about demography and the collective body, the individual becomes superfluous, therefore, it makes sense that the body becomes the tool. Suicide bombers may be internalizing the logic of demography without having the ability to distance themselves from this outlook and sense their own individuality. Demography also highlights the futility of this whole phenomenon, since terror in itself does not, and cannot change the basic demographics.

### C. Politics Reduced to Personal Tragedies

The evening news stands for ‘the political’ in Israeli society. Since the beginning of the ‘second intifada’ the reporting of suicide attacks resemble each other to the point of indistinction — it is a type of reporting that does not try to elucidate new meanings — only endless repetition. Instead of deliberating policies we are drawn to watch human suffering, and talk about one personal tragedy after the other. In suffering we are all the same — this type of news-reports creates a false sense of solidarity because it is not based on arguments but on the common feeling of suffering and empathy.

This state in which ‘the personal becomes the political’<sup>23</sup> is connected to the feeling of helplessness experienced by citizens of the attacked society, and the loss of faith in the ability of organized state to provide the elementary security needed for normal living. This results in the *de-facto* privatization of the primary responsibility of the state to provide physical security to its citizens. Thus, citizens begin to build their own ‘separation walls’ and to patrol their own neighborhoods. However, this development is not accompanied by an added sense of civic potency. Rather, suicide terror also changes the self-understanding of citizens. The scenes of suicide bombings shown on TV manifest that the human body is extremely permeable and easy to penetrate, that it is delicate and can break into little pieces. We become conscious of our own physical fragility. The more we become bodies the less we think of ourselves as citizens, the more fragile we are, the less we have a sense of ourselves as potent political actors.

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23 This is a reference to the famous slogan of feminist activist, that is turned, ironically, into a terrifying reality without the sense of empowerment sought by feminists.

### III. ANALYSIS

So far I have pointed out the distinctive characteristics of suicidal terror and the political discourse that they engender. This type of politics, I argued, is frustrated by the counter-rationality of the terrorist acts, by the search for stable solutions sought for in demography, and by the focus on the private realm (personal tragedies, body-talk, etc.) that distracts the participants from dealing with sustained normative arguments or long term policies. How do these phenomena connect? In what sense suicidal terror immobilizes and distorts the political sphere? In the following section I suggest that the thread underlying the various manifestations is their destructive impact on the very foundations of the political field — the attack on language and distinctions.

#### A. Suffering and Politics

I believe that the different manifestations are all related to our difficulty of talking about pain and suffering in political and legal terms. Elaine Scarry in *The Body in Pain* explains the a-political nature of suffering and traces it back to its incommunicability, to the difficulty of explaining physical pain: "Physical pain does not simply resist language but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned".<sup>24</sup> Scarry demonstrates how the problem of pain is bound up with the problem of epistemology since pain enters into our lives as something that cannot be denied and yet cannot be confirmed: "To have pain is to have *certainty*; to hear about pain is to have *doubt*".<sup>25</sup> Shai Lavi opposes Scarry's characterization of the problem as one of epistemology and suggests describing it, instead, in terms of empathy: "We do not know the pain of others (say by learning it from their behavior) but primarily share with them their pain".<sup>26</sup> He demonstrates how law and medicine have long been able to treat pain inter-subjectively. Lavi argues that the problem emanates from the difference between the way in which pain is subjectively experienced by the individual, and the way law and medicine quantify it in objective terms. I would argue that although Scarry and Lavi locate the problem in different places, both demonstrate the a-political

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24 Elaine Scarry, *The Body in Pain* 4 (1987).

25 *Id.* at 13.

26 Shai Lavi, *The Problem of Pain and the Right to Die*, in *Death, Pain and the Law* 159 (2001).

nature of pain, either because of its un-communicability (Scarry) or because relating to it necessitates a turn to empathy as the mode of communicating (Lavi). I would add that talk about pain is anti-political and undermines a political solution in several ways. *First*, the expected response to pain is empathy. There is no place for arguments and disagreements.<sup>27</sup> *Second*, the report of pain and suffering has the tendency to focus on the level of the individual. The big picture is therefore fragmented into small episodes with which one can more easily empathize. *Third*, the talk about pain is often meant to obscure and not to expose, to heal rather than to analyze.

## B. Politics and Distinctions

Aristotle characterizes human beings as *Homo Politicus*, a speaking creature whose language is based on distinctions and on which our political existence depends for both maintaining and creating categories and meaning.<sup>28</sup> Arendt who was deeply influenced by Aristotle's writings has built her whole political philosophy on the importance of making distinctions between related concepts.<sup>29</sup> It is this conception of politics that is being challenged by suicidal terror.

On the simplest level, Terror is an attack on human distinctions, as captured by the title of Amnesty's report *Without Distinction*.<sup>30</sup> Terror disregards the distinctions between a civilian and a soldier, between a minor and an adult, between a tank and an ambulance, a house and a bunker, an army camp and a sacred place.<sup>31</sup> Rather, every distinction is (ab)used to further the terrorist's aim, knowing that the other side will try to respect the distinction. With such disregard, terror aims to undermine the most important distinction — between an army and a terrorist group — by forcing the army to fight back following its example.

In order to be effective, the army has to disregard distinctions created

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27 For a recent discussion of the place of compassion in relating to terror, see Martha C. Nussbaum, *Compassion and Terror*, in *Terrorism and International Justice*, *supra* note 1, at 229.

28 Aristotle, *Politics* 54 (Benjamin Jowett trans., New York: Random House, 1943). For elaboration, see Fred D. Miller Jr., *Nature, Justice, and Rights in Aristotle's Politics* 30-37 (1995).

29 Thus, for example, the difference between labor, work and action; between violence and power, etc.,

30 *Without Distinction: Attacks on Civilians by Palestinian Armed Groups* (July 2002).

31 See H.C. 2936/02, *Med. Doctors for Human Rights Ass'n v. IDF Commander in the West Bank*, 56(3) P.D. 3,4: "On several occasions weapons were transported by ambulances and terrorists took shelter in hospitals ...".



by the laws of war,<sup>32</sup> but by doing so, the army itself begins to resemble the terrorist. We have witnessed the turn to different questionable tactics by the Israeli army during the last Intifada. For example, the Israeli army is engaged in assassinations (referred to in Israel as "targeted killing") of suspected terrorists, that is, killing suspected individuals without trial. During these attacks civilians might also get killed or injured (the term used for this result is "collateral damage"). The army has also used civilians as "human shields" to protect the soldiers in their searches for wanted terrorists. All these activities were the result of looking for effective measures to fight terror. All of them were challenged in court, as we shall see below. The alarming impression is that there is no way to fight terror effectively without becoming, in some fundamental way, a terrorist yourself — that is, without blurring distinctions and disregarding important boundaries such as the protection of civilians in war.

War is supposed to be an extraordinary means — limited in time and space. Terror, in contrast, has no existence outside ordinary life since it is sure to lose in the battlefield. Therefore, its main aim is to make the exception of "emergency rule" into the norm.<sup>33</sup> But here lies the danger; that in fighting terror a society will have to change the laws that make it into a democratic society. We notice the confusion between the civil and military spheres in the way by which the Israeli army begins to play the role of police, justifying its resort to different tactics in terms of criminal law. For example, assassinations, or "targeted killings" are often justified as the least damaging means. Instead of attacking the whole surroundings of the terrorist, the army tailors its response so that only (or mostly) known individuals that are involved in terror will be killed.<sup>34</sup> In other words, the army no longer deals with 'risks' but with guilty people; it borrows the language of criminal law, the language of fault in order to justify the attack on known individuals.<sup>35</sup> This seems to be an improvement in contrast to collective action against unidentified people. However, the danger comes from the fact that the army uses the language of guilt borrowed from criminal law, without adopting the law of procedure and

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32 Respecting the distinction between Just and Unjust War has been one of the important developments since World War II, see Michael Walzer, *The Triumph of Just War Theory (and the Dangers of Success)*, 69 Soc. Res. 925 (2002).

33 David Dyzenhaus, *The Permanence of Temporary: Can Emergency Powers Be Normalized?*, in *The Security of Freedom* 21 (Ronald J. Daniels et al. eds., 2001).

34 Daniel Statman, *Targeted Killing*, 5 *Theoretical Inquiries L.* 179 (2004); Asa Kasher & Amos Yadlin, *A Moral Fight on Terror*, 2 *Bitachon Leumi* (June, 2003).

35 *But see* Kasher and Yadlin, *id.*, who argue that these assassinations should not be viewed as acts of revenge or punishment, but as ways to avoid and eliminate risks.

evidence that renders the use of violence — that is authorized by criminal law — legitimate. This is not really criminal law because in these killings the army commander plays the role of prosecutor judge and executioner. There is no criminal trial that precedes these assassinations.<sup>36</sup>

Terror resides on the boundary between war and crime, and thus the response demands that we blur the line between army and police. Since the rhetoric we use to justify the response is relying of concepts of criminal law (punishing the guilty and sparing the lives of the innocents), the norms of criminal law cannot but be infected in the process. The reversal, as we shall see in the following section, is also evident in the role of the court. The Israeli High Court of Justice (HCJ) is expected to endorse the logic of deterrence (collective punishment) and re-interpret the laws (both criminal law and the law of war) in its light. I argue that this blurring of the line between the role of the army (preventing risks) and the role of the court (ascertaining guilt) undermines the possibility of maintaining the rule of law under these conditions.

The two components of the new political discourse — body talk (or focus on human suffering) and the blurring of the line between army and police have a destructive effect on politics. The emphasis on human suffering contributes to the silencing of any normative political debate. The lack of clear distinction between the army and the police, between ‘fault’ and ‘risk’, also contributes to the undermining of politics since traditional boundaries of legitimate action gradually disappear. These ‘destructive elements’ are brought, in turn, to the doorstep of the court, which is asked by different political actors to intervene in order to restore the old distinctions. The court is expected to make difficult choices: between an empathic judgment and a principled one; between a legal discussion that upholds traditional distinctions in the name of the rule of law, and a legitimization talk that is

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<sup>36</sup> See the *Barguti* case, the only exception so far for detaining and bringing to criminal trial, DSCC 1158/02, State of Israel v. Barguti (pending) (27.3.03 date of most recent disposition of the case) *available at* [http://62.90.71.122/Prod01/ManamHTML.nsf/18A3C16C9485190442256D01006C41CB/\\$FILE/35F5EBE097F1D22442256CF600223294.html?OpenElement](http://62.90.71.122/Prod01/ManamHTML.nsf/18A3C16C9485190442256D01006C41CB/$FILE/35F5EBE097F1D22442256CF600223294.html?OpenElement). In this regard see also petition to investigate the killing of an innocent Palestinian by IDF. B’Tselem and the Organization of Civil Rights in Israel submitted a petition to the High Court of Justice against the Military Judge Advocate General (JAG). The organizations called on the JAG to open military investigations into all cases in which IDF soldiers killed Palestinian civilians who were not involved in combat. The petition details the circumstances surrounding the death of eight Palestinians who were killed by IDF soldiers between May 2002 and May 2003. For elaboration see [www.B'tselem.org/English/Press\\_Releases/2003/031027.asp](http://www.B'tselem.org/English/Press_Releases/2003/031027.asp).

moved by the need to allow the army to respond effectively to the threats. These petitions are actually challenging the court to rethink its role in the shadow of suicidal terror.

#### IV. THE ROLE OF LAW IN THE FIGHT AGAINST TERROR

*In this country, amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war as in peace.*

Lord Atkin, dissenting, in *Liversidge v. Anderson*<sup>37</sup>

So far I have argued that suicidal terror is transformed from being used as a means to achieve a political goal into the goal itself — destroying the foundations of politics and law. The attempt of an organized army to respond effectively to suicidal terror is ridden by the dilemma of effectiveness-legitimacy, that is, the more the response is effective, the more difficult it becomes to retain the distinction between the actions of the army and the actions of the terrorist. Moreover, during the attempt to bring the actions of the army to the review of the court, the legal system itself is infected by the same dilemma, as concerns about effectiveness might lead the court to undermine fundamental legal concepts. In this part, I would like to examine the response of the Israeli Supreme Court to several petitions that questioned the legality of the means employed by the IDF in its fight against terror. These cases provide a unique opportunity to examine the way in which terror infiltrates into the very legal system that is called upon to respond to it, mainly by changing the legal language. The question that guides my discussion is what effect terror exerts on the legal language itself? And can law provide a way to resist the destructive influence of terror on the political system?

Can law stand in the way of terror that aims to destroy any distinction, any boundary in order to make those who fight against it resemble it to the point of non-distinction? Moreover, can the law offer an alternative when the political actors are set on an endless cycle of blood, revenge and counter-revenge? What tools can law offer, when facing grave risks to state security, and knowing that it does not have in its arsenal, neither tanks nor battalions of warriors? What can the power of the words uttered by the judge be in such times?

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37 1942 A.C. 206, 244.

Traditionally it was thought that in times of national emergency the muses are silent and so is the law.<sup>38</sup> The Israeli Supreme Court has long been challenging this understanding, claiming to remain active in delineating the boundaries between the legal and illegal in the fight against terror.<sup>39</sup> In the beginning of the latest wave of suicidal terror, however, the destruction of politics was accompanied by the relative silence of law.

During operation 'Defensive Wall' (*Homat Magen* in Hebrew) which took place during 2002, more than twenty petitions were submitted to the Supreme Court by Human Rights organizations challenging the legality of different combat actions conducted by the IDF around Jenin. The court stated its willingness to review the actions of the IDF. However, in most cases its decisions were not accompanied by elaborate normative reasoning. The Court tended to affirm the legality of the action laconically while stating the army's commitment to uphold the norms of the humanitarian law of war.<sup>40</sup> In the few decisions in which the court was ready to invalidate the army's policy (such as in the use of "human shields") the army itself changed its orders prior to the decision and, subsequently, the court affirmed this change.<sup>41</sup> In other cases, the court refused to intervene altogether since the petition was brought to the court in the middle of the fighting.<sup>42</sup>

In the small number of cases where the court did intervene, it presented

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38 In Cicero's words, "*Silent enim leges inter arma*" ("In battle, the laws are silent"). Cicero, *Pro Milone* 16 (N.H. Watts trans., 5th ed. 1972).

39 Moshe Goral, *Should The HCJ Prevent the Targeted Killings and Can He Do So?*, *Ha'aretz*, Mar. 17, 2002, available at <http://www.Haaretz.co.il/arch/objects/pages/ArchPrintArticle.jhtml?code=1&E;>; Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *Harv. L. Rev.* 16 (2002) ("Even when the artillery booms and the Muses are silent, law exists and acts and decides what is permitted and what is forbidden") citing from his opinion in H.C. 168/91, *Morcos v. Minister of Def.*, 45(1) P.D. 467, 470-77, cited again in H.C. 3451/02, *Almadani v. Minister of Def.*, 56(3) P.D. 30 (a petition regarding the food shortage among the besieged Palestinians in the Church of the Nativity in Bethlehem, which was rejected on the merits).

40 See H.C. 2936/02, *Med. Doctors for Human Rights Ass'n v. IDF Commander in the Gaza Strip*, 56(3) P.D. 3; H.C. 2117/02, *Med. Doctors for Human Rights Ass'n v. IDF Commander in the West Bank*, 56(3) P.D. 26.

41 H.C. 3799/02, *Adallah v. OC Cent. Command*, 2003(1) Tak-Al 671. A petition for a temporary injunction can be found at <http://www.adalah.org/eng/index.php>. Subsequently, we witness several attempts by the army to broaden the boundaries of permissible tactics.

42 See, e.g., H.C. 6696/02, *Amar v. IDF Commander in the Gaza Strip*, 56(6) P.D. 110; H.C. 2977/02, *Adallah v. IDF Commander in Judea & Samaria* (Apr. 9, 2002), available at [http://62.90.71.124/files/02/770/029/b02/02029770.b02/HTML\(an appeal](http://62.90.71.124/files/02/770/029/b02/02029770.b02/HTML(an appeal)

its decision within a larger frame of justification backed by a *legitimization narrative* about the actions of the Army. For example, in a petition for the location, identification and burial of corpses in the Jenin refugee camp, the Court rejected the petition (while facilitating an agreement between the parties) and added the following short narrative:

In Jenin there was a battle — a battle in which many of our soldiers fell. The Army fought from house to house, not by bombing from the air, in order to prevent, to the greatest extent possible, civilian casualties. Twenty-three IDF soldiers lost their lives. Scores of soldiers were wounded. The Petitioners did not succeed in lifting the burden of evidence they bear. A massacre is one thing. A difficult battle is something else.<sup>43</sup>

These petitions, although important in terms of stating the determination of the court to apply the ‘rule of law’ to the army’s fight against terror, manifest several drawbacks. One troubling point is the resort of the court to ‘clean’ language, adopting the army’s idioms without revealing the linguistic camouflage they create. For instance, in the first petition regarding “targeted killings” of suspected terrorists, Justice Matza didn’t mention the word assassinations nor did he imply that ‘targeted killings’ was the main issue of his decision. In a laconic and vague opinion (consisting of only one paragraph) he wrote: “The choice of means of warfare, used by the respondents to timely preempt murderous terrorist attacks,

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to order the IDF to refrain from destruction of houses without pre-warning, without giving a hearing and without allowing the evacuation of the houses from both inhabitants and property).

43 H.C. 3114/02, Barakeh v. Minister of Def., 56(3) P.D. 11 (author’s translation). It is interesting to compare this narrative with the court’s decision regarding the screening of the movie “Jenin, Jenin” by Muhammad Bakri. H.C 316/03 Muhammad Bakri v. The Film Board (11.11.03 date of final decision) *available at* [http://62.90.71.124/heb/verdict/search/verdict\\_by\\_case\\_rslt.asp?case\\_year=03&case\\_nbr=316](http://62.90.71.124/heb/verdict/search/verdict_by_case_rslt.asp?case_year=03&case_nbr=316). In the latter, the court invalidates the decision of the censor to ban the screening because of its undue effect on the freedom of speech. The Court stresses that it is not the function of the censor to provide the public with the one true version of the events (implying that the censor’s function is not to determine what really happened in Jenin). In Barakeh, however, the Supreme Court undertakes to do just this, to positively determine the truth that no massacre occurred in Jenin, even though this decision is only incidental to the main issue of the petition, and without first conducting a thorough legal investigation of the matter. See also the introductory narrative provided by the court in this decision regarding “Jenin Jenin”.

is not the kind of issue the Court would see fit to intervene in."<sup>44</sup> Another drawback is the court's avoidance of conducting a thorough factual review, or for that matter, an elaborated interpretation of the laws of war (as they apply to the fight against terror). One exception to this, as we mentioned above, was in the cases concerning the use of 'human shields'. During the second Intifada, IDF soldiers used Palestinian civilians as 'human shields'. In some of the incidents the soldiers ordered Palestinians to enter buildings to check if they were booby-trapped, or to remove the occupants. Israeli and Palestinian human rights organizations petitioned the HCJ to put an end to this practice.<sup>45</sup> Not long after the petition was filed, the IDF informed the HCJ that the forces in the field will cease to use any civilians as a means of "living shield" against gunfire or attacks by the Palestinian side. The IDF change of course underlies the importance of the HCJ in creating a dialogue (be it limited as it was) between the army and the civilian population and human rights organizations, and moreover the incentive it creates for the IDF to restrain its measures. However, the state argued that ordering Palestinians to direct other Palestinians to guide the army into the house of a suspect, a procedure known as "neighbor procedure," does not fall within the term "human shields", which, as mentioned, has been abandoned by the IDF. Reality proved this statement to be false when a Palestinian was killed as a result of such a practice in an incident that occurred in August 2002.<sup>46</sup> Following this incident, a temporary injunction was issued by the HCJ forbidding the IDF's use of the "neighbor procedure" as well.<sup>47</sup>

In contrast to this line of laconic decisions, one landmark case, *Ajuri v. IDF Commander in Judea and Samaria*, which was written by Justice Barak, stands out.<sup>48</sup> The case originated in the decision of the army to introduce harsher means of response, since demolition of houses of family members of

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44 H.C. 5827/01, Barakeh v. Prime Minister, 56(3) P.D. 1. The issue of assassinations or "targeted killing" is still pending in the court, see H.C. 769/02, Pub. Comm. against Torture in Israel v. Gov't of Israel (3.9.03 date of most recent major disposition in the case), available at <http://62.90.71.124/files/02/690/007/e16/02007690.e16.HTM>.

45 H.C. 3799/02, Adallah v. OC Cent. Command, 2003(1) Tak-Al 671.

46 For further details, see B'Tselem — The Israeli Info. Ctr. for Human Rights in the Occupied Territories, Human Shield — Use of Palestinian Civilians as Human Shields in Violation of High Court of Justice Order (Nov. 2002), available at <http://www.btselem.org>.

47 H.C. 3799/02, Adallah v. OC Central Command (temporary injunction given Aug. 18, 2002), available at <http://62.90.71.124/files/02/990/037/j07/02037990.j07.pdf>. This temporary injunction remains in effect to this day.

48 H.C. 7015/02, Ajuri v. IDF Commander in Judea & Samaria, 2002 Isr. L. Rep. 1 (Sept. 3, 2002), available at <http://62.90.71.124/files/02/150/070/a15/02070150.a15.pdf>. For a discussion of the legitimization role of land-mark cases by the High Court of

terrorists did not bring about the sought deterrence. The new order was to deport family members of the terrorist involved in suicide attacks from the West Bank to the Gaza Strip. After the intervention of the Attorney General, however, a condition was added to the military order, that the order could be applied only to family members who were actually involved in the relevant terrorist activity. The issue was then petitioned to the Supreme Court. The judgment of the court is fascinating and complex, but in this article I would like to highlight only the relations between law, language, and terror that is manifested in the opinion, since I believe that here lies the key to understanding both the strength and the limits of the role of the court. In order to do this I shall begin with two other landmark cases that together signal the unique way in which the Israeli Supreme court, under the guidance of its president, Justice Barak, took to respond to the threat of radical evil.

The two cases that set the ground for the *Ajury* case were HC 5100/94 *The Public Committee Against Torture in Israel v. The State of Israel*<sup>49</sup> and Cr.F.H 7048/97 *Anonymous Persons v. Minister of Defense*.<sup>50</sup> All three decisions were written by Justice Barak, the President of the Supreme Court. In all three cases the court reviews the legality of the relevant policy of the security forces and decides to intervene. In the two preceding cases, however, the entire policy is found illegal and ultra-vires, while in the *Ajury* case the court legitimizes the policy by offering a 'dynamic' interpretation of article 78 of the Geneva Convention of 1949 (dealing with assigning the residency of people who pose security threat), while invalidating a specific order.<sup>51</sup>

Notice that in all three cases the court does not limit its decision to legalistic reasoning but also provides a legitimizing narrative for its intervention. These narratives can be described as 'narratives of contrast,' since the court compares the terrorist on the one hand, and the State of Israel, on the other. On the basis of this contrast ("*we* are not like *them*") the Court justifies its refusal to uphold a policy that the security forces deem necessary in the fight against terror. Thus, the *Ajury* case opens with this paragraph:

Since the end of September 2000, fierce fighting has been taking place in Judea, Samaria and the Gaza Strip... Israel's fight is complex.

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Justice, see Ronen Shamir, "*Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 *Law & Soc'y Rev.* 781 (1990).

49 H.C. 5100/94, Pub. Comm. against Torture in Israel v. State of Israel, 53(4) P.D. 817.

50 Cr.A. (Further Hearing) 7048/97, Anonymous v. Minister of Def., 54 (1) P.D. 721 [hereinafter *Bargaining Chips* decision].

51 Geneva Convention (III) Relative to the treatment of Prisoners of War; August 12, 1949 75 U.N.T.S 135. can be found also at <http://Untreaty.un.org/English>.

The Palestinians use, *inter alia*, guided human bombs. These suicide bombers reach every place in which Israelis can be found (within the boundaries of the State of Israel and in the Jewish villages in Judea and Samaria and the Gaza Strip)... Indeed the forces fighting against Israel are terrorists; they are not members of a regular army; they do not wear uniforms; they hide among civilian Palestinian population in the territories, including in holy sites; they are supported by part of the civilian population, and by their families and relatives.<sup>52</sup>

This short narrative is invoked in order to justify the imposition of limitations on the use of force by the Israeli army (in this case, deportation of family members of the terrorists). The limitations that the court imposes, in other words, are presented as 'self imposed' limitations that underline the distinction between a democratic state and its enemies, who do not hesitate to use any means to further their goals. Similar narratives of contrast can be found in the HC 5100/94 (torture practices)<sup>53</sup> and in Cr.F.H 7048/97 (Detained illegal combatants).<sup>54</sup>

In our three cases, these 'contrast narratives' set the stage for the Court to examine the arguments and counter-arguments dealing with a policy that has been shrouded in secrecy for security reasons. Thus, for example, the power of language to distinguish between the legal and illegal is re-introduced into the context of police interrogation of suspected terrorists that has been controlled till the decision by violence and counter-violence. In her book *The Body In Pain*, Scarry examines the logic behind the use of torture in police interrogations. She explains that although these investigations seem to manifest a belief in the importance of words, as the whole point of the investigation is to get information in time, language is really superfluous in them. Instead, the real logic of the investigation is about causing pain, and the muteness that it brings about.<sup>55</sup> This understanding can shed light on the approach that the Court takes in invalidating the use of torture (or, as the court calls it "physical means" used in interrogation).

In 1999, the Israeli Supreme Court ruled that the use of physical force in interrogations was not authorized under Israeli law and hence not within the competence of the Israeli interrogators.<sup>56</sup> The Court did not limit its reasoning

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52 *Ajuri*, 2002 Isr. L. Rep. at 5.

53 H.C. 5100/94, Pub. Comm. against Torture in Israel v. State of Israel, 53(4) P.D. 817, 844-45.

54 Cr.A., *supra* note 50, at 743-44.

55 Scarry, *supra* note 19, at 28-38.

56 *Pub. Comm. against Torture in Israel*, 53(4) P.D 817. H.C 5100/94.



to the legalistic side of the case. Rather, it devoted a large part of its opinion to examine the use of language by the interrogators of the General Security Services (GSS). The court criticized the tendency to use words that refer to legitimate ways of interrogation as a 'cover-up' for the use of extra-ordinary, and illegitimate resort to force.

The central role that the return to the ordinary use of language plays in the rhetoric of the court is easily detected. For example, the Court examined the legality of the means of investigation referred to as the "*Shabach*" position. A suspect investigated under the "*Shabach*" position has his hands tied behind his back, he is seated on a small and low chair and his head is covered by an opaque sack. Powerfully loud music is played in the room. Suspects are detained in this position for a prolonged period of time. In examining this means of interrogation the Court criticized the security forces for not using words in their ordinary meaning. Thus, the Court refuses to see the unusual way of "cuffing" the hands of the suspect as dictated by security considerations. The Court writes:

The suspect is cuffed with his hands tied behind his back. One hand is placed inside the gap between the chair's seat and back support, while the other is tied behind him, against the chair's back support. This is a distorted and unnatural position. The investigators' safety does not require it.<sup>57</sup>

About the unusual way of "seating" a suspect the Court writes,

We accept that seating a man is inherent to the investigation. This is not the case when the chair upon which he is seated is a very low one, tilted forward facing the ground.<sup>58</sup>

About the unusual way of covering the eyes, the Court writes,

From what was stated in the declarations before us, the suspect's head is covered with an opaque sack throughout his "wait" in the "*Shabach*" position. It was argued that the sack (head covering) is entirely opaque, causing the suspect to suffocate. .... All these methods are not inherent to an interrogation...what is the purpose of causing the suspect to suffocate?<sup>59</sup>

Given the Court's insistence that the interrogators of the GSS stick to

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57 *Id.* ¶ 26, at 18.

58 *Id.* ¶ 27, at 18.

59 *Id.* ¶ 28, at 19.

the ordinary meaning of words, the failure of the Court to admit that the use of exceeding physical force amounts to forbidden torture is revealing. Throughout the judgment, Justice Barak avoids the word 'torture' and opts for the term "physical means." Ironically, the word 'torture' is, nevertheless, present in the decision, but only through the name of the petitioners.<sup>60</sup>

In 2001 the court delivered another landmark case, ruling that the indefinite detainment of so-called "illegal combatants" was not within the authority of the Israeli authorities and that an authorizing statute was necessary.<sup>61</sup> Unlike in the torture decision, in this case it took the court two separate legal proceedings in order to reach a decision by the majority of the court that invalidated the policy. The dissent of Justice Dorner in the first decision, based on the moral principle that human beings will be punished according to their own actions and not be used as a means to exert pressure on others, becomes the majority view in the *Further Hearing*. Particularly dramatic is the decision by Justice Barak, since he admits to have changed his mind, saying:

"In a democratic society, one that seeks liberty and security, the administrative detention of a person who poses a threat to national security may be acceptable, but such a detention should not be extended to any circumstances where the person concerned poses no similar threat, and is being kept merely as a "bargaining chip". The reason for this distinction lies in a "qualitative" difference between the two cases. The Court draws here a clear line. In the second case, the state, through its executive branch, orders the arrest of a person who did not commit any crime, and who poses no danger. He is taken into custody solely due to his (assumed) capacity to serve as a future "bargaining chip". The violation of individual freedom and human dignity is thus so deep and unbearable that such a detention should not be permitted in a state which values freedom and human dignity, even if national security considerations may lead in a direction of taking such measures."<sup>62</sup>

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60 Note, however, that in a recent article published in the *Harvard Law Review*, President Barak mentions the word "torture" several times within the text. Barak, *supra* note 32, at 28.

61 Cr.A., *supra* note 50, at 721. (The Petitioners were citizens of Lebanon who were held by Israel in administrative detention after they completed their sentence. There was no dispute between the parties that the petitioners pose no threat to the security of Israel. All agreed that the only reason to keep them in detention was for using them as "bargaining chips" in future negotiations for the release of kidnapped soldiers.)

62 Cr.A., *supra* note 50, at 741. Notice that only the dissenting Justice (J.Cheshin) who

It has been noted by others that the two landmark cases, discussed so far, demonstrate a new resolve by the Israeli court to intervene even in highly sensitive security issues, when important moral and legal principles are at stake.<sup>63</sup> I would say that the boundary that the Court refuses to cross is when it is asked to deviate from basic principles of law, when there is, as Barak wrote, a 'qualitative difference'. Such was the case when the army asked the court to approve the detainment of 'illegal combatants' for the sole reason of using them later in the negotiation to release Israeli citizens who were illegally detained by the enemy. This was also with the torture case. The boundary that the Court is drawing is sometimes vague, since the court does not rule that *every* consideration of deterrence, or collective punishment (such as when destroying the homes of family members of terrorists) is illegitimate.<sup>64</sup> The importance of drawing this line in landmark cases, however, emerges from the need to distinguish law from politics, and by so doing to remind the public that the law has ways of its own, and that while the army's main concern should be risk-avoidance, the court's main role is to ascertain guilt, and that these tasks may sometimes conflict.

A neglected aspect of these landmark cases, I believe, is the emphasis they put on language and on legal distinctions in developing a 'jurisprudence of terror'. The Court's intervention meant that what had been done in secrecy would come out to the light of day and would be exposed to public debate. The Court demanded that the security forces provide reasons and justifications for their actions, and was unwilling to accept the tendency to change the meaning of ordinary words, or to blur important distinctions. As a result, in these decisions, words return to their ordinary use. Moreover, while admitting in principle the legitimacy of considerations such as deterrence and prevention, the court emphasizes the individuating nature of the rule of law, the need to listen to the individual complaint and to tailor the response of the army to the actions of the individual. Most important, the court presents the law itself as an art of limitations, and recast these limitations not as mere 'obstacles' to the security forces, but also as guidelines for the

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upholds the detention criticizes the use of the term "Bargainig Chips" to describe detained people. (at 749, Hebrew).

63 Michael Sefarad, *International Litigation in a National Court: Between Judicial Dilution to Judicial Isolationism — A Report on the Current Situation*, 15 *Hamishpat* 73 (Feb., 2003).

64 But see the admission of Justice Cheshin of the foreignness of these considerations to the field of law in H.C. 1730/96, *Sabih v. Brigadier General Ilan Biran*, 50(1) P.D. 353.

work of the security forces in a democratic state. In other words, the force of law lies in posing limitations on the state's force.

We can notice in these landmark cases the opposite direction from the one taken by the suicide terrorist. While the terrorist turns his body into the instrument of death, thus losing its humanity, the court insists that the security forces continue to respect the humanity of the people detained by them. The court refuses to allow reducing human beings into means to achieve collective goals, as a policy. The challenge is whether these landmark cases can be used as guidelines in times of crisis, in the midst of a fierce wave of suicidal-terror attacks. Can law retain its limits when facing 'radical evil'?

The Israeli court first took to answer this challenge in the *Ajury* case that we have introduced above. The decision in the *Ajury* case, unlike the torture decision and the decision regarding the detained illegal combatants, was delivered during the second Intifada, when Israel was facing an intense wave of suicide bombing. The dilemma of how the court should intervene was therefore intensified in this case. We can notice two distinctive features of this decision: First, the court decided to rely solely on International law, instead of basing its decision on Israeli administrative law. Second, the court validated the policy of the army, while invalidating its application in one of the cases. Thus, the Court could no longer hide behind formalistic considerations of legal authorization and had to review the actual discretion of the military commander.<sup>65</sup> These two features, as one commentator noted, put the Court in a different position *vis-à-vis* the political authorities.<sup>66</sup> Relying on International law, the court left no option for the Israeli legislator to decide differently than the court. And by reviewing the decision of the military commander, the court risked undermining the legitimacy of its judgment — since this kind of decisions is usually considered to be the expertise of the army.<sup>67</sup>

How well did the court withstand the onslaught of suicidal-terror attacks in its *Ajury* decision from a rhetorical perspective? The answer is a mixed one. On the one hand, unlike the majority of the *Intifada* cases that were laconic,<sup>68</sup> in this decision the court delivered a reasoned decision,

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65 For further discussion of the significance of these points, see Eyal Benvenisti, Case Review: *Ajuri et-al. v. IDF Commander in the West Bank et al.* (not yet published) Unpublished Manuscript (2003), available at [www.tau.ac.il/law/members/benvenisti/articles/Ajuri%20et%20al-1.pdf](http://www.tau.ac.il/law/members/benvenisti/articles/Ajuri%20et%20al-1.pdf).

66 *Id.*

67 *Id.*

68 See, for example, the following decisions: H.C 727/02 Med. Doctors for Human

interpreting the relevant articles of the Geneva Convention and showing why the deportation to the Gaza Strip of family members who deliberately took to help the terrorist can be considered as falling within the limitations set by the Convention. However, the interpretation of article 78 (assigned residency) of the Convention as applicable to the case, demanded that the Court view both the West Bank and Gaza Strip as under the effective control of the IDF, while the reality is much more complex.<sup>69</sup> Moreover, by authorizing the policy measures taken by the army, the Court was ready to accept the accuracy of the legal term ‘assigned residency’ of article 78, a term that conceals the real logic behind the military order — more deterrence through *de-facto* deportation. On the other hand, in reviewing the application of this policy to the three family members, the court reiterates its commitment to the rule of law. It individualizes the cases, demanding that the order be applied only to individuals according to his or her culpability (and risk that he or she presents). The court also reiterates the priority of criminal law over administrative actions, and encourages the army to resort to it, whenever possible. The effect of this decision is to limit the ability of the army to exercise collective punishment under the disguise of ‘assigned residency’. In other words, although the initial decision to rely on article 78 of the Geneva Convention (dealing with assigned residency) rather than on article 49 (dealing with deportations), was meant to facilitate collective punishment, to allow the *de-facto* deportation of family members of terrorists without calling it so, the Court’s decision actually changes the nature of the act. By its willingness to review the discretion of the military commander in each individual case in order to weigh the evidence of his or her involvement, the Court has changed what was supposed to be a swift and collective action, into a quasi ‘criminal law’ review. Thus, the Court’s interpretation forces the army to use individuating measures and in this way to impose important limitations on the possibility of the army to act swiftly and collectively, as real deterrence would have demanded.

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Rights Ass’n v. IDF Commander in the Gaza Strip, 56(3) P.D. 39,40; H.C. 2936/02, *supra* note 40, at 4.

69 *Id.*; Orna Ben Naftali & Keren Michaely, *The Call of Abraham: Between Men and God Following H.C. Ajury v. Commander of IDF Forces in the West Bank*, 15 Hamishpat 56 (2003) (Hebrew).

## CONCLUSION

What is the most important contribution of the court in this important crossroad that suicidal terror is creating? I have argued that we should not expect the court to provide legal tools tailored to allow the most efficient fight against terror, neither is it to stick blindly to legalistic considerations and narrowly define its role during times of war. An important, though overlooked, role of the court lies in its commitment to the ordinary use of words, to normative arguments, to legal distinctions. The role of rhetoric and the proper use of language, which is not in the central stage of legal considerations during normal times, become of crucial importance in these dark times. The insistence on finding the right argument, on providing an explanation, on individuating the cases — are of crucial importance in delineating the boundaries of the political sphere within a democratic state. The force of law lies in the limitations it imposes on the political actors — acknowledging the limits of law and politics in confronting radical evil.

This insight brings us back to the teachings of Arendt with whom we began our exploration. In the introduction to her book *On Revolution*, Arendt offers a unique interpretation of a classical work of literature: *Billy Budd*, by Herman Melville.<sup>70</sup> Arendt suggests that the work be read as an implicit critique of the wave of terror, which followed the French Revolution. Billy Budd represents ‘natural goodness’, the angel who strikes back Claggart, the person representing ‘elemental evil’, and kills him. The story, however, does not end here because Budd has to come before the law, to stand trial before Captain Vere. And it is the dilemma confronted by Captain Vere that carries the deep message of the story. Arendt sees in this story a parable about the limits of human law — it cannot adequately punish radical evil, but it also fails to acquit complete innocence. In other words, the law’s field of action is delineated by human categories that are always short of absolute (be it good or evil). And here Arendt makes an important point for our investigation — she argues that law’s inherent limitations make it an institution that can guarantee some continuity and direction to a society in crisis. Its power, in other words, lies in its constraints.

Arendt explains:

The tragedy is that the law is made for men, and neither for angels nor for devils. Laws and all lasting institutions break down not only

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<sup>70</sup> Herman Melville, *Billy Budd, Sailor* (Large Print ed. Thorndike, Me.: G.K. Hall, 1997).

under the onslaught of elemental evil but under the impact of absolute innocence as well. The law, moving between crime and virtue, cannot recognize what is beyond it, and while it has no punishment to mete out to elemental evil, it cannot but punish elemental goodness even if the virtuous man, Captain Vere, recognizes that only the violence of this goodness is adequate to the depraved power of evil. The absolute — and to Melville an absolute was incorporated in the Rights of Man — spells doom to everyone when it is introduced into the political realm.<sup>71</sup>

In our context (judging elemental evil), the challenge for law is to resist the very logic of terror — that is, to recognize its own limits and to stick to its distinctions. The power of law in this respect lies not in responding ‘effectively’ (as did Billy Bud) to elemental evil but, rather, in creating a space, imposing a distance, between the violent act of the terrorist and the proper reaction of organized society. Law should avoid both extremes to which the political realm tends to veer in times of crisis — violence and compassion. Compassion, Arendt explains, “shun the drawn-out wearisome processes of persuasion, negotiation, and compromise, which are the processes of law and politics, and lend its voice to the suffering itself, which must claim for swift and direct action, that is, for action with the means of violence.”<sup>72</sup> In contrast, law relies on the power of words, it relies on the need to explain, to justify, to persuade and to compromise. The important contribution of law in confronting suicidal terror is, as we saw, not to fashion adequate radical means of response, but rather to remind itself, and the political and military authorities, of the limits of democracy and of the rule of law. In this way law reintroduces a distance between the action and the counter-action — a space from which politics can reemerge.

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71 Hannah Arendt, *On Revolution* 84 (1965).

72 *Id.* at 86.

