

Remarks by Secretary Michael Chertoff and President of the Supreme Court of Israel Dorit Beinisch to the Heritage Foundation's Civil Rights and the War on Terror: Dilemmas and Challenges Event

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Mr. Feulner: Good afternoon ladies and gentlemen. I'm Edwin Feulner, President of the Heritage Foundation. On behalf on all my colleagues, welcome to this very important program this afternoon. We, at the Heritage Foundation are indeed proud to host such an important program as this one. In the past, as is true today, democratic society has struggled to protect both liberty and security. An overemphasis of one could lead to an infringement of the other, but the challenge of free governments is to maximize both. Israel has faced hostility from its neighbor since it declared its independence almost 60 years ago, 60 years next month. The constant threat of external aggression, starting with the 1948 Arab-Israeli War, required vigilance and determination on the part of Israeli defense and security forces yet, in the face of this animosity, Israel remains a stable, liberal democracy. Israelis are able to vote for their leaders, and voice their opinions freely, and the view of the minority are not trampled by the will of the majority. And Israel remains prepared to defend itself militarily.

In the post 9-11 world, the United States faces many of the same threats as Israel. As a nation, we have much to learn from, and much to share with our longtime ally. Free nations, like Israel and the United States, must protect civil liberties while simultaneously providing robust levels of national security. Here to speak this afternoon on this vital issue is Justice Dorit Beinisch, the President of the Supreme Court of Israel, and Secretary Michael Chertoff, a former judge of the United States Third Circuit Court of Appeals, and of course of Secretary of Homeland Security. Before assuming his current position at Homeland Security, Secretary Chertoff also served as U.S. Attorney for the district of New Jersey. He is a graduate of both Harvard College and Harvard Law School. We appreciate your being with us today, Mr. Secretary.

President Beinisch is a graduate of Hebrew University in Jerusalem. She was admitted to the Israeli bar in 1967, and began her public service as Assistant to the Jerusalem District Attorney. First appointed to the Supreme Court of Israel in 1995, she was appointed President - our equivalent of Chief Justice - of the Supreme Court in 2006. She is the first woman to serve as the President of the Court. She is joined here today by her husband, who is an attorney as well. I'd also like to welcome too, Israeli Ambassador Matador - their Ambassador to the United States is here with us today. We're very happy you could be with us for this discussion, Mr. Ambassador. We're also joined today by members of the D.C. Circuit Court of Appeals. Chief Judge David Sentelle, Justice Douglas Ginsburg, Justice Janice Rogers Brown, and D.C. Circuit Court Judge Robert -- former D.C. Circuit Court Judge Robert Bourque. Thank you all for being here.

I'd like to now invite you, Madam President, if you would, to take the podium and share your thoughts with us. Thank you.

President Beinisch: Thank you for introduction and thank you for giving me the opportunity to introduce the Israeli Supreme Court approach to the complicated issue of protecting human rights in times of terror, and discuss with you this important subject that the international community faces nowadays.

Terrorism is not a new phenomenon, yet over the last decade terrorism evolved to new dimensions, and has become a serious threat to democratic states. Indeed, we all face the reality of vicious and cruel terror that knows no bounds and as the plague of terror is spreading throughout the world, we all share the same concerns. Terrorism presents new and different challenges to human rights. On the one hand, danger to innocent people lies everywhere at all times. We've felt it in Israel, you know it here too, of course. Men, women and children are always at risk in public places, in street, and even in privacy of their own homes. On the other hand, the reaction to terrorism may also harm human rights. Unfortunately, we are all familiar with the phenomenon of suicide bombers who cannot be deterred by traditional means of law enforcement. Therefore, governments and legislatures in democratic state introduced extreme measures aimed to cope with terrorism. And of course, you know it, we know it, problems of administrative arrest, detentions, deportations,

imposing various limitations on people's rights.

In this difficult and complicated struggle, the courts took upon themselves the difficult role of scrutinizing the decisions and legislation that were introduced during the fight against terrorism with the goal of preserving human rights while maintaining security. In Israel, since its early days as it was already mentioned, 60 years, the Supreme Court took on the difficult and complex task of maintaining the conditions necessary to protect a society in a permanent state of emergency while preserving the rule of law and basic human rights.

In one of our decisions, we stated, "Since the founding of the state, the organs of the government have been faced with a need to protect the security of the state and its citizens. Admit, which sometimes requires placing limitations on certain rights in order to provide security and protection of life. For years, our caseload has contended with the conflict between these two pulls and dealt with it successfully. This tension has increased in recent years for reasons arising from the difficult security position on one hand, and from reasons based on the enshrining of basic human rights. It's constitutional, super-logistically rights on the other. But the strength of the tension cannot exempt us from the need to exercise our judicial review and examine the constitutionality of the law even when the factual position is complex." End of quote.

We live in a period of constant tension between ensuring security and safeguarding human rights. The public demands security. Government is under pressure to protect the public and ensure them peaceful and safe lives. The quote is part of Israeli society. We're in the midst of this tense situation. As judges, we share its concerns, yet we recognize our role and our responsibilities. We acknowledge a duty of the executive to protect the cities and preserve the right to life against the threat of terrorism. We also recognize, however, that it is the duty of the judiciary to guarantee that a nation fighting for its survival will not sacrifice those very values that make the fight worth while.

The level of protection of human rights in times of peace differs from the protection in times of war and armed conflict, when naturally the balance between security and human rights shifts. But if the state does not protect human rights in times of emergency, it will lose its democratic character in times of peace. And this is, of course, the difficult task and difficult role of the judiciary, the guard against disproportionate limitation basic human rights of every individual, including terrorists, even in times of emergency.

In today's reality, our court confronts the challenge of balancing these dual values - security and human rights - on a daily basis. I believe that no other court in the world faces so many cases involving issues of safeguarding human rights and humanitarian considerations, while fighting terrorism in such a complicated reality. And I will not exaggerate if I tell you that we already dealt with hundreds of cases like that. Our guiding points appear that the battle against terrorism must be fought within the law, and that no war may take place outside the boundaries prescribed by law.

So how do we review the cases? What are the main tool that we use? And we say that there are five aspects of our judicial review that make the Supreme Court particularly responsive to the needs of our time.

First, we give a very broad access to the courts, facilitated by the practical elimination of any requirement of the right of standing. We don't demand right of standing. That gives, of course, people who are interested organizations, NGO's, access to the court on behalf of protected people in the territory and others who need a remedy from the cold. The fact that the court - this is a second principle. The fact that the court almost never closes its doors on grounds of injudicability and is willing to apply judicial review to government activities, including military operations.

When necessary - this is the third one - under the circumstances, judicial review is exercising real-time, and not retrospectively, because ex-post facto review in this case is not effective. And, another feature that's important, wield a lot. We apply international law, substantive law, as an interpretive guide. And substantive law of international law is part of the system because we keep witness to the territories which have kept. They were never annexed to Israel. They are kept under international principles of belligerent occupation which means that we apply the Geneva convention's fourth convention and we apply there, as basic norms, international law. We interpret our laws in the light of international principles.

As to the access - the first thing I mentioned was the access to the court, access to justice. And we decided when basic human rights are at stake, the doors of the Supreme Court are open to anyone who is seeking a remedy against any activity of the Executive branch or against any public authority. And that means Israelis, Palestinians from the territories, residents, they are protected persons. Aliens all have direct access. In our system, direct access to the Supreme Court and up to other courts, which makes it, of course, a burden on the

court but gives us the power to review the measures taken for security purposes.

As to justiciability, as you can understand, this is something which is in the public debate. Are we correct or not? Are we right or not with our approach? When the court scrutinizes major operations or other state measures implemented in the course of the fight against terrorism, time and again the state argues that these actions or decisions are not justifiable, since they are politically in the nature and due to the fact that the court has no special expertise in such matters. But, to understand our approach, you have to understand the atmosphere in the situation where we live. If we declare all those issues not justifiable, it becomes -- the problems and the terror programs are so interwoven in the life of every Israeli that if you declare those issues not justifiable, human rights could be violated with no review with no limits. So this is part of the background in which we function.

So, in various cases concerning measures such as security interrogations of suspected terrorists, which, I don't know, but maybe many of you know already that we had a very famous case against torture and the methods of interrogation of the security service, or a case of targeted killing. Or many, more than hundred cases, as to the security fence that will be -- the court rejected, in all those cases, the argument of injustice. In all these cases the court emphasized that when a claim of direct violation of human rights is raised, the suit is always justifiable. That, the court affirmed, that there are no black holes with no judicial review. We do, of course, recognize that the political nature of some issues renders them outside the appropriate privy of the court. But those are the rare cases. Most of them we do review.

But, the limits are (inaudible) to this review. When the court scrutinizes security decisions that were made on the basis of experience and expertise of the military professionals, the court will examine whether the decision was reasonable, meaning the court will examine whether the security measures taken fall within the zone of reasonableness, and, the main tool we use judicially, is the principle of proportion. If those measures are proportionate, such that, a military commander was permitted to make. In this regard, our basic premise is that the court should not adopt a position on the question of what the most appropriate security measure for the war against terrorism are. With this, of course, we are not experts. The appropriateness of the security measures is a matter that is in the proper jurisdiction of other branches of government so long as the other branches are using measures that are within their authority and meet the requirement of proportionality. Then, there is no justification for judicial intervention.

We have the whole technique of how to apply the principle of proportionality. We have subtlety. We put, of course, so that it could be understood, what we demand when we're talking about the principle of proportionality. We are also aware that security considerations are not magic words that the court accepts whenever raised. Therefore -- because this is part of our life, and the easiest way for the executive or for the military is to say, "we're sorry, those are security considerations," and hide behind it. We don't accept it that way. Therefore, the court must examine carefully the relevant information laid before it and the reasoning behind the specific security measure which, of course, are needed.

When the court is convened, the security consideration is really -- it is the dominant consideration, and that the security measure is proportionate and in accordance with the necessary security purpose. Of course, the petitions aren't dismissed. I'm afraid with the time limit, so tell me when I have to --. Of course, there are problems of how we look into the material of the confidential material. What are the rules? How do we do it? And those are technical problems although they of course relate to basic human rights.

Another very important thing that I mentioned and another principle is that we have to deal with the cases in real-time. Sometimes, on a daily basis, we have to refer to petitions for injunctions, and the typical thing is of course the security fence. And I'll elaborate a bit on the issue of the security fence, because cases against erecting the security fence -- as I said before, we had more than hundred cases of this kind. In our judgments, we decided first of all we accepted the arguments of the government, that the security fence is a security necessity. In order to block the way of the -- of terrorists, of suicide bomber, to go in to the country which was for a few years a very, very serious problem we had.

So, with this deciding that it's really a necessity -- I'll refer to it that this was not accepted by international court of justice in their advisory opinion. We dealt with it too. But first of all I want to lay down the principle. The principle was we accept that it is a necessity for security reasons, but the military commander shouldn't exceed the power given to him for that purpose and that purpose alone. Because when you compare to what do you have to weigh and balance? You have to balance the need to block the road for terrorists to come into the country and you need to balance between this and the fact that in order to put this fence on private land, land of farmers is taken by the army. So it should be done only when really necessary. And those were cases

that we looked into them, the Supreme Court -- direct access to the Supreme Court. Military commander with maps, aerial photos, showing us one kilometer after the other that what is really needed is to put the fence here and not in any other place. And it's not only needed or it's not at all needed to expand another settlement or to build a town and not just to take too much or too much wide road a security measures unless they are really needed. Sometimes it's very close to a settlement, yet we approve that less private land is taken. Those petitions were mostly brought to the court by Arab settlers, Arab farmers, or organization and NGOs, or joint settlers that were complaining why not to put a fence too close to their settlement or further on. And as it has to do with really rights, property rights, the right to free movement for people because the fence of course blocks the way for innocent people, too. This is a very difficult task to weigh what is the right balance. But we did it. We did it case after case and I must say not only that the government accepted the judgments, which of course they have to, but after two major important decisions, the itinerary of the fence was changed by the government. They took the principles laid by the court, they accepted it, and they changed a lot. A lot. It means sometimes -- 10 kilometers to change the itinerary of the fence means, for many families, Arab protected people, families, a great change because they have their own farms.

Yet, of course, it's a balance. It's not just right and wrong, black and white. Some are accepting, some are criticizing, but I think this was one of the major roles that the court took while accompanying the situation and the need to build the fence.

Now you have to take into consideration, when we are talking about a security fence we are not talking about dangers far away. A great part of it was the fence in Jerusalem, where we live. Where the danger is very close to our home. We are in the midst of this feeling. We are not far away from the problems. We are part, of course, of the Israeli citizens who feel the danger, who are worried. Yet, we have to put limits on the power of the state while doing this and building the fence.

Now, other issues that we were dealing, of course. Detentions, arrest, right to meet with a counsel -- we decided that 18 days for a detainee is too long. They should shorten the time to give the detainees who are suspected of terrorism to meet lawyers. We decided that even we need, unfortunately, to keep in detentions for a very long time, yet - and many people unfortunately, sometimes we're talking about large numbers - it should be on an individual basis and should be individually looked into each case of every detainee. And this normally is done. We also review decisions of the military court on that matter. We also dealt with conditions of detention.

According to standards of international law, of human rights conventions, and we went into a lot of details in the conditions (inaudible) and all the background they were -- they kept. Of course, again, it's a perfect hit on the balancing principle. Other matters that I can tell you that we dealt with -- of course, I mentioned the targeted kills, which we approved according to international law. The additional protocol to the Fourth Geneva Convention, Article 51 3. And with this we put limitation on the power of the state. I'm not sure they are always kept. I hope they are. And, of course, according to our judgment there should be an investigation after such a thing if something happened because the article I mentioned says, "surveillants shall enjoy protection afforded by this section unless, and for such time, as to take a direct part in hostilities." So we are the first court to apply this article and to interpret what means, "for such time as they take direct part in hostilities." And who -- we decided in that case that they are civilians. They are not illegal combatants. They are civilians. Therefore, they have right to have -- they are protected but not protected as other protected habitants in the territory, and the limitations of cause if you can use less harmful measures, the state should use less harmful measure before it decides to operate in a targeted killing. We also decided that if and as far as it happens innocent people are injured or killed, the state should compensate. So we had few conditions to limit this practice that is -- it is accepted, according to our interpretation by international law, but should be very much scrutinized and limited.

Other cases that we dealt of this matter that can really bring so many examples because you have to know that we are dealing with those matters on a daily basis. We have cases like this every day. I don't believe that any other court in the world had, unfortunately, so many opportunities and such a need to interpret the rules of a democratic state fighting terror. With this, of course, we share the concerns of all the western world that has to face those problems. You know, Israel is in the midst of the fight and in an emergency state since its founding. This very week, the next week, we are celebrating 60 years. 60 years to the state of Israel. In September it will be 60 years of the Supreme Court of Israel since it's establish -- the court was established. At that time, it was a fear for the existence of the state. It was a weak, very weak, state that absorbed survivors from the Holocaust, poor state. And even, in those times, the court was very strong and firm in implementing and guarding human rights in a very -- in very difficult conditions.

The situation of the state changed. We are stronger now, we are not that worried about our future of existence,

yet we have to be worried about those terrorist activities and our security situation. And, so -- about three months ago, we had a case that was in relation to the decision of the government to cut enough supply fuel and electricity to Gaza strip. Gaza, that is kept by the Hamas, that all the time attacks Israeli settlement, Israeli cities, with missiles, with (inaudible), yet we decided we are not obliged. We don't have to supply all the supplies that Gaza needs in such a situation of unarmed conflict. But as we control the passages, we have to supply the minimum standard for humanitarian purposes. For hospitals, according again to international law. And this was the decision of the court after we got information from the military commanders and all the data about what's happening there.

So this is, as I said, our really daily work. I want to conclude -- we emphasize in our judgment that in a time of conflict like the one under discussion which was really the Gaza story, which is unfinished story, civilian population finds itself, unfortunately, in a territory in which combat is taking place. And they are the first and primary victims of the combat situation, even when efforts are being made to reduce the harm. In the territory of the state of Israel as well, in an era of terrorist attacks that have been continuing for years, the immediate and main victim of the combat situation are the civilian population. However, regarding the actions carried out against Israel, by no means -- they are not random and not a clutter arm. They are frequent terrorist attacks with intent aimed directly at the civilian population and intended to strike at innocent civilians. This is not, of course, the way the state acts.

This is the difference between the state of Israel, a democratic state fighting for its life in the framework of the means that the law puts at its disposal, and the terrorist organization that rise up against it. In the 80's already, the Supreme Court -- it was 1991. the Supreme Court said, "the state fights in the name of the law and in order to preserve it. Terrorists fight against the law and in violation of it. The war against terrorism is also the law's war against those who rise up against it." And this was 1990. Not today. So this is our reality all the time.

On September 11, it became clear that the plague of terrorism is spreading and rearing its head every day in different parts of the world. Western democratic states have prepared themselves for a response to terror in the struggle against it, and have even equipped themselves with new legal tools in matters of this fight. Israel had emergency laws since its founding. We had very little legislation in the last years. We had, but lately. Its struggle is an old one, although it became more difficult in the last few years. The government and the Knesset as elected bodies may respond to public opinion in deciding how they will deal with terror. However, the professionalism independent of the judicial system obligated us, as judges, to exercise objective judgment, unaffected by public pressure, even though we all live in the heart of the terrifying reality.

In exercising judicial review, our premise is that the law is not silent before the guns of war. Our decisions on these issues do not always win public applause, because you can imagine. Some think that the court is exercising judicial review to restrict the operational and deterrent capabilities of the executive branch, and intervenes in areas beyond scope of its jurisdiction. I would not be surprised if some of you would think so. But others think that the court's protection of human rights is insufficient. This is also possible. According to them, not enough has been done to reduce the number of human rights violations on the civilian population in the territories - a civilian population which is suffering greatly as a result of the operation adopted in Israel's war against terror.

The answer to this criticism is that the court examines the issues before it according to prescribed legal criteria. The court reviews only a minority of instances in which security concerns are balanced with human rights. Like courts in every other country, our court is not an institution that initiates judicial review. Our court considers only those matters brought before it by an interested party, and many are brought before us. Our belief is that the court fulfills its role when it exercises judicial review in times of war, in times of peace. A democracy that ignores basic principles of human rights is liable to give terrorism the victory it seeks. Let us hope that all of us will have better days without and the difficult times that we're experiencing will soon pass. I wish I can be optimistic about it and that we will have the duty to apply law in normal days. And will be able to advance the values of law and justice in times of peace. Thank you.

Secretary Chertoff: Well, I want to thank President Beinisch for a very interesting talk and also welcome her to the United States and extend my congratulations on the 60th anniversary of Israel's foundation.

Because I know you all are chomping at the bit to weigh in on this, and also because I have the lingering affects of a cold, I'm going to be mercifully brief. You can hear from me any time. I'm always around talking, so I was just going to make a few observations and then suggest that we throw it open.

As kind of a matter, perhaps, of academic interest there's some obvious differences between the way the

Israeli courts look at these issues and the way our courts do. For example, when the President said there's no requirement of standing to get before an Article 3 court, I know the judges in the room here felt a stab in their heart, because as you all know, Article 3 requires, as a Constitutional matter, judges only hear cases where there is standing and just issuability. So these obviously reflect differences in our constitutions and in our legal traditions.

Likewise, although, I think international law, like treaties, are interpreted and applied by courts as part of the law of the land under the Constitution. I would venture to say there would be, at a minimum, a highly vigorous debate about whether one would rely on that for interpreting our domestic Constitution laws. But, again, that's probably a difference in our tradition and also many more so in our founding document.

I would, however, point to three things which I think are very interesting and reflective that the fact that we are in a new era and where I was interested to hear how the Israeli courts have dealt with this issue. First of all it's perfectly evident the Israeli courts have dealt with a volume of cases dealing with these very, very challenging, troubling issues. It far exceeds probably those dealt by all the other courts in the world. So it's certainly instructive and interesting to hear how they have wrestled with those issues, although I hasten to add not necessarily useful in terms of interpreting our Constitution.

Second, I would also point out that Israel gets virtually no credit for this by the way. In other words, the fact that you have a court that's taking a position that's very protective of human rights gets no praise from the people out in the world who are constantly attacking the Israelis for being the worst kind of barbarians. So it's truly a case where the good deeds being done here are not getting much praise.

But it seems to me as we are in our brand new century dealing with an issue of terrorism and a struggle that is unlike any we have seen for this country, and probably unlike any the world has seen, it seems to me there are three very interesting issues that are presented as we try to assess how our legal systems deal with it.

First, of course, the traditional legal model does not really apply necessarily to the 21st century for a couple of reasons. We know, for example, in the criminal law we're accustomed to thinking about the criminal law as functioning with a deterrent and a retribution element.

In other words we punish people after they've committed a crime. We do it not only to give them their just deserves, but we do it also to deter other people from doing things. But as the President said, terrorists are inherently undeterrable. If you are willing to blow up yourself it is unlikely that you're going to be deterred by the threat of punishment. That's distinct, by the way, from the threat of failure, which actually does work as a deterrent.

So our law has to deal with the issue how do you prevent an act; potentially a horrific act, rather than how do you deter it or how do you punish it afterwards. So that is one legal challenge we have to deal with.

Second, the technology of the 21st century is changing so rapidly that many of our rules and procedures, which were built at a time that we had a certain kind of communication system and a certain kind of analog set of processes, that legal structure seems woefully inadequate to a digital age when the movement of communications is not rooted in any one place and when it's very difficult to take the concepts which made a lot of sense in the days of the rotary telephone and apply them in the world of voice over internet protocols. And so that has caused a lot of challenge with how do we deal with things like the authority to intercept communications, the ability to intercept information or to collect information that's publicly available and to integrate it and analyze it.

Some people, for example, find themselves offended by the notion that we might have video cameras up in public places recording their images. They view that as an invasion of privacy. And yet this is at the same time that anybody with a telephone is like a walking big brother because they can photograph you and put you on YouTube. So this rapid evolution of technologies is really changing the way we apply our legal principles to a whole host of issues, not the least of which are terrorism. So I guess that's my first observation. We are really trying to adapt 20th century legal rules to a new world.

Second, of course, we have to consider what are the roles of the courts in all this. I agree with the President that everything we do has to take place within the confines of the law, and we do accept in this country, as in any civilized country, that the rule of law has to trump everything else. And that's why, for example, whether or not the Administration believes that the Supreme Court decides a particular case correctly or incorrectly, the government always follows the law. It always follows the ruling of the court. I've never heard anybody say that

the Court's ruling ought be rejected or disobeyed.

The flip side of that, though, is the courts have a special responsibility in exercising that final word to make sure they are not exceeding the limits of their own competency; and not to assume that the privilege of having the last word means that it is necessarily the correct word. And that's why what the President said, issues like deference to the reasonableness of determinations by military commanders, recognition that, in the fog of war, there's a lot of uncertainty. It's very important as a self-restraining element on the court.

A court that rushes to have a say about everything and to substitute its judgment on matters that judges have no particular reason to be expert in is a court that will begin to lose its legitimacy over time because it will rub up against the commonsense that the people have in looking at what the right role of a court is.

So the privilege of having the final say on what the rule of law is comes with a corresponding very, very profound obligation to exercise that privilege wisely and with restraint, and with a very keen sense of modesty about what a judge is, not only his personal capabilities or her personal capabilities, but the institutional ability of the courts as a way of weighing what happens in a dynamic real-world environment where things happen very quickly and where a false mistake could result in the loss of thousands of human lives.

The last point I would make before I sit down is that I think we are at the stage in this country's legal development when we are suffering from a lack of clarity about the legal rules going forward. It was very understandable that in the couple of years after 9/11 using a set of tools that had not been written or designed to deal with the exigencies of the circumstances, that people had to use the legal principles that laid at hand and try to adapt them to the reality that was being faced.

But I think we all recognize that we are dealing with a series of challenges, you know, and how do we deal with communications, how do we deal with information collection, how do we prevent people from carrying out acts of terror that do require taking a new look at what the legal rules are.

And this is a matter that ought to be debated in order to be decided; and we ought to understand that when we make a decision to strike the balance there's going to be a consequence on both sides, which means that if we decide we want to pitch the civil liberties issue at a certain level and we understand that that may cost us the ability to gather certain communications or to prevent certain things from happening, then society must explicitly accept the cost of that.

What we'll not do is to say we're going to limit your ability to do things but when something happens we're going to blame you for not stopping it. That is not an acceptable way to go about our business.

Part of a debate is a recognition of the fact that there will be a cost on either side. We have to prepare to accept that cost. I think what's happened all too often is we've kicked that decision down the road and, as a consequence, then, in the line of hindsight, particularly when threats have been avoided, there's been a tendency to be critical about measures that were taken and it's hard not to wonder whether that's not influenced by the fact that nothing's happened and therefore, since nothing happened, maybe we didn't need to do as much as we did. It's a little bit like saying I didn't need to take my vaccination because I didn't get sick. Well, you know, who knows whether you would have gotten sick.

Basic fairness to the people who put their lives on the line and go out there and actually operate and execute in the defense of the country suggest that we owe them support for what they've done as long as it's being done in good faith and not for a corrupt motive or an evil motive; and then we owe them if we don't like what they've done, then we owe them the respect of clarifying what the rules are going forward and telling them that we're going to hold them harmless; that as of a consequence of these rules something bad does happen and it was not avoided because we said you can't collect this information or you can't do this then, then we owe them to say well, we understand you weren't able to do it. That was our decision. We decide to accept responsibility and we will not blame you for failing in your job. And I think that remains in my mind the last and most significant step we need to take as a society in adapting our legal process to the 21st century challenges for terrorists.

Mr. Gaziano: Thank you both. I'm Todd Gaziano, director of our center for legal and judicial studies and I will try to pose a question or two unless I -- let me ask you first, Madam President, if you have some other thoughts that you'd like to respond to -- that were raised by Secretary Chertoff's remarks.

President Beinisch: I just want to say, of course, not only the factual situation but the background, the cultural, the legal background, the atmosphere, the culture of the state is of course different. We share the

same concerns. We are, I think, allied also in the important goal to protect democracy and protect from -- prevent terror, it is true. It should be prevented in advance and I think we seek the same way those issues. The solutions are part of their - and of course, here we differ - in our cultures and legal tradition and the different situation in which we are. You said, rightly, Mr. Secretary, that Israel is not too much praised although we have our Supreme Court. I don't want to think what would be if we didn't have it because, as I said, it is so much part of our life, of everyday life. It's not once in a while a problem to solve. And if not we control the review detect -- also only officials. I was one of them once. And how to handle those issues and those matters thinking about keeping under a military regime territories and this difficult situation we are in without the influence and the power of the court to give the guidelines and to deter from unlawful measures. I don't want to think what could happen. So this is part of our guarantee. Thank you.

Mr. Gaziano: Response? There is something that you said that that raised a very fascinating -- raised a question in my mind, and that is that in litigation in the United States, there's been much debate about whether customary international law has been incorporated in our domestic law for a treaty or otherwise, some other domestic law, and also there's usually debate over what is the customary international law. Lots of claims about what it is. And one way to understand that is customary international law is what nations in this sort of circumstance customarily have done or do. But since you correctly pointed out that Israel is in a very unique situation, why isn't the answer that what is customary for your unique nation is whatever the Knesset says, and that customary -- if that isn't the right answer, how do you know what the right claim of customary international law is? What are the principles that your court applies?

President Beinisch: So first of all, of course, all the Knesset legislate is our law. And it's in the hierarchy above customary international law. If the Knesset legislated a law, we are bound, of course, by the law. But when we have to interpret the legislation, and you know not all the answers are always in legislation. Here comes the interpretation. And for interpretation we use international law as one of the tools, not a decisive one, of interpretation. This is one thing. The decision that customary law, whatever it means, is part of the law of the country is not something new in our system. It was decided -- I think it was in a case of the year that the state was founded. '48 if not '49. One of the -- I think it was the first criminal case of the Supreme Court where it was decided that customary law - and this we took from British Common Law, of course, this was not an Israeli idea - it was that customary law is binding. Not more than Israeli legislation, but it is binding if we don't have legislation. This is one thing. Of course, the interpretation gives us the power to decide what is customary law. But this is not just what we figure out. There is a lot, of course, jurisprudence, international and lately, the last years, a lot about what it means, customary international law.

I mentioned also that we have a special situation in the territories where there is no -- the Israeli law does not apply. But norms from the customary international law -- this is how we decided in '67 when the territories were kept to keep them according to belligerent occupation. International principles of belligerent occupation. International principles of -- which means the Geneva Fourth Convention. Those rules that we interpret because we need them. Other courts don't have so much opportunity to interpret those. You know, it started that the state argued that they are not binding and that we accept it. I argued it myself in Supreme Court. We accept -- on behalf of the government. That we accept the principle - humanitarian principles - in the Geneva convention because we want to do that. It's the decision of the government. It's a government decision and it's not binding by international law. They don't argue it anymore. This is became part of our law. Because at that time, no one thought of 40 years in the same situation. So, above all is the Knesset legislation, but we respect customary law and not only. We also try to guide ourselves through interpreting, as I mentioned, the additional protocol or other and also human right conventions. Israel is party to them. They are not binding, but they are guiding us.

Mr. Gaziano: Secretary, do you have any thoughts on the role of international law in our -- in making the clear -- giving clear guidance to American officials?

Secretary Chertoff: I'm not an expert in international law. I mean, we tend to, obviously, subordinate everything to our constitution so whether it's a difference of opinion or a difference of approach, the Constitution trumps. I think -- I'm always a little cautious in suggesting to you what is the appropriate source of customary international. My understanding is it's supposed to be those actions that a state undertakes as a matter of obligation, not as a matter of choice. And so the question, "who determines what customary international law is?" always makes me as a kind of a larger, free person, a little nervous because to the extent that it becomes academics who decide what customary international law is. Sometimes the wish becomes the father to the deed. In other words, it no longer becomes what customary international law is, it becomes what a particular academic would like it to be and of course that's a very different proposition.

President Beinisch: Excuse me. I want to just say two remarks. First of all, we mentioned -- in our judgments that the international law, and this is important, didn't foresee the situation in which -- not we, Israel, but the situation with solving terror problems because international -- customary international law and those convention were formed after World War Two. We're talking about, we're dealing with armies, and not with terrorists. Things change a lot, and we don't find good answers everywhere in all what we know in international law. So we try, as I said, to take them as a guide but not really binding because we don't find solution for every -- even problem. And the other thing is, we are part of a community, of an international community. This is the way we look on our status. And I think in the Israel accord, he's interpreting and applying international law, although sometimes not -- our interpretation is not accepted by all academics of international law. If we do this, we save our people international courts. Because the domestic courts will be the ones who decide what is the law.

Mr. Gaziano: Well, I'm required to end this program somewhat on time. Are there any concluding thoughts, either of you? Secretary Chertoff?

Secretary Chertoff: It must be a great and fascinating time to be a law student because when I was in law school I took a course in international law, but I looked -- the main reason I took it was because it was my third year of law school, it seemed kind of easy, and I was looking to cruise to graduation with the minimal amount of effort. But now, actually, it turns out to be far more relevant than I certainly imagined when I was in law school. So it's a fertile area. I think in general the whole question of law and terrorism is overdue for some serious non-politicized discussion. I think we owe it to the people who are -- have the responsibilities for actually carrying out the projection of the country, both overseas and here at home. The clarity to say that we are going to strike a social balance just to the right pitch we should have for civil liberties and the right pitch we would have for security, and then we ought to be prepared to back up our operators if they abide by that balance. What I think is the most debilitating circumstance is one in which, and I have a vivid recollection of this, one in which in the wake of 9/11 someone gets up in front of Congress and says we're going to take the gloves off now, and everybody goes, "yeah, absolutely, take them off, right on." And then, people take the gloves off and then several years later they find out, "oh, we weren't supposed to take the gloves off. We didn't really mean what we said." I mean, that's a very pernicious type of situation so I think we ought to be in to the community after the fact is now being debated in the FISA context. If we tell people in the private sector that activities undertaken at the request of the government in good faith, meaning no one was being bribed or stealing money or attempting to accomplish a (inaudible) purpose, that activities undertaken -- if we don't tell them that those activities undertaken in good faith are going to be protected, then we will have sent a very clear message going forward which is do not ever answer the call of your government, because you will get bitten after it's all over. And I'm not sure we really want to do that. We are to think hard before we do that. The best answer is to take the time now to have the hard discussion and if there are certain things we want to put off limits, we ought to put them off limits. But then we ought to recognize that they'll be a cost and we ought to accept the fact that we, as a society, will bear the responsibility for the cost.

Mr. Gaziano: Thank you. Any last thoughts?

President Beinisch: I agree with Secretary Chertoff. We have to defend the people that are doing the real work to protect us. And this is our approach too. I think we are not looking to the way to punish people who, as you said, if they were acting in good faith it's enough. If they were acting in good faith. But we have to give them guidelines how they should act. And for that the test of good faith is not enough. The reasonableness, principles of proportionality, how to do that. They are doing the very important work and I agree that it's sometimes too late ex-post facto to look for them and then it's to the purpose is heavy. Heavy target -- to protect society today and I agree that even if we have the illusion of some quiet days it doesn't mean that we can be satisfied that everything is calm. I believe this fight is not finished but it is so important for all of us to live in a democratic society and we have to recognize that whenever we decide to balance we are taking into consideration that we may pay a price. I agree and then this is our dilemmas and they are not easy. They are very difficult but we are ready to confront them. Thank you

Mr. Gaziano: Thank you. Please join me in thanking both speakers.

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