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Legislating Responses to Security Threats:

The Requirement of Legislative Authority to Take Anti-Terrorist Measures

Keynote Address

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Introduction

In *Hamdan* (2006), in which the U.S. Supreme Court ruled that a suspected terrorist cannot be tried by a military commission, Justice Breyer pointed-out that the Court's holding "rests upon a single ground: Congress has not issued the Executive a 'blank check.' " According to this position, "[w]here …no emergency prevents consultation with Congress", the Court would "insist" requiring "the President [to return] to Congress to seek the authority he believes necessary."[1] This doctrine is of high importance in every democracy, but its scope is quite vague. For one thing, it is debated whether the proposition "Congress has not issued the Executive a 'blank check'" is merely an interpretation of some specific legislation or rather a constitutional rule, resembling the Non-Delegation doctrine. Moreover, it is not settled whether this requirement of legislative authority applies to all anti-terrorist measures. For instance, does it apply to targeted killings or restrictions like curfew or closure imposed on the population at an occupied territory, which are typically not authorized in legislation? An additional aspect is the status of the laws of war (mainly the Geneva Conventions) in this respect: does the conclusion that international law does not prohibit taking a certain measure exempt the Executive Branch from the requirement to seek explicit legislative authority? Finally, as a matter of policy, what are the expected consequences of insisting on legislative authorization—would it limit (for better or for worse) the arsenal of actions the government can take in its fight against terrorism?

The first step in the attempt to answer at least some of these

1 Hamdan v. Rumsfeld, 548 U.S. 557, 636 (2006) (joined by Justices Kennedy, Souter, and Ginsburg).

questions is to understand the current practices in the democratic world regarding legislating responses to security threats. The comparative analysis presents a mixed picture. Under the prevailing constitutional norms, the requirement of legislative authorization is limited mainly to instances of measures taken in the territory against citizens, and to activities aimed at retribution rather than preemption. Accordingly, while the last decade has witnessed a growing involvement of legislatures in delineating what measures can legitimately be employed and in what circumstances, this legislation is limited mostly to authorizing measures employed within the territory and target citizens, and only scarcely one can find legislation authorizing "military" anti-terrorist activities taken abroad. Moreover, while such legislation does impose some restrictions on the use of force, reflecting an interest in achieving appropriate "balancing" between security and liberty, its more dominant purpose is precisely in the opposite direction, aiming at legitimizing the use of certain measures that were otherwise considered prohibited.

Not surprisingly, legislators are reluctant to initiate legislation which restricts or otherwise delineates the powers of the Executive Branch in its fight against terrorism. The stakes are high, and imposing restraints on the use of certain types of military force is typically perceived as a politically unrewarding activity, especially when the measures are directed against foreigners. Thus, if legislating what measures can be employed is desirable, it is probably inevitable to expand the relevant constitutional doctrine and in appropriate cases to judicially enforce the requirement of explicit legislative authorization to take certain measures. The debate is whether such requirement is indeed desirable. I suggest that legislatures should play a greater role in delineating the powers governments may employ in their fight against terrorism.

The requirement of legislative authorization is based on several arguments. A well known one is that of democratic self-government. The requirement of explicit legislative authorization to take certain measures is essential to induce democratic deliberation.[2] It may seem that the quite poor record of legislation in the democratic world, which primarily enables, rather than restricts governmental activities, should serve as a strong indication that insisting on legislated authorization is futile. Even worse, the enactment may be detrimental to the protection of basic liberties, due to the symbolic and other indirect adverse effects of authorizing in legislation human rights infringements. I find these concerns unfounded. The duty to openly justify holding certain powers, while approaching the tragic choices involved in responding to security threats under a Rawlsian constraint of "public reason,"[3] substantially restrains the powers the Executive is authorize to take. The concern of the symbolic adverse effects of authorizing human rights infringements is limited. Once it is accepted that basic liberties may justifiably be infringed under certain circumstances, there is no escape from delineating those circumstances.

According to an opposite concern, if enforcing the requirement does prevent the government from applying certain measures, it will endanger the national security. This concern too is unpersuasive. The

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2 As suggested by Justice Scalia in *Hamdi*, "[i]f civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires…". Hamdi v. Rumsfeld, 542 U.S. 507, 578 (2004). In his concurring opinion in *Hamdan*, Justice Breyer referred to this reasoning: "judicial insistence upon … consultation [with Congress] does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means." *Hamdan*, 548 U.S. at 636.

3 JOHN RAWLS, POLITICAL LIBERALISM 223 (1993).

doctrine under consideration does not require the government to obtain the legislature's approval to employ certain measures (or, for that purpose, to declare "war" or a state of emergency). It merely imposes the Executive Branch to convince the legislature that certain measures should be included in the arsenal of actions that can be used, in a given set of circumstances, in the fight against terrorism. Indeed, when the circumstances are exigent, the Executive Branch may employ its emergency powers and take actions even without legislative authority. It may also take immediate measures as needed in cases of necessity. The government is required, however, to establish that the circumstances are indeed exigent. The fight against terrorism should not be regarded as constituting a state of emergency, as the measures that governments consider as essential to purse this fight are well known. It is the Executive Branch's responsibility to initiate legislative proceedings to obtain the authority it deems necessary.

Legislation provides the required authority only when it explicitly addresses specific measures and details the circumstances in which each of them can be employed. Thus, decisions such as the U.S. Congress Authorization for the Use of Military Force (AUMF), which authorizes the President "to use all necessary and appropriate force" against those involved in the 9/11 terror attack, "in order to prevent any future acts of international terrorism against the United States," are insufficient. Such an authorization may fulfill the requirement of the War Powers Resolution, by providing "[a]uthority to introduce United States Armed Forces into hostilities."[4] But this is an authority to use, in a specific

4 The AUMF provision that "Congress declares that this section is intended to constitute specific statutory authorization…" refers to the War Powers Resolution requirement of a "provision [which] specifically …states that it is intended to constitute specific statutory authorization" to use force (section 8(a)(1)).

context, only those measures that the President finds as "necessary and appropriate" which the Executive Branch is empowered to take according to existing legislation. Resolutions such as the AUMF do not trump the requirement of legislative authorization to take *specific* anti-terrorist measures.

The essay proceeds as follows: Part I provides an overview of the scope of legislation in several Western democracies in determining the legitimacy of specific responses to security threats. Part II discusses legal and political considerations that affect the decision whether to legislate in this context. Part III presents the case in favor of a greater involvement of the legislature in determining what measures are legitimate in response to threats of terror, by evaluating the benefits and the costs of legislation in this area.

I. Legislating Anti-terrorist Measures: An International Comparison

Countries vary in the intensity of their fight against terrorism, and it is thus difficult to compare the various legal systems' tendency to legislate in this area. A state that does not use measures such as targeted killings or administrative detentions of suspected terrorists can hardly be expected to authorize in legislation employing such powers. With this caveat in mind, this Part aims at providing a brief overview of the current practice in this area in several democratic states. Democracies take numerous anti-terrorist measures, and instead of detailing all the nuances of specific statues in each country, the discussion here presents only the main patterns. It addresses the following anti-terrorist measures:

targeted killings and other "military" measures, administrative detention, and information gathering.[5]

The comparative study addresses two main aspects: First, in this Part, to what extent the power to employ specific anti-terrorist measures is explicitly authorized in (domestic) legislation; and when such legislation is missing, what is the alternative legal basis of taking such measures? Second, in Part II below, when such legislation exists, what are the prevailing reasons for the enactment?

1. Targeted Killings and Other "Military" Measures

Several countries, including the United States and Israel, have made targeted killing—the deliberate assassination, usually by an airstrike, of a person who is involved in terrorist activities, as a preemptive measure—a central part of their fight against terrorism. As a general matter, democracies do not authorize in legislation taking such actions. The prevailing view is that as long as this policy is applied as a preemptive measure, rather than for pecuniary purposes or deterrence, an explicit legislative authorization is not required. In some countries, such as the U.S., the policy of targeted killings is authorized in Presidential Executive Orders;[6] while in others even such an explicit statement

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5 For a related typology, *see* Daphne Barak-Erez, *Terrorism Law between the Executive and Legislative Models*, 57 AM. J. COMP. L. 877 (2009) (evaluating the choice between promulgating anti-terrorism measures through the executive ("the executive model of terrorism law") as opposed to doing so through the legislative branch ("the legislative model of terrorism law.")); John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 216-18 (2004) (referring to "the legislative model" as one which "handles emergencies by enacting ordinary statutes that delegate special and temporary powers to the executive.").

6 Executive Order 12333 (1981) bans covert acts of murder for political reasons, but in 1998 President Clinton issued a presidential finding (equivalent to an executive

endorsing this policy is missing. This approach enables legislatures to refrain from taking part in resolving the difficult dilemmas about the conditions in which it is justified to use such measures.

In the absence of explicit legislation, the arguable legal authority to employ this policy is typically based on international law. The main source is the customary international law and Article 51 of the United Nations Charter, which allows countries to use force in self-defense after suffering an "armed attack."[7] The prevailing view is that if there is no explicit domestic law that prohibits the state from applying this measure, no explicit authorization is needed. Courts and scholars find two types of general norms as sufficient domestic authorization. One type is legislation which grants the Executive Branch with general authority to use force. This is the case in the U.S., in which the government and some scholars refer in this respect to the broad language of the AUMF, which authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[8]

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order) authorizing the use of lethal force in self-defense against Al-Qaeda in Afghanistan. Following the attacks of September 11, 2001, President Bush reportedly made another finding that broadened the class of potential targets, authorizing to kill even U.S. citizens abroad if there was strong evidence that they are involved in organizing or carrying out acts of terrorism against the United States. *See, e.g.*, Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 149-51 (2010); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 37-44 (2008).

7 Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 119 (1989).

8 FINDLAW, Authorization for Use of Military Force (Enrolled Bill), *available at*

Similarly, the Israeli Supreme ruled that the requirement of domestic authorization to deliberately kill persons who take "direct part in hostilities" is fulfilled by the general authority granted in legislation to the armed forces, "to do all acts necessary and legal, in order to defend the State and in order to attain its security-national goals."[9]

Another type of legislation which is often mentioned as a possible formal source of authority is domestic legislation which provides law enforcement officers with the power to use, in appropriate circumstances, all the necessary means to effect the arrest.[10] A related argument is that the authorization can be found in the general concept of necessity; or, as in the Israeli case, by reference to the criminal law defense of lawful capacity of office.[11] The Israeli Supreme Court ruled, in response to the claim about the lack of legislated authorization, that "when soldiers of the Israel Defense Forces act pursuant to the laws of armed conflict, they

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http://news.findlaw.com/hdocs/docs/terrorism/sjres23.enr.html (last visited May 15, 2012).

9 Article 1 of Basic-Law: the Army; article 18 of the Administration of Rule and Justice Ordinance, 1948; article 40(b) of Basic-Law: the Government, which recognizes the government's powers to take "any military acts needed in order to defend the State and public security."; HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel, 62 (1) PD 507, para. 19 [2006] (Isr.), English translation *available at* http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.; The Israeli Court ruled there that the state may deliberately kill persons on the basis of article 51(3) of the First additional Protocol to the Geneva Convention, which provides that "civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

10 For a discussion of the legitimate scope of such legislation, *see, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985) (holding that such statutes are constitutional insofar as they authorize the use of deadly force against only if the use of such force is necessary to prevent a person's escape from arrest and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others).

11 According to article 34(m)(1) of the Israeli Penal Code, a person shall not be criminally liable for an act which he "has a duty, or is authorized, by law, to do".

are acting 'by law,' and they have a good justification defense."[12] The prevailing view in the U.K. is that targeted killings are authorized by Section 3(1) of the Criminal Law Act, 1967, which states that "a person may use such force as is reasonable in the circumstances in the prevention of crime…," and by the common law norms of self-defense.[13] Similarly, in Germany a reference is made to legislation which empowers law enforcement officers to kill a person in order to protect others from serious bodily harm or unlawful violence to their lives.[14]

However, it is doubtful whether the last type of legislation is indeed sufficient here. First, a criminal law defense, of either excuse or justification, is not tantamount to explicit, ex-ante authorization to use force. When a criminal law justification applies, the underlying assumption is that a criminal prohibition was violated, but that in the relevant circumstances there was a justified reason for doing that. In contrast, a statute which authorizes a state official to employ a policy of targeted killings presents the view that this policy is a justified one.[15] The aim of the requirement of statutory authorization is to call the legislature to determine whether the action is justified, not whether state-

12 HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel, 62 (1) PD 507, para. 19 [2006] (Isr.).

13 MELZER, *supra* note 6, at 22-27.

14 *Id*. at 12-13. For such "final rescue shot" acts, *see, e.g*., Section 54(2) PolGBW (Baden-Württemberg); Art. 66(2)(2) BayPAG (Bayern); § 66(2)(2) BbgPolG (Brandenburg); § 60(2)2) HSOG (Hessen); § 76(2)(2) Nds.SOG (Niedersachsen); § 63(2)(2) POG RP (Rheinland-Pfalz); § 57(1)(2) SPolG (Saarland); § 34(2) SächsPolG (Sachsen); § 65(2)(2) SOGLSA (Sachsen-Anhalt); § 64(2)(2) ThürPAG (Thüringen*)*.

15 For a discussion on this issue, *see* Miriam Gur-Arye, *Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience, in* TORTURE: A COLLECTION 183 (Sanford Levinson ed., 2004); Miriam Gur-Arye, *Justifying the Distinction between Justification and Power* (*Justifications vs. Power*), 5 CRIM. L. & PHIL. 293 (2011).

actors should be exempted from criminal liability if taking such measure. Second, criminal law defenses and the legislation which provides law enforcement officers with the power to use force to effect an arrest refer to instances in which the use of lethal force is not a premeditated plan to kill someone. The typical case is that of a failed attempt of arrest of a person imposing an immediate threat. In contrast, targeted killing is a policy in which armed forces deliberately aim to kill a person, often without attempting to capture him (presumably based on the view that such an attempt is impractical). It is a policy that according to the prevailing view can be employed even when the targeted person does not impose an immediate threat, as it is sufficient that he takes a direct part in hostilities. This distinction was at the heart of the European Court of Human Rights decision in the case of *McCann*, which evaluated the killing of three persons, suspected as IRA terrorists, by the U.K. government. The U.K. denied a premeditated plan to kill these persons, possibly due to its recognition of a lack of sufficient legislative authorization to carry out such a policy, and the Court thus employed the norms relevant to the use force to effect an arrest, and found the action unlawful.[16]

Interestingly, international human rights treaties too mostly exclude the requirement of explicit authorization in law as one of the conditions of justified infringement of the right to life. The International Covenant on Civil and Political Rights (ICCPR), the American Convention on

16 The Court ruled that due to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the killing did not constituted the use of force which was no more than absolutely necessary in defense of persons from unlawful violence, within the meaning of article 2(2)(a) of the European Convention. McCann and Others v. the United Kingdom, 21 Eur. Ct. H.R. 97, para. 148-50 (1995).

Human Rights, and the African Charter of Human and People's Rights prohibit *arbitrary* deprivation of life.[17] Similarly, Article 2(2) of the European Convention on Human Rights, allows for killing a person "when it is… absolutely necessary, in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent escape of a person lawfully detained; [or] in action lawfully taken for the purpose of quelling a riot or insurrection." Here too the standard prerequisite for justified infringement of other right, that the action would be "as proscribed by law," is missing. Possibly, the implicit assumption is that legitimate infringements of the right to life are those that are not premeditated, that is that can be justified in terms of immediate necessity, and these do not require an explicit ex-ante authorization; whereas deliberate killings can be justified only under the laws of war, outside the scope of human rights law.

Explicit legislated authorization is also missing regarding the various military anti-terrorist measures taken by governments within occupied territories. The international law of Belligerent Occupation authorizes the occupying state to "take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (Article 43 of the Annex to the Hague IV Regulations Respecting the Laws and Customs of War on Land, 1907). These norms provide the occupying state with extensive powers, making legislation, under the conventional view, unnecessary. Thus, for instance, the Israeli Supreme

17 *See* International Covenant on Civil and Political Rights, art. 6(1), Dec. 16, 1966, 99 U.N.T.S. 171 (entered into force Mar. 23, 1976); American Convention on Human Rights, art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978); African Charter on Human and Peoples' Rights, art. 4, June 27, 1981, 1520 U.N.T.S. 217 (1982).

court ruled that the government is authorized, notwithstanding the lack of authorizing domestic legislation, to take within occupied territories anti-terrorist measures such as demolitions of houses in which suicide-bombers lived, and to employ mass curtailments of freedom of movement, including imposing curfews and closures on the residents in certain areas, and the construction of a separation barrier within the occupied territory.

2. Detentions and Criminal Trials

The central measure taken against suspected terrorists is apprehension. Democracies use three different means is this respect: indicting suspects through the "regular" criminal justice system, sentencing them in military commissions, and holding such persons in military (or "administrative") detention. The first option is always based on explicit legislation, as it is essential in determining offences.

An important element here is the quite broadly-defined crime of "membership" in a terror organization, and providing it material support. Such legislation can be found in practically all democracies. Examples include, in the U.S., 18 U.S.C. § 2339B, a statute making it a felony to provide "material support or resources" to a designated foreign terrorist organization;[18] and in the U.K., sections 11 of the Terrorism Act 2000, prohibits belonging or professing to belong to a proscribed organization.[19] Similar Acts were enacted in Germany, Israel, Australia,

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18 In addition, 18 U.S.C. § 2339(A) (2000) makes it an offence to provide material support or resources, knowing or intending that they be used in preparation for, or in carrying out, a violation of various criminal prohibitions associated with terrorism.

19 For a discussion of the compatibility of this Act with the Human Rights Act 1998, *see, e.g.*, R (On the Application of the Kurdistan Workers' Party and Others) v. Secretary of State for the Home Department, [2002] EWHC 644 (Admin.) (Eng.); and R v. Sheldrake and AG's Reference (No. 4 of 2002), [2004] UKHL 43, [2005] 1

Canada, and more.[20] Legislation is also prevalent regarding other prohibitions on supporting terror, including norms prohibiting financing terror organizations and incitement to terrorism.

In addition to legislating crimes of supporting terror organizations, several democracies enacted special rules regarding criminal procedures against suspected terrorists. A notable example is the U.S. enactment of the Classified Information Procedures Act (CIPA), which allows judges to approve the use of redaction, substitution and other methods meant to reconcile a defendant's rights with the government's obligation to preserve the secrecy of sensitive information. Israel is another notable example in this respect. The Israeli legislature has enacted statutes which derogate several procedural rights of suspected terrorists.[21] In many democracies explicit legislation empowers holding suspected terrorists in a civil detention for periods that exceed the generally applicable

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A.C. 264.

20 For a review, *see* Liat Levanon, *Criminal Prohibitions on Membership in Terrorist Organisations*, 15 NEW CRIM. L. REV. 224 (2012).

21 For instance, the Criminal Procedure (Enforcement Powers-Detentions) Law, 1996, compels investigation authorities to inform a relative of a person detained and a lawyer of his or her choice about the detention; but according to this law, in the case of persons suspect of terrorist activities the Court may exempt security agencies from the requirement to inform someone about the detention for up to 15 days, "whenever the Minister of Defense approved that the State's security compels keeping the detention secret" (sections 33 and 36). The same is true in respect to the right to counsel. The Criminal Procedure (Enforcement Powers-Detentions) Law, 1996, compels investigation authorities to enable a detainee to counsel with a lawyer. However, this law authorizes infringing this right for up to 10 days whenever the detainee is accused in "security" offenses (sections 34 and 35). Additional legislation include the Criminal Procedure Act (A Detainee Accused in a Security Offence) (Temporary Provision), 2006, which empowers the government to infringe other basic liberties of persons who are suspected terrorists, and the Criminal Procedures Act (Criminal Investigations), 2002, which provides a general exemption from the duty of written or video documentation of interrogations in the case of investigating a person accused of terror related offenses (section 17).

norms.[22]

The same is true with respect to military commissions. As this measure is not aimed at preemption but primarily at retribution and deterrence, the powers of military commissions to try suspected terrorists is regulated in legislation. In the U.S., such legislation, the Military Commissions Act of 2006, was enacted only following a judicial decision (in the *Hamdan* case) that such legislation is required to try suspected terrorists in such tribunals, at least for crimes which do not amount to war crimes.[23] In other countries such legislation was enacted without judicial intervention.

Military or administrative detentions are not always authorized in legislation. However, it seems that there is a pattern of a growing involvement of the legislature in authorizing and regulating employing the power to hold suspected terrorists in a military detention. The debate in this respect is whether administrative detention should be viewed, at least for the purpose of the requirement of legislation, similar to the power to hold enemy combatants as prisoners-of-war (POW). This latter power is conceived as invested in the powers of the Executive Branch, making domestic legislation unnecessary. While suspected-terrorists do not enjoy the status of POW's under the laws of war, one may argue that the power to detain them, for preventive purposes, should be similarly part of the powers of the government. Following this view, the U.S. Congress has declined to address this issue of military detention without

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22 For instance, the USA Patriot Act of 2001 allows the U.S. attorney general to detain alien without charge for seven days; in the UK, Schedule 8 of the Terrorism Act of 2000 regulates terrorists pre-charge detention; in Australia, Section 23DA Crimes Act 1914; and in Israel, the Criminal Procedure Act (A Detainee Accused in a Security Offence) (Temporary Provision), 2006.

23 *Hamdan*, 548 U.S. at 636.

trial in any detail. The prevailing view is that since military detention aims to incapacitate in order to prevent future harm in battle, this measure is part of the President's War Powers. Thus, in the Hamdi case (2004) the U.S. Supreme Court ruled that the government can hold even an American citizen in detention without explicit legislative authorization. It ruled that the general authorization provided by the AUMF is sufficient for this purpose.[24]

This view is doubtful. According to the laws of war, a person can be detained only if he is a member of enemy armed forces.[25] The affiliation of suspected terrorists, mainly those who are not detained in the battle field, is typically questionable. In this respect the U.S. Supreme Court insisted in *Hamdi* (regarding U.S. citizens) and in *Rasul* (regarding aliens) that the power to hold a person in detention exists only once it is sufficiently clear that the individual is, in fact, an enemy combatant; and absent explicit legislation stating otherwise, the detainee is entitled that this issue will be reviewed through a judicial process.[26] The U.S. Congress reacted by enacting the Detainee Treatment Act of 2005 (and then again the Military Commissions Act of 2006) which explicitly eliminated statutory habeas jurisdiction for Guantanamo detainees,

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24 *Hamdi*, 542 U.S. at 519 ("…it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.").

25 Article 21 of the Third Geneva Convention authorizes parties international armed conflicts to detain during hostilities any individual who qualifies as a prisoner of war, and article 4(A) in turn specifies six categories of persons who fall under that heading, including: membership in enemy armed forces, membership in an armed force that professes allegiance to an unrecognized government, persons authorized to accompany such forces, and those who crew merchant marine vessels or civilian aircraft.

26 *Hamdi*, 542 U.S. at 532-36; Rasul v. Bush, 542 U.S. 466, 480-85 (2004).

replacing it with another framework of judicial review.

In Israel, the power of administrative detention is authorized in a detailed legislation. The central provision is the Emergency Powers (Detentions) Law, 1979. The Israeli Supreme Court ruled that this power can only be used as a forward-looking preventive measure, against a person who poses an individual threat, and may not be used as punishment for past acts.[27] The Court held that "a person should not be detained merely because he has been detained during warfare. …The circumstances of his detention must be such that they raise the suspicion that he—he individually and no one else—presents a danger to security."[28] In response, the Israeli legislature enacted a new legislation (without revoking the earlier one)—the Internment of Unlawful Combatants Law, 2002, which authorizes the state to intern persons who are classified as "unlawful combatants," to bypass the requirement of proving the detainee's individual dangerousness.[29]

In the U.K., the Prevention of Terrorism Act of 2005 empowers placing "control orders" (including detention) on "dangerous"

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27 *See, e.g.*, HCJ 5784/03 Salama v. Israel Defence Forces Commander in Judea and Samaria 57(6) PD 721, para. 7 [2003] (President Barak) (Isr.): "The basic premise is that administrative detention is meant to prevent future danger to the security of the state or to the public safety. Administrative detention is not meant to be a tool used to punish previous acts, or to be used in place of criminal proceedings." English translation *available at*: http://elyon1.court.gov.il/Files_ENG/03/840/057/A05/03057840.A05.HTM.

28 HCJ 3239/02 Marab v. IDF Commander in the West Bank 57(2) PD 349, para. 23 [2003] (President Barak) (Isr.). The Court added in this respect that the army is not authorized to make "mass detentions." *Id*. English translation *available at* http://elyon1.court.gov.il/Files_ENG/02/390/032/A04/02032390.A04.pdf.

29 However, the Israeli Supreme Court ruled that this law should be interpreted such that the individual dangerousness requirement is applied. *See* CrimA 6659/06 A v. The State of Israel [2008]. English Translation *available at* http://elyon1.court.gov.il/Files_ENG/06/590/066/n04/06066590.n04.htm.

individuals. In Canada, detention of suspected terrorists is made under the Immigration and Refugee Protection Act.[30] Other countries did not enact specific legislation of this kind. In Germany, for instance, laws enable a detention for public safety reasons, but for very limited periods of several days.

3. Interrogations and Information Gathering

Democracies tend to authorize in legislation powers related to interrogations and information gathering, but in the context of the fight against terrorism such legislation is often quite lax. On the one hand, legislation prohibiting the use of force in interrogations, and certainly torture is prevalent. For instance, in the U.S. both Federal and State legislation forbids torture or other like-torture methods by security forces.[31] In Germany, in addition to explicit legislation, such probation is entrenched in the Basic-Law.[32] In Australia various legislated norms prohibit torture.[33] And in the U.K., the Human Rights Act incorporates

30 This Act was reviewed in Charkaoui v. Canada (Citizenship and Immigration) [2007] 1 S.C.R. 350 (Can.).

31 The Federal Torture Statute, 18 U.S.C. §§ 2340-2340(A). This issue is determined in a more elaborated way in non-legislative norms, such as the Army Field Manual 2 22.3, and Executive Order No. 13440, and No. 13491, "Ensuring lawful interrogations." *See* WHITE HOUSE, http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/ (last visited May15, 2012).

32 Article 104(I) of the Basic-Law states that "persons in custody may not be subjected to mental or physical mistreatment." *See also* Section 136(a) to the German Criminal Procedure Code, which sets additional ground rules to police officers in regards to interrogation.

33 *See* Commonwealth Criminal Code (Cth) § 268.13, § 268.25, and § 268.73. Torture is also made criminal by the Human Rights Act of 2004 § 10(1). *See also* Australian Security and Intelligence Organisation Act 1979 (Cth) § 34T, which states that a person questioned should "be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment by anyone exercising authority under the warrant or implementing or enforcing the direction."

the European Convention on Human Rights, and thus sets forth the prohibition on torture.[34]

On the other hand, legislation often provides extensive powers to gather information. For instance, the USA Patriot Act (Sections 215, 206) and the Intelligence Reform and Terrorism Act of 2004 (Section 6001), implement extensive measures for wiretap, tracing persons and collecting data on U.S. citizens, and permit secret intelligence surveillance on non-U.S. citizens. In Germany, the Federal Intelligence Service Law 1990 authorizes the Federal Intelligence Service to "gather intelligence... about foreign countries" and "gather all the necessary information." Similarly, in the U.K. the Security Service Act 1989 and the Intelligence Services Act 1994, which provides the legal framework of the British intelligence agencies, do not detail any limitation on information gathering methods by the relevant agencies. In Australia too, the Intelligence Services Act 2001 only determines the functions of Australia's intelligence agencies, without specifying the actions allowed in obtaining information about non-Australian citizens, whereas the Telecommunication (Interception) Act 1979 and its amendments imposes several restrictions regarding wiretapping Australian citizens. In Israel, the Wiretap Law, 1979 prohibits investigation authorities to engage in wiretaps, unless authorized to do so, for the purpose of preventing high crimes, by a court order. However, the law exempts security agencies from this requirement, and authorizes them to wiretap "whenever needed for security reasons," subject only to the approval of

34 However, the Anti-terrorism, Crime and Security Act of 2001, and mainly the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code C), which was instituted under authority of the Police and Criminal Evidence Act of 1984, elaborates the scope of legitimate forms of questioning and interrogations.

the Minister of Defense (Section 4).

4. Summary

The comparative analysis presents a mixed picture. While the last decade has witnessed a growing involvement of legislatures in delineating what measures can legitimately be employed and in what circumstances, this legislation is limited mostly to authorizing measures employed within the territory and target citizens, and only scarcely one can find legislation authorizing "military" anti-terrorist activities taken abroad. Moreover, while such legislation does impose some restrictions on the use of force, reflecting an interest in achieving appropriate "balancing" between security and liberty, the more dominant purpose is to legitimize the use of certain measures that were otherwise considered prohibited.

II. Positive Evaluation of the Decision whether to Legislate: Legal and Political Considerations

The preceding discussion shows that legislatures often take a rather minimalist approach in determining the legitimacy of decisions taken by the Executive Branch in the fight on terror. The following discussion briefly outlines the underlying reasons of the decision to legislate certain aspects of this fight and to avoid it in others. The discussion refers to two main types of considerations in deciding whether or not to enact—legal and political ones. It aims at explaining the current legal doctrine regarding the requirement to provide explicit legislative authorization, and the reluctance of legislatures when such a requirement does not apply.

1. The Requirement of Explicit Legislative Authorization

The Legal doctrine regarding the requirement of explicit legislative authorization is somewhat ambiguous, but it can be summarized according to the following main elements. One aspect, which is relevant only in Presidential regimes, is whether the legislature has the power to legislate in these areas. The doctrine known in the U.S. as "War Powers," suggests that decisions of the president related to a war or national crisis are beyond the reach of statutory law. According to one view, as long as a country is at war with terrorist organizations, "the full panoply of presidential power in time of war comes into play."[35] The result is that the legislature is not authorized to restrain the President, as the Commander-in-Chief, to employ certain anti-terrorist measures. However, this view is generally rejected. The fight on terror is made "within the law," and legislated and court-made law bind the Executive Branch.[36]

One type of cases in which legislated authorization is required is when specific legislation prohibits the use of a certain measure. The authorization is then required to override the legislated prohibition. An example is the U.S. case of *Hamdi* (2004). The Court there was split on whether the AUMF provides sufficient legislated authority to hold a U.S. citizen in military detention.[37] The important point is, however, that all Justices based their view that such an authorization is required on an

35 John C. Eastman, *Listening to the Enemy: The President's Power to Conduct Surveillance of Enemy Communications During Time of War*, 13 ILSA J. INT'L & COMP. L. 1, 5 (2006). For a similar view, *see, e.g.*, JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 8-20 (2006).

36 VICTOR M. HANSEN & LAWRENCE FRIEDMAN, THE CASE FOR CONGRESS: SEPARATION OF POWERS AND THE WAR ON TERROR 2 (2009).

37 *Hamdi*, 542 U.S. at 517.

existing legislation—the Non-Detention Act of 1971. This Act states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Similarly, in the case of *Hamdan* (2006) the Court ruled that an explicit legislated authority is required, and it based this position on its ruling that an existing legislation, the Uniform Code of Military Justice, prohibits trying suspected terrorists in military commissions for crimes which do not amount to war crimes.[38] In such instances the requirement of legislation is thus based on concrete existing norms.

Anti-terrorist measures that typically require legislative authorization on this basis are those that involve trying a suspect at the criminal justice system. The norms of criminal procedure and criminal law are of general applicability, and to implement more stringent rules in trying suspected terrorists, an explicit overriding legislation is required. Existing legislation that prohibits the government from taking certain measures can also be expected regarding powers that may infringe basic liberties of the general public, such as privacy infringing surveillance measures, as well as measures that were inappropriately employed in the past in the relevant country.

An interesting issue in this category of cases is whether the finding that a certain measure is incompatible with the relevant norms of international law would serve as a basis for requiring an explicit authorization in law as a prerequisite to justifying taking such measure. This is clearly the case when the relevant international law norm is part of the domestic law. This is also true when an existing legislation is interpreted as excluding a prohibition to take a certain measure only if

38 *Hamdan*, 548 U.S. at 636.

employing this measure is permitted according to international law. This was the case, for instance, in *Hamdan*, where Article 21 of the Uniform Code of Military Justice permitted trying a person by a military commission only "with respect to offenders or offenses that by …the law of war may be tried by military commissions;"[39] and this was the case in *Hamdi*, where the AUMF, which was viewed as permitting the government to override the prohibition set forth by the Non-Detention Act only as long as the measures violating this Act are permitted according to the laws of war.[40] Another example is the Israeli Supreme Court decisions that invalidated certain anti-terrorist measures taken by the government on the basis of their incompatibility with relevant international law norms. Here too, to override such rulings an explicit legislation is inevitable.

Legislation may also be required based on constitutional doctrines. It is generally accepted that a measure which infringes upon entrenched constitutional rights must be authorized in legislation. This norm expands the criminal law principle of legality (*nullum crimen sine lege*). In many democracies this doctrine is explicit in the constitutional text. For instance, in Canada, Section 1 of the Canadian Charter of Rights and Freedoms guarantees that the rights set out in the Charter may be limited as "prescribed by law."[41] In Germany, Article 80(1) of the German Basic Law stipulates that "the Federal Government, a Federal Minister, or the Land governments may be authorized by a law to issue statutory

39 *Id*. at 717-18.

40 *Hamdi*, 542 U.S. at 541.

41 Constitution Act, 1982. This requirement was the basis of numerous decisions that invalidated certain measures. For instance, *see, e.g.*, R v. Therens, [1985] 1 S.C.R. 613 (Can.); R. v. Simmons, [1988] 2 S.C.R 495 (Can.) (the right to counsel cannot be denied without explicit legislative authorization); R. v. Dersch, [1993] 3 S.C.R. 768 (Can.) (access medical records by the police).

instruments. The content, purpose, and scope of the authority conferred shall be specified in the law." And in Israel, according to Article 8 of the Basic-Law: Human Dignity and Liberty, it is impermissible to infringe human rights unless the infringement is prescribed by law.

This principle is accepted in other democracies as well. For instance, in the U.S., the Supreme Court ruled in the *Youngstown* case that the President's War Powers do not trump the requirement of legislative authorization whenever he seeks to infringe basic liberties. The Court ruled that the framers did not contemplate "that the title commander-in-chief of the Army and Navy" would also make the President "Commander-in-Chief of the country, its industries and its inhabitants."[42] It ruled that notwithstanding the existence of war, to pursue the domestic action of seizing steel mills the President would have to follow the rules set by Congress. As the Court added in *Hamdi*, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[43]

Several aspects of the scope of this doctrine are contested. One aspect is how detailed and precise the authorization should be. Under the prevailing approach, following the European Court of Human Rights decision in the *Sunday Times* case, "a norm cannot be regarded as 'law' unless formulated with sufficient precision to enable the citizen to

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42 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643-44 (1952) (Jackson J., concurring).

43 *Hamdi*, 542 U.S. at 536.

regulate his conduct."[44] In practice, courts do not insist on substantial involvement of the legislature in authorizing the scope and type of the infringement. Often, norms which confer governmental officials with wide discretion are recognized as limitations "prescribed by law," notwithstanding the Non Delegation doctrine. Some jurisdictions apply a sliding-scale approach, which adjust the level of precision required in legislation to the intensity of the infringement. In some instances courts ruled that a statute that confers discretion may well be read as to deny acts which infringe constitutional rights.[45]

The main difficulty is the decision in what instances an infringement of basic liberties is recognized. According to the prevailing view, human rights law applies only within the territory and not when traditional actions of war are taken.[46] Instances of international armed conflict, and by stipulation also instances of a fight against terrorist organizations abroad, are typically subject to the laws of war rather than to domestic or international human rights law, at least in the context of the requirement that the infringement will be "proscribed by law." For

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44 Sunday Times v. United Kingdom, 2 Eur. Lt. H.R. Rep. 245, 270-73 (1980).

45 One example is the Canadian Supreme Court decision in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, 1077 (Can.), that "it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. …Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed." Another example of this approach is the Israeli Supreme Court decision in HCJ 3267/97 Rubinstein v. Minister of Defense 52(5) PD 481 [1998] (Isr.), in which it held that the power to exempt persons from the draft should not be interpreted to include the authority do so on a collective basis, as this would amount to an infringement of the right to equality, which must be explicitly decided by the legislature.

46 This view somewhat resembles Cass Sunstein's interpretation of the *Hamdan* decision as one which requires "clear congressional authorization [whenever] the executive seeks to intrude into the realm of liberty or departs from practices that are historically entrenched." Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1, 5 (2007).

instance, the Israeli Supreme Court does apply, as a routine, both humanitarian international law doctrines and domestic human right law in its review of measures taken in Israel's fight against terror in occupied territories; but the provisions of the domestic Basic Law: Human Dignity and Liberty are applied only with respect to the evaluation whether infringements are justified. The requirement that the measure will be proscribed by law is not enforced. In the handful of cases in which the Court did refer to this requirement in addressing measures taken within the occupied territories it applied a very lenient approach, such that a very broad authorization was held sufficient to fulfill this requirement.

Courts hardly insist on legislative authorization outside the realm of human rights law. An interesting exception to this view was offered by the Israeli Supreme Court's 1998 *Rubinstein* case. The Court ruled there that employing contested powers, ones which involve substantive moral dilemmas or raise public and political dispute, must be resolved in legislation: "The people's elected representatives must adopt substantive decisions regarding State policies. …[T]o the extent that the regulation of a particular area requires that fundamental decisions which substantially affect the lives of individuals and society be taken, it is appropriate that such decisions be made within the confines of the statute itself."[47] However, in practice the Court applies this doctrine, to limit the government's powers, only when it recognizes a human right infringement.[48] Take, for instance, the decision to erect the Separation

47 HCJ 3267/97 Rubinstein v. Minister of Defense 52(5) PD 481 [1998] (Isr.).

48 In 1999 the Court implemented this doctrine by holding that it is impermissible to use coercive interrogation methods, not even in the case of a "ticking bomb," at least as long as no explicit authorization to do so is promulgated in legislation. HCJ 5100/94 Public Committee against Torture in Israel v. Government of Israel 53(4) PD 817 [1999] (Isr.).

Barrier ("the Wall"), outside the Israeli territory. This is a project of unprecedented scale, in terms of its financial costs, its large scale effect on Palestinians who live close to it, and the potential political consequences of this project. The project, which included confiscating land, and denying entry to certain areas, was approved by the Court, notwithstanding the lack of legislation authorizing it, based exclusively on (expansive) interpretation of norms of humanitarian international law. The same is true with respect to the policy of "targeted killings," and other military measures.

2. The Decision whether to Legislate: Political Considerations

The decision whether to enact norms that relate to governmental powers in general, and to the fight against terrorism in particular, may be based on three main types of considerations—functional, deliberative and symbolic ones. The central element is the functional aspect. Legislation may serve to either legitimize an otherwise prohibited governmental measure or to prohibit an otherwise legitimate one. This consideration is contingent on two background conditions. The first is the governing constitutional norms, mainly the scope of judicial review of governmental activities, and the enforcement of the requirement of explicit legislative authorization as a prerequisite to employ certain powers. A second relevant aspect is the legislature's political motivation to restrain the government. Legislation that restrains the government can be expected when such intervention is required (mainly since the judiciary fails to effectively scrutinize the Executive Branch's actions), and the majority in parliament is willing to confront the government. Respectively, a functionally-based permissive legislation is expected in response to an activist court, and a parliamentary support of the government (based either on the legislature serving as a mere rubber-

stamp of the government's policies, or on an ideological position that the government should hold the powers under dispute). A related functional role of legislation is not only to set policies but also to direct behavior of soldiers and other officials. A permissive legislation may serve to shield soldiers from the risk of criminal liability, and a prohibitive one may be aimed at deterring them from taking certain measures. Here too the background rules matters. For instance, if the criminal law defense of lawful capacity of office, which provides that a person shall not be criminally liable for an act which he has a duty, or is authorized, by law, to do, applies when soldiers act pursuant to the laws of armed conflict, domestic legislation is not required for this purpose.

The two other considerations are more nuanced. The deliberative aspect refers to the process of legislation, rather than its outcome. This process serves as a forum for public deliberation on the disputed issue. Thus, the decision whether to legislate is also a result of the prevailing political culture regarding the question whether inducing such an open deliberation is desirable or not. A strategy of parliamentary deference to the Executive Brach may thus be the result of a principled position that the proper division of powers between the two branches requires assigning the government with limitless discretion in the current context.

The third consideration, the symbolic one, has to do with the outcome of the legislative process, but unlike the functional aspect, the current one emphasizes the informal consequences of legislation. Typically, the explicit authorization in legislation to hold certain powers or to take certain measures, including ones that infringe basic human rights or even deontological constraints, may have adverse symbolic and (both domestic and international) political consequences. Here too, the decision whether to legislate or not can be expected to take these aspects

into account, based on an evaluation of their scope and nature in the relevant circumstances.

In general, legislatures do not show an interest, independent of that of the government, in restricting or otherwise delineating the powers of the Executive Branch. Times of armed conflicts and threats to terror activities are characterized by a high level of uncertainty and ambiguity. The choice of security measures is based on an integration of complicated body of data, some of it confidential, some of it missing or indefinite. The stakes are high, and imposing or enforcing restraints by the parliament on the use of certain types of military force is typically perceived as a politically unrewarding activity.[49] It is not surprising then that legislatures in liberal democracies employ a rather minimalist approach in regulating the fight against terrorism, as discussed above.

From the government's perspective, legislation is typically costly, in terms of both the requirement of holding extensive deliberations and

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49 For a similar evaluation of minor rule of Congress in regulating the US war on terror, *see, e.g.*, Jerry L. Mashaw, *Due Process of Governance: Terror, the Rule of Law, and the Limits of Institutional Design*, 22 GOVERNANCE: INT'L J. POL'Y, ADMIN. & INST. 353, 363 (2009) ("Congress has revealed itself to be a weak reed, indeed. …Faced with a direct executive branch challenge to its authority to regulate electronic surveillance, Congress essentially legalized the administration's extralegal practices. A Congress threatened with political responsibility for making Americans less safe seems to be a Congress determined to maintain that responsibility in the executive branch, even at the cost of delegating the responsibility to protect basic legal and procedural rights to that branch as well."); Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 450-51 (2011) ("President Bush put Congress in an untenable position. If it refused funding to enforce its statutory limitations on the war, it would be accused of abandoning the troops in the field. This was too high a political price to pay to force the president to retreat from Iraq, as the initial congressional authorization required. …The strategic use of emergency appropria-tions allowed the president to engage in 'bait-and-switch' tactics that undermined effective democratic control over the use of military force.").

the symbolic effects of ex-ante explicit authorization to infringe basic liberties. As long as the scope of judicial review is "bearable" in terms of the measures it prevents the government from taking, the above costs are usually prohibitive. The judicial scrutiny imposes a cost on the government, as it prohibits the government from taking the measures it deems appropriate and necessary in its fight against terrorism. When the gap between the political majority's views about this issue and the activities permitted by the judiciary is large enough, sufficiently high cost of the latter type is generated, and the government finds it justified initiating legislation and bearing the costs associated with it. Accordingly, the higher the above-mentioned costs of legislation that is aimed at overriding judicial decisions, the wider the judiciary's power to impose its positions about what measures may be legitimately employed, and vice verse.[50] Therefore, one can expect permissive legislation mainly when this is legally necessary, as discussed above.

Finally, it should be noted that even when there is a functional interest in prescribing a certain measure in law, the political costs of such legislation are often prohibitive. Consider in this respect the Israeli experience. The Israeli Supreme Court employs a relatively activist approach in reviewing the legitimacy of various military activities.[51] In

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50 *Cf.* Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296 (2004) (suggesting that where both legislature and executive endorse a particular tradeoff of liberty and security, the courts have accepted that judgment; but where the executive has flown in the face of legislative policies or without legislative approval, the courts have invalidated executive action, even during wartime, or scrutinized it more closely).

51 *See, e.g.*, Yoav Dotan, *Legalising the Unlegaliseable: Terrorism, Secret Services and Judicial Review in Israel 1970–2001*, *in* JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES 190 (Mark Hertogh & Simon Halliday eds., 2004).

a few cases, the Court declared anti-terrorist measures explicitly authorized in legislation invalid.[52] However, the government, and thus the Israeli parliament too, have been reluctant to enact norms that override these judicial decisions. In most cases the Court based the decision on its interpretation of both the Israeli Constitution and the norms of IHL. It thus indicated that a legislation legitimizing the prohibited measures would be perceived as overriding not only the Court's ruling but also the dictates of IHL. For these reasons, the Court's greater activism made the process of enacting laws to override it more expansive for the government, and consequently only in a handful of cases it chose to initiate a legislation process. In the majority of the cases, most notable of which is the prohibition against the use of coercive measures in interrogation, the government preferred "to bite the bullet," and chose not to ask for legislative approval of such activities.

III. The Appropriate Role of the Legislature

The decision what role the legislature should play should be based on general, universal considerations, but it clearly has a substantial local

52 HCJ 8823/07 John Does v. The State of Israel, 10(4) PD 312 [2010] (Isr.), in which the Court invalidated section 5 of the Criminal Procedure Act (A Detainee Accused in a Security Offence) (Temporary Provision), 2006, which authorized the government to ask, and the court to approve to hold the court hearings on extending the period of detention without the detainee's presence; HCJ 8276/05 Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defense, 62(1) PD 1 [2006] (Isr.), in which the Court invalidated a provision denying persons harmed in "conflict zones" in the Occupied Territories from the right to receive compensations. English translation *available at* http://elyon1.court.gov.il/files_eng/05/760/082/a13/05082760.a13.pdf.

and contextual dimension.[53] For simplicity, the following discussion focuses on general aspects.

Supporters of the view that the Executive Branch should hold "inherent" powers to employ all measures it deems necessary in response to security threats base their position primarily on the view that the benefits of insisting on legislation are marginal. As discussed above, the legislature may be expected to mostly legitimize employing certain measures rather than to restrain the government, making the requirement of ex-ante legislative authorization superfluous. Accordingly, a legislation which restricts the executive to act efficiently in response to threats is dangerous; whereas legislation such as the one adopted by the U.S. Congress almost immediately following the 9/11 attacks (the AUMF), which simply authorized the president to use all "necessary and appropriate force" to subdue the perpetrators of that attack, their allies, and supporters, is meaningless.[54] It is also suggested that requiring legislation is costly. Arguably, it is difficult, or even impossible to predict

53 For an analysis which accentuates the contextual dimension (distinguishing between different types of powers), *see, e.g.*, Barak-Erez, *supra* note 5, at 886-91. For localized comparisons, *see, e.g.*, Michael J. Glennon, *The United States: Democracy, Hegemony, and Accountability*, *in* DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 323 (Charlotte Ku & Harold K. Jacobson eds., 2003); Georg Nolte, *Germany: Ensuring Political Legitimacy for the Use of Military Forces by Requiring Constitutional Accountability*, *in* DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 231 (Charlotte Ku & Harold K. Jacobson eds., 2003); Yves Boyer et al., *France: Security Council Legitimacy and Executive Primacy*, *in* DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 280 (Charlotte Ku & Harold K. Jacobson eds., 2003); Nigel D. White, *The United Kingdom: Increasing Commitment Requires Greater Parliamentary Involvement*, *in* DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 300 (Charlotte Ku & Harold K. Jacobson eds., 2003).

54 *See, e.g.*, Barak-Erez, *supra* note 5, at 883-84 ("executive orders that are solely based on blank authorization in a statutory text …should be regarded as falling within the scope of the executive model.").

what types of measures will be required in response to possible security threats. In addition, as mentioned above, the explicit authorization in legislation to hold certain powers may have adverse symbolic consequences.

I find these arguments unpersuasive. To my view, enforcing the requirement of legislation is justified. I start by addressing benefits of the requirement of explicit statutory authorization. I then move to discuss the concerns and suggest the appropriate scope of required legislation.

1. The Benefits of Requiring Legislated Authorization

Insisting on legislation is expected to induce three main benefits: it imposes the representatives to take direct and formal part in a deliberation on the relevant aims and means, which may have a substantial effect of on actual outcomes; it increases the likelihood that the legislature would scrutinize governmental activities; and it requires the government to act on the basis of general, predefined norms.

Deliberative Aspects of Legislation. The democratic principle of citizens' equal participation in delineating the circumstances under which infringements of basic liberties should be deemed permissible lends support to legislative ordering of this issue, following public deliberation.[55] It also provides the executive with an explicit expression of popular support, which is often needed in order to take extreme measures.[56] But the most important benefit of requiring legislation is

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55 *See, e.g.*, JEREMY WALDRON, LAW AND DISAGREEMENT 232-34, 244-49 (1999).

56 Ferejohn & Pasquino, *supra* note 5, at 220 ("This need for legitimation is chronic in modern democracies, and that it helps explain the emergence of legislative emergency powers, whereby the legislature provides a measure of democratic support for the executive's actions.").

probably the public deliberation which the process of legislation induces.[57]

The process of legislation produces an open discussion, which requires the decision-makers to present their empirical evaluations of the relevant risks and the expected efficacy of the measures under consideration to tackle these risks.[58] It also requires them to explicitly state their moral positions, including, for instance, what weight should be given to the rights of "enemy civilians," how to address uncertainties, and so forth.[59] The public debate and deliberation that is part of the parliamentary process also serves the vital function of informing constituents.

Essentially, the deliberative process may well shape preferences, rather than merely restating attitudes.[60] Parliamentary deliberation over

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57 Frank Michelman, *Relative Constraint and Public Reason: What Is "The Work We Expect of Law"?*, 67 BROOK. L. REV. 963, 977 (2002); Barak-Erez, *supra* note 5, at 894-95.

58 Barak-Erez, *supra* note 5, at 891 ("Whereas the specifics concerning the implementation of some anti-terrorism measures should remain undisclosed, the basic features of the methods used should be open to public criticism and debate.").

59 For a similar view, *see, e.g.*, Craig Martin, *Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with International Law*, 76 BROOK. L. REV. 611 (2011) (advocates enforcing a constitutional requirement that the legislature approve any use of force rising above a *de minimus* level, since the legislative process results in better decisions due to the attenuation of extreme positions, the canvassing of a wider range of perspectives and sources of information, and the vigorous public interrogation of reasons and motives underlying proposals.); Owen Greene, *Democratic Governance and the Internationalisation of Security Policy: The Relevance of Parliaments*, *in* THE "DOUBLE DEMOCRATIC DEFICIT" 28 (Hans Born & Heiner Hänggi eds., 2004).

60 Paul F. Diehl & Tom Ginsburg, *Irrational War and Constitutional Design: A Reply to Professors Nzilebe and Yoo*, 27 MICH. J. INT'L L. 1239, 1249-50 (2006) (deliberative process involves the transformation of preferences, rather than merely serving as a means by which society can aggregate preferences); *see also* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 1-20 (2004); DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998).

the constitutionality of the use of force is an essential element of democratic decision-making, as it serves to rebut moral disagreements by conducting a debate which is based on reason and that can be justifiable by everyone.[61] More than any other form of deliberation, the process of legislation increases the chances that the tragic choices involved in responding to security threats are approached under what John Rawls calls a "constraint of Public Reason." According to this constraint, "[p]articipants in social decisions must stand ready to explain the consonance of their positions with some conception of a complete, legitimating constitutional agreement."[62] Recognizing the crucial role in a democratic society of the appeal to "public reason" in justifying the use of force, and of public deliberation in general, serves as an important justification of the requirement of ex ante authorization in legislation.

This is especially true in the current context, in which the conflicting interests are usually not represented. The harms of anti-terrorist measures are typically inflicted on non-citizens, such as the

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61 Chi-Ting Tsai, *Presidential War Power in the Deliberative Moment—An Empirical Study of Congressional Constitutional Deliberation and Balance of War Power* (Working Paper, 2010) (demonstrating that a higher level of congressional deliberation over a use of force influences Congress to impose a higher level of control over presidential war power).

62 *See* JOHN RAWLS, POLITICAL LIBERALISM 223 (1993); *see also id*. at 217 ("Our exercise of political power is proper and hence justified only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy. And since the exercise of political power itself must be legitimate, the ideals of citizenship impose a moral, not a legal, duty—the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason."). For a discussion of this concept, *see, e.g*., Gillian K. Hadfield & Stephen Macedo, *Rational Reasonableness: Toward a Positive Theory of Public Reason*, 6 LAW & ETHICS HUM. RTS. 5, 7 (2012) (pointing at the role that public reason plays in stabilizing a political conception of justice).

residents of occupied territories, or members of an ethnic minority which bears a heavier burden of certain anti-terrorist measures (through explicit or implicit profiling strategies). An appeal to public reason requires the decision-makers to present valid justifications for inflicting (unintended) harm on enemy civilians, to justify a position which assigns different values to people's lives according to their nationality, and so forth.

Moreover, the requirement to hold public deliberations may contribute to mitigate the concern of the institutional bias of law enforcement and security agencies, whose primary goal is to fight crime and terror.[63] As explained by Justice Souter in the *Hamdi* case, "[i]n a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises."[64] Imposing the government to justify the measures which it views as appropriate, by appeal to public reason, may substantially mitigate this risk.

Legislation as an Essential Form of Scrutinizing Governmental Activities. An important argument in favor of requiring the involvement of the legislature is the concern that in times of crises there is no

63 *See, e.g.*, Thomas P. Crocker, *Torture, with Apologies*, 86 TEX. L. REV. 569, 585-93 (2008).

64 *Hamdi*, 542 U.S. at 545 (Souter J., concurring).

effective way to appropriately scrutinize the activities of the Executive Branch. The lack of adequate information and the high risk which is involved in such decisions make the efficacy of the parliament's supervision powers very limited.[65] Typically, parliaments do not hold formal powers to supervise the use of military measures in specific instances. They are empowered to direct the government's activities only through legislation.

It should be noted that according to one model, the Executive Branch is provided with "inherent" powers to take certain anti-terrorist measures only as long as the legislature explicitly declares that a security threat exists ("a state of emergency," "a state of war," and so forth). However, this model is not suited to address the current concern. It is doubtful whether the parliament is suited to hold a thorough and independent review of the government call to declare a state of emergency. The Israeli experience demonstrates such a failure: according to Israeli law, the government enjoys an almost limitless power to enact, in times of national emergency, regulations that curtail, and even to derogate basic liberties. The Israeli parliament declared "a state of emergency" within four days after the foundation of the country, at times in which the state's existence was indeed in real danger, but it has extended this declaration ever since, and Israel is thus in a continuous state of emergency for more than sixty years now. More generally, declaring a "state of emergency" is typically not as politically costly as explicit authorization in legislation to take specific measures, and it is thus not as effective as the requirement of legislation in

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65 *See* Heiner Hänggi, *The Use of Force under International Auspices: Parliamentary Accountability and "Democratic Deficits"*, *in* THE "DOUBLE DEMOCRATIC DEFICIT" 3 (Hans Born & Heiner Hänggi eds., 2004).

restraining the government. Carl Schmitt has famously argued that it is simply impossible to develop effective constitutional constraints on the use of armed force, for in moments of crisis such constitutional provisions will be simply ignored.[66] It seems that this theory is particularly powerful in reference to this model of providing the government with unlimited powers whenever a state of emergency is declared.[67]

It seems that the only effective way to induce the legislature to take part in reviewing the executive is by the continued operation of a thick substantive notion of the rule of law during the period of emergency. Enforcing the requirement of legislation calls upon the parliament to share with the government the political responsibility for the use of the relevant measures. The prediction that the legislature may take an important role in restraining an unjustified use of force is based not only on the evaluation of the expected outcome of deliberations in parliament.[68] It is the political costs that are involved in formally legislating the legitimacy of taking certain measures that serve as the main check. Absent an overwhelming or obvious threat, the procedural requirements to obtain support of the majority of the legislature would

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66 CARL SCHMITT, POLITICAL THEOLOGY, FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (George Schwab trans., University of Chicago Press 2006) (1922).

67 *See, e.g.*, Ferejohn & Pasquino, *supra* note 5, at 216 ("the dangers carried by the exercise of emergency authority are too great to be used in any but the most dire circumstances."). For a critical analysis of Schmitt's theory, *see, e.g.*, David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2030-37 (2006); Oren Gross, *The Normless and the Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 CARDOZO L. REV. 1825, 1827-29 (2000).

68 *See, e.g.*, Martin, *supra* note 59, at 684 ("The risks [of] irrational or sub-optimal decisions to use armed force would be reduced, in the case of each of these particular phenomenon, by spreading the decision-making process more widely through the inclusion of the legislative body.").

impose significant political costs upon the executive, both domestically and internationally.[69]

The Israeli experience in this respect is again illuminating. Its security service, the GSS used force in interrogation for more than a decade. This practice was not a secret, and was even approved by a public committee appointed to investigate the matter.[70] Interestingly, this practice violated not only international law but also an explicit provision of the Israeli criminal code, which prohibits the use of force in interrogation (section 277 of the Criminal code, 1977).[71] However, the use of force in interrogations of suspected terrorists was considered permissible according to the criminal law defense of necessity. The Israeli parliament did not scrutinize this practice, and can be assumed to implicitly approve it. In 1999, when the Supreme Court held that absent explicit authorization such a practice is prohibited,[72] one could have

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69 Lori Fisler Damrosch, *The Interface of Using National Constitutional Systems with International Law and Institutions on Military Forces*, *in* DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 39, 58-60 (Charlotte Ku & Harold K. Jacobson eds., 2003).

70 COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY, REPORT (1987) [in Hebrew]. For English translation of excerpts from the Report, *see Part I of the Landau Commission Report*, 23 ISR. L. REV. 146 (1989). For a critical analysis of the Landau Commission Report, *see* Mordechai Kremnitzer, *The Landau Commission Report – Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?*, 23 ISR. L. REV. 216 (1989). The Supreme Court of Israel rejected petitions against the GSS practices of interrogation. HCJ 2581/91 Salahat v. The Government of Israel, 47(4) PD 837 [1993] (Isr.); HCJ 70/95 Amar v. GSS [1996] (Isr.); HCJ 5395/94 Abu Kwieder v. The Commander of the Military Prison in Hebron [1995] (Isr.).

71 This provision prohibits officials to use force against a person or to threaten to do so, in order to make this person confess in committing a crime or providing information about a crime.

72 HCJ 5100/94 Public Committee Against Torture in Israel v. Government of Israel, 53(4) PD 817 [1999] (Isr.).

assumed that the government, who strongly advocated for maintaining it by suggesting that the lives of dozens of persons are at risk if the GSS cannot use force in interrogating suspected terrorists, could easily convince the legislature to legislate a provision authorizing this practice. However, after almost three years of deliberations, the government preferred not to ask for such authorization. It was clear that even though the majority would probably approve such a measure, the political costs of such legislation are too high. The mere enforcement of the requirement to legislate was sufficient, despite the majority's support in this measure, to change the practice.

Rulifying the Fight on Terror. Imposing the requirement of explicit authorization is also based on the concept of the rule of law, as it requires the government to act on the basis of general, overt, predictable norms, in accordance with the requirements of formal justice.[73]

Refraining from setting guidelines *ex ante* is unfair to actors who are exposed to the risk of bearing civil and criminal liability if it turns out that their judgment regarding the permissibility of the infringement is different from that of the ex post reviewer. In fact, the absence of an *ex ante* authorization may result in officials refraining from taking justified measures. Prior authorization may thus be necessary to encourage risk-averse agents,[74] who are reluctant to "dirty their hands," to nevertheless promote the overall good when such action involves a justified infringement of a moral constraint.[75] Thus, even those whose major

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73 *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

74 Nathan A. Sales, *Self Restraint and National Security*, 6 J. NAT'L SEC. L. & POL'Y 227, 269 (2012) (George Mason Law & Economics Research Paper No. 10-41, 2010) (arguing that self restraint might be the result of systematic risk aversion within military and intelligence agencies).

75 For the "dirty hands" argument, *see, e.g.*, Michael Walzer, *Political Action: The*

concern is inducing the executive to take the necessary measures in response to security threats should in fact support the requirement of prior authorization in legislation.[76] In modern states most emergencies can be successfully managed by the operation of the ordinary legal-constitutional system, and it can reasonably assumed that the legislature will be actually willing to enact statutes conceding new powers to the executive in the face of unique circumstances.[77] Finally, such legislation may also narrow the scope of judicial review of military actions.[78]

2. Symbolic Costs of Legitimizing Human Rights Infringements in Legislation

Some scholars object to determining in legislation the permissibility of measures taken in the fight against terrorism by pointing at the expressive role of such authorization. This objection rests on the notion that legal provisions do not only impose duties and convey rights. They also express attitudes, shape public perceptions, and may thus inflict

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Problem of Dirty Hands, 2 PHIL. & PUB. AFF. 160 (1973) (suggesting that moral public officials are the ones willing to get their hands dirty by choosing to violate a constraint to bring about a sufficiently high social good).

76 *See, e.g.*, Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2530-32 (2006) (suggesting that the increased political costs of obtaining parliamentary approval can help to generate public support and signal the depth of commitment to potential adversaries).

77 Ferejohn & Pasquino, *supra* note 5, at 216-18. *See also* Deborah Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549 (2009) (arguing that "organization analysis" supports involving the legislature in forming responses to security threats).

78 Issacharoff & Pildes, *supra* note 50, at 1-5 (suggesting that where both legislature and executive endorse a particular tradeoff of liberty and security, the courts have accepted that judgment; but where the executive has flown in the face of legislative policies or without legislative approval, the courts have invalidated executive action, even during wartime, or scrutinized it more closely); Barak-Erez, *supra* note 5, at 893 ("when anti-terrorism measures are legislated, the tendency of courts to review them is likely to be more restrained.").

"expressive" harm. For instance, a statute authorizing the torture of a suspect terrorist or the killing of an innocent person, even only in very rare circumstances, can be considered disrespectful of human dignity. According to this objection, agents, including public officials, may act extra-legally when necessary in the face of calamity,[79] but such acts should only be evaluated ex post factum.[80] This position is implicit, for instance, in the German Constitutional Court's judgment regarding the validity of a statute authorizing officials to shoot down an aircraft that is being wielded as a deadly weapon.[81] The court held that granting an *ex ante* authorization to inflict such harm is unacceptable, but did not rule out the possibility of granting a criminal law defense to officials who resort to such measures, if the action is deemed justified *ex post*.[82] At the core of this view lies the concern that formal legitimization of infringements is objectionable from a deontological perspective and undesirable from a consequentialist one.[83]

As for deontological concerns, justifiably infringing basic liberties or other deontological constraints to attain a desirable outcome is

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79 *See, e.g.*, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 152-58 (2006).

80 *See, e.g.*, Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1526-34 (2004); Alon Harel & Assaf Sharon, *"Necessity Knows No Law": On Extreme Cases and Uncodifiable Necessities*, 61 U. TORONTO L.J. 845 (2011).

81 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, BvR 375/05, *available at* http://www.bundesverfassungs gericht.de/entscheidungen/ rs20060215_1bvr035705.html.

82 *Id*. at § 128. *See also* article 8(2)(b)(xxiii) of the Statute of the International Criminal Court; Gross, *supra* note 80, at 1528 (proposing "an absolute legal ban on torture while, at the same time, recognizing the possibility… of state agents acting extralegally... and seeking *ex post* ratification of their conduct.").

83 The discussion in this subsection is based, in part, on EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 117-22 (2010).

different from attaining the same outcome without infringing any constraint. Arguably, agents who act in accordance with ex ante authorization to infringe a constraint may lose sight of this fundamental moral distinction. Prior authorization may turn the actor's decision-making process into a rather technical assessment of whether the conditions set forth by the legislature are met, without giving sufficient attention to the nature of the action as an infringement of a constraint, and of the constraint's underlying rationales.[84] A law that expresses, even inadvertently, an improper message should arguably be invalidated even if its content and expected outcomes are desirable.[85] The very formulation of rules that determine when it is permissible to kill or torture people is disrespectful of human dignity. Extreme emergencies may indeed compel one to do horrible things to prevent catastrophic outcomes. However, respect for people requires that such acts be "unprincipled, context-generated;" they "ought to be performed strictly as acts of necessity, not as acts governed by principles."[86]

I find these arguments unpersuasive. For one thing, many anti-terrorist measures are deemed permissible under rather "regular" circumstances, not merely under extreme ones. Moreover, even if one focuses on such extreme measures like killing and torture, if no

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84 *Cf.* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement,* 148 U. PA. L. REV. 1503, 1512 (2000); Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISR. L. REV. 345, 353 (1989).

85 Anderson & Pildes, *supra* note 84, at 1513. For a critique, *see* Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506, 520 (2001).

86 Harel & Sharon, *supra* note 80, at 848. *See also* CHARLES FRIED, RIGHT AND WRONG 10 (1978) (arguing that "the concept of the catastrophic is a distinct concept just because it identifies the extreme situations in which the usual categories of judgment (including the category of right and wrong) no longer apply"); Oren Gross, *Torture and an Ethics of Responsibility*, 3 LAW, CULTURE & HUMAN. 35, 44 (2007).

principles govern the behavior of agents in extreme cases, how would agents decide whether the circumstances they face are truly extreme? How can one judge, in retrospect, whether the infringement was justified? Once it is accepted that basic liberties may justifiably be infringed under certain circumstances, there is no escape from delineating those circumstances. In addition, this argument is relevant in the current context only with respect to the marginal effect of justifying certain measures through legislation, since, at least in some countries, the judiciary sets rules of behavior that justify taking numerous anti-terrorist measures, such that the adverse symbolic effect, if exists, was already done. It is doubtful whether the "expressive" effect of legislation is substantially greater than that of forward looking "judicial legislation."

Another argument that can be raised against *ex ante* authorization is that such authorization is likely to bring about unjustified activities.[87] It may lead to routine use, or at least routine consideration, of measures that should be taken, or even considered, only in extreme and rare circumstances.[88] In certain contexts, for instance the case of authorizing

87 For a discussion of theories of "expressive law and economics," which accentuate the effect of "what the law says" (rather than of "what the law does") on preferences and behavior, *see, e.g.*, Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Robert D. Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000).

88 Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 141 (1978) (arguing that while torture may be justified when it is the least harmful means available to secure a supremely important aim, it should nevertheless be strictly prohibited, since "[a]ny practice of torture once set in motion would gain enough momentum to burst any bonds and become a standard operating procedure"); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1446 (2005) (contending that once coercive interrogation is allowed in any circumstances, it will be used casually, and a "culture of torture" will come into being); Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1165 (2006); John H. Langbein, *The Legal History of Torture, in* TORTURE: A COLLECTION 93, 101 (Sanford Levinson ed., 2004); Jean

coercive interrogations, it may also induce the establishment of institutions that would train agents to act accordingly, thus making infringements an even more readily available option.[89] It was also suggested that legislating taking extreme measures may enable officials to maintain what is known as "role distance." The message to the official is that the legislator decided that the measure is appropriate, and that person is not expected to employ sufficient discretion whether taking the measure is indeed legitimate in the circumstances.[90] More generally, it is argued that due to its expressive effects, legitimizing an infringement in certain circumstances may be (wrongly) perceived as implicitly legitimizing it in other circumstances too.[91] These "slippery slope" arguments suggest that even though legitimizing a (presumably justified) activity in one set of circumstances does not logically legitimize it under different circumstances, the former is prone to bring about the latter due to political and psychological reasons.[92]

While the slippery slope argument cannot be ignored, it does not necessarily preclude predetermined guidelines for the permissibility of

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Bethke Elshtain*, Reflection on the Problem of "Dirty Hands"*, *in* TORTURE: A COLLECTION 77 (Sanford Levinson ed., 2004) .

89 *See, e.g.*, Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT'L L. 231, 238 (2006); Kremnitzer, *supra* note 70, at 216, 254-57.

90 MEIR DAN-COHEN, HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY 233-35 (2002); Gur-Arye, *supra* note 15, at 305.

91 In addition, "liberties won slowly over long periods of time may be subject to rapid erosion in emergencies and these new restrictions, if they are embedded in law, may not be rapidly restored if they are restored at all." Ferejohn & Pasquino, *supra* note 5, at 219. *See also* Barak-Erez, *supra* note 5, at 893 ("The tendency to abolish anti-terrorism powers established by legislation is low, probably reflecting the assumption that it is better to have them available 'for a rainy day'.").

92 Bernard Williams, *Which Slopes Are Slippery?*, *in* MORAL DILEMMAS IN MODERN MEDICINE 127, 128 (Michael Lockwood ed., 1985); *see* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

infringements. For one thing, the absence of ex ante authorization may result in people (including officials) refraining from taking justified measures, as suggested above. Moreover, such authorization may be accompanied by measures that deter unjustified activities. Accurately evaluating these and other considerations is difficult, yet at the very least they make the slippery slope argument inconclusive.

For these reasons, while I agree that legislation authorizing the government to take extreme measures in response to security threats may well have adverse symbolic effects, these costs are not a sufficient reason to exempt the government from the requirement of legality. In fact, making these symbolic effects a decisive reason against legislation directly contradicts the very basic reasons for insisting on legislation in the first place, including the deliberative value of the process of legislation and the political costs associated with such legislation. If the government finds it impossible to openly justify its activities, it should not be shielded from scrutiny by referring to arguments of the sort of "acoustic separation."[93] If the "noise" is troubling, the government should not make it, not merely conceal it behind "acoustic" walls.

IV. Concluding Remarks

There are good reasons to enforce the requirement of explicit authorization in law to take specific anti-terrorist measures. The ultimate question is what types of measures should be "determine[d] through democratic means." I suggest that the requirement should apply to

93 *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

measures which infringe upon basic human rights, including rights of aliens, even those who are suspected terrorists. Measures which are aimed at killing persons or infringing other basic liberties can be employed only subject to legislative authorization (or when the circumstances are exigent), irrespective of the nationality of the persons subject to such measures and the place in which the governmental activity takes place. As indicated, legislation provides the required authority only when it explicitly addresses specific measures and details the circumstances in which each of them can be employed.