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HOW TO JUSTIFY AN EMERGENCY REGIME AND PRESERVE CIVIL LIBERTIES IN TIMES OF TERRORISM

*Emanuel Gross**

*"For as adamant as my country has been about civil liberties during peacetime, it has a long history of failing to preserve civil liberties when it perceived its national security threatened ... After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along."*¹

I. INTRODUCTION

The opening quotation was made by Justice William J. Brennan, one of the great justices of the U.S. Supreme Court, during a speech given in Israel in 1987. Today, more than twenty years later, it seems that the U.S. government's response to the September 11, 2001 terrorist attacks against its citizens has illustrated Justice Brennan's argument indisputably.

Times of emergency, and especially national security emergencies, pose a complicated constitutional challenge to the democratic state. In order to fulfill its duty to protect the lives and well-being of its citizens and restore public order as soon as possible,² the state must make use of wider administrative powers than those required in times of peace. However, the use of these powers inherently infringes the traditional scope of protection given to individual rights

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¹ William J. Brennan, *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 ISR. YEARBOOK HUM. RTS. 11 (1988).

² See Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. MILITARY ETHICS 3 (2005).

and freedoms in times of peace. Therefore, a proportionate balance must be struck between two competing interests: state and public security on the one hand, and individual fundamental rights and freedoms on the other.³

Shaping this balance is not an easy task. While the need to protect fundamental rights and freedoms does not justify undermining national security in every situation, national security is not a supreme value, and the need to ensure it does not always justify violating civil liberties. The outcome of this balance necessarily requires the imposition of certain limitations, both on civil liberties and on the state's security interest.⁴ In particular, terrorism related emergencies intensify this constitutional challenge due to their special nature, which bears no resemblance to other forms of national security threats. In light of the special nature of the fight waged between democratic states and terrorist organizations, a controversy exists as to how a democracy should respond to the terrorist threat: whether its response ought to be bound by the traditional legal constraints imposed by the constitution or whether the uniqueness of terrorism exigencies justifies creating a new "extraordinary" constitutional paradigm.⁵

This article suggests that although terrorism-related emergencies entail unique characteristics in comparison to traditional forms of national security emergencies and bring unprecedented legal dilemmas, these new dilemmas should nonetheless be dealt with by the ordinary array of constitutional balances and not by creating a new "extraordinary" constitutional order for times of crisis. Terrorism exigencies should not be perceived as standing outside the ordinary legal order; rather, the state's response to the exigency should be found within the boundaries of the ordinary constitutional order and should be accompanied by effective oversight mechanisms. We shall try to explore the normative characteristics of an emergency regime in

³ See *infra* sections III and IV.

⁴ Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 153-56 (2002).

⁵ See generally Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004); Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, THE CONSTITUTION IN WARTIME – BEYOND ALARMISM AND COMPLACENCY 39 (Mark Tushnet ed., Duke University Press 2005).

general and to find out whether we can justify such a regime in a war on terrorism.

Section I of this article examines the variety of normative definitions accorded to the concept of “emergency” by legislatures, scholars, and the international community; it suggests five core characteristics that ought to distinguish times of emergency from times of normalcy. Section II examines the unique applicability of each of these five elements to terrorism related states of emergency. Section III analyzes the desirable balance of power between national security, human rights, and liberties in times of crisis. Section IV analyzes the desirable scope of judicial review during times of terrorism related emergencies.

II. STATES OF EMERGENCY – DEFINITIONS AND CHARACTERISTICS

The life of a nation, as history teaches, entails an inherent combination of peace and times of emergency. The nature, intensity, and frequency of each of these periods of time may vary from state to state and from time to time; however, there is no nation which has not experienced exigencies that have been caused by wars or other security threats; rebellions and revolutions; economic crises; epidemics; large scale environmental hazards; or natural disasters.

The variety of the possible exigencies is infinite. From a short review of worldwide events in recent years, we can learn of the efforts of the states in east Asia to recover from the enormous damage caused by the massive tsunami that killed more than two hundred thousand people; of Sudan, whose citizens suffer from a large-scale humanitarian disaster as a result of an extended and blood soaked civil war; of Iraq and Afghanistan, which aspire to instill the values of liberal democracy after long years of oppression; and of the Western democracies, which are constantly occupied with thwarting terrorist threats posed by extreme religious and nationalist groups.

In order to protect the public in times of emergency, the Executive Branch is conferred with wider administrative powers than in times of peace. While the transition from times of peace to times of emergency does not entail special normative difficulties for authoritarian regimes, the transition in democracies intensifies the

tension between two conflicting interests.⁶ On the one hand, it is necessary to infringe the traditional scope of protection given to individual rights and freedoms in times of peace in order to effectively deal with the crisis and restore public order as soon as possible. On the other hand, the state must make sure that it uses only the necessary measures least damaging to human rights. Thus, it is important to distinguish between states of emergency – which require an unusual normative response – from other dangers and threats, which should be addressed with the ordinary powers conferred on the state in times of peace.

We shall now examine what normative preconditions ought to exist in order for a state of emergency to be declared. In the next section, we shall examine the unique application of these preconditions to terrorism related states of emergency.

The concept of emergency has never received an objective and descriptive definition that clearly expresses its scope of application. Although numerous efforts have been made to define it, these definitions were vague and devoid of precise analytical meaning. The reason for this, as was eloquently expressed by Alexander Hamilton, is that “[i]t is impossible to foresee or to define the extent and variety of national exigencies . . . The circumstances that endanger the safety of nations are infinite[.]”⁷

Indeed, as reality shows, states of emergency may occur due to an infinite variety of circumstances and in various levels of severity. Furthermore, because states also vary from one another in the size of their territory, culture, and the constitutional structure of their governments, every attempt to define in the parameters that characterize the emergency in advance is inherently flawed as it ignores the need to examine each event according to its unique context and circumstances.⁸

⁶ See Itzhak Zamir, *Human Rights and National Security*, 23 ISR. L. REV. 375, 376-79 (1989); Venkat Iyer, *States of Emergency – Moderating Their Effects on Human Rights*, 22 DALHOUSIE L.J. 125, 127 (1999).

⁷ THE FEDERALIST NO. 23 (Alexander Hamilton).

⁸ See The International Law Association, *Paris Report*, 59 para. i (1984), *quoted in* Jaime Oraa, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW, 31 (Oxford, Clarendon Press 1992) (“[I]t is neither desirable nor possible to stipulate *in abstracto* what particular type or types of events will automatically constitute a public emergency within the meaning of the term; each case has to be judged on its own merits taking into account the overriding concern for the continuance of a democratic society.”)

In spite of these preliminary difficulties, numerous attempts have been made to define the concept of emergency, both at the domestic and international level, as well as by various scholars. In Israel, The Basic Law: The Government confers on the parliament (and in situations of exceptional urgency on the government as well) the authority to declare a state of emergency.⁹ Although the Basic Law does not contain a definition of the phrase “state of emergency,” it states that during times of emergency the government may issue emergency regulations in order to protect state security, public safety, and the supply of crucial services.¹⁰ From this statutory arrangement, it follows that the purpose of the declaration of a state of emergency is to authorize the government to issue the necessary temporary orders to protect these services. From these three objectives, it can be concluded that the Israeli Legislature applies the concept of “emergency” to events which are capable of disrupting the ability of the state to defend its existence, threatening the safety of its citizens, or interrupting the supply of essential services within its territory.

In Canada, the Emergencies Act distinguishes between four types of emergencies: “public welfare emergency,” “public order emergency,” “international emergency,” and “war emergency.”¹¹ Each type of emergency is defined in the act. For example, a public order emergency is defined as “an emergency that arises from threats to the security of Canada [and] that is so serious as to [be] a national emergency,” and war emergency is defined as “war or other armed conflict, real or imminent, involving Canada or any of its allies that is so serious as to be a national emergency.”

In the international arena, the United Nations International Covenant on Civil and Political Rights defines public emergencies as situations that threaten the life of the nation.¹² The U.N. Human Rights Committee generally characterizes states of emergency as times of an exceptional and temporary nature.¹³ The Siracusa Principles on the Limitation and Derogation Provisions define a state of public

⁹ Basic Law: The Government, 2001, S.H. 1780, available at http://ww.w.knesset.gov.il/laws/special/eng/basic14_eng.htm.

¹⁰ *Id.* § 39(a).

¹¹ Emergencies Act, R.S.C., ch. 22 §§ 5, 16, 27, 37 (1985).

¹² International Covenant on Civil and Political Rights art. 4(1), December 19, 1966, 999 U.N.T.S. 3 (entered into force: March 23, 1976).

¹³ U.N. Human Rights Committee, *General Comment No. 29 on Article 4 of the International Covenant on Civil and Political Rights*, para. 2, U.N. Doc. CCPR/C/21/REV.1/ADD.11 (August 31, 2001).

emergency as “a situation of exceptional and actual or imminent danger which threatens the life of the nation.”¹⁴ Further,

[a] threat to the life of the nation is one that (a) [a]ffects the whole of the population and either the whole or part of the territory of the State, and (b) [t]hreatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.¹⁵

The American Convention on Human Rights defines times of emergency as situations of war, public danger, or other emergency that threatens the independence or security of the state.¹⁶ The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) defines states of emergency as times of war or other public emergency threatening the life of the nation.¹⁷ In the *Lawless* report, the term “public emergency threatening the life of the nation” has been defined by the majority members of the European Commission of Human Rights as: “a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organized life of the community which composes the state in question.”¹⁸ In the *Lawless* judgment, the European Court of Human Rights has adopted the Commission’s definition.¹⁹

¹⁴ U.N. Econ. & Soc. Council, Commission on Human Rights, *Status of the International Covenants on Human Rights*, Annex: The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, para. 39, U.N. Doc. E/CN.4/1985/4 (1985).

¹⁵ The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, para. 39, Annex, UN Doc E/CN.4/1985/4 (1985).

¹⁶ Pact of San José, Costa Rica, American Convention on Human Rights art. 27(1), November 22, 1969, O.A.S. Treaty. Series No. 36, 1144 U.N.T.S. 123 (entered into force: July 18, 1978).

¹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(1), November 4, 1950, 213 U.N.T.S. 221. (entered into force: September 3, 1953).

¹⁸ *Lawless v. Ireland*, App. No. 332/57, 1 Eur. Comm’n. of H.R. Dec. & Rep. 15 (1960).

¹⁹ *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) at 56 (1961) (No. 3). It should be noted that while the English text of the judgment refers to “an exceptional situation of crisis or emergency,” the French text – which is the

In the *Greek* case, the Commission described the main conditions necessary for the existence of a state of public emergency:

- (1) it must be actual or imminent;
- (2) its effects must involve the whole nation; and
- (3) the continuance of the organized life of the community must be threatened.

The crisis or danger must be exceptional, in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health, and order are plainly inadequate.²⁰ Many scholars have also tried to define the concept of “emergency,” whose lexical meaning is of critical importance as a sudden and urgent incident, usually unexpected, which requires an immediate and extraordinary response.²¹ Carl Schmitt, one of the prominent legal theorists in this field, characterized the concept of emergency as “a case of extreme peril, a danger to the existence of the state, or the like.”²² The International Law Association defines a public emergency as “an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.”²³ The most obvious feature of the above mentioned definitions is their vagueness. In order to encompass as many potential emergencies as possible, all the definitions are formulated in broad and inclusive language, which can be interpreted in various ways. Thus, some scholars believe that it is not useful to formulate a universal definition

official text of the judgment – adds a requirement for the imminence of the attack. This point is made in para. 112 of “The Greek Case,” *infra* note 20.

²⁰ The Greek Case, 1969 Y.B. EUR. CONV. ON H.R. 72, ¶ 153 (Eur. Comm’n on H.R.) (1969); Oren Gross, *Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT’L L. 437, 457 (1998); Oren Gross & Fionnuala Ni Aolain, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE*, 249 (Cambridge University Press 2006); Christopher Michaelsen, *International Human Rights on Trial – The United Kingdom’s and Australia’s Legal Response to 9/11*, 25 SYDNEY L. REV. 275, 288-89 (2003).

²¹ BLACK’S LAW DICTIONARY (Brian A. Garner ed., Minnesota, West Group, 2004); THE NEW SHORTER OXFORD DICTIONARY 806 (5th ed., 1993).

²² CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE THEORY OF SOVEREIGNTY* 6 (George Schwab trans., MIT Press 1985).

²³ *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 75 AM. J. INT’L L. 1072, 1075 (1985).

of the concept of emergency. In their opinion, every working definition of a state of emergency will necessarily be amorphous and therefore unable to provide practical standards to distinguish between times of emergency and times of peace.²⁴

Although this approach does raise valid arguments, which should in no way be disparaged, it cannot justify abstention from formulating a definition. Indeed, the concept of emergency cannot be precisely defined. Its potential scope of application is infinite and is not subject to prediction. It may change from time to time and from one society to another. Nevertheless, it is certainly possible to define the core elements that characterize all states of emergency. True, such a definition, by its nature, has an "open texture" – i.e., it does not aspire to describe specific events, but makes use of general and sweeping terms which ought to be adapted to the changing reality. Its implementation depends on the unique characteristics of every individual case. Thus, it is not inevitable that a certain incident will amount to a state of "emergency" in one context but not in another.

It is true that such a "framework definition" cannot provide a high level of clarity and certainty as to what constitutes an emergency. However, it is capable of delineating the substantive guiding standards as to when the state is confronted with genuine times of emergency and when it is confronted with other difficulties and disruptions which do not amount to states of emergency.²⁵ In my opinion, it is possible to identify five core elements that distinguish states of emergency from states of normalcy. *First*, a state of emergency exists when a state's sovereignty is at risk. According to international law, one of the requirements in order for a political entity to be recognized as a "state" is the existence of an effective governmental mechanism which is capable of performing all necessary administrative functions.²⁶ The fundamental obligation of the government is to ensure state and public security and the ordinary supply of essential public services.²⁷

²⁴ See Gross, *supra* note 20, at 438.

²⁵ See generally Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 522-26 (1994) (arguing that vagueness can be reduced by defining clear boundaries).

²⁶ See generally Conference on Yugoslavia, Legal Opinions of the Arbitration Committee, Opinion No. 8, 31 I.L.M. 1494, 1522 (1992) (noting that a state ceases to exist when it can no longer exert authority over its defined territory).

²⁷ ASSA CASHER, *MILITARY ETHICS* 38 (Ministry of Defense Press 1996); Inaki Agirreazkuenaga & Greer Steven, *Shoot to Kill: The Lethal Use of*

Disruption of the ordinary supply of governmental services may cause danger to human life, national security and public order, public health, and foreign relations. When such a destructive event occurs, the situation amounts to a state of emergency requiring special treatment in order to prevent the realization of the danger or at least deal with its harmful consequences *ex post facto*.

Second, a state of emergency may exist only in light of grave and exceptional threats.²⁸ The definitions accorded to the concept of "emergency" do not determine how injurious the event must be in order to justify the transition from normalcy to the exception. Specifically, they do not determine whether only existential threats may justify such a transition. Perhaps even non-existential threats, that undermine public order or disrupt the ordinary supply of essential services, may also amount to states of emergency.²⁹ The prevailing view is that existential threats are not the only exigencies meriting exception.³⁰ There is no doubt that existential threats are the core of states of emergency, and that threats which may only result in minor injuries do not justify transition from normalcy to the exception. Between these two extremes, however, we may find "hard cases."³¹ These hard cases contain characteristics that cannot be defined in advance, but must always be examined in light of their specific context. If this examination shows an unusual threat which may put the state's

Firearms by the Security Forces in the Basque Country, 45 N. IR. LEGAL Q. 285, 287 (1994).

²⁸ JOAN FITZPATRICK, *HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY* 55 (University of Pennsylvania Press 1994).

²⁹ It is important to note that due to the various parameters that distinguish one country from another (such as the size of their territory and the constitutional structure of their governments), a certain threat may be regarded as "existential" under one array of circumstances and as "non-existential" under another.

³⁰ FITZPATRICK, *supra* note 28, at 55-58; Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1, 16 (1981). For example, in *Lawless*, only the five dissenters of the Commission offered narrow interpretations to the term "public emergency." According to these interpretations, a state of "public emergency" must be analogous to circumstances of war or completely break down the constitutional order of the state. See *Lawless* (Commission), 1 Eur. Comm'n. of H.R. Dec. & Rep. at 95, 101.

³¹ Oren Gross, *Exception and Emergency Powers: The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 CARDOZO L. REV. 1825, 1832 (2000).

sovereignty at great risk, the threat ought to be dealt with within the emergency paradigm.

Third, the crisis must be of a temporary nature. The temporary duration of the emergency is an integral part of the notion of the exception. As normalcy is perceived as the normal state of affairs, the emergency is perceived as an unusual event which necessitates an extraordinary response in order to reinstate the normal state of affairs as soon as possible.³²

Fourth, the crisis must be real or imminent.³³ A state of emergency might occur due to actual threats or in light of an imminent danger. In the latter case, the state does not have to be inactive until the actual realization of the danger; rather, it may take preventive actions accompanied by a declaration of a state of emergency in cases where the danger is imminent. For example, if a government knows of the intention and operational capability of an organization to carry out a nuclear attack within its territory, it would be irrational to wait until the actual realization of the danger. As a result, the state may take preventive measures in order to thwart the danger before it occurs. Nonetheless, it is important to distinguish between immediate threats and general threats. A government is not entitled to make use of its emergency powers in light of theoretical or potential dangers which are not imminent.

Fifth, a declaration of the existence of a state of emergency is within the powers of both the Legislative and Executive branches. Nonetheless, the power retains a judicial character despite becoming more exclusively Executive during times of emergency. For this reason, it is especially important to determine the standard of proof needed to satisfy the elements of imminence and severity of the expected danger. The standard of proof required reflects a balance between the public interest in granting an appropriate degree of latitude to the Executive in order to effectively fulfill governmental responsibilities, and the interest of the individual in minimizing the risk of erroneous declarations of states of emergency which entail

³² R. St. J. Macdonald, *Derogations Under Article 15 of the European Convention on Human Rights*, 36 COLUM. J. TRANSNAT'L L. 225, 241 (1997); Susan Marks, *Civil Liberties in the Margin: the UK Derogation and the European Court of Human Rights*, 15 OXFORD J. LEGAL STUD. 69, 85-86 (1995).

³³ Macdonald, *supra* note 32, at 241; Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 AM. U. J. INT'L L. & POL'Y 35, 42 (1986).

unnecessary limitations of the individual's civil liberties.³⁴ The standard evidentiary test for civil law, "preponderance of the evidence," creates a high risk for erroneous declarations of emergency. In contrast, the standard evidentiary test for criminal law, proof "beyond a reasonable doubt," is also inappropriate due to the difficulty of collecting evidence relating to terrorist activities. The appropriate constitutional balance in this case requires the government to reach a level of "clear and convincing" proof, which, in its nature and scope, falls between the civil and criminal standards. This burden requires something more than a showing of reasonableness. The evidence submitted must clearly and unequivocally indicate the nature of the threat with regard to both its imminence and its anticipated severity.³⁵

III. TERRORISM RELATED STATES OF EMERGENCY

A wide variety of circumstances may satisfy the five core elements of states of emergency mentioned above. As noted in the previous section, these are general elements which should be applied according to the unique context and characteristics of each event. In this section, we shall examine the unique applicability of each of these five elements to terrorism related states of emergency.

Generally, it is possible to identify a number of unique characteristics of a terrorist act. Typically, a terrorist commits an act that fits one of the following characteristics: destruction of lives, property and public order; motivated by ideology; or seeks to provoke fear, suspicion, anxiety, panic, or dread among all or specific sections of the public.³⁶ In contrast to the traditional wars between sovereign states, terrorist acts are not carried out by combatants who carry their arms openly, have a fixed emblem recognizable at a distance, and conduct their operations in accordance with the laws of war. On the contrary, terrorist attacks are carried out by combatants operating from

³⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

³⁵ See Emanuel Gross, *Human Rights in Administrative Proceedings: A Quest for Appropriate Evidentiary Standards*, 31 CAL. W. INT'L L.J. 215 (2001).

³⁶ EMANUEL GROSS, *THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM: LESSONS FROM THE UNITED STATES, THE UNITED KINGDOM, AND ISRAEL* 16 (Virginia University Press 2006).

the center of civilian populations in order to enjoy the protections afforded citizens in times of war.³⁷

Although a terrorist act is criminal in nature, society deems it much more serious and blameworthy.³⁸ The terrorist act does not draw its unique gravity from the cruel and brutal way in which it is carried out or from the severe physical and mental injuries and property damage it causes its victims, because ordinary criminal acts can be carried out in an equally abhorrent way. The terrorist act is distinct from other criminal acts by virtue of the unique immoral quality of its motives.³⁹ Whether acting against a liberal democratic state whose values threaten his fundamentalist beliefs or an enemy that controls his forefathers' land, the terrorist severs himself from humanity, with its moral, legal, and social customs, and devotes himself solely to his ideological beliefs. Moral values, humanitarian obligations, and basic human conventions are brushed aside if they conflict with his ultimate commitment. Rejecting law and morality, the terrorist will work to advance his cause using all the means he considers effective. The terrorist's attacks possess a personal touch in that he is not interested in the identity of the concrete victim, but only in the victim's affiliation with the entity against which he is fighting. Perceiving an individual as a means to an end creates the psychological effect of fear, suspicion, and dread among the public. Often times, this heightened fear bears no relation to the direct damage caused by the specific terrorist act. This fear stems from the fact that an individual may become the victim of the next terrorist attack.⁴⁰

According to this unique set of characteristics, it is possible to conclude that "terrorism" can be defined as the systematic and deliberate commission (or threat of commission) of injurious acts

³⁷ *Id.* at 199; Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva III]; BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK – PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM*, 66 (Yale University Press 2006).

³⁸ See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 718 (2004); George P. Fletcher, *The Indefinable Concept of Terrorism*, 4 J. INT'L CRIM. JUST. 894 (2006).

³⁹ GROSS, *supra* note 36, at 13; Alex Schmid, *Terrorism - The Definitional Problem*, 37 CASE W. RES. J. INT'L L. 375, 404 (2005).

⁴⁰ GROSS, *supra* note 36, at 13; Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23, 56-57 (2006).

which, in the circumstances of their commission provoke fear and panic among all or part of the public, when these acts are directed against innocent civilians or their property for the purpose of advancing political, social, or religious ideology.⁴¹ Similar acts directed against government or military targets not only constitute acts of terrorism but also amount to actual acts of war.⁴² There are no moral or legal justifications that can support a terrorist's cause.⁴³

It is important to examine the effect that the unique characteristics of a terrorist act have on the implementation of the five core characteristics of states of emergency.

The first two elements of states of emergency deal with transition from normalcy to the exception in light of grave and exceptional threats to the existence or ordinary function of governmental mechanisms. Although existential threats meet these requirements, less severe threats may also justify transition from normalcy to the exception provided that they are capable of significantly disrupting public order and the ordinary supply of essential services. Indeed, it is this latter possibility that describes most contemporary terrorist threats.

An examination of the ideological platforms of terrorist organizations around the world shows that while some organizations operate with the intention of bringing about the complete or partial destruction of the group under attack, other terrorist organizations do not have the ultimate goal of eliminating all of the members of the group against which they are struggling. The latter organizations, despite the heinous nature of their activities, perceive their violent struggle as a strategic means for attaining specified objectives.⁴⁴ They do not perform acts of terror with the intention of bringing about the complete defeat of their enemy, but instead seek to disrupt public order and weaken their enemy's stability and strength.

There is no doubt that existential terrorist threats justify transition to an emergency regime. Despite that, the difficult question remains in trying to determine what terrorist threats characterized as non-existential justify such a transition. As noted, the terrorist threat is

⁴¹ GROSS, *supra* note 36, at 11-12 (discussing in detail the difficulties preventing the formulation of a universal legal definition of a terrorist act).

⁴² Alberto R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 297, 298 (1987).

⁴³ Louis Rene Beres, *The Meaning of Terrorism – Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT'L. L. 239, 242 (1995); Fletcher, *supra* note 38, at 4(E).

⁴⁴ GROSS, *supra* note 36, at 20.

characterized by creating a psychological effect of fear among the public to a degree that bears no relation to the direct damage caused by the specific terrorist act. Thus, it seems that the severity of the terrorist threat should not be assessed according to the concrete damage caused by each isolated attack, but as a combination of both the physical and psychological damage caused by the threat in general. The September 11, 2001 terrorist attacks against the citizens of the United States illustrates this argument: in spite of the great number of victims and the enormous extent of property damage, the attacks did not pose an existential threat to the U.S. government. Nevertheless, the attacks were perceived by the Bush Administration as a sufficient reason to declare a state of emergency in the United States.⁴⁵ Although the rationale underlying this initiative was the unusual severity of the attacks, the transition to an emergency regime occurred because of their overall cumulative physical and psychological impact.

The third element of states of emergency deals with the temporary duration of the emergency. Due to the unique nature of the terrorist threat, the implementation of this classic element of terror emergencies entails distinctive features. In contrast to the traditional armed conflicts between sovereign states, the terrorist threat has no defined beginning and end. Its ending can be reached only by a total and decisive victory. A cease fire is not a realistic option. Victory over terror requires the absolute neutralization of the terrorist enemy without leaving any possibility for its future rehabilitation. This objective can only be achieved by means of a terrorist's capture, incarceration, or eradication.⁴⁶ An absolute neutralization of the terrorist enemy is almost never possible and a substantial neutralization necessitates prolonged activity. This neutralization process involves, *inter alia*, infiltration into the organization in order to gather useful intelligence, eliminating financial support, and capturing the political and spiritual leaders of the organization. These objectives are not easily achieved. Notwithstanding this approach, which might be considered extreme and maybe unrealistic, there are different schools of thought which combine the termination of terrorism with an attempt to deal with the reasons

⁴⁵ Proclamation No. 7463, 66 FED. REG. 48199 (September 14, 2001).

⁴⁶ GROSS, *supra* note 36, at 55-56.

that sow the seeds of this phenomena.⁴⁷ However, these and similar approaches also set goals whose achievement is no less difficult.

In contrast to the traditional risks, which are caused by wars between sovereign states, financial crises, natural disasters, and epidemics, the overwhelming majority of the terrorist threats are lasting threats. Any attempt to define their duration is artificial. A prime example is the constant emergency regime that has existed in Israel since its establishment in May 1948. Since its inception, the State of Israel has been forced to contend with continual security threats. Israeli citizens have always been subject to security threats and murderous attacks by religious and nationalist terrorist organizations. In order to effectively respond to these threats, a state of emergency has been declared. As noted in the previous section, the declaration of the existence of a state of emergency empowers the government to make use of extensive security powers in order to defend state and public security and ensure the ordinary supply of the essential services. Although the declaration of a state of emergency is limited to a maximum period of twelve months, it has repeatedly been renewed by parliament each year. In practice, a state of emergency has always prevailed in Israel since its establishment.⁴⁸

Courts around the world have reached similar conclusions upon examining the element of temporariness in the context of terrorist threats. For example, the House of Lords authorized the decision of the British government to declare a state of public emergency as a result of

⁴⁷ See generally Kevin J. Fandl, *Winning the War on Terror Without the War*, 19 AM. U. INT'L L. REV. 587 (2004) (detailing economic and social alternatives to armed conflict against terrorism); Brian Burgoon, *On Welfare and Terror – Social Welfare Policies and Political-Economic Roots of Terrorism*, 50 J. CONF. RESOL. 176 (2006) (discussing the correlation between poverty and terrorism).

⁴⁸ Adam Mizock, *The Legality of the Fifty-Two Year State of Emergency in Israel*, 7 U.C. DAVIS J. INT'L L. & POL'Y 223, 227 (2001). It should be mentioned that in 1999 the Association for Civil Rights in Israel petitioned the Supreme Court and argued that the constant renewal of the declaration of a state of emergency by the parliament is unlawful since Israel is not confronted with extraordinary security threats but with security issues which does not justify transition to an emergency regime. Thus far, the Supreme Court has not yet ruled in this issue and the declaration of the state of emergency still exists. It should be noted that in light of the petition, the parliament and the government have gradually started to amend Israel's emergency laws in an attempt to set out more moderate and balanced powers. See HCJ 3091/99 Association for Civil Rights in Israel v. The Knesset [2006] (unpublished).

the September 11, 2001 attacks.⁴⁹ Similarly, the European Commission of Human Rights and the European Court of Human Rights emphasized the requirement of the temporal duration of the emergency, but in practice, both tribunals interpreted this criterion in a flexible manner and applied it in a way that undermined its significance.⁵⁰

Nevertheless, I believe that the element of temporariness should not be regarded as meaningless in the context of terrorism related emergencies. Instead, its interpretation ought to be adapted to the unique characteristics of the terrorist threat. As noted, during declared states of emergency, the Executive authority is conferred with wider administrative powers than in times of peace. The purpose of the temporariness requirement is to limit the duration of these powers and thus promise their application as unusual temporal orders. This rationale applies both in short-term and long-term emergencies. Yet, in the latter situations, the temporariness requirement substantially loses its traditional meaning in the sense that normalcy is no longer perceived to be the regular state of affairs and exigency as the exception. Instead, the exigency is perceived not just as a short-term deviation from the normal state of affairs, but as the prevailing reality for the foreseeable future.⁵¹

The importance of the temporariness requirement in these situations lies in the preservation of the analytical difference between the normalcy and the exception.⁵² The temporariness requirement expresses recognition of the right and duty of the state to make use of

⁴⁹ A and others v. Secretary of State for the Home Department [2004] UKHL 56, para. 22.

⁵⁰ See Gross, *supra* note 20, at 464.

⁵¹ Gross, *supra* note 20, at 455 (“[a] substantial number of states of emergency in the modern world do not follow the “normalcy-rule, emergency-exception” paradigm. Rather than provisional and temporary emergencies, the world increasingly faces *de facto*, permanent, institutionalized, or entrenched emergencies.”).

⁵² Colm Campbell, *‘Wars on Terror’ and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict*, 54 INT’L & COMP. LAW Q. 321, at part III (2005) (“Conceptually, the term ‘emergency’ is locked in a dichotomous relationship with the norm by reference to which it is located. Implicit in this relationship is the temporariness of the emergency. Were it not a temporary phenomenon, there could be no norm in contradistinction to which it is defined. This relationship has been variously described in terms of a governing paradigm of ‘normalcy-rule, emergency-exception’, or of the ‘implicit counterpoint between emergency and normality’, producing the ‘emergency/normality’ antimony.”) (footnotes omitted)

the extraordinary emergency powers to thwart the security threats to its citizens and restore state and public security as soon as possible. The temporariness requirement prevents an analytical vagueness between the normalcy and the exception, and it stresses the fact that although the exigency is about to become the prevailing reality in the foreseeable future, it will always be perceived as an exceptional state of affairs. From this, it follows that emergency powers are inherently of temporal duration and their implementation always represents a deviation from the ordinary constitutional regime. As a result, the power necessitates an increased level of parliamentary or judicial oversight.⁵³

The last two elements of states of emergency deal with transition from normalcy to the exception in light of actual or imminent crises whose imminence and gravity had been proven by the Executive authority in accordance with the required evidentiary standard. As noted, when imminent threats have not yet been realized, the state is not required to abstain from any responses until their actual realization. In order to thwart the danger, it may take preventive actions accompanied by a declaration of a state of emergency. In contrast, the state may not declare a state of emergency in light of speculative and unspecified dangers, especially when these dangers are not supported by reliable, intelligent information.

For this reason, a sovereign may not declare a state of emergency in light of recurring terrorist threats which are being made by an unknown organization who has never committed such attacks and who does not possess the operational capability to execute its threats. A declaration of the existence of a state of emergency under these circumstances does not satisfy the evidentiary burden of “clear and convincing” proof regarding the actuality and imminence of the threat. Under certain circumstances when reliable intelligence information is available, a sovereign may declare a state of emergency as a preventive measure within the normative framework of self-defense. The reason for this is that a declaration of a state of emergency is possible not only in response to threats which had already been carried out but also in the face of future imminent dangers. However, in order to take such a preventive measure, the terrorist threats must be made by an organization that has the operational capability to carry out such attacks, notwithstanding the question whether it had actually committed such attacks in the past. The fact that a terrorist organization has already proven its dangerous capabilities will be of particular interest when gauging the imminence of the possible threat.

⁵³ See *infra*, section IV.

An additional question with regard to the imminent character of the emergency is whether a state whose citizens were not subject to an actual attack may declare a state of emergency as a result of a terrorist attack which took place within the territory of another country. For example, following the September 11, 2001 attacks in the United States, the British government concluded that there was a state of public emergency threatening the life of its nation, within the meaning of Article 15(1) of the European Convention.⁵⁴ The courts in the United Kingdom, including the House of Lords, ratified this determination.⁵⁵ The court accepted the government's assertion that the unprecedented atrocities in New York, Washington, DC, and Pennsylvania created a new reality in Britain that satisfied the five core elements of states of emergency.

The courts stated that a state of public emergency may occur even if there was no imminent threat of a terrorist attack, but rather an intention and a capacity to carry out serious terrorist violence.⁵⁶ In other words, the court determined that even if the government of the United Kingdom did not have evidence pointing to a specific threat, it was not required to wait until the actual realization of the danger. In order to take preventive measures, all it had to prove is that it was subject to a threat by an organization which had the capability of implementing it. As the House of Lords noted, a determination whether a state of emergency does or does not exist under these circumstances requires

a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behavior of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical[.] It would have been irresponsible not to err, if at all, on the side of safety.⁵⁷

⁵⁴ See *Britain Moves to Detain Foreigners Without Trial*, THE WASHINGTON POST, Nov. 12, 2001 at A18.

⁵⁵ See *A and others v. Sec. of State for the Home Department*, [2002] EWCA Civ 1502; *A and others v. Sec. of State for the Home Department*, [2004] UKHL 56. See also Mark Elliott, *United Kingdom: Detention Without Trial and the 'War on Terror'*, 4 INT'L J. CONST. L. 553 (2006) (discussing British counter-terrorism activity in the wake of September 11).

⁵⁶ *A and others* [2002], paras. 82-85; *A and others* [2004], paras. 24-29.

⁵⁷ *A and others* [2004], para. 29.

As a result, a state whose citizens were not subject to a terrorist attack may declare a state of emergency as a result of an attack which took place within the territory of another country. First and foremost, the attack must satisfy the above-mentioned five core elements of terrorism related states of emergency so that there will be no doubt that the state under attack is entitled to declare a state of emergency. To justify the heightened state of emergency, a state must prove two additional parameters: (1) the identity of the attacker and the motivation for committing the attack; and (2) the degree of ideological resemblance between the two states. The more similar the ideological platforms are between the two states, the more justification a state has in regards to its actions. For example, the United States had been attacked by al-Qaeda, an international fundamentalist Islamic terrorist organization intended to bring down infidel regimes around the world and replace them with religious Islamic regimes.⁵⁸ Apart from the vast physical damage, in terms of the number of victims and the extent of the destruction, the attack was intended to shatter the symbols of Western Democracy and thus create fear among the citizens of every Western democracy. The British government is founded on similar basic principles as the American government, namely the freedom of the individual. Both nations share a long tradition of cooperation in advancing liberal causes and Britain is a major ally of the United States in the struggle against international terrorism. al-Qaeda's attack on the United States demonstrated the organization's operational capability and will to carry out such operations anywhere and at any time in the future. In light of the great ideological resemblance between the United Kingdom and the United States, it is not reasonable to demand the British government to wait for the next disaster to strike before taking the necessary steps to collect clear and convincing evidence regarding the nature and severity of the threat.

IV. RESPONDING TO TERRORISM RELATED EMERGENCIES: THE PROPER NORMATIVE PARADIGM

In light of the unique characteristics of terrorism related emergencies, we now must address the subsequent question of what is the proper normative framework for a democracy to deal with emergencies of this kind?

⁵⁸ See 9-11 COMMISSION, OVERVIEW OF THE ENEMY, Staff Statement No. 15 (2004), available at: http://www.911commission.gov/staff_statements/staff_statement_15.pdf.

In times of emergency, the Executive branch is vested with wider administrative powers than in times of peace; however, these powers inherently infringe upon the traditional scope of protection given to the individual's rights and freedoms. Thus, although these extraordinary powers are aimed at enabling the state to effectively respond to the emergency, they also pose a significant constitutional challenge. There is no doubt that in times of emergency, preference should be given to security needs, regardless of if they infringe upon human rights.⁵⁹ Nonetheless, security needs are not absolute interests. The infringing upon human rights in the name of security should be carried out in a proportionate manner, and then, as a last resort for a temporary period of time.⁶⁰ The constitutional challenge posed before a democracy during terrorism related exigencies lies in the need to properly determine to what extent and subject to what restrictions the state should be entitled to limit the basic human rights and liberties of the individual.

Generally, there are three possible normative premises to resolve this constitutional dilemma. *First*, by preferring national security considerations over human rights by granting state authorities a high level of discretion in implementing the effective means available to thwart the terrorist threat, notwithstanding their harsh implications on fundamental human rights and liberties.⁶¹ *Second*, by preferring human rights over national security considerations through preserving, as much as possible, the traditional array of balances applicable in times of peace, notwithstanding the exceptional security needs resulting from

⁵⁹ LAURENCE LUSTGARTEN & IAN LEIGH, IN FROM THE COLD: NATIONAL SECURITY AND PARLIAMENTARY DEMOCRACY, 16 (Claredon Press 1994).

⁶⁰ Martha Minow, *The Constitution as Black Box During National Emergencies: Comment on Bruce Ackerman's Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, 75 *FORDHAM L. REV.* 593, 602 (2006); Yigal Mersel, *Judicial Rreview of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era*, 38 *N.Y.U. J. INT'L L. & POL.* 67, 91-92 (2005-2006).

⁶¹ See RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (Oxford University Press 2006); Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 *VA. L. REV.* 1091 (2006); see also John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 *GEO. MASON L. REV.* 565 (2007) (arguing that increased government surveillance is a valid exercise of the President's authority as Commander-in-Chief during wartime).

the emergency.⁶² *Third*, by conducting a constitutional equilibrium between the conflicting interests: the fundamental rights and liberties of the individual on the one hand and state and public security on the other.⁶³

The first two normative premises reject the notion of “balancing” and present contrasting, extreme solutions. While the first premise tilts the scales toward national security considerations in light of the disastrous consequences that may result because of “too moderate” responses, which grant human rights a relatively high level of protection, the second premise asserts that it is simply unnecessary to sacrifice human rights for security needs since the former may often be reconciled with the latter. It is not difficult to see that both premises are improper in a democracy. A state of emergency does not justify the abandonment of fundamental human rights in the name of national security; yet, neither does it justify disregarding the extraordinary security needs resulting from the emergency and thus make the mere declaration of a state of emergency meaningless.⁶⁴ Indeed, both human rights and security considerations are valuable “goods.” The optimistic assumption, made by the second premise, that both interests can often be reconciled, or otherwise co-exist, is unrealistic as issues such as administrative detentions, targeted preventive eliminations, and interrogations of suspected terrorists, clearly demonstrate.

In contrast, the third normative premise suggests that in times of emergency, neither of the conflicting interests is made absolute nor entirely abandoned. Instead, a proportionate balance that requires the imposition of certain limitations both on the national security interest and on fundamental human rights must be struck. Finding this proper constitutional balance between these conflicting interests is one of the most difficult challenges of a democracy, as it is forced to make difficult choices and compromises in order to remain faithful to its

⁶² Kent Roach, *The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 CARDOZO L. REV. 2151 (2006); Christopher Michaelsen, *Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric*, 29 U. N. S. W. L. J. 1 (2006).

⁶³ Barak, *supra* note 4, at 155-56; David Cole, *The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11* 59 STAN. L. REV. 1735, 1745-46 (2007).

⁶⁴ Cole, *supra* note 63, at 1745-46.

democratic character.⁶⁵ Terrorism related states of emergency intensify this difficulty due to their unique characteristics and the fact that they compel the state to find solutions to new and unprecedented dilemmas. We shall now focus exclusively on the third normative paradigm in order to examine the appropriate response of a democracy to the dilemmas posed before it in times of terrorism related exigencies.

The implementation of the balancing paradigm in the face of contemporary security threats is highly complex. To the unique nature of the terrorist act, one should also add its somewhat irrational psychological affect on the public. The arbitrariness of the terrorist act, as well as its murderous and destructive consequences, may well produce fear, suspicion, and dread among the public to a degree that bears no relation to the actual probability of the realization of future attacks.⁶⁶ Consequently, the public might urge the government to change the traditional array of constitutional balances between civil liberties and national security in favor of the latter. The government, relying on the support of the majority, may act in accordance with these popular feelings, even in cases where they are not backed by valid

⁶⁵ See HCJ 7015/02 Ajuri v. Commander of IDF Forces in Judea and Samaria [2002] IsrSC 56(6) 352, 383 (“In this balancing, human rights cannot receive their full protection, as if there was no terrorism, and state security cannot receive its full protection, as if there were no human rights. A delicate and sensitive balancing is needed. That is the price of democracy. It is a dear price, which is worthwhile to pay. It maintains the strength of the state. It makes the State’s struggle worthwhile.”), *translation available at* http://elyon1.court.gov.il/Files_Eng/a1/207/5/0/150/a15/02070150.HTM; *see also* HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel [2006] IsrSC 57(6), para 63 (“The question is not whether it is possible to defend ourselves against terrorism. Of course it is possible to do so, and at times it is even a duty to do so. The question is how we respond. On that issue, a balance is needed between security needs and individual rights. That balancing casts a heavy load upon those whose job is to provide security. Not every efficient means is also legal. The ends do not justify the means. The army must instruct itself according to the rules of the law. That balancing casts a heavy load upon the judges, who must determine – according to the existing law – what is permitted, and what forbidden.”), *translation available at* http://elyon1.court.gov.il/Files_Eng/02/690/007/a34/02007690.a34.HTM

⁶⁶ Cass R. Sunstein, *On The Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503 (2007); Jules Lobel, *Symposium: 9/11 Five Years on: A Look at the Global Response to Terrorism: The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1441 (2007).

objective needs. This blanket reliance could cause irreversible harm to the fundamental rights and liberties of the individual.⁶⁷

It is the need to find ways to calm the popular sense of insecurity following a terrorist attack that makes the government willing to use more extreme means against a large ethnic population. The need to assure the citizens that the government has effective command and control makes it more compelling and more necessary to find a just equilibrium to ensure that civil liberties are not sacrificed in the name of popular sentiment. In this stage, the courts should play their crucial role as the protectors of the constitution. The subject of judicial review becomes an important brick in the temple of democracy, particularly in times of emergency.

IV. JUDICIAL REVIEW IN TIMES OF TERRORISM

It is a widely accepted fact that effective judicial review has a vital role in a democratic regime. It is a crucial mechanism of checks and balances that ensures protection of the individual against governmental misconduct and guarantees objective and impartial justice.⁶⁸ Moreover, effective judicial review by the judiciary is a fundamental constitutional principle in a democracy and an essential precondition for the protection of the rule of law. This is true in times of peace and even more so in times of crisis.⁶⁹ Nonetheless, the role of the judiciary during times of crisis, and especially during times of

⁶⁷ Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, in *THE CONSTITUTION IN WARTIME – BEYOND ALARMISM AND COMPLACENCY* 73 (Mark Tushnet ed., Duke University Press 2005).

⁶⁸ Antonio Lamer, *The Rule of Law and Judicial Independence: Protecting Core Values in Time of Change*, 45 U.N.B. L.J. 3, 6-8 (1996); Aharon Barak, *The Role of the Supreme Court in a Democracy*, 33 ISR. L. REV. 1 (1999). *But see* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (arguing that there is no reason to conclude that individuals in a democracy are better protected by judicial review than they would be by the legislature).

⁶⁹ David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2570-71 (2003); HCJ 3239/02 Marab v. The Commander of IDF Forces [2003] IsrSC 57(2), para. 26 (“Judicial intervention stands before arbitrariness; it is essential to the principle of rule of law . . . [i]t guarantees the preservation of the delicate balance between individual liberty and public safety.”), *translation available at* http://elyon1.court.gov.il/Files_Eng/02/390/032/a04/02032390.a04.htm.

terrorism exigencies, raises a number of complicated questions:⁷⁰ Should counter-terrorism measures initiated by the legislature and the executive branches be subject to judicial review? Do courts have the necessary expertise to adjudicate these kinds of security issues? Should the courts exercise judicial review at all times or should they abstain from exercising judicial review during declared times of emergency and adjudicate the legality of counter-terrorism measures only after the period of emergency has ended?

As demonstrated by the above questions, the critical role of the judiciary during times of national security emergencies has never been self-evident. For example, the Supreme Court of the United States has a long history of considering military decisions in times of national security emergencies to be outside the jurisdiction of the federal courts. The Supreme Court has repeatedly taken a restrictive approach and refrained from exercising judicial review of military matters, asserting that the Executive Branch and the President, as the Commander-in-Chief, enjoy full discretion in determining which measures to take when confronted with a crisis.⁷¹ For example, in *Johnson v.*

⁷⁰ See Mersel, *supra* note 60, at 68; Cole, *supra* note 69, at 2570-71; WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 222 (Vintage Press 2000) (1998).

⁷¹ John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 584 (2006); Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795, 813 (2004); see also *In re Yamashita*, 327 U.S. 1, 8 (1946) ("In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court . . . They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power 'to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.' 28 U. S. C. §§ 451, 452. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions."); see also *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and

Eisentrager,⁷² the court held that twenty-one German nationals captured by American forces in China, tried and convicted for war crimes by the American Military Commission in Nanking, and incarcerated in occupied Germany were not entitled to be heard by the American courts. The Court held that because the German detainees were not tried and incarcerated within the United States' territorial jurisdiction, they had no constitutional right to habeas corpus review.⁷³

Even when the Supreme Court has claimed jurisdiction to review certain military matters in times of emergency, the Court usually denied the petitioner's argument and upheld the government's position.⁷⁴ Typically, the Court has only provided relief to the petitioners and rejected the government's contentions in cases where the emergency had already ended.⁷⁵

perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.")

⁷² *Johnson*, 339 U.S. at 789.

⁷³ *Id.* at 777; see e.g., *United States v. Milch*, 332 U.S. 789 (1947); *Brandt v. United States*, 333 U.S. 836 (1948); *In re Muhlbauer*, 336 U.S. 964 (1949).

⁷⁴ *Cole*, *supra* note 69, at 2566; The World War II judgment of *Korematsu v. United States*, 323 U.S. 214 (1944), is one of the more infamous examples to the court's reluctance to protect civil liberties during times of warfare. The court found that the forced exclusion of more than 110,000 American citizens and residents of Japanese ancestry merely due to race considerations was essential and therefore constitutional by reason of the legitimate security needs then prevailing.

⁷⁵ REHNQUIST, *supra* note 70, at 222. It is important to note that *Korematsu*'s conviction was overturned four decades later when the court concluded that his relocation and detention were not justified by military necessity. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

In recent years, academic opinions have increasingly advocated restricting the power of judicial review and granting greater power to the Executive on the grounds that only this will allow an effective and timely response to the terrorist threat.⁷⁶ The response of the U.S. Executive and Legislative branches to the September 11, 2001 attacks is perhaps the most powerful illustration of this approach. The administrative and statutory counter-terrorism initiatives which followed the attacks significantly restricted the power of the Judiciary to adjudicate certain matters in the name of security interests. The Detainee Treatment Act of 2005,⁷⁷ the Military Commissions Act of 2006,⁷⁸ and the Protect America Act of 2007⁷⁹ are only a few recent examples.

⁷⁶ See e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004) (suggesting a fundamental change of the existing constitutional structure, so that in times of emergency the government would enjoy wider counter-terrorism powers without thorough and timely judicial review. According to Ackerman, the "emergency constitution" theory is designed to establish a constitutional legal doctrine that presents a clear distinction between the powers of the government in times of crisis and its powers in times of peace, and thus guarantee the limitation of civil liberties to times of emergency only and prevent unnecessary and long-range restrictions on individual freedoms in times of peace); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003) (arguing that there may be circumstances that justify use of means which violate accepted constitutional norms in order to thwart terrorist threats, provided that public official's openly and publicly acknowledge the nature of their actions); Posner & Vermeule, *supra* note 61, at 1097, 1128-44 (arguing in favor of maintaining a high level of judicial deference in times of emergency due to the fact that during these periods judges' information is especially poor, their ability to sort justified from unjustified security measures is limited, and the cost of erroneously blocking necessary measures may be disastrous).

⁷⁷ Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2600 (2006). The Act deprives the federal courts of jurisdiction to consider habeas corpus petitions filed by or on behalf of foreign nationals designated as "enemy combatants" and detained in military custody at Guantanamo Bay, Cuba. Instead, the act confers on the U.S. Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review only the legality of the above mentioned designation.

⁷⁸ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006). Although the act provides statutory authority for the military commissions' trials, it still does not bring the trials into compliance with the Uniform Code of Military Justice and the Geneva Conventions, but rather adopts less strict procedures and evidentiary rules which deviate from the rules and procedures that apply to trials by military courts-martial. In addition, the act contains provisions which limit judicial review by U.S. federal courts. In

Because the heavy burden of dealing with terrorist threats rests with the Executive and the Legislative Branches – not the Judiciary – only they are being held accountable for the consequences of their counter-terrorism actions. However, history teaches that when the Judiciary does not carry out active and sufficient judicial review, there is an increased danger of the constitutional scales tilting excessively toward security needs at the expense of the fundamental rights of the individual. Subsequent to the September 11, 2001 attacks, it seems that this has been the guiding principle for the U.S. Supreme Court, in formulating a more active and vigorous judicial approach. In contrast to the traditional judicial deference afforded to the political branches of government during times of crisis, the Supreme Court has demonstrated a greater willingness to review the legality of counter-terrorism measures initiated by the Legislature and the Executive Branches since 2001.⁸⁰

Nonetheless, it is important to note that when the Court asserted the justiciability of the war on terrorism, the Court relied on the fact that the petitioners were entitled to constitutional safeguards because they were either American citizens⁸¹ or foreign nationals detained in military custody at the Guantánamo Bay Naval Base in Cuba, a

particular, the act eliminates habeas corpus review as to any military commission trials and prohibits the courts to base their rulings on international law norms, including the Geneva conventions; *see also* Jennifer Trahan, *Military Commission Trials at Guantanamo Bay, Cuba: Do They Satisfy International and Constitutional Law?*, 30 FORDHAM INT'L L.J. 780, 821-27 (2007) (analyzing the legality of military commission procedures); Carlos Manuel Vazquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 A.J.I.L. 73 (2007) (detailing the provisions of the MCA that address the judicial enforcement of the Geneva Conventions).

⁷⁹ Protect America Act of 2007, 110 Pub.L. No. 55, 121 Stat. 552. The act grants the law enforcement authorities extensive security measures and at the same time also diminishes the degree of judicial review. Among other things, the act amends the Foreign Intelligence Surveillance Act of 1978 (FISA) and authorizes warrantless electronic surveillance to phone calls and e-mails made between the United States and foreign nations. It should be mentioned that the Act contains a sunset provision to the effect that these amendments are intended to expire 180 days after its enactment; *see also* William C. Banks, *A Look at the Global Response to Terrorism: The Death of FISA*, 91 MINN. L. REV. 1209 (2007) (arguing that that constitutional protections not infringed by FISA should be retained).

⁸⁰ Yoo, *supra* note 71, at 573; Cole, *supra* note 69, at 2578; Scheindlin & Schwartz, *supra* note 71, at 816-17.

⁸¹ *See* *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *see also Hamdi*, 542 U.S. 507.

territory over which the United States has exercised plenary and exclusive jurisdiction for more than a hundred years and is likely to maintain control of in the foreseeable future.⁸² In essence, the court ruled that citizens of the United States and non-citizens detained at Guantánamo Bay are entitled to seek judicial redress from U.S. federal courts.⁸³ The court failed to clarify whether its rationale was limited only to the detainees held at Guantánamo Bay or if it may also extend review to the detention of non-citizens held in U.S. custody *anywhere* in the world.⁸⁴ As a result, it is currently unclear whether people detained by the U.S. military forces situated in Afghanistan or Iraq are entitled to judicial redress from U.S. federal courts. Similarly, it is unclear whether the courts would exercise jurisdiction over foreign nationals held in U.S. custody outside the United States and review the

⁸² See *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557, 623-24, 634 (2006) (“The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter . . . Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission’s procedures typically have been the ones used by courts-martial. That the jurisdiction of the two tribunals today may sometimes overlap, does not detract from the force of this history; Article 21 did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool. Article 36, confirming as much, strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war. That Article not having been complied with here, the rules specified for Hamdan’s trial are illegal . . . Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.”).

⁸³ Richard H. Fallon Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2049-64 (2007); Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 127, 140 (2006).

⁸⁴ See Fallon & Meltzer, *supra* note 83, at 2058.

lawfulness of prisoners forcefully transferred to countries that abide by lesser interrogational restraints.⁸⁵

The rulings of the federal courts pursuant to September 11, 2001 testify to the fact that the judiciary has learned the lessons of the past and chosen not to fall into the same errors in the future.⁸⁶ Without detracting from the great constitutional importance of these rulings, it should be emphasized that they still fail to provide the full and comprehensive judicial scrutiny expected from the judiciary in times of crisis.

As noted, since the Judiciary performs a critical role in preserving individual civil liberties in times of crisis, it is only in cases where it fails to conduct an appropriate judicial oversight that the Executive and Legislative Branches can excessively infringe the fundamental rights of the individual in the name of security interests. Indeed, for many years, this has been the guiding perception of the Israeli Supreme Court in asserting the justiciability of the war on terrorism. Although the Israeli Supreme Court acknowledged that judicial review of the legality of the war on terrorism may make the war harder, it concluded that a thorough and timely judicial review is an essential component of the rule of law in a democracy.⁸⁷ Accordingly, the court determined that all counter-terrorism measures initiated by the political branches of government are subject to judicial

⁸⁵ It should be mentioned that most federal courts that address this issue have asserted jurisdiction to consider challenges to the legality of rendition of foreign nationals incarcerated at Guantánamo Bay. See Hafetz, *supra* note 83, at 160-65. However, it is unclear whether the courts would also recognize the federal courts' power to review renditions of foreign nationals held in U.S. custody in other foreign regions of the world, such as Afghanistan and Iraq.

⁸⁶ See *Hamdi*, 542 U.S. 507; see also *supra* note 34, para. 23: "As critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."

⁸⁷ Barak, *supra* note 4, at 159-60 ("One must recognize that the court will not solve the problem of terrorism. It is a problem to be addressed by the other branches of government. The court's role is to ensure the constitutionality and legality of the fight against terrorism. It must ensure that the war against terrorism is conducted within the framework of the law. This is the court's contribution to democracy's struggle to survive. In my opinion, it is an important contribution, one that aptly reflects the judicial role in a democracy. Realizing this rule during a fight against terrorism is difficult. We cannot and would not want to escape from this difficulty . . .").

review, regardless if they have been conducted inside or outside of the political border of the State of Israel.⁸⁸ The federal courts, in contrast, have thus far taken a much more restrained approach which focuses on exercising judicial review of military decisions concerning two defined groups of people: American citizens and foreign nationals detained in military custody at Guantánamo Bay. The courts have not yet asserted jurisdiction over all counter-terrorism activities performed by U.S. military forces, regardless of whether the United States possesses either effective control or political sovereignty over the territory where those activities took place.

The guiding principle of the Israeli Supreme Court is that the struggle of a democracy against terrorism must be fought within the rule of law; wherever there is a law, there must also be a court to enforce it.⁸⁹ In accordance with this perception, the Supreme Court, sitting as the High Court of Justice, has exercised judicial review over a substantial number of sensitive and complex counter-terrorism

⁸⁸ HCJ 769/02, *IsrSC* 57(6); *see also supra* note 65, para. 18 (“Alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier ‘carries in his pack’ and which go along with him wherever he may turn, may apply.”); HCJ 2056/04 *Beit Surik Village Council v. Government of Israel* [2004] *IsrSC* 58(5) 807, para. 24 (“Together with the provisions of international law, ‘the principles of the Israeli administrative law regarding the use of governing authority’ apply to the military commander . . . Thus, the norms of substantive and procedural fairness (such as the right to have arguments heard before expropriation, seizure, or other governing actions), the obligation to act reasonably, and the norm of proportionality apply to the military commander.”); HCJ 393/82 *Jam’iat Ascan Elma’almoon Eltha’aoniah Elmahduda Elmaoolieh v. Commander of the IDF Forces in the Area of Judea and Samaria*, [1983] *IsrSC* 37(4) 810 (“Indeed, every Israeli soldier carries in his pack the rules of customary public international law regarding the laws of war, and the fundamental rules of Israeli administrative law.”).

⁸⁹ Ariel L. Bendor, *Justiciability of the Israeli Fight Against Terrorism*, 39 *GEO. WASH. INT’L L. REV.* 149, 156-63 (2007); HCJ 4764/04 *Physicians for Human Rights v. Commander of IDF Forces in Gaza Strip* [2004] *IsrSC* 58(5) 385, para. 7 (“‘Israel is not an isolated island. She is a member of an international system.’ . . . [t]he military operations of the IDF are not conducted in a legal vacuum. There are legal norms – of customary international law, of treaties to which Israel is party, and of the fundamental principles of Israeli law – which set out how military operations should be conducted.”), *translation available at* http://elyon1.court.gov.il/Files_Eng/04/640/047/a03/04047640.A.03.htm; HCJ 3451/02 *Almandi v. Minister of Defense* [2002] *IsrSC* 30 56(3), para. 9, *translation available at* http://elyon1.court.gov.il/Files_Eng/a1/207/5/0/150/a15/02070150.htm.

practices, such as: the legality of targeted preventive eliminations;⁹⁰ the methods of interrogation;⁹¹ administrative detentions;⁹² house demolitions;⁹³ and civil liability of the state for counter-terrorism measures taken by the security forces.⁹⁴ Nonetheless, it should be noted that in conducting judicial review of the political branches of government the court does not substitute its discretion for their own; rather, the court examines the legality of the counter-terrorism measures used by the other branches.⁹⁵ Among other things, the court examines the nature and validity of the security considerations that prompted the legislative or executive action. In addition, the court examines whether the security measures adopted were the least damaging to human rights among available measures. As long as these measures fall within the boundaries of the law, the court will not intervene.

In this context, it is also useful to examine the approach taken by the United Kingdom. The British courts, unlike the courts in Israel and the United States, lack the constitutional power to strike down acts of

⁹⁰ HCJ 769/02, *supra* note 65.

⁹¹ HCJ 5100/94 [1999] The Public Committee against Torture in Israel v. Government of Israel, IsrSC 53(4) 817.

⁹² CrimFH 7048/97 Anonymous v. Minister of Defense [2000] IsrSC 54(1) 721.

⁹³ HCJ 2006/97 Janimat v. Commander of the Central Command [1997], IsrSC 51(2) 651; HCJ 798/89 Shukri v. Minister of Defense [1990] (unpublished); HCJ 6696/02 Amar v. Commander of IDF Forces in Judea and Samaria [2002] IsrSC 56(6) 110; HCJ 6026/94 Nazal v. Commander of I.D.F. Forces in Judea and Samaria [1994] IsrSC 48(5) 338.

⁹⁴ HCJ 8276/05 Adalla – The Legal Center for Arab Minority Rights in Israel v. Minister of Defense [2006] (unpublished).

⁹⁵ See HCJ 4764/04, IsrSC 58(5) 385; *see also supra* note 89, para. 17 (“We do not review the wisdom of the decision to take military action. We review the legality of the military operations.”); HCJ 7015/02, *supra* note 65, para. 30: (“The Supreme Court, when sitting as the High Court of Justice, reviews the legality of the military commander’s discretion. Our point of departure is that the military commander, and those who obey his orders, are civil servants holding public positions. In exercising judicial review, we do not turn ourselves into experts in security affairs. We do not substitute the security considerations of the military commander with our own security considerations. We take no position regarding the way security affairs are run. Our task is to guard the borders and to maintain the boundaries of the military commander’s discretion . . . [h]owever, we shall not substitute the discretion of the commander with our own discretion. We shall check the legality of the discretion of the military commander and ensure that his decisions fall within the ‘zone of reasonableness.’”).

Parliament that are incompatible with the Human Rights Act of 1998. The courts are authorized to make a "declaration of incompatibility" under section 4 of the Act; however, this does not "affect . . . the validity . . . of the impugned statutory provision."⁹⁶ As to administrative decisions, the traditional approach was that the Judiciary would not interfere when national security interests were at stake unless these decisions were "aberrant or totally 'unreasonable.'"⁹⁷ Nonetheless, despite the normative and traditional restraints mentioned above, the judiciary has demonstrated a sincere willingness to exercise meaningful judicial review and adjudicate the legality of counter-terrorism measures taken by the Legislative and Executive branches. The cornerstone of this innovative approach was laid down in December 2004, when the House of Lords declared that section 23 of the Anti-terrorism, Crime and Security Act 2001, which significantly relaxed the conditions for administrative detention of non-nationals suspected of terrorism, in comparison to the conditions for detaining British nationals, was "disproportionate and discriminatory" on the ground of nationality.⁹⁸ Although the ruling was purely declarative in nature, the government felt bound by it and replaced section 23 with the Prevention of Terrorism Act of 2005, which not only makes no distinction between nationals and non-nationals, but also eliminates the possibility of issuing detention orders.⁹⁹

⁹⁶ Human Rights Act of 1998, ch. 42; *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56, paras. 142, 220; Po Jen Yap, *Rethinking Constitutional Review in America and the Commonwealth: Judicial Protection of Human Rights in the Common Law World*, 35 GA. J. INT'L & COMP. L. 99, 122-24 (2006).

⁹⁷ Mark Elliott, *United Kingdom: Detention Without Trial and the 'War on Terror'*, 4 INT'L J. CONST. L. 553 (2006); Jeffrey Jowell, *Judicial Deference: Servility, Civility or Institutional Capacity?*, 2003 PUB. L. 592.

⁹⁸ *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56, *supra* note 49; see also Clive Walker, *Keeping Control of Terrorists Without Losing Control of Constitutionalism*, 59 STAN. L. REV. 1395, 1447 (2007) (arguing that counter-terrorism activities cannot undermine the constitutional values they seek to protect); Alexandra Chirinos, *Finding The Balance Between Liberty and Security: The Lord's Decision On Britain's Anti-Terrorism Act*, 18 HARV. HUM. RTS. J. 265, 273 (2005) (discussing the severe parliamentary and judicial scrutiny of the ATA).

⁹⁹ The Prevention of Terrorism Act is aimed at preventing terrorism related activity through the imposition of derogating and nonderogating control orders on suspected terrorists. Derogating control orders require derogation from the European Convention on Human Rights, while nonderogating control orders impose various restrictions on the individual that do not infringe convention rights that require derogation.

The government's remarkable response to this declarative ruling may be attributed not only to moral and political considerations, but also to the ability of individual applicants to bring their cases before the European Court of Human Rights in Strasbourg and seek appropriate remedies. However, the British government's response is still very striking in comparison to the unsatisfactory manner in which the U.S. government reacted to the Supreme Court ruling regarding the inadequate structure and procedures of the military commissions. The U.S. Supreme Court's ruling led to the enactment of the Military Commissions Act of 2006, which does not present a significant improvement in this matter.¹⁰⁰ Instead of assimilating the constitutional guidelines provided by the court into the Military Commissions Act, the Bush Administration chose to gather support in Congress for the enactment of the Act as is, which may well force the court to choose whether to intervene once again.

Prior to the September 11, 2001 attacks, the federal courts of the United States had traditionally shown a high level of deference to military decisions taken by the political branches of government in times of national-security crisis. Although this approach has gradually changed, it is still much more restrained in comparison to the wide-ranging judicial review implemented by the Israeli Supreme Court. In order for this encouraging change of direction to continue, the federal courts ought to assert jurisdiction over all counter-terrorism operations performed by U.S. military forces, even if these operations take place in a territory over which the United States does not possess effective control or political sovereignty. Only then will the judiciary be able to successfully fulfill its critical role in protecting the fundamental values of democracy in times of national exigencies. It should also be noted that because the courts lack the power to guarantee proper implementation of their rulings by Congress and the President, public opinion and moral commitments play a crucial role in this context. Nevertheless, the U.S. Supreme Court, as the interpreter of the Constitution, does have the authority to review the constitutionality of the Acts of Congress. Whether it chooses to do so effectively when national security matters are at stake is the core question.

¹⁰⁰ See *Hamdan*, 548 U.S. 557; see also *supra* note 78 and accompanying text.

V. CONCLUSION

The struggle of democracy against modern terrorism involves finding solutions to new and unfamiliar dilemmas. Terrorism exigencies not only do not fit the traditional pattern of states of emergency, but they also raise complicated questions regarding the proper normative framework for a democracy to deal with emergencies of this kind as well.

Protection of the fundamental civil liberties of the individual during terrorism-related emergencies poses complex constitutional challenges to democratic regimes both regarding the desirable scope of judicial review and the proper normative framework for a democracy to deal with this type of national-security emergency. In coping with these challenges, the state must formulate a proper balance between its security interest on the one hand and the civil liberties of the individual on the other. The difficulty in finding the proper balance between these two clashing interests is great. However, it is also unavoidable. As Aharon Barak, the Chief Justice of the Israeli Supreme Court, has written:

This is the destiny of a democracy – it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.¹⁰¹

Indeed, it is the right and the duty of the state to thwart terrorist activities in order to protect its citizens. Yet, it also has a duty to maintain its democratic character while doing so. The lawfulness of the struggle against terror is not less important than its success.¹⁰²

¹⁰¹ HCJ 5100/94, 53(4) Isr(SC) 817; *see also supra* note 91, at 845.

¹⁰² *See* Zamir, *supra* note 6, at 378; *see also* Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235 (2006) ("It is hard for the Justices, or for that matter anyone, to accept that we may have to risk the material well-being of the nation in order to be faithful to the Constitution and the duties it imposes. Still, it must be remembered that the issue is not just the survival of the nation . . . but rather the terms of survival.")