
CONSTITUTIONS BEYOND BORDERS: THE OVERLOOKED PRACTICAL ASPECTS OF THE EXTRATERRITORIAL QUESTION

Galia Rivlin*

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* JSD candidate at NYU School of Law. I thank David Golove, Mattias Kumm, Eyal Benvenisti, Austen Parrish, as well as Colin Grey, Moran Yahav, Kobi Kastiel, Lital Helman and Doreen Lustig for helpful comments and advice. I further thank the participants in the 2009 JSD forums at NYU.

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ABSTRACT

The question of whether constitutions should apply beyond national borders is more acute today than ever. In recent years we have witnessed more and more attempts by both citizens and non-citizens who are affected by extraterritorial acts of democratic and liberal states to invoke the protection of the constitutional safeguards of those states.

In this article I focus on a much-neglected aspect of the question of extraterritorial application of constitutions. Current scholarship and judgments around the world addressing the extraterritorial question usually assume that we may have justice-based reasons in favor of an extraterritorial application of constitutions, and that against these stand practical considerations. The latter considerations concern the ability of the state to adhere to the constitution abroad due to the different circumstances or the lack of adequate resources abroad, as well as the state’s ability to effectively act against threats to its national security.

I submit that, contrary to common belief, we may have practical reasons to apply constitutions beyond national borders, while justice-based concerns may support a presumption against an extraterritorial application of constitutions. I contend that extraterritorial constitutional limitations may actually promote the long-term goals of democratic and liberal states. However, if the judiciary is not capable of conducting objective judicial review in cases concerning the acts of the state abroad, an extraterritorial application of constitutions may encounter important justice-based concerns. In situations of occupation an extraterritorial application of constitutions may also blur the line between occupation and sovereignty.

I use the case of Israel, a country which has encountered the extraterritorial question in the West Bank and Gaza, to illustrate various practical and justice-based concerns involved in the application of constitutions beyond national borders. For this purpose, I interviewed officials in the Israeli military and Ministry of Justice, as well as attorneys in Israeli human rights NGOs. These interviews reveal important aspects of constitutional limitations of democratic and liberal states that have not received sufficient attention thus far.

I. INTRODUCTION

In recent years traditional notions of territories and communities have dramatically changed. Globalization and political and economic phenomena have led to an erosion of territorial borders and the creation of new states and communities. At the same time, both people and ideas now cross borders with increasing ease. Moreover, states act beyond national borders more frequently, affecting both citizens and non-citizens abroad. These changes have made questions regarding the nature of our responsibilities toward citizens and non-citizens residing beyond our domestic borders more acute than ever. Traditionally, the scope of this discussion has been confined to the realm of international law.¹ Yet, we are now witnessing increasing attempts by individuals whose rights are violated by a state in which they do not reside to invoke the protection of the constitutional safeguards of that very state.² As the frequency of such attempts

¹ The classic sovereignty model of international law viewed states' jurisdiction as strictly territorial. See, e.g., Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 23 (2002); Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 234-44 (2010) (writing that strict territoriality approaches were integral to nineteenth century concepts of sovereignty because, under international law principles, a sovereign's jurisdiction to legally regulate conduct was coterminous with territory. A state enjoyed absolute jurisdiction to act within its territory, but was incompetent to act outside of it, except possibly to exercise authority over its own nationals); see also Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 127 (2007) (describing the classical sovereignty model which "affirms the state's 'monopoly' of power within its borders, and reveals the traditional paradigm of prescriptive jurisdiction as exclusively territorial"). However, international law has evolved since then and now recognizes extraterritorial jurisdiction. See, e.g., Cleveland, *Embedded International Law*, *supra*, at 244-70 (noting that international law now recognizes certain situations in which a state may act abroad, while applying the principle of effective control to constrain the extraterritorial exercise of the state's power); see also Colangelo, *supra*, at 128-29 (writing that both jurisdictional rules among the several states of the United States and international law evolved due to largely increased travel and communication and presently provide for extraterritorial jurisdiction).

² Judiciaries around the world have addressed the question of extraterritoriality. In the United States, we have witnessed different approaches to the extraterritorial question. Among United States Supreme Court cases addressing the extraterritoriality question, one can find the *Insular Cases*, which were heard before the Court between 1901 and 1922, and addressed the status of the then newly annexed territories of the Philippines, Puerto Rico and Guam. See generally Cleveland, *Powers Inherent in Sovereignty*, *supra* note 1; see also Christina Duffy Burnett, *A Convenient Constitution: Extraterritoriality after Boumediene*, 109 COLUM. L. REV. 973, 982-83 (2009) (noting that the Supreme Court distinguished in the *Insular Cases* between "incorporated" and "unincorporated" territories: the Constitution as a whole

applied to the former, while only fundamental rights applied to the latter); Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 1, 1-23 (Christina Duffy Burnett & Burke Marshall, eds., 2001) (elaborating on the development of the incorporation doctrine during the twentieth century); Jose A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 *YALE L.J.* 1660, 1704 (2009) (noting that the *Insular Cases* distinguished “between ‘political rights,’ which the government did not necessarily have to respect in the territories, and ‘personal and civil rights,’ which might bind the government”). Following the *Insular Cases* the Supreme Court addressed the extraterritorial constitutional question on different occasions. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 763-64 (1950) (holding that German combatants who were convicted of war crimes by a United States military commission were not entitled to petition for habeas corpus in United States courts); *Reid v. Covert*, 354 U.S. 1, 18-20 (1957) (addressing the case of wives of United States servicemen stationed at United States military bases in England and Japan who were accused of murdering their husbands, the Court held that they were entitled under the United States Constitution to trial by a civilian jury rather than a military court-martial); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (holding that the Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in foreign country); *Boumediene v. Bush*, 553 U.S. 723, 761-62 (2008) (applying a “functional” test to determine whether non-citizens detained at Guantanamo Bay have the constitutional privilege of habeas corpus). The Canadian Supreme Court also addressed the extraterritorial question in different instances. *See, e.g.*, *R. v. Cook*, [1998] 2 S.C.R. 597, para. 42 (holding that the Canadian Charter of Rights and Freedoms applies to non-citizens interrogated by Canadian officials in the United States, and stating that “law enforcement officers acting in their official capacity are state representatives who are authorized to give effect to coercive state power, in some instances at great personal risk”); *see also R. v. Hape*, [2007] 2 S.C.R. 292, paras. 45-51 (limiting the extraterritorial application of the Charter to circumstances in which there is an explicit consent to such a step by the state in which the Canadian officials acted, yet stressing that the deference to foreign states “ends where clear violations of international law and fundamental human rights begin”); *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, para. 3 (allowing an extraterritorial application of the Charter following the exception established in *Hape* for human rights violations). The Israeli Supreme Court also addressed the extraterritorial question. *See, e.g.*, HCJ 1661/05, *The Gaza Coast Regional Council v. The Knesset* 49(2) PD 481 [2005] (holding that the Israeli Basic Laws of Human Rights, which allow constitutional judicial review, apply to Israeli citizens residing in the Occupied Territories); HCJ 8276/05 *Adalah v. Minister of Defense* [2006] (leaving open the question whether the Israeli Basic Laws apply to Palestinians in the Occupied Territories). For a description of additional cases around the world in which the question of extraterritorial application of constitutional rights arose, *see* Chimène I. Keitner, *Rights Beyond Borders*, 36 *YALE J. INT’L L.* 55 (2011). For an elaborate account of the U.S. experience with the extraterritorial question, *see generally* KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009).

increases, we are no longer able to restrict the discussion about the nature of states' responsibilities to those residing outside their territory to the realm of international law. Constitutional law needs to be incorporated into this discussion. The traditional relationship between international and constitutional law must be called into question.³

Attempts to invoke the extraterritorial application of constitutional safeguards can be observed in two different types of cases.⁴ The first type is cases in which the state's executive acts outside national borders and affects the rights of individuals abroad. Common examples are criminal cases during peaceful times in which officials of one state act in the territory of another state (hereinafter a "host state") – usually with the consent and sometimes even the cooperation of the authorities of the host state – in order to prosecute in their homeland a suspect residing in the host state's territory. The extraterritoriality question usually arises in

³ Among scholars currently examining the relationship between constitutional and international law in the context of the extraterritorial question are Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 820 (2009) (arguing that human rights are better protected when international problems are solved internationally, not unilaterally through domestic litigation); Gerald Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 397 (2009) (exploring the possibility of turning to international human rights law when applying a global due process methodology to address extraterritorial cases); Note, *The Extraterritorial Constitution and the Interpretive Relevance of International Law*, 121 HARV. L. REV. 1908, 1911-17 (2008) (arguing that the "impracticable and anomalous" standard, which was applied in several cases addressing the extraterritorial question, need not be considered problematic if it is interpreted as implicitly referencing generally applicable international law); Colangelo, *supra* note 1 at 166-70 (exploring the possibility of incorporating international law through the Fifth Amendment to determine whether a certain application of U.S. law to a particular individual abroad comports with due process); Cleveland, *Embedded International Law*, *supra* note 1, at 274 (contending that the Court's functional approach to extraterritoriality in *Boumediene* opened a space for aligning U.S. domestic obligations more closely to contemporary international legal approaches); Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 539-40 (2007) (arguing that international law and United States statutes, rather than the Bill of Rights, should apply to United States relations with noncitizens outside the country); Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 266 (2004) (examining whether detention of people in Guantánamo is constitutional by referring to norms drawn from international humanitarian and human rights law); Jean-Marc Piret, *Boumediene v. Bush and the Extraterritorial Reach of the U.S. Constitution: A Step Towards Judicial Cosmopolitanism?*, 4 Utrecht L. Rev. 81, 83, 99 (2008) (referring to international law as a second order framework for constitutional interpretation); Cabranes, *supra* note 2, at 1672 (examining the authority of states to prosecute individuals residing beyond their borders according to international law).

⁴ When I refer to cases in which a state influences the lives of individuals abroad, I seek to exclude general global and distributive justice questions of whether states have a duty to provide aid to individuals abroad who are in need.

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such cases when the suspect claims that the state officials violated the constitution of their own state while investigating or arresting him, or while conducting searches of his property in the host state's territory.⁵ Other examples include cases in which the officials of a state act in an area which is under their state's occupation or effective control and affect the rights of individuals who either reside in that area or are brought for interrogation there, and cases in which the state's officials come into contact with individuals on foreign territory during times of war or combat.⁶ The second type is cases in which the state's legislature enacts laws that address individuals abroad and impact their lives,⁷ and a question arises as to whether such laws are constitutional.⁸

⁵ See, e.g., *Verdugo-Urquidez*, 494 U.S. at 259.

⁶ See, e.g., *Boumediene*, 553 U.S. at 761-62. For an analysis of the Court's judgment in *Boumediene* see Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259 (2009) [hereinafter Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*] (describing the functional approach to extraterritorial constitutional rights, and examining future implications of the majority's approach to extraterritorial constitutional rights with regard to national security cases, and broader implications for the rights of U.S. citizens, the rights of foreign nationals in U.S. territory, and the rights of foreign nationals abroad); Ernesto Hernandez-Lopez, *Boumediene v. Bush and Guantanamo, Cuba: "Does the Empire Strike Back"?*, 62 SMU L. REV. 117, 150, 191 (2009) (arguing that Guantanamo's legal anomaly is not an aberration, but instead is a precise objective of U.S. foreign relations, and that legal anomaly remains embedded in the law supporting overseas authority); Jordan J. Paust, *Boumediene and Fundamental Principles of Constitutional Power*, 21 REGENT U. L. REV. 351, 360 (2009) (contending that "*Boumediene* has reaffirmed that executive power is restrained by law and that judicial review of the propriety of executive detention of persons in time of war or some other national security crisis"); Richard H. Fallon Jr., *Jurisdiction Stripping Reconsidered*, 96 VA. L. REV. 1043, 1053-64 (2010) (analyzing the future implications of the majority's opinion in *Boumediene* on questions of stripping jurisdiction from the federal courts); Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism* 2-3 (Chi. Pub. Law & Legal Theory, Working Paper No. 228, 2008) (arguing that the significance of Justice Kennedy's opinion has less to do with separation-of-powers theory than with a commitment to protecting the interests of noncitizens overseas, and that it reflects an emerging type of jurisprudence, i.e., "judicial cosmopolitanism").

⁷ See, e.g., HCJ 8276/05, *Adalah v. Minister of Defense* [2006] (Isr.) (addressing the question of whether Palestinians in the Occupied Territories may invoke the protection of Israel's Basic Laws when they are affected by Israeli domestic legislation).

⁸ A third possible type of situation in which the extraterritorial question may arise is a case in which an individual (citizen or non-citizen) residing in one state ("state B") is interrogated and arrested by the officials of that state, and then extradited and brought to trial before the judiciary of another state ("state A"). The extraterritorial question that arises in such cases is whether evidence that was collected against such an individual by the officials of state B should be admissible in the domestic courts of state A, if it was collected in violation of the constitution of state A. In cases where it

Attempts by individuals abroad to invoke the protection of their constitutional safeguards usually encounter, at best, a suspicious reaction by judiciaries around the world. The judiciary often applies a presumption that the scope of domestic constitutions is essentially territorial (I refer to this presumption as the presumption against extraterritoriality),⁹ and that

is clear that the officials of state A were not involved in the acts of the foreign officials of state B on state B's land, it can be argued that the extraterritorial question does not arise, since the violation of rights occurs when the evidence against the suspect is accepted by domestic courts of state A, *within* the borders of state A. Such cases may involve questions of violation of the Fifth Amendment's privilege against self-incrimination. The majority in *Verdugo* noted that "[a]lthough [extraterritorial] conduct by law enforcement officials prior to trial may ultimately impair th[e] right [against self-incrimination], a constitutional violation occurs only at trial" in the United States. *Verdugo-Urquidez*, 494 U.S. at 264; *see also* Keitner, *supra* note 2, at 74 n.83.

⁹ Such a presumption was applied in different extraterritorial cases around the world. For the application of the presumption in Canada, *see, e.g.*, *R. v. Hape*, [2007] 2 S.C.R. 292, para. 69 ("Simply put, Canadian law, whether statutory or constitutional, cannot be enforced in another state's territory without the other state's consent Since effect cannot be given to Canadian law in the circumstances, the matter falls outside the authority of Parliament and provincial legislators."); *R. v. Cook*, [1998] 2 S.C.R. 597, para. 53 (allowing an extraterritorial application of the Canadian Charter, yet cautioning that "the holding in this case marks an exception to the general rule in public international law . . . that a state cannot enforce its laws beyond its territory"). Such a presumption was also applied by the Israeli Supreme Court:

When a law is to be applied to people or actions outside Israel it should be so stated in the law itself (either expressly or by implication). True, there is a presumption that all the laws of Israel apply to legal relations within Israel, and are not meant to regulate legal relations outside Israel This is also the rule with regard to Israeli legislation within the area. Judea, Samaria and Gaza are not part of the State of Israel There is a presumption that Israeli legislation applies in Israel and not in the area, unless it is stated in the legislation itself (expressly or indirectly) that it applies to the area. The same rule applies to the Basic Laws.

Adalah, at para. 22 (Galia Rivlin trans.) (holding that the jurisdiction of Israeli legislation is generally territorial). The Constitutional Court of South Africa also applied a presumption against extraterritoriality:

Two observations are called for. First, the Constitution provides the framework for the governance of South Africa. In that respect it is territorially bound and has no application beyond our borders. Secondly, the rights in the Bill of Rights on which reliance is placed for this part of the argument are rights that vest in everyone. Foreigners are entitled to require the South African State to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. Clearly, they lose the benefit of that protection when they move beyond our borders Section 7(1) refers to the Bill of Rights as the cornerstone of democracy in South Africa The bearers of the rights are people in South Africa. Nothing suggests that it is to have general application, beyond our borders.

See Kaunda v. President of South Africa 2004 (10) BCLR 1009 (CC) at para. 36.

the negation of this presumption requires special justification. However, trying to detect the reasons for such a presumption reveals widespread disagreement. There is no commonly accepted theoretical framework to address the issue.¹⁰

In this article I offer a new framework to address the question of whether constitutional safeguards should apply beyond national borders (hereinafter: “the extraterritorial question”). I create a division between justice-based considerations relating to the extraterritorial question and practical considerations. The latter concern the effective operation of the government, and its ability to secure and perhaps even strengthen its governance and powers.¹¹ Such practical considerations are weighed when the state addresses its ability to effectively execute its short-term and long-term goals.

It should be noted that I limit my discussion in this article to democratic and liberal states, and I examine how such considerations may influence the way they currently address the extraterritorial question.

Judges and scholars opposed to an extraterritorial application of constitutional rights often warn against the possible *practical* consequences. Some argue that it would be “impracticable and anomalous” to apply the constitution beyond the state’s national borders due to the different circumstances that exist abroad.¹² Others warn that such a step would pre-

¹⁰ Scholarship regarding the extraterritorial question addresses the question in various ways. The current dominant approaches to the extraterritorial question are as follows: the social contract (or membership in a political community) approach; limited government; universalism; strict territoriality; mutual obligations; and balancing approaches (e.g. “global due process,” and the “functional approach”). For a description of these approaches, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRATIONS, BORDERS AND FUNDAMENTAL LAW 5-8 (1996); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 914-20 (1991). For a more elaborate description of these approaches, see *infra* note 46.

¹¹ There are obviously numerous ways in which we can define the purposes of a constitution. I do not mean to maintain that the proposed distinction between justice-based and practical purposes is the only way to think of the purposes of a constitution, or even that this distinction covers all possible purposes. Moreover, in practice we will find that most constitutional limitations on state power have a mixed character and include both justice-based and practical reasons to limit the acts of the state. However, I believe that the theoretical distinction proposed here allows us to bring to light important aspects of the extraterritorial question which have been neglected thus far.

¹² See *Reid v. Covert*, 354 U.S. 1, 74-78 (1957) (Harlan, J., concurring). For an analysis of the “impracticable and anomalous” test, see Burnett, *supra* note 2, at 996-1003 (contending that Harlan’s test failed to distinguish clearly between the applicability and enforceability of constitutional guarantees, and in the process subjected the question of applicability to an analysis driven entirely by consequentialist concerns).

vent the executive and legislature from acting effectively against outside threats to the state's national security.¹³

Proponents of an extraterritorial application of constitutional safeguards often turn to justice-based arguments in reply. They stress that we cannot ignore our obligations towards those who are affected by our acts abroad.¹⁴ The debate then turns to focus on the appropriate balance

¹³ Such pragmatic arguments have been especially dominant in the numerous discussions on the proper balance of powers among the executive, legislative and judicial branches of government in the ongoing war on terror. See generally ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURT* (2007) [hereinafter POSNER & VERMEULE, *TERROR IN THE BALANCE*] (arguing that: (1) during emergencies government should and will reduce civil liberties in order to enhance security in those domains where the two must be traded off, and (2) that the deference thesis holds that the executive branch, not Congress or the judicial branch, should make the tradeoff between security and liberty); RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006). This practical view was criticized by other scholars addressing the question of the appropriate balance between liberty and security in the war on terror context. See, e.g., Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191, 200-04 (2003) (raising concerns about just distribution of liberty in cases in which a majority infringes the liberties of a minority in order to increase the majority's security); Michael Sullivan & Daniel Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 697-714 (2003) (arguing that Posner's pragmatism offers little help when it comes to evaluating and selecting ends, and suggesting that this failure results from Posner's attempt to excise pragmatism's theoretical dimension); David Cole, *The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11*, 59 STAN. L. REV. 1735, 1745-51 (2007) (examining the implications of Richard Posner's theory in *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY*, arguing that the Constitution does no "binding" work whatsoever in Posner's hands, and its only function is to obscure the subjective value judgments made in its name); DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERROR* 17-21 (2003) (arguing that for the most part the United States government has not asked American citizens to sacrifice their liberty in the war on terror, rather asking noncitizens to do so, as they have no voice in the democratic process).

¹⁴ See, e.g., Cabranes, *supra* note 2, at 1704 (writing that constraints set forth by the Constitution on the power of the government are more likely to be enforced when the risk of irreparable injustice is high). Cabranes also attributes justice concerns to Harlan's concurring opinion in *Reid*. 354 U.S. at 77; see also *id.* at 1705 (contending that Justice Harlan emphasized the fact that the proceedings at issue were capital proceedings, and that determining which procedures apply to a criminal trial takes on greater urgency when the outcome of the trial could be a sentence of death). Cabranes also views the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008) as based on justice considerations. See *id.* (noting that the majority opinion in *Boumediene* expressed concern over the injustice of further delay in determining whether the detainees were properly held in United States custody); see also Elizabeth Sepper, *The Ties That Bind: How the Constitution Limits the CIA's*

between normative justice-based concerns and more practical considerations relating to our national security and other real-life implications of extraterritoriality.¹⁵

I offer a different way to approach this debate. Although the question of the appropriate balance between justice and practical concerns is obviously an important one, I argue that in the extraterritorial context there are certain considerations that were overlooked thus far. These considerations show that we may actually have *practical* reasons to allow an extraterritorial application of constitutional rights. I contend that these considerations need to be incorporated into our discussion, as they shed new and important light on the extraterritorial question. I raise this overlooked aspect of the extraterritorial question because I believe it could significantly impact the way judges and scholars around the world address this issue.

I also address the possibility that there may actually be *justice-based* reasons *not* to allow an extraterritorial application of the constitution, and that these reasons may at times conflict with practical reasons in favor of extraterritoriality.

In order to shed new light on the practical aspects of the extraterritorial question, I present interviews that I conducted with officers in the Israeli Defense Force (IDF), both from combat units and from the Military Advocate General Corps. I also interviewed officials from the Israeli Ministry of Justice and the Israeli State Attorney Office, as well as attorneys from NGOs that represent Palestinian petitioners before the Israeli

Actions in the War on Terror, 81 N.Y.U. L. REV. 101, 109 (2006) (advocating for a fundamental rights approach to the extraterritorial question, which also seems to be based on justice considerations). The Canadian Supreme Court's judgment in *Hape* also seems to have been guided by justice concerns. See *R. v. Hape*, [2007] 2 S.C.R. 292, paras. 51-52 (stressing that the deference to foreign states "ends where clear violations of international law and fundamental human rights begin"); see also *Canada v. Khadr*, [2008] 2 S.C.R. 125, para. 3 (allowing an extraterritorial application of the Charter, relying on the exception established in *Hape* for human rights violations).

¹⁵ See Burnett, *supra* note 2, at 1031-36 (arguing that when addressing the extraterritorial issue, we need to distinguish between two different questions: *whether* a constitutional guarantee applies in a given circumstance, and that of *how* an applicable guarantee may be enforced. Pragmatic factors should come into play only at the second stage of our examination). For a different view, see Cabranes, *supra* note 2, at 1708-11, who advocates for a pragmatic ad-hoc approach. If we believe that a constitution should promote both practical and justice-based considerations, a question arises about the point at which practical considerations should come into play. In order to answer this question, we need to determine which type of consideration takes priority over the other. If we believe that justice-based considerations take priority over practical ones, then the latter should indeed only come into play once we determine whether we have justice-based reasons in favor of or against extraterritoriality.

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High Court of Justice.¹⁶ These interviews illustrate different practical and justice-based considerations which we should take into account when examining the extraterritorial question. The interviews demonstrate ways in which constitutional limitations abroad may prove to be enabling. They serve as real-life examples of possible ways such limitations on a state's power may ultimately help the state prevent threats to its national security and bring to justice criminal suspects residing abroad. At the same time, the interviews also reveal justice-based considerations we may have against an extraterritorial application of constitutional rights, such as prolonging or legitimizing situations of combat or occupation.

In Part II, I present various practical considerations in favor of constitutional limitations on the power of democratic and liberal states. I begin by presenting Stephen Holmes' writing on the enabling aspect of constitutional limitations,¹⁷ and explore this side of constitutional limitations in general. In Part III, I depart from Holmes and proceed to examine whether the enabling aspect of constitutional limitations extends into the extraterritorial realm. I present the interviews I conducted with senior officials in the Israeli Defense Force, the Israeli Ministry of Justice and the Israeli State Attorney Office. I then present different practical considerations in favor of an extraterritorial application of constitutions. I illustrate my argument by referring to the interviews I conducted. I distinguish in this context between different circumstances in which the extraterritorial question arises: criminal cases or civil cases; peaceful times or emergency times; sovereign foreign land or territories under occupation or effective control. Part IV of the article examines whether the enabling limitations on the extraterritorial acts of the state must be derived from constitutional law, rather than from more intuitive bodies of law, such as international law. I argue that there is special value in turning to constitutional law in this respect. Part V of the article examines possible counter justice-based consideration against an extraterritorial application of constitutional rights. I examine whether practical considerations and justice-based concerns can go hand in hand in the extraterritorial context.

¹⁶ The Israeli Supreme Court serves both as the highest instance for appeals, and as the high court of justice (HCJ) with original jurisdiction in petitions concerning the state in which the Courts decides to grant a remedy as a matter of remedy and which are not under the jurisdiction of any other court or tribunal. *See* Article 15 of the Israeli Basic Law of justiciability (1984).

¹⁷ *See* STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995); STEPHEN HOLMES, *THE MATADOR'S CAPE: AMERICA'S RECKLESS RESPONSE TO TERROR* (2007).

II. THE NEGLECTED PRACTICAL ASPECT OF THE CONSTITUTION'S LIMITATIONS

In this part I focus on what may seem at first an unconventional way of analyzing the nature of the limitations imposed by the constitutions of democratic and liberal states on the state's executive and legislature.

When addressing the extraterritorial question we need to distinguish between *constraining* and *enabling* aspects of constitutional limitations on the state's power. I refer in this context to Professor Stephen Holmes' writing on the enabling aspect of constitutional limitations.¹⁸ According to Holmes, constitutions can be viewed as facilitative documents, not just constraining ones.¹⁹ Holmes' idea of enabling constraints demonstrates the value of imposing constitutional limitations on the state's power beyond national borders. Holmes shows us that, paradoxically, by setting constitutional limitations on the state, we can actually secure and promote its long-term goals. If this assertion is indeed true, it has significant implications on the extraterritorial question.

A. Holmes' Empowered Limited Government

Holmes observes that a limited government is, or can be, more powerful than an unlimited government. He asserts that "the paradoxical insight that constraints can be enabling, which is far from being a contradiction, lies at the heart of liberal constitutionalism."²⁰ Holmes notes that it now seems obvious that "liberalism can occasionally eclipse authoritarianism as a technique for accumulating political power."²¹ "Constitutions restrict the discretion of power-wielders because rulers, too, need to be ruled."²² But Holmes stresses that "constitutions not only limit power and prevent tyranny; they also construct power, guide it toward socially desirable ends, and prevent social chaos and private oppression."²³ "Liberal constitutions," Holmes writes, "are crafted to help solve a whole range of political problems."²⁴ "Constitutions are multifunctional."²⁵

Holmes distinguishes between the restricting and enabling aspects of the constitution. Constitutions can be seen as "preventive or inhibitory devices, meant to check or repress tyranny and other abuses of power."²⁶ Yet, we must also take into account, Holmes writes, the facilitative dimensions of constitutionalism. "Constitutions are also enabling

¹⁸ See HOLMES, PASSIONS AND CONSTRAINT, *supra* note 17; HOLMES, THE MATADOR'S CAPE, *supra* note 17.

¹⁹ See HOLMES, PASSIONS AND CONSTRAINT, *supra* note 17, at 6.

²⁰ *Id.* at xi.

²¹ *Id.*

²² *Id.* at 6.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 7.

devices, not merely disabling ones.”²⁷ “They can be instruments of state-building, for instance, or Union-building. . . .”²⁸

In reality we will likely find that most constitutions have both negative and positive functions, and that constitutional limitations are usually both enabling and restrictive. However, by creating a *theoretical* division between these two kinds of constitutional limitations, we may be able to shed new light on important aspects of the extraterritorial question.

B. *Enabling Constitutional Limitations in Democratic and Liberal States*

The possibility of strengthening the power of the state by setting limitations on its power seems strange at first glance. How can constitutional limitations be both enabling and restricting at the same time? If the constitution’s limitations only strengthen the state, do they not cease to be limitations?²⁹

²⁷ *Id.* at 7.

²⁸ *Id.* at 7-8. Holmes further writes:

A constitution is an instrument of government. It establishes rules that help put democracy into effect. It creates an institutional framework that, if it functions properly, makes decision making more thoughtful and mistakes easier to learn from and correct. It prevents power-wielders from invoking secrecy and shutting themselves off, as they are naturally inclined to do, from criticisms, counterarguments, and fresh ideas. At the same time it mobilizes collective resources for solving collective problems.

Id.

²⁹ Holmes explores Jean Bodin’s theory as an eye-catching way to overturn the normally unchallenged premise of constitutional theory that constitutions are designed primarily to limit the power of the sovereign. Although Bodin is usually thought to be an absolutist, Holmes shows that a close reading of his theory exposes constitutional theory on new foundations. *See id.* at 8 (arguing that Bodin’s writing may allow us to view the constitution as a facilitative document, not just a constraining one). Holmes notes that:

Bodin had to confront the question, How can the right to rule be transformed into the capacity to rule? . . . Because he was concerned with this practical dilemma, rather than the scholastic issue of legal right, Bodin turned his attention to strategically designed limitations on Supreme power. By allowing his power to be restricted in certain specific ways, a sovereign increases the likelihood of social compliance with his wishes But how can the wielder of the highest authority be *compelled* to compel himself? . . . The challenge Bodin faced, in other words, was to devise a method for persuading the king to accept informally enforceable constraints on royal authority. His solution was to redescribe traditional limitations on royal power as conditions for the successful exercise of royal power.

Id. at 110. Holmes further notes that “Bodin sought to reconceptualize traditional restraints as *instruments* of princely authority.” *Id.* at 110. According to Holmes, “[a] prudent sovereign will relinquish some of his power voluntarily when he learns, from Bodin and others, that limitations placed upon his caprice markedly increase his capacity to govern and to achieve his steady aims.” *Id.* at 111. Holmes stresses that

Holmes asks us to “set aside our intuitive belief that restrictions inhibit.”³⁰ “Limitations may facilitate as well as cripple. Limits can well be enabling because they are disabling . . . [b]y submitting ourselves to constraints we gain the capacity to do many things we would otherwise never be able to do.”³¹

Under certain circumstances legal and institutional limitations may actually produce political and social flexibility.

Constitutional limitations can be enabling in several ways. First, they may be viewed as a tool for the state to achieve *cooperation and support*, rather than just compliance. One way in which such cooperation can be achieved is if the state creates for itself a name for being trustworthy. Holmes uses an example of a sovereign who breaks its word too often. In such a case the sovereign’s word “will become useless as a tool for mobilizing cooperation.”³² Constitutional limitations can thus be used by the state as a way to gain the support of the people. Self-binding can help maintain or increase the state’s power.³³

An additional way in which constitutional limitations can allow the state to gain the support of its people is by enabling it to promote the interests of its people.³⁴ Such support is not only important as an *ex-post* factor – after the state acts – in order to allow it to continue to govern the people. It is also a key component *ex-ante*. Without the support of the people the state would not be able to successfully carry out its goals. When it comes to domestic constitutional limitations, the constitutional pact between the state and the people allows the state’s authorities to be aware of the interests and wishes of the members of the political commu-

“the central paradox of Bodin’s theory of sovereignty [is]: less power is more power In other words, by limiting himself, the sovereign is able to . . . strengthen himself . . . [and] achieve his concrete goals.” *Id.* at 115 (quoting what Holmes views as the key sentence in the *Republique*: “The less the power of the sovereign is (the true marks of majesty thereunto still reserved) the more it is assured.” (quoting the *Republique IV*, 6, 517)).

³⁰ *Id.* at 109.

³¹ *Id.*

³² *Id.* at 111. Holmes contends that Bodin shows us that “by adapting . . . to his subjects’ habits and beliefs, the [sovereign] can increase his ability to influence their behavior.” *Id.* at 112. In order “to achieve his objectives, [the sovereign] must cultivate a reputation for trustworthiness, and this requires him to play by the rules.” *Id.* at 114.

³³ *Id.* at 114.

³⁴ Holmes quotes Bodin in the *Republique* in this regard:

A commonwealth grounded upon good laws, well united and joined in all the members thereof, easily suffers not alteration: as also to the contrary we see some states and commonweals so evil built and set together, as that they owe their fall and ruin unto the first wind that bloweth or tempest that ariseth.

Id. at 112 (quoting the *Republique*, IV, 1, 434).

nity, and to act accordingly. Holmes indeed views constitutions as bargains. The sovereign strikes a deal with potential troublemakers.³⁵

Support from outside is also a key component in securing the governance of the state and allowing it to achieve its goals. Although it might be of less importance than support from within, surely in today's world states would find it almost impossible to execute their goals for the benefit of their people without the support and cooperation of other states. I will try to show that in the extraterritorial context domestic constitutional limitations can also be used by the state as a tool to gain the support and cooperation of other countries in the world.

Furthermore, constitutional limitations can be enabling in another important respect: they can diminish the risk of bad judgments on the part of the state. This enabling aspect of constitutional restraints is related to the principle of separation of powers. If we allow each branch to supervise the other two branches' extraterritorial acts and decisions, we can ensure that they make fewer mistakes in their judgments.³⁶

Holmes stresses that power-sharing can actually increase the capacity of the executive to achieve its aims: "[E]xecutive power hinges upon the president's capacity to mobilize support and voluntary cooperation for its projects."³⁷ According to Holmes, "Power-sharing can increase overall power in another way as well. Human beings do not always perform best when unwatched and uncorrected. . . . Secrecy has its own pathologies, including a tendency to perpetuate mistaken policies long after they could have been profitably corrected."³⁸ Constitutional limitations, safeguarded by separation of powers, may therefore improve the decision-making mechanisms of the executive and legislature acting abroad.³⁹ The state gains in return the support and cooperation of the people.

We can therefore divide the enabling aspect of constitutional limitations into three purposes: First, they can serve the state as a tool to gain domestic support, trust and cooperation for its acts. This can be done in two ways: they can allow the state's officials to gain a reputation for being

³⁵ *Id.* at 115.

³⁶ See HOLMES, *THE MATADOR'S CAPE*, *supra* note 17, at 287.

³⁷ *Id.* at 300.

³⁸ *Id.*

³⁹ Holmes writes with regard to the United States Constitution that:

The Founder's Constitution is based on three basic principles: all people, including rulers, are loathe to admit their mistakes even when midstream readjustments would serve the public interest; and most people are delighted to point out the mistakes of their rivals. The separation of powers is basically a system that assigns the right to make mistakes to one branch and the right to correct mistakes to the other two branches, as well as to the free press and to the electorate at large.

Id. at 287.

trustworthy,⁴⁰ and can also allow the state to promote the interests of its subjects in order to secure its governance.⁴¹ In the domestic context this will be done directly by adhering to citizens' interests that are embedded in the constitutional pact, and in the extraterritorial context – when non-citizens are involved – this can be done indirectly, as I show in the following sections of the article, by promoting the interests of foreigners abroad.

Second, in the extraterritorial context, I also demonstrate that constitutional limitations can allow the state to gain international support and thus carry out its goals more effectively.

Third, constitutional limitations, safeguarded by the principle of separation of powers, reduce the risk of bad judgments.⁴² Each branch can make sure that the other two branches abide by the constitutional pact, and help them in that manner to gain legitimacy and support from the people (assuming, as I argue in the following parts of the article, that if the state abides by its constitutional pact abroad, this may serve the political community's interests). Separation of powers also prevents secrecy and perpetuation of mistakes, and ensures that each branch acts in a deliberative way and includes all relevant considerations.⁴³

Although the constitution is not required legally, it is thus indispensable politically.⁴⁴ The enabling aspect of constitutional limitations is not grounded, as I show, in moral reasons, but rather in *practical* reasons. Repression should be avoided “because it is self-defeating.”⁴⁵

The above analysis offers us a different way of looking at the limitations that constitutions impose on state authorities. Holmes shows us that we should not focus only on the constraining side of the constitution's limitations. We must also be aware of their ability to allow the state to effectively fulfill its long-term aims. Once we accept the idea of enabling constitutional limitations, we need to examine the extraterrito-

⁴⁰ Referring to Bodin's discussion of coinage in order to demonstrate why a king would want to cultivate a reputation of being trustworthy, Holmes notes that:

This is the perfect illustration of a self-enforcing restriction on royal whim Public credit is a vital resource for the crown. By committing himself in advance to coins of fixed value, the king can successfully resist pressures to depreciate, cultivate the confidence of creditors, and retain better control of the economy in general.

HOLMES, *PASSIONS AND CONSTRAINT*, *supra* note 17, at 114.

⁴¹ *See id.* at 112.

⁴² *See* HOLMES, *THE MATADOR'S CAPE*, *supra* note 17, at 286-87.

⁴³ *Id.*

⁴⁴ *See* HOLMES, *PASSIONS AND CONSTRAINTS*, *supra* note 17, at 118-19.

⁴⁵ *Id.* at 123. Holmes contends that Bodin argues, for instance, against slavery “not for moral reasons, because it is sinful, but on the purely practical grounds that it poses a threat to slave-owners.” *Id.* at 124. Violence, Holmes writes, is thus viewed as counterproductive: “The more [the minds of men] are forced, the more forward and stubborn they become.” *Id.* at 124 (quoting the *Republique*, IV, 7, 537).

rial question from a different perspective. It may be the case that by granting constitutional rights to individuals residing abroad, the state can promote its effective governance. In other words: in contrast to conventional belief, we may actually have practical reasons to restrict the state authorities when they act outside of the state's borders. If this is indeed the case, we need to also examine whether there may actually be justice-based reasons *not* to apply the constitution beyond national borders.

III. ENABLING CONSTITUTIONAL LIMITATIONS BEYOND THE STATE'S BORDERS?

Holmes refers to the idea of enabling constitutional limitations in the traditional sense, a sovereign that restricts its powers when dealing with its own subjects. But what happens when state officials affect the rights of individuals residing abroad? Even if we accept the concept of enabling constitutional limitations, it is not obvious that it would also have a plausible meaning in the extraterritorial context. In this part of the article I examine whether constitutional limitations can indeed be enabling when our officials' actions affect both citizens and non-citizens residing beyond national borders.

I begin by examining the general differences between internal and extraterritorial constitutional limitations and then explain why the enabling aspect of constitutional limitations is especially important in various ways in the extraterritorial context. In order to illustrate the many ways in which extraterritorial constitutional limitations can be enabling, I refer to interviews I conducted with key figures in Israel who are involved in petitions to the Israeli High Court of Justice regarding the extraterritorial acts of the state.

A. *Is There a Difference between Internal and Extraterritorial Constitutional Limitations?*

Current scholarship addressing the extraterritorial question presents various approaches. Some are based on notions from international law, while others focus on ideas from the realm of constitutional law.⁴⁶

⁴⁶ Commentators address the extraterritorial question in various ways. The current dominant approaches are as follows: The "social contract/membership/compact" approach "emphasizes the consent of a particular population to be governed. A government is legitimate, not because it is inherently limited, but because the members of the citizenry have agreed to be governed in a particular manner." See Cleveland, *Powers Inherent in Sovereignty*, *supra* note 1, at 20. Only members and beneficiaries of the social contract can invoke its protection. The social contract/membership approach is usually thought of as one that supports the alleged presumption against extraterritoriality. For an overview of this approach see, e.g., NEUMAN, STRANGERS TO THE CONSTITUTION, *supra* note 10, at 6; Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2046 (2005); Jules Lobel, *The Constitution Abroad*, 83 AM. J. INT'L L. 871, 872

(1989); Keitner, *supra* note 2 at 63-65; Cabranes, *supra* note 2, at 1665-67; Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 13 (1985); Sepper, *supra* note 14, at 1812-14. The “limited government” or “conscience” approach views the constitution as an “organic” act, giving life to the government and providing its power. According to this view, the government cannot exercise powers withheld by a constitution. The constitution operates both as the source of governmental authority and a constraint on its power. If the constitution is indeed directed to the officials of a state there should be no reason to stop applying it when they act outside the state’s borders. For a general description of this approach see NEUMAN, STRANGERS TO THE CONSTITUTION, *supra* note 10, at 6; Cleveland, *Powers Inherent in Sovereignty*, *supra* note 1, at 19; Cabranes, *supra* note 2, at 1667-69 (referring to this approach as the “organic theory of the constitution”); Lobel, *supra* at 872-73; Keitner, *supra* note 2, at 66-68; Robert Knowles & Marc D. Falkoff, *Toward A Limited Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 644-48 (2007); Marc D. Falkoff & Robert Knowles, *Bagram, Boumediene, And Limited Government*, 59 DEPAUL L. REV. 851, 869-871 (2010). The “universal” approach is defined by Gerald Neuman as one which requires us to apply those “constitutional provisions that create rights with no express limitation as to the persons or places covered” to every place in the world. A universal approach may rely upon a conception of natural rights and notions of global justice. See NEUMAN, STRANGERS TO THE CONSTITUTION, *supra* note 10, at 5-6; see also Posner, *supra* note 6, at 33-34; Kent, *supra* note 3, at 481-84. The “strict territoriality” approach is described by Cleveland as one which was “integral to nineteenth century concepts of sovereignty because under international law principles, a sovereign’s jurisdiction to legally regulate conduct was coterminous with territory.” See Cleveland, *Powers Inherent in Sovereignty*, *supra* note 1, at 22-23; Cleveland, *Embedded International Law*, *supra* note 1, at 231-44. For a description of the strict territoriality approach see Colangelo, *supra* note 1, at 127; Sepper, *supra* note 14, at 1812. The “mutuality of obligations” approach perceives rights as a prerequisite for justifying legal obligations: when a government seeks to impose its laws on those who reside beyond its borders it should also extend to them its constitutional safeguards. For an analysis of the mutuality of obligations approach see NEUMAN, STRANGERS TO THE CONSTITUTION, *supra* note 10, at 8; Gerald Neuman, *Extraterritorial Rights and Constitutional Methodology after Rasul v. Bush*, 153 U. PA. L. REV. 2073, 2077 (2005); Sepper, *supra* note 14, at 1813. The roots of the “balancing approaches” (e.g. “global due process” or the “functional approach”) can be found in Justice Harlan’s judgment in *Reid v. Covert*, 354 U.S. 1, 75 (1957) (noting that the application of all the guarantees of the United States Constitution beyond the country’s borders might prove to be impracticable and anomalous, and that the question of which specific constitutional safeguards should be applied overseas “can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case”); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275-278 (1990) (Kennedy, J., concurring) (adopting Harlan’s approach when examining whether the Constitution applies to non-citizens residing outside the United States); NEUMAN, STRANGERS TO THE CONSTITUTION, *supra* note 10, at 8 (suggesting that extraterritoriality comes down to the application of a “single right: the right to ‘global due process’”); Neuman, *The Extraterritorial Constitution After Boumediene v. Bush* *supra* note 6, at 2076 (noting that the “functional approach,” which was applied by the majority opinion in *Boumediene v. Bush*, 553 U.S. 723, 764

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We should begin our inquiry in the realm of constitutional law by taking a closer look at the common purposes of liberal and democratic states' constitutions. If we turn again to our suggested distinction between justice-based and practical purposes of constitutions, it seems that both justice-based and practical considerations may have a different character in the extraterritorial context. I first explore the nature of relevant practical considerations in the extraterritorial context. I then turn to explore relevant justice-based concerns, as I believe that the practical aspect of the extraterritorial question also sheds new light on relevant justice-based concerns.

As discussed in Part II, the enabling aspect of constitutional limitations allows states to act in an effective way and promote their governance over their political community. But does the enabling aspect of constitutional limitations have any value in the extraterritorial context?

I assert that the enabling character of the constitution's limitations is especially important in the extraterritorial context, as practicality arguments are most commonly raised against constitutional extraterritoriality. Courts around the world and scholars that address the extraterritorial question often raise the logistic and procedural difficulties entailed in extraterritoriality due to the different circumstances and lack of adequate resources beyond the state's borders.⁴⁷ Others warn us that if the state is

(2008), can perhaps also be viewed as a balancing one, as it takes into account various considerations and weighs them against each other according to the situation at hand).

⁴⁷ See, e.g., *In re Ross*, 140 U.S. 453, 464 (1891) (Harlan, J., concurring) (noting the "impossibility of obtaining a competent grand or petit jury" outside the country, and warning that "[t]he requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution"); Reid, 354 U.S. at 74, 76, n. 12 (noting that to "require the transportation home for trial of every petty black marketeer or violator of security regulations would be a ridiculous burden on the Government"); *Johnson v. Eisentrager*, 339 U.S. 763, 778-79 (1950) (describing the logistical difficulty of transporting thousands of German detainees to the United States for habeas hearings, noting that "[t]o grant the writ to these prisoners might mean that our army must transport them across the seas for hearing," requiring the "allocation of shipping space, guarding personnel, billeting and rations" and "transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend the legality of the sentence"); *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., Concurring) (holding that "[t]he conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country"). Such practical concerns were also raised in the dissenting opinion by the Canadian Supreme Court. See, e.g., *R. v. Cook*, [1998] 2 S.C.R. 597, para. 94 (noting that away from Canada, where the Canadian government has no legal authority, officials may not be able to

subjected to the constitution's limitations abroad, it will not be able to act effectively against threats to its national security in the context of the ongoing war on terror.⁴⁸ Since the extraterritorial question often arises

provide the protection available in Canada because of differences in the legal systems and the resources available). *See also* Cabranes, *supra* note 2, at 1707-08 (elaborating on the practical difficulties entailed in an extraterritorial application of the United States Constitution); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 641 (2003) [hereinafter: Posner & Vermeule, *Accommodating Emergencies*] (arguing that “[j]udges do not have the information that executives have and are reluctant to second guess them. They also do not have access to the levers of power, so they can only delay a response to emergency by entertaining legal objections to it. They do not have such access because such power cannot be given to people who are not politically accountable”).

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⁴⁸ *See, e.g., supra* sources accompanying note 13; *infra* sources accompanying note 140, 156. In *Johnson v. Eisentrager*, the majority stated that:

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The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be conflict between judicial and military opinion highly comforting to enemies of the United States.

Eisentrager, 339 U.S. at 778-79.

Justice Scalia's dissent in *Rasul v. Bush* stressed that:

In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of the earth The Court's unheralded expansion of federal-court jurisdiction is not even mitigated by a comforting assurance that the legion of ensuing claims will be easily resolved on the merits From this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive's conduct of a foreign war.

Rasul v. Bush, 542 U.S. 466, 498-99 (2004) (Scalia, J., dissenting). It should be noted that *Rasul* concerned statutory habeas corpus, rather than the constitutional writ of habeas corpus. However, the nature of the practical concerns raised by Scalia was very similar to the concerns raised in *Eisentrager*. *Compare* *Eisentrager*, 339 U.S. at 778-79, *with* *Rasul*, 542 U.S. at 489-99 (Scalia, J., dissenting); *see also* Verdugo-Urquidez, 494 U.S. at 273-74 (“The result of accepting [respondent's] claims would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries Application of the Fourth Amendment to [the employment of Armed Forces outside of the United States] could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.”).

during times of emergency, there is also the fear that the judiciary is not equipped to address cases involving emergency powers.⁴⁹

States may also fear that granting the protection of the constitution to non-citizens outside the state would alienate members of the state's political community. Moreover, extending the protection of the constitution to non-members of the community might undermine the sense of solidarity that the members of the community share via their constitution.⁵⁰ These concerns are also valid in the domestic sphere, when non-citizens inside the state are concerned. However, they seem to be even stronger when non-citizens abroad are concerned, as their connections with the state's political community are generally even weaker than those of non-citizens within the state.

As some of the more dominant arguments against extraterritorial application of constitutions often have a practical character, the enabling aspect of constitutional limitations becomes especially important. It is important to realize that we may actually have practical reasons to adopt a presumption in favor of extraterritorial application of constitutions. Moreover, when we neglect to address the enabling aspect of the constitution's limitations, we overlook important concerns about justice, which can be raised *against* extraterritoriality. These concerns are only revealed when we expose the neglected practical reasons in favor of extraterritorial application of constitutions.

B. *Practical Considerations in Favor of Extraterritorial Constitutional Limitations*

In this section I present examples of the various ways in which extraterritorial limitations may prove to be enabling. I refer from time to time to the interviews I conducted as possible illustrations for my arguments. I begin by presenting the ways in which the state can gain support from within and from outside if it is subjected to domestic constitutional limitations when it acts or affects people outside the state. I then submit that the decision-making mechanisms of the state authorities can also be improved, if subjected to constitutional limitations in the extraterritorial context.

⁴⁹ See, e.g., Posner, *supra* note 6, at 44 ("These questions are not meant to deny the benefits that result when governments reciprocally advance the interests of noncitizens. The question is one of judicial competence and constitutional theory.").

⁵⁰ See DAVID GOLOVE, *THE CASE FOR INCORPORATING GLOBAL JUSTICE INTO THE U.S. CONSTITUTION* 14 (work in progress) (on file with author); see also David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 384 (2003) (writing that some argue that "if we were to extend to foreign nationals the same rights that citizens enjoy, we would devalue citizenship itself") [hereinafter Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*].

After I explore the possible ways in which the power of the state may be enhanced if it is subjected to domestic restraints extraterritorially, I present specific situations in which the extraterritorial question often arises. Here, I take into account additional factors relevant to such situations, e.g. whether domestic courts are capable of conducting judicial review in times of war or conflict beyond the state's borders; the "technical" ability of the executive to adhere to constitutional limitations beyond national borders, due to the different circumstances and possible lack of resources abroad; and the overall ability of the executive and the legislative branches to achieve their goals if they are subjected to domestic constitutional limitations abroad. I then examine whether the enabling aspect of the constitution's limitations can overcome such concerns in the long run.

In order to demonstrate the possible ways in which extraterritorial constitutional limitations can prove to be enabling I present interviews that I conducted in Israel, a country which has faced the extraterritorial question with regard to Gaza and the West Bank.⁵¹ These interviews allow us

⁵¹ I used the technique of "elite interviews," which involves selecting activists at different levels to explore how political institutions work and discern the intellectual trends at the root of the political activity. See, e.g., LISA HARRISON, *POLITICAL RESEARCH: AN INTRODUCTION* 94 (2001). Lisa Harrison writes that:

If we wish to discover how political institutions operate, how important decisions are made and how political power is attained, we are not likely to ask the public at large, but rather those individuals (very often a small group) who have access to this level of information – those referred to as political elites.

Id. Harrison notes that although the information gathered from elite interviews "is likely to be a highly subjective account of an event or issue, the primary role of an elite interview is to provide insight into the mind of that particular actor. *Id.* Harrison further writes that:

We must also bear in mind that the limitations of access [in elite interviews] affect the overall representativeness of any research findings, whilst the reliability of the information gleaned may be questionable (interviewees could supply inaccurate information both intentionally and unintentionally) or impossible to substantiate. The reliability of interviewees is something we should always consider. While information may be inaccurate for very genuine reasons (memory lapse), interviewees may also be unreliable for ulterior reasons (because they have an axe to grind or wish to portray themselves in a positive light).

Id. at 94-95.

David Richards also notes that:

By their very nature, elite interviews provide a subjective account of an event or issue. Thus, elite interviewing should not be conducted with a view to establishing 'the truth,' in a crude, positivist manner. Its function is to provide the political scientist with an insight into the mind-set of the actor/s who have played a role in shaping the society . . . and an interviewee's subjective analysis of a particular episode or situation.

See David Richards, *Elite Interviewing: Approaches and Pitfalls*, 16(3) *Politics* 199, 200 (1996).

to step out of the theoretical realm and consider real life examples of the various ways in which extraterritorial limitations may be enabling.

1. Personal Interviews with Israeli Officials and Attorneys

The interviews with Israeli state officials and attorneys from Israeli NGOs illustrate the ways in which constitutional limitations are enabling, while those limitations may also possibly conflict with justice-based concerns. The interviews do not serve as empirical data or provide an objective answer to the question of whether constitutional safeguards should apply abroad, but they do provide real-life examples of the various considerations at play in determining a constitution's extraterritorial relief. Perhaps most importantly, the interviews reveal considerations in the extraterritorial question that so far have received insufficient attention.

Before I proceed to present information from the interviews, several comments should be made on the applicability of the Israeli case to the general discussion of extraterritorial application of constitutions of democratic and liberal states. First, it should be noted that Israel's High Court of Justice decided to apply Israel's Basic Laws of Human Dignity and

When deciding whether to conduct elite interview, Richards suggests that we examine whether interviewing would shed any further light upon our research. *Id.* He notes that elite interviewing can "help you understand the context, set the tone, or establish the atmosphere of the area you are researching." *Id.* Richards mentions various problems we may encounter when conducting elite interviews. For instance, we may have difficulties relating to unrepresentative sampling due to problems of access due to problems of access. *Id.* The reliability of interviewees may also be questionable "due to failures in his/her memory." *Id.* "Interviewees asked about the same event can say different things at different interviews or, alternatively, they can change their mind in the course of a single interview." *Id.* at 201. Interviewees can also be "too deferential in their interviews." *Id.* In addition, "there exists an issue of power relations: an interviewee, concerned with presenting his/her viewpoint may want to control and dominate the interview." *Id.* As a result, "the interviewer may not be able to control the format, or direction of the interview." *Id.* See also Jeffrey M. Berry, *Validity and Reliability Issues in Elite Interviewing*, 35(4) *POLITICAL SCI. & POLITICS* 679, 680 (2002) (noting that "[i]nterviewers must always keep in mind that it is not the obligation of a subject to be objective and to tell the truth Consciously or unconsciously, they've thought about what they want to say in the period between the request and actual interview. They're talking about their work, and, as such, justifying what they do."). Berry further writes, that "[s]ometimes all we want to know is the subject's point of view and this problem does not loom as large . . . other times, though, we're trying to come as close to the truth as is humanely possible" These are all indeed important concerns. Because of such concerns the interviews I conducted are not meant to serve as empirical data supporting or negating an extraterritorial application of constitutions. The different points of views of my interviewees were only meant to serve as examples of important aspects of the extraterritorial question that did not receive much attention thus far.

Freedom of Vocation⁵² to Israelis who resided in the Gaza Strip before it was vacated by Israel.⁵³ However, the question of the application of constitutional law to Palestinians residing in Gaza and the West Bank was not determined. In addition, Israel's High Court of Justice has ruled that Israel's administrative law should follow Israeli state officials wherever they go.⁵⁴ The limitations on Israel's power with regard to non-citizens residing outside Israel are therefore currently derived only from international law and domestic statutory law. Some may argue as a result that any conclusions we infer from the Israeli case should be limited to international law and Israeli administrative law. However, I argue that if we come to the conclusion that extraterritorial limitations derived from the realm of international and administrative law can be enabling, there are even stronger reasons to believe that extraterritorial constitutional limitations may be enabling.

Second, the Israeli case may seem to be unique, since it concerns a long-lasting occupation, an abnormal situation that may require different treatment. Still, as more areas in the world are subject to long-term foreign military presence, such as Iraq and Afghanistan, the Israeli case seems more relevant than ever for our analysis of the extraterritorial question.

Third, it can be argued further that the Israeli case is also unique because Israel is a relatively small country with a majority of Jewish population, whose judges serve in the military as part of mandatory conscription.⁵⁵ I address this possibility in my interviews. When I asked the attorneys I interviewed whether the fact that most of the judges in the Israeli High Court of Justice served in the military has any effect on the security information that is revealed before the Court, almost all of them answered that the judges' service in the IDF has no significance.⁵⁶ How-

⁵² Both of these human rights laws allow constitutional judicial review in Israel. See CA 6821/93, *United Mizrahi Bank v. Migdal Cooperative Village* 49(4) PD 1, 222, 421-27 [1995] (holding that Israel's Basic Laws on human rights allow constitutional judicial review).

⁵³ See HCJ 1661/05, *The Gaza Coast Regional Council v. The Knesset* 49(2) PD 481 [2005].

⁵⁴ See HCJ 7015/02 *Ajuri v. The Commander of the IDF Forces in the West Bank* PD 56(6) P.D. 352, 375-77 [2002].

⁵⁵ The Israeli Security Service Law (integrated version) 1986 regulates the mandatory drafting of all citizens and permanent residents in Israel.

⁵⁶ Major General Mandelblit stated in this regard:

There is no significance to the fact that the judges served in the military. Judges are judges. We let them see everything. It does not even come up for discussion. The judges should see whatever they want. I have 100% trust in the judges. It is inconceivable that I will not reveal information to the judges. If I find out something of this sort took place I will even consider initiating a criminal investigation.

In person interview with Major General Mandelblit and Major Gurtler (December 31, 2008). An IDF spokesperson was present during the interview.

ever, as I further elaborate in part V of the article, some of my interviewees felt that the judges in the Israeli High Court of Justice tend to remain loyal to the Israeli system that they represent in their judgments. In light of the above comments, I examine whether we can make inferences from the Israeli case that would be relevant to other cases in which the extra-territorial question arises.

I interviewed the following people in Israel:⁵⁷ 1) Major General Avi Mandelblit, the former IDF Military Advocate General, along with 2) his then assistant Major Joshua Gurtler;⁵⁸ 3) a Brigadier General who also served in the past as the IDF's Military Advocate General;⁵⁹ 4) Colonel Sharon Afek, Deputy of the IDF's Military Advocate General and formerly the IDF's Legal Advisor of the West Bank;⁶⁰ 5) Colonel David Yahav, who was the IDF's Legal Advisor of the Gaza Strip and the Sinai Peninsula in the years 1980-83, the IDF's Legal Advisor of the West Bank between 1986-89, the head of the Military International Law Department between 1989-91 and 1994-95, and the Deputy of the Military Judge

Sari Bashi, Executive Director of Gisha (an Israeli not-for-profit organization, whose goal is to protect the freedom of movement of Palestinians) said in reply to the same question:

No. All judges undergo security clearance in order to be able to access the information, whether or not they served in the military.

Phone interview with Sari Bashi (November 13, 2011).

Tamar Peleg-Sryck, an attorney at the legal department of Hamoked – Center for the Defense of the Individual, also gave a similar answer:

Not more than on anybody else. Everyone serves in the army. Besides, security information is prepared and produced by the intelligence service (GSS, Shabak) which is greatly respected and trusted by everybody in Israel, including judges

Email correspondence interview with Tamar Peleg-Sryck (November 17, 2011).

Dan Yakir, the Chief Legal Counsel of the Association for Civil Rights in Israel said in this regard that “[the fact that the Supreme Court judges served in the IDF] does not influence their ability to understand the relevant security considerations.” In person interview with Dan Yakir (December 29, 2009), continued via email (November 6, 2011).

Due to the limits of the scope of this article I do not cite all interviewees' answers to this question. These answers of the interviewees are not meant, however, to serve as evidence that the Israeli case is not unique due to the size of Israel and the composition of its judges. If we do choose to learn from Israel's experience, we may thus need to take into account Israel's special features.

⁵⁷ Almost all of the interviews were conducted in Hebrew and then translated by me, G.R. The only interviews that were conducted in English were with Sari Bashi, *supra* note 56 and Tamar Peleg-Sryck, *supra* note 56.

⁵⁸ Mandelblit & Gurtler interview, *supra* note 56.

⁵⁹ In person interview with the former Israeli Defense Force Military Advocate General, who has asked to remain anonymous (December 28, 2008, continued January 4, 2009).

⁶⁰ Phone interview with Colonel Sharon Afek (January 10, 2009) (with the approval of the IDF spokesperson unit).

Advocate General between 1991-93;⁶¹ 6) General Yishai Beer, who served as a commander in various IDF units from 1974 onward (Beer is currently a Corps commander in his reserve duty; in his civilian life, Beer is currently the Dean of the Faculty of Law at the Inter-Disciplinary Center, Herzliya);⁶² 7) A Lieutenant Colonel who served in different senior positions in combat units in the IDF as part of his reserve duty, and works as an attorney in his civilian life;⁶³ 8) A senior official from the Israeli Ministry of Justice;⁶⁴ 9) A former official from the Israeli Ministry of Justice;⁶⁵ 10) A senior official from the Israeli State Attorney Office;⁶⁶ 11) Dan Yakir, the chief legal counsel of the Association for Civil Rights in Israel;⁶⁷ 12) Sari Bashi, Executive Director of Gisha;⁶⁸ 13) Tamar Feldman, head of the legal department in Gisha and the head of the Human Rights in the Occupied Territories Department in the Association for Civil Rights in Israel;⁶⁹ 14) Tamar Peleg-Sryck, an attorney in the legal department of Hamoked – Center for the Defense of the Individual;⁷⁰ and 15) Ido Blum, the head of the legal department in Hamoked – Center for the Defense of the Individual.⁷¹

Most of the state officials that were interviewed served as attorneys, either in the military or in the State's Attorney's Office, and were

⁶¹ Phone interview with Colonel David Yahav (January 5, 2009).

⁶² Among other positions, General Beer served as commander of different units in the IDF's Paratrooper Brigade and as the Head of the Military Court of Appeals. Prof. Beer was also formerly a tax professor at the Hebrew University faculty of law in Jerusalem. In person interview with Yishai Beer (January 2, 2009), continued via email (August 30, 2010).

⁶³ Phone interview with the Lieutenant Colonel who served in different senior positions in combat units in the IDF, who has asked to remain anonymous (January 8, 2011).

⁶⁴ In person interview with the senior official from the Israeli Ministry of Justice, who has asked to remain anonymous (January 5, 2009).

⁶⁵ Interview with a former official from the Ministry of Justice, (October 30, 2011). Note that this interview was with a *former* official from the Ministry of Justice, unlike the interview noted above in *id.*

⁶⁶ In person interview with a senior official from the Israeli State Attorney Office, who has asked to remain anonymous (January 6, 2009).

⁶⁷ Yakir interview, *supra* note 56.

⁶⁸ Gisha is an Israeli not-for-profit organization, founded in 2005, whose goal is to protect the freedom of movement of Palestinians, especially Gaza residents. Bashi interview, *supra* note 56.

⁶⁹ Tamar Feldman mainly spoke about her experience at Gisha before transferring to her new position in the Association for Civil Rights in Israel. Phone interview with Tamar Feldman (November 13, 2011).

⁷⁰ Tamar Peleg-Sryck represented numerous Palestinian administrative detainees before the military judges and filed petitions with the Israeli Supreme Court, sitting as the Israeli High Court of Justice. Peleg-Sryck interview, *supra* note 56.

⁷¹ Phone interview with Ido Blum (November, 30, 2011, continued December 1, 2011).

involved in various extraterritorial cases. I chose to interview mostly individuals with such backgrounds because I expected them to provide insights on the involvement of the Israeli High Court of Justice in cases concerning Palestinians in Gaza and the West Bank, both from a legal perspective and from the executive's point of view.⁷²

I present in this article only some of the questions I asked in my interviews. As noted, these interviews are by no means meant to serve as empirical data, nor do they represent the views of all Israeli officials. There are undoubtedly many people with different opinions than those presented here. However, these interviews may allow us to illustrate important, yet neglected, aspects of the extraterritorial question.

The interviews with attorneys who work in Israeli NGOs were meant to present the perspective of individuals on the other side of the spectrum, who submit petitions to the Supreme Court on behalf of Palestinians who reside outside Israel. Their point of view may shed more light on possible justice-based arguments against the practical line of arguments presented in this article. It is important that we take such considerations into account, as justice-based considerations⁷³ are currently mostly viewed as reasons *in favor* of extraterritorial application of constitutions.⁷⁴ Once

⁷² Some of the people I interviewed were attorneys in their civilian life, but were not involved in any extraterritorial cases. They did, however, serve in non-legal positions in combat units that acted outside Israel's borders. I thought their point of view was important, as they were involved in the IDF's extraterritorial operations, not as lawyers, but as IDF commanders. At the same time I believed their civilian professions would give them legal insights on the involvement of the judiciary in the actions of the military.

⁷³ See *supra* note 14 for a more elaborate description of such considerations.

⁷⁴ See *e.g.* Cabranes, *supra* note 2, at 1704 (“Constraints set forth by the Constitution on the power of the government are more likely to be enforced when the risk of irreparable injustice is high. This can be inferred from the distinction drawn in *Murphy v. Ramsey*, 114 U.S. 15 (1885)] and the Insular Cases between ‘political rights,’ which the government did not necessarily have to respect in the territories, and ‘personal and civil rights,’ which might bind the government The nature of the constitutional provision invoked – and the consequences of failing to recognize the applicability of that provision – is an important factor in Supreme Court decisions in this area Conversely, in the decisions that deny the application of constitutional provisions, the risk of irreparable injustice appears to be low.”). See also Jeffrey Kahn, *Zoya's Standing Problem: When Should the Constitution Follow the Flag*, 108 MICH. L. REV. 673, 713-14 (2010) (“At first glance the . . . social compact theory would seem to offer the best support for a standing exercise that assesses a plaintiff's prior substantial connections to determine whether the court should hear her claims of constitutional injury abroad. After all, this theory is based on a conception of the Constitution as an agreement about governance over a definable population This social compact theory, too, ultimately falls short . . . for there exists a class of government conduct that ‘shocks the conscience.’ Such conduct is so shocking that, even absent such contacts, proponents of this theory would not only agree that the Constitution forbids it but also that it is necessarily permits (in fact

we are aware of the practical considerations in favor of extraterritorial application of constitutional rights, we can proceed to weigh them against possible counter justice-based arguments.

2. Gaining International and Internal Legitimization Via Extraterritorial Constitutional Limitations

When exploring the possible ways in which constitutional limitations may be enabling, I assume that legislators and executives in democratic and liberal states want to act for the benefit of the state's political community. A successful regime would be one that fulfilled its long-term goals for the benefit of its people. The state's authorities would want to make "good" decisions, i.e. decisions that would promote the interests of the state's political community. In that way the government would gain the community's support and cooperation. The government would also want to gain the support of other countries in order to successfully carry out its goals.

It is interesting to refer in this regard to the autobiographical book of Moshe Ya'alon, who served as the Israeli Military Chief of Staff from 2002 to 2005.⁷⁵ Ya'alon writes that over the years he has learned that in order to use power one needs to gain legitimization for its acts.⁷⁶ According to Ya'alon, political and military maneuvering flexibility is based on three circles of legitimization: moral legitimization, legitimization from within and legitimization from outside.⁷⁷ The state needs to examine whether its powers are backed by the people's moral values, by their general support (which is composed, according to Ya'alon, of society's moral

promotes as a means of redress) a civil action to be heard on the merits."); Keitner, *supra* note 2, at 67 (writing with regard to what she defines as the conscience model for addressing the extraterritorial question, that "[r]hetorical appeals to a conscience model generally invoke a country's basic values. Those values might entail substantive prescriptions, such as not inflicting torture. They might also involve structural principles such as the value of living in a government characterized by checks and balances, or in which the government cannot act beyond the scope of its enumerated powers. In practice, courts appear to resort to conscience-based arguments when they feel that the political branches have seriously violated either a substantive or structural value, but not otherwise."); NEUMAN, STRANGERS TO THE CONSTITUTION, *supra* note 10, at 6 (writing with regard to the universalist approach that "[t]he argument for universal application may rely upon the natural rights background of the American constitutional tradition, possibly reinforced by contemporary conceptions of human rights"); Henkin, *supra* note 46, at 32 (contending that the United States must respect the rights of any person who comes within its jurisdiction because "[t]he social compact . . . is not merely an arrangement for mutual protection; it is a compact to establish a "community of righteousness").

⁷⁵ MOSHE YA'ALON, *THE LONGER SHORTER WAY* (2008) (Hebrew).

⁷⁶ *Id.* at 142-43.

⁷⁷ *Id.*

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values and political ideology), and by the support of actors in the international arena.⁷⁸

Legitimization from within and legitimization from outside are two key elements in securing the effective governance of democratic and liberal states, although they are obviously not the only factors. I therefore focus in the next sections of the article on these elements and divide my analysis of the importance of internal and external legitimization for the state's acts into two categories: cases involving citizens abroad and cases involving non-citizens abroad.

a. *International and Internal Legitimization: The Case of Citizens Beyond the State's Borders*

When it comes to citizens residing abroad who are affected by the state's acts, there seem to be more obvious reasons for the state to extend its constitutional restrictions on itself than in the case of non-citizens. If the state considers citizens residing abroad to be part of its political community, it would obviously want to gain their support. In states where citizens residing abroad have a right to vote, the government will have even more incentives to grant them the protection of the constitution in order to secure its power. Holmes shows that "[in order to] have power, that is, to achieve his objectives, a king must cultivate a reputation for trustworthiness, and this requires him to play by the rules."⁷⁹ By keeping its word and playing by certain rules the government of the state earns the trust and cooperation of those members of the community who are residing abroad, as well as their support for the continuation of its regime.

Even if citizens living beyond the state's borders do not have a right to vote, and even if they are not considered part of the state's political community, they may still have an influence on the members of the political community. Thus the state would still want to grant them the protection of the constitution in order to avoid resentment among their families and friends who live within the state's borders.⁸⁰

⁷⁸ *Id.*

⁷⁹ See HOLMES, *PASSIONS AND CONSTRAINTS*, *supra* note 17, at 114.

⁸⁰ As I further discussed in *infra*, notes 116-122 and the text accompanying them, Posner and Vermeule describe possible ways in which the welfare of aliens within the United States may indirectly be taken into account when we try to secure the welfare of members of the United States' political community in times of emergency. See, e.g., POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 13, at 124-25. The two argue that we have fewer reasons to worry about discrimination against aliens within the United States than we may be inclined to believe. This is because their welfare is actually a component in the welfare of the voting majority in the country. For instance, the two argue, "recent immigrants maintain family and ethnic ties to aliens and object when these aliens are subjected to governmental discrimination." *Id.* at 125. Posner and Vermeule note that although aliens cannot vote themselves, their friends or family often can, and through these mechanisms of virtual

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Still, one may argue that citizens residing beyond the state's borders have much less influence on the state's governance than those residing within the state's borders. This may be true, but it does not mean that the state's authorities should ignore the rules of the game when acting beyond the state's borders or enacting statutes with an extraterritorial effect. Rights that may be granted to citizens (and non-citizens) residing outside the state's territory do not have to be the same as those granted to citizens within the state.⁸¹ We can subject the legislature and executive to extraterritorial constitutional limitations, and at the same time allow the judiciary to give more weight to the rights of those residing within the state's borders.

b. *International and Internal Legitimization: The Case of Non-Citizens Beyond the State's Borders*

When non-citizens residing abroad are concerned, it is less apparent why a state would need to set extraterritorial constitutional limitations on its power to gain support from *within*. Here, another important aspect of enabling restraints comes into play: the possibility of gaining international support for the state's actions. International support for the state's actions seems to be a more obvious reason to restrict the state's power beyond its borders. To achieve its goals a state often needs support and even cooperation from other states.⁸² Ya'alon writes that as the IDF Chief of Staff he learned "that the Diplomatic and Public Relations front is just as important as the battle front. Especially if a political goal can be achieved without war. . . . [W]ithout international legitimization there would be no room for maneuvers in the power of the IDF."⁸³

Indeed, most of the Israeli officials I interviewed stated that they believe the involvement of the Israeli High Court of Justice in cases con-

representation aliens receive a degree of political influence. *Id.* Although Posner and Vermeule refer to aliens within the United States, it seems just as plausible to argue that aliens outside the United States also maintain ties with recent immigrants who live within the state's borders. The question I address in this article is whether this should be viewed as a practical reason to grant aliens abroad constitutional rights, or rather as a reason to deny those rights from them, as Posner and Vermeule argue.

⁸¹ See Burnett, *supra* note 2, at 1031-36 (contending that we must first decide whether a particular constitutional right should be applied abroad. Then, at the second stage of our analysis we can consider how such rights should be applied abroad, according to the particular circumstances at hand).

⁸² Holmes notes that:

[A]llies have interests, yes, but they also have ideas, insight, information, imagination, and skill. To gratuitously deprive ourselves of these assets is shortsighted at any time, but most especially at a time when the United States, as the principal target nation, cannot easily bring the evolving terrorist threat into focus, much less counter it, without substantial foreign help.

HOLMES, *THE MATADOR'S CAPE*, *supra* note 17, at 235-36.

⁸³ YA'ALON, *supra* note 75, at 252 (Galia Rivlin trans.).

cerning Palestinians' rights outside Israel helps Israel gain international support for its actions. When asked how the IDF commanders feel about the High Court of Justice involvement in such cases, the IDF's former Military Advocate General, Major General Avi Mandelblit, stated:

There is an understanding that things are complex. [Former Chief of Staff] Ya'alon once said that we have four fronts: the military front, which serves the second front, the political front; the media front; and the legitimization front, which includes the legal front but is a broader term. There are some things which are legally allowed, but are not legitimate. There is an internal legitimization front, which sometimes is even more important than the international one. The commanders understand that very well. In every operation we think about legitimization all the time. It is not the only factor, but it is an important one. In this area there is an important role for the Israeli Supreme Court. Israeli society and the international community have high confidence in the Court. It enjoys prestige and high esteem. There are also some human rights associations that hint that if domestic courts will not intervene they will turn to international tribunals. The Supreme Court enjoys high prestige abroad. A lot of this can be attributed to Justice Aaron Barak. The commanders understand that the fact that the Supreme Court reviews their acts makes them stronger. They are interested at all times in cases that reach the Court and want to know the Court's decisions. We give them briefs all the time. They understand that the Court gives legitimization to their acts. There are judgments of the Court that we do not always like. But they are still binding. . . . The involvement of the Court started with Justice Shamgar, and we were born to this reality. But it is a good thing that we were. If the situation in the West Bank were not subject to judicial review, I have no doubt that it would have been worse. Who would have defended the IDF in front of the world and the Israeli public? The Court is the defense shield of the state. It defends the state. . . .⁸⁴

⁸⁴ Mandelblit & Gurtler interview, *supra* note 56.

I asked Colonel David Yahav how he thinks the involvement of the High Court of Justice in cases related to Palestinians in the West Bank affects the general interests of the military and/or the state. He answered:

We are stressing the fact that all of the military's actions are subject to the scrutiny of the High Court of Justice in our public relations. There is no precedent for that in the world. We know how to make use of this fact in the explanatory and media realm, as well as in the international arena. In general, the Court acts in the right balance. Its involvement has a general positive influence. Our military is more moral and has higher values because of the Court. On the bottom line, it is hard to say that the Court restricted the state in any significant way. Although there is no precedent in the world for anything close to the involvement of the Israeli High Court of Justice in the military's actions, it is a very positive thing.

Some of the officials I interviewed also pointed out that the involvement of the Israeli High Court of Justice in cases concerning Palestinians may affect the involvement of international courts.⁸⁵ If domestic courts hear such cases in an objective manner and in good faith, international courts may find intervention in these cases redundant. Moreover, domestic courts may enjoy important practical advantages over international courts, as they may have more access to relevant domestic information and local witnesses.⁸⁶

When I interviewed one of the senior officials in the Israeli State Attorney Office,⁸⁷ I asked him about the effect of the Court's involvement in cases related to Palestinians on the overall interests of the state. He answered:

The involvement of the Court prevents unjustified use of authority and power. The mere existence of the Court and its willingness to address such cases prevents that. It is hard to imagine a scenario in which in Israel's current security situation, there would not be any supervision on the security authorities. It is necessary in order to guard the human rights of the protected inhabitants of the West Bank. As for Gaza, there are specific rights, which derive from the laws of war and not from the laws of belligerent occupation, for instance, the duty to transfer medicine and the duty to prevent starvation. *It is an interest of the State to be just.* Whoever wants to have security alongside justice needs to prevent an unjustified harm to human rights. It is the interest of the state itself, and it is also its interest in international forums such as the U.N. commissions. The mere fact that the state presents an independent and effective system

Yahav interview, *supra* note 61.

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I also asked the Brigadier General who formerly served as the IDF's Military Advocate General I interviewed the same question. He answered:

Security is not only the achievement of a certain military goal. Security which is not backed up by consensus and moral support could harm the military It may also result in damages in the international arena: it could affect public opinion worldwide, the way foreign governments treat Israel and the relationship between Israel and the United States

Anonymous former IDF Military Advocate General interview *supra* note 59.

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⁸⁵ See *supra* note 84 and *infra* notes 87-88, 93 and the text accompanying them.

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⁸⁶ The senior official I interviewed from the State Attorney Office noted, for example, that the involvement of the Court in the *Beit Sourik* case was "important in the international sphere because the Supreme Court conducted a detailed examination and checked every Dunam [a quarter of an acre, G.R.] of Palestinian land. Segments of the Fence, which did not reflect a reasonable balance, were declared as illegal." Anonymous Israeli State Attorney Office senior official, *supra* note 66.

⁸⁷ Anonymous Israeli State Attorney Office senior official, *supra* note 66.

with quick relief for petitioners allows Israel to repel criticism on it in these matters.⁸⁸ (emphasis added)

I asked the senior official from the State's Attorney's Office if he recalled specific cases in which the involvement of the High Court of Justice, or the fear of its involvement, hindered the achievement of important military goals. He referred in reply to the *Beit Sourik* case⁸⁹ in which the Israeli High Court of Justice examined the legality of the Israeli Security Fence:⁹⁰

I can give as an example the *Beit Sourik* judgment. The State wanted a fence which would give Israel maximum defense. Obviously the fact that the Israeli High Court of Justice decided that 40 Kilometers of the route of the fence are illegal did not allow maximum security, because the Court balanced the need for security with human rights.⁹¹

He emphasized in particular that although there may appear to be tension between security and justice, in reality that is not always the case:

It seemingly hurt the "pure security interest," but at the end of the day there is no pure security interest because a democratic society must secure human rights, and the judgment therefore advanced the interests of the State. It advanced a more just society and less harm to Palestinians. This helps diminish their hostility to us and our fear from them. So what seemingly looks as something harmful to Israel's security is not harmful at all. . . .⁹²

Moreover, the decision of the court was important in the international realm:

In the international sphere it is also important that we have a court which balances between security and human rights. The International Court of Justice in The Hague decided that the Fence was illegal and the Israeli High Court of Justice scrutinized its decision and ruled that it was wrong. People from the academia agreed with the Israeli Supreme Court's decision. It is important in the international sphere because the Supreme Court conducted a detailed examination and checked every Dunam [a quarter of an acre, G.R.] of Palestinian land. Segments of the Fence, which did not reflect a

⁸⁸ *Id.*

⁸⁹ HCJ 2056/04, *Beit Sourik Village Council v. Israel* 58(5) PD 807 [2004].

⁹⁰ *Id.* (holding that certain segments of the route of the fence were illegal and should be changed, but at the same time, criticizing the ICJ for not giving enough weight to Israel's security needs, and for not taking the time to examine each segment of the fence individually).

⁹¹ Anonymous Israeli State Attorney Office senior official, *supra* note 66.

⁹² *Id.*

reasonable balance, were declared as illegal. The Palestinians also saw that they have a useful forum they can turn to. . . .⁹³

Most of the Israeli state and IDF attorneys I interviewed believed that the involvement of the Israeli High Court of Justice in cases concerning Palestinians in the West Bank is a very important factor in Israel's efforts to gain international support.⁹⁴ Yet, the Lieutenant Colonel, who served in different senior positions in the IDF, did not seem to look at the scope

⁹³ *Id.* Colonel Sharon Afek also seemed to believe that the Court's involvement was important in the international realm. I asked Colonel Sharon Afek if he recalled specific cases in which the involvement of the High Court of Justice, or the fear of its involvement, helped or hindered the achievement of military goals. He answered:

There are cases which had a meaningful influence. Like in the neighbor procedure: In operations in the West Bank the military used to go at times to the neighbor next door or to someone in the street and ask him to call the residents of the house to come out, so the soldiers would not be at risk. The High Court of Justice decided that this practice was illegal, and because of that there was a meaningful change in the military's actions The route of the Security Fence would have also been completely different if the Court had not intervened in this issue. All of the Israeli settlements until 1979 were established on private Palestinian lands. From 1979 on this practice was also changed due to the *Ayub* judgment. As for achievements, the Court does not give the military any tools which it does not have. The Court does not help the military achieve any goals. There are cases in which it decides not to intervene and does not prevent the state from doing something, but it does not give the state tools to do what it wants. *The only thing that the Court grants the state is legitimization from within and outside*

Afek interview, *supra* note 60 (emphasis added).

⁹⁴ In addition to the above interviews with Colonel Sharon Afek and the senior official from the Israeli State Attorney Office, who referred to this point, other interviewees also talked about the effect of the involvement of the Court on Israel's image in the world. The Brigadier General who formerly served as the IDF Military Advocate General also believed that the Court's involvement is important in the international sphere. I asked him about the effect of the Supreme Court's involvement in cases related to Palestinians residing outside of Israel on the general interests of the military and/or the State. He answered:

Security is not only the achievement of a certain military goal. Security which is not backed up by consensus and moral support could harm the military: it could result in fractions within the people; it may undermine the motivation of the military soldiers themselves; lead to criticism against the military and diminish its prestige in the eyes of the people. It may also result in damages in the international arena: it could affect the public opinion worldwide, the way foreign governments treat Israel and the relationship between Israel and the U.S.A

Anonymous former IDF Military Advocate General interview *supra* note 59.

David Yahav said in reply to the same question:

We are stressing the fact that all of the military's actions are subjected to the scrutiny of the Supreme Court in our Public Relations. There is no precedent to that in the world In general, the Court acts in the right balance. Its involvement has a general positive influence. Our military is more moral and has higher values because of the Court

Yahav interview, *supra* note 61.

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of the involvement of the Court in a favorable manner. I asked him what is the effect of the Court's overall involvement in cases concerning Palestinians outside Israel on the general interests of the military and/or the state. I also asked if he would recommend any changes in the current system. He replied:

In general, I would have expected the Court to intervene less in the interpretation or the application of the military's ethical code,⁹⁵ and would find it sufficient for it to advise the commanders what to do, rather than deliver obligating judicial judgments. This is what the Court does when it interacts with the legislator. It takes greater care when it interacts with the legislative authority. This is also what we should expect it to do when it interacts with the military. . . . I would expect the Court to give the military a chance to see through its internal inquiries and proceedings before it resorts to binding judicial rulings. The world would not change its views about the Court even if the Court finds it sufficient to give the military general guidelines rather than obligating rulings.⁹⁶

The concerns raised by the lieutenant Colonel seem to refer to the extent of the involvement of the Court. He would rather have the Court "advise the commanders what to do, rather than deliver obligating judicial judgments."⁹⁷ He further stated that:

If the Supreme Court declares something as illegal, it would allow international courts to follow its steps and also declare it as illegal. On the other hand, if the Court declares something as being legal, it would promote our interests since the Court enjoys high prestige in the world. I would prefer not to have either one of these scenarios. . . . I do not want the Court to be our shield. I would prefer it to only address cases that are actually relevant to it, and find it sufficient to deliver general guidelines when it comes to the military. The Military Advocate General should have the final say in these matters. When it comes to the Military Advocate General Office it is clear that it is easier for the military attorneys to claim that they are only doing what the Court instructed them to do. But if they do so, they will only be running away from their responsibilities. Instead of being responsible for their own judgments and decisions, they will transfer their responsibility to the Court.⁹⁸

Indeed, if the Court applies extraterritorial constitutional limitations to the acts of the legislature and executive, it may at times find that these branches have breached the constitution. But if a democratic and liberal

⁹⁵ For a description of the IDF's ethical code see *Ethics*, ISRAELI DEFENSE FORCES, <http://dover.idf.il/IDF/English/about/doctrine/ethics.htm> (last visited Mar. 12, 2012).

⁹⁶ Anonymous Lieutenant Colonel interview, *supra* note 63.

⁹⁷ *Id.*

⁹⁸ *Id.*

state believes that in most cases it acts in accordance with domestic constitutional law, as well as international law, and if it trusts its domestic courts to offer genuine and objective judicial review, it may find that such domestic constitutional limitations would be enabling in the long run. Domestic courts may have more access to relevant information than international courts. Furthermore, if domestic courts hear cases that are brought before them in good faith, and offer the petitioners real and prompt relief, international tribunals may find it unnecessary to intervene.⁹⁹ In this way, both the state and the petitioners benefit. Petitioners can find quick and appropriate relief from the domestic courts of the state that affected their rights. As I further explain in part IV of the article, domestic courts may also be more preferable than international courts from the perspective of the petitioners due to lack of enforcement mechanisms in international law. The state, on its side, could earn the support of the international community when its domestic courts prove that they are impartial and aware of the need to safeguard democratic values and human rights.

⁹⁹ For instance, Article 17 of the Rome Statute of the International Criminal Court states that the ICC shall not here a case which is already investigated or prosecuted by a State in a genuine manner:

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90.

These contentions obviously require empirical data and will not be resolved here.¹⁰⁰ However, it is important that democratic and liberal states are at least aware of this practical aspect of the extraterritorial question. A state, which believes that it acts in accordance to its domestic constitutional values and international law, may have an interest in subjecting its officials to constitutional judicial review by domestic courts in order to gain international support for its acts. However, as I further discuss in part V of the article, this would only be the case if both the state and the international community trust the state's domestic courts to offer genuine and objective judicial review.

International support is indeed important in legitimizing the effective governance of the state, but it is not enough in itself to allow the state to achieve its goals. Some of the officials I interviewed noted that even when non-citizens outside the state are involved, constitutional limitations safeguarded by domestic judicial review are important in order to gain support and legitimization from within.¹⁰¹

But why would the members of the state's political community care about the treatment of non-citizens on foreign territory? One can suggest various reasons that may lead the members of the state's political community to care about the way their representatives act beyond the state's borders, and the extraterritorial effect of domestic legislation. For example, they may fear that their own welfare could be affected if the rights of the non-citizens residing outside the state are violated;¹⁰² they may also be worried that if the executive acts in an immoral way beyond the state's borders, it might act in a similar manner within the state's borders; or they may care about the welfare of fellow human beings abroad for purely moral reasons, even if their own welfare is not at stake.¹⁰³

¹⁰⁰ The question of the appropriate scope of involvement of the Court is further addressed in the following sections of this article. See *infra* notes 153-165 and the text accompanying them. **R**

¹⁰¹ Anonymous Ministry of Justice senior official interview, *supra* note 64 **R**

¹⁰² Posner argues, however, that this argument is speculative and that there is no indication that this would indeed be the case. See Posner, *supra* note 6, at 43-44 (contending that there is no reason to believe that Americans would benefit as a result of the Court's grant of habeas protections to noncitizens in Guantanamo Bay, referring to the United States experience with reciprocal rights in the past: "[w]hat exactly did they receive in return for giving up the juvenile death penalty? Europeans seem no more inclined to adopt American religious freedoms than in the past – and would we really gain if they did?"). **R**

¹⁰³ We can refer again in this regard to the interview with the senior official from the State Attorney Office. As noted *supra*, notes 91-93 and the text accompanying them, I asked the senior official from the Israeli State Attorney if he recalls specific cases in which the involvement of the Supreme Court, or the fear of its involvement, have hindered the achievement of important goals of the State, or alternatively helped achieve important goals. He answered: **R**

Some of the officials I interviewed indeed emphasized that the government would not be able to effectively exercise its powers if the members of the state's political community believed it acted in an immoral way towards foreigners beyond the state's borders. If the members of the political community feel that their government acts in an immoral way they may refuse to cooperate with the government's acts. There is also a risk in such cases that fractures within the society may appear. When I asked Major General Mandelblit about the impact of the Court's involvement in cases regarding Palestinians outside of Israel on the interests of Israel, he answered:

I do not see anything that needs to be changed. . . . My mind is determined in this regard. There should be judicial review over the acts of the IDF. The IDF is part of Israeli society and an organ of the state. What bothers the Court's judges also bothers the citizens of the state. That is "beautiful Israel."¹⁰⁴ Would "beautiful Israel" not want judicial review? That is unheard of. When we think of an army in a democratic society we understand that it is justified to have judicial review over the IDF. Even in the operational aspect, it is important that the army receive legitimization from within and outside. This is a utilitarian consideration which is also important to the IDF, even though I see it as a less significant consideration.¹⁰⁵

I can give as an example the Beit Sourik judgment It seemingly hurt the "pure security interest," but at the end of the day there is no pure security interest because a democratic society must secure human rights, and the judgment therefore advanced the interests of the state. It advanced a more just society and less harm to Palestinians. This helps diminish their hostility to us and our fear from them. So what seemingly looks as something harmful to Israel's security is not harmful at all. After the Court's judgment the IDF changed the route of the fence in a way that diminished the harm that was caused to the Palestinians and occupied less land. When the new route was brought before the Court the Court approved it. This is a good example of the fact that we can achieve reasonable security while causing less harm to human rights. That is more important to the public's interest than maximum security with no human rights.

Anonymous Israeli State Attorney Office senior official, *supra* note 66.

¹⁰⁴ The phrase "Beautiful Israel" is sometimes used in Israel to refer to an ideal Israel.

¹⁰⁵ Mandelblit & Gurtler interview, *supra* note 56.

The Brigadier General who formerly served as the IDF Military Advocate General stated in reply to the same question:

Security is not only the achievement of a certain military goal. Security which is not backed up by consensus and moral support could harm the military: it could result in factions within the people; it may undermine the motivation of the soldiers themselves, lead to criticism against the military and diminish its prestige in the eyes of the people The more the military is involved in actions which may be perceived as questionable, the more damage could be caused to it. As a result it is actually the good soldiers who may refuse to join the military because of that. The military may have conflicts with the élites in Israel, and its image in

David Yahav also believed the Court's involvement was important in terms of Israel's internal moral values. I asked Yahav if he recalled any specific cases in which the involvement of the Supreme Court, or the fear of its involvement, affected the achievement of military goals. He answered:

I assume that there will be some who will argue that if it were not for certain judgments of the Court we could have reached more military achievements. I do not know if this is true. On the other hand, there is no doubt that the Supreme Court's judicial review makes us a more moral society with values. In most cases the Court did not prevent us from doing what we needed to do. Perhaps it made things more difficult for us and restricted us, but nothing beyond that. On the other hand it helped shape the military's values and battle morals.¹⁰⁶

Yahav's answer perhaps demonstrates that the members of the Israeli political community may care for purely moral reasons about the way non-citizens are treated abroad. If this is indeed the case, the state has practical reasons to act in a moral way towards non-citizens abroad in order to gain the support of its own people.

The members of the political community may also fear that if the state officials violate the constitution's safeguards when they act abroad, they will end up violating the constitution when they act within the state's borders.¹⁰⁷ Jeremy Waldron referred to this point with regard to the ongoing

the eyes of the public will suffer because of it. This would result in fewer people who are willing to become officers, and in a military that would not be as good as it could be. It may also result in lower budgets for the military, a deterioration of the military's relationship with other armies, less military assistance from foreign armies and less economic assistance from other countries in the world. All of this may harm the state's security. Therefore, it is important that a moral military abides by international and domestic law and is subject to the supervision of the Supreme Court of the country Even if in the short term it looks like the Court's decisions hurt the military, those are only minor tactical losses. Overall, the decisions of the Court do not reach the level of damage which could otherwise be caused to the military, to the willingness of the people to join the military and become officers in it, and to the motivation of the soldiers themselves.

Anonymous former IDF Military Advocate General interview *supra* note 59.

¹⁰⁶ Yahav interview, *supra* note 61.

¹⁰⁷ See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1740-41 (2005) [hereinafter Waldron, *Torture and Positive Law*]; Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law*, 22 EUR. J. INT'L L. 389, 341-342 (2008) [hereinafter Waldron, *Sovereigns*]. See also Jules Lobel, *The United States Constitution in its Third Country: Foreign Affairs: Rights - Here and There: The Constitution Abroad*, 83 AM. J. INT'L L. 871, 873 (1989) ("We require the Government to conform to the constitutional command whenever and wherever it acts because we recognize that the domestic order cannot be insulated from the international arena. Condonation of

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war on terror: “Do not imagine that you can maintain a firewall between what is done by your soldiers and spies abroad to those they demonize as terrorists or insurgents, and what will be done at home to those who can be designated as enemies of society.”¹⁰⁸

The fear of the penetration of immoral values into one’s own society, if aliens abroad are treated in an immoral way, is especially strong in situations like the ongoing war on terror, in which it is more difficult to distinguish between war and peacetime.¹⁰⁹ We are now witnessing more and more ongoing battles, with no clear end, where the line between the home front and the battlefield is constantly blurred.¹¹⁰ It is in these situations that the extraterritorial question often arises: situations of ongoing occupation or effective control in remote areas.¹¹¹

When the extraterritorial question arises in criminal cases during peacetime,¹¹² it seems even more difficult to draw a clear line between the way we treat people from within and people from outside, unlike situations where enemies of the state are involved.¹¹³

For that reason, the members of the state’s political community may want to ensure that state officials act in a moral way towards people beyond the state’s borders. By subjecting themselves to the constitution’s limitations even when dealing with individuals beyond the state’s borders, the state’s officials signal to the members of their own political community that they have no reason to fear their behavior within the state’s borders.

governmental torture or other misconduct against aliens abroad will inevitably lead to toleration of unconstitutional action at home.”). *See also* in the context of the war on terror, Paul B. Stephan III, *Constitutional Limits on the Struggle against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 CONN. L. REV. 831, 848-49 (1987) (examining the possibility that if American agents learn to use torture abroad, they may not be controlled once they leave their service).

¹⁰⁸ Waldron, *Torture and Positive Law*, *supra* note 83, at 1740-41. *See also* David Cole *Symposium: Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2589 (2003) [hereinafter Cole, *Symposium: Judging the Next Emergency*] (“Once the political process has ratified a particular extralegal emergency action, officials will be able to point to that precedent as justification for their own subsequent actions.”).

¹⁰⁹ *Id.*

¹¹⁰ *See, e.g.,* HOLMES, *THE MATADOR’S CAPE*, *supra* note 17, at 302 (“In the war on terror . . . the foreign front and the home front have become harder to distinguish As a result, the president’s war powers, if grotesquely distended and freed from oversight . . . threaten to overwhelm and submerge the Constitution, not just abroad but also domestically.”).

¹¹¹ *See infra* cases accompanying note 153.

¹¹² *See infra* cases accompanying note 144.

¹¹³ *See, e.g.,* Johnson v. Eisentrager, 339 U.S. 763 (1950) (addressing the rights of enemy combatants abroad).

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The argument can be conceived as a type of slippery slope argument: If state officials start acting in a certain manner when they cross the state's borders, soon they would act in a similar manner inside the state's borders, and nothing would stop the acceleration towards a non-moral society.¹¹⁴

Posner and Vermeule call slippery slope arguments "cheap – easy to make but hard to make persuasively."¹¹⁵ Indeed, the above argument, like most of the arguments brought in this part of the article, requires empirical evidence. When it comes to enabling limitations meant to secure the state's power, the empirical evidence needed does not necessarily pertain to the fact that the slope is truly slippery. Rather, we may need evidence of the fact that the members of the political community *fear* that the slope is slippery. If they indeed feel that way, they might want to restrict the state's acts abroad, even without empirical support for their fears.

In addition to these reasons for members of the political community to care about the way their government treats foreigners abroad, members of the community may also have good reasons to believe that their own welfare is affected by the way foreigners outside the state are treated. Posner and Vermeule adopt a utilitarian view that focuses on the welfare of the United States' political community.¹¹⁶ However, they describe possible ways in which the welfare of aliens within the United States may nevertheless indirectly be taken into account when we try to secure the welfare of members of the United States' political community in times of emergency.¹¹⁷ They argue that we have fewer reasons to worry about discrimination against aliens within the United States than we may be inclined to believe. This is because their welfare is actually a component in the welfare of the voting majority in the country.¹¹⁸ This proposition can be seen in several ways: First, "the voting majority wants foreigners to come to its country – as tourists, who consume goods and services; as students, who pay tuition; and as employees, who bring needed skills. . . . If states regularly discriminate against aliens, people will be less likely to come."¹¹⁹ Second, "recent immigrants maintain family and ethnic ties to aliens and object when these aliens are subjected to governmental discrimination."¹²⁰ Posner and Vermeule note that although aliens cannot vote themselves, their friends or family often can, and through these

¹¹⁴ *Id.* at 795-96 (Black, J., dissenting).

¹¹⁵ See POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 13, at 156.

¹¹⁶ *Id.* at 124 ("It is uncontroversial that the U.S. government has much less responsibility over the welfare of aliens living in foreign countries than it has over American citizens, here and abroad.").

¹¹⁷ *Id.* at 124-25.

¹¹⁸ *Id.* at 125.

¹¹⁹ *Id.*

¹²⁰ *Id.*

mechanisms of virtual representation aliens receive a degree of political influence.¹²¹ Third, “members of the voting majority travel abroad, becoming aliens in other countries, and they know that their good treatment in foreign countries depends on the good treatment of aliens in the United States.”¹²² Although Posner and Vermeule refer to aliens within the United States, all of the above mentioned reasons seem to be applicable to aliens outside the United States.¹²³

The question, however, is whether we trust the government to take into account the interests of aliens abroad without constitutional limitations.¹²⁴ Should we not let the legislative and executive branches decide for themselves when and how their acts beyond the state’s borders would influence the welfare of the state’s political community? When examining the possibility of reciprocal extraterritorial rights, Posner argues that governments have an electoral incentive to take into account the altruistic interests of their citizens.¹²⁵ Posner further contends that “unilateral action by courts to grant unreciprocated benefits to non-citizens simply weakens the bargaining power of their own government.”¹²⁶

It can also be argued that even if members of the political community care for various reasons about the way the state treats non-citizens abroad, they may still prefer their own interests over those of foreigners abroad. A possible answer is that the scope and extent of rights granted to non-citizens outside the state do not have to be identical to the scope and extent of citizens’ rights. In this way we may give priority to citizens’ interests while still granting rights to non-citizens abroad. Domestic courts would be able to balance conflicting interests in order to make

¹²¹ *Id.*

¹²² *Id.*

¹²³ Indeed, Posner acknowledges elsewhere the possibility that Americans may have interests in the welfare of people abroad. However, he does not believe that this implies a constitutional role for the judiciary. *See* Posner, *supra* note 6, at 43 (describing intrinsic and instrumental reasons for the members of the political community to care about the welfare of individuals abroad); *see also* Stephan, *supra* note 107, at 848-49 (noting that in order to lessen the chance that Americans, whether overseas or at home, could become victims of certain conducts, we might demand that no one in our government engage in that conduct. Moreover, acquiring a reputation for fair dealing and fundamental decency could increase the United States’ prestige and influence overseas, enhancing the well-being of its society).

¹²⁴ *See* POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 13, at 125-26 (arguing that the fact that the welfare of aliens is itself a component of the welfare of the voting majority is sufficient to ensure that governments do not treat aliens much more harshly than they do their own citizen).

¹²⁵ *See* Posner, *supra* note 6, at 43.

¹²⁶ *Id.* at 43-44.

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sure that the interests of foreigners do not come at the expense of the state's political community.¹²⁷

We need to determine whether we indeed trust the government to take into account the interests of aliens abroad for the benefit of its own political community. Holmes shows us that “limits can well be enabling because they are disabling.”¹²⁸ The question is whether we believe that the executive and legislature would impose upon themselves such limitations when they act abroad. Constitutional division of powers may reduce the risk of poor decisions from an unchecked legislature and executive.¹²⁹ Domestic judicial review, especially in emergency times, may ensure that the rights of individuals abroad are not scarified.¹³⁰ This may ultimately enhance the power of the state by allowing it to gain national and international support.

¹²⁷ See, e.g., Burnett, *supra* note 2, at 1027 (arguing that we need to first decide whether constitutional guarantees should apply abroad, and only then determine how they should be enforced. “[T]he same distinction between whether and how should play a central role in the territorial and extraterritorial cases.”).

¹²⁸ See HOLMES, *PASSIONS AND CONSTRAINTS*, *supra* note 17, at 109.

¹²⁹ See HOLMES, *THE MATADOR'S CAPE*, *supra* note 17, at 286-7.

¹³⁰ See, e.g., David Cole, *Symposium: Judging the Next Emergency*, *supra* note 108, at 2590 (“[T]he public and their elected representatives are especially prone to overreaction during times of crisis. The public is easily scared, and quick to approve of security measures launched in its name Their elected representatives know that, and vote accordingly. Indeed, the very reason that we adopted a Constitution was that we understood that the people and their representatives would be tempted to violate basic principles in times of stress.”); Christina E. Wells, *Symposium: Interdisciplinary Perspectives on Fear and Risk Perception in Times of Democratic Crisis - Questioning Deference*, 69 *MO. L. REV.* 903 (2004). Wells examines the role of courts from a psychological perspective. She argues that “in times of crisis, government actors can err by misperceiving that certain groups pose a danger or by acting on the erroneous perceptions of others. Occasionally, they might even fan the flames of such misperception to obtain public support for their own agendas [H]istory . . . suggests that, contrary to the claim of proponents of judicial deference, executive officials are not inherently adept at assessing or reacting to national security threats.” *Id.* at 908. Wells therefore suggests that “opponents of deference are correct to push for more rigorous judicial review.” *Id.* She further contends, “Research shows that people who know they will be accountable reach better-reasoned decisions Judicial review . . . can serve as a mechanism of accountability, thus improving executive branch decision making in times of crisis.” *Id.* See also Aharon Barak, *Foreword – A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *HARV. L. REV.* 16, 40 (2002) (“The need for judicial review is less intense when one can rely on the self-restraint of the majority. This is apparently the situation in the United Kingdom. The Human Rights Act – an ordinary statute – allows judges to hold legislation incompatible with it, without authorizing them to void the incompatible legislation Personally, however, I am skeptical. In hard situations, like terrorist attacks or other emergencies, this self-restraint is unlikely to suffice.”).

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3. Improving Mechanisms of Decision Making

In this section I present an additional enabling aspect of constitutional limitations: the possibility of improving the state's decision-making processes. This enabling aspect of the constitution's limitations helps us understand why such limitations should be imposed on the state, and not left to its discretion. I demonstrate the importance of this aspect of the constitution's limitations in the extraterritorial context.

If we seek to determine whether we need to impose constitutional limitations on the state, we need to explore the ability of constitutional limitations to improve mechanisms of decision making. If we view constitutional limitations as an impediment to state officials' power, we may have good reason to give more deference to the legislative and executive branches' estimation of the long-term effects of their actions on their own subjects. But if we also pay attention to the enabling aspect of constitutional limitations, we can understand why such limitations are also necessary to ensure that the state authorities make the right choices, i.e., choices that would promote the interests of their citizens in the long run. By allowing domestic courts to supervise and monitor extraterritorial actions of the state, we can make sure that the government's decisions are subjected to constitutional supervision for the benefit of the state's political community.¹³¹

Even if the state has electoral incentives to take its citizens' long-term interests into account when it acts abroad, it may make poor judgments when its actions are not subjected to constitutional judicial review. The temptation to act without restraint may be especially strong when non-citizens beyond the state's borders are concerned. The state may not always realize that it could lose the support of its own people, and perhaps even harm the welfare of its people, if it does not adhere to domestic constitutional limitations abroad. Extraterritorial constitutional limitations, safeguarded by domestic judicial review, might allow us to guarantee that the legislature and executive abide by the constitution's limitations and take all relevant considerations into account, even when they act on or affect people outside the state's borders. Extraterritorial constitutional limitations could also prevent, as Holmes notes, the perpetuation of mistakes "long after they could have been profitably corrected."¹³² If the executive is not compelled by the courts to give plausible reasons for its actions "it may end up having no plausible reasons for its actions. . . . It will not establish an intelligent list of priorities,

¹³¹ See HOLMES, *THE MATADOR'S CAPE*, *supra* note 17, at 233, 287, 300-01 (stressing the need for judicial review and supervision of the legislature in order to make sure that the executive does not make arbitrary decisions, and that its mistakes are corrected by the other two branches).

¹³² *Id.* at 300.

keep its powder dry, or allocate scarce resources in a prudent and effective manner.”¹³³

It is interesting to examine here what the Israeli state officials I interviewed thought about the involvement of the courts in their extraterritorial decisions and acts. It may elucidate the possible ways in which the imposition of limitations on the state can actually benefit the state. For instance, I asked the Brigadier General who formerly served as the IDF Military Advocate General what is the effect of the overall involvement of the Supreme Court in cases related to Palestinians residing outside of Israel on the general interests of the military and/or the state. He answered:

The Supreme Court helps the military act according to the law. The military itself seeks to abide by the law, and the Court helps it do so. Still, the military has missions which it has to perform. Without the fear of the Supreme Court it may find itself on a slippery slope; it may start with small infringements and end up with large infringements. A problematic situation may result with problematic discretion on the part of the military's commanders. It is important that the military's commanders know that there is an authority outside the military, which can overrule their decisions. It is also important for the IDF's Attorney General. It is important to the IDF's Military Advocate General that the commanders know that their decisions may be overruled by the Supreme Court. There is no commander who would want the Supreme Court to openly declare that he acted with ill discretion. There are certain borderline cases which are problematic. It is important that there is an external body which can prevent the system from getting into trouble in advance and not after years of acting illegally. . . .¹³⁴

Colonel Sharon Afek said in reply to the same question:

I can tell you my personal view in this matter. I think it is a positive thing that the Supreme Court checks the way the state acts towards Palestinians. *It makes the system conduct a better balance between security considerations and other considerations, and that is a good thing. I think that if the Supreme Court would not have been involved in these cases the system's decisions would have been less balanced, so this is a good thing for the state.* It is difficult for me to estimate the influence of this on the Court's prestige, because it requires it to address complex matters without clear solutions. It is not comfortable for it to hear a lot of these cases, and it is also subjected to criticism from people in Israel and abroad who claim that it legitimizes a lot of these cases. But I think that overall this is a good thing for the system, which would help it in the long run. Some people think that

¹³³ *Id.*

¹³⁴ Anonymous former IDF Military Advocate General interview *supra* note 59.

the Court intervenes in too many cases, but as someone who has been part of the system for years, I think that this is not true, and that the Court's involvement in these things is a positive thing. *I think that in general the Court's involvement is a positive thing. The military has a great interest in having its actions and decisions scrutinized by the Court.*¹³⁵ (emphasis added)

I also asked the officials I interviewed if they think that there is a difference between the balance of interests found by IDF commanders and that struck by the judges of the High Court of Justice, and if they believe the Court follows clear legal standards or balances between security and other considerations. Major General Mandelblit, the IDF's current Military Advocate General, stated in this regard:

It is a mixture of the two. The Supreme Court always balances between security considerations and other considerations, which usually include human rights, which must also receive its appropriate weight. This is something that in my vision helps me and makes me stronger. The commanders mostly understand this, but there are also some who do not understand this, and think that the Supreme Court should be weakened.¹³⁶

Most of the state officials and IDF attorneys I interviewed seemed to believe that, as an adversarial forum, the Court can establish a more objective balance between conflicting considerations and take into account considerations that military commanders might overlook.¹³⁷

¹³⁵ Afek interview, *supra* note 60.

¹³⁶ Mandelblit & Gurtler interview, *supra* note 56.

¹³⁷ I asked Colonel Sharon Afek, for example, if he thinks that there is a difference between the balance of interests found by IDF commanders and that struck by the judges of the High Court of Justice, and if he believes the Court follows clear legal standards or balances between security and other considerations. Colonel Afek said in reply:

There is obviously a difference between the balance considered by the commanders and that considered by the Court. In the case of the neighbor procedure, the military thought we could get assistance from Palestinians in certain actions, while the Court thought that the balance between the rights of the Palestinians and other considerations was wrong. The Court does not examine what it would have done if it were in the shoes of the military commander. It examines whether the commander's decision exceeded reasonable limits. In most cases the Court does not come to that conclusion, but in some instances it does conclude that, and overrules the commander's decision. The IDF is the military commander, the administrative authority, and the legislature in the West Bank. It is therefore easy to reach decisions that do not take into account all the relevant considerations. The involvement of the Court therefore has a positive, balancing and restraining effect, which brings more considerations into the picture. If tomorrow the Court were to decide not to intervene any more in cases relating to Palestinians, I think that the decisions of the military commanders would not be as good, as a result.

Afek interview, *supra* note 60.

However, the two IDF officers who served in the past at the front had a somewhat different view in this regard. The Lieutenant Colonel, who served in in different senior positions in combat units in the IDF, replied in response to the above question:

I think that at the end of the day the commander on the battlefield worries first and foremost about the lives of his soldiers. The factors that he takes into account are different from the factors the Court takes into account. The Court sits in a nice chamber, without any pressure, or fire that is headed in its direction. It is obvious that the

David Yahav offered the following answer:

The mere fact that security matters can be subjected to the Court's scrutiny led the military to examine itself over and over again. The military knew that every one of its actions could be examined by the Supreme Court, and it therefore constantly examined itself. It took more care and precautions as a result. The Court's involvement influenced the military in its daily actions

Yahav interview, *supra* note 61.

I also referred the same question to the senior official from the Ministry of Justice. He answered:

As for whether there is a difference between the balance of interests conducted by the Court, and that conducted by the military's commanders, the answer to this question is complex. The military's commanders are not all the same. A military commander first and foremost wants to fulfill his mission: to achieve security and protect the state. He has a basic duty. He is supposed to consider as part of his job other considerations, but like all other administrative authorities he also has his own aims. His first aim is to ensure security. The more the circle gets wider, we have lawyers from both sides of the fence and more considerations are added. When it comes to the Court it must be adversarial. It is different than the procedures that take place in a governmental office. Obviously because of that the Court has to be more balanced. At the end of the day the executive has a certain goal, but the Court conducts a somewhat different balance. It puts more emphasis on human rights than other governmental or legislative branches.

Anonymous Ministry of Justice senior official interview, *supra* note 64.

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The senior official I interviewed in the Israeli State Attorney Office said in reply to the same question:

There are general standards, but at the end of the day, just like in every case, every matter is examined on its own merits. No one is immune from making mistakes. Anyone who has power may take advantage of it. There may also be a case in which the commanders would give too much weight to security considerations. Part of this can be stopped at the Military Advocate General Corps. The mere existence of the Supreme Court prevents unbalanced things from occurring. Sometimes even before a judgment is delivered, the executive authority decides to change its previous decisions following the judges' comments during the hearing. Some cases end in settlements which the State Attorney office initiates, and in some cases the state's authorities change their minds following the comments the Court makes during the hearing of the case. As a result there are relatively only a small number of judgments which void the decisions of the executive. The military authorities listen to the judges' comments during the hearing of cases, and sometimes change their policy following the judges' comment even before a judgment is delivered. An actual judgment thus often becomes redundant.

Anonymous Israeli State Attorney Office senior official, *supra* note 66.

factors that it takes into account are different from those that the commanders take into account. The commander's first priority is to take care of his soldiers and bring them home safely, and to fulfill his assignment. The considerations he takes into account are different from those of the Court. The military's rules are very strict. We are taught that it is better to spare the lives of citizens than to kill them, even at the risk of harming your own soldiers. This is very significant. It does not exist in any other military. It is taught in basic training throughout all commanders courses. . . .¹³⁸

When I asked the same officer if he thinks cases that come before the High Court of Justice come to end in a reasonable amount of time or not, he also commented on his general feeling about the involvement of the court in the IDF's acts. It is interesting that although he thought the as a general matter, the Court should not intervene in the acts of the military, on a more personal level he did not seem to mind the involvement of the Court:

In my opinion, the IDF always examines itself according to the military's ethical code, and the modern judgments we see nowadays are only a small part of this process. The IDF commanders are being taught to act according to the Ethical code of the IDF when they go through the military officers' course. There is no need for the Court in order to allow things to penetrate to all levels of the military. . . . The ethical code is based on humanism, the Jewish faith in the sanctity of life and the international law. The Court's interference often harms the military. But as an officer I was happy that the Court intervened. I did not have any problem with the fact that there was another external body who supervised the IDF's use of fire. At the end of the day the commander is the one deciding, not the military attorney. But I do not remember any incidents in which we did not adhere to the military attorneys' advice. As far as the operations that I supervised are concerned, there was no incident in which the Court delayed any actions. But commanders who used the neighbor procedure were affected by the Court's involvement. Other than the Court's ruling in the neighbor's procedure I do not remember anything dramatic.¹³⁹

A common argument against the involvement of the Court in extraterritorial cases relates to the appropriate division of labor among the executive, legislature, and the judiciary.¹⁴⁰

¹³⁸ Anonymous Lieutenant Colonel interview, *supra* note 63.

¹³⁹ *Id.*

¹⁴⁰ See generally, e.g., John C. Yoo, *Judicial Review and the War on Terrorism*, 72 *GEO. WASH. L. REV.* 427, 428-29 (2003) ("The Constitution does not give the federal courts a role in reviewing the initiation of hostilities because it has directly vested the authority to make that decision in the political branches This is not to say,

General Yishai Beer, who served as a commander in various IDF units referred to the division of labor question during his interview:

I should first say that from an institutional standpoint the legal system in general, and courts in particular have an institutional role in criticizing the conduct of the Military (as any other administrative body). It is obvious that this role should be maintained. There is not – and there should not be – any military conduct which is immune from public-legal criticism. My criticism relates to the current division of labor, in which the external systems take it upon themselves, sometimes against their own interests, a different role than the one which they were meant to have. In this manner they cause harm to themselves as well as the IDF. My original standpoint is that the law . . . is shallow when it comes to setting the standard of behavior of individuals and institutions. In my view, morality and ethics set a higher standard for human conduct, while the law sets a lower standard. This is the case in internal state matters (in which the criminal law sets a lower standard for human behavior. A standard which only defines what is a crime, while the moral rules set a normative standard of how one should act). This is always the case in international matters. The laws of war only set a minimal standard, while morality sets the desired standard. Since ethics concerns human dignity – e.g. in the IDF's ethical code of conduct human dignity is a central value – it is very close to constitutional law, which perceives human dignity as the source of rights and as a compass for balancing between rights. . . .¹⁴¹

however, that the courts are completely ousted from any case involving war [J]udicial review may apply to domestic wartime measures, but in a manner that provides options to the political branches for the conduct of the war, rather than simply serving as a negative check on government action.”); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2679 (2005) [hereinafter Tushnet, *Controlling Executive Power in the War on Terrorism*] (“[J]udges have proven extremely deferential to actions taken by the political branches, and their deference to the political branches in national security matters is entirely predictable. Judges rarely have the background or the information that would allow them to make sensible judgments about whether some particular response to a threat to national security imposes unjustifiable restrictions on individual liberty or is an unwise allocation of decisionmaking power.”). See also Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 YALE L.J. 1011, 1042 (2003) (describing different possible constitutional models of emergency powers).

¹⁴¹ Beer interview, *supra* note 62.

The Lieutenant Colonel, who served in different senior positions in combat units in the IDF, also referred to the division of labor question in his interview. I asked him how the involvement of the High Court of Justice in cases concerning Palestinians affected the role of IDF commanders. He answered in reply:

The debate over the appropriate division of labor among the executive, legislature and the judiciary in extraterritorial cases is, of course, not new. It often comes up in the context of the war on terror.¹⁴² However, it may also be relevant in extraterritorial cases in peaceful times.

At this point, it is important to distinguish between the different situations in which the extraterritorial question arises. In some cases the division of labor argument, like other relevant practical considerations, may be more dominant than other cases.

C. *Additional Practical Considerations in Different Cases in Which the Extraterritorial Question Arises*

The extraterritorial question arises in many situations. Thus far, I considered general practical reasons for a state's political community to set extraterritorial (enabling) constitutional limitations on the state's authorities. I submitted that extraterritorial limitations can be enabling when either citizens or non-citizens abroad are concerned. However, the enabling aspect of the constitution's limitations will not always dominate.

When examining whether constitutional limitations can be enabling in the extraterritorial context, we need to take into account the potentially enabling functions of extraterritorial limitations that we have mentioned

There is a feeling that the system does not protect you as much as it used to. If one thinks that it is a closed system, and that things will stay within the system, this is not the case. The Court often even intervenes in matters under the supervision of the Military Advocate General, and instructs him to take certain steps against IDF soldiers. This creates an unpleasant atmosphere. The soldiers are not backed up by the military. There is a problem here with the separation of powers. The Military Advocate General is the one who is supposed to intervene in such matters, not the High Court of Justice. We follow certain codes, and we do not deviate from these codes. We do not need the Court for this purpose. We know what needs to be done. We have no interest in the involvement of the Court. The Court's involvement does not influence the activity of the simple soldier or the military commander in the battlefield. Perhaps it influences the considerations of the higher ranked commanders. But it does not influence the simple soldier's considerations

Anonymous Lieutenant Colonel interview, *supra* note 63.

¹⁴² The question of judicial review in times of emergency has been widely addressed by commentators. *See, e.g.*, Tushnet, *Controlling Executive Power in the War on Terrorism*, *supra* note 140; Wells, *Supra* note 130; Robert J. Pushaw, Jr., *Symposium: Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959 (2004); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, *supra* note 47; Cole, *Symposium: Judging the Next Emergency*, *supra* note 108; Mark Tushnet, *Defending Korematsu: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003); Gross, *supra* note 140; Anthony Lewis, *Civil Liberties in a Time of Terror*, WIS. L. REV. 257 (2003); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); Norman Dorsen, *Here and There: Foreign Affairs and Civil Liberties*, 83 AM. J. INT'L L. 840 (1989); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1409-12 (1989).

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thus far, i.e., gaining international and internal support and improving mechanisms of decision-making. In addition, we need to consider counter arguments. For example, the ability of domestic courts to conduct judicial review in the novel situations in which the extraterritorial question often arises; the “technical” ability of the executive to adhere to constitutional limitations beyond national borders, including possible lack of resources and different circumstances existing abroad (especially when acting in a hostile foreign country); and the overall ability of the executive and legislative branches to carry out their missions abroad when subjected to domestic constitutional limitations. I next explore these considerations in some of the more common circumstances in which the extraterritorial question arises.

1. Extraterritoriality During Peaceful Times

The enabling aspect of the constitution’s limitations during regular peaceful times seems to have been especially neglected by commentators addressing the extraterritorial question.¹⁴³ Most often, these are criminal cases in which people residing outside a state are investigated or arrested by its officials on foreign sovereign territory and brought to trial inside the former state.¹⁴⁴ There is currently no common framework to address the extraterritorial question within these criminal cases. The judiciary

¹⁴³ Perhaps this is because the discussion over judicial deference, and the advantages and disadvantages of constitutional restrictions, seems more acute during emergency times. Cf. Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 3 (2003) [hereinafter Cole, *The New McCarthyism*] (“[T]he criminal process, with its rights to counsel, confrontation of adverse witnesses, public trial, and the presumption of innocence, undoubtedly makes preventive law enforcement more difficult. Accordingly, in times of fear, government often looks for ways to engage in prevention without being subject to the rigors of the criminal process.”).

¹⁴⁴ See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-66 (1990) (holding that the Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in foreign country); *R. v. Cook*, [1998] 2 S.C.R. 597, para. 42 (Can.) (applying the Canadian Charter of Rights and Freedoms to an investigation of an American citizen by Canadian officials in the United States, based on the nationality of the Canadian law enforcement authorities who interviewed Cook); *R. v. Hape*, [2007] 2 S.C.R. 292, paras. 45-52 (Can.) (holding that the Canadian Charter does not apply to a search conducted by Canadian agents in the office of a Canadian citizen in the Turks and Caicos Islands, but only applies in circumstances in which there is an explicit consent to such a step by the state in which the Canadian officials acted, and that deference to foreign states “ends where clear violations of international law and fundamental human rights begin”).

around the world (and sometimes within the same state) approaches these cases in very different ways.¹⁴⁵

The temptation to arrest and convict suspects who reside outside the state without granting them any constitutional protection may eventually harm the state's interests. It may harm the welfare of the people in the state in the ways described above.¹⁴⁶ It may also result in the conviction of innocent people, while allowing the guilty to continue to pose a risk to the state. The constitution's restrictions may insure that decisions relating to the criminal process are not taken lightly just because individuals abroad are concerned.¹⁴⁷

¹⁴⁵ For example, the circumstances in *Verdugo-Urquidez*, *Cook*, and *Hape* were very similar (the circumstances in *Verdugo* and *Cook* were especially similar as *Verdugo* was not a U.S. citizen, and *Cook* was not a Canadian citizen. *Hape*, in contrast, was a Canadian citizen). All of these cases concerned criminal investigations lead by state agents on foreign land with the cooperation of officials of the hosting state. See *Verdugo-Urquidez*, 494 U.S. 259, 262; *Cook*, 2 S.C.R. 597, paras. 2-7; *Hape*, 2 S.C.R. 292, para. 1. Despite the similarity between these cases, the court in each case took a very different path. In *Verdugo* the Court interpreted the text and history of the United States Constitution, holding that the Fourth Amendment does not extend to a search conducted outside the United States that involves an alien with no substantial connections to the United States, even when the search is performed by U.S. authorities. *Verdugo-Urquidez*, 494 U.S. 259, at 265-67. In contrast, the courts in *Cook* and *Hape* chose to refer to international law in order to determine whether the Charter should apply beyond Canada's borders: The Court in *Cook* allowed an extraterritorial application of the Canadian Charter based on the Canadian nationality of the state officials who interviewed *Cook*. However, the Court cautioned that "the holding in this case marks an exception to the general rule in public international law discussed above that a state cannot enforce its laws beyond its territory." (emphasis added) *R. v. Cook*, [1998] 2 S.C.R. 597, at para. 53. The Court in *Hape* held that the Charter only applies in circumstances in which there is an explicit consent to such a step by the state in which the Canadian officials acted. However, deference to foreign states "ends where clear violations of international law and fundamental human rights begin." (emphasis added) *R. v. Hape*, [2007] 2 S.C.R. 292, at pra. 45-51. The Court in *Hape* stressed that "[i]n interpreting the scope of application of the Charter, the Court should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction." *Id.* at 56.

¹⁴⁶ See Posner, *supra* note 6, at 43 (elaborating on intrinsic and instrumental reasons for citizens to care about individuals abroad). Cf. POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 13, at 125 (presenting the ways in which the welfare of foreigners within the state may affect the welfare of the members of the community).

¹⁴⁷ Wells, *supra* note 130, at 908 ("Psychologists describe the phenomenon of accountability as the expectation that one may have to justify one's actions as sufficiently compelling or face negative consequences. Research shows that people who know they will be accountable reach better-reasoned decisions and avoid many of the problems that lead to skewed risk assessment."); Cole, *The New McCarthyism*, *supra* note 143 (arguing that when the government invokes administrative processes

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A practical argument in opposition is that the judiciary does not have enough information about what happens beyond the state's borders.¹⁴⁸ But surely the executive can deliver such information to the judiciary in peaceful times.¹⁴⁹ As we have seen, some commentators and courts addressing the extraterritorial question also argue that the executive may lack the resources required to adhere to all constitutional requirements when acting abroad due to the different circumstances on foreign territory.¹⁵⁰ But at least in peaceful times and in cases where the state's officials cooperate with the officials of the state in which the suspect is arrested, one can expect that such technical difficulties could be overcome in today's global world.¹⁵¹ In addition, the judiciary could take such differences into account when balancing between relevant conflicting interests.¹⁵²

In order to avoid the guarantees associated with the criminal process “[i]n hindsight, these responses are virtually always considered mistakes. They invite excesses and abuses, as many innocents suffer without any evident gain in security. And most significantly, they compromise our most basic principles – commitments to equal treatment, political freedoms, individualized justice, and the rule of law.”).

¹⁴⁸ POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 13, at 18 (“[I]n emergencies . . . [t]he novelty of the threats and of the necessary responses makes judicial routines and evolved legal rules seem inapposite, even obstructive.”).

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¹⁴⁹ Such information can be delivered to the court even in cases involving sensitive intelligence sources. For a description of how secret information is brought before the Israeli Supreme Court in extraterritorial cases, *see infra* note 161.

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¹⁵⁰ *See supra* cases accompanying note 48.

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¹⁵¹ *Cf.* *Rasul v. Bush*, 542 U.S. 466, 498-99 (2004) (Scalia, J., dissenting) (referring to an additional practical concern: the problem of court clog due to the fact that the court's doors would be open to litigation involving individuals residing beyond the state's borders). In contrast, Jeffrey Kahn believes that we need not fear such a scenario, at least not in the United States. *See Kahn, supra* note 74, at 718-19 (arguing that once we allow courts to address extraterritorial cases on the merits, their decisions will either decrease some foreign litigation, expedite other foreign claims, “or they may have no more or less effect than the present system This is so because this case law will inform litigants whether going to court is likely to be worth the expense.” In addition, such case law would have a valuable informative effect on prospective government action).

¹⁵² *Cf.* Burnett, *supra* note 2, at 1035-36 (arguing that in a case like *Verdugo* practical considerations should only come into play after we decide whether the Fourth Amendment has any geographical or citizenship limitation, and whether the “government's intrusion in *Verdugo* was of the sort which the prohibition has historically been concerned.” Only then should “[t]he *how* stage of the analysis” come into play, and take into account “the difficulties of enforcing the right in a collaborative efforts with foreign authorities on foreign land.”); Kal Raustalia, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2552 (2005). Raustalia offers an approach that “lies somewhere between what Gerald Neuman has called ‘global due process’ and ‘mutuality of obligation.’” *Id.* He argues that “when the government exercises power, that exercise is presumed to operate without regard to territorial

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2. The Extraterritorial Question in Emergency Times and in Territories Under Effective Control

In recent years, we have witnessed more and more cases in which the extraterritorial question arises with respect to territories that are under a state's effective control or occupation.¹⁵³

location and is always subject to constitutional restrictions." *Id.* at 2551. However, this does not demand "that all rules apply identically in all places." *Id.* According to Raustalia:

[W]hen a constitutional or statutory rule is clearly and textually subject to a territorial limitation, or reasonably may be nullified in its effect if it did not contain a territorial limitation, or would violate principle of international law and comity if it lacked such a limitation, a spatially limited reading of its scope may also be justified.

Id. In a similar fashion, Raustalia suggests that, in criminal cases, "the Miranda warning would remain constitutionally-required, yet would not operate identically outside the confines of U.S. territory as it would inside our borders." *Id.* at 2557. According to Raustalia:

[The right to silence aspect of Miranda warnings] is not overly burdensome on law enforcement and serve[s] the same functional purpose wherever the interrogation by criminal justice officials may take place. But an additional issue in giving a Miranda warning [is the] provision to supply a lawyer . . . The availability of a lawyer and the requirements or restraints of local law are clearly not within the preview of the U.S. agents operating abroad.

Id. Therefore, according to Raustalia, "[i]t seems a reasonable accommodation of the extraterritorial location of the interrogation to waive this requirement when U.S. agents act abroad, especially when they act within the territory of another state." *Id.* However, "the substantial purpose of the Miranda requirement – to inform suspects of their rights and to ensure that interrogations are minimally coercive – can and would be secured outside our borders as well as within them." *Id.*

¹⁵³ See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 766 (2008) (holding that non-citizens detained at Guantanamo Bay have the constitutional privilege of habeas corpus). The Court in *Boumediene* applied a "functional approach" to determine the extraterritorial reach of the Suspension Clause. *Id.* (holding that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which the status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ). The functional approach was also applied by the Court of Appeals in the District of Columbia Circuit. See *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (holding that the petitioners, a group of detainees held at the United States military base at Bagram, Afghanistan, do not have a constitutional right to seek a writ of habeas corpus in United States federal courts. Bagram is not under United States effective control, because "there is no indication of any intent to occupy the base with permanence, nor is there hostility on that part of the 'host' country." In addition, there are many practical concerns involved in granting habeas corpus to detainees in Bagram, as it "remains a theater of war."); see also *(Justice) v. Khadr*, [2008] 2 S.C.R. 125, para. 18 (Can.) (holding that the Charter applies to an investigation of a Canadian citizen by Canadian officials in Guantanamo, citing *Hape's* exception to the principle of comity: "deference required by the principle of

The interviews I conducted in Israel illustrate some practical advantages of restricting the power of the state in areas under its effective con-

comity ‘ends where clear violations of international law and fundamental human rights begin.’”). The Israeli Supreme Court also addressed the extraterritorial question with regard to Israelis and Palestinians in Gaza and the West Bank. *See* HCJ 1661/05, *The Gaza Coast Regional Council v. The Knesset* 49(2) PD 481 [2005]. The Court held that Israel’s Basic Laws applied to Israeli settlers in the area Israel vacated. *Id.* at para. 80. However, it rejected a challenge brought by the local council representing the Jewish settlements in Gaza against the constitutionality of the Implementation of the Disengagement Law, holding that the challenged law presented a justifiable limitation on the settlers’ protected constitutional rights, e.g., right to property and right to human dignity. *Id.* at paras. 81-119. Still, some of the compensation arrangements were found to be overly restrictive and required revision. Para. 482. *See also* HCJ 8276/05, *Adalah v. Minister of Defense* [2006] (Isr.) (leaving open the question whether the Israeli Basic Laws, which serve as Israel’s constitution, apply to Palestinians in the Occupied Territories). The Israeli Supreme Court in *Adalah* addressed the question of whether Palestinians in the Occupied Territories may invoke the protection of Israel’s Basic Laws when they are affected by Israeli domestic legislation. *Id.* at paras. 20-23. In 2005, the Israeli law of torts was amended (Amendment no. 7) with regard to the State of Israel’s liability arising for the actions of Israel’s security forces in the territories of Judaea, Samaria and the Gaza Strip. The Amendment increased the scope of the state’s exemption from liability, which was previously limited to combatant activities, to any activity taking place in a “conflict zone.” *Id.* at paras. 1-9. The minister of Defense was authorized to determine which areas would constitute “conflict zones,” and he exercised his power. *Id.* at paras. 7-9. The Israeli Supreme Court was asked to determine whether Amendment no. 7, which affected Palestinians in Gaza and the West Bank, was constitutional under Israel’s Basic Law: Human Dignity and Liberty. The Court held that the Amendment was unconstitutional, but it decided to leave unanswered the question of whether Israel’s Basic Laws concerning human rights also give rights to Palestinians in the Occupied Territories. The court held:

The rights of the residents of the territories, which are violated by amendment 7, are rights that are given to them in Israel. They are their rights under Israeli private international law, according to which, when the appropriate circumstances occur, it is possible to sue in Israel, under the Israeli law of torts, even for a tort that was committed outside Israel This application is not extra-territorial. It is territorial.

Id. at para. 23.

At least one judge felt that Chief Justice Barak did not adequately address the extraterritorial question. As Justice Grunis wrote:

[W]e are dealing with events that took place outside the borders of Israel. Even if according to the conflict of law rules the Israeli law of torts applies to those events, this does not change the place where the tort was committed. Applying the Israeli law of torts does not create a fiction whereby the event occurred in Israel. The mere fact that the matter is tried before an Israeli court under Israeli law, cannot lead to the conclusion that the rights are given to the injured parties in Israel Therefore it would appear that we need first to decide the question of the extraterritorial application of the Basic Law: Human Dignity and Liberty.

See id. at para. 3 (Grunis, J., concurring).

trol. If the state can show its authority is constrained by genuine limitations when acting abroad, it may improve its decision-making mechanisms and gain internal and international legitimization for its acts. As for possible counter (practical) arguments, in cases involving territories under occupation or effective control, it could be easier for state officials to adhere to domestic constitutional limitations than in foreign sovereign countries. The state officials should have more domestic resources available in such situations, as the relevant area is under their control. There should also be less chance of friction with a host government. This would be especially true when the occupying state maintains order in the occupied area.¹⁵⁴

However, in times of emergency and war, this would not necessarily be the case. In such cases, it can be argued that constitutional limitations could prevent the executive from acting effectively against threats to the state's security.¹⁵⁵ In addition, our concern that the judiciary lacks the knowledge and tools to conduct quick judicial review in extraterritorial matters may seem especially relevant to emergency or war times.¹⁵⁶ Some commentators argue that unlike ordinary crimes, each national threat in emergency times may be unique, and defensive measures will thus be extremely hard to evaluate.¹⁵⁷

However, other commentators warn that the risk of panicked and hasty decisions is especially strong during emergency times.¹⁵⁸ Holmes argues that in order "[t]o defend ourselves against our most dangerous enemies we do not need unrestricted government. We need intelligent government. And no Administration that shields itself compulsively from criticism has a prayer of being even sporadically intelligent."¹⁵⁹

¹⁵⁴ For example, in *Boumediene*, the Court noted that:

[A]t the time *Eisentrager* was decided, the Court was right to be concerned about judicial interference with the military's efforts to contain 'enemy elements, guerilla fighters, and were-wolves.'" In contrast, "[t]he United States Naval Station at Guantanamo Bay consists of 45 square miles of land and water" and the detainees there "are contained in a secure prison facility located on an isolated and heavily fortified military base." Furthermore, there is no indication "that adjudicating a habeas corpus petition would cause friction with the host government [T]he United States is, for all practical purposes, answerable to no other sovereign for its acts on the base Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be 'impracticable or anomalous' would have more weight.

Boumediene, 553 U.S. at 769-70. See also Cabranes, *supra* note 2, at 1708 (referring to the practical considerations raised by Justice Kennedy in *Boumediene*). R

¹⁵⁵ See *supra* cases accompanying note 48, 140. R

¹⁵⁶ See POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 13, at 14, 18 (arguing for need for deference to the executive in emergency times). See also Posner & Vermeule, *Accommodating Emergencies*, *supra* note 47, at 641. R

¹⁵⁷ *Id.* at 18.

¹⁵⁸ Cf. HOLMES, *THE MATADOR'S CAPE*, *supra* note 17, at 233.

¹⁵⁹ See *id.* at 233-34.

My aim in this article is not to resolve this long-lasting debate over the deference due to the executive in emergency times. In order to answer this question we must again acknowledge the fact that claims both in favor of and against constitutional limitations in times of emergency are speculative and require empirical support. It should be noted, however, that the fact that “in emergencies, the judges are at sea, even more than are executive officials”¹⁶⁰ need not necessarily be a decisive factor. The executive may be able to find ways to convey to the judiciary all relevant information, even though the judges are far from where the actions of the executive actually take place.¹⁶¹ As for the need for quick action, this is

¹⁶⁰ See POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 13, at 18.

¹⁶¹ In the Israeli context, all the state and military officials I interviewed stated that they reveal before the Israeli Supreme Court all information regarding their actions abroad, and that judges have no security clearance. If there is a need to convey to the Court security information that can expose the military’s sources or can pose a danger to the military or the state if revealed, it is conveyed to the Court *ex parte*. The lawyers of the petitioners receive paraphrases of information that is considered to be classified. If the petitioners’ lawyers object and argue that the information should not be revealed *ex parte*, a presumption that the executive acted in a reasonable way comes into force and the Court can deliver a judgment against the petitioners. These procedures also apply to regular domestic cases that involve classified information, not just in extraterritorial cases.

I asked my interviewees about this procedure, and received different responses from Israeli state officials and from attorneys who work for Israeli NGOs. For instance, I asked the senior official from the Israeli State Attorney Office which kind of extraterritorial cases are conducted *ex-parte* and in closed doors. He answered:

We paraphrase the secret information, as much as we can. If the petitioners agree, we show all the information to the Court *ex parte*. We present some of the information to the Supreme Court in writing and some in oral arguments. If the petitioners do not want the Supreme Court to see the material *ex parte*, there is a presumption that the judgment of the military court was right. Their petition is then denied, because the Supreme Court cannot see the material that the military court has seen. In regular [non-extraterritorial] criminal detentions there is also a similar procedure in which the judges see the material *ex parte*. In regular criminal cases the Court does not even need the agreement of the other side to see the material *ex parte*. If we reveal the secret information before the other side in criminal cases, we would not be able to continue the investigation against him/her. This procedure does not only exist in cases concerning Palestinians in the Territories.

Anonymous Israeli State Attorney Office senior official, *supra* note 66.

I asked the senior official from the Israeli Ministry of Justice the same question. He replied:

Ex parte cases are cases where there are security concerns, such as: deportation, prevention of entry to Israel and administrative detention. The security information is divided into information that is not classified and submitted to both the Court and the petitioners/appellants, and to classified information which is revealed before the Court *ex parte*, whether it is through the testimony of men from the security services or through secret documents based on intelligence sources. This is information that could pose a risk to the life of its source, if it is

indeed a complex issue in emergency times, compared to extraterritorial cases that arise in peaceful times. There may be some cases in which it may be easier for the judiciary to meet this challenge, even in emergency times. However, in other instances, such as cases that arise in the midst of a war or battle, this may not be the case.¹⁶²

revealed. Usually this means that there is a source that claims that someone said or did something, and then we have someone from the General Security Services or the police that explains the information to the Court. Only a part of the proceeding may be conducted *ex parte*, but most of the case is conducted with the participation of the two parties.

Anonymous Ministry of Justice senior official interview, *supra* note 64.

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I also asked these officials whether the lawyers of the petitioners/appellants have access to information which is revealed before the Judges *ex parte*. The senior official from the Israeli State Attorney Office answered:

The lawyers do not have access to this information, just like in regular criminal cases. There is classified information in these cases which could put an intelligence source at risk. The same applies to criminal cases. Since the secret information is not admissible in the criminal case itself, but only in the investigation proceedings, we would not present it in during the hearing of the criminal case. However, we would want the Court to supervise this procedure. In cases where the other side does not see all the information, the Court makes great effort to be more active. It asks every question that the other side would have possibly asked, precisely because of the fact that the hearing is held *ex parte*.”

Anonymous Israeli State Attorney Office senior official, *supra* note 66.

The senior official from the Israeli Ministry of Justice said in reply to the same question:

The lawyers of the petitioners/appellants do not have access to the secret information. We once considered having lawyers who would be classified to see the secret information, but if the lawyers would sit together with the Security Services and the State, without being able to show the classified information to their clients, their clients would probably lose their faith in them. It could be convenient for the Court, but it would only be half a lawyer if he is not able to ask his client what actually happened. It would not really help.

Anonymous Ministry of Justice senior official interview, *supra* note 64.

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I address some of the concerns which may rise when privileged information is conveyed to the Court *ex parte* in part V of the Article.

¹⁶² I asked the state officials I interviewed whether they feel that procedures in cases concerning Palestinians who reside outside Israel usually take a reasonable time, considering their effect on the actions of the IDF or the state. Their answers varied.

Major General Mandelblit stated in this regard:

It is very rare to see cases in which the IDF is the petitioner. Usually the IDF is required to reply to the petition. So the continuation of the procedures in the Court usually does not disturb us, except in cases where the Court issues intermediate decrees which delay an action or activity. These decrees were somewhat more interruptive in petitions regarding the Security Barrier. We had certain sections of the Security Barrier that remained open and that caused security problems.

Mandelblit & Gurtler interview, *supra* note 56.

Major Gurtler, the legal assistant to Major General Mandelblit, who was also present at the interview, added in this regard:

The fact that there are parts of the Security Barrier that are still not built affects our security. There is danger in those sections of the Security Barrier that are still not built. In the Samaria route we had petitions to the Supreme Court, and until the principal judgment of the Court in the *Beit Sourik* and *Alfei Menashe* cases regarding the legality of the Security Barrier, we had dozens of petitions waiting for the judgment of the Court. This is a unique example of the criticism of the whole security system towards the Court about the fact that it delays the building of the Security Barrier.

Id.

Major General Mandelblit added:

This is one example but it is unique. By the way there are also hold-ups that seem to be intended. The Court wants to see how things develop in the area. The Supreme Court is a unique court. It understands that the time dimension also has significance; that sometimes we need to wait and see how things develop. After a judgment is given it cannot be taken back. But it is important to me that you understand that usually there are not a lot of hindrances. When the Security Barrier was constructed there were terror attacks while the interim orders were still standing. But that is an exception. Usually there are no major delays that affect the conduct of the IDF.

Id.

Colonel Yahav stated in this regard:

There is no doubt that things used to be held up because of the Court. There were even operational actions that were held up. It was not always in favor of the operations and actions of the military. But the Court always understood time was of essence, and did everything it could to hear the cases that came before it without delay. The Court even once heard a petition of Hamas members, who were about to be deported to Lebanon, at 5 AM. The Court did everything it could to hear the cases that came before it as quickly as possible, but there were times in which its involvement delayed certain military operations.

Yahav interview, *supra* note 61.

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The senior official I interviewed in the State Attorney Office elaborated on this issue:

This is a complex issue. The Supreme Court has a lot of cases it has to hear, and it tries to hear all of them in an efficient and quick manner. When there is a need, it schedules petitions in a matter of a few days or a week. It finds time to hear cases immediately when there is an urgent need. There was a famous case in 1988 (Supreme Court case 358/88) of the Israeli Human and Citizen Rights Organization in which there was a petition regarding the demolition of houses of terrorists according to regulation 119 of the Security Regulations. The Court issued an interim injunction, which prevented the demolition of houses while the case was still being heard. The petitioners argued that the military did not give the residents of the houses a chance to argue against their demolition. Rabin, who was the minister of defense at that time, did not want to grant terrorists a hearing right. He also did not want to prolong the proceedings to the extent that when the houses were finally demolished, no one would remember that they were terrorists' houses. There was a lot of criticism at the time directed towards Shamgar [then the Supreme Court's Chief Justice] because of the interim injunction that he issued, and the duration of the proceedings before the Court. The main hearing in the case was in December 1988, and the judgment was in July 1989, so the case lasted over a year. The issue came up since regulation 112 – the

The former official I interviewed from the Ministry of Justice pointed at the possible importance of the distinction between times of actual combat and more general cases which arise in times of emergency. I asked him if a distinction should or should not be drawn between the involvement of the Court in times of emergency or battle and its involvement in more peaceful times. He answered in reply:

I think that the Court should not be involved in cases of actual combat. The Court is supposed to hear cases in a quiet manner, and this is not possible during actual combat. When there were petitions concerning combat in the refugee camp in Jenin, Barak (former Chief Justice of the Israeli Supreme Court) issued an intermediate injunction on a Friday night. The hearing was not conducted until Sunday, and a soldier who was on reserve duty appeared before the Court on his own behalf. He told the judges the injunction forced the soldiers to stay in the area for two additional days, putting them in danger as a result. We need to recognize actual combat times in which the Court should not intervene; things that are actually happening in the present. However, I think that the Court can examine more general questions relating to operations at other times, when actual combat is not occurring. This is not to say the Court should not intervene when general petitions concerning the war on terror come before it. This only refers to petitions which concern actual combat.¹⁶³

The distinction between extraterritorial cases which concern actual combat and more general cases which arise in emergency times is indeed an important one, at least when we examine the extraterritorial question from a practical perspective. The possible practical advantages and disadvantages of extraterritorial constitutional limitations may greatly depend

deportation regulation – states that whoever is about to be deported has a hearing right, while regulation 119, which concerns the demolition of houses, does not grant such a hearing right. The consequences of the interim injunction were significant. There were dozens of cases concerning the demolition of houses at that time and the Court's decision influenced the duration of those proceedings. Another example is the petition against the investigation methods of the Security Services, which was submitted in 1994. The judgment in that case was only given in 1999.

Anonymous Israeli State Attorney Office senior official, *supra* note 66.

These interviews reveal some of the many difficulties the judiciary may face when trying to address extraterritorial cases in a reasonable time. Indeed, there may be times where it may be extremely difficult for the court to address such cases in a reasonable time. In other cases, it may be able to offer quick relief to the petitioners. When addressing this aspect of the extraterritorial question it is important that we take into account the various circumstances in which the question arises as well as possible justice concerns which may arise in this regard. *Cf. infra* note 165.

¹⁶³ Former Ministry of Justice official interview, *supra* note 65.

on whether the cases we address arise during actual combat or more peaceful times.¹⁶⁴

¹⁶⁴ The interviews I conducted illustrate the difficulties entailed in drawing a line between times of war and more peaceful times. I asked the interviewees whether a distinction should or should not be drawn between the involvement of the Court in times of emergency/war and its involvement in more peaceful times. Their answers varied. Some of them indeed distinguished between general emergency times and actual combat. The senior official from the Israeli State Attorney Office said in reply to the same question:

The answer to this question should be divided to two. Obviously, the involvement of the Court during war time is more limited. The nature of warfare events also determines this: the reality keeps changing, and the Court does not know what happens every second. In general, the Court also refrains from addressing the fighting methods and the means of fighting while the fighting is still going on. It is also obvious that the court would not intervene as much when there is warfare in an occupied area or in an area beyond the state's borders. This is because these are issues of foreign affairs, in which there is less room to intervene. Nevertheless, it is also obvious to every Israeli that even in war time the Israeli Supreme Court can address allegations about war crime, and grant injunctions which would prevent such things. Still, during war time, like in targeted killing cases, there will be things that the Court will not be able to address in real time because of their short duration. The Court will thus only address these issues ex-post. But that is a natural thing due to the nature of warfare events.

Anonymous Israeli State Attorney Office senior official, *supra* note 66.

The senior official from the Israeli Ministry of Justice also shared a similar view in this respect:

We need to examine whether the relevant matter is appropriate for judicial review. In some cases there is not enough time to turn to the Supreme Court due to the circumstances in the area. For instance, if the army fire back towards targets that are shooting at its forces, there is no time to turn to the Court against the army action. But if there is time to turn to the Court, why should we not do that? We do not have anything to hide. A democratic state needs to allow people to turn to the judiciary, but the judiciary cannot intervene in everything. We cannot start debating in the midst of a battle whether we should have approached our target from the right or the left. However, when we prepare our soldiers to battle we need to explain the laws of war to them and the restrictions that apply to them. I also do not see any distinction between operational activities and legislation acts. The state is the state when it acts and when it legislates. In principle, the state cannot do via legislation what we do not allow the Military Commander to do via administrative acts.

Anonymous Ministry of Justice senior official interview, *supra* note 64.

Major General Avi Mandelblit, the IDF's Former Military Advocate General replied to the same question:

The question whether it is a peaceful or not peaceful time is not the one we need to ask when determining whether the Court should intervene in actions of the IDF. The main question should be the characteristics of the military activity. Pure military actions in an area which is not under our belligerent occupation should not be scrutinized by the courts. For instance, it has been argued that the current operation in Gaza (operation "Cast Lead" that took place in time of the interview – G.R.) should not come before the courts. But there are some things that even in these circumstances, I see no problem for them to come before the

courts. If there is a concrete complaint about looting in Jabalia, and the IDF's Military Advocate General refuses to open an investigation in this regard, the Court should intervene. So we should also distinguish between combat operations and activities and non-combat operations. Even if recognizing the position that "pure" combat operations should not come before the Court, it does not mean that there should be a legal "black hole" either. Soldiers acting outside of the state should still be subjected to the military-justice law. That is also true with respect to soldiers who might have committed offences involving criminal behavior such as violence towards detainees or looting. As for our operations in the West Bank – including our combat operations – they can and should be scrutinized by the Court. Obviously, the degree of restraint from the side of the Court should be bigger when combat operations in the West back are concerned in contrast to governmental actions

Mandelblit & Gurtler interview, *supra* note 56.

Colonel Sharon Afek, Deputy of the IDF's Military Advocate General and formerly the IDF's Legal Advisor in the West Bank said in reply to the same question:

I think that there are matters which relate to actual combat in which it is clear that the Court would not intervene. For instance, if we had a petition regarding a belligerent operation in Gaza or Lebanon, the Court would not intervene in questions about whether the military forces would enter the area from the left or the right. On the other hand, there are things in which the Court can intervene even during combat. For instance, there is now a petition for humanitarian aid in Gaza, which is something that is not as related to the fighting itself.

Afek interview, *supra* note 60.

The lieutenant Colonel who served in different senior positions in combat units in the IDF had a different view in this matter, and did not think the Court should intervene in the extraterritorial acts of the military in emergency times or in "everyday actions":

I think that the Court should not intervene at all, but if it does intervene, there is no difference between times of emergency and everyday actions. I also do not believe that the Court would allow itself to intervene in emergency times. It will just postpone the hearings in such cases until the warfare is done. The Court does not have tools to intervene in such cases. In my opinion even in routine actions the Court's ability to intervene is limited. The Military Advocate General is the one that needs to supervise the military, not the Court. If the military exceeds its authority, the military commanders would be held responsible. I do not think that everything should come before the judiciary.

Anonymous Lieutenant Colonel interview, *supra* note 63.

In contrast, most of the attorneys I interviewed from Israeli NGOs which represent Palestinians before the Israeli High Court of justice did not think there a distinction should be drawn between the involvement of the Court in emergency times and its involvement in peaceful times. Dan Yakir, chief legal counsel of the Association for Civil Rights in Israel said in reply to the above question:

I do not think that we need to distinguish between the involvement of the Court in peaceful times and during emergency. During the second Intifada there were important cases in which the Court intervened. In the past I thought that there was room to distinguish between the two- we had the Oslo Accords when two major decisions were rendered: the torture case and the administrative detention of the Lebanese who were held as hostages. But then there were important judgments even during operation Defense Shield like the Mar'ab case in which the Court stroke down parts of a military order that allowed arbitrary detention of suspects. The mere fact that the Court was willing to intervene in such cases

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In any event, it is apparent that without empirical evidence we cannot resolve these practical questions. Some of the practical considerations can be determined *ad hoc*, but when determining whether constitutions should apply beyond national borders during emergency times, it is important to recognize that there may be important practical reasons in favor of their extraterritorial application.

In cases in which the practical considerations against extraterritoriality may be more dominant, we also need to remember that we may be able to diminish the limiting impact of constitutional safeguards in appropriate cases, without eliminating their enabling aspect altogether. We may decide that there are general practical considerations which justify an extraterritorial application of constitutions; however, the scope and extent of rights granted in each case may vary.¹⁶⁵

Thus far we have defined the concept of enabling constitutional limitations and tried to determine its meaning in the context of democratic and liberal states acting beyond national borders. Yet, an important question arises at this point – even if extraterritorial limitations can indeed be enabling, must they come from the realm of constitutional law?

IV. ARE INTERNATIONAL AND DOMESTIC STATUTORY LAW NOT ENOUGH?

International law is usually perceived as the appropriate body of law to regulate events that occur beyond the state's borders.¹⁶⁶ Domestic

showed that there isn't necessarily a direct link between the extent of its involvement and the security situation.

Yakir interview, *supra* note 56.

Ido Blum, Head of the Legal Department in Hamoked believed that the Court should be involved even in actual fighting:

Since the situation is that of occupation, it is constantly important that the Court remains involved. Naturally, the nature of the intervention changes in different situations. Yet, it is clear that the Court must be involved even in situations of actual fighting.

Blum interview, *supra* note 71.

Sari Bashi, Executive Director of *Gisha*, also shared similar views: "Israel has been in a state of emergency in the last 63 years, so I don't see the distinction between peace time and emergency time." Bashi interview, *supra* note 68

¹⁶⁵ Cf. Burnett, *supra* note 2, at 1031-36 (arguing that we may decide to apply a constitutional right abroad, while allowing for variations in the content of the right in light of the particular circumstances).

¹⁶⁶ See sources cited *supra* note 1. Among the cases addressing the question of extraterritoriality from the standpoint of international law are *Bankoviæ v. Belgium*, 2001-XII Eur. Ct. H.R. 333, at paras. 59-61, 71 (holding that from the standpoint of public international law the "jurisdictional competence of a state is primarily territorial," and recognition of the exercise of extra-territorial jurisdiction by a Contracting state is thus exceptional and reserved to cases where the respondent state exercises effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation, or

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administrative law is usually the body of law that restrains the state's executive. Why, then, need we turn to constitutional law in the extraterritorial context? Would limitations from the realm of international law, or regular domestic law, not be enabling in extraterritorial cases?

The interviews I conducted in Israel mostly concerned limitations from the realms of international and administrative law that were placed on Israeli state officials in the West Bank and Gaza. The Israeli High Court of Justice decided to apply Israel's Basic Laws of Human Rights¹⁶⁷ to Israelis outside Israel,¹⁶⁸ but did not determine whether Palestinians outside the state can enjoy the protection of the Basic Laws.¹⁶⁹ Is there

acquiescence of the Government of that territory). In contrast, *see* Issa v. Turkey, 41 Eur. Ct. H.R. 27 (2004), at para. 71 (holding that the Convention "cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory."). In *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. (2008) the court followed *Banković* when addressing the case of crew members on a Cambodian ship intercepted by the French Navy near Cape Verde. The crew members challenged the legality of their detention at sea. *See id.* at para. 67 (holding that the applicants were within the jurisdiction of France during their detention at sea because the ship was under "full and exclusive control" of France); *see also* *Al-Skeini v. Secretary of Defense*, [2007] UKHL 26, [2007] 3 WLR 33 (the British House of Lords also followed the reasoning of the Court in *Banković*, holding that a contracting state must have "effective control" of the area in which the petitioners claim the violation of rights has occurred). For a more elaborate description of these cases and additional cases addressing the extraterritorial question from the standpoint of international law, *see* Keitner, *supra* note 2, at 91, 96-108. In its recent judgment in *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. (2011), however, the European Court of Human Rights took a somewhat different view. In *Al-Skeini*, the court chose to focus on whether the United Kingdom exercised some of the public powers normally exercised by a sovereign government in Iraq. The Court held that:

The United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations as to establish jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

Al-Skeini v. United Kingdom, App. No. 55721/07, Eur. Ct. H.R. (2011), at para. 149. *See also* Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, in 23 EUROPEAN J. OF INT'L L. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917395.

¹⁶⁷ As noted, Israel's Basic Law of Human Dignity and Basic Law of Freedom of Vocation allow constitutional judicial review. *See supra* note 52.

¹⁶⁸ *See* HCJ 1661/05, *The Gaza Coast Regional Council v. The Knesset* 49(2) PD 481 [2005].

¹⁶⁹ *See* HCJ 8276/05, *Adalah v. Minister of Defense* [2006].

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any justification to impose additional constitutional limitations on the state officials?

A. *International Law and the Extraterritorial Question*

If we seek to gain practical benefits by imposing limitations from the realm of international law on the state, we must take into account the disadvantages of international law. As these disadvantages have been widely discussed by international law scholars,¹⁷⁰ I will not extend my discussion of this point. It is sufficient for our purposes to point out two of the most prominent problems. The first is the lack of a central enforcement mechanism. International law is often viewed as weak because many mechanisms of international law lack coercive power.¹⁷¹ States, especially powerful ones, may disregard the demands of international law and simply walk away from international tribunals that try to enforce these demands.¹⁷² In countries where the national constitution is the supreme law of the land, international law only matters if and to the

¹⁷⁰ For an overview of the scholarship addressing the various problems of international law see Parrish, *supra* note 3, at 815-27. Parrish distinguishes between two types of international law scholars: Sovereignists, sometimes also referred to as nationalists or revisionists, and modern Internationalists. See *id.* For Sovereignists international law poses a threat to democratic sovereignty. They often contend that international law is only obeyed when convenient to those holding coercive power. In contrast, modern Internationalists view international law as the key means of promoting human and environmental rights, as well as global peace and stability. They view international law as appropriately created and enforced and embrace transnational processes. They find the traditional view of international lawmaking anachronistic. See *id.*

¹⁷¹ For example, Paul Berman contends that,

Making ‘law’ synonymous with ‘government’ may lead scholars to over-emphasize the actions of nation-states, because only at the nation-state level can a government with coercive power be found. The rest of international ‘law,’ in this view, amounts to a mere set of rhetorical statements that are obeyed only when convenient to those holding the reins of coercive power.

Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485, 492-93 (2005). See also generally JACK GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT’L & COMP. L. 463, 468 (2006) (stating that “international law is limited because it is a product of, and is bounded by, state interests and distribution of power”); Jonathan D. Greenberg, *Does Power Trump Law?* 55 STAN. L. REV. 1789, 1791 (2002) (distinguishing between realist and liberal international law scholars and stating that “‘realist logic’ leads to the conclusion that international law essentially doesn’t matter (or doesn’t matter very much)”).

¹⁷² See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). The United States refused to participate in the proceedings in this case after the ICJ rejected its argument that it did not have jurisdiction to hear the case.

extent that the national constitution so determines.¹⁷³ Multilateral treaties and the supranational institutions they create are often distrusted because treaties are subservient to state power.¹⁷⁴ Domestic law may thus be seen as more effective than international law in addressing violations of human rights and in gaining internal and international legitimization.

Another common argument against international law is that it undermines the principle of democratic sovereignty, which may be referred to as the “democratic deficit” or legitimacy problem.¹⁷⁵ From a practical point of view, if we seek support from members of a state’s internal political community for the extraterritorial actions of its officials, international law may be inferior to domestic law. Members of the political community may view domestic constitutional limitations as more legitimate.¹⁷⁶

¹⁷³ See, e.g., Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State*, in RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE, 258, 258-59 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

¹⁷⁴ See, e.g., Parrish, *supra* note 3, at 823 (“[Sovereignists] particularly distrust multilateral treaties and the supranational institutions they create.”); Greenberg, *supra* note 171, at 1796 (“[For neorealists,] treaties have little or no autonomy Subservient to state power, treaties are ultimately unreliable and weak.”).

¹⁷⁵ See, e.g., Parrish, *supra* note 3, at 825 (describing the Sovereignists’ concern of the democratic legitimacy of international law); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT’L L. 907, 912 (2003) (exploring the developments in international law after the cold war which “brought serious legitimacy issues to the fore”); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self Execution*, 55 STAN. L. REV. 1557, 1559-60 (2003) (writing that the delegation of authority by the United States to international institutions could raise democratic accountability concerns); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 76-78 (2000) (examining whether delegation of federal powers to international organizations is constitutional); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1503 (2004) (exploring whether the assignments of legislative power to international institutions infringe the U.S. Constitution); John Yoo, *New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 116 (1998) (examining the constitutional difficulties entailed with delegating governmental power outside of the national government); Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT’L L.J. 527, 533 (2003) (arguing that supranational lawmaking circumvents the domestic constitutional lawmaking structure); Rep. Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 HARV. J. ON LEGIS. 299, 299 (2002) (arguing the “United States involvement in international organizations and treaties has come at the cost of national sovereignty”).

¹⁷⁶ Parrish argues, however, that an extraterritorial application of constitutions may also suffer from the democratic legitimacy problem, at least in the eyes of foreigners residing beyond the state’s borders. According to Parrish:

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Under traditional notions of democracy, government rests upon the consent of the governed. But extraterritorial laws force foreigners to bear the costs of domestic regulation, even though foreigners (i.e. those beyond the state's territorial borders) are nearly powerless to change those regulations. Foreigners are the true outsiders to the political process with no vote, and presumably little formal ability to influence domestic political processes. The decision makers – the domestic courts – are politically unaccountable to the foreign defendants and apply laws to which the foreigners have not consented.

Parrish, *supra* note 3, at 859-60. Cf. Al-Skeini *supra* note 166.

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Lord Rodger writes with regard to the extraterritorial application of the ECHR that:

The essentially regional nature of the Convention is relevant to the way that the court operates. It has judges elected from all the contracting states, not from anywhere else. The judges purport to interpret and apply the various rights in the Convention in accordance with what they conceive to be developments in prevailing attitudes in the contracting states The result is a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world Hence, as noted in *Bankovic* . . . the court had “so far” recognized jurisdiction based on effective control only in the case of territory which would normally be covered by the Convention. If it went further, the court would run the risk not only of colliding with the jurisdiction of other human rights bodies but of being accused of human rights imperialism.

Id. Cf. Ralph Wide, *Complementing Occupation Law?, Selective Judicial Treatment of the Suitability of Human Rights Norms*, 42(1) *ISR. L. REV.* 80, 89 (2009) (discussing Lord Rodger's view in [2007] UKHL 26 Al-Skeini with regard to the application of human rights law in occupied territories). Wide notes that “[t]his view, although articulated in the context of the applicability of the ECHR, is potentially relevant more broadly to situations where States act in territory that is not their own, and which does not form part of another State that is also bound by the same human rights obligations as they are.” *Id.* Wide further writes that “according to this view . . . having the human rights obligations applicable to the occupying State in the territory concerned would potentially introduce a normative regime that had not been in operation previously. This would amount to ‘human rights imperialism’ in the sense that it would mandate the imposition of human rights standards which are not applicable on a universal level, and, crucially, not applicable to the territory concerned, but, rather, ‘specific’ to a sub-universal grouping of States.” *Id.*

In contrast, in his concurring opinion in *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. (2011), at paras. 37-39, judge Bonello rejects the possibility of human rights imperialism:

I confess to be quite unimpressed by the pleadings of the United Kingdom Government to the effect that exporting the European Convention on Human Rights to Iraq would have amounted to “human rights imperialism.” It ill behaves a State that imposed its military imperialism over another sovereign State without the frailest imprimatur from the international community, to resent the charge of having exported human rights imperialism to the vanquished enemy Being bountiful with military imperialism but bashful of the stigma of human rights imperialism, sounds to me like not resisting sufficiently the urge to frequent the lower neighbourhoods of political inconstancy. For my part, I believe that those who export war ought to see to the parallel export of guarantees against the atrocities of war. And then, if necessary, bear with some fortitude the oppro-

It should be stressed, however, that an extraterritorial application of the constitution should be distinguished from an incorporation of international law into domestic constitutions,¹⁷⁷ as the norms protected by each body of law may be different.¹⁷⁸ Still, when we address the extraterritorial question from a practical perspective, and search for the best body of law to gain internal and international legitimization and improve internal

brium of being labeled human rights imperialists. I, for one, advertise my diversity. At my age, it may no longer be elegant to have dreams. But that of being branded in perpetuity a human rights imperialist, I acknowledge sounds to me particularly seductive.

Id.

We may argue in reply that the possibility of violating a foreign state's sovereignty (the "imperialist" argument) or the democratic legitimacy problem in the extraterritorial context, seem to be more of a concern when a state tries to enforce its own laws on people in foreign land, or when we try to examine whether our state officials have authority according to international law to act abroad in the first place. Yet, the extraterritorial question is not concerned with these situations. Rather, it tries to examine two sub-questions: (1) whether domestic statutes with an extraterritorial effect should be subjected to *internal scrutiny* by our constitution, and (2) whether our *own state officials* should be subjected to the limitations of our domestic constitution when they act abroad. An affirmative answer to both of these sub-questions would not lead to the conclusion that foreigners abroad are subjected to any obligations under our constitution. The extraterritorial question seeks to examine whether the latter can enjoy its protection, either directly, by invoking the constitution's safeguards, or indirectly, via the domestic limitations which are imposed on our own officials. *Cf.* Cleveland, *Embedded International Law*, *supra* note 1, at 237-38 (referring to Justice Field's opinion in *In Re Ross*, 140 U.S. 453 (1891), which upheld the conviction of an American seaman for murder committed on an American ship in a Japanese harbor by a U.S. consular court in Japan, and suggesting that the question which should have been addressed there was not whether the United States had jurisdiction to impose its own constitutional requirements on Japanese subjects, "but rather whether, once the United States chose to exercise its authority abroad, it was required to do so consistent with constitutional constraints"). *See also* NEUMAN, STRANGERS TO THE CONSTITUTION, *supra* note 10, at 82 ("Field's logic in *In Re Ross* was slippery: our Constitution had no binding force on the government of Japan, but that does not mean that the United States government, in negotiating an extraterritorial treaty with Japan, was free to negotiate for a system of trial that violated our Constitution.").

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¹⁷⁷ *See, e.g.*, Colangelo, *supra* note 1, at 166-69 (exploring the possibility of incorporating international law through the Fifth Amendment to determine whether a certain application of United States law to a particular individual abroad comports with due process).

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¹⁷⁸ When it comes to democratic and liberal states, there may also be instances in which domestic constitutions grant more extensive human rights protection than international law. *Cf.* *R. v. Hape*, [2007] 2 S.C.R. 292, para. 186 (Can.) (Binnie, J., concurring) (raising concerns about the ability of international human rights law to function as a substitute for the Charter, "since the content of such obligations is weaker and their scope is more debatable than the Charter guarantees").

mechanisms of decision-making, we must take into account the disadvantages of international law.

B. *Domestic Statutory Law v. Constitutional Law*

If we turn to regular domestic law in order to impose enabling extraterritorial limitations on state authorities, we may be able to avoid the enforcement problems we face with international law. We may also be able to gain more support from the members of the political community for our extraterritorial acts, by avoiding the “democratic deficit” associated with the limitations of international law.¹⁷⁹

The question at this point is whether there is any advantage in turning to constitutional law for this purpose,¹⁸⁰ rather than to domestic statutory law, such as administrative law.¹⁸¹ The answer to this question is twofold.

First, if we do not allow an extraterritorial application of the constitution, the extraterritorial statutory limitations we apply to the executive would be somewhat crippled. The legislature and executive could always join forces in order to limit the effect of statutory limitations on the executive,¹⁸² but without constitutional judicial review over statutes with an extraterritorial effect, we can never truly be confident that extraterritorial

¹⁷⁹ See Parrish, *supra* note 3, at 825 (“[S]cholars skeptical of international law . . . often refer to the threat it poses to sovereignty, its lack of accountability, and to the notion of a mounting ‘democratic deficit’ in global governance.”). See also e.g. Bob Barr, *Protecting Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 HARV. J. ON LEGIS, 299 (2002) (arguing that national sovereignty is threatened when the government “enters into treaties that run counter to basic constitutional principles, thereby circumventing the appropriate amendment process”); Daniel W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT’L L. 321, 322 (2001) (“The question for democratic governments is how to balance serving the national will through democratic means with meeting international obligations Some commentators argue that . . . international law is making a sure and steady encroachment on democratic sovereignty, affecting the United States.”); Jed Rubenfeld, *Commentary: Unilateralism and Constitutionalism*, 79 N.Y.U.L. REV. 1971, 2006 (2004) (“In American constitutionalism, the U.S. Constitution is supposed to reflect our own fundamental legal and political commitments – not a set of commitments that all civilized nations must share [I]nternational law today rests on a fundamentally antidemocratic conception of fundamental law in tension with American understandings and American commitments to self-government.”).

¹⁸⁰ Cf. Posner, *supra* note 6, at 43-44 (arguing that even if the United States has incentives to take into account the well-being of people living abroad, there is no reason to believe that this implies a constitutional role for the courts).

¹⁸¹ The Israeli Supreme Court, as noted, did exactly this. See H CJ 7015/02, *Ajuri v. IDF Commander in West Bank* (56)6 PD 352 [2002], at para. 14 (holding that Israeli state officials carry Israel’s administrative law with them in their backpacks wherever they go).

¹⁸² See HOLMES, *THE MATADOR’S CAPE*, *supra* note 17, at 233, 286-87, 300-01.

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statutory limitations on the executive would be sufficient to achieve all the above-mentioned practical aims.¹⁸³ If the legislature enacts laws affecting individuals beyond the state's borders, regular domestic law will not do. Constitutional law must come into play. Second, even in cases in which the legislature is not involved, and even in countries where constitutional law is not safeguarded by judicial review, I submit that, if we seek to gain internal legitimization for our acts, constitutional law has a special role that statutory law cannot replace.

As we have seen, the members of a state's political community may have both practical and altruistic reasons to care about the welfare of individuals abroad.¹⁸⁴ This being the case, if the state seeks to gain the support of the political community for its acts, it has practical reasons to subject itself to extraterritorial limitations. When deciding which body of law is most appropriate to gain internal support and legitimization, we need to examine whether the political community sees any value in turning to constitutional law.

An extraterritorial application may have a symbolic effect unachievable by either international or regular statutory law. The members of the political community may feel that this body of law represents their shared values more than any other.¹⁸⁵ Whether or not we advocate for a constitutional theory that sees the constitution as including the values of the political community,¹⁸⁶ it is important that we examine the way the con-

¹⁸³ In referring to Bodin's analysis of the informal power of judges, Holmes quotes the *Republique*:

[N]either ought the prince . . . knowing the magistrate to be of contrary opinion unto his, to constrain them thereunto: for the ignorant and common people is no ways more moved to disloyalty, and contempt of their prince's edicts and laws, than to see the magistrate hardly dealt withall, and the laws by them contrary to their good liking published and enforced.

HOLMES, *PASSIONS AND CONSTRAINT*, *supra* note 17, at 117 (quoting the *Republique*, III, 4, 323).

¹⁸⁴ See notes 102-123 and the text accompanying them.

¹⁸⁵ See, e.g., Ruth Gavison, *What Belongs in a Constitution*, 13 *CONST. POL. ECON.* 89, 97 (2002) (contending that the inclusion of the political community's values in the constitution indicates the degree to which the society governed by the constitution has an "inner cohesion and civic identity that is accepted by the large majority of citizens." Moreover, a declaration of the basic values and commitments of the state may help in bringing "visibility, legitimacy and stability to the shared framework of political life").

¹⁸⁶ See, e.g., Richard H. Fallon Jr., *How to Choose a Constitutional Theory*, 87 *CALIF. L. REV.* 535, 546 (1999) (writing with regard to the United States' constitution that we need to determine whether the constitution "is only the written document preserved in the national archives," or whether it includes "widely shared and enduring values and assumptions"); Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 *HARV. L. REV.* 1787, 1810-1811 (2005) (noting that some view the United States' constitution "as a deliberately vague articulation of ideals the content of which should be supplied by the American people, acting through politics"); see

stitution is perceived by the members of the community. Even if the members of the political community believe that the constitution includes only internal values not shared with individuals abroad,¹⁸⁷ they may fear that if the state's officials ignore this particular body of law abroad, the state's officials may end up violating it within the state's borders. They may also fear that if the state's officials violate the state's domestic constitutional values abroad, other nations will also disrespect their values when interacting with them abroad, and foreigners will hesitate to visit.

However, one may argue that domestic constitutions, more than any other body of law, serve as instruments to create patriotic sentiments among citizens of the state.¹⁸⁸ This factor might be more important for the unity of the state's political community than the sympathy its citizens have for non-citizens abroad. Therefore, the members of the community may prefer that limitations on the state's officials beyond national borders come from international law or domestic statutory law, rather than constitutional law. Yet, as noted, we can still allow an extraterritorial application of the constitution without undermining the patriotic sentiments of the political community by limiting the extent and scope of rights granted to those residing outside the state.¹⁸⁹

This line of argument, like most of our practical arguments, requires empirical evidence. Once again, the empirical evidence needed does not necessarily need to show that the slope is indeed slippery. We do not need to prove that violations of domestic constitutional values abroad would necessarily lead to violations of those values within the state's borders. Rather, it is sufficient that we show that members of the political community fear that the slope is slippery. If that is indeed the case, the state may soon lose the support of its own domestic community for its extraterritorial acts. Although we do not have empirical data to support one claim over the other, we should not neglect this possibility when

also Michael J. Perry, *What is "the Constitution"?* (and other Fundamental Questions), in *CONSTITUTIONALISM – PHILOSOPHICAL FOUNDATIONS* 99 (Larry Alexander ed., 1998) (distinguishing between the "document called the constitution" and "the norms that constitute 'the supreme law'"); Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, in *CONSTITUTIONAL THEORY* 853 (Wojciech Sadurski ed., 2005) (describing the different ways we may approach the question "what the constitution is" from both conceptual and normative perspectives).

¹⁸⁷ This view is mostly identified with the social contract approach to the extraterritorial question. See *supra* note 46.

¹⁸⁸ See Golove, *supra* note 50, at 14; see also Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, *supra* note 50, at 384 (writing that some argue that "if we were to extend to foreign nationals the same rights that citizens enjoy, we would devalue citizenship itself").

¹⁸⁹ In that way the state's officials would still be asked to follow the constitution's values wherever they go, but the rights extended to members of the political community would differ from those extended to non-members. Cf. *supra* text accompanying note 165.

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examining the extraterritorial question. We need to take into account that we may have such practical reasons in favor of an extraterritorial application of the constitution.

In order to illustrate this point it may be helpful to turn to my interview with the senior official from the Israeli Ministry of Justice. When I asked him about the impact on Israeli interests of the involvement of the High Court of Justice in cases related to Palestinians, he answered:

We have no other choice. That is the reality. I do not see a situation in which we will hold territories there, and will not have judicial review there. Article 11 of the Basic Law: Human Dignity and Liberty states that “every authority needs to respect this law.” Even if you are a soldier at the front you must respect this law.

I would not want commanders in the Territories who do not respect human rights. I do not need the law of nations for this purpose. I want them to respect our own constitutional law. These commanders may become mayors in our cities later on. I want them to learn to respect our laws even when they are in the army. If there are actions which conflict with our constitutional law, it is best if we refrain from doing them. What does it matter if we are out of the state’s territory? If I am a soldier abroad and I return to my state after I served in a regime that despised rights abroad – how would I act in my state if I become the mayor in one of the state’s cities? I do not believe in the ability to separate the two. It is the same person who acts – whether it is here or abroad. Human rights are a matter of education. The Israeli Parliament enacts rules, and the human rights that are included in these laws must apply to everyone.¹⁹⁰

Indeed, if we allow the state’s officials to ignore the state’s basic constitutional values when they act abroad, they may lose the trust and support of the members of their own political community. Even if the states officials act in accordance with international law when they act outside the state, this may not be sufficient in the eyes of the state’s domestic political community. The members of the state’s internal community may expect their representatives to follow the state’s internal values wherever they may go.

V. ENABLING CONSTITUTIONAL LIMITATIONS AND JUSTICE CONCERNS

Thus far I have addressed practical reasons to allow an extraterritorial application of constitutional safeguards. However, at this point we also need to consider possible conflicting justice-based considerations. When we gain a better understanding of the enabling aspect of a constitution’s limitations, important justice concerns are also revealed. Contrary to what one may initially believe, democratic and liberal states may actually

¹⁹⁰ Anonymous Ministry of Justice senior official interview, *supra* note 64.

have at times practical reasons to apply constitutional limitations beyond national borders, and justice-based reasons not to do so. The enabling aspect of a constitution's limitations should not come at the expense of the interests of those affected by the extraterritorial acts of democratic and liberal states. We should advocate for an extraterritorial application of the constitution only if it allows democratic and liberal states at the same time to fulfill their justice-based obligations to those affected by their extraterritorial acts. Efforts to strengthen the power of the state and legitimize its extraterritorial acts should not compromise the interests of individuals outside of our borders. The question is whether the enabling aspect of a constitution's limitations can go hand in hand with the justice-based obligations states may have, and with the requirements of international law. I now turn to present some of the justice concerns entailed in the extraterritorial question. I then examine whether this aspect of the question necessarily conflicts with the enabling aspect of the question.

A. *Are Domestic Courts Able to Offer Objective and Independent Judicial Review in Extraterritorial Cases?*

An example of a possible moral hazard entailed in the extraterritorial question is the possibility that domestic courts would interpret the constitution so as to favor their state's authorities.¹⁹¹ Even unconsciously, domestic judges would most likely be inclined to protect the interests of the state over those of individuals outside the state, especially when non-citizens abroad are concerned.¹⁹² The enabling aspect of the constitu-

¹⁹¹ See Ronen Shamir, "Landmark Cases" and the Reproduction of Legitimacy: The case of Israel's High Court of Justice, 24(3) LAW AND SOCIETY REV. 781, 782 (1990) (noting that there is "accumulated empirical knowledge which indicates that courts systematically support the operations of state rulers").

¹⁹² Shamir notes, "A substantial literature attributes this tendency [of judges to support the government] to the social origins of judges, their political dependence on rulers, and their immersion in hegemonic ideology." *Id.* On the possible unconscious bias of domestic courts against foreigners see generally Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 34-5 (1996) (writing in the United States' context that "[a] strong argument could be made that, if involved in a dispute, undocumented persons need the protection of an impartial federal forum in light of the history of their unpopularity, exploitation, and vulnerability in this nation"); Kimberly A. Moore, *Xenophobia in American Courts*, 97 Nw. U. L. REV. 1497, 1497, 1504 (2003) (writing with regard to patent law cases adjudicated in the U.S. that empirical data "validates concerns that American courts, and American juries in particular, exhibit xenophobic bias. The most significant finding illustrates a substantial disparity in domestic and foreign party success in jury trials However, there is no significant difference in win rate for foreign and domestic parties when judges adjudicate."). In contrast, other commentators argue that foreigners receive fair treatment in U.S. courts. See, e.g., Kevin M. Clermont &

tion's limitations only makes this possibility more apparent. We may be able to gain legitimacy for our extraterritorial acts if we offer the protection of the constitution to those affected by such acts. But this legitimacy would not be justifiably earned if domestic courts favor the state's interests over those of individuals beyond the state's borders.

Ronen Shamir writes that "[m]any theorists contend that upholding and sustaining state actions in court provide ultimate proof that the court is a legitimation vehicle."¹⁹³ He claims that "[a]lthough this may be generally correct, a judicial *failure* to uphold and sustain state actions can also contribute to state legitimacy. By occasionally overruling or annulling governmental policies in some "landmark cases," the judicial apparatus asserts its independence from the polity."¹⁹⁴ According to Shamir, this allows courts to "cast the cloak of legitimacy over the state as a whole by vindicating other decisions that uphold governmental actions as rightful and reasonable."¹⁹⁵ Shamir notes that he does not mean to suggest that legitimacy is an intended goal of judges. However, "[t]he intricate relations of law and politics often bring about unintended consequences."¹⁹⁶

Shamir examines the involvement of the Israeli High Court of Justice in cases that came before it from 1967 until 1986. He argues that "[t]he overwhelming majority of these petitions were removed, compromised, or settled in one way or another."¹⁹⁷ He notes that in five of the sixty-five cases that were adjudicated, the Court upheld at least some of the arguments of the petitioners. Shamir contends that "[b]y declaring certain actions to be void . . . the court publically embarrassed the government and appeared to endorse alternative course of action."¹⁹⁸ According to Shamir, "[t]he long-range outcome of these decisions legitimized governmental policies precisely because these decisions became symbols of democracy in action."¹⁹⁹ Shamir further argues that "when isolated court decisions are mistakenly identified as real breakthroughs . . . [e]xaggerated expectations with regard to the ability of the judicial system to impose a political change are created."²⁰⁰

Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1143 (1996) ("The available data indicate that foreigners do very well in the federal courts. They win a higher percentage of their cases, whether as plaintiff or as defendant, than do their domestic counterparts. Thus, the data offer no support for the existence of xenophobic bias in American courts.").

¹⁹³ See Shamir, *supra* note 191, at 782.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 783.

¹⁹⁷ *Id.* at 785.

¹⁹⁸ *Id.* at 786.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 797.

David Kretzmer also examines the possible implications of judicial review in the Israeli case.²⁰¹ Kretzmer presents different approaches to the involvement of the Israeli High Court of Justice in petitions concerning West Bank and Gaza. He notes that some of the criticism towards the Court “stems mainly from the notion that mere accountability of the military to an outside body undermines its authority, that delays caused by judicial review reduce the deterrent effect of some measures . . . and that pressure by judges . . . often forced authorities to back down from proposed action.”²⁰² On the other hand, “it may be argued that the main function of the [Israeli Supreme] Court has been to legitimize government actions in the Territories. By clothing the acts of military authorities in a cloak of legality, the Court justifies and rationalizes these acts.”²⁰³ According to this view, the Court has allowed the state to “produce legitimization in the eyes of . . . the Israeli public, in whose name the military authorities are acting, and for foreign observers sympathetic to Israel’s basic action.”²⁰⁴ Kretzmer further writes that the main evidence supporting this view is that “in almost all cases relating to the Occupied Territories . . . the Court has decided in favor of the authorities, often on the basis of dubious legal arguments.”²⁰⁵ Kretzmer notes that in internal judgments relating to Israel itself, the Court has justifiably earned a reputation of a “rights-minded court.”²⁰⁶ Yet, this right-minded approach is “generally conspicuous by its absence in decisions relating to the Occupied Territories.”²⁰⁷

In order to determine “which function of the Court has been more dominant: its legitimizing or restraining function,”²⁰⁸ Kretzmer suggests that we distinguish “between the Court’s decisions and the influence of its shadow.”²⁰⁹ If we only focus on the Court’s actual decisions, we may come to the conclusion that the Court’s legitimization function is more dominant.²¹⁰ Yet, if we consider the overall picture, “the conclusion is less clear,” according to Kretzmer, “since the Court’s shadow has played a significance role in restraining the authorities.”²¹¹

²⁰¹ DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* (2002).

²⁰² *Id.* at 2.

²⁰³ *Id.* at 2.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 3.

²⁰⁶ *Id.* at 188.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 190.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

An interview with Tamar Feldman²¹² underscores the Court's restraining power in the early stages of petitions that are submitted to the Court. However, at the same time, Feldman seems to view the court only as a last resort option from the perspective of the attorneys who represent Palestinian petitioners. I asked Feldman if she recalls specific cases in which the involvement of the Supreme Court, or the possibility of its involvement, have hindered the achievement of certain goals, or alternatively helped achieve important goals. She answered in reply:

From the perspective of the attorneys that represent Palestinian petitioners, especially those who reside in Gaza, the Court is a means to put pressure on the authorities. We do not turn to the Court in order to obtain favorable judgments. We turn to the Court in cases in which we think that the authorities would either change their decision because of the submission of the petitions, after we have tried all other alternative procedures, or in cases which we believe will raise enough empathy, so that the Court itself would put pressure on the state authorities. We try to generally refrain from submitting petitions to the Court. We first try to resolve the matter with the state authorities. If that does not help, we submit a pre-petition (i.e. a complaint to the High Court of Justice Division in the Israeli State Attorney Office). Only if the matter is not resolved in that way, we submit a petition to the Court, and even that only happens in cases in which we believe that there is a chance that we might find the High Court of Justice helpful as a means to put pressure on the state authorities. We usually hope that the matter would be resolved before the hearing of the case – that the authorities would change their decision. Or alternatively, that if we reach a hearing before the Court, it would come to an end with pressure on the part of the Court, and not with a judgment. If we reach the stage in which there is an actual ruling, it would most likely be against us. Sometimes we also turn to the Court, knowing that we would lose the case, in an attempt to obtain certain public goals. . . .²¹³

Ido Blum²¹⁴ also stressed in reply to the same question that the chances of the petitioners he represents to obtain favorable results in their petitions exist mainly, if at all, in the initial stage of the petition, in which the state attorney needs to submit to the Court its reply to the petition:

In specific cases, such as cases of individuals who wish to leave the West Bank, our chance of succeeding in the petition exists mainly in the stage in which the state attorneys need to respond to the petition.

²¹² Formerly the Head of the Legal Department in Gisha and currently the Head of the Human Rights in the Occupied Territories Department in the Association for Civil Rights in Israel. Feldman interview, *supra* note 69.

²¹³ *Id.*

²¹⁴ Blum interview, *supra* note 71.

It is unlikely that the Court would intervene if the State Attorney objects to the petition. I suppose that when making its decision the State Attorney takes into account the fact that the petition would reach to the Court. However, there is very little chance that the Court would intervene in a concrete case. There are more chances that the State Attorney would intervene, though the chances of that happening are not high either. We also submit petitions to the Court when we cannot get responses from the Military Commander or from the Civil Authority. In such cases, we submit a petition to the Court in order to receive a response. The involvement of the Court in cases of this sort is helpful since it allows the petitioner to receive a response to its claims.

There were only few cases in which we came before the Court after there was a particular objection concerning a certain individual, and the Court intervened. This almost never happens. When we file a petition against a decision which prevents the petitioner's from leaving the Territories, our chances to win the case exist mainly at the stage in which the state attorneys are asked to respond to the petition. Moreover, there are many petitioners who prefer not to even come before the Court, and withdraw the petition after they receive the State's response, since they know it would be almost impossible to confront the state's response when the case is heard *ex parte*. Once the State Attorney delivers its response, the case is lost as far as they are concerned. They might also end up with a judgment which would declare that they are active in Hamas, based upon classified information which they could not confront.

When it comes to petitions which concern the Territories, there is a feeling that the judges are not familiar with the relevant factual data and the legal rules in the Territories, which are a mixture of international law, military legislation and the Oslo accords.²¹⁵

The interviews with Feldman and Blum seem to reinforce Kretzmer's argument that the Court's shadow may have a more significant role than its actual judgments. Kretzmer tries to determine why it is "that the Court's shadow has had this restraining influence if its actual bite is so mild."²¹⁶ He points at several possible explanations. First, he writes, the Israeli High Court of Justice enjoys prestige and respect in Israel, especially among the political and legal elites.²¹⁷ The judges are regarded as the "guardians of society's moral fabric."²¹⁸ It is thus difficult for the state authorities to "resist pressure by the judges . . . to back down in a specific case."²¹⁹ Second, the chance of losing in a case usually outweighs

²¹⁵ *Id.*

²¹⁶ See KRETZMER, *supra* note 201, at 190.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

the gains of going through it. “Thus, the general policy has been not to defend a case unless the legal advisors are convinced that the Court will rule in favor of the authorities, either because they have a strong legal and factual case or because the case raises a major question of principle” in which the Court will be reluctant to rule against the government’s position.²²⁰ A possible third explanation that Kretzmer suggests is that “[government] lawyers have used the threat of judicial review as a way of restraining the authorities.”²²¹ In contrast to the previous explanation, here their threat is not based on their assessment of their actual chances to win the cases. According to Kretzmer, since they are aware of the “general trend of the Court to legitimize government actions,” they may be only too aware that “if the matter goes to court, the authorities will prevail.”²²² Still, they “use their professional prestige and status to persuade the military authorities that it would not be advisable to defend the action in court.”²²³

Kretzmer notes, however, that even if the Court’s shadow indeed fulfills a significant restraining function, there still remains a question of why is there “disparity between the Court’s general jurisdiction and its jurisdiction in cases relating to the Occupied Territories.”²²⁴ He argues that although judges may be independent, they are not neutral.²²⁵ They are

²²⁰ *Id.* at 191.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* The interviews I conducted with the officials in the Ministry of Justice and the State Attorney Office seem to support this possibility. I asked the officials I interviewed how the involvement of the Supreme Court in such cases affects their role as senior officials in the Ministry of Justice or State Attorney Office, and the legal advice they gives to the state’s authorities. The senior official from the Ministry of Justice answered in reply, “We take into account the possible involvement of the Court in every one of our decisions. If we think that something would not pass the scrutiny of the Court, we usually advise to refrain from taking that action.” Anonymous Ministry of Justice senior official interview, *supra* note 64.

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I asked the former official from the Ministry of Justice the same question. He replied, “The source of strength of the attorney in the State Attorney Office is the possibility of intervention by the High Court of Justice. We are asked to examine every decision, while trying to predict what would occur in the High Court of Justice.” Former Ministry of Justice official interview, *supra* note 65. The senior officials from the State Attorney Office answered in reply to the same question:

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In general, it is easier for attorneys to follow the legal rules. The Court’s ruling guides the State Attorney Office in deciding whether a case should be defended or not. There are many things that at the end of the day look gray, and what seems balanced to one person can seem unbalanced to another. We then come before the Court, which is not part of the executive, and it sees things in a more objective way, and rules accordingly.

Former Ministry of Justice official interview, *supra* note 65.

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²²⁴ *See supra* note 201, at 191.

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²²⁵ *Id.*

still “part of the machinery authority within the State.”²²⁶ In times of relative calm and in domestic disputes, Kretzmer argues, it may be easier for judges to act as neutral arbitrators.²²⁷ However, when it comes to external disputes in situations of conflict it may be more difficult for courts to remain neutral. In such cases, “courts will inevitably act as institutions whose primary duty is to protect the perceived interests of the state. . . .”²²⁸ Tamar Feldman referred to such concerns when I asked her if the fact that the judges themselves served in the IDF has any effect on the security information that is revealed before the Court:

I cannot tell. But I can say that the fact that they belong to the Israeli institution has a huge impact on their judgments. The courts are captive in the conception of being victims because they are part of this society. The judges think that they can rise above that, but their discourse replicates the public discourse in Israel. The fact that they are part of the Israeli collective dictates the type of discourse that they bring to their judgments, and it has a significant impact on their rulings. . . .²²⁹

When examining the litigation outcomes of petitions to the High Court of Justice, it is also important to refer to a general empirical study conducted in Israel by Yoav Dotan between 1986 and 1994 (not in the context of the extraterritorial question). Dotan examined the success rates of various cases that came before the Israeli High Court of Justice in those years.²³⁰ He included in his study out-of-court settlements, noting “it is well known that most cases and controversies are settled rather than disposed by a final judicial decision.”²³¹ Dotan found that “the government enjoys extremely high success rates in litigation that reaches final judicial disposition.”²³² He writes that “[s]ome suggest that governments are successful simply because they are the most capable of all repeat players, possessing the greater resources, expertise, insider knowledge of the judicial process, and other repeat player characteristics.”²³³ However, he notes that the government’s higher success rates in litigation may also be explained “in terms of resource shortage rather than the affluence of governments.”²³⁴ Research shortage may lead the government to only liti-

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 192.

²²⁹ Feldman interview, *supra* note 69.

²³⁰ Yoav Dotan, *Do the “Haves” Still Come Out Ahead: Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice*, 33(4) *LAW & SOCIETY* 1059, 1066 (1999).

²³¹ *Id.*

²³² *Id.* at 1075.

²³³ *Id.*

²³⁴ *Id.*

gate cases in which it has high rates of success.²³⁵ Other explanations may relate to “the institutional relations [of government attorneys] with courts, and their key function within the judicial process.”²³⁶ Yet, Dotan argues that “the full picture of success in litigation cannot be learned by focusing only on the outcomes of court decisions.”²³⁷ Dotan finds in his study that “[w]hen out-of-court settlements are taken into account. We see that the success rates of petitions in general are considerably higher than appears from studying cases disposed by judicial decisions exclusively.”²³⁸ According to Dotan, “government agencies that appear before the HCJ tend to settle many cases to allow petitions significant achievements in litigation.”²³⁹

Later studies reveal more complex empirical data. Guy Davidov and Amnon Reichman examined whether “the level of deference shown by the Israeli Supreme Court to military decisions has changed over time” by empirically analyzing the Court’s decisions in petitions against the Military Commander between 1990 and 2005.²⁴⁰ Davidov and Reichman found that deference to the military commander has “diminished significantly” in those years,²⁴¹ and argue that “this is best explained by the continuation of the armed conflict.”²⁴²

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 1076.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Guy Davidov & Amnon Reichman, *Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel*, 35(4) LAW & SOCIAL INQUIRY 919 (2010).

²⁴¹ *Id.*

²⁴² *Id.* Davidov and Reichman found that “[o]f the 439 petitions against the military commander during the examined time period, only a small number (4.6 percent, 20 cases) were granted, in the sense that the Supreme Court issued a decisive order against the military commander.” *Id.* at 935. However, “a closer look reveals a different picture. Our results corroborate the finding of Dotan (1999) that a large number of cases end with a favorable result for the petitioner – in the sense that the petitioner achieves at least some of the requested remedy – even though the petition is formally dismissed.” *Id.* When the two examined the data “by looking for possible changes over time between the years 1990 and 2005, [they] . . . found an increase in the number of petitions against the military commander ending favorably (either being granted or favorably dismissed) . . .” *Id.* at 237. “The Court’s changing attitude toward the military commander seems even more remarkable once we exclude the petitions of Jewish settler . . . [When we] focus on ‘routine’ Palestinian petitions concerning the commander’s day-to-day decisions – 311 cases altogether – and examine the change over time, the correlation is stronger . . . Even stronger is the increasing willingness of the Court to intervene in the context of Palestinian petitions concerning the demarcation of the security barrier, infringement of property rights, and travel permissions to leave or enter the Occupied Territories. We located 88

Menachem Hofnung and Keren Weinshall Margel also conducted an empirical study, which examined cases that came before the HCJ between 2000 and 2008.²⁴³ They note that “most research conducted on the Israeli High Court of Justice argues that despite using the rhetoric of human rights, the HCJ rarely intervenes in security-based decisions targeted to prevent terrorist activity.”²⁴⁴ However, they contend that their empirical study shows that “the picture is more complex, and that in fact the Israeli court does play a significant role in reducing human rights violations.”²⁴⁵

The attorneys I interviewed from Israeli NGOs seemed to believe that the High Court of Justice is unable to render the Palestinian petitioners they represent objective judicial review. During the interviews I noted

judgments bearing on these concerns altogether, and rejections fell dramatically over the years from 1990 to 2005.” *Id.* at 938.

²⁴³ Menachem Hofnung & Keren Weinshall Margel, *Judicial Setbacks, Material Gains: Terror Litigation at the Israeli High Court of Justice*, 7(4) J. OF EMPIRICAL LEGAL STUDIES 664 (2010).

²⁴⁴ *Id.*

²⁴⁵ *Id.* “[C]lose inspection of the court’s caseload reveals a more complex reality than a simple binary dichotomy between ‘winning and losing.’” *Id.* at 676. Their “classification method is geared to capture this complex reality by adding two other categories between A (full victory for the petitioner) and D (complete failure).” *Id.* Category B measures partial victory for the petitioners, which means that “the court, in its formal decision, intervenes in a security-based decision because it violates human rights, yet the petition is not fully accepted.” *Id.* at 676-677. “Category C stands for decisions in which the Court acknowledges the validity of the petitioners’ claims, but nevertheless rejected their petition.” *Id.* at 677. These are cases in which the Court “literally forces the executive to amend its position in favor of the petitioner and to accept a ‘settlement’ that satisfies the court, but not necessarily the plaintiffs. The pressure is applied . . . during the process of litigation, and only when the state caves in, does the court issue a formal rejection of the petition.” *Id.* Hofnung and Margel argue that in many of the cases “where, at the outset, the justices conclude that the security-based actions cannot be justified, they tend to opt first for latent intervention in the state’s actions . . . [T]hey ask the state to consider an alternative plan of action.” *Id.* at 686. If the authorities refuse to do so, the court will then either overtly intervene or reject the petition, “taking into consideration the political and security circumstances.” *Id.* Hofnung and Margel further argue that although “[f]ull and partial acceptance of petitions does not amount to a majority of cases . . . given the court’s political limitations and constraints, and in comparison to its rulings on nonterror executive decisions, the court is relatively active in terror cases.” *Id.* at 688. By granting relief during litigation, the court can intervene in a particular case “without curbing future security operations.” *Id.* “[B]y employing the judicial strategy of carefully avoiding written decisions in favor of the petitioners, the court can maintain its invisible power to force security agencies to consider less drastic solutions for fear of being overruled by the court.” *Id.* Moreover, “the HCJ’s latent power is also manifested by the fact that it meticulously examines almost every terror-related petition, and frequently reminds the state of its authority to decide on terror cases.” *Id.* at 688-89.

that some people claim that the High Court of Justice intervenes too often in cases regarding Palestinians outside of Israel, while others argue that in reality the Court acts as a rubber stamp for the actions of the military and the state. I then asked the interviewees about their opinion. Ido Blum answered in reply:

As I said, there are only a few rare cases in which the Court intervenes in the military commander's decisions both in individual matters and in principled issues. I think that the Court awards a legal dress to a policy which is illegal. I view the Court as a rubber stamp. I file petitions to the Court only when it is suitable. There are cases referring to certain practices in which I know that the Court would not intervene, and would only grant legal legitimization to an illegal practice.²⁴⁶

Sari Bashi also shared similar views:

I think it is a rubber stamp. The Court is extremely reluctant to intervene in military policies. In some cases it will exercise pressure to change an individual decision, and that means the world to the individual that is helped, but overall the Court approves military policies in the Occupied Territories without engaging in substantial review.²⁴⁷

In contrast, the state officials and IDF officials I interviewed had different views. The senior official I interviewed from the State Attorney Office did not view the Court as a rubber stamp:

The judges in the Supreme Court are not all the same. Each judge has its own principled perspective about the extent and scope of the Court's involvement in such cases. At the end of the day, the number of final injunctions that are ordered against the State in these cases is very small. On the other hand, the Court obviously does not

²⁴⁶ Blum interview, *supra* note 71.

²⁴⁷ Bashi interview, *supra* note 56. Dan Yakir also replied to the same question: My views are closer to the second thesis. In most cases the Court grants the IDF legitimization. The cases in which the judges intervene are rare. It is hard for them to take responsibility. Sometimes they cover up for the state, and sometimes they genuinely believe that they are driven by security considerations. Yakir interview, *supra* note 56.

Tamar Feldman said in reply:

As a matter of fact we cannot say that the Court intervenes in many cases. Studies show that it intervenes in between 3% to 5% of the cases which come before it concerning Palestinians. It is difficult to claim that it intervenes often as a matter of fact. Some may argue that when it does intervene it is too active. From the other end of the spectrum I also do not think it is accurate to say that it is a rubber stamp. Maybe the result is that it serves the function of a rubber stamp, but this is not done consciously. I think that the judges' motives are psychological-sociological, and as a result the system can be described as one that legitimizes the acts of the occupier.

Feldman interview, *supra* note 69.

act as a rubber stamp. Proof for that can be found in the many cases, which end in settlements (and less often in final injunctions) after the Court has seen all the material, and commented on it during the hearing of the case. It is important to note that the Supreme Court's judgments are binding and guide the military authorities in their day to day activities. The military authorities follow the Court's principled judgments, and in that way many inappropriate decisions are prevented in advance.²⁴⁸

Colonel Sharon Afek also did not view the Court as a rubber stamp:

I think that in general the Court acts in the right balance. There are some areas in which I think that the Court has gone too far, such as issues with a clear operative character. However, overall, I think that it intervenes to the right extent. I think that the discussion in the general public about the involvement of the Court is a populist one. As someone who deals with these petitions every day, and who has witnessed dozens of such petitions to the Supreme Court, I can see that the balance the Court makes is a right one. The Court does not intervene beyond what is needed, and does not substitute the discretion of the military commander. On the other hand, it does not act as a rubber stamp either. It only gets involved in cases in which it is clear there was a deviation from what was reasonable to do.²⁴⁹

The question of whether the Israeli High Court of Justice intervenes too often in the acts of the military, or alternatively acts as a rubber stamp, as noted above, is an empirical question, which will not be resolved here. However, as I further discuss in the next section of the

²⁴⁸ Anonymous Israeli State Attorney Office senior official, *supra* note 66.

²⁴⁹ Afek interview, *supra* note 60. The Lieutenant Colonel, who served as a commander in different units in the IDF, shared similar views:

I do not think that the Court was ever a rubber stamp. Whoever says that is lacking information. This is what makes our Court special, its independence. The Court shares its opinion about almost everything, even if its opinion does not go hand in hand with the general views of the public. This is the case in almost every area. I attended more than a few hearings at the High Court of Justice, for instance in cases of administrative detention. The judges asked tough questions, even after they saw secret information, which was not always revealed before the detainees. Most people would expect the Court to be more protective when it comes to the state, since we are under constant threat. But the general feeling is that the Court is neutral and does not protect the military. This helps the military, even if it is not aware of that. The world knows that when our Court criticizes the military it does so in an objective and impartial manner. It would be difficult to attack our Court's decisions, when it is perceived in this way. Our acts gain more legitimacy when they pass the scrutiny of the Court.

Anonymous Lieutenant Colonel interview, *supra* note 63.

Major General Mandelblit also did not view the Court as a rubber stamp: "If there is criticism from both sides I think it means that the Court is doing okay. Overall, we can see balance and discretion when we look at different judgments over the years." Mandelblit & Gurtler interview, *supra* note 56.

article, if there is conclusive empirical data showing that courts are not able to offer objective and independent judicial review in extraterritorial cases, or at least in extraterritorial cases which arise during war or occupation, this would not only raise a crucial justice concern. It may end up also undermining the enabling aspect of extraterritorial constitutional limitations.

Another concern that may arise in extraterritorial cases in times of conflict or war relates to classified information, which may be conveyed to the judiciary *ex parte*. As noted in part III of the article,²⁵⁰ when extraterritorial cases involve security considerations, the state authorities may need to find ways to convey the relevant information to the court without undermining the state's security. In Israel the privileged information is revealed in certain cases before the Court *ex parte*, while the attorneys of the petitioners only receive paraphrases on the relevant information.²⁵¹

Dan Yakir expressed his concerns about information revealed before the court in cases regarding Palestinians in the West Bank. Yakir noted that "all cases regarding administrative detention and other administrative restricting measures" are conducted *ex parte* and/or behind closed doors.²⁵² I asked him whether the lawyers of the petitioners or appellants have access to information revealed before the judges *ex parte*. He said in reply that they do not have access to that information. He also contended that:

The classified information is a problem which stains the whole procedure. I do not have a good solution for this issue. In England a classified lawyer is allowed to see the material, while the suspect cannot. That is a problematic solution. There is a bill which is supposed to regulate this issue. Another problematic issue is the fact that the High Court of Justice does not hear witnesses, and evidence is not submitted to it in the regular procedure. In the Fence cases there were actually presentations of military officials, but it was not done in the regular procedure of an examination and a cross examination. It was like a lecture which was submitted to the court as a presentation.²⁵³

²⁵⁰ See *supra* note 161.

²⁵¹ *Id.*

²⁵² Yakir interview, *supra* note 56. I also asked Ido Blum from Hamoked - Center for the Defense of the Individual the same questions, which kind of cases are conducted *ex parte* or/and in closed doors. He answered:

Almost any case involving security materials is conducted *ex parte*. The military almost always claims that it holds secret information that can be revealed only *ex parte*. The cases in which the State is willing to disclose such materials referring to an individual are very rare.

Blum interview, *supra* note 71.

²⁵³ Yakir interview, *supra* note 56.

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Ido Blum also raised similar concerns when I asked him if the petitioners in cases he represents have access to information that is revealed before the Judges *ex parte*. He answered in reply:

No. The most we are able to get is a general paraphrase such as “the petitioner is a member of the Hamas or related to the Hamas.” Those are the kind of paraphrases that we get; nothing you can cope with or contradict. I believe that the very fact that the judges are convening in the presence of one side – a state attorney and members of the security services, which represent a sole stance – makes it difficult for the court to reach a different conclusion. The adversary procedure requires a decision between two different positions. When there is only one side, one does not have the tools to make a decision. We have no way to respond to the state’s paraphrase, stating that that petitioner is a dangerous person. We cannot disprove something like that²⁵⁴

Sari Bashi from *Gisha* also shared similar views when answering the same question: “In cases in which the security authorities claim that there is a security risk, the evidence is presented *ex parte*, so that the petitioners do not see or have a chance to respond to the claims against them.”²⁵⁵

Additional justice-based considerations, which may arise in extraterritorial cases, are closely related to some of the practical considerations I have noted before. For instance, the practical ability of the judiciary to deliver its judgments in extraterritorial cases in a quick and prompt manner affects not only the state’s interests, but also the interests of those affected by its acts beyond its borders.²⁵⁶

²⁵⁴ Blum interview, *supra* note 71.

²⁵⁵ Bashi interview, *supra* note 56.

²⁵⁶ The attorneys I interviewed from Israeli NGOs had different views in this regard. I asked Dan Yakir if cases regarding Palestinians who reside outside of Israel usually come to an end after a reasonable amount of time or not. He answered, “It depends: in principled cases it takes the Court more time to deliver a judgment and it can linger for years. Individual cases need less time for a judgment of the Court.” Yakir interview, *supra* note 56.

I asked Sari Bashi the same question. She replied:

No. The military can delay its answers for months or years, and any court process can be slow, meaning that students miss their studies, workers can lose their jobs and family members die waiting for permission for their love ones to visit.

Bashi interview, *supra* note 56.

Ido Blum said in reply to the same question:

When there is an urgent matter at issue, the case usually comes to an end after a relatively short time. In cases which are not considered urgent, a year can pass just from the time in which the petition was submitted until a hearing is scheduled. For instance, if someone wants to leave the country, it is not considered an urgent case. In internal matters the Israeli legal system views any hold ups on the right to leave the country as a severe sanction that needs to be limited in its duration. Time plays a crucial role in such cases. Yet, when it comes petitions filed by individuals who were prevented from leaving the Occupied Territories, if

B. “Normalizing” Situations of Occupation

In the Israeli case, there are some who argue that the involvement of the Israeli High Court of Justice in the West Bank actually prolongs the occupation because it leads to its normalization.²⁵⁷ According to this view, if it were not for the involvement of the Court in cases concerning the West Bank, the occupation may not have lasted for so long.²⁵⁸ The situation may have been too abnormal to continue.²⁵⁹

Tamar Feldman also referred to such concerns when I asked her if she recalls specific cases in which the involvement of the High Court of Justice, or the possibility of its involvement, have hindered the achievement of certain goals, or alternatively helped achieve important goals:

the petitioners do not have an immediate reason to leave the Occupied Territories, the mere fact that they cannot leave the West Bank will generally not be considered as a reason to hear the case immediately. An urgent case relating to the Occupied Territories would be considered a case in which someone needs to get out of the West Bank in order to get medical treatment or a case in which the petitioner needs to start his studies abroad. Only then, the petition would be quickly heard.

Blum interview, *supra* note 71.

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Tamar Feldman answered in reply:

Individual cases which concern urgent matters usually come before the court in a relatively short time and come to an end in a reasonable time. The Court is receptive to the urgency of the petitions, which are brought before it. On the other hand, petitions which concern principled matters, even if they concern individual persons, can drag on for years . . . Usually the Court knowingly postpones its decision in such matters. The Court waits until the circumstances change or until it is the right time to make a decision, or alternatively the administrative authorities change their conduct so that the Court would not have to intervene. But if one chooses an informal way to resolve cases of this sort, such as putting pressure upon the authorities or resolving the matter outside the court, things can be resolved more quickly.

Feldman interview, *supra* note 69.

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Tamar Peleg-Sryck said in reply to the same question, “Individual petitions of residents of the Occupied Territories such as those against administrative detention are dealt with promptly. This is not the case with general subjects such as petitions against, extrajudicial killings, etc. These may take years.” Peleg-Sryck interview *supra* note 56. See also *supra* note 162, describing some of the practical concerns raised by the state and IDF officials I interviewed with regard to the duration of procedures before the Israeli High Court of Justice.

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²⁵⁷ See, e.g. KRETZMER, *supra* note 201, at 198. Kretzmer writes that “[i]n the short term, the lack of formal external constraints on the discretion of the military almost certainly would have resulted in more arbitrariness.” *Id.* However, Kretzmer asks if it is possible “that in the medium or long term, the very lack of restraint that would have resulted from the absence of judicial review would have made the occupation less palatable for Israeli elites, and that the pressure to end the occupation by political settlement . . . would have been felt much earlier.” *Id.*

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²⁵⁸ *Id.*

²⁵⁹ *Id.*

Obviously, one can also claim that as a general matter, beyond the case of the specific petitioner, these informal means undermine the general effort to bring the occupation to an end. There is a general common argument that this system only gives legitimization to the occupation, and only creates the appearance of legality and accountability. However, when we represent specific petitioners, our priorities change. We put the particular petitioner's interests above the general goal.²⁶⁰

Arguments of this sort usually arise with regard to the merging of human rights law into international humanitarian law,²⁶¹ and the application of Israeli law to the settlers in the Territories.²⁶² Yet they seem to be just as relevant to the extraterritorial application of the constitution of an occu-

²⁶⁰ Feldman interview, *supra* note 69. The senior official I interviewed from the Israeli Ministry of Justice also referred to such concerns when asked about whether there should be a distinction between extraterritorial cases concerning citizens and extraterritorial cases concerning non-citizens:

In principle there should not be any distinction between Israelis and Palestinians. The substantive rules are different, but as far as the way the judges' work is concerned, as well as the procedural rules and the need to secure the public's trust in the legal system – these are all the same. Human beings are human beings. We cannot apply to them a lower legal standard *In principle we have a military regime that has been there for years. The Court has opened its doors to Palestinians in the Territories, but we do not know what would have happened, had it closed its doors. There are some who argue that in opening its doors the Court actually assisted the state, and legitimized the continuation of the occupation.* (emphasis added)

Anonymous Ministry of Justice senior official interview, *supra* note 64.

²⁶¹ See Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation*, 18 EUR. J. INT'L L. 1, 4 (2007). Gross argues that "the merging of IHRL into IHL, rather than expanding human protection may serve to undermine it as well as to legitimize violations of the rights of people living under occupation [T]he introduction of a rights analysis into the context of occupation abstracts and extrapolates from the context of occupation and puts all involved persons – the citizens of the occupying state and the people living under occupation – on a supposedly equal plane." *Id.* According to Gross, this may upset "the balance of IHL, which ensures special protection to people living under occupation In turn, the rights of citizens from the occupying power are often subsumed under security considerations, leading to a security imbalance that enables broad violations of the rights of people living under occupation." *Id.*

²⁶² See Marti Koskenniemi, *Occupied Zone – "A Zone of Reasonableness"?*, 41 ISR. L. REV. 13 (2008) Koskenniemi argues that the "extension of Israeli jurisdiction in personal or functional terms to the settlers undermines the distinction between sovereignty and occupation" *Id.* at 37. Koskenniemi further contends that one should worry about the eroding distinction between sovereignty and occupation "out of concern for the implications of characterizing occupation in managerial terms as regular 'government' and thus wiping out the sense of its exceptionality, the way in which the occupation itself . . . is felt as a violation." *Id.* at 38. This eroding distinction, Koskenniemi writes, "not only fails to articulate but effectively makes it

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pying state in its occupied territories. We may argue that if we allow an occupying state to apply its constitutional law to the inhabitants of in occupied land, such a step would only contribute to the normalization of the occupation, and blur the distinction between sovereignty and occupation.²⁶³ If an extraterritorial application of constitutional rights would indeed allow an occupying state to gain domestic and international support to its acts in the occupied area, the enabling aspect of the extraterritorial question may ultimately only prolong situations of occupation, and strengthen the power of the occupier at the expense of the inhabitants of the occupied territories.

Another possible concern in cases of occupation is that if an occupier applies its constitutional law to the inhabitants of the occupied area, it may violate Article 43 of the Hague Regulations.²⁶⁴ It can be argued that if an occupying state applies its constitutional safeguards to the inhabitants of its occupied territories, it may lead to a change in the laws in force in the country.²⁶⁵ Yet, one can argue in reply that the occupier in

impossible for the Palestinian population to express their principal grievance, the denial of their (formal) sovereignty.” *Id.*

²⁶³ *Cf. id.* at 37-38; KRETZMER, *supra* note 201, at 198; Gross, *supra* note 257, at 4.

²⁶⁴ *See* Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land art. 43, Oct.18, 1907, 36 Stat. 2277. Article 43 of the Hague Regulations states that in situations where authority of a legitimate power has passed to the hands of an occupying power, “the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” *Id.*

²⁶⁵ Such an argument was raised with regard to the application of human rights law to occupied territories. *See* Al-Skeini v. Secretary of State for Defence, [2007] UKHL 26; [2007] 3 WLR 33, para. 129 (Lord Brown) (Lord Brown discusses the possibility of conflict between the extraterritorial application of the ECHR and Article 43 of the Hague Regulations. He notes that Article 43 of the Hague Regulations requires an occupant to respect “the laws in force” in the occupied country. He further wrote that the occupant should not “introduce laws and the means to enforce them (for example, courts and a justice system) such as to satisfy the requirements of the Convention. Often (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied.”). The Court in Al-Skeini v. United Kingdom, App. No. 55721/07, Eur. Ct. H.R. (2011), at para. 86 also referred to Lord Brown’s comments on Article 43 in the [2007] UKHL 26 Al-Skeini judgment. *Cf. Wide, supra* note 176, at 92 (discussing possible conflict between Article 43 of the Hague Regulations and Human Rights law. Wide notes that the Court in the 2007 Al-Skeini judgment examined whether an extraterritorial application of human rights could confirm with Regulation 43 of the Hague Regulations. “Lord Brown’s point is perhaps rooted in . . . concern . . . about a situation of divergence between human rights standards applicable to the occupying State and those applicable to the occupied territory . . . [W]here there is no such divergence, the *status quo* in the occupied territory can be preserved: the previous administrative regime in that territory was already bound to apply the standards in

such cases would not be asking the inhabitants of its occupied territories to adhere to its domestic territorial laws. Rather, it would ask its own officials to abide by its domestic constitution when acting in the occupied territory.²⁶⁶

These are serious concerns. The enabling aspect of the extraterritorial question should obviously not come at the expense of justice concerns or lead to the violation of international law. We want to offer the inhabitants of occupied territories adequate protections, but at the same time we may be concerned of the possibility of “normalizing” situations of occupation, and prolonging their duration. We therefore need to determine whether the practical aspect of the extraterritorial question ultimately conflicts with counter-justice concerns.

C. *Can Practical Considerations go Hand in Hand with Justice-Based Concerns in the Extraterritorial Context?*

The interviews I conducted with attorneys from NGOs representing Palestinians before the Israeli High Court of Justice shed new light on some of the justice concerns entailed in the extraterritorial question. As we have seen, in contrast to what one may initially believe, democratic and liberal states may have practical reasons to impose on the state’s officials extraterritorial constitutional limitations. At the same time there may be possible justice-based reasons not to apply constitutions outside domestic borders. It is important to distinguish in this regard between cases which arise during war or occupation and cases which arise in peaceful times. Judges may find it more difficult to remain objective and impartial during times of war or occupation.²⁶⁷ In situations of occupation there is also the risk that an extraterritorial application of the consti-

question . . . [In contrast,] where there is such a divergence, as in Iraq (a non-ECHR-contracting State), then a problem arises and a potential clash between the norms of occupation law and the norms of human rights law presents itself . . . Under this approach, a particular instance of foreign State territorial control can meet the test for applying the law of occupation but should not meet the test for human rights law, because of the obligations that flow from the first area of law.”)

²⁶⁶ Cf. Cleveland and Neuman in *supra* note 176.

²⁶⁷ Cf. KRETZMER, *supra* note 201, at 191. “In democratic countries, courts enjoy varying degrees of independence,” which ensures that the judges’ decisions are based on their conscience and are not dictated by other branches of government. *Id.* It should not conceal the fact, however, that the courts “are part of the machinery of authority within the State.” *Id.* “In times of relative calm, the impact of the judges’ role as political functions of the state may be subtle and may even pass undetected.” However:

[This] ‘stance of neutrality’ can be maintained only when the dispute before the court is perceived to be a “domestic dispute” between a government agency and an individual. It cannot be maintained when the dispute is perceived to be an ‘external dispute’ involving a challenge to the very authority of the state. In such

tution of the occupying power would lead to the normalization of the occupation.²⁶⁸

In some cases we may find that there is no actual conflict between relevant practical considerations and justice-based concerns. If democratic and liberal states are not subjected to real constitutional limitations when acting abroad, they may soon lose the trust of both their own people and the international community.

For instance, if the state authorities are not subjected to real constitutional restraints and independent and objective judicial review in the extraterritorial context, the members of its political community may fear that those authorities might act unjustly in the domestic sphere. In addition, if individuals outside the state's borders are subjected to such treatment by the state authorities, members of the community may be subjected to similar treatment by other states' authorities. Minorities within the state may also care about the way the state's authorities treat their relatives abroad. Members of the community may also simply care about the welfare of individuals abroad for altruistic reasons.²⁶⁹

Similarly, if the international community suspects that the state's authorities are not truly constrained by the constitution's limitations, the state will not be able to gain international legitimization for its extraterritorial acts. If the rights of individuals beyond the state's borders are violated with no real relief, the state may soon lose the support of the international community.

In addition, mechanisms of decision making would not be truly improved if the constitutional limitations imposed on each branch are not real limitations. Thus, if a democratic and liberal state is not subjected to real constitutional limitations in the extraterritorial context, the enabling aspect of the constitution's limitations would lose much of its force.

Nevertheless, there may still be situations in which we fear a serious risk of collision between the enabling aspect of the extraterritorial question and justice concerns. This may be the case, for example, when we address situations of occupation, if we believe that an extraterritorial application of constitutional rights would lead to the normalization of the occupation. In such cases we will also need to determine whether an extraterritorial application of constitutions would undermine interna-

a case, courts will inevitably act as institutions whose primary duty is to protect the perceived interests of the state

Id. at 191-92.

²⁶⁸ *Cf.* Gross, *supra* note 261.

²⁶⁹ *See e.g.*, Posner, *supra* note 6, at 43.

tional law,²⁷⁰ and what would be the appropriate relationship between constitutional and international law as a result.²⁷¹

Even if we come to the conclusion that there may be cases in which the enabling aspect of the extraterritorial question would collide with justice concerns, we at least must be aware of the existence of this neglected aspect of the extraterritorial question. It is important to realize that in contrast to what we may believe initially, we actually may have practical reasons in favor of extraterritoriality, and possible justice-based reasons against it. We must then determine in which cases such considerations would necessarily conflict and calculate our next steps accordingly. In any event, a comprehensive answer to the extraterritorial question needs to take into account these neglected aspects of the extraterritorial question.

²⁷⁰ There are cases, however, in which an extraterritorial application of constitutions may be viewed as undermining international law. For instance, if it would result in the blurring of the distinction between sovereignty and occupation, as noted in *supra* notes 261-263 and the text accompanying them. This may also be the case if we come to the conclusion that an extraterritorial application of the occupier's constitution would undermine Article 43 of the Hague Regulations. *See supra* note 263. Some also argue that an extraterritorial application of domestic law ultimately undermines progressive development of international treaty law and international institutions. *See Parrish, supra* note 3, at 866 (contending that comprehensive solutions are nearly impossible through domestic litigation. Extraterritoriality inevitably leads to a patchwork of inconsistent adjudications as different courts from different countries approach international issues using different laws and procedures. In comparison, international tribunals enjoy procedural and other advantages that make them more suited to resolving international claims).

²⁷¹ For an analysis of the question of the appropriate relationship between constitutional and international law in the extraterritorial question see *supra* articles accompanying note 1. We need to remember in this context that the fact that state officials are subjected to domestic constitutional limitations abroad does not mean that international law ceases to operate in this realm. *See Vienna Convention on the Law of Treaties* arts. 27, 46, May 23, 1969, 1155 U.N.T.S. 331 (1969). Article 27, Internal law and observance of treaties:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

Article 46, Provisions of internal law regarding competence to conclude treaties of the Vienna Convention:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.

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VI. CONCLUSION

Holmes shows us that the constitution may be seen as a facilitative document, not just a constraining one. I have submitted that, in the extraterritorial context, constitutional limitations on state power may prove to be enabling in three main respects. First, they can serve the state as a tool to gain internal support, trust and cooperation for its acts. The state could gain internal support in two possible ways: the enabling restraints can allow it to gain a reputation of being trustworthy, and they can allow the state to promote the interests of the members of its political community in order to ultimately secure its governance (when non-citizens are involved, this will be done indirectly: the state will promote the interests of its own people by safeguarding those of foreigners abroad). Second, constitutional limitations may serve as a tool for the state to gain international support for its acts by securing the rights of people it affects abroad. Third, when constitutional limitations are safeguarded by judicial review, they can reduce the risk of bad judgments on the part of the executive and legislature.

I have also argued that there is special value in turning to constitution law in this respect. More than any other area of law, constitutional law represents the shared values of the political community. If the state seeks to gain the support and cooperation of the members of its political community, it may be wise for it to continue to adhere to those shared values even when it acts beyond its national borders.

Once we bring to light the enabling aspect of the constitution, the debate over the extraterritorial question changes. When first addressing the extraterritorial question, one may believe that there are mostly practical reasons *not* to allow an extraterritorial application of the constitutions of democratic and liberal states, and justice-based reasons to promote their extraterritorial application. However, I have argued that once the enabling aspect of the constitution's limitations is revealed, new light is also shed on relevant justice-based concerns. Such justice-based considerations seem at first glance to collide with practical reasons in favor of extraterritoriality. However, I have also argued that a closer look at these considerations reveals a more complex picture. The enabling aspect of constitutions should not come at the expense of those affected by the acts of states beyond their borders. In some cases we may find that there is no actual conflict between relevant practical considerations and justice-based concerns. Only genuine constitutional restrictions would allow democratic and liberal states to gain both internal and international legitimization, and improve decision-making mechanisms. However, there may be certain cases in which we may be concerned that the judiciary is simply not capable of conducting objective judicial review when it comes to the acts of the state abroad. In situations of occupation we may also worry about the possibility of "normalizing" the occupation, and blurring

the line between occupation and sovereignty. In such cases practical considerations and justice concerns may not be able to go hand in hand.

Accepting the idea of enabling restraints, alongside important relevant justice-based concerns, may have important implications on the extraterritorial question. If we take these considerations into account, we may find that, contrary to common belief, there are cases in which we may have practical considerations to apply constitutions beyond borders and justice-based considerations not to do so. One of the main challenges to both the idea of enabling constitutional limitations and related justice-based concerns is the need to support such arguments with empirical data. However, despite the empirical challenges we face when addressing the extraterritorial question, it is important that we do not continue to overlook these important aspects of the extraterritorial question. The concept of enabling restraints adds an important new dimension to the extraterritorial question that should not be neglected. At the same time it sheds new light on equally important justice concerns that so far have received insufficient attention.

