United We Stand: National Courts Reviewing Counterterrorism Measures

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Following the initial shock in the wake of 9/11, national courts began to scrutinize counterterrorism measures. Hesitant at first, they subsequently asserted novel claims that bolster their judicial authority, claims that may well resonate beyond the context of counterterrorism. The evolving practice of national courts is characterized by a number of features, all quite striking given previous trends and initial expectations. First, the courts refuse to function as a rubberstamp for the actions of the political branches. They respect the executive and legislature and seek to engage in meaningful deliberation with them—and, no doubt, to share responsibility with them for the outcomes—but they also signal their intention to set limits for counterterrorism measures they deem excessive. Second, courts from the Anglo-American tradition alternate between couching their activism in formal language and asserting themselves as the better-equipped institution to balance between security and liberty. Third, they invoke international law and engage in serious analysis of the international norms they apply. This Chapter describes and explains this evolving practice. It suggests that the courts reacted to far-reaching restrictions of rights that threatened not only the individual but also the judiciary’s very authority to protect against governmental abuse of power. To prevent their jurisdictions from becoming a haven for terrorists and to preempt international pressure on their governments not to comply with the courts’ rulings, it was necessary for those courts to coordinate outcomes with their counterparts across national jurisdictions. The availability of identical or similar norms—international law and human rights law—has facilitated an emerging inter-judicial coordination effort.
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I. Introduction
The “war on terrorism” is far from over, if it will ever be. However, more than five years into the coordinated global effort against Al-Qaeda and its associated groups, we can hesitantly point to one possible victor: the national courts. The persistent attempts of the executive and legislative branches of several democracies to curtail the authority of courts to review counterterrorism policies have, by and large, failed. They have not convinced the courts to defer judgment and, in fact, have generated a counter-reaction on the part of the judiciary. Hesitant at first, the courts regained their

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confidence and asserted novel claims that bolster their judicial authority, claims that may well resonate beyond the context of terrorism and counterterrorism. The aim of this Chapter is to describe and explain this reaction.

In the wake of the September 11, 2001, terrorist attack, national courts faced a major challenge to their authority. Concerned with the potentially devastating effects of global terrorism, national bureaucracies sought to intensify restrictions on rights and liberties perceived as facilitating terrorist acts or impeding counterterrorism efforts. They insisted on their exclusive discretion in shaping and implementing these restrictions as they deemed fit. The executive’s demand for broad, sole discretion rested on its claim of a relative advantage over the other branches of government in assessing the risks of terrorism and in managing those risks. Most legislatures complied without demur. Far-reaching legislative changes, hurriedly introduced in most democracies in the weeks and months following the Al-Qaeda attack, sailed through legislatures with little public debate or scrutiny. The threat of suicide terrorists intent on using weapons of mass destruction to kill scores of innocent—a threat promulgated by government officials—was sufficient for legislators to support wide-scale curtailment of basic rights, particularly when minorities and immigrants were regarded as one possible source of the threat and, hence, were the targets of the restrictive measures. The demand for enhanced security in many countries seemed to justify far-reaching limitations on individual liberties, without providing the traditional guarantees of judicial review. The immediate shock of 9/11 led many to view basic principles of due process, shaped by democratic societies’ preference to err

1 In some countries, the legislative process was brief and did not come up against any significant opposition. Bills were passed within a few weeks or days (even hours in the case of Germany) of the September 11th events. On the legislative changes in the various democratic countries, see the country reports in Terrorism as a Challenge for National and International Law: Security versus Liberty?, C. Walter, S. Vöneky, V. Röben, F. Schorkopf (eds.) (2004); Kent Roach, Sources and Trends in Post-9/11 Anti-Terrorism Laws (2006), available at http://ssrn.com/abstract=899291.
in favor of liberty, as entailing unacceptable risks. To allow nine criminals to walk
free rather than put one innocent person behind bars, the risk-management rule
informing the rights of the accused, was now deemed intolerable when some of those
nine could be capable of wreaking horrendous injury and suffering.

The wave of acquiescence to the demands of the national political leaders for
absolute discretion in acting to guarantee national security swept the courts as well. In
fact, conformity of this nature had been the hallmark of judicial practice in previous
wars and national crises.\(^2\) Suffice it to recall the decisions of the U.K. and U.S. courts
during the two World Wars and the early Cold War era, in which they deferred to the
executive’s discretion, based on the courts’ limited authority and institutional capacity
to assess and manage the risks of war.\(^3\) And thus, indeed, in the weeks following
September 11th, the familiar rhetoric of judicial deference by frightened judges was
repeated. Lord Hoffmann of the British House of Lords explained in *Rehman* his
approval of the Secretary of State’s decision to deport a Pakistani national based on
(disputed) evidence linking him to Islamic terrorist groups operating on the Indian
subcontinent:

“[T]he question of whether something is ‘in the interests’ of national security
is not a question of law. It is a matter of judgment and policy. Under the
constitution of the United Kingdom and most other countries, decisions as to
whether something is or is not in the interests of national security are not a
matter for judicial decision. They are entrusted to the executive.”\(^4\)

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\(^2\) On wartime jurisprudence, see my analysis in Eyal Benvenisti, *National Courts and the “War on

\(^3\) Recall Justice Jackson’s opinion in *Korematsu v. U.S.,* 65 S. Ct. 193, 245 (1944): “In the nature of
things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on
evidence, but are made on information that often would not be admissible and on assumptions that could
not be proved…. Hence courts can never have real alternative to accepting the mere declaration of the
authorities that issued the order that it was reasonably necessary from a military viewpoint.”

In Hoffmann’s view, not only are the courts unable to assess what national security requires, they also lack the authority to balance security interests against interests in liberty. In other words, the courts possess neither the tools nor the legitimacy to make an independent judgment in such matters. Lord Hoffmann continued,

“It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.”

The September 11th attack, in some inexplicable way, “proved” more clearly than ever the case for judicial silence. As Lord Steyn added in the same judgment, “the tragic events of 11 September 2001 in New York reinforce compellingly that no other approach is possible.” Thus the Law Lords were following the traditional explanation for their abdicating responsibility during wartime.

Three years into this new era, however, the Lords transformed themselves into the guardians of the constitution and the champions of individual rights, even as the war on terror continued with only modest success. The 8-to-1 majority in the so-called Belmarsh Detainees decision, asserting judicial competence and legitimacy to review security measures against non-British suspected terrorists, was a stunning departure

5 Id. at p. 17, para. 62.
6 Lord Slynn and Lord Steyn offered a similar, although more refined take on the role of the courts. Lord Slynn (Rehman, id. at p. 9, para. 26) stated that “the Commission must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him.” Lord Steyn (Rehman, id. at p. 10, para. 29), in turn, asserted, “The dynamics of the role of the Secretary of State, charged with the power and duty to consider deportation on grounds of national security, irresistibly supports this analysis.”
7 Id. at p. 10, para. 29.
8 Supra note 2 and accompanying text.
9 A (FC) and Others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2004] UKHL 56 (2004).
from the Anglo-American tradition of judicial deference. In a public lecture on June 10, 2005, Lord Steyn, who was not on the panel in Belmarsh Detainees, commended the House of Lords for its landmark decision, affirming the stance that courts are fully authorized and competent to make “exceedingly difficult choices as to when they should defer to the other branches of government and when not.”

He made another reference to September 11th, but focused rather on the reactions of the U.K. and U.S. governments to the attack:

“Nobody doubts in any way the very real risk of international terrorism. But the Belmarsh decision came against the public fear whipped up by the governments of the United States and the United Kingdom since 11 September 2001 and their determination to bend established international law to their will and to undermine its essential structures. It was a great day for the law—for calm and reasoned judgment, analysis without varnish, and for principled democratic decision making by our highest court.”

Lord Hoffmann joined the majority in the Belmarsh Detainees opinion. He made no reference to his earlier position, in Rehman, even though that stance was indirectly criticized in the other majority opinions in Belmarsh and endorsed only by the minority. Instead, he took the most extreme assertion any judge has ever made in this context. In his view, the Court was entitled not only to assess the proportionality of certain measures deemed necessary by the executive to contend with grave risks to society, it was perfectly capable of examining, and in fact required to examine, the executive’s determination of those risks. And preferring his own determination, he dismissed the latter’s assessment of the risk at hand: “Terrorist violence, serious as it
is, does not threaten our institutions of government or our existence as a civil community.”

The transformation manifested in the Belmarsh Detainees decision is not limited to the U.K. context. In light of the similar, if not as dramatic, changes in the ways in which national courts have reacted to their executive’s security-related claims since September 11th, it is possible to now speak of a new phase in the way democracies are addressing the threat of terrorism: executive unilateralism is being challenged by national courts in what could perhaps be a globally coordinated move. Courts have embarked on this challenge by relying on a number of techniques that allow them to ratchet up or down their level of intervention in the political branches’ exercise of power. They prefer to affect outcomes by using the least-restrictive, lowest-profile methods possible and thereby engage the executive and the legislature in on-going institutional negotiations that encourage the political branches to reconsider their policies. This Chapter describes these techniques and demonstrates the measured use that has been made of them. Amongst these techniques, the use of international law is particularly intriguing, given the traditional judicial hesitation to resort to international law and the reluctance of some societies to accept international law as a legitimate set of norms that ought to constrain the domestic political process. Part II outlines the different judicial responses to the executive’s claim to autonomous discretion. These techniques reveal an emerging judicial theory on the role of courts in a democracy, which goes beyond the context of terrorism. Part III explores this theory and assesses its origins. Part IV attempts to explain the use of the different techniques and to suggest a theory for the evolving judicial approach that could be

12 Supra note 9, Hoffmann’s opinion, para. 96.

13 These cases will be discussed in infra Part II.

viewed as a coordinated response on the part of a group of national courts to the coordinated counterterrorism policies of their national governments. Part V concludes.

II. Post-9/11 Judicial Responses: Climbing up the Ladder of Judicial Review

To elucidate the ability of courts to engage the political branches in a dialogue over the fine-tuning of counterterrorism measures, this Part describes the medley of tools that courts employ when reviewing security measures. Leaving aside possible claims of non-justiciability, acts of state, and similar avoidance doctrines, the judicial review of executive action is a two-tiered process. The first tier is institutional: the courts inquire into whether the executive has been given the authority to act. In the framework of this inquiry, courts track the line of possible sources of authorization for executive power/action, starting with the constitution, through the authorizing statute, down to the administrative regulation. The second tier focuses on substance: the courts examine whether the executive has exercised its authority in line with the restrictions set by the authorizing law, as interpreted and constrained by constitutional law (and international law, if domestic law refers to it). In this process, the courts examine not only the relevant constraints imposed by the law but also the way they were applied by the executive to the facts of the specific case. This inquiry requires that the courts either weigh up the conflicting risks and interests or review how the executive performed this delicate balancing act.

15 For an analysis of the various avoidance doctrines, see id. at 169-73.
Courts that operate in a legal and political environment that views judicial intervention with suspicion will tend to avoid as much as possible making a determination of illegal executive action based on second-tier considerations. They will, rather, rule on the question of institutional authority to act, a question that is no doubt the domain of the courts and, in so doing, will prefer to leave room for the legislature to weigh-in on the matter. Their hope would be that the legislature will cooperate by imposing effective constraints on the executive. But before referring the matter to the legislature, a court might clarify the considerations that the executive must take into account in exercising its discretion and then try to induce the executive to reconsider its original decision in light of this determination. After pleading with the executive to rethink its action, the least controversial judicial intervention would be to declare the action unauthorized by law or read into the existing source of authorization stringent standards that the executive has to comply with, thereby inviting the legislature to clarify the limits of executive authority in the particular matter. While focusing on the institutional level, the courts can set higher barriers for legislative authorization by invoking international law and, ultimately, the constitution as precluding certain authorizing legislation. The latter two possibilities, which limit or even preempt the regular democratic process, will prove difficult for courts whose political sphere is apprehensive about such judicial intervention.

Through the prisms of these two tiers of review, we can identify five possible positive judicial responses to requests for judicial review of executive actions. As the Canada Supreme Court 2002 decision in Suresh v. Canada\(^{16}\) demonstrated, referring an action back to the executive for reconsideration constitutes the least controversial, but often a quite effective, response. The next step up the ladder would be to refer the

matter to the legislature to clarify the scope of authorization granted to the executive. By rejecting open-ended and vague authorizations and insisting on legislative involvement\(^\text{17}\) or by reading into existing authorization strict requirements that constrain the executive’s discretion, thereby giving the legislature the opportunity to intervene,\(^\text{18}\) the courts position themselves as guardians of the democratic process. It is when they restrict democratically accepted outcomes that their competence becomes more controversial. Thus, a third type of referral would require the legislature to depart from its international treaty obligations and would impose significant limits on the legislature’s discretion (unless the executive and legislature assign little value to how their courts interpret their international obligations). Beyond these three types of judicial responses is the realm of constitutional review. Judicial determinations as to the incompatibility of specific measures with the national constitution constitute the most extreme form of judicial intervention. In the framework of this fourth manner of response, the court would declare a certain piece of legislation unconstitutional, but allow the legislature to re-legislate it in a more circumscribed fashion so as to conform to constitutional standards. Finally and ultimately, the fifth response would be to declare a certain measure as utterly infringing constitutional limitations and therefore beyond the legislature’s scope of authority. Such a response could be in the form of an explicit declaration of the

\(^{17}\) See, e.g., Leung Kwok Hung v. HKSAR (Hong Kong Court of First Instance HCAL 107/2005 (9 February 2006) (Hong Kong Unreported Judgments, available at Lexis as [2006] HKCU 230) (legislation authorizing covert surveillance, including the secret interception of private communications, infringes the right to privacy and therefore incompatible with the Basic Law due to wide discretionary powers it allows to executive).

\(^{18}\) See the New Zealand Supreme Court decision concerning the deportation of refugees who face the risk of torture in their home countries (the Suresh scenario), Zaoui v. Attorney-General (No 2) [2006] 1 NZLR 289 para. 93 (“[T]he Minister, in deciding whether to certify under s 72 of the Immigration Act 1987 that the continued presence of a person constitutes a threat to national security, and members of the Executive Council, in deciding whether to advise the Governor-General to order deportation under s 72, are not to so decide or advise if they are satisfied that there are substantial grounds for believing that, as a result of the deportation, the person would be in danger of being arbitrarily deprived of life or of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).
unconstitutionality of the enabling statute, or it could be implicit, in the form of reading into the relevant statute strict standards that would make it, in the eyes of the court, compatible with the constitution.

These five types of responses can be depicted as five steps up the ladder of judicial review. Relative to any prevailing political resistance to judicial intervention, we can anticipate that courts will climb up or down that ladder, summoning the political branches to enter into a dialogue and thereby also seeking to share with them responsibility for the outcome. The remainder of this Part considers the different steps on which different national courts have perched, while Part III examines the justifications provided by those courts for climbing up the ladder beyond the initial and obvious first step of review.

On January 11, 2002, a few months into the new counterterrorism era, the Supreme Court of Canada came to a unanimous decision in the matter of Suresh, a member of the LTTE (“Liberation Tigers of Tamil Eelam”), the Tamil Tigers organization struggling against the Sri Lankan government. The judgment approved in principle the decision of the Minister of Citizenship and Immigration to deport Suresh to Sri Lanka, despite the possibility that he would be tortured there. This decision reiterated the Rehman line of reasoning, that the authority to balance the conflicting interests rests with the Minister rather than the Court\(^\text{19}\) and that, in principle, there is no prohibition on deportation to a country that may inflict torture on the deportee.\(^\text{20}\) The Suresh decision did, however, set forth the required decision-making process in cases where there is a \textit{prima facie} risk of torture and remanded the

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\item Suresh, supra note 9, para. 38: “The court’s task, if called upon to review the Minister’s decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament’s legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion.”
\item Id. para. 76 (emphasis added): “[B]arring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice.”
\end{enumerate}
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case back to the Minister for reconsideration in line with the guidelines set by the Court. Thus, the Minister was required to explain in writing the reasons for deporting a person to a country that is likely to torture him or her. No doubt, the Court anticipated that this procedural requirement would prove a sufficiently high threshold to preclude such deportations. As it has indeed since turned out, no Canadian minister has been willing to issue such a statement, and therefore nobody has subsequently been exposed to the threat of torture.\(^{21}\)

A good example of climbing up the first, second, and third steps of the judicial review ladder can be found in the U.S. Supreme Court jurisprudence regarding the treatment of post-9/11 detainees in Guantanamo and elsewhere. Referral back to the executive or legislature is the first stage of the Court’s involvement in this matter. The Rasul\(^ {22} \) and Hamdi\(^ {23} \) decisions, rendered on the same day, asserted the Court’s jurisdiction to review executive action with respect to unlawful combatants held on U.S. territory or territory under U.S. administration, including Guantanamo, and that neither Congress nor the Constitution grants the executive a blank check to act as it pleases. In these decisions, the Court referred the policies back to the government to

\(^{21}\) See also the recent order of Deputy Judge MacKay of the Federal Court of Canada in the Jaballah case, rendered on October 16, 2006, at http://www.fct-cf.gc.ca/bulletins/whatsnew/DES-04-01_determinations.pdf, ruling that an Egyptian national who has resided in Canada since May 1996 can be deported from Canada but not to countries where he would face a serious risk of being tortured; the allegations that Mr. Jaballah poses a security threat in Canada are not of such an “exceptional” nature as to justify exposing him to torture. This follows an earlier decision of MacKay’s in the same matter, where he referred to the exercise of discretion in such cases as follows: “In assessing ‘exceptional circumstances’ that would justify Mr. Jaballah's deportation to face torture, the Minister's delegate made no reference to circumstances facing Canada or its security, other than the conclusion that it is endangered by Mr. Jaballah's presence in Canada. In Suresh v. Canada (Minister of Citizenship and Immigration), the S.C.C. referred to ‘exceptional circumstances’ in terms of ‘natural disasters, the outbreak of war, epidemics and the like’, and to cases where the exceptional circumstances referred to appear to concern those facing Canada as a nation. In the present case, the Minister's delegate made no reference to such circumstances that would warrant exception from the protection of section 7 of the Canadian Charter of Rights and Freedoms, either in the balancing of fundamental rights or in the examination of evidence to support an exception based on section 1 of the Charter. The delegate's assessment of the danger posed by Mr. Jaballah also failed to consider the limits on his freedom should he remain in Canada. The delegate thus erred in law.” In the Matter of Mahmoud Jaballah 2005 FC 399, available at http://reports.fja.gc.ca/en/2005/2005fc399/2005fc399.html.\(^ {22}\) Rasul v. Bush, 542 U.S. 466 (2004).\(^ {23}\) Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
assert its authority to act. The second round came two years later with the *Hamdan* decision,\(^\text{24}\) which rejected the government’s response to the earlier decisions. In *Hamdan*, the majority relied on international law as the standard for assessing the legality of the military commissions established by the President to determine the status of Guantanamo detainees. In its judgment, the Court diverged from the executive’s position in two important aspects: first, that Common Article 3 of the 1949 Geneva Conventions applies to the conflict with Al-Qaeda and, second, that the standards set by that Article are not met by the commissions.\(^\text{25}\) The justices still resorted to the referral technique when they emphasized that the executive can seek Congress’ approval for derogating from the requirements of international law, without acknowledging that such derogations may be costly to the United States in the international sphere.\(^\text{26}\) It is noteworthy that the justices refrained from directly invoking the constitutional guarantees of due process, but Justice Kennedy, joined by Justices Souter, Ginsburg, and Breyer, added an important warning: the Court may eventually resort to the third and ultimate response, namely, the examination of the constitutionality of the military commissions once they are established by Congress:

> “Because Congress has prescribed these limits, Congress can change them, requiring a new analysis *consistent with the Constitution* and other governing

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\(^\text{25}\) Justice Stevens, *id.* at p. 126: “Common Article 3, by contrast, affords some minimal protection. […] While Common Article 3 does not define its ‘regularly constituted court’ phrase, other sources define the words to mean an ‘ordinary military court’ that is ‘established and organized in accordance with the laws and procedures already in force in a country.’ At a minimum, a military commission can be ‘regularly constituted’ only if some practical need explains deviations from court-martial practice. No such need has been demonstrated here. Common Article 3’s requirements are general, crafted to accommodate a wide variety of legal systems, but they are requirements nonetheless. The commission convened to try Hamdan does not meet those requirements.”

\(^\text{26}\) As Justice Breyer said in *Hamdan*, *id.* at pp. 135-36, “The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’ … Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary. Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.”
laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.”

This muffled threat did not deter Congress when it enacted the Military Commissions Act of 2006. The Act sent a strong and unequivocal message to the Court. It aimed at stripping the courts of habeas corpus jurisdiction with respect to non-U.S. citizens ("aliens") determined by the executive to be enemy combatants; it declared that the Act conformed with the standards set by the 1949 Geneva Conventions and, at the same time, provided that neither the Conventions could be invoked by any “alien unlawful enemy combatant subject to trial” under the Act nor that the definition of Common Article 3 violations could be interpreted by the courts using “foreign or international source[s] of law.” In the wake of this Act, Professor John Yoo suggested, “[I]n the struggle for power between the three branches of government, it is not the presidency that ‘won.’ Instead, it is the judiciary that lost. The new law is, above all, a stinging rebuke to the Supreme Court.” At the time of writing, it is not clear whether the Court will respond to this challenge by climbing one of the two final, constitutional, rungs of the judicial review ladder.

It should be noted that, in some specific instances, the second step may effectively...

27 Id. at p. 164 (emphasis added).
28 [S 3930], passed by the U.S. Senate on September 28, 2006, and by the U.S. House of Representatives on September 29, 2006.
29 Id. s. 950j(b): “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”
30 Id. s. 948b(f): “A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”
31 Id. s. 948b(g): “No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”
32 Id. s. 6(a)(2): “No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in [Common Article 3].”
33 John Yoo, Op-Ed, Sending a Message: Congress to Courts: Get out of the War on Terror, Wall St. J., Oct. 19, 2006, http://www.opinionjournal.com/editorial/feature.html?id=110009113. Yoo further states, “Hamdan was an unprecedented attempt by the court to rewrite the law of war and intrude into war policy. The court must have thought its stunning power grab would go unchallenged.”
34 For more on the use of international law and its significance, see infra Part IV.
be the ultimate one. In the Belmarsh Detainees decision, the House of Lords mentioned that, under the 1998 Human Rights Act, the ultimate determination lies with Parliament, since the Court has the authority only to declare a legislative act as incompatible with the European Convention on Human Rights (“ECHR”) and not to declare a law invalid. Formally, Parliament can disregard the House of Lords’ declaration. But in a political and social atmosphere where international law in general and the ECHR in particular weigh heavily, such a step would seem politically unlikely (especially in view of a possible vindication of the House of Lords’ position by the European Court on Human Rights).35

In a different legal setting, the reliance of the Israeli High Court of Justice on international law effectively constitutes the final word with respect to the legality of Israeli measures in the territories occupied by Israel. Under the legal regime in those territories, it is the Israeli Army that wields authority there in accordance with international law, whereas the Israeli legislature is not directly involved. The Israeli Parliament (Knesset) cannot modify judicial limitations of the occupying power’s authority without shattering the formal legal wall that separates the Israeli legal system from the legal system in the Occupied Territories. Hence, judicial determinations that certain measures violate the law of occupation or the laws of armed conflict effectively bind the Israeli political branches.36

The French Conseil constitutionnel and the German Bundesverfassungsgericht (the German Constitutional Court) have, for their part, climbed the final two steps of the ladder to explicitly reject as unconstitutional certain legislative acts related to terrorism. In 1996, the Conseil constitutionnel found unconstitutional provisions of

35 On the “margin of appreciation” granted by the European Court to the member states, see infra note 77 and accompanying text.
36 For examples of such decisions, see infra notes 44, 55, 57.
the Act to Strengthen Enforcement Measures to Combat Terrorism and Violence against Holders of Public Office or Public Service Functions and to Enact Measures relating to the Criminal Investigation Police.\(^37\) In this decision, some of the measures (classifying assistance to illegal entry of foreign nationals as terrorism-related and authorizing conducting searches without judicial warrant) were declared disproportionate or excessive (the fourth step), while the Act’s retroactive force in overseas territories was declared unconstitutional based on the principle that criminal legislation cannot have retroactive effect (the fifth step).

In 2005, the Bundesverfassungsgericht took the fourth step in the European Arrest Warrant Case.\(^38\) In this case, the Court examined the European Arrest Warrant Act passed by the German Bundestag to implement the Framework Decision on the European Arrest Warrant, which had been promulgated in view of facilitating inter-European cooperation in combating crime and terrorism. The Court found the Act to infringe on constitutional rights in a manner beyond what was necessary to meet the goals of the European policy. It thereby referred the matter back to the legislature to reenact the Act so that the restriction of the fundamental right to freedom from extradition would be proportionate.\(^39\) But when it found the Air Security Act of 2005 unconstitutional, the German Court took the fifth and final step. This Act, which authorized federal authorities to order the downing of any civilian aircraft carrying...
hostages whose hijackers intend to crash the plane on a populated target (the September 11th scenario), was deemed to violate, *inter alia*, the principle of human dignity.\(^40\)

In 2004, the Indian Supreme Court resorted to implicit constitutional review when it read into the 2002 Prevention of Terrorism Act (“POTA”) several additional conditions to a number of key provisions in the Act. The Court deemed such conditions as mandated under the Indian Constitution\(^{41}\) and authorized lower courts in administrative and criminal matters to further expound the constitutional requirements identified by the Court.

Most recently, in February 2007, a unanimous decision by the Canada Supreme Court declared the procedures allowing for the deportation of non-citizens suspected of terrorist activities on the basis of confidential information, as well as denying prompt hearing to foreign nationals, to be incompatible with the Canadian Charter of Rights and Freedoms.\(^{42}\) This decision—a rather bold one for a court that belongs to the Anglo-American tradition—invited the legislature to respond by reshaping the hearing procedures: the declaration concerning the illegality of these procedures was suspended for a period of one year from the day of the judgment’s rendering, “to give Parliament time to amend the law” in light of the Court’s suggestions.\(^{43}\)

### III. The Emerging Judicial Philosophy Concerning the Review of Counterterrorism Measures


\(^{41}\) People's Union for Civil Liberties v. Union of India [2004] 1 LRI 1.


\(^{43}\) *Id.* para. 140.
In principle, one would expect that the more invasive judicial intervention into the executive’s and legislature’s spheres of action, the stronger the reasoning presented by the court for such intervention. But courts do not necessarily engage in an open discussion of their justifications, often masking their decisions behind formal reasoning that does not acknowledge their activism. The *Conseil constitutionnel* and the *Bundesverfassungsgericht* do not waste words on explaining the source of their authority, as judicial institutions, to constrain the legislature. To them, their authority to interpret the constitution and assess the proportionality of limitations on individual liberties is self-evident, entrenched in the legal and political environment of the two countries. This may also explain the willingness of these courts to so closely scrutinize their legislatures. Such a role is apparently less acceptable in countries from the Anglo-American tradition, and it is thus here that the judiciary goes to such great lengths to present reasons for its growing assertiveness. At times, however, the judiciary’s insecurity in its reviewing role is what leads it to underplay its exercise of discretion, resorting to formal reliance on “clear” text that governs the case and leaves the judges no discretion in the interpretative exercise, but only to announce its outcome.

Since the interpretation of legal texts is the quintessential domain of the courts, they can present themselves as passively accepting the necessary inference of the constitutional or international text. Such interpretations do not require that the court address directly the government’s assertions related to the war on terrorism when the text provides “clear” rules that are not subject to a balancing of conflicting interests. This is the formal approach discernible in a number of Israeli High Court of Justice decisions. By interpreting international treaty obligations as prescribing clear
prohibitions under the law of armed conflict or the law of occupation, the Court has placed limits on the operations of the Israeli Army without any need to reason its authority to intervene. The U.S. Supreme Court ruling that Common Article 3 of the Geneva Conventions applies to the conflict with Al-Qaeda was based on a cursory examination of the text and on foreign sources, with no discussion of the Court’s authority to interpret such international texts. Moreover, the Court’s assertion that the Geneva Conventions set a higher standard of due process than the standard followed by the military tribunals set up by Military Commission Order No. 1 was presented as an almost logical conclusion from a treaty text that leaves no room for doubt or for judicial discretion.

The reason a court gives for its role as reviewer of the other branches of government in the context of the war on terrorism is contingent on which steps it climbs on the scale of review: on whether the outcome of the decision is referral of the matter to (or back to) the executive or the legislature or whether the decision significantly constrains the legislature. Referral to the legislature requires only that the court state that it is protecting the political process against attempts on the part of the

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45 On the applicability of Common Article 3, see Justice Stevens’ opinion at *Hamdan*, supra note 24, at 126: “In context, then, the phrase ‘not of an international character’ bears its literal meaning.” On the interpretation of Common Article 3, see Justice Stevens’ opinion, *id.* at p. 129: “While the term ‘regularly constituted court’ is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning.”

46 On the standard set by the Convention, see Justice Stevens’ opinion at *id.* at p. 131: “[The phrase ‘all the judicial guarantees which are recognized as indispensable by civilized peoples’] is not defined in the text of the Geneva Conventions. *But it must be understood* to incorporate at least the barest of those trial protections that have been recognized by customary international law” (emphasis added).
executive to short-circuit that process (and, of course, that ensuring the smooth operation of the political process is important also during times of crisis). As Justice Breyer stated in *Hamdan*,

> “Nothing prevents the President from returning to Congress to seek the authority he believes necessary. Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.”

Justice Kennedy added that the democratic process, given the stability that it provides, is in itself no less an important asset in national crisis:

> “Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.”

It is when they restrict the legislature’s margin of discretion that the Anglo-American courts are most challenged to justify their action. Thus, when they choose to address this challenge openly, rather than present themselves as passive interpreters, they must contend with the criticism regarding their institutional deficiency vis-à-vis the political branches. It is in this context that the new philosophy of the courts has recently emerged. Three explanations have been put forth by judges in response to this challenge to the courts’ authority to intervene. The first is a formal explanation, namely, that the courts implement a constitutional—and, hence, fully

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47 *See supra* note 24, at 135-36.
48 *See supra* note 24, at 136. His opinion continues at *id.* at pp. 136-37: “This is […] a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.”
democratic—mandate. The second explanation asserts a special role for the courts to correct the flaws of the democratic process that may work against minorities. Finally, the third and most far-reaching explanation maintains that the courts, as expert balancers, are better equipped than the political branches to resolve conflicts between liberty and security.

The final claim is novel and has extensive consequences and thus warrants an exploration of both its foundation and ramifications. It constitutes an unabashed refutation of the rhetoric that emanates from the “countermajoritarian difficulty,” which has proved to be the “obsession” or “fixation” of U.S. constitutional theory since 1962, when Alexander Bickel published his influential treatise The Last Dangerous Branch. Casting-off the position of the less-capable institution—the “inferiority complex” status that accompanied the characterization of “countermajoritarian”—the newly asserted argument celebrates the courts’ institutional superiority to the political branches: the executive may have the expertise for weighing security needs; the legislature may be the most qualified to set general

49 Lord Bingham of Cornhill, in the Belmarsh Detainees decision, supra note 9, para. 42, stated, “The 1998 Act gives the courts a very specific, wholly democratic, mandate.” See also Hamdi, supra note 23: “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” The Indian Supreme Courts asserts a similar ground for constitutional review: “Our Constitution laid down clear limitations on the state actions within the context of the fight against terrorism. To maintain this delicate balance by protecting ‘core’ human rights is the responsibility of court in a matter like this.” Supra note 39, para. 15.

50 This is the process-based justification for judicial review, expounded by John Hart Ely in Democracy and Distrust (1980) and resorted to in the context of counterterrorism measures by two Law Lords in the Belmarsh Detainees decision, supra note 9. Lord Hope of Craighead, in Belmarsh, id. para. 108, noted, “We are dealing with actions taken on behalf of society as a whole which affect the rights and freedoms of the individual. This is where the courts may legitimately intervene, to ensure that the actions taken are proportionate. It is an essential safeguard, if individual rights and freedoms are to be protected in a democratic society which respects the principle that minorities, however unpopular, have the same rights as the majority.” Baroness Hale of Richmond, id. para. 237, added, “Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities.” Note that these minorities may also be non-citizens who cannot participate in the political process. Nonetheless, the common perception under both international human rights law and domestic constitutional norms is that non-citizens are entitled to the protection guaranteed by these norms.

51 These terms are aptly used by Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 Yale L.J. 153 (2002).
national priorities; but the courts have the necessary expertise for balancing those interests against individual rights. Therefore, in democracies, the courts must be the ultimate decision-makers in matters related to restrictions on human rights, for there is no better institution to entrust with such a task. More than any other branch of government, the courts are “the guardians of human rights.”52 “The courts are charged by Parliament with delineating the boundaries of a rights-based democracy” argues Professor Jeffrey Jowell,53 cited with approval in the Belmarsh Detainees decision54 and presented more clearly by President Barak of the Israeli Supreme Court in his Beit Sourik opinion concerning the proportionality of the route set for the “Wall” or “separation fence” built by Israel on West Bank territory.55 According to Barak,

“The question is whether the route of the separation fence, according to the approach of the military commander, is proportionate. The standard for this question is not the subjective standard of the military commander. The question is not whether the military commander believed, in good faith, that the injury is proportionate. The standard is objective. The question is whether, by legal standards, the route of the separation fence passes the tests of proportionality. This is a legal question, the expertise for which is held by the Court.”56

Justice Barak continued this argument, citing an earlier decision of his,

“Judicial review does not examine the wisdom of the decision to engage in military activity. In exercising judicial review, we examine the legality of the military activity. Therefore, we assume that the military activity that took place in Rafah was necessary from a military standpoint. The question before us is whether this military activity satisfies the national and international standards that determine the legality of that activity. The fact that the activity is necessary on the military plane does not mean that it is lawful on the legal plane. Indeed, we do not substitute our discretion for that of the military commander’s, as far as it concerns military considerations. That is his

54 supra note 9, para. 42.
56 Id. para. 48.
These assertions can be understood in two different but compatible ways. The first sense emphasizes the characterization of determining proportionality as a legal task (“This is a legal question.”). By defining this task as belonging to the legal sphere, Barak implied that the ultimate arbiter of legal questions is the court—at the apex of the judicial branch. In other words, proportionality analysis, just like interpretation of texts, is the domain of courts. This assertion is similar to that made in *Marbury v. Madison*, where the U.S. Supreme Court claimed exclusive authority to interpret the Constitution since interpretation is a matter of legal reasoning. Barak’s claim is therefore susceptible to the same criticism directed at *Marbury*: the fact that a question is one of law does not in and of itself necessitate that the courts have exclusive authority to interpret it.

The second sense of Barak’s assertions goes beyond mere formality: the courts are experts at balancing just as the security services are experts at assessing threats (“We examine the results on the plane of the humanitarian law. That is our expertise.”). Proportionality is what courts are designed to assess; this is what they do better than other branches of government; this is why they have the ultimate word in such matters. This novel claim redefines the judicial role, the role of guardians of human rights. Such an assertion may seem trivial to constitutional lawyers and to...

58 5 U.S. 137 (1803).
60 In an article published in 2002, Justice Barak referred to an earlier case, in which the Court intervened to order the equal distribution of gas masks in the West Bank during the 1991 Gulf War: “We did not intervene in military considerations, for which the expertise and responsibility lie with the executive. Rather, we intervened in considerations of equality, for which the expertise and responsibility rest with the judiciary.” Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16, 152 (2002).
politicians on the Continent, but for those intrigued by the justifications for the
activism of this countermajoritarian institution, this argument must be viewed as far-
reaching. Critics of the human rights “movement” have often derided what they
maintain to be the inflated claims of its visionaries: the concept of human rights will
be empty as long as different societal interests can be dressed up as human rights. If,
for example, national security can be reconceptualized as the right to life of all or
some citizens (or their right to property), then the protection granted by the rights
rhetoric to individuals against the collective interest becomes bereft of any real
significance. Rights no longer trump social interests. While this criticism is valid, the
emerging discourse in the House of Lords and the Israeli High Court suggests that the
“human rights revolution” did ultimately matter. Its real impact was, however,
institutional rather than substantive: although the pull of the rights rhetoric elevated
also societal interests to the status of individual rights and therefore essentially
leveled the playing field between the competing rights, it also reallocated the
authority to weigh these interests by transferring them from the political branches to
the courts. The human rights paradigm provides a platform for the courts to assert
their institutional supremacy over the political branches and determine the balance
between conflicting rights. The challenge to the political branches has never been
clearer.

IV. The Emerging International Coalition of National Courts

From the discussion thus far, an evolving practice on the part of national courts has
emerged, characterized by a number of striking features in contrast to previous trends
and initial expectations. First, national courts are refusing to simply rubberstamp the

61 For the approaches in France and Germany, see supra notes 35-38 and accompanying text.
actions of the political branches. They respect the executive and legislature and seek to engage in meaningful dialogue with them, as well as, no doubt, to share responsibility with them for outcomes; but they also have clearly signaled their intention to set limits to counterterrorism measures they deem excessive. Second, courts of the Anglo-American tradition alternate between couching their activism in formal language and asserting themselves as the better-equipped institution to balance security and liberty. Third, they do not hesitate to invoke international law and engage in serious analysis of the international norms they apply.

I will not dwell here on the first feature, the least surprising of the three. Judicial silence could be tolerated during crises that are both overwhelming and limited in duration. During a major war, there would be judges who would subscribe to Chief Justice Rehnquist’s suggestion to defer judgment until after the conflict has been resolved. Some human rights activists might even agree with this proposition, for “if, in fact, courts are more prone to uphold wartime claims of civil liberties after the war is over, may it not actually be desirable to avoid decision on such claims during the war?” But the current so-called war on terror is emerging as a protracted and, thus far, not overwhelming one. And as I have suggested elsewhere, under such conditions, the need for judicial intervention in legislative and executive action is compelling. The prolongation of low-key war brings back the institutional necessity of any administration to rely on the court as a legitimizing agent. At the same time, it demonstrates the court’s resolve to maintaining a reputation as an independent institution. These two factors may take the back seat during short and well-defined emergency situations, but as emergency becomes a way of life, the public’s—and hence

also the government’s—interest in and reliance on an independently minded court
resume.63

In this final part, I will focus on the two other features of the emerging
jurisprudential. I will argue that the underlying logic of these features is the desire to
coordinate a transnational coalition of national courts. Both the assertiveness of the
courts and their use of international law have facilitated the evolution of such
cooperation. To explain the reasons for the emergence of this alliance, it is necessary
to return to the early 1990s, when national courts exhibited little interest in such
cooperation and, in fact, ensured their respective governments a free hand in handling
international affairs.

Almost fifteen years ago, I presented a comparative analysis of the approaches
taken by national courts to the implementation of international law.64 The article
focused on the use of international law in general but, in particular, in security matters
and described a consistent policy on the part of national courts of avoiding applying
international law against the will of the executive branch. Through an assortment of
avoidance doctrines (such as “standing,” the “political question,” non-justiciability,
and other doctrines), the identification or mis-identification of customary
international law, or the interpretation of treaties, national courts had managed to
align their findings and judgments with the preferences of their governments. Some
courts acknowledged their reticence and explained their deference as a tribute to the
executive’s expertise in negotiating international relations and referred to the
necessity for the state “to speak in one voice.”65 The article also identified a judicial
policy of guaranteeing complete leeway to the executive in external affairs,

63 Supra note 2, at 318.
64 Supra note 14.
65 Id. at pp. 173-74.
intertwined with a sense of very limited recognition of international law as a legitimate constraint on the domestic political process. Ultimately, I argued, “National courts are the prisoners in the classic prisoner's dilemma. If they could have been assured that courts in other jurisdictions would similarly enforce international law, they would have been more willing to cooperate. They might have been ready to restrict their government's free hand, had they been reassured that other governments would be likewise restrained. But in the current status of international politics, such cooperation is difficult to achieve, and rational judges act like the prisoner who cannot be sure that his or her fellow prisoner will cooperate.”

The ways governments interact have changed considerably over the last fifteen years. In a globalized environment, the regulation of human activity is subject to a mesh of formal and informal international commitments. The contemporary ease of communication, on the one hand, and global interdependency, on the other, have resulted in a significant increase and deepening of coordinated efforts amongst national bureaucracies. The availability of means of communication and the need to make use of them bring diverse parts of national bureaucracies into direct contact, sometimes on a daily basis, with their foreign counterparts. This is particularly true for the post-9/11 global counterterrorism effort, which effectively united national security agencies in a concerted effort for a common cause, acting both directly and through a web of international institutions (formal and informal), openly and clandestinely, legally and also illegally (for example, the practices of “extraordinary renditions” and “secret prisons”). This novel, multifaceted activity has set a new challenge for the national courts that is unique in two aspects. First, the issue is no

66 Id. at p. 175.
67 The main UN body set up to curb terrorism is the Counter-Terrorism Committee (“CTC”) (for its mandate and activities, see http://www.un.org/sc/ctc). Post 9/11 informal institutions devoted to counter-terrorism include the Financial Action Task Force’s (“FATF”) so-called Nine Special Recommendations (concerning the financing of terrorism) (see http://www.fatf-gafi.org/document/9/0,2340,en_32250379_32236920_34032073_1_1_1_1,00.html) and the Proliferation Security Initiative (“PSI”), initiated by the U.S. government in 2003 (see http://www.state.gov/t/np/c10390.htm).
longer one of ensuring the executive a free hand in conducting international affairs, because the intensive external peer pressure faced by most governments leaves them little room to maneuver. Second, the issue is no longer one of international affairs, because the spheres of the coordinated counterterrorism policies cut deeply across the fabric of the domestic regulation of daily lives and the timeframe for such measures is indefinite.

In light of the web of international commitments, it makes little sense to maintain that governments enjoy complete leeway in conducting international affairs and that, therefore, national courts should refrain from influencing their government’s policy choices. In fact, quite the contrary is often the case: opposing pressure from a disapproving court may in fact result in a government enjoying more latitude in its relations with its foreign counterparts, because it can use the constraining court decision to explain why it is prevented from bowing to the external pressure to limit its citizens’ rights. Moreover, due to their pervasive effects and indefinite duration, counterterrorism measures do not stop at a state borders. Measures impinging on human rights can entail also far-reaching limitations on the political freedoms and privacy within the country and impinge severely on the rights of the citizens. Thus, acquiescing to the executive’s demand for judicial deference threatens the courts’ very authority as the so-called guardians of human rights and democracy.

An assertive judiciary gives rise to a number of primary as well as secondary concerns. The primary concerns relate to the direct and tangible consequences of judicial activism: greater risk of terrorist attacks and greater risk of politicians’ attempting to curtail the power of the courts. There is no way to diminish the first

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68 This is the logic of the so-called two-level game, which depicts governments’ need to negotiate treaties both at the international level and at the domestic level (to obtain domestic ratification for the treaties). The weaker a government is domestically, the more valid claims it can make for concessions from the other governments. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 Int’l Org. 427 (1988).
concern other than manage it through the balancing process, which is essentially an act of risk-management. To meliorate the second primary concern, the courts, as I have shown, employ an array of techniques to ratchet up and down the extent of their intervention, inviting the politicians to enter into a dialogue with them.

The secondary concerns are related to the interaction between the different countries. Constraints imposed by a court in one state but not by courts in other states may expose the citizens of the former state to an increased risk of terrorist attack. A state that does not deport refugees due to concerns regarding torture or a country in which privacy rights are strictly respected could become (or could be seen as potentially becoming) a haven for terrorist cells if other countries were to opt for more stringent limitations of those same rights. Another secondary concern is the international pressure that could be brought to bear on a government not to comply with its courts’ decisions or else risk the loss of peer protection for failing to conform to the group’s demands. The optimal response to these secondary concerns is coordination amongst courts. A transnational united front amongst the highest national courts ensures that no country becomes more terrorist-friendly than its neighbors and little peer pressure is exerted on the different governments to ignore their courts’ judgments. The court decisions described above function as signals to other courts, emboldening them or weakening their resolve in the face of the same dilemmas.

It is in this context that comparative analysis takes center-stage. Extensive cross-reference amongst courts indicates attention to one another’s approaches and an

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69 See, e.g., Lord Carswell in the Belmarsh Detainees decision, supra note 9, para. 150 (citing the statement of President Barak of the Israel High Court of Justice in Public Committee Against Torture in Israel v. State of Israel, supra note 40, concerning the need to follow the rule of law in combating terrorism). In A (EC) and Others (EC) v. Secretary of State for the Home Dep’t, [2005] UKHL 71, concerning the admissibility of evidence obtained through torture by foreign officials, the Law Lords engaged in a comparative analysis of the jurisprudence of foreign courts, including Canadian, Dutch,
openness to coordinated stances. Courts compare statutory arrangements in different
countries as a way to determine the measures that minimally impair constitutional
rights.\textsuperscript{70} Even more importantly, international law, as the source of collective
standards, becomes a most valuable coordination tool. The fact that national courts
can rely on the same or similar legal norms (international treaties such as the 1949
Geneva Conventions and human rights law) facilitates harmonization among the
courts.\textsuperscript{71} International norms perform another important task, mentioned above:\textsuperscript{72} they
allow courts to take a step up the ladder of judicial review and impose a significant if
not fatal burden on the legislature. These two features may explain why national
courts in the post-9/11 era have departed from their tradition of deference and have
begun to assert their authority to interpret and apply international law.\textsuperscript{73}

Note that my analysis thus far has omitted any discussion of the potential
influence of the various international tribunals on the stances of national courts. No
doubt, the emerging transnational litigation on matters concerning violations of
human rights and the laws of war (international criminal tribunals, foreign courts
exercising universal jurisdiction for war crimes, foreign courts adjudicating civil suits

\textsuperscript{70} In the recent \textit{Charkaoui} decision (supra note 42), the Canadian Supreme Court presented the
procedure adopted in the United Kingdom as a model for the Canadian Parliament to consider when it
reenacts the statute found by the Court to be incompatible with the Canadian Charter of Rights and
Freedoms (see especially id. para. 86 (emphasis added): “Why the drafters of the legislation did not
provide for special counsel to objectively review the material with a view to protecting the named
person’s interest, as was formerly done for the review of security certificates by SIRC \textit{and is presently
done in the United Kingdom, has not been explained.”).}

\textsuperscript{71} \textit{See} Anne-Marie Slaughter, A New World Order, at ch. 2 (2004).

\textsuperscript{72} \textit{See} discussion in supra notes 35-36 and accompanying text.

\textsuperscript{73} Nowhere is this departure more pronounced than in the jurisprudence of the U.S. Supreme Court.
Until the \textit{Hamdan} decision, supra note 24, deference to executive treaty interpretation was near
absolute, based on the theory that the President has both the constitutional responsibility for, and
special competency in, foreign affairs. See Justice Thomas’ dissenting opinion in \textit{Hamdan}, id. at p.
272: “Our duty to defer to the President's understanding of the provision at issue here is only
heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief
and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and
chacter of an armed conflict.” On the doctrine of deference, see also Robert M. Chesney, Unraveling
Deference: \textit{Hamdan}, the Judicial Power, and Executive Treaty Interpretations (2006); David J.
for damages for violations of international law) is having a significant impact on the jurisprudence of national courts. It makes sense to argue, as Amichai Cohen does,\textsuperscript{74} that the potential of rebuke from a foreign court helps convince certain bureaucrats that it is best that their own national court pass judgment on their acts, thereby strengthening the courts’ confidence to engage in such analysis. Indeed, just such an impact on perceptions of this matter can be discerned in the Israeli context.\textsuperscript{75}

But there are reasons to doubt the proposition that national courts are motivated to conform to the jurisprudence emerging from the new judicial forums, at least as an autonomous explanation for their new assertiveness. Some courts—notably the U.S. Supreme Court—are less troubled by international or foreign oversight. The Canadian Supreme Court may be rebuked by the Human Rights Committee or the Committee Against Torture, but this would not terribly damage the Court’s reputation. The decisions of European courts may be reviewed by the European Court of Human Rights (“EctHR”), but the latter assigns a wide margin of appreciation to the balancing processes of national courts.\textsuperscript{76} That the different European national courts are not motivated by a desire to please the EctHR is highlighted by the fact that they do not adopt the rhetoric of margin of appreciation that the EctHR eventually uses in reviewing national courts’ decisions. Instead, they insist on conducting the proper


\textsuperscript{75} Id. See also my Case Review: Ajuri et al. v. IDF Commander in the West Bank et al., 9 EUR. PUB. L. 481, 491 (2003): “One explanation for the decisive change may be the growing demand from Israeli officials for a more assertive judiciary, one that both legitimates Israeli policies in the face of the widespread foreign criticism and protects those same officials from being subject to international criminal liability. The evolving possibilities of international criminal adjudication (highlighted by, amongst other things, the criminal charges brought against Prime Minister Sharon in Belgium and the entry into force of the ICC Statute) have increased public awareness in Israel regarding the potential consequences of violating international law. The Court’s recent interventionist decisions have offered Israeli officials legal backing for their policies, and if they have been denied such backing—an explanation to the Israeli public as to why harsher measures cannot be adopted.”

\textsuperscript{76} Paul de Hert suggests that the European Court of Human Rights does not seem ready to scrutinize surveillance and other law-enforcement counter-measures adopted post-9/11, Paul J.A. de Hert, \textit{Balancing Security and Liberty within the European Human Rights Framework}, 1 Utrecht L. Rev. 68 (2005), http://www.utrechtlawreview.org/.
balancing themselves. In fact, the House of Lords in the *Belmarsh Detainees* case emphatically rejected the government’s claim that it should be allowed the same margin of discretion that the EctHR allows member states, with Lord Hoffmann explicitly suggesting that the margin of appreciation doctrine “means … that we, as a United Kingdom court, have to decide the matter for ourselves.”

Even more profoundly, there may be grounds to argue that the newly-created venues of international adjudication are prompting national courts to act collectively *against* the evolving and expected jurisprudence of these tribunals. National governments have good reason to be wary of the activism of international tribunals such as the ICTY and the ICTR, which have departed from agreed texts and transformed the laws of war. National courts have their own concerns about potential tension between their own interpretations of the law (given their own legal and institutional constraints) and those of international tribunals, whose only allegiance is to their understandings of international law. In other words, the international tribunals pose a common threat to national courts. The latter must respond collectively to this threat. This Chapter has sought to show that this is precisely what they are doing: united, they can deter both domestic and international sources of threat.

**V. Conclusion**

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77 See the *Belmarsh Detainees* decision, *supra* note 9, para. 37, citing the Attorney-General’s argument: “Just as the European Court allowed a generous margin of appreciation to member states, recognising that they were better placed to understand and address local problems, so should national courts recognise, for the same reason, that matters of the kind in issue here fall within the discretionary area of judgment properly belonging to the democratic organs of the state. It was not for the courts to usurp authority properly belonging elsewhere.”

78 *Id.* para. 91.

Following the initial shock that ensued after 9/11, this Chapter has suggested, national courts began to assert their authority to limit what they deem to be excesses of executive power, in the context of internationally coordinated counterterrorism measures impinging considerably on individual rights. They have preferred to engage the legislature as a potential ally in this task, but in the face of reluctance on the part of the latter to share the burden, the courts have acted alone. In this intensifying process of review, the national courts climb up a ladder whose rungs represent different techniques that enable them to tailor their intervention in legislative and executive acts to the political circumstances, inviting the political branches to share in the deliberative process. The Chapter has raised possible reasons for this assertiveness on the part of the judiciary, which may actually amount also to an emerging trend of coordination amongst the highest national courts of several democratic states.

Counterterrorism measures in the wake of 9/11 included far-reaching restrictions on the political freedoms and privacy of individuals. Acceding to the executive’s demand for deference to its discretion in security matters would entail that the courts abdicate their competence in areas that are significant to many if not most citizens. The courts have reacted consistently to the extensive restrictions placed on political freedoms, privacy, and other rights by the executive’s counterterrorism measures, which have threatened not only individual freedoms but also the courts’ very authority to protect those freedoms. To prevent their jurisdictions from becoming a haven for terrorists and to thwart international pressure on their governments not to comply with the courts’ rulings, it has been necessary for the courts to coordinate outcomes across national jurisdictions—hence the endeavor towards inter-judicial coordination. The availability of identical or similar norms (grounded in international law and human rights law) has facilitated this coordination effort. It remains to be seen whether this
unity will persist and to what extent the courts’ self-perception as guardians of human rights will extend beyond the context of counterterrorism.

The analysis of the different techniques that national courts apply in their review process, particularly their use of international standards to encumber legislatures and strengthen inter-judicial coordination, should be taken into account by the drafters of international agreements. Specifically, those seeking to strengthen courts vis-à-vis their political branches and promote judicial cooperation should be attentive to the distinction between rules and standards. Clear rules, like the rules against torture and hostage-taking, make the judicial task of reviewing national policies less politically contested than do vague standards. Standards invite courts to exercise their discretion and thereby open up the possibility of different judicial outcomes and greater tension with the political branches, whose discretion the courts might challenge. Albeit only one factor amongst several that should shape the way treaties are drafted, this factor is nevertheless a significant one, as emphasized in this Chapter.

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